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Idaho Supreme Court
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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 Idaho,

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 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

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 Dkt. Nos. 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.

CORRECTED RESPONDENTS IDAHO COMMISSION FOR REAPPORTIONMENT'S AND LAWERENCE DENNEY'S RESPONSE BRIEF

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I. INTRODUCTION

After considering more than 80 full and partial legislative redistricting plans, taking testimony at 18 public hearings throughout the State of Idaho and online, and weighing the testimony of the public and their fellow Commissioners, the bi-partisan Idaho Commission for Reapportionment ("Commission") adopted Plan L03 and delivered its 104 page final report explaining its findings and conclusions to the Idaho Secretary of State on November 12, 2021. The Commission determined that Plan L03 created districts of as close to ideal district size as practicable while effectuating the rational state policy of minimizing county divisions. Plan L03 has a maximum population deviation of 5.84% and only divides eight counties. In comparison to the plans advanced by Petitioners, which contain much higher and regionally distributed deviations, the small population deviations in Plan L03 are distributed fairly throughout the State.

Petitioners' challenges to how the Commission divided Idaho's counties in performing this high-wire balancing act cannot stand. The Commission carefully considered the plans that split fewer than eight counties and reasonably determined that they did not comply with the Equal Protection Clause for a variety of reasons. Because the Commission was not presented with evidence that it could split fewer than eight counties and still comply with the Equal Protection Clause, it cannot have violated Idaho's Constitution. Petitioners' remaining objections, such as their arguments regarding the number of times a county is divided into a district that combines it with another county, lack any support in precedent. Ultimately, Petitioners' challenges are transparent efforts to substitute their theories of reapportionment with the Commission's judgment and discretion. These efforts should be rejected.

The Commission's careful work demonstrates just how daunting a task reapportioning Idaho's legislative districts is. The Commission must distribute the population of 44 counties into 35 legislative districts and, in so doing, balance the requirements of the U.S. Constitution's Equal Protection Clause, which requires that districts be as equal in population as practicable, with the requirements of Idaho's Constitution, which requires that county boundaries be preserved except as necessary to comply with the Equal Protection Clause. And the Commission must do this in light of Idaho's unique political boundaries and uneven population distribution.

One of the hallmarks of reapportionment is that perfection is unattainable. There is always another proposed plan with a slightly different combination or deviation, and some group, region or person will always be unhappy. As demonstrated within this brief and through the Commission's Final Report, Plan L03 legally balances the need for districts of as equal population as practicable with as few county splits as necessary. Plan L03 is not perfect—no plan is—but it is legally permissible. Petitioner Durst's and Ada County's challenges should be dismissed and Plan L03 upheld.

II. STATEMENT OF THE CASE

A. The bi-partisan Commission worked for months to create a legislative districting plan that complied with governing law and reflected the input of Idahoans from across the State.

This is an original proceeding under article III, section 2(5) of the Idaho Constitution and Idaho Code § 72-1509(1), consolidating two petitions challenging the Commission's adoption of legislative redistricting Plan L03.

Absent an order from this Court requiring an earlier reapportionment, Idaho's legislative districts are reapportioned every ten years upon the release of a new federal census. Idaho Const. art. III, § 2(2). The results of the federal census of 2020 were received by the State of Idaho on August 12, 2021.[1] *See* Final Report of the Commission dated November 10, 2021 (hereinafter "Final Report"), at 1. That very same day, August 12, 2021, Secretary of State Lawerence Denney issued his Order Establishing Commission for Reapportionment and identifying the individuals to serve on the Commission.[2] Final Report at 1.

The Commission is bi-partisan.[3] When forming the Commission, specific consideration is given to geographic representation of individuals from throughout the state of Idaho. Idaho Code § 72-1502. Commissioners are prohibited from serving in the Idaho legislature for five years following service. *Id.* In contrast, the challenging petitioners represent their own highly local interests, and they are not prohibited from seeking legislative office for any period of time. One of

[1] These results were received months later than usual because census activities were delayed by the COVID-19 pandemic. Final Report at 1, n.2.

[2] The following individuals were named to the Commission: Bart Davis, appointed by Chuck Winder, President Pro Tempore of the Idaho Senate; Tom Dayley, appointed by Scott Bedke, Speaker of the Idaho House of Representatives; Nels Mitchell, appointed by Fred Cornforth, Chair of the Idaho Democratic Party; Amber Pence, appointed by Ilana Rubel, Minority Leader of the Idaho House of Representatives; Eric Redman, appointed by Tom Luna, Chair of the Idaho Republican Party; and Dan Schmidt, appointed by Michelle Stennett, Minority Leader of the Idaho Senate. Final Report at 1. The Commissioner biographies are found in the Final Report, App. I.

[3] "The president pro tempore of the senate, the speaker of the house of representatives, and the minority leaders of the senate and the house of representatives shall each designate one (1) member of the commission and the state chairmen of the two (2) largest political parties, determined by the vote cast for governor in the last gubernatorial election, shall each designate one (1) member of the commission." Idaho Code § 72-1502.

the petitioners is an active politician from Ada County and the other is the political entity of Ada County.[4]

The Commission convened on September 1, 2021, electing Commissioner Davis[5] and Commissioner Schmidt as co-chairs. Final Report at 1. The Commission immediately began work in early September 2021, adopting rules for organization, procedure and other matters, and drafting redistricting plans for discussion and consideration by the public.[6] *Id.* The Commission toured the state over four weeks, holding in-person public hearings at seventeen different locations where public testimony was received and draft plans were submitted by the public.[7] These locations included Boise, Meridian, Eagle, Caldwell, Nampa, Coeur d'Alene, Sandpoint, Moscow, Plummer, Lewiston, Hailey, Twin Falls, Burley, Idaho Falls, Pocatello, and Rexburg.[8] An eighteenth public hearing was conducted on October 12, 2021, which allowed for remote

[4]Mr. Durst is a Republican running for State Superintendent. https://twitter.com/brandendurst?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor. Ada County Commissioners Davidson and Beck are Republicans while Commissioner Kenyon is a Democrat. https://adacounty.id.gov/commissioners/.

[5] Co-chair Davis is the former United States Attorney for the District of Idaho, recently serving from 2017 through 2021. Final Report, App. I at 2-5. Commissioner Mitchell, who also has had a distinguished legal career, similarly lent legal expertise to the Commission. Final Report, App. I at 8.

[6] The Commission's rules are found in Final Report, App. IV.

[7] The Commission held 34 meetings at locations throughout the state between September 1, 2021 and November 10, 2021. *See* Final Report, App. III (Meeting Minutes); Final Report, App. XI (Draft Commission Redistricting Plans); Final Report, App. XII (Proposed Redistricting Plans Submitted by the Public and Comments on Plans); Final Report, App. XIII (Written Public Testimony and Letters).

[8] *See* Final Report, App. III.

testimony. Final Report at 2. The Commission also accepted written comments and draft plans through its website. *Id.*

The Commission met during the end of October and beginning of November to finalize redistricting plans, taking into consideration applicable redistricting law, testimony from throughout the state of Idaho, written comments, and draft plans. *See generally* Final Report, App. III. Sixty-five days after convening, the Commission unanimously adopted Plan L03 on November 5, 2021 as Idaho's legislative redistricting plan and again on November 10, 2021 out of concern for a potential open meeting law violation. Final Report at 2. The Commission adjourned on November 10, 2021, after it had considered more than 80 full and partial legislative plans and spent over 80 hours considering testimony and conducting meetings to formulate Plan L03. *Id.* Plan L03 and the Final Report were transmitted to the Idaho Secretary of State's Office on November 12, 2021.

In adopting Plan L03, the Commission correctly identified the legal hierarchy for legislative redistricting. Final Report at 5-10. The Idaho Constitution's preference for limiting the total number of counties divided was a top priority, second only to compliance with the Equal Protection Clause in the Fourteenth Amendment to the U.S. Constitution. *Id.* at 9. The Commission determined the ideal district size was 52,546, based on a total state population of 1,839,106 and the constitutional requirement of 35 legislative districts.[9] *Id.* at 10, 19. The Commission determined that no district would deviate by more than 5% over or under the ideal size, unless the

[9] Idaho's Constitution was recently amended to fix the number of legislative districts at 35. It previously allowed anywhere from 30 to 35 legislative districts. *See* 2020 Idaho Sess. Laws 1003.

district was an outlier or an extraordinary reason existed for the larger deviation. *Id.* at 11. The Commission's rationale was to reduce preferential treatment for people in one district at the expense of people in other districts, consistently apply state policy, and maximize each voter's right to vote and effective representation. *Id.* The Commission adopted Plan L03 after determining it satisfied the Equal Protection Clause with a maximum population deviation of 5.84% while dividing the fewest number of counties (eight) possible. *See id.* at 11.

With regard to dividing the fewest number of counties, the Commission determined that seven counties had a population exceeding the ideal district size and six of those counties had to be divided one or more times into districts (referred to herein as "split") in order to satisfy equal protection standards. *Id.* at 20. Those counties were Ada, Bannock, Bonneville, Canyon, Kootenai, and Twin Falls. *Id.* at 20-22. The Commission's rationale, described in the Final Report at General Legislative Plan Finding 3, was as follows:

> A. Ada County. Ada is the state's most populous county, with 494,967 people. Mathematically, this predicts nine internal districts, with a remainder of 22,053. Evenly dividing 22,053 people among nine districts would result in districts with a population of 54,996. This would be 2,450 above the ideal district size, for a +4.7% deviation.[60] If Ada were divided into ten internal districts, each with a population of 49,497, then the population of each district would be 3,049 below the ideal district size, for a deviation of -5.8%. It is mathematically possible to draw only internal districts in Ada County, but either nine or ten internal districts would deviate a great deal from the ideal district size. Because lower deviations are possible with external divisions of Ada County, and because the Commission is obligated, under the Equal Protection Clause and the *Reynolds* line of cases, to make a good faith effort to achieve ideal district size, the Commission finds that Ada County should be externally split.
>
> B. Bannock County. Bannock's population is 87,018. Mathematically, this predicts one internal district, with a remainder of 34,472. If Bannock were made into one self-contained district, the population of the district would be 34,472 above

the ideal district size, for a +65.6% deviation. If Bannock were divided into two internal districts, each with a population of 43,509, then the population of each district would be 9,037 below the ideal district size, for a -17.2% deviation. It is mathematically impossible to create a redistricting plan that presumptively satisfies equal protection standards without externally splitting Bannock County. Therefore, Bannock County must be externally split.

C. Bonneville County. Bonneville's population is 123,964. Mathematically, this predicts two internal districts, with a remainder of 18,872. Evenly dividing 18,872 people between two districts would result in districts with a population of 61,982. This would be 9,436 above the ideal district size, for a +18% deviation. If Bonneville were divided into three internal districts, each with a population of 41,321, then the population of each district would be 11,225 below the ideal district size, for a deviation of -21.4%. It is mathematically impossible to create a redistricting plan that presumptively satisfies equal protection standards without externally splitting Bonneville County. Therefore, Bonneville County must be externally split.

D. Canyon County. Canyon is the second most populous county in the state, with 231,105 people. Mathematically, this predicts four internal districts, with a remainder of 20,921. Evenly dividing 20,921 people among four internal districts would result in districts with a population of 57,776. This would be 5,230 above the ideal district size, for a +10% deviation. If Canyon were divided into five internal districts, each with a population of 46,221, then the population of each district would be 6,325 below the ideal district size, for a deviation of -12%. It is mathematically impossible to create a redistricting plan that presumptively satisfies equal protection standards without externally splitting Canyon County. Therefore, Canyon County must be externally split.

E. Kootenai County. Kootenai's population is 171,362. Mathematically, this predicts three internal districts, with a remainder of 13,724. Evenly dividing 13,724 people among three internal districts would result in districts with a population of 57,121. This would be 4,575 above the ideal district size, for a +8.7% deviation. If Kootenai were divided into four internal districts, each with a population of 42,841, then the population of each district would be 9,705 below the ideal district size, for a -18.5% deviation. It is mathematically impossible for a redistricting plan to presumptively satisfy equal protection standards if it includes four internal districts in Kootenai County. While it might be mathematically possible, if unlikely, for a redistricting plan to satisfy equal protection standards if it includes three internal districts in Kootenai County, the Commission finds that a +8.7% deviation is unacceptably high. Because lower deviations are possible with external divisions

> of Kootenai County, and because the Commission is obligated, under the Equal Protection Clause and the *Reynolds* line of cases, to make a good faith effort to achieve ideal district size, the Commission finds that Kootenai County should be externally split.
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> . . .
>
> G. Twin Falls County. The population of Twin Falls is 90,046. Mathematically, this predicts one internal district, with a remainder of 37,500. If Twin Falls were made into one self-contained district, the population would be 37,500 above the ideal district size, for a deviation of +71.4%. If Twin Falls were divided into two internal districts, each with a population of 45,023, then the population of each district would be 7,523 below the ideal district size, for a deviation of -14.3%. It is mathematically impossible to create a redistricting plan that presumptively satisfies equal protection standards without externally splitting Twin Falls County. Therefore, Twin Falls County must be externally split.

Final Report at 20-22.[10]

Two other counties, Bonner and Nez Perce, also had to be split to satisfy equal protection:

> A. Bonner County. For the following reasons, Bonner County must be divided so that part of it forms a district with Boundary County and part of it joins with a district to the south. Boundary is the state's northernmost county, with a population of 12,056. This is too low for Boundary to be a self-contained district. To satisfy equal protection standards, Boundary must be joined with another county, and to satisfy Article III, Section 5 of the Idaho Constitution, Boundary must be joined with a contiguous county. To the north, west, and east, Boundary borders other jurisdictions — British Columbia, Washington, and Montana. The only county in Idaho that borders Boundary is Bonner, with a population of 47,110. One legislative district containing the whole of both counties would have a population of 59,166 — 6,620 above the ideal district size, for a deviation of +12.6%. It is mathematically impossible for a redistricting plan with such a district to presumptively satisfy equal protection standards. Therefore, Bonner County must be divided, part of it combining in a district with Boundary, and part of it combining with counties to the south. Like Boundary, Bonner has a limited number of potential partners in a district, as its western and eastern neighbors, Washington and Montana, are other jurisdictions.

[10] Madison County had a constitutionally insignificant deviation of 0.7% so remained a self-contained district. Final Report at 22.

B. Nez Perce County. Six contiguous northern counties — Boundary, Bonner, Kootenai, Shoshone, Benewah, and Clearwater — together have a population of 261,961. Dividing that number by the ideal district size predicts five districts for these six combined counties, and **Plan L03**, adopted by the Commission, in fact allots five districts to these six counties.

The next three counties — Latah, Nez Perce, and Lewis — have a combined population of 85,140, which mathematically predicts 1.62 districts. A district containing all three counties would exceed the ideal district size by 32,594, for an unconstitutional deviation of +62%. Each county is too small to be a self-contained district. Nez Perce, the most populous, has a population of 42,090, which deviates -19.9% from the ideal district size; Latah has a population of 39,517, which deviates -25% from the ideal district size; and Lewis has a population of 3,533, which deviates -93.3% from the ideal district size. No district combining two counties of the three would comply with constitutional requirements: Latah and Nez Perce are contiguous, but their combined population is 81,607, which deviates +55.3% from the ideal district size; Latah and Lewis are not by themselves contiguous, and even if they were, their combined population would deviate -18.1% from the ideal district size; and Nez Perce and Lewis, while contiguous, would together deviate -13.2% from the ideal district size. Combining these two counties together would also leave Latah stranded, with no contiguous county to combine it with.

What the Commission finds in this part of the state is a Gordian knot that must be untangled or cut through. Equal protection and the command in the Idaho Constitution to keep counties whole are in tension, but the Idaho Constitution resolves the dilemma by providing that its requirements must yield to those of the United States Constitution.

To create districts of acceptable population including these counties, Latah, Nez Perce, and Lewis Counties must be combined with counties farther south. Idaho County is contiguous with both Nez Perce and Lewis, and Adams County is contiguous with Idaho County. The five counties together have a population of 106,060; dividing that by the ideal district size would predict 2.02 districts. However, the only one of these counties adjacent to Latah is Nez Perce. Therefore, Latah can form a district with one or more of the counties farther south only if part of Nez Perce County acts as a bridge between them. Based on this analysis, the Commission finds that Nez Perce County must be split.

Final Report at 22-25.

Five plans were submitted by the public that split seven counties.[11] *Id.* at 11-12. The Commission closely reviewed each of these plans, and determined that all of them would likely violate the Equal Protection Clause and were also inconsistent with other principles applicable to the redistricting process. *Id.* at 10-19. The Commission determined that "[c]ommitment to equal protection requires aiming for 0% deviation, not 10%. Commitment to equal protection requires being able to justify deviations with a rational state policy, consistently and neutrally applied." *Id.* at 15. The Commission further determined that the seven-county split maps would give people in one region more voting power than people in the rest of the state. *Id.* at 19. The Commission concluded that the minimum number of counties that must be split to comply with equal protection standards was eight. *Id.*

B. Branden Durst filed an untimely petition challenging the Commission's Plan under the Idaho Constitution.

Petitioner Branden Durst filed his Petition for Review on November 10, 2021 challenging Plan L03, two days before the Commission's Final Report was transmitted to the Idaho Secretary of State's Office. Durst argues (incorrectly) that the Commission divided more counties externally than necessary to comply with the U.S. Constitution and thereby violated the Idaho Constitution. Petitioner Branden Durst's Opening Brief ("Durst Brief"), at 13.

Durst incorrectly contends that, because Plan L084 splits seven counties only externally, Plan L084 splits only seven counties relevant to the analysis under the Idaho Constitution. *See*

[11] The five plans were submitted on October 12th (L071), 13th (L075), 25th (L076), and 26th (L077 and L079). Final Report, App. XII at 49-50.

Durst Petition for Review, at 5; Final Report, App. XII at 51. Plan L084 splits Bonner, Kootenai, Nez Perce, Canyon, Twin Falls, Bannock and Bonneville Counties externally. *Id.* But Plan L084 also splits Ada County internally into multiple districts. *Id.* Plan L084 also has serious equal protection issues.

Durst's challenge also does not address the public testimony that the Commission gathered throughout the entire state of Idaho. Instead, Durst's preferred Plan L084 is the product of his highly local perspective. Durst is a qualified elector of the state of Idaho and registered to vote in Ada County. Durst Verified Petition for Review ("Durst Petition"), at ¶ 5, Verification to Durst Petition, at ¶ 2. He spoke to the Commission one time on September 16, 2021, in Meridian, Idaho where he noted his viewpoint was based upon being born, raised and residing in the Treasure Valley.[12] *See* Final Report, App. III, Sept. 16, 2021 Minutes; Durst Petition, App. A at 2:15-18, 4:8-17. Specifically, he testified: "Now, if I can really just talk about Ada County because this is where we are today, this is the area that I have the most subject matter expertise in." Durst Petition, App. A at 11:6-9. He submitted two legislative plans for discussion at the September 16, 2021 meeting: L013 and L024. *See* Final Report, App. III, Sept. 16, 2021 Minutes. Plan L084, the plan Durst relies upon to support his Petition, was not submitted to the Commission until November 2, 2021, weeks after the Commission stopped taking in-person public testimony and only three days before the Commission adopted Plan L03. *See* Final Report, App. XII at 51.

[12] The transcript Petitioner filed with his Petition confusingly indicates his testimony occurred on October 8, 2021, but the meeting minutes from October 8, 2021 reflect that the Commission met in Idaho Falls on that date and that Petitioner did not testify on that date. *See* Final Report, App. III, Oct. 8, 2021 Minutes.

C. Ada County filed a timely petition challenging the Commission's Plan under the Idaho Constitution and Idaho Code.

Ada County timely filed its petition challenging L03 shortly after Durst filed his challenge. Ada County is a duly organized county within the state of Idaho. Ada County Petition for Review, at ¶ 2.

Ada County submitted at least one plan for consideration by the Commission. On October 22, 2021, Ada County, apparently acting through Anthony Locke-Smith, submitted Plan L072 to the Commission.[13] Just like Plan L03, Plan L072 split eight counties, and created districts that combined parts of Ada County with other counties (Owyhee and Canyon Counties). *See* Final Report, App. XIII at 70; Final Report, App. XII at 49, 114. Plan L072 had a deviation of close to 9.6%. *Id.* It is unclear whether Mr. Locke-Smith was acting on Ada County's behalf with his other map submissions (Plans L061, Plan L063, L064, L073[14], and L077[15]). Final Report, App. XII at 47, 49, 50. Plan L072 was the only plan that Ada County specifically endorsed to the Commission. Plan L072 created two partially external districts wherein portions of Ada County were combined with Owyhee County and Canyon County. Final Report, App. XII, at 114. Ada County offered no support for the Plans it now embraces to challenge the constitutionality of Plan L03 (Plans L075,

[13] Plan L072 was submitted to the Commission by Anthony Locke-Smith; however, Ada County states that it submitted Plan L072. *See* Final Report, App. XIII at 70.

[14] Plan L073 also combines portions of Ada County with portions of Canyon and Owyhee Counties. Final Report, App. XII at 115.

[15] Plan L077 is a seven county map, but it is presumptively unconstitutional as it has a 12.72% deviation. *See* Final Report, App. XII at 119 (District 5 (-7.74%) and District 31 (4.98%)). Plan L077 also combines portions of Ada County with portions of Canyon and Owyhee Counties. Final Report, App. XII at 119.

L076, and L079). *See* Final Report, App. XIII at 70. In other words, Ada County's own actions reflect approval of re-districting plans similar to Plan L03. Like Durst's challenge, Ada County's challenge is a transparent attempt to substitute its own discretion and preferences for those of the Commission.

In its brief, Ada County contends that Emmett is not part of the Treasure Valley. Petitioner Ada County's Brief ("Ada County Brief"), at 12. But Emmett has long been tied to the Treasure Valley through its commuting workers and school participation in the 4A Southern Idaho Conference.[16] Indeed, a majority of Gem County workers who work outside Gem County commute to Ada County.[17] Finally, a trusted local news company recently did a story into the origins of both the Magic Valley and Treasure Valley.[18] The story not only discussed the history of both regions, but also identified the traditional boundaries and counties within each region. *Id.* It noted that Gem County is part of the Treasure Valley. *Id.* The Commission, which took public

[16] Ada cites the interests of the Melba School District as justification for its split into Owyhee County. Ada County Brief at 15. The inclusion of the Emmett school district in the Treasure Valley for sports should hold similar weight, especially where Emmett competes against Bishop Kelly, Caldwell, Kuna, Middleton, Nampa, Ridgeview, and Vallivue.

[17] The most recent reporting data from 2011 through 2015 shows a five year commuting flow from residence in Gem County to place of work in Ada (1,768), and Canyon (39) as opposed to those staying in Gem County (3,155). *See* Table 1, 2011-2015 5-Year ACS Commuting Flows, U.S. Census, https://www.census.gov/data/tables/2015/demo/metro-micro/commuting-flows-2015.html.

[18] Brian Holmes, *How a Caldwell businessman in 1959 gave the Treasure Valley its name,* The 208 KTVB7 (Oct 21, 2021, 04:49 PM), https://www.ktvb.com/article/news/local/208/how-treasure-valley-got-its-name-oregon-trail/277-cc3131bd-6798-43ac-80f6-85818b911e55.

testimony, appropriately determined that portions of Ada County and Gem County shared sufficient interests to constitute a community of interest. Final Report at 54-55.

This Court consolidated the two Petitions for the purposes of briefing and oral argument given the substantial overlap in the arguments made by both Petitioners. Order Consolidating Actions and Resetting Briefing Schedule, issued November 23, 2021. Ultimately, both challenges boil down to efforts to weaponize the Idaho Constitution's county division language and Idaho Code to substitute the Commission's judgment and discretion with Petitioners' own. Petitioners' challenges lack merit and must be rejected.

III. LEGAL STANDARD FOR REDISTRICTING

In reviewing challenges to a legislative redistricting plan, the Court must consider the hierarchy of legal requirements that govern the Commission's reapportionment of Idaho's legislative districts. The plan must comply with the U.S. Constitution first, the Idaho Constitution second, and Idaho Code third. Each of these legal standards is highly deferential to the Commission's chosen plan.

A. The Commission's plan is presumptively constitutional under the U.S. Constitution, and the burden is on Petitioners to prove otherwise.

First, the plan must comply with the U.S. Constitution, specifically, the one-person, one-vote requirement contained in the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Twin Falls County v. Idaho Com'n on Redistricting*, 152 Idaho 346, 348, 271 P.3d 1202, 1204 (2012). Under the Equal Protection Clause, the Commission must "make an honest and good faith effort to construct districts . . . as nearly of equal population as is

practicable." *Bingham County v. Idaho Com'n for Reapportionment*, 137 Idaho 870, 872, 55 P.3d 863, 865 (2002) (quotations omitted). When a plan's maximum deviation is less than 10%[19], as it is here, it is presumptively constitutional. The burden falls on the challenger to prove that an irrational or illegitimate purpose predominated over a legitimate state purpose in order to invalidate a presumptively constitutional plan. *Harris v. Arizona Independent Redistricting Com'n,* 578 U.S. 253, 136 S. Ct. 1301, 1307, 194 L. Ed. 2d 497 (2016).

B. Petitioners have the burden of proving that the Commission's plan violates the Idaho Constitution by identifying a competing plan that splits fewer counties and complies with the Equal Protection Clause.

The second legal requirement that the plan must meet is set out in Idaho's Constitution. *Twin Falls County*, 152 Idaho at 348, 271 P.3d at 1204. The Idaho Supreme Court has interpreted article III, section 5 of Idaho's Constitution as prohibiting "the division of counties, except to meet the constitutional standards of equal protection." *Bonneville County v. Ysursa*, 142 Idaho 464, 471, 129 P.3d 1213, 1220 (2005) (quoting *Bingham County*, 137 Idaho at 878, 55 P.3d at 871). In order to prove that the Commission's plan violates Idaho's Constitution, the challenger must establish that the Commission could have drawn a plan that divided fewer counties and still complied with

[19] Maximum population deviation expresses the difference between the least populous district and the most populous district in terms of the percentage those districts deviate from the ideal district size. The ideal district size is calculated by dividing the total population by the number of districts. For example, if among thirty-five districts, the least populous district is four percent below the ideal, and the most populous district is four percent above the ideal, the maximum population deviation would be 4% to -4%, or 8%. *Bonneville County v. Ysursa*, 142 Idaho 464, 467, n.1, 129 P.3d 1213, 1216 (2005).

the Equal Protection Clause by identifying a competing plan that divides fewer counties and complies with the Equal Protection Clause. *Twin Falls County*, 152 Idaho at 350, 271 P.3d at 1206.

C. Petitioners bear the burden of proving that the Commission violated Idaho Code.

The third source of law governing legislative redistricting plans is Idaho's statutes. Most relevant is Idaho Code § 72-1506, which includes a mix of mandatory and advisory goals for the Commission to consider. *Twin Falls County*, 152 Idaho at 349, 271 P.3d at 1205. Because the Commission is a body created through constitutional amendment, it represents the "will of the people," and must be afforded as much deference as legally possible. Reapportioning legislative bodies is a legislative task that courts should make every effort not to preempt. *Wise v. Lipscomb*, 437 U.S. 535, 539, 98 S. Ct. 2493, 2497, 57 L. Ed. 2d. 411 (1978) (White, J.); *Caesar v. Williams*, 84 Idaho 254, 277, 371 P.2d 241, 255 (1962). Although the Commission is not a legislative body, the Court extends the same allowance for discretion and judgment vested in the legislature to the Commission unless limited by constitution or statute. *Bonneville County*, 142 Idaho at 472, n.8, 129 P.3d at 1221. The Court "simply cannot micromanage all the difficult steps the Commission must take in performing the high-wire act that is legislative district drawing." *Bonneville County*, 142 Idaho at 472, 129 P.3d at 1221.

IV. ARGUMENT

A. Plan L03 satisfies the U.S. Constitution.

Petitioners do not dispute that Plan L03 complies with the U.S. Constitution. As discussed above, under the Equal Protection Clause of the Fourteenth Amendment, Plan L03 is

presumptively constitutional because it has a maximum population deviation of less than 10% — specifically 5.84% deviation.

The Fourteenth Amendment's Equal Protection Clause requires that "the vote of any citizen [must be] approximately equal in weight to that of any other citizen in the State." *Reynolds v. Sims*, 377 U.S. 533, 579, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). The U.S. Supreme Court has not set a mathematical rule for redistricting, but rather required "an honest and good faith effort to construct districts, in both houses of [a state's] legislature, as nearly of equal population as is practicable." *Id.* at 577. The U.S. Supreme Court reaffirmed its rejection of a mathematical test in *Roman v. Sincock*, 377 U.S. 695, 710, 84 S. Ct. 1449, 12 L. Ed. 2d 620 (1964). ("[I]t is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause."). The "proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State . . . there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Id*. Put differently, the U.S. Constitution permits deviations from equal population only when justified by "legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579. The legitimate considerations include "traditional districting principles such as compactness and contiguity" and "maintaining the integrity of political subdivisions." *Harris,* 136 S. Ct. at 1306.

"[M]inor deviations from mathematical equality among state legislative districts" do not make out "a *prima facie* case of invidious discrimination under the Fourteenth Amendment," and

thus do not need to be justified by the state. *Gaffney v. Cummings*, 412 U.S. 735, 745, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973). A minor deviation is a maximum population deviation under 10%. *Brown v. Thomson*, 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L. Ed. 2d (1983). This is an evidentiary burden-shifting line, not a constitutional requirement.

Contrary to the intimation of the Court in *Twin Falls County* and Petitioners' apparent understandings, a deviation of less than 10% does not necessarily mean that a plan complies with the Equal Protection Clause. *Compare Twin Falls County*, 152 Idaho at 350, 271 P.3d at 1206 (suggesting that alternative maps be evaluated to determine whether they actually comply with the Equal Protection Clause just by looking at whether they are under 10% deviation); Durst Brief at 9-10; Ada County Brief at 5 (incorrectly referring to "the 10% deviation requirement") *with Larios v. Cox*, 300 F. Supp. 2d 1320, 1340 (N.D. Ga. 2004), *aff'd*, *Cox v. Larios*, 542 U.S. 947, 949, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004) (Stevens, J., concurring) (stating the Court has properly rejected the invitation to create "a safe harbor for population deviations less than 10 percent"); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 364-65 (S.D.N.Y. 2004), *aff'd per curiam*, 543 U.S. 997, 125 S. Ct. 627, 160 L. Ed. 2d 454 (2004); *Bonneville County*, 142 Idaho at 468, 129 P.3d at 1217 ("We say 'presumptively' constitutional because a plan whose maximum population deviation is less than ten percent may nonetheless be found unconstitutional[.]") When the deviation is under 10%, "those attacking a state-approved plan must show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate

reapportionment factors rather than the 'legitimate considerations' . . . referred [to] in *Reynolds* and later cases" to prove an equal protection violation. *Harris*, 136 S. Ct. at 1307.[20]

As Plan L03 is well within the 10% threshold, the Commission need not justify the deviations. And because Petitioners make no effort to show—and, indeed, do not argue[21]—that illegitimate reapportionment considerations predominated over legitimate considerations, this Court must find Plan L03 complies with the U.S. Constitution.

B. Plan L03 satisfies the requirements of Idaho's Constitution.

Petitioners' self-serving challenges to Plan L03 under the Idaho Constitution cannot stand. The Idaho Constitution is not a cudgel with which third-parties can impose their own redistricting preferences on the entire state.

As described above, the Idaho Supreme Court has interpreted article III, section 5 of the Idaho Constitution to mandate that counties may be divided to form legislative districts only as necessary to comply with the Equal Protection Clause. *Bonneville County*, 142 Idaho at 471, 129

[20] In *Bonneville County*, which was decided prior to the U.S. Supreme Court's more detailed analysis in *Harris*, the Idaho Supreme Court stated a prior iteration of this test. The outdated iteration of the test for a challenge to a plan with less than 10% deviation is: "[a] plan whose maximum population deviation 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." *Bonneville County*, 142 Idaho at 468, 129 P.3d at 1217.

[21] While Ada County argues in its brief that certain of the Commission's actions were inconsistent with equal protection to support its Idaho Constitution and Idaho Code arguments, Ada County does not actually challenge Plan L03 as violating the U.S. Constitution. *See* Ada County's Petition (challenging Plan L03 for violating the Idaho Constitution and Idaho Code); Ada County Brief at 4-15. With these gestures, Ada County appears to argue that the Commission applied an arbitrary and contradictory rationale when it evaluated equal protection concerns with third-party maps versus in Plan L03. *See* Ada County Brief at 7-9, 12. These erroneous arguments are addressed below.

P.3d at 1220. In *Twin Falls County*, the Court interpreted article 3, section 5 of Idaho's Constitution to mean that, if a challenger can show that the Commission could have drafted a map with fewer county splits[22] and still complied with the Equal Protection Clause, the Commission could only split that number of counties. *Twin Falls County*, 152 Idaho at 351, 271 P.3d at 1207. Plan L03, which splits eight counties, survives scrutiny under the Idaho Constitution because there is no evidence the Commission could have split fewer counties and still have complied with the Equal Protection Clause.

Idaho's geography and population distribution makes the mandate to minimize county splits a challenging one. The unique shape of the state limits the combinations of contiguous counties, and article 3, section 5 of Idaho's Constitution requires that counties only be joined with contiguous counties. The geography, such as mountain ranges, wilderness areas, rivers, and deserts, in some cases limit the combination of counties. And the population distribution magnifies this challenge as certain counties are very sparsely populated compared to others. Yet, as the Court

[22] Given the two different county division arguments Petitioners make, Respondents will refer to any time a county is divided to form one or more districts as a "county split." Regardless of the number of districts a county is divided into, it only counts as having been "split" once. A "county split" is different from the number of times a county is divided to create one or more districts. An "external division" occurs when a district is formed by combining part of one county with all or part of another county. Final Report at 8. For example, if half of Valley County was combined with all of Adams County to form a district then that would be an external division of Valley County. An "internal division" occurs when a county is divided to create two or more districts wholly contained within the county. Final Report at 8. For example, if Ada County was divided down the middle to form two districts within the county, that would be an internal division. Petitioners' erroneous arguments related to external divisions are discussed in Section IV(B)(iii), below.

has recognized, "in a state with 44 counties and 35 legislative districts … joining counties or parts of counties with one another is necessary." *Bingham County*, 137 Idaho at 875, 55 P.3d at 868.

Petitioners concede that the Commission was correct in concluding that it is necessary to split seven counties—Ada,[23] Bannock, Bonner, Bonneville, Canyon, Kootenai and Twin Falls Counties. *See* Final Report, App. XI at 7; Final Report, App. XII at 117, 118, 121, 126. As the Commission found, Bonner County must be split because Boundary County is too small to make its own district and so must be combined with Bonner because of geography, but the population of Bonner and Boundary Counties together is too great to form a single district. Final Report at 23. And Kootenai, Canyon, Ada, Twin Falls, Bannock and Bonneville Counties must each be split because the population of each of these counties is too great to constitute one district. *Id.* at 20-22. The only county that the Commission found necessary to split that was not split in the seven county maps identified by Petitioners (Plans L075, L076, and L079) is Nez Perce County.

The Commission found it necessary to split Nez Perce County because it determined that the populations of Latah, Nez Perce and Lewis Counties had to be combined with populations further south to avoid violating the requirements of the Equal Protection Clause. Final Report at 23-24. Combining Latah, Nez Perce and Lewis together would result in an unconstitutional deviation of +62%. Final Report at 24. But each county on its own is too small for a self-contained district. *Id.* ("Nez Perce, the most populous, has a population of 42,090, which deviates -19.9% from the ideal district size; Latah has a population of 39,517, which deviates -25% from the ideal

[23] Durst contends that his Ada County split does not count as the split is wholly internal. Durst is incorrect for the reasons discussed in Section IV(B)(ii), below.

district size; and Lewis has a population of 3,533, which deviates -93.3% from the ideal district size."). And no district of constitutional deviation could be created by combining two of the three counties. *Id.* ("Latah and Nez Perce are contiguous, but their combined population is 81,607, which deviates +55.3% from the ideal district size; Latah and Lewis are not by themselves contiguous, and even if they were, their combined population would deviate -18.1% from the ideal district size; and Nez Perce and Lewis, while contiguous, would together deviate -13.2% from the ideal district size. Combining these two counties together would also leave Latah stranded, with no contiguous county to combine it with.").

The Commission realized, "this part of the state is a Gordian knot that must be untangled or cut through. Equal protection and the command in the Idaho Constitution to keep counties whole are in tension, but the Idaho Constitution resolves the dilemma by providing that its requirements must yield to those of the United States Constitution." *Id.* Thus, the Commission rationally concluded that, in order to combine the populations of Latah, Nez Perce and Lewis Counties with those further south, it had to split Nez Perce County to use it as a bridge join Latah County with communities further south. *Id.* at 24-25. This one additional county split was necessary to avoid regional underpopulation of northern Idaho districts at the expense of southern Idaho districts. Final Report at 17-18.

The Commission acted appropriately in splitting these eight counties. The Petitioners' challenges under the Idaho Constitution fail because they fail to prove that the Commission could have divided fewer than eight counties without violating the Equal Protection Clause.

i. The seven county plans do not show that the Commission could have divided fewer counties and still have complied with the Equal Protection Clause**.**

Having advocated for an eight county split plan before the Commission and had its preferred line drawing rejected, Ada County now embraces the seven county split plans submitted by others in the apparent hope that it can get Plan L03 overturned and have another bite at the redistricting apple. Durst similarly has embraced the seven county split plans only at the briefing stage. Petitioners' efforts fail because, as the Commission reasonably concluded, the seven county split maps Petitioners identify (Plans L075, L076 and L079) cannot be said to comply with the Equal Protection Clause. This is fatal to Petitioners' challenges. *Twin Falls County*, 152 Idaho at 351, 271 P.3d at 1207.

First, Plans L075, L076 and L079 appear to have been drawn to get to or just under the 10% deviation and stop, which itself suggests a violation of the Equal Protection Clause. Plans L075 and L076 have deviations of 9.97% and L079 has a 10% deviation. Final Report at 13. "[T]he free-wheeling use of deviations up to 10% without furthering any other constitutionally acceptable redistricting criteria is not itself a constitutionally acceptable redistricting criterion." *Perez v. Abbott*, 250 F. Supp. 3d 123, 202 (W.D. Tex. 2017). In *Larios v. Cox*, the court noted that evidence that all efforts to minimize population deviations ceased after the 10% deviation was reached could suggest that illegitimate considerations predominated over legitimate considerations in map drawing. *Larios*, 300 F. Supp. 2d at 1341. Another district court has agreed, stating that if the "sole redistricting criteria is that the total population variance must fall below 10%, then such a single criteria in a vacuum may suggest arbitrariness, a lack of good faith in re-drawing lines, and the

absence of legitimate considerations." *Kueber v. City of San Antonio*, 197 F. Supp. 3d 917, 926 (W.D. Tex. 2016). This is because all divergences from a strict population standard must be justified by the good faith application of a rational state policy. *Reynolds*, 377 U.S. at 579; *Roman*, 377 U.S. at 710; *Brown*, 462 U.S. at 843.

Second, the Commission reasonably concluded that Plans L075, L076, and L079 impermissibly demonstrate regional favoritism. Final Report at 13-19. All three plans significantly underpopulate districts in northern Idaho at the expense of fast-growing southern Idaho.

The Commission found that, in L075, the five northernmost districts are extremely underpopulated, which gives voters in those districts undue political power at the expense of voters living in other districts. Final Report at 13. Districts 1, 2, 3, and 4 have a deviation of -7.25%, District 5 has a deviation of -7.24%, and District 6 has a deviation of -6.6%. *Id.* Starting with Clearwater County and heading south the pattern of underpopulation dramatically changes, with the southern Idaho Districts 11, 12, 14, 17, 18, 19, 20, 22, 23, and 33 all at the top end of the deviation range at 2.72%. *Id*; Final Report, App. XII at 117; Plan L075 Population Summary. Between the least and most populated districts, there is a difference of over 5,200 people; the Commission found this to be a significant disparity. Final Report at 13.

The Commission found that Plans L076 and L079 similarly significantly underpopulate the five northernmost districts. Final Report at 16-17. In Plan L076, Districts 1, 2, 3, and 4 have a deviation of -7.25% and District 6 has a deviation of -6.66%. Final Report, App. XII at 118. In Plan L079, Districts 1, 2, and 3 have a deviation of -7.23%, District 5 has a deviation of -7.26%, District 4 has a deviation of -7.27% and District 6 has a deviation of -6.66%. Final Report, App.

XII at 121; Plan L079 Population Summary. Again, starting with Clearwater County and heading south, the pattern of underpopulation changes to overpopulation, resulting in consistent overpopulation in the southern portion of the state. Final Report at 16-17; Final Report, App. XII, at 118, 121. In Plan L076, Districts 11, 12, 14, 17, 18, 19, 20 and 33 are at the maximum population deviation of 2.72%. Final Report at 16; Final Report, App. XII at 118. Between the least and most populated districts, there is a difference of 5,240 people. *See* Plan L076 Population Summary. In Plan L079, 16 districts are overpopulated by 2% or more, up to 2.72% (Districts 31, 13, 19, 11, 23, 15, 10, 27, 16, 22, 20, 26, 17, 14, 18, and 9). *See* Plan L079 Population Summary. Between the least and most populated districts, there is a difference of 5,250 people (only 5 people from having a deviation that would render the plan presumptively unconstitutional). *Id.*

A plan may only deviate from a good faith effort to create districts with as equal a population as practicable if it is pursuing legitimate considerations. Regional favoritism is not a legitimate consideration. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1338, 1342-45 (N.D. Ga. 2004), *aff'd*, *Cox v. Larios*, 542 U.S. 947 (2004). This is because "[a] citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm." *Reynolds*, 377 U.S. at 568. "Legislators are elected by voters, not farms or cities or economic interests." *Id.* at 562. In the context of regional favoritism, it is enough to strike down a map as a violation of equal protection if the map demonstrates regional under and overpopulation and there is evidence that the drafter intended to protect a specific region. *Larios*, 300 F. Supp. 2d at 1342. Here, because Ada County's motivations necessarily remain opaque, the patterns of regional favoritism in the plans were enough for the

Commission to reasonably conclude that they do not show that fewer counties can be divided without violating the Equal Protection Clause.

Second, the Commission found that Plans L075 and L076 contain markers suggesting that legitimate redistricting criteria did not predominate because the boundary lines of many of the districts are irregular. *See, e.g.*, Final Report, App. XII at 117 (Districts 11, 12, 14, 18, and 29); Final Report, App. XII at 118 (Districts 10, 11, 14, 18, 22, 23, and 27); Final Report, at 14, 18. Irregular boundary lines can suggest an equal protection violation. *Raleigh Wake Citizens Association v. Wake County Board of Elections*, 827 F.3d 333, 346-47 (4th Cir. 2016) (hereinafter *RWCA*); *City of Greensboro* v. *Guilford County Board of Elections*, 251 F. Supp. 3d 935, 944 (M.D. N.C. 2017); *Rodriguez*, 308 F. Supp. 2d at 371; *Larios*, 300 F. Supp. 2d at 1342, 1348, 1350.

Third, even if one assumes the motivations of the map drawers, the Commission reasonably found that Plans L075 and L076 do not reflect the consistent application of a legitimate state interest in preserving county integrity because both maps divide Bonner County into three districts.[24] Final Report at 15, 16. Plan L03 demonstrates, and the Commission found, that Bonner

[24] Ada County suggests that the Commission's evaluation of the Bonner County divisions in the seven county plans was somehow inappropriate or unreliable because of how the Commission divided Ada and Canyon in Plan L03. Ada County Brief at 8. Ada County compares apples to oranges. The Commission divided Ada and Canyon Counties in the interest of equal protection, to get as close to ideal district size as practicable while still effectuating rational state policies. *See, e.g.*, Final Report at 56 ("all county divisions in Plan L03 were made in the interest of equal protection."). In comparison, in evaluating the seven county plans, the Commission was looking to see whether illegitimate consideration could have predominated over legitimate considerations for the third party map drawer and whether any possible legitimate considerations might have been applied arbitrarily. Put differently, the Commission evaluated the seven county plans for whether the county divisions could potentially reveal arbitrary conduct. The Commission did not need to do this for its divisions of Ada and Canyon Counties because it knew it was dividing those counties

County need only be divided into two districts. *Id.* at 16. Plan L075 also unnecessarily divides Twin Falls County into 4 districts, and Plans L076 and L079 unnecessarily divide Twin Falls County into 3 districts. Final Report, App. XII at 117, 118, 121. Plan L03 only divides Twin Falls County into 2 districts. Final Report, App. XI at 7. Finally, Plan L075 divides Canyon County into 7 districts, when Plan L03 only divides Canyon County into 6 districts. *Compare* Final Report, App. XI at 7 *with* App. XII at 117. In short, Plans L075, L076 and L079 reflect arbitrary decisions of how counties should be divided. They do not reflect the good faith application of a legitimate state policy, even if a legitimate consideration were at play.

Finally, Ada County is incorrect to argue that the Commission's statements about third-party motivations bear weight. Ada County Brief at 6, n.4 (quoting Final Report at 15 ("In making this analysis, the Commission does not mean to imply that anyone who submitted a seven-county-split plan did so for improper purposes.")). While it is correct that, when a state-adopted plan has a deviation of less than 10%, the challengers "must show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate considerations over legitimate considerations," *Harris*, 136 S. Ct. at 1307, that test cannot apply wholesale to the Commission's evaluation of whether a third-party map demonstrates compliance with the Equal Protection Clause.

Contrary to Ada County's assertion, by no reasonable construction can the Commission be considered the "challenger" to Plans L075, L076, L079, or L084. *See* Ada County Brief at 6, n.4.

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to ensure the districts were as close to equal population as practicable while still complying with the Idaho Constitution.

As described below, the procedural posture of an actual challenge to a government-adopted plan is far different from the Commission's evaluation of a third-party submitted map. Thus, as Ada County points out, the Commission is correctly careful to say in its Final Report that it has no evidence that anyone submitting a map to it had an improper purpose behind its submission. Final Report at 15. Such information is simply not available to the Commission, or this Court, and thus determining compliance with the Equal Protection Clause cannot consider actual motivations.

These evidentiary limitations mean the Court must either reject *Twin Falls County*'s test for compliance with the Idaho Constitution (evaluating whether competing plans with fewer splits comply with the Equal Protection Clause) as unworkable and unwise[25] or it must apply a modified version of the equal protection test to third-party plans. This modified test must evaluate the plans submitted by the third-party within the Commission's evidentiary limitations. This is because (1) there is little to no evidence available to the Commission to scrutinize true motivations behind third-party plans given how they are developed and submitted, especially compared to what is available in a challenge to a state-adopted plan; (2) the record is insufficient for this Court to review the motivations underlying third-party plans; (3) there are no guard-rails on the process by which

[25] This Court should consider the Court's suggestion in *Twin Falls County* that compliance with the Equal Protection Clause for the purposes of counting county splits is determined by looking at whether the plan fell within 10% deviation to be dicta. Assuming *Twin Falls County* requires evaluation of whether competing plans fail under the actual equal protection test set by the U.S. Supreme Court, this evaluation is both unworkable and unwise for the reasons discussed in this Section. This Court is not compelled to follow its prior precedent when it concludes that such precedent is "manifestly wrong," "has proven to be unjust or unwise over time," "or that a change in the law is necessary to 'vindicate plain, obvious principles of law [to] remedy continued injustice.'" *AgStar Financial Services, ACA v. Northwest Sand & Gravel, Inc*., 168 Idaho 358, 483 P.3d 415, 427 (2021).

third-party plans are generated compared to Commission-generated maps, meaning that third-party plans should be treated with greater skepticism, and (4) the Commissioners are entitled to deference, whereas third parties are not.

First, in challenges to government-adopted plans with less than 10% deviation, courts have considered the following evidence to determine whether illegitimate considerations predominated: (1) public records documenting the process by which a commission or legislature developed a plan, including the statements of commissioners or legislators during the process and email correspondence, *Harris*, 136 S. Ct. at 1308-09; *RWCA*, 827 F.3d at 346-47; (2) evidence of the true motivations of the plan drafters, *RCWA*, 827 F.3d at 346; *Bonneville County*, 142 Idaho at 470-71, 129 P.3d at 1219-20; *Rodriguez*, 308 F. Supp. 2d at 367-68; *Larios*, 300 F. Supp. 2d at 1342, 1350; (3) evidence of regional patterns of overpopulation versus underpopulation, of odd district shapes, and unusual numbers of precinct splits; *RWCA*, 827 F.3d at 346-47, 50; *City of Greensboro*, 251 F. Supp. 3d at 944; *Rodriquez*, 308 F. Supp. 2d at 371; *Larios*, 300 F. Supp. 2d at 1342 and 1348, 1350; (4) expert testimony of computer simulations of district compositions if only legitimate considerations had been considered, *RWCA*, 827 F.3d at 346-47, 350; *City of Greensboro*, 251 F. Supp. 3d at 943; (5) testimony supporting the conclusion that the stated legitimate rational(es) for redistricting were pretextual, *RWCA*, 827 F.3d at 349-50; *City of Greensboro*, 251 F. Supp. 3d at 946-47; (6) evidence that the development of the redistricting plan resulted from a departure from usual procedures, *City of Greensboro*, 251 F. Supp. 3d at 944; (7) evidence that the alleged rational state policy that caused the deviations "was not applied in a consistent and neutral way," *Larios*, 300 F. Supp. 2d at 1347; *City of Greensboro*, 251 F. Supp. 3d

at 943-44; and (8) evidence that all efforts to minimize population deviations ceased after the 10% deviation was reached. *Larios*, 300 F. Supp. 2d at 1341. The vast majority of this evidence isn't available for when the Commission is evaluating whether a third-party plan could be found to violate the Equal Protection Clause.

Second, the record available to this Court is similarly insufficient to evaluate the motivations underlying third-party plans. A challenge to a redistricting plan is an "appeal" that reviews the record created before the Commission. Idaho Code § 72-1509. But the evidence required to scrutinize motivations must be developed at the trial court level through affidavit, discovery and deposition, to be evaluated either on summary judgment or at trial. *See Harris,* 136 S. Ct. at 1306 (5-day bench trial); *RWCA*, 827 F.3d at 339-40 (bench trial with numerous witnesses and 481 exhibits); *City of Greensboro*, 251 F. Supp. 3d at 937, n.2; *Larios*, 300 F. Supp. 2d at 1322 (bench trial held on the one-person, one vote claims); *Rodriguez*, 308 F. Supp. 2d at 371 (deciding the equal protection claim on summary judgment).

Third, third-party plans must be treated with greater skepticism given the contrast between the Commission's proceedings and third-party development of plans. The process by which the Commission developed its plan is set out by statute and the publicly available Rules of the Commission for Reapportionment. *See* Idaho Code §§ 72-1501 *et seq*; Final Report, App. IV (Rules of the Commission for Reapportionment ("ICR Rules")). In contrast, there is no rule or statute that governs the process by which third-party plans are developed. The Commission is comprised of six individuals appointed by government officials of differing political orientations with consideration to achieving geographic representation. Final Report at 1; Idaho Code § 72-

1502. But any individual or organization can submit a third-party plan. Final Report, App. IV at 4 (IRC Rule 11(a)). Finally, the Commission is required to be transparent about its decision-making process; it held multiple business meetings subject to the open meetings laws and 18 public hearings, and it issued a 102-page Final Report explaining the reasoning that led it to adopt Plan L03. Final Report at 1-2; Idaho Code § 72-1508. In contrast, the individual or party submitting a third party plan need not provide any comment or explanation for the motivations or reasoning behind their proposal. Final Report, App. IV at 4 (ICR Rule 11).

And fourth, the equal protection test was developed in the context of challenges to government-adopted plans, where courts must give some degree of deference to the state's choice of plan and the state actors that adopted the redistricting plan are presumed to have acted in good faith as public officials. *See Rodriquez*, 308 F. Supp. 2d at 362; *Bonneville County*, 142 Idaho at 474, 129 P.2d at 1223 ("in light of the degree of deference we must afford the Commission"). Third-parties are not entitled to any degree of deference or presumption of good faith.

The fundamental differences between challenges to government-adopted plans and the Commission's evaluation of third-party plans demonstrate Ada County's error in attempting to force the Commission to prove that illegitimate considerations predominated with Ada County's maps. The evidence the Commission considered in concluding that the seven county plans could be found to violate the Equal Protection Clause is sufficient for this Court to be assured that the Commission reasonably reached these conclusions. And this reasonable conclusion was sufficient for the Commission to conclude that it was required to split eight counties to comply with the Equal Protection Clause. Petitioners' effort to substitute some other judgment for the

Commission's must fail. They have failed to prove that the Commission erred in splitting eight counties, rather than seven.

ii. Durst's Plan L084 does not prove that the Commission's Plan violated the Idaho Constitution**.**

When properly counted, Plan L03 and Durst's Plan L084 both split eight counties. Because both plans split eight counties, "[t]he commission certainly has the discretion to reject" Plan L084. *Twin Falls County*, 152 Idaho at 351, 271 P.3d at 1207. Plan L084 therefore does not prove that Plan L03 violated the Idaho Constitution.

Durst fatally misreads how the Idaho Constitution and the Idaho Supreme Court count county splits to assert that Plan L084 has fewer splits than the Commission's Plan L03. He argues, "Plan L03 divides eight counties externally" while "Plan L084 divides seven counties externally." Durst Petition, Introduction. Durst's belief that a county split counts only when the county is divided externally is inconsistent with this Court's interpretations of the Idaho Constitution.

The Court most recently interpreted article III, section 5 of the Idaho Constitution in its decision in *Twin Falls County*. There, the Court did not treat internal and external divisions differently when applying article III, section 5.[26] It said that determining whether a redistricting plan complies with article III, section 5 of the Idaho Constitution can be determined by counting the "total number of counties divided under the plan." *Twin Falls County*, 152 Idaho at 349, 271 P.3d at 1205. To illustrate that principle, the Court explained that "[i]f one plan that complies with

[26] Unlike Durst, Ada County acknowledges that *Twin Falls County* "did not address the external division issue." Ada County's Opening Brief at 11.

the Federal Constitution divides eight counties and another that also complies divides nine counties, then the extent that counties must be divided in order to comply with the Federal Constitution is only eight counties." *Id.* When explaining the constitutional significance of a divide or a division, the Court used the words generally. It did not say that only an external divide or an external division was constitutionally significant. In fact, the words "external", "externally", and "internal" do not appear at all in *Twin Falls County*. The proper reading of *Twin Falls County* thus requires the Commission to count any division of a county, internal or external, as a split.

If the Court's language in *Twin Falls County* were not enough, the plan that the Court analyzed confirms that it considered both external and internal divisions to be a split. The petitioners in *Twin Falls County* challenged Plan L87 from October 2011. *Id.* at 347, 271 P.3d at 1203. The Court said that "Plan L87 divides twelve counties." *Id.* at 350, 271 P.3d at 1206. Plan L87 divided eleven counties externally: Bannock, Bingham, Bonner, Bonneville, Canyon, Fremont, Gem, Kootenai, Owyhee, Teton, and Twin Falls. Appendix to Respondents' Brief. If Durst were correct that only external divisions should be counted, the Court would have said Plan L87 divides eleven counties. By concluding that Plan L87 divided 12 counties, the Court counted Ada as a divided county even though it was divided only internally. That fact confirms that when determining how many counties have been divided for purposes of satisfying article III, section 5 of the Idaho Constitution, both external and internal divisions count as county splits.

Properly applying *Twin Falls County*, Plan L084 splits eight counties: Ada, Bannock, Bonner, Bonneville, Canyon, Kootenai, Nez Perce, and Twin Falls. Final Report, App. XII at 126. Plan L03 divides the same eight counties. Final Report, App. XI at 7. The Commission has

discretion to select between plans that split the same number of counties. *Twin Falls County*, 152 Idaho at 351, 271 P.3d at 1207. The Commission thus could not have violated article III, section 5 of the Idaho Constitution by selecting Plan L03 over Plan L084, even if Plan L084 complied with the Equal Protection Clause.

But Plan L084 does not comply with the Equal Protection Clause. Durst makes no effort to show that Plan L084 meets the requirements of the Equal Protection Clause beyond arguing that Plan L084 has a deviation of 9.48%, less than 10%. Durst Petition at ¶ 15; Durst Brief at 4, 9-10. This cannot cast a shadow on Plan L03's constitutionality, as a map with less than 10% deviation is not automatically compliant with the Equal Protection Clause. *Larios*, 300 F. Supp. 2d at 1340, *aff'd*, *Cox v. Larios*, 542 U.S. 947. When Plan L084 is evaluated for the hallmarks of compliance with the Equal Protection Clause, it fails.

First, just like Plans L075, L076, and L079, Plan L084 appears to have been drawn simply to get under the 10% deviation threshold. Thus, as discussed above, Plan L084 cannot represent the nonarbitrary application of legitimate state considerations and does not comply with the Equal Protection Clause.

Second, just like the seven county maps, Plan L084 impermissibly demonstrates regional favoritism, this time favoring the remainder of the state at the expense of urban Ada County. Plan L084 significantly and impermissibly overpopulates districts in Ada County compared to the rest of the districts. Final Report, App. XII at 126. In Plan L084, Ada County is comprised of Districts 14, 15, 16, 17, 18, 19, 20, 21, and 22. *Id.* Each of these districts has a deviation above the ideal district size between 4.12% and 4.94%. *Id.;* Plan L084 Population Summary. No other district is

as overpopulated as those in Ada County. *Id.* The majority of the remaining districts in Plan L084 (18 to be specific) are underpopulated, up to -4.94%. *Id.* The average deviation in Plan L084 is -1.68% if one excludes the districts in Ada County. *Id.* Turning deviations into actual people, Plan L084 overpopulates Ada County districts by a total of 22,053 people. *Id.* In contrast, Madison County, the only other county that is wholly contained in one or more districts in Plan L084, is comprised of one district with a deviation of 0.7%. *Id.* The Madison County district is overpopulated by just 367 people. *Id.*

Third, an equal protection violation exists when the legitimate state policy that could justify deviation from purely equal districts is applied in an arbitrary or discriminatory manner. *See Larios*, 300 F. Supp. 2d at 1348 (rejecting deviations that were supported by a legitimate state policy because that policy was applied in a discriminatory and arbitrary manner). It appears that Durst deviated from equal protection in order to minimize the number of counties divided externally.[27] Final Report, App. XII at 51. As discussed below, this is not a legitimate state consideration in Idaho.

But even if one assumes that minimizing the number of counties divided externally is a legitimate state interest, Plan L084 still cannot survive review under the Equal Protection Clause. This is because Plan L084 reflects that this policy was applied in an arbitrary or discriminatory manner. Plan L084 keeps Ada County whole while dividing other counties externally. Plan L084

[27] As discussed above, the nature of the evidence that can be evaluated on this appeal means that Durst's motivations must necessarily remain opaque; that element to determine whether Plan L084 violates equal protection cannot be considered.

breaks Ada County into wholly internal districts at Bonneville County's expense, which Plan L084 splits into two wholly internal and two partially external districts. *See* Final Report, App. XII at 126. In contrast, Plan L03 splits Bonneville County into two wholly internal and one partially external district. *See* Final Report, App. XI at 7. In other words, Plan L084 avoids dividing Ada County externally at the expense of dividing Bonneville County externally one more time than is necessary. These arbitrary decisions of which counties to split externally do not reflect the good faith application of a legitimate state policy, even if a legitimate consideration were at play.

Because the Commission could have reasonably concluded that Plan L084 could be found to violate the Equal Protection Clause, Plan L084 cannot establish that Plan L03 failed to comply with the Idaho Constitution.

iii. <u>The number of times a portion of a county is combined with another county to create a district is irrelevant to the analysis under the Idaho Constitution.</u>

Durst and Ada County go even farther astray in arguing that the Idaho Constitution's language "a county may be divided" additionally requires counting the total number of times a county is divided into districts that contain part of another county. Idaho Const. art. III, § 5. The 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. Petitioners' interpretation has no support in precedent.

In *Twin Falls County*, this Court held that determining whether a districting plan complies with article III, section 5 of the Idaho Constitution "can be determined *only* by counting the *total number of counties* divided under the plan." 152 Idaho at 349, 271 P.3d at 1205 (emphasis added).

Consistent with that language, the Court described Plan L87 from 2011, the plan at issue in *Twin Falls County*, as dividing 12 counties, even though there were a total of 20 external divisions. The Commission followed *Twin Falls County*'s directive, selecting a plan that divided 8 total counties only after determining that the plans that divided 7 total counties violated the Equal Protection Clause. Petitioners now ask the Court to change this rule, requiring the Commission to look at the total number of external divisions instead of only looking at the total number of county splits. Petitioners' argument is inconsistent with the Court's holding in *Twin Falls* and should be rejected.

This Court's prior statements in *Bingham County* do not require a different result. There, the Court noted that if a county must be divided to meet the Equal Protection Clause's requirements that does "not mean that a county may 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, 55 P.3d at 867. The Court continued that a "county may not be divided and parsed out to areas outside the county to achieve ideal district size, if that goal is attainable without extending the district outside the county." *Id*.

What the Court did not say is key. The Court did not say that external divisions must be avoided in favor of internal divisions in all circumstances. Nor did it say that external divisions must be minimized. It instead said that the Commission must select internal divisions over external divisions to achieve a specific purpose: ideal district size. "Ideal district size" is a term of art, meaning the total population of Idaho divided by the required 35 districts. *Bingham County*, 137 Idaho at 871, 55 P.3d at 864. And reaching an ideal district size is not synonymous with satisfying the Equal Protection Clause, as other factors also inform the Equal Protection Clause analysis.

Consequently, all *Bingham County* held was that, if a county can be divided internally to create districts with an ideal district size, it should be divided internally instead of externally. It did not say that the Commission must count the total number of external divisions and select the plan with the fewest, on top of selecting the plan with the fewest number of county splits that complies with the Equal Protection Clause. Such a test would render the Commission's work a mere computer exercise, nullifying both the Commission's judgment and all public input.

It is impossible to divide Ada County only internally to create districts with the ideal district size, so *Bingham County* does not apply here. Based on the 2020 census, the total population of Idaho was 1,839,106, which means the ideal district size is 52,546. Final Report at 10. Ada County's population is 494,967. Final Report at 20. If Ada County were divided only internally, it would have to be divided into 9 districts with a population of 54,996 each. *Id.* That is 2,450 or 4.7% greater than the ideal district size. *Id.* Ada County's population can be divided into 9.42 districts of the ideal district size. Thus, Ada County cannot be divided only internally and meet the ideal district size. *Bingham County*'s statement that "a county may not be divided and parsed out to areas outside the county to achieve ideal district size, if that goal is attainable without extending the district outside the county" does not apply. 137 Idaho 870, 874, 55 P.3d 863, 867.

Further, requiring the Commission to prioritize dividing Ada County internally would create Equal Protection Clause concerns and require inconsistent treatment for other populous counties. If the Commission divided Ada County only internally, then, on average, the districts in Ada County would be significantly overpopulated by about 4.6%. By externally dividing Ada County, the Commission gave individuals living Ada County greater voting power, not less. And

setting aside the overpopulation of Ada County, the Commission would need to underpopulate other districts in other counties to counterbalance the overpopulation in Ada County. As demonstrated by Plan L084, to achieve the necessary underpopulation, other counties would need additional external divisions. *See* Final Report, App. XII at 126. In Plan L084, it is Bonneville County that sustains the additional external division to keep Ada County whole. *Id.* The Commission would need to inconsistently apply the preference for internal divisions throughout the state, effectively imposing a preference for external divisions in other counties to counterbalance the preference for internal divisions for Ada County. That inconsistency is arbitrary and improper. *Bonneville County*, 142 Idaho at 472, 129 P.3d at 1221. Because any sort of test favoring external divisions can only be applied arbitrarily, it would necessarily violate the Equal Protection Clause. It cannot be said to be a legitimate state interest. Therefore, the Idaho Constitution cannot be read to contain the preference for external county divisions argued by Durst and Ada County.

Even if *Bingham County* supported Petitioners' claims, the law has changed since it was decided, weakening any preference for internal divisions. The Idaho Constitution provides that "a county may be divided in creating districts only to the extent it is reasonably determined *by statute* that counties must be divided[.]" Idaho Const. art. III, § 5 (emphasis added). This Court has held that "I.C. § 72–1506 qualifies as the statute referenced in Idaho Const. art. III, § 5." *Bonneville County,* 142 Idaho at 473, 129 P.3d at 1222. Idaho Code § 72-1506(5) addresses the division of counties.

When *Bingham County* and *Bonneville County* were decided, that statute said "[c]ounties should be divided into districts not wholly contained within that county only to the extent reasonably necessary to meet the requirements of the equal population principle." 1996 Idaho Sess. Laws 563-64. That statutory language gave preference to internal divisions, and it directly impacted the constitutional analysis because Article III, Section 5 defers to the statutory determination to reasonably divide counties. In 2009—after *Bingham County* and *Bonneville County* were decided but before *Twin Falls County* was decided—the Legislature amended Idaho Code § 72–1506(5), removing any preference for internal county division. "It is a well established rule . . . that 'where an amendment is made it carries with it the presumption that the legislature intended the statute thus amended to have a meaning different than theretofore accorded it'. . . . [In] enacting amendments to existing statutes, the legislature must have intended to clarify, strengthen, or make some change in existing statutes." *Pearl v. Board of Professional Discipline of Idaho State Bd. of Medicine*, 137 Idaho 107, 113-14, 44 P.3d 1162, 1168-69 (2002). After that amendment, the statute now says: "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." That language requires the Commission to avoid divisions generally, without a preference for external or internal divisions.

In its only redistricting decision after the statute was amended, this Court in *Twin Falls County* said nothing about treating external and internal divisions differently. That approach is consistent with the change to Idaho Code § 72-1506(5). To the extent language in *Bingham County*

and *Bonneville County* conflict with *Twin Fall County*'s agnostic approach to internal and external divisions, they have been abrogated by the change to Idaho Code § 72-1506(5).

Based on the Court's prior interpretations, article III, section 5 of the Idaho Constitution does not require the Commission to consider the total number of external divisions when comparing legislative plans.

C. Plan L03 complies with Idaho Code.

Ada County's remaining arguments amount to little more than localized quibbles. Contrary to Ada County's arguments, Plan L03 does not violate Idaho Code § 72-1506. The Commission properly exercised its discretion in including portions of Ada County with Gem County and with the other hyper-local decisions that Ada County challenges.

The Court should first decline Ada County's improper efforts to have this Court scrutinize portions of Plan L03 in a vacuum. Evaluating Idaho Code § 72-1506's requirements necessarily requires consideration of the entire state. This is because the requirements of Idaho Code § 72-1506 are subordinate to the United States and Idaho Constitutions. *Twin Falls County*, 152 Idaho at 349, 271 P.3d at 1205. One cannot just pick out Ada County (or any county), draw district lines for that county, and comply with the U.S. and the Idaho Constitutions.[28] Accordingly, for all the

[28] One example of this is Districts 10, 14, and 23 in Plan L03, which combine parts of Ada County with other counties or portions of Canyon County. As the Commission properly found, Ada County is surrounded by counties that (with the partial exception of Canyon County) must be combined with other counties to create population sizes that comply with the Equal Protection Clause. Final Report at 20, 47-49, 54-56, 71-72. Thus, in good faith, the Commission combined portions of Ada County's population with populations from other counties to create districts with deviations of 1.96% (District 14), 1.81% (District 10) and 1.67% (District 23). In other words, the Commission drew Ada County's district lines to create districts of as equal population as

reasons discussed above, Ada County's arguments fail in relation to Idaho Code § 72-1506(5), because the choices Plan L03 made were necessary to comply with the more stringent requirements found in both Constitutions.

Even then, Plan L03 also complies with Idaho Code § 72-1506 because, as the Commission found, the districts it drew maintained local communities and traditional communities of interest to the maximum extent possible, as required by Idaho Code § 72-1506(2). Final Report at 54-56. The Commission considered Ada County's objection to the combination of a portion of Ada County with Gem County and, in its considered judgment, concluded Ada County's objections were without merit. Final Report at 55.

The Commission reached this conclusion in part because, contrary to Ada County's arguments about the combination of urban and rural, Gem County is not actually "sparsely populated." Final Report at 55; Ada County Brief at 14. While Ada County casts Emmett, Gem's county seat, as an "agricultural community," it is more urban than Eagle as it has 2,731 population per square mile as opposed to Eagle at 1,049 population per square mile.[29] Ada County Brief at 14; s*ee Bingham County*, 137 Idaho at 871, 55 P.3d at 877 (identifying one factor for determining local community as being whether the residents in the district live in a urban or rural areas).

practicable. Final Report, App. XI at 7. Just looking at Ada County without consideration of the populations of Gem, Owyhee, and Canyon Counties might result in superficially attractive line drawing, but it would cause equal protection problems elsewhere.

[29] *See* Quick Facts, Emmett City, Idaho; Eagle City, Idaho. United States Census Bureau, https://www.census.gov/quickfacts/fact/table/emmettcityidaho,eaglecityidaho,US/PST045219

In any case, Ada County's objections on the urban versus rural front are spurious. As the Commission properly noted, Ada County repeatedly urged the Commission to adopt its own map (Plan L72), which combined portions of Ada and Canyon Counties with Owyhee County, just like L03. *See* Final Report at 55; Final Report, App. XII at 114; Final Report, App. XIII at 70. Ada County's justifications for why it repeatedly urged a certain urban/rural combination cannot override Ada County's concession that it can be appropriate to combine more rural areas with more urban areas, just as the Commission did.

With little to no evidence, Ada County further contends that Emmett is not part of the Treasure Valley. As explained previously, Emmett is considered part of the Treasure Valley, and has extensive ties to the Treasure Valley through its workforce and the Emmett School District. Non-membership in a non-profit organization is insufficient to refute the Commission's finding that Emmett is part of the Treasure Valley. *See* Final Report at 54. As to the existence of a highway connection between Eagle and Emmett, the Commission properly found that a highway connection exists in the form of State Highway 16, making the less than 20 mile drive a short half-hour drive. Final Report at 57.

It is unclear whether Ada County challenges the Commission's line drawing with regard to Garden City. *See* Ada County's Brief at 14. Ada County's argument, at most, is merely that it believes its division of Garden City in Plan L072 is better than what the Commission did with Garden City in Plan L03 (Ada County doesn't say). *Id.* The Commission drew its lines relative to Garden City in an appropriate effort to preserve urban cores and in considered response to public input. Final Report at 55. This is sufficient for the Court to uphold the Commission's exercise of

its discretion, particularly in light of the deference that must be given to the Commission's judgments.

Ada County would also blow-up Plan L03 based upon an alleged "appearance." Specifically, Ada County contends "it appears that the neighbors in the same cul-de-sac above the Highland Golf Course" are separated into legislative districts depending upon the side of the street the person lives on.[30] Ada County Brief at 15. Ada County apparently takes issue with a line separating Districts 28 and 29 that impacts the other side of the state. While this argument is too vague to be seriously entertained, the Commission drew the lines between District 28 and District 29 to keep Pocatello together in one district to the extent possible, in accordance with public testimony. Final Report at 84-85. But Pocatello had to be divided somewhere because it is more populous than the ideal district size; in so doing, the Commission "preserv[ed] traditional neighborhoods and local communities of interest to the maximum extent possible." Final Report at 85. Deference must be given to the Commission's decision-making. Ada County's mere contention, particularly without supporting argument, as to an "appearance" in a completely separate area of the State is insufficient to void Plan L03.

[30] Ada County's concern with a cul-de-sac is a concern with information the Commission could not consider. As required by statute, the only population data the Commission considered was census data. Final Report at 28; Idaho Code § 72-1506(1). Census blocks are the smallest geographic area for which the Bureau of the Census assigns data. https://www.ncsl.org/research/redistricting/the-redistricting-lexicon-glossary.aspx ("Census block"— " . . . The Census Bureau provides redistricting data down to the block level, which is the lowest level of census geography.") That particular census block splits the cul-de-sac in question. Even if it were possible to do so in light of the superseding constitutional requirements, the Commission cannot preserve cul-de-sacs statewide because it does not have that information available to it.

Ultimately, Ada County would have this Court "micromanage all the difficult steps the Commission must take in performing the high-wire act that is legislative district drawing." *Bonneville County*, 142 Idaho at 472, 129 P.3d at 1221. Those difficult steps the Commission takes are fact intensive and dependent. Given the deference that must be afforded the Commission, it cannot be said to have violated Idaho Code in creating the district lines that Ada County challenges.

D. If the Court were to reject Plan L03, the appropriate remedy is to remand this matter back to the Commission, not to adopt Plan L084.

Durst makes his desire to substitute his judgment for that of the Commission's explicit with his request that the Court "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 Brief at 17. The Court should reject this request because it is an improper remedy.

Durst petitions under Idaho Code § 72-1509, which permits a registered voter to "appeal" a "plan adopted by the commission." Properly read, Idaho Code § 72-1509 asks the Court to perform a specific task: reconsider the decision to adopt Plan L03. If the Commission erred then it "*shall* be reconvened." Idaho Code § 72-1501(2) (emphasis added). The reconvened Commission can then consider the Court's order that Plan L03 is to be "revised," not to be replaced. *Id.*

In *Twin Falls County*, this Court recognized the proper procedure is to reconvene the Commission to consider revisions to the adopted plan. Similar to Durst, the petitioners there asked the Court to issue an order establishing the legislative districts. *Twin Falls*, 152 Idaho at 351, 271 P.3d at 1207. The Court declined that request, noting that there was "no reason to believe that the

commission will not perform its duty to adopt a plan that complies with mandatory constitutional and statutory provisions." *Id.* So instead the Court "order[ed] that Plan L87 be revised" "pursuant to Idaho Code section 72-1501(2)." *See Smith v. Idaho Com'n on Redistricting*, 136 Idaho 542, 545, 38 P.3d 121, 124 (2001) (holding that the "plain meaning of the word "reconvene" is that the same commission that adopted [unconstitutional plan] L66 should be responsible for adopting an alternative plan prior to the next general election.") Similarly here, there is no reason to think this Commission would not perform its duty and the remedy should thus be the same.

Exigent circumstances do not justify Durst's improper request. Durst Brief at 17. Idaho Code § 72-1501(2) contemplates that the Commission must be reconvened to make revisions as long as the Court's order is issued "prior to the next general election." Given the expedited schedule of this case, there is no reason to think the Court will not issue an order before the May primary. In *Twin Falls County*, for example, there was a similar litigation schedule, as the Commission adopted a plan in mid-October and the petitioners filed suit on November 16. 152 Idaho at 347, 271 P.3d at 1203. This Court issued an opinion by January 18 and ordered the Commission to reconvene to consider revisions. Durst's claims are no more expedient, and thus undeserving of extraordinary relief.

If the Court concludes that the Commission erred in adopting Plan L03, it should only order the Commission to reconsider the legislative plan and in no event should it order transmittal of Plan L084.

E. Durst is not entitled to attorney's fees.

Durst claims an award of "attorney's fees, expenses and costs under Idaho Code § 12-117, § 12-121, or as otherwise provided by law and particularly under the common fund doctrine." Durst Petition at 7. However, Durst is not entitled to attorney fees under any of the statutes or doctrines he has asserted.

i. The common fund doctrine is inapplicable.

The common fund doctrine is not applicable in a redistricting dispute against the Idaho Secretary of State and the Idaho Commission for Reapportionment. It has been recognized as a basis for attorney fees in a dispute between an automobile insurer and insured in the recovery of a subrogated interest or monetary interests. *See Wensman v. Farmers Ins. Co. of Idaho*, 134 Idaho 148, 997 P.2d 609 (2000); *Boll v. State Farm Mut. Auto. Ins. Co.*, 140 Idaho 334, 92 P.3d 1081 (2004). The common fund doctrine has also applied in fiduciary law, specifically in the context of trusts, and again, concerning monetary interests. *Kenneth F. White, Chtd. v. St. Alphonsus Regional Medical Center*, 136 Idaho 238, 242, 31 P.3d 926, 930 (Ct. App. 2001). But this case does not concern disputed insurance recoveries, trust disputes or anything involving monetary interests. Accordingly, no basis exists for Durst to recover attorney fees under the common fund doctrine.

ii. Durst is not entitled to attorney fees under Idaho Code § 12-117 against Idaho Secretary of State Denney.

Idaho Code § 12-117 allows for an award of reasonable attorney's fees to a prevailing party if the non-prevailing party acted without a reasonable basis in fact or law and the proceedings involved a state agency or a political subdivision and a person. Petitioner cannot recover attorney

fees against the Secretary of State, because he is not a "state agency" or a "political subdivision" for purposes of Idaho Code § 12-117. *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 524, 387 P.3d 761, 777 (2015).

iii. Durst is not entitled to attorney fees under Idaho Code § 12-117 or Idaho Code § 12-121 against the Commission or under Idaho Code § 12-121 against Idaho Secretary of State Denney.

"The standard for awarding attorney fees under Idaho Code section 12-121 is essentially the same as that under Idaho Code section 12-117." *Coeur D'Alene Tribe*, 161 Idaho at 525, 387 P.3d at 778. Under Idaho Code § 12-117, the focus is on the "'reasonableness of the losing party's actions". *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). Where a legitimate question is presented, attorney fees are inappropriate. *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2011). Idaho Code § 12-121 may allow for an award in a mandamus proceeding "when this court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation." *Coeur D'Alene Tribe*, 161 Idaho at 524-26, 387 P.3d at 777-79. "Fees will generally not be awarded for arguments that are based on a good faith legal argument." *Regan v. Denney*, 165 Idaho 15, 27, 437 P.3d 15, 27 (2019).

As discussed above, the Commission acted in good faith and under a reasonable interpretation of the law. Even if the Court ultimately disagrees with the Commission, there is nothing unreasonable or without foundation in the Commission's adoption of Plan L03. Attorney fees should be denied to Petitioner just as in *Bingham County*, 137 Idaho at 878, 55 P.3d at 871 ("No attorney fees allowed.")

iv. Durst is not entitled to attorney fees under the private attorney general doctrine.

Durst did not request attorney's fees under the private attorney general doctrine in his Petition, though he did raise the doctrine in his brief. In any case, he is not entitled to them both because he cannot prevail on the merits, *Joki v. State*, 162 Idaho 5, 394 P.3d 48, 54 (2017), and also because there is no evidence that private enforcement was necessary or was pursued at significant burden to plaintiff. *Smith*, 136 Idaho 542, 38 P.3d 121 (analyzing three elements for whether they justified an award of fees: (1) the litigation must have vindicated an important or strong public policy; (2) private enforcement was necessary in order to vindicate the policy and was pursued at significant burden to the plaintiff; and (3) a significant number of people stand to benefit from the decision).

Most notably, Durst has presented no argument that private enforcement was necessary. Durst Brief at 8-19. Ada County, a political subdivision, filed a substantially similar challenge, demonstrating that private enforcement was not necessary. And Durst has presented no argument that he has pursued this challenge at significant burden to himself. Durst Brief at 8-19. Durst's conduct in jumping the gun to file his Petition[31] demonstrates that there was no significant burden

[31] Arguably, this Court does not have subject matter jurisdiction over this Petition because Durst filed it prematurely. Durst filed his petition on November 10, 2021, two days before the Final Report was transmitted to the Idaho Secretary of State. Idaho Appellate Rule 5(b) clearly provides:

> In accord with article III, section 2(5) of the Idaho Constitution, any registered voter, any incorporated city or any county in this state, may file an original action challenging a congressional or legislative redistricting plan adopted by the Commission on Reapportionment. Such challenges **shall be filed within 35 days of the filing of the final report with the office of the Secretary of State by the Commission**.

to him to pursue this challenge. He announced his attentions as early as November 5 and then announced on November 10, 2021 that he had in fact filed his lawsuit (prematurely).[32] By his own actions, this suit has been anything but a burden to Durst; rather, he actively sought this fight. Durst should not be awarded attorney fees in this matter, just as in *Bingham County*, 137 Idaho at 878, 55 P.3d at 871 ("No attorney fees allowed.")

V. CONCLUSION

For the foregoing reasons, Respondents request that the Court declare the final legislative redistricting plan adopted by the Commission constitutional. Respondents further request that the Court refuse to issue the requested writs of prohibition, that the Court refuse to remand this matter back to the Commission, and that the Court decline to award attorney fees to Petitioner Durst.

DATED this 17th day of December, 2021.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Megan A. Larrondo*
MEGAN A. LARRONDO
Deputy Attorney General

Id. (emphasis added). A redistricting plan may not be challenged until it is filed with the Secretary of State's Office. Accordingly, I.A.R. 5(b) creates a clear, transparent jurisdictional window for when Commission plans may be challenged. The starting point, or initiating event, is the filing of the final report with the Secretary of State's Office. It does not begin before that date and it does not continue after the thirty-fifth day from filing with the Secretary of State's office. The filing of Durst's Petition flouts the plain and simple language of I.A.R. 5(b). Further, Durst's premature filing is not excused by I.A.R. 17(e) because this is not a routine appeal.

[32] See https://twitter.com/brandendurst?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor; https://twitter.com/brandendurst?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 17, 2021, I filed the foregoing electronically through the iCourt E-File system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notification of Service.

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I HEREBY FURTHER CERTIFY that on December 17, 2021, I served the following party to be served by electronic means (personal email) and via U.S. Mail, First Class.

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DEPUTY ATTORNEY GENERAL

RESPONDENTS IDAHO COMMISSION FOR REAPPORTIONMENT'S AND LAWERENCE DENNEY'S RESPONSE BRIEF

APPENDIX

Legislative Plan L87