IN THE SUPREME COURT
OF THE STATE OF IDAHO
Docket Nos. 49261, 49267, 49295 & 49353

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

Petitioner,

and

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

Intervenor-Petitioner,

v.

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

Respondents,

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

Petitioner,

v.

Boise, January 2022 Term

Opinion Filed:
March 1, 2022

Melanie Gagnepain, Clerk

SUBSTITUTE OPINION, THE COURT'S PRIOR OPINION DATED JANUARY 27, 2022, IS WITHDRAWN

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 Chairman of the 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.

Original proceeding before the Supreme Court of the State of Idaho.

The petitions are denied.

Bryan D. Smith, Smith Driscoll & Associates, PLLC, Boise, for petitioner, Branden Durst. Bryan D. Smith argued.

Bryan F. Taylor, Canyon County Prosecuting Attorney, Caldwell, for intervenor-petitioner, Canyon County. Alexis Klempel argued.

Jan M. Bennetts, Ada County Prosecuting Attorney, Boise, for petitioner, Ada County. Lorna Jorgensen argued.

Spencer Stucki, petitioner *pro se*.

Deborah A. Ferguson and Craig Durham, Ferguson Durham, PLLC, Boise, for petitioners Chief J. Allan and Devon Boyer. Deborah A. Ferguson argued.

Lawrence G. Wasden, Idaho Attorney General, Boise, for respondents, Idaho Commission for

Reapportionment and Lawerence Denney. Megan A. Larrondo argued.

STEGNER, Justice.

This case arises out of multiple petitions challenging the constitutionality of Plan L03, the legislative redistricting plan adopted by the Idaho Commission for Reapportionment ("the Commission") following the 2020 federal census.

Under Article III, Section 2 of the Idaho Constitution, the six-member bipartisan Commission is tasked with creating 35 new legislative districts after each decennial federal census. These districts, collectively referred to as a "plan," must conform to the requirements set forth by the Federal Constitution, the Idaho Constitution, and statute. Petitioners generally argue that Plan L03 splits more counties than is required to comport with federal constitutional requirements, rendering Plan L03 unconstitutional under the Idaho Constitution. The petitions were filed before this Court, which has original jurisdiction over them pursuant to Article III, Section 2 of the Idaho Constitution. Petitioners request that this Court issue a writ of prohibition to restrain the Secretary of State from transmitting a copy of the Commission's Final Report and Plan L03 to the President Pro Tempore of the Idaho Senate and the Speaker of the Idaho House of Representatives. For the reasons discussed below, we decline to issue such a writ.

I. Factual and Procedural Background

Every ten years, the federal government conducts a national census. When the results of that census are available, Article III, Section 2 of the Idaho Constitution requires a six-member bipartisan commission be formed to draw new electoral district boundaries. Idaho Const. art. III, § 2. Idaho received the results of the 2020 federal census on August 12, 2021. That same day, the Secretary of State entered an order establishing the Idaho Commission for Reapportionment. The six members of the Commission convened on September 1, 2021.

On November 5, 2021, after weeks of traveling around the state and holding public hearings seeking feedback from residents, the Commission unanimously voted to adopt Plan L03. On November 10, 2021, the Commission "reaffirmed its adoption" of Plan L03, adopted its "Final Report," and adjourned. The Commission filed its Final Report with the Secretary of State's office on November 12, 2021.

On November 10, 2021, Branden Durst filed a verified petition against the Commission and the Secretary of State (collectively "the Respondents"), urging this Court to review Plan L03, conclude it violated Idaho's Constitution because it divided more counties than necessary to comply with the Equal Protection Clause, and adopt his proposed plan (L084). A week later, on November 17, 2021, Ada County filed a similar petition alleging Plan L03 violated Idaho's Constitution. On November 19, 2021, Respondents moved to

consolidate the two cases. This Court granted Respondents' motion.

Spencer Stucki filed a *pro se* petition challenging L03 on December 1, 2021, alleging different areas of the state were treated unequally and that the Commission should have adopted a plan which split nine counties instead of eight.

Next, Chief J. Allan and Devon Boyer, leaders of the Coeur d'Alene and Shoshone-Bannock tribes respectively, filed a verified petition challenging Plan L03 on December 16, 2021, on the grounds it unconstitutionally divided more counties than necessary and failed to preserve, to the maximum extent possible, communities of interest as required by Idaho Code section 72-1506. Petitioners Allan and Boyer moved to consolidate their case with Durst and Ada County's. This Court granted the motion to consolidate, and additionally *sua sponte* consolidated Stucki's case, as all four petitions challenge Plan L03. This Court designated *Durst v. Idaho Commission for Reapportionment* as the lead case.

Finally, Canyon County filed a verified petition to intervene in *Durst's* case. This Court granted Canyon County's petition to intervene. No other petitions challenging the legislative redistricting plan were filed. The time for filing a petition challenging the Commission's legislative redistricting plan has now expired. The consolidated cases proceeded to argument before this Court.

II. STANDARDS OF REVIEW

"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." I.A.R. 5(b). This Court has "original jurisdiction over actions involving challenges to legislative apportionment." IDAHO CONST. art. III, § 2.

> There is a hierarchy of applicable law governing the development of a plan for apportioning the legislature: The United States Constitution is the paramount authority; the requirements of the Idaho Constitution rank second; and, if the requirements of both the State and Federal Constitutions are satisfied, statutory provisions are to be considered.

Twin Falls Cnty. v. Idaho Comm'n on Redistricting, 152 Idaho 346, 348, 271 P.3d 1202, 1204 (2012).

The burden to prove a plan is unconstitutional lies with the challenger to the plan. *See Bonneville Cnty. v. Ysursa*, 142 Idaho 464, 468, 129 P.3d 1213, 1217 (2005) (stating that "the challenger holds the burden to prove that [] the deviation resulted from an unconstitutional or irrational state purpose or that the strength of voters' votes has been diluted").

III. Analysis

A. We first address whether Durst's petition is timely.

Respondents argue that Durst's petition was untimely because it was filed prematurely. Durst filed his verified petition at 5:01 p.m. on November 10, 2021. Although the Commission voted to adopt Plan L03 on November 10, 2021, the Commission's Final Report was not officially filed with the Secretary of State until November 12, 2021.

On November 18, 2021, recognizing his petition may have been " 'premature' because it was filed before the Final Report was filed with the Secretary of State," Durst filed a "motion for clarification" requesting that this "Court enter an order clarifying the status of his Petition for Review so that Petitioner will know whether the current pleading is timely or whether Petitioner will need to refile his Petition for Review." This Court denied Durst's motion on November 22, 2021, concluding that "the motion for clarification [was] an effort to obtain an advisory ruling from the Court. This Court decline[d] the invitation to provide an advisory opinion."

In their response brief, Respondents assert that Durst's petition was untimely because it was filed "two days *before* the Commission's Final Report was transmitted to the Idaho Secretary of State's Office." (Italics added.) In reply, Durst argues that his petition is timely because Idaho Appellate Rule 5(b) requires a petition be filed *within* thirty-five days of the filing of

the Final Report but does not require that the petition be filed within the thirty-five days *after* the filing of the Final Report. Durst further contends that, even if his petition was filed early, pursuant to Idaho Appellate Rules 17 and 21 the Court should treat the petition "like a prematurely filed notice of appeal" which "became valid when the Final Report was filed with the Secretary of State."

Idaho Appellate Rule 21 states that

> the failure to physically file . . . a challenge to a final redistricting plan with the clerk of the Supreme Court . . . within the time limits prescribed by [the Idaho Appellate Rules], shall be jurisdictional and shall cause automatic dismissal of such appeal or petition, upon the motion of any party, or upon the initiative of the Supreme Court.

I.A.R. 21. Idaho Appellate Rule 5(b) governs the time limit for filing a challenge to a redistricting plan: "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." I.A.R. 5(b) (italics added).

While Durst's reading of the Rule may appear meritorious on its face, he neglects to consider Idaho Appellate Rule 22, which governs the computation of time. Rule 22 provides in relevant part:

> In computing the time period prescribed or allowed for the filing or service of any document in these rules, the day of the act or event *after* which the designated period of time *begins* to

> run is not to be included, but the last day of the period so computed is to be included. . . .

I.A.R. 22 (italics added). In a redistricting challenge, the time period "begins to run" after the Commission's filing of its final report with the Secretary of State. I.A.R. 5(b). Rule 22 clearly does not contemplate a retrospective time period calculation.

Nevertheless, the fact that Durst filed his petition early is not fatal to his case. We have historically held that a notice of appeal filed prior to the entry of a written appealable judgment becomes valid once the written appealable judgment is entered. *See*, *e.g.*, *Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 621, 226 P.3d 1263, 1268 (2021). Based on the circumstances here—showing that the Final Report was completed the day Durst filed his petition, but not yet officially filed with the Secretary of State's office until two days later—we see no reason to refrain from applying this principle here. I.A.R. 48 ("In cases where no provision is made by statute or by these rules, proceedings in the Supreme Court shall be in accordance with the practice usually followed in such or similar cases[.]"). Therefore, we hold Durst's petition became valid on November 12, 2021, after the Commission filed its Final Report with the Secretary of State's office. Accordingly, Durst's petition is timely, and we will consider its merits.

B. Petitioners have failed to establish that the Commission "unreasonably determined" that Plan L03 comported with the federal and state constitutions.

1. The Federal Constitution

Before we address Petitioners' arguments that the Plan violates Idaho's Constitution, we must initially determine whether the Plan complies with the Equal Protection Clause of the Federal Constitution. Our reasons for doing so are twofold. First, the hierarchy of applicable law governing redistricting provides that the Equal Protection Clause of the Federal Constitution is the paramount authority. *Twin Falls Cnty.*, 152 Idaho at 348, 271 P.3d at 1204. Second, Idaho's Constitution prohibits the division of counties, except to meet the constitutional standards of equal protection. *Id.* at 349, 271 P.3d at 1205.

The United States Supreme Court has held that the Equal Protection Clause of the Federal Constitution requires the seats in both houses of a bicameral state legislature be apportioned on a population basis. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). "[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.* at 578. While the Court recognized that a state may legitimately desire to maintain the integrity of various political subdivisions, "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to

that of any other citizen in the State." *Id.* at 578-79. The Court later held that an apportionment plan with a maximum population deviation[1] under 10% was insufficient to make out a *prima facie* case of invidious discrimination under the Equal Protection Clause so as to require justification by the state. *Brown v. Thompson*, 462 U.S. 835, 842 (1983). A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the state. *Id.* at 842-43.

Based on the data gathered during the 2020 federal census, the population of the state of Idaho is 1,839,106. Idaho has thirty-five legislative districts. If Idaho's population was equally divided among the thirty-five districts, the "ideal district size" would be 52,546 people.[2] The Commission found that Plan L03 had a maximum population deviation of 5.84%, which is presumptively constitutional from an equal protection standpoint and is, in fact, the lowest deviation for

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[1] "Maximum population deviation expresses the difference between the least populous district and most populous district in terms of the percentage those districts deviate from the ideal district size." *Bonneville Cnty.*, 142 Idaho at 467 n.1, 129 P.3d at 1216 n.1. "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-(-4), or eight percent." *Id.*

[2] 1,839,106 divided by 35 is 52,545.89 people per district, rounded to two decimal places. *See Bonneville Cnty.*, 142 Idaho at 467 n.1, 129 P.3d at 1216 n.1 ("The ideal district size is calculated by dividing the total population by the number of districts."). Because it is impossible to include 0.89 people in a district, the Commission rounded up to the nearest whole number.

a plan ever adopted by a commission[3] in discharging its constitutional obligation. None of the petitioners contend that Plan L03 violates the Equal Protection Clause of the Federal Constitution.[4]

2. The Idaho Constitution

We next turn to the determination of whether L03 violates Article III, section 5 of Idaho's Constitution. Article III, section 5 of Idaho's Constitution guides our review of Petitioners' claims:

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[3] The 2001 Commission originally adopted Plan L66, which had a maximum population deviation of 10.69%; Plan L66 was struck down by this Court in *Smith v. Idaho Commission for Reapportionment*. 136 Idaho 542, 544, 38 P.3d 121, 123 (2001). The 2001 Commission then adopted Plan L91, which had a maximum population deviation of 11.79%; Plan L91 was also struck down by this Court. *Bingham Cnty.*, 137 Idaho at 872, 55 P.3d at 865. The 2001 Commission then adopted, and this Court upheld, Plan L97, which had a maximum population deviation of 9.71%. *Bonneville Cnty.*, 142 Idaho at 468, 129 P.3d at 1217. Following the next census, the 2011 Commission adopted Plan L87, which had a maximum population deviation of 9.92%. Plan L87 was struck down by this Court in *Twin Falls County*. 152 Idaho 346, 271 P.3d 1202. The 2011 Commission subsequently adopted Plan L93, which had a maximum population deviation of 9.70% and remained in place until the current Commission adopted Plan L03.

[4] Petitioner Stucki seemingly contends that, had the statutory criteria in Idaho Code section 72-1506 been applied in such a way as to effectuate nine county splits, equal protection could have been better promoted. However, he concedes that Plan L03 complies with the Federal Constitution: "By holding tightly to the requirement to make districts as nearly equal in size with low deviations they [the Commissioners] were meeting the provisions of the United States and Idaho constitutions."

> A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and *a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided to create senatorial and representative districts which comply with the constitution of the United States.* A county may be divided into more than one legislative district when districts are wholly contained within a single county.

IDAHO CONST. art. III, § 5 (italics added). As written, the phrase "reasonably determined by statute" suggests we should review the reasonableness of a "statute" to determine whether Plan L03 is constitutional. The phrase, however, is ambiguous because it is unclear to which statute it refers. From the outset, we are skeptical of any effort to seemingly allow a "statute" to control our interpretation of the Constitution in any respect, given that a statute constitutes "[a] lower ranking source of law in this hierarchy [and] is ineffective to the extent that it conflicts with a superior source of law." *Twin Falls Cnty.*, 152 Idaho at 348, 271 P.3d at 1204.

Further confusion exists because the phrase "by statute" has been previously interpreted by this Court in the following manner:

> [W]e believe I.C. § 72-1506 qualifies as the statute referenced in Idaho Const. art. III, § 5. That statute recognizes the Legislature's authority to authorize splitting of counties

> under art. III, § 5 and simultaneously facilitates the people's intent of removing the Legislature from the details of the district-drawing process as evidenced in art. III, § 2.

Bonneville Cnty., 142 Idaho at 473, 129 P.3d at 1222. As we are given the task of interpreting the phrase "reasonably determined by statute," we disavow this Court's prior interpretation of it in *Bonneville County* as an inaccurate statement of law.

In order to explain our disavowal, we need to delve into the history of article III, section 5. The Legislature, not the Commission, was responsible for redistricting in 1986. During the legislative session that year, the Legislature proposed amendments to article III, sections 2, 4, and 5 of the Constitution to permit the Legislature to vary the number of districts from 30 to 35, to prohibit floterial districts, and to essentially eliminate the anachronistic constitutional provision prohibiting the division of counties. H.R.J. Res. No. 4, 1986 Idaho Sess. Laws 869–70. The three proposed amendments were approved by Idaho's voters in the general election of 1986. The amendment of article III, section 5 allowed counties to be divided, but only to the extent that a duly adopted reapportionment *statute* reasonably determined county divisions to be necessary in order to comply with the Equal Protection Clause of the Federal Constitution.

At the time the amendment to article III, section 5 was approved by the voters in 1986, redistricting had been accomplished like any other legislation: by a

legislatively passed and gubernatorially signed *statute*, which was codified in Idaho Code section 67-202. (Section 67-202, as it existed in 1986, was subsequently repealed in 2009 and is no longer in use today. Act effective July 1, 2009, ch. 52, § 1, 2009 Idaho Sess. Laws 135–36.) In other words, the legislature would create a redistricting plan, the entirety of which would be incorporated into a bill to amend Idaho Code section 67-202. If both houses passed the legislation and it was signed by the Governor, it would become law and define the boundaries of each legislative district until the next decennial census, unless it was established in court by an objecting party that the resulting districts were "unreasonably determined" by the Legislature.

Following the 1986 amendment to article III, section 5, the process by which the Legislature created legislative districts continued to utilize Idaho Code section 67-202. In 1992, the Legislature created a new redistricting plan and drafted a bill to amend the then-existing version of Idaho Code section 67-202. Both houses of the Legislature passed the bill, which was then signed by the Governor. Act of Mar. 2, 1992, ch. 13, § 2, 1992 Idaho Sess. Laws 32–38. Notably, the Legislature's 1992 redistricting plan split seventeen counties, notwithstanding the fact that the Legislature had to be aware of the recently amended article III, section 5 of the Idaho Constitution which stated "a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided. . . "

Given this history, it is clear that at the time of the 1986 amendment of article III, section 5, that the words "by statute" did not refer to Idaho Code section 72-1506 as we incorrectly concluded in *Bonneville County*, but instead referred to the then-existing Idaho Code section 67-202. As previously explained, that latter statute authorized the *Legislature* to reapportion the state's legislative districts. Accordingly, based on this analysis, we disavow the statement in *Bonneville County* which states the words "by statute" in article III, section 5 refer to Idaho Code section 72-1506. They do not.

Instead, the phrase "reasonably determined by statute" must now be interpreted in light of subsequent amendments to Idaho's Constitution which transferred the responsibility to redistrict Idaho from the Legislature to a citizen's commission. In 1993, the Legislature proposed amendments to article III, section 2 of Idaho's Constitution. S.J. Res. No. 105, 1993 Idaho Sess. Laws 1530–31. The amendments, which were ratified in 1994, provided that a bipartisan citizens' commission, rather than the Legislature, would be responsible for the legislative redistricting process. Subsequent legislation in 1996 created the eight statutes governing the commission that are still largely in effect today. Act of Mar. 12, 1996, ch. 175, § 1, 1996 Idaho Sess. Laws 561–64; *see also* I.C. §§ 72-1501–08. The Statement of Purpose accompanying the 1996 legislation indicates that "[t]he purpose of this legislation [wa]s to implement the provisions of Section 2, Article III, of the State Constitution." No mention was made of implementing any

of the provisions in article III, section 5. Article III, section 5 has not been amended since 1986, so the "reasonably determined by statute" phrasing remains.

In light of this history, the phrase "reasonably determined by statute" should be read as "reasonably determined." The "by statute" language became inoperative in light of the 1994 constitutional amendment because, unlike the Legislature, the Commission does not need to pass a statute to implement the redistricting plan it adopts. Further, given the 1994 constitutional amendment, the language "reasonably determined" now refers to the Commission's determinations concerning how many counties must be divided to comply with the Federal Constitution. Article III, section 5 thus directs us that, when reviewing Petitioners' claims, we must determine whether the Commission "reasonably determined" the number of counties that must be divided to comply with the Equal Protection Clause. This interpretation is consistent with our prior holdings. *See*, *e.g.*, *Bonneville Cnty.*, 142 Idaho at 472 n.8, 129 P.3d at 1221 n.8 ("We believe the same discretion and judgment that was vested in the Legislature when it was drawing districts applies to the Commission, unless otherwise limited by statute or the constitution.").

In its Final Report, the Commission explicitly found that Plan L03 had a maximum population deviation of 5.84% and divided eight counties: Ada, Bannock, Bonner, Bonneville, Canyon, Kootenai, Nez Perce, and Twin Falls. The Commission noted that there were five plans—L071, L075, L076, L077, and L079—proposed

by members of the public that divided only seven counties; however, in considering these other plans, the Commission determined that "each would likely violate the Equal Protection Clause and that they [were] also inconsistent with other principles applicable to the redistricting process."

Petitioners Durst, Ada County, Allan, Boyer, and Canyon County all assert that Plan L03 is unconstitutional under Article III, section 5 of the Idaho Constitution because Plan L03 splits more counties than necessary to comply with the Federal Constitution's Equal Protection Clause. Except for Durst, these Petitioners identify three of the publicly submitted plans, rejected by the Commission, which split only seven counties: Plans L075, L076, and L079. Because the total population deviation in each of these plans is at or just below 10%, rendering the plans presumptively constitutional under the Equal Protection Clause, Petitioners contend the existence of these plans demonstrate that the number of county divisions necessary to comply with the Equal Protection Clause is seven. Therefore, Petitioners argue that Plan L03 is unconstitutional under Article III, section 5 of the Idaho Constitution because it splits eight counties, one more than is necessary to comply with the Federal Constitution.

In addition, Durst contends that the Commission neglected to adequately consider his proposed plan, Plan L084, asserting that "[t]he Commission treated Plan L084 as if it had the same number of counties divided as Plan L03 because the Commission did not

differentiate between internal and external divisions[.]" Durst argues internal divisions should be favored over external divisions and contends Plan L084 should have been considered along with the other five plans that only divided seven counties, because each divided county in those plans has an external division.

This Court has previously held, when assessing whether a redistricting plan violates the Idaho Constitution because it divides too many counties, that "[a] county can be divided *solely* for one reason—'to the extent it is reasonably determined by [the Commission] that counties must be divided to . . . comply with the constitution of the United States.'" *Twin Falls Cnty.*, 152 Idaho at 349, 271 P.3d at 1205 (quoting IDAHO CONST. art. III, § 5) (italics and ellipsis in original). "The extent to which counties (plural) must be divided to comply with the Federal Constitution can be determined only by counting the total number of counties divided under the plan." *Id.* "If one plan that complies with 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.*

In *Twin Falls County*, this Court reviewed a challenge to a legislative redistricting plan adopted by the 2011 Commission. *Id.* at 347, 271 P.3d at 1203. In reviewing the plan adopted by the 2011 Commission, this Court concluded that the plan complied with the Equal Protection Clause because it had a maximum deviation less than 10%. *Id.* at 350, 271 P.3d at 1206. Without

any further discussion or analysis, this Court then stated the plan did not comply with the Idaho Constitution because it divided 12 counties while "other plans that comply with the Federal Constitution . . . divide fewer counties." *Id.* In so holding, this Court failed to consider the language in Article III, section 5 that indicates a county may be divided if the commission "reasonably determined" that twelve counties had to be divided to comply with the Equal Protection Clause. Further, the holding in *Twin Falls County* appears to imply that so long as a plan has a maximum deviation of less than 10%, the plan automatically satisfies the Equal Protection Clause.

We now take this opportunity to disavow our decision in *Twin Falls County* to the extent it failed to give effect to the "reasonably determined" language contained in Article III, section 5. We also disavow the decision to the extent it suggested that a plan with a maximum deviation of less than 10% automatically satisfies the Equal Protection Clause because such a suggestion is not supported by the law. "[S]tate legislative plans with population deviations of less than 10% may be challenged based on alleged violation of the one person, one vote principle." *Larios v. Cox*, 300 F.Supp.2d 1320, 1340 (N.D.Ga. 2004) (three judge panel), *aff'd by Cox v. Larios*, 542 U.S. 947 (2004). "Indeed, the very fact that the Supreme Court has described the ten percent rule in terms of 'prima facie constitutional validity' unmistakably indicates that 10% is not a safe harbor." *Id.* at 1340–41 (quoting *Connor v. Finch*, 431 U.S. 407, 418 (1977)).

Regardless of whether we consider both the number of counties divided *and* the number of external divisions per county—a point of law we need not decide today—Petitioners' constitutional challenge to Plan L03 still fails because Petitioners have not established that the Commission erred in rejecting Plans L075, L076, and L079. Petitioners have failed to show the Commission unreasonably determined these plans did not comply with equal protection.

Plans L075 and L076 both have maximum population deviations of 9.97%. Plan L079 has a maximum population deviation of exactly 10%. Plan L084 has a maximum population deviation of 9.48%. Petitioners maintain that, because these plans have a maximum population deviation of 10% or less, each plan is presumptively constitutional. However, *presumptively* constitutional does not mean constitutional. "[D]eviations from exact population equality may be allowed in some instances in order to further legitimate state interests such as making districts compact and contiguous, respecting political subdivisions, maintaining the cores of prior districts, and avoiding incumbent pairings." *Larios*, 300 F.Supp.2d at 1337. "However, where population deviations are not supported by such legitimate interests but, rather, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny." *Id.* at 1338.

Members of the public submitted plans to the Commission for consideration. *See* I.C. § 72-1505. Generally, the proposed plans were submitted through a website; the plans' proponents were then able, but not

required, to give testimony in front of the Commission regarding how and why the plans were drawn as they were. Importantly, this means that, absent a scenario where a map drafter articulates an arbitrary or discriminatory intent behind the plan, the Commission must evaluate each submitted plan for arbitrariness or discrimination based solely on the plan itself.

Using this limited information, the Commission specifically analyzed Plans L075, L076, and L079 regarding whether they conformed to the Equal Protection Clause of the Federal Constitution and found each lacking in that regard. The Commission's Final Report includes an extensive and illuminating analysis of these three plans. The challengers are obliged to demonstrate that the Commission erred when it "reasonably determined" that splitting eight counties was necessary to comply with the Federal Constitution. As a result, we find it appropriate to quote the Commission's report at length to illustrate the in-depth evidentiary analysis undertaken by the Commission.

> While numeric equality between districts is not the only redistricting criterion the Commission is obliged to consider, it is the first and most important one. In creating legislative districts, the Commission must "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as practicable." This principle, known as the "one person, one vote" principle, allows small deviations from a strict population standard only if the deviations are based on "legitimate considerations

incident to the effectuation of a rational state policy."

Idaho's total state population, as determined by the 2020 census, is 1,839,106. The ideal district size — the quotient of the total state population divided by the total number of districts, 35 — is 52,546. That number — 52,546 — must serve as the Commission's polestar, and each deviation in each district from that number must result from service to a rational state policy, legitimately applied.

As discussed above, plans with a maximum population deviation less than 10% are generally constitutional but are unconstitutional if the deviation results from an irrational purpose or if the individual right to vote in some parts of the state is diluted as compared to others. Even a deviation meant to serve a rational state policy is impermissible if the application of the policy is inconsistent, arbitrary, or discriminatory. Nonpopulation criteria may justify deviation from the ideal district size only if they are applied consistently and neutrally.

The Commission determined that a good faith effort to achieve voter equality — the standard mandated by the United States Supreme Court in *Reynolds* — requires staying as close as possible to the ideal district size while still effectuating state policy. The Commissioners agreed that in no instance would they craft a district that deviated more than 5% over or under the ideal district size, unless

the district was an outlier and there was an extraordinarily compelling reason for the larger deviation.

The Commission's rationale here was threefold. First, any district deviation that was over or under 5% from the ideal district size would put pressure, perhaps significant, on other districts to have a minimal deviation. Otherwise, the plan might violate the 10% guideline for constitutionality. If, for example, one district was very underpopulated, with a deviation of -7.5%, then every other district in the state would require a deviation less than +2.5%. The Commission did not believe, absent an extraordinary reason, that the people in one district deserved such preferential treatment at the expense of the people in the rest of the state.

Second, the Commission believed that a lopsided deviation might well represent an arbitrary and inconsistent application of state policy, especially if an exception were made for multiple districts, instead of one outlier district with unique geographical challenges.

Finally, the Commission suspected that a lopsided deviation, which would represent significant overpopulation or underpopulation of a district — a difference of thousands of people — could result in dilution of the individual right to vote and the diminishment of effective representation. Constituents in a heavily overpopulated district, for example, could not be said to enjoy approximately the same access

to their legislators as constituents in more underpopulated districts.

The Commission's approach ultimately yielded **Plan L03**, which has a 5.84% maximum population deviation and divides eight counties. The Commission's detailed rationale for dividing eight counties is explained in the General Legislative Plan Findings below. However, five proposed plans submitted by the public divided only seven counties. After closely analyzing the plans, the Commission finds that each would likely violate the Equal Protection Clause and that they are also inconsistent with other principles applicable to the redistricting process.

. . .

Two of the plans, **L071** and **L077**, both have maximum population deviations of 12.72%, which means they are *prima facie* unconstitutional. Two more, **L075** and **L076**, have a maximum population deviation of 9.97%, and the last one, **L079**, has a maximum population deviation of 10%. These last three plans have significant defects and stand on dubious equal protection grounds.

L075 and **L076** are presumptively constitutional, if barely. But that is not the end of the analysis. As mentioned above, the 10% guideline is not a safe harbor; a plan with a presumptively constitutional deviation may still be found unconstitutional if the deviation results from an unconstitutional,

irrational, inconsistent, or discriminatory state purpose.

The plain purpose of **L075** is to achieve a seven-county-split plan. This is not a plan one would draw if equal protection were the primary purpose being served. The five northernmost districts in the state are all underpopulated to an extreme degree, with deviations of either -7.25% (Districts 1, 2, 3, and 4) or -7.24% (District 5). District 6 is also significantly underpopulated, with a -6.6% deviation. Outside of North Idaho, Districts 10 through 26, along with 28, 31, and 33, are all overpopulated, with ten districts — 11, 12, 14, 17, 18, 19, 20, 22, 23, and 33 — at the top end of the deviation range, +2.72%. Three more districts, 10, 15, and 16, have a deviation of +2.71%; one district, 24, has a deviation of +2.7%; two districts, 13 and 21, have a deviation of +2.69%; and one district, 26, has a deviation of +2.68%. There is a difference of over 5,200 people between the least and most populated districts in **L075**. In legislative districts, that is a significant disparity.

If the Commission adopted **L075** as its redistricting plan, the Commission could not sincerely claim that it attempted, in good faith, to achieve voter equality. This becomes obvious when the district boundary lines in some of the overpopulated district are examined. Consider the boundary line between Districts 11 and 12 in Figure 4[.] The yellow line is the district boundary, while the straight horizontal line running above it is Ustick

Road — a major thoroughfare and therefore an attractive prospect for a district boundary. One common theme that emerged in the public testimony and comments submitted to the Commission is that roads, especially major roads, make for good district boundaries. But the district boundary in Figure 4 does not follow the obvious straight line. Rather, the boundary meanders about on no set course, carving out census blocks here and there, following no logic or reason except this: to ensure that the people in the white, unshaded census blocks stay in District 11, so that District 12's population does not increase. If the boundary were cleaned up even slightly, so that the 38 people in the census blocks marked by the red arrows were moved to District 12 instead of District 11, that would raise the deviation of District 12 to +2.79%, making the maximum population deviation of **L075** 10.04% and the plan *prima facie* unconstitutional.

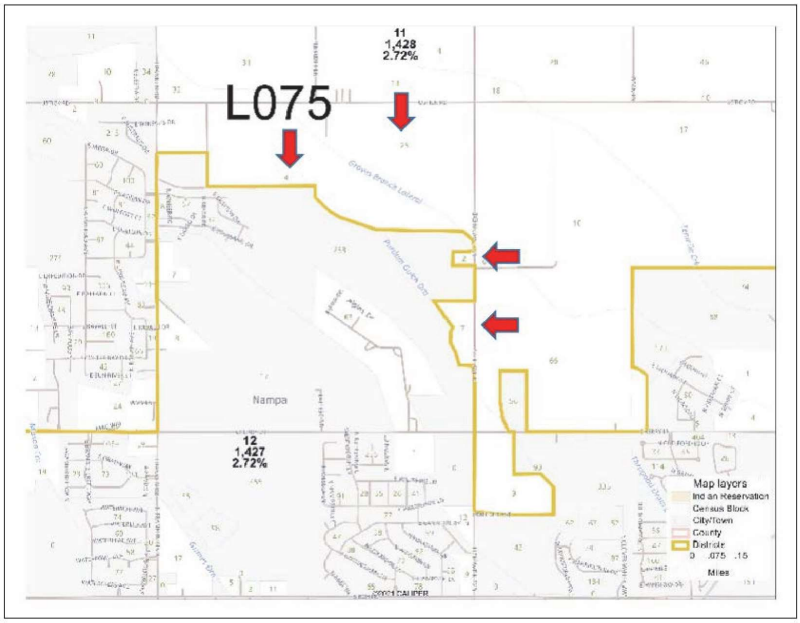

Figure 4
Boundary Line between Districts 11 and 12
Plan L075

In the opinion of the Commission, a sincere commitment to equal protection — a *good faith* commitment to equal protection — requires more than drawing an irregular line so that 38 people fall on one side of the line instead of the other. If a plan requires irrational boundary manipulation to fall just under the 10% guideline, then the plan is, at the very least, constitutionally suspect.

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. The Commission sincerely appreciates the efforts and participation of all

the Idahoans who submitted maps and provided guidance to the Commission.

But if equal protection is to mean anything, it must mean more than drawing irregular lines to capture 38 people for one district instead of another. Commitment 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.

It is undoubtedly a rational state policy to preserve county integrity as much as possible. But that interest must be served consistently and in a way that complies with both the federal and state constitutions, and the Commission finds that **L075** does neither. In addition to the equal protection problems discussed above, the plan fails to preserve county integrity. Though it does indeed divide only seven counties, it does this by dividing Bonner County — population 47,110 — into three separate legislative districts. In District 1, part of Bonner is combined with Boundary County; in District 2, part of Bonner is combined with Shoshone County, and part of Kootenai County; and in District 3, part of Bonner is combined with Kootenai.

The reason this is problematic is that Article III, Section 5 of the Idaho Constitution provides that a county may be divided for only one reason: to comply with the United States Constitution. As the Idaho Supreme Court

stated in *Twin Falls County v. Idaho Commission on Redistricting*, the word "only" means "solely." "A county can be divided *solely* for one reason" — to comply with equal protection. Thus, a county cannot be divided, once or more than once, just to spare another county from being divided. The protection of counties is a provision of the Idaho Constitution, not the United States Constitution.

If a redistricting plan divides a county, such as Bonner, for a reason other than equal protection, then the plan is invalid under the Idaho Constitution. And there is no equal protection standard that justifies dividing Bonner County more than once. Mathematically, Bonner County is smaller than the ideal district size and should not be divided at all. As explained in General Legislative Plan Finding 4.A., the Commission found it necessary, due to the population distribution in North Idaho, to split Bonner once, but finds no equal protection justification for splitting Bonner twice. Indeed, the division of Bonner into three districts might not even be necessary to produce a map that divides only seven counties. **Plan L079**, another seven-county-split plan, divides Bonner in to two districts, not three.

Based on the analysis above — because **Plan L075** significantly underpopulates one region of the state at the expense of other regions, thus making the weight of a citizen's vote dependent on where in the state the citizen lives, and because Bonner County is

divided for reasons unrelated to equal protection — the Commission finds that **Plan L075** is constitutionally unviable and should not be adopted as Idaho's legislative redistricting plan.

Plan L076 shares many of the same problems that **L075** has. Six of the North Idaho districts are, again, significantly underpopulated. Bonner County is, again, unnecessarily divided into three districts. The systematic underpopulation of North Idaho puts so much pressure on the rest of the plan that 26 districts — almost 75% of them — are overpopulated. Seven of them — 11, 12, 14, 17, 18, 19, 20, and 33 — are at the top end of the maximum population deviation. Many district boundaries are similar to those in **L075**, and similarly arbitrary; again, these boundaries seem to have been manipulated specifically to keep the maximum population deviation just under 10%. The Commission therefore finds that **Plan L076** is constitutionally unviable, for the same reason that L075 [sic] was.

Plan L079 is in some ways a more attractive plan than either **L075** or **L076**. The district boundary lines seem cleaner and less arbitrary. Bonner County is divided into two districts, not three, but **L079** has a maximum deviation of exactly 10%.

Courts have been somewhat imprecise in describing how a maximum population deviation of exactly 10% should be viewed. The United States Supreme Court observed in

Brown v. Thomson, 462 U.S. 835, 843 (1983), that plans with a maximum population deviation under 10% generally fall within the category of permissible minor deviations, while "a plan with larger disparities in population ... creates a *prima facie* case of discrimination and therefore must be justified by the state." This would imply that a deviation of exactly 10% is *prima facie* unconstitutional. However, at other times, the United States Supreme Court has described plans with a maximum population deviation *above* 10% as being *prima facie* unconstitutional.

Assuming *arguendo* that no presumption applies to a plan with a maximum population deviation of exactly 10%, or that a plan with a maximum population deviation of exactly 10% is presumptively constitutional, the Commission nevertheless finds that **Plan L079** does not satisfy equal protection standards for much the same reason that **L075** and **L076** did not: the significant underpopulation of the North Idaho districts at the expense of much of the rest of the state does not serve the cause of voter equality.

What all five seven-county-split plans demonstrated to the Commission is this: in order for the Commission to adopt such a plan, it would have to significantly underpopulate several North Idaho districts, and furthermore, it would have to draw irregular district boundary lines to achieve a presumptively acceptable maximum population deviation. Drawing more regular boundary lines to avoid

voter confusion would likely put the state in the position of having to justify a plan with a maximum population deviation of more than 10%. In light of existing precedent from both the United States Supreme Court and the Idaho Supreme Court, the Commission did not believe it could justify a seven-county-split plan.

To the Commission's knowledge, the Idaho Supreme Court has never upheld a legislative redistricting plan with a maximum population deviation of 10% or more. In three cases — *Bingham County v. Idaho Commission for Reapportionment*, *Smith v. Idaho Commission on Redistricting*, and *Hellar v. Cenarrusa* — the Idaho Supreme Court invalidated plans with deviations of, respectively, 11.79%, 10.69%, and 32.94%.

However rational Idaho's policy of maintaining county integrity might be, the Idaho Constitution itself makes clear that the policy is subordinate to the requirements of equal protection, and the Commission is skeptical of its ability to justify any plan that appears to systematically underpopulate, to a significant degree, six districts in one region of the state. In coming to this conclusion, we have found the case *Larios v. Cox* instructive. In that case, a federal court found Georgia's legislative redistricting plan unconstitutional. The plan had a maximum population deviation of 9.98% but "intentionally and systematically" underpopulated districts in certain parts of the state while overpopulating districts in

> other parts of the state. The federal court took a dim view of how the plan drafters, rather than making an effort to equalize districts throughout the state, only shifted "as much population ... as they thought necessary to stay within a total population deviation of 10%." The decision was affirmed without comment by the United States Supreme Court, but in a concurring opinion, Justice Stevens remarked that "regionalism is an impermissible basis for population deviations."
>
> Whether the underlying purpose of a seven-county-split map is a sincere effort to effectuate Idaho's policy against county division or a discriminatory effort to give people in one region more voting power than people in the rest of the state, the effect is the same: North Idaho voters are favored and voters in the other parts of the state are disfavored. Either way, the Commission does not believe these maps reflect the application of equal protection as the primary principle in redistricting.
>
> Based on the analysis above, and for the reasons explicated in the General Legislative Plan Findings below, the Commission finds that the minimum number of counties that must be divided to comply with equal protection standards is eight.

(Italics and bolded emphases in original; footnotes, some figures, and some citations omitted.) The Commission analyzed its responsibility to achieve the "one person, one vote" principle at length. Further, it

cogently explained why Plans L075, L076, and L079 were deficient in that regard. The Commission rejected Plans L075, L076, and L079 for specific reasons related to equal protection: the plans each underpopulate northern Idaho at the expense of the rest of the state and only achieve a presumptively constitutional maximum population deviation using arbitrary boundary lines.

The Commission did not directly discuss Plan L084 in its Final Report; however, as noted by Respondents in their briefing before this Court, Plan L084 overpopulates districts in Ada County by dividing it into nine districts, each with a population exceeding the ideal district size by between 4.12% and 4.94%. Respondents correctly point out that there are no other districts in Plan L084 that are as overpopulated as those in Ada County. Because overpopulated districts dilute voting power for citizens in those districts, Plan L084 would result in citizens in Idaho's most populous county—constituting more than one-quarter of the state's population—being the most underrepresented. Consequently, Plan L084 suffers from the same problem as Plans L075, L076, and L079: it overpopulates one region of the state while underpopulating northern Idaho.

Petitioners argue that there is no evidence to show that any of their championed plans were drawn to intentionally favor one region of the state over another. They point to this Court's decision in *Bonneville County*, which stated that "a regional deviation, by itself, is not enough to overcome the presumption of

constitutionality." 142 Idaho at 470, 129 P.3d at 1219. However, we can find no fault with the Commission's determination that the Equal Protection Clause mandates it *cannot* favor one region of the state over another. "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination[] based upon factors such as race or economic status." *Reynolds*, 377 U.S. at 566 (internal citations omitted). "The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote." *Id.* at 567. "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." *Id.* at 562. "A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm." *Id.* at 567. "[T]he weight of a citizen's vote cannot be made to depend on where he lives." *Id.* "The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well of all races." *Id.* at 568. In keeping with this restraint on regional favoritism, we have held "while the purpose of one person, one vote is to protect voters, not regions, a plan will be held unconstitutional where the individual right to vote in one part of a state 'is in substantial fashion diluted when compared with votes of citizens living in other parts of the State.'" *Bonneville Cnty*, 142 Idaho at 468, 129 P.3d at 1217 (citations omitted).

Petitioners ask us to second-guess the Commission and decide that another plan is better. The Constitution,

however, directs us to review whether the Commission reasonably determined eight counties must be split to satisfy equal protection. A necessary part of that inquiry is to review whether the Commission reasonably determined that the other plans did not satisfy equal protection. We hold that the Commission's determination that plans put forth by Petitioners did not satisfy equal protection was reasonable. Outside establishing their plans are at or below a 10% maximum population deviation, Petitioners have not established any of their plans truly comply with the one person, one vote principle. The Constitution does not allow us to pick another plan just because the numbers are different.

Due to Idaho's unique geography and the supremacy of federal law, there is unavoidable tension between the Idaho Constitution's restraint against splitting counties and the Federal Constitution's Equal Protection Clause. Navigating this tension is no easy feat. Effectuating a plan that adheres to both federal and state constitutional mandates is a delicate balancing act, entrusted to the Commission by the Idaho Constitution and the citizens of Idaho. IDAHO CONST. art. III, § 2. To perform that balancing act as quickly and thoroughly as the Commission did, resulting in a legislative plan with unanimous bipartisan support on behalf of all six commissioners, is certainly laudable. We think it appropriate to acknowledge the challenges the Commission faced and to not overstep our responsibility in acknowledging that it is the Commission that must make difficult choices in trying to balance the various competing interests involved. *See Bonneville*

Cnty., 142 Idaho at 472, 129 P.3d at 1221 ("We simply cannot micromanage all the difficult steps the Commission must take in performing the high-wire act that is legislative redistricting."). Our review is constitutionally limited: pursuant to Article III, section 5, we must determine whether the Commission "reasonably determined" the number of counties that must be divided to comply with the Equal Protection Clause. IDAHO CONST. art. III, § 5. We conclude the Commission did so here.

We hold that Petitioners have failed to meet their burden of showing that the Commission unreasonably determined that eight county splits were necessary to afford Idaho's citizens equal protection of the law. Therefore, Petitioners have failed to demonstrate that Plan L03 violates either the state or federal constitutions.

C. Plan L03 does not violate Idaho Code section 72-1506.

Petitioners Ada County, Allan, Boyer, and Stucki contend that Plan L03 violates Idaho Code section 72-1506. Idaho Code section 72-1506 provides in full:

> Congressional and legislative redistricting plans considered by the commission, and plans adopted by the commission, shall be governed by the following criteria:
>
> (1) The total state population as reported by the U.S. census bureau, and the population of

subunits determined therefrom, shall be exclusive permissible data.

(2) To the maximum extent possible, districts shall preserve traditional neighborhoods and local communities of interest.

(3) Districts shall be substantially equal in population and should seek to comply with all applicable federal standards and statutes.

(4) To the maximum extent possible, the plan should avoid drawing districts that are oddly shaped.

(5) 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.

(6) To the extent that counties must be divided to create districts, such districts shall be composed of contiguous counties.

(7) District boundaries shall retain the local voting precinct boundary lines to the extent those lines comply with the provisions of section 34-306, Idaho Code. When the commission determines, by an affirmative vote of at least five (5) members recorded in its minutes, that it cannot complete its duties for a legislative district by fully complying with the provisions of this subsection, this subsection shall not apply to the commission or legislative redistricting plan it shall adopt.

> (8) Counties shall not be divided to protect a particular political party or a particular incumbent.
>
> (9) When a legislative district contains more than one (1) county or a portion of a county, the counties or portion of a county in the district shall be directly connected by roads and highways which are designated as part of the interstate highway system, the United States highway system or the state highway system. When the commission determines, by an affirmative vote of at least five (5) members recorded in its minutes, that it cannot complete its duties for a legislative district by fully complying with the provisions of this subsection, this subsection shall not apply to the commission or legislative redistricting plan it shall adopt.

I.C. § 72-1506. It is well established that "the requirements of Idaho Code section 72–1506 'are subordinate to the Constitutional standard of voter equality and the restrictions in the Idaho Constitution upon splitting counties except to achieve that voter equality.'" *Twin Falls Cnty.*, 152 Idaho at 349, 271 P.3d at 1205. As this Court explained in *Twin Falls County*,

> [t]here is a hierarchy of applicable law governing the development of a plan for apportioning the legislature: The United States Constitution is the paramount authority; the requirements of the Idaho Constitution rank second; and, *if the requirements of both the State and Federal Constitutions are satisfied*, statutory provisions are to be considered.

Id. at 348, 271 P.3d at 1204 (italics added).

Ada County argues that Plan L03 violates Idaho Code section 72-1506 because it unnecessarily divides Ada and Canyon Counties and fails to keep communities of interest intact by placing rural and urban populations within the same district. The requirements of Idaho Code section 72-1506 are subservient to the requirements of both the federal and state constitutions, and Ada County has not established that the Commission unreasonably determined that the plans Ada County puts forth—L075, L076, and L079—violate equal protection.

Stucki faults Plan L03 for having "oddly shaped districts," not retaining local precinct boundary lines, unnecessarily splitting communities of interest, and having districts that are not directly connected by roadways, all in violation of Idaho Code section 72-1506. Stucki contends the Commission should have split nine counties in order to better comply with the requirements of the statute. The Commission, however, could not do so and at the same time comply with the Idaho Constitution: "a county may be divided in creating districts *only* to the extent it is reasonably determined by statute that counties must be divided to . . . comply with the constitution of the United States." IDAHO CONST. art. III, § 5. Because of this constitutional restraint, the Commission concluded it was unable to split counties to comply with the statute. Had the Commission followed the reasoning that Stucki now lays out, the plan it adopted would be unconstitutional under Article III, section 5.

Allan and Boyer assert that Plan L03 violates Idaho Code section 72-1506(2) because the Plan does not adequately preserve the Shoshone-Bannock and Coeur d'Alene tribes as communities of interest. Specifically, they argue that Plan L03 splits the Shoshone-Bannock tribe into three separate districts and splits the Coeur d'Alene tribe into two districts. Allan and Boyer point to Plan L078, a plan that splits the same eight counties as Plan L03. Plan L078 also splits the Shoshone-Bannock tribe, but places "the bulk" of its population into a single district, rather than "split[ting] the Reservation's primary hub and population in half," as Plan L03 does. Additionally, Plan L078 leaves the Coeur-d'Alene tribe intact and in a single district.

From the outset, even though the Commission did not specifically analyze Plan L078 in its Final Report, we note that Allan and Boyer's championed plan suffers from a similar issue as the plans discussed above. Plan L078 has a maximum population deviation of 9.83%, rendering it presumptively constitutional. However, like the plans discussed above, Plan L078 suffers from regional favoritism: Plan L078 underpopulates southeastern Idaho at the expense of voters in Ada, Canyon, and Gem Counties. Fifteen of the 35 districts are underpopulated; of those, nine are in southeastern Idaho and, on average, are underpopulated by -4.43%. In contrast, Ada, Canyon, and Gem Counties are comprised of 14 districts, *all* of which are overpopulated, on average, by 2.92%. Given the level of regional favoritism displayed in Plan L078, we cannot fault the

Commission for choosing a different plan in order to comply with the Equal Protection Clause.

Additionally, like the tension between the Idaho Constitution's restraint against splitting counties and the Federal Constitution's Equal Protection Clause, the tension between the subsections in Idaho Code section 72-1506 requires that the Commission perform a delicate balancing act. For example, Plan L078 preserves the Tribes as communities of interest pursuant to Idaho Code section 72-1506(2) but does not contain districts which are "substantially equal in population," as is required by Idaho Code section 72-1506(3). Compared to Plan L078, Plan L03 does a worse job at preserving the Tribes but a better job at achieving districts which are "substantially equal in population," given that Plan L03 has a maximum deviation of only 5.84%. When competing interests are at stake, it is the Commission's responsibility—entrusted to it by the people of Idaho—to determine how best to balance those interests, and we will not substitute our own views for the Commission's. *See Bonneville Cnty.*, 142 Idaho at 472, 129 P.3d at 1221.

Though Allan and Boyer contend "[i]t is self-evident that the Tribes' interests in unity and maintaining their voting power should receive the same respect, if not more, than Idaho's counties or cities do during the redistricting process," that is not how the law is written. We are unable to raise community interests, such as the Tribes', above the counties' interests, which are protected to a greater degree by the Idaho Constitution. To afford the Tribes the heightened status they

seek, an amendment to the state constitution would be required. Likewise, Idaho Code section 72-1506(2) only requires that, "[t]o the maximum extent possible, districts shall preserve traditional neighborhoods and local communities of interest." I.C. § 72-1506(2). The statute does not elevate a particular type of community of interest above another: cities, neighborhoods, and tribal reservations are all treated the same under the statute.

Based on the foregoing analysis, we hold that Plan L03 does not violate Idaho Code section 72-1506.

IV. CONCLUSION

For the reasons stated above, we deny Petitioners' requests to issue a writ of prohibition barring implementation of the Commission's final plan, L03. We award costs to Respondents as allowed by Idaho Appellate Rule 40.

Chief Justice BEVAN, Justices BRODY, MOELLER and ZAHN CONCUR.

ON DENIAL OF PETITION FOR REHEARING

STEGNER, Justice.

The Petitioner, Ada County, has filed a petition and brief seeking rehearing of this Court's opinion in this case which was released January 27, 2022. Having now had the opportunity to review Ada County's

petition and brief in support of its petition, we deny the Petition for Rehearing of our decision in *Durst v. Idaho Commission for Reapportionment*.

Ada County raises four arguments in support of its Petition for Rehearing. However, before we address the specific arguments raised by Ada County, we initially address two premises that appear to underlie its Petition. First, the arguments assume that Petitioners' claims required this Court to decide whether Plans L075, L076, L079, and L084 violated the Equal Protection Clause of the United States Constitution. However, the Petitioners did not raise an equal protection challenge. Instead, they claimed that Plan L03 violated Article III, Section 5 of the Idaho Constitution and Idaho Code section 72-1506.

The relevant language from Article III, Section 5 does not require this Court to determine whether the other plans referenced by Petitioners violate the Equal Protection Clause of the United States Constitution:

> A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, *and a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided to create senatorial and representative districts which comply with the constitution of the United States*.

IDAHO CONST. art. III, § 5 (italics added). As we explained in *Durst*, this constitutional language allows a

county to be divided when it is *reasonably determined* by the Commission that a county must be divided to comply with the United States Constitution. The wording of Idaho's Constitution thus requires this Court to determine whether the Commission *reasonably determined* the number of counties that must be split to comply with equal protection. Ada County seems to contend that our review should begin and end with an equal protection analysis of any other plans that split fewer counties. However, had the drafters of this provision and Idaho's citizens intended this Court to make its own determination of how many counties needed to be divided to comply with equal protection, there would be no need for the "reasonably determined" language. Rather, the provision would direct this Court to determine whether the number of counties divided was necessary to comply with equal protection. As a result, Idaho's Constitution does not require this Court to determine whether any other plans splitting fewer counties violated the Equal Protection Clause but instead directs us to review whether the Commission reasonably determined eight counties needed to be split to comply with equal protection.

The second premise that appears to underlie Ada County's arguments is that this Court's decision in *Durst* constituted a "dramatic change to reapportionment law in Idaho." We construe Ada County's argument as taking issue with our statements disavowing portions of this Court's prior decisions in *Twin Falls County* and *Bonneville County*. "In Idaho, 'the rule of stare decisis dictates that we follow [controlling precedent] unless

it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice.'" *Farm Bureau Mutual Ins. Co. of Idaho v. Cook*, 163 Idaho 455, 459–60, 414 P.3d 1194, 1198–99 (2018) (quoting *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990)). In *Durst*, we explained we abrogated portions of our prior decisions only to the extent they were manifestly wrong. *Bonneville County* incorrectly stated that Idaho Code section "72-1506 qualifies as the statute referenced in Idaho Const. art. III, § 5." 142 Idaho 464, 473, 129 P.3d 1213, 1222 (2005). We are not alone in this line of thought: the author of the majority decision in *Bonneville County* has since recognized that decision was premised on an erroneous interpretation of the "reasonably determined by statute" phrase in article III, section 5 of the Idaho Constitution. *Twin Falls Cnty. v. Idaho Comm'n on Redistricting*, 152 Idaho 346, 356, 271 P.3d 1202, 1212 (J. Jones, J., dissenting) ("The opinion in Bonneville County should have stated that the Commission drew its authority from Article III, § 2, and that the Commission, through its duly adopted plan, is the mechanism intended by the Legislature to make the reasonable determination contemplated in Article III, § 5.").

In *Durst*, we maintained and followed the holding of Bonneville County, "that by amending art. III, § 2, the people intended to remove the Legislature from the details of the [redistricting] process." 142 Idaho at 473, 129 P.3d at 1222. *Bonneville County* is thus consistent

with our holding in *Durst* that the Commission is the entity with the discretion to determine—subject to this Court's oversight—whether and how to split counties. *See id. Twin Falls County*, on the other hand, contravened the principles set forth in Bonneville County and our prior case law. 152 Idaho at 350– 51, 271 P.3d at 1206–07. The analysis in *Twin Falls County* as to whether a county split was necessary to comply with the Equal Protection Clause was erroneously focused only on whether a plan's maximum population deviation was below 10%. *Id.* That analysis misapplied equal protection precedent and failed to give proper acknowledgement to the Commission's decision making that county splits were necessary to comply with equal protection, as is required under article III, section 5 of the Idaho Constitution and our prior case law. *Id.* Thus, it was this Court's decision in *Twin Falls* County, not *Durst*, which was the "dramatic change to reapportionment law in Idaho." Our decision in *Durst* was simply a return to this Court's correctly decided precedent.

Turning to the specific arguments Ada County raises in its Petition for Rehearing, Ada County first argues that we unconstitutionally delegated our responsibility for interpreting the Equal Protection Clause to the Commission because we did not independently review Plans L075, L076, L079, and L084 to determine whether the plans complied with equal protection. However, Petitioners never alleged that Plan L03 violated the Equal Protection Clause. As a result, we did not hold that any other plans were

unconstitutional. We simply addressed the Petitioners arguments and held that, under the Idaho Constitution, the Commission reasonably determined eight county splits were necessary to comply with equal protection.

Second, Ada County contends that we have imposed "stricter requirements in determining compliance with the Equal Protection Clause" "than is required under federal law" because we "include[d] an intermediate step where an unelected, unaccountable state body makes a reasonable determination that its decisions have complied with federal law." As explained above, we did not render any holdings concerning whether the other plans complied with the Equal Protection Clause and therefore did not impose any additional requirements to an equal protection analysis. Ada County seeks to recast our decision in terms of federal constitutional law when our decision was clearly decided on state constitutional grounds.

Third, Ada County asserts that this Court judicially amended Article III, Section 5 of the Idaho Constitution through our interpretation of the phrase "reasonably determined by statute." While Ada County discusses Idaho Code section 72-1506 concerning county splits, it fails to explain how that statute can be read to somehow supersede the Equal Protection Clause. The legislative history of the statute not only fails to mention Article III, Section 5 of the Idaho Constitution, but the statute itself provides no guidance on how to draw districts that comply with the "one person, one vote" principle of the United States Constitution.

Rather, the statute simply requires that "[d]istricts shall be substantially equal in population and should seek to comply with all applicable federal standards and statutes." I.C. § 72-1506(3). Additionally, while Ada County stresses that the Legislature must have known the meaning of the word "statute" when it put forth Article III, Section 5 for the citizens of Idaho to ratify in 1986, Ada County ignores the subsequent ratification of the 1994 constitutional amendment of Article III, Section 2, which established that a commission for reapportionment would be responsible for redistricting. Ada County's interpretation fails to give effect to the 1994 amendment of our constitution by which the responsibility for redistricting was transferred from the Legislature to the Commission.

Finally, Ada County argues that it "met its burden demonstrating that Plan L03" violated the Equal Protection Clause. However, on page four of its opening brief, Ada County expressly conceded that Plan L03 "meet[s] the equal protection standard." It is therefore not possible for Ada County to have "met its burden demonstrating that Plan L03 was unconstitutional under the Equal Protection Clause" given it took the opposite position when it explicitly denied that it was challenging Plan L03 on federal equal protection grounds.

For the foregoing reasons, Ada County's Petition for Rehearing is DENIED

Chief Justice BEVAN, Justices BRODY, MOELLER and ZAHN CONCUR.

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Petitioner,

and

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

Intervenor-Petitioner,

v.

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

Respondents,

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

Petitioner,

v.

Order Denying Petition for Rehearing

Supreme Court Docket No. 49261-2021

Consolidated Case No(s): 49267-2021; 49295-2021; 49353-2021

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 Chairman of the 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.

Respondent Ada County having filed a Petition for Rehearing on February 17, 2022, and supporting brief on February 23, 2022, of the Court's Published Opinion released January 27, 2022; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent Ada County's Petition for Rehearing be, and is hereby, denied, as a Substitute Opinion was issued by the Supreme Court on March 1, 2022.

Dated March 1, 2022

By Order of the Supreme Court

/s/ Melanie Gagnepain
Melanie Gagnepain
Clerk of the Courts

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Petitioner,

and

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

Intervenor-Petitioner,

v.

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

Respondents.

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

Petitioner,

v.

Supreme Court Docket No. 49261-2021

Consolidated Cases Nos. 49267-2021, 49295-2021, 49353-2021

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 Chairman of the Shoshone-Bannock Tribes,

Petitioners,

v.

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

Respondents.

PETITIONER ADA COUNTY'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

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[1] I. INTRODUCTION

The United States Supreme Court, in *Gamble v. United States*, 139 S.Ct. 1960, 1969 (2019) stated:

> S*tare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Of course, it is also important to be right, especially on constitutional matters, where Congress cannot override our errors by ordinary legislation. But even in constitutional cases, a departure from precedent 'demands special justification.' *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). This means that something more than 'ambiguous historical evidence' is required before we will 'flatly overrule a number of major decisions of this Court.' *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 479, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). And the strength of the case for adhering to such decisions grows in proportion to their "antiquity." *Montejo v. Louisiana*, 556 U.S. 778, 792, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009).

The law was well-established regarding the constitutional parameters of reapportionment in Idaho prior to January of 2022. And the Commission on Reapportionment ("Commission") purported to follow this well-established law in formulating L03. Based on the well-established precedent many Petitioners challenged the

Commission Plan, L03[1]. The numerous challenges are likely a result of the impact not being felt by an individual in an individual case but by impacts to hundreds of thousands of people in their legislative representation for a period of ten years. In addition, when the Idaho Legislature amended the reapportionment statutes in 2015, the Legislature demonstrated a lack of deference to the Commission by specifically allowing almost anyone to challenge Commission plans.[2] This is far different from other statutes where the Legislature has placed specific limitations on who can challenge other governmental decisions.[3]

Because Petitioner Ada County's briefs and arguments were based on the established law, Ada County, as well as other Petitioners, did not have an opportunity to brief nor argue law that was not before the Court. Ada County brings this Petition for Rehearing because the Petitioners should have the opportunity to present briefing and argument regarding the dramatic change to reapportionment law in Idaho.

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[1] The Idaho Legislature specifically provided a low bar for challenges to reapportionment plans when the Commission was established.

[2] "[A]ny registered voter, incorporated city or county in this state may appeal to the supreme court a congressional or legislative redistricting plan adopted by the commission." Idaho Code §§ 72-1509, 72-1510.

[3] For example, see Idaho Code § 67-6521, § 67-6535, and § 31-3505G.

II. ARGUMENT

A. The United States Constitution does not permit a state court to delegate to a state administrative body largely unreviewable responsibility for interpreting the Equal Protection Clause of the 14th Amendment.

This Court erred by deferring to the Commission's determination of whether the plans dividing seven counties violated the Equal Protection Clause. The U.S. Constitution required the Court itself to make that determination de novo.

This Court interpreted the Idaho Constitution to require deference to the Commission's determination of federal equal protection law. The Court said, "Article 3, Section 5 . . . directs us that, when reviewing Petitioners' claims, we must determine whether the Commission 'reasonably determined' the number of counties that must be divided to comply with the Equal Protection Clause." January Decision at 10. Applying that "reasonableness" standard of review, the Court concluded, "Petitioners have failed to show the Commission unreasonably determined [that the plans dividing 7 counties] did not comply with equal protection." *Id.* at 13. Thus, the Court itself made no determination about whether those plans complied with equal protection.

The Court's failure to do so violates the U.S. Constitution. The Due Process Clause of the Fourteenth Amendment requires state courts to decide issues of federal constitutional rights—such as rights protected

by the Equal Protection Clause—independently of state administrative entities' determination of those issues. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1926) (holding that, for claim that state agency violated individual's federal constitutional rights—there, rights grounded in substantive due process—"the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment"); *see also Ng Fung Ho v. White*, 259 U.S. 284–85 (1922) (holding that petitioners were entitled as a matter of due process to judicial determination of whether they were citizens or were instead noncitizens subject to deportation, as had been held by immigration agency; Court relied upon "the difference in security of judicial over administrative action"); *Ex parte Young*, 209 U.S. 123, 147 (1908) ("If the law be such as to make the decision of the [state] legislature or of a commission conclusive as to the sufficiency of the rates [when challenged on federal constitutional grounds], this court has held such a law to be unconstitutional.") (citing *Chi., Milwaukee, & St. Paul Ry. Co.*, 176 U.S. 167, 172 (1900) (rejecting proposition that state ratemaking commission could violate railroad's federal due process rights "without any right of appeal to the courts"); *cf. McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1990) ("To satisfy the requirements of the Due Process Clause, . . . the State must provide taxpayers with . . . a fair opportunity to challenge the accuracy and legal validity of their tax obligation").

Precedent like *Ben Avon* involved claims that state ratemaking orders violated economic rights protected by substantive due process. *Ben Avon*, 253 U.S at 288–89; *Ex parte Young*, 209 U.S. at 127–30; *Chi., Milwaukee, & St. Paul Ry.*, 176 U.S. at 168. As this Court has recognized, economic substantive due process no longer justifies "intrusive" judicial review of ratemaking orders. *Hayden Pines Water Co. v. Idaho Pub. Util. Comm'n*, 122 Idaho 356, 358–59, 834 P.2d 873, 875–76 (1992). The duty of state courts to conduct de novo review of claimed violations of federal constitutional rights, however, does not rest on *substantive* due process. It rests on *procedural* due process.

A fundamental facet of procedural due process is an unbiased decision maker. See, *e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). There is a strong presumption that state court judges and adjudicators will be unbiased. *Id.* at 47 (stating that there is "presumption of honesty and integrity in those serving as adjudicators"). But no similar presumption attaches to legislative determinations by an administrative entity. *See St. Joseph Stock Yards v. United States*, 298 U.S. 38, 51–52 (1936) (stating that, when federal constitutional protections for property or liberty are at stake, legislature cannot shield itself or its agents from "independent judicial review upon the facts and the law by courts of competent jurisdiction"); *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 225–27 (1908) (to the same effect).

The need for this Court independently to review the equal protection issues in this case has particular force, for three reasons.

First, it appears that the Commission's view of federal equal protection law was influenced by its view that its preferred plan, L03, reflected the best policy. The Commission initially adopted the view that "no district should deviate more than 5 percent, either over or under, from the ideal district size, unless there was a compelling reason for such deviation." Final Report at 2; *see also id.* at 10–11. The Commission did not, however, definitively determine that this view was compelled by the Equal Protection Clause. Indeed, the Commission's view differs from, by being more stringent than, U.S. Supreme Court precedent establishing the presumptive constitutionality of plans with a maximum population deviation under 10%. *See Brown v. Thomson*, 462 U.S. 835, 842 (1983). The Commission's view nonetheless inevitably predisposed it to reject any plan that did not comport with that view, regardless whether that plan comported with the Equal Protection Clause. *See* Final Report at 12 (finding that plans dividing seven counties "would *likely*" violate equal protection and "are also inconsistent with *other principles* applicable to the redistricting process") (emphasis added).

Second, the record before the Commission was inadequate for it to determine whether the plans dividing seven counties complied with equal protection. As this Court observed, the Commission acted upon "limited information." January Decision at 13. For the plans submitted by the public, including those dividing only seven counties, the Commission had no "testimony . . . regarding how and why the plans were

drawn as they were." *Id.* As a result, the Commission could only "evaluate each plan for arbitrariness or discrimination based solely on the plan itself." Such facial review cannot adequately resolve whether a plan is arbitrary or discriminatory, for it depends on sheer guesswork about the purposes and rationales for the plan. Reflecting the record's inadequacy, the Commission ultimately found no more than this: "[E]vidence in the Commission's record *suggests* that seven-county-split plans are discriminatory under the Equal Protection Clause." *Id.* at 20 (emphasis added).

Third, and further reflecting the record's inadequacy, the Commission equivocated on whether the plans dividing seven counties actually violated the Equal Protection Clause. At the outset of its analysis of the five plans dividing seven counties, the Commission stated: "The Commission finds that each *would likely* violate the Equal Protection Clause . . . . " Final Report at 12 (emphasis added). At later points, too, the Commission studiously stopped short of definitively determining that one or more of these plans violated equal protection. The Commission said that two of the plans (L071 and L077) "are *prima facie* unconstitutional" and the other three (L075, L076, and L079) "stand on dubious equal protection grounds." Final Report at 13. True, the Commission later said that Plans L075 and L076 were "constitutionally unviable" (*id.* at 16, 17) and that "the minimum number of counties that must be divided to comply with equal protection standards is eight." Final Report at 19. Read as a whole, however, the Final Report plainly reflects the

Commission's awareness that it lacked adequate grounds for definitively determining that every plan dividing seven counties violated the Equal Protection Clause.

U.S. Supreme Court precedent compels independent state court review of federal constitutional determinations by state administrative entities exercising legislative functions. *See supra*. This precedent applies with special force where, as here, the administrative determinations are so equivocal and rest on such an inadequate record.

B. A state court cannot impose stricter requirements in determining compliance with the Equal Protection Clause of the United States Constitution than is required under federal law.

The Fourteenth Amendment to the United States Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws." The Equal Protection Clause is a restriction on state action. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Federal law governing challenges to whether states' legislative reapportionment plans comply with the Equal Protection Clause has two components. First, is there a prima facie showing of constitutionality. The United States Supreme Court opined in 2016 that:

> We have further made clear that 'minor deviations from mathematical equality' do not, by themselves, 'make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.' [*Gaffney v. Cummings*, 412 US 735, 745 (1973)] We have defined as 'minor deviations' those in 'an apportionment plan with a maximum population deviation under 10%. [*Brown v. Thomson*, 462 U.S. 835, 842 (1983)] And we have refused to require States to justify deviations of 9.9% [*White v. Register*, 412 U.S. 755, 764 (1973)], and 8% [*Gaffney*, 412 U.S. at 751]. See also [*Fund for Accurate and Informed Representation, Inc. v. Weprin*, 506 U.S. 1017 (1992)] (summarily affirming a District Court's finding that there was no prima facie case where the maximum population deviation was 9.43%).

Harris v. Arizona Independent Redistricting Com'n, 578 U.S. 253, 136 S.Ct. 1301, 1307 (2016) (unanimous decision).[4] Second, once there is a threshold showing of constitutionality with a deviation under 10%, the burden of proof shifts to a challenger to show discrimination, arbitrariness and irrational policies used in development of the reapportionment plan. *Id*. at 1307; *See Bonneville Cnty v. Ysursa*, 142 Idaho 464, 468, 129 P.3d 1213, 1217 (2005).

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[4] The Court's January decision only discusses L03's deviation but fails to address the second component. The Court touches on the ideal district size of 52,546 people but does not discuss how Ada County and Canyon County were deprived of their ideal districts. January Decision at 7.

Federal law does not include an intermediate step where an unelected, unaccountable state body makes a reasonable determination that its decisions have complied with federal law. The burden under federal law is for a challenger to show discrimination, arbitrariness and irrational policies of a Commission's reapportionment plan. The burden is not for a challenger to show that the Commission did not unreasonably determine that other plans did not comply with equal protection[5]. A state cannot impose this additional standard on the Equal Protection Clause, and restrict challengers who are seeking to protect their rights under federal law.

The law is that a deviation below 10% is prima facie constitutional unless there is evidence to demonstrate that it is more probable than not that illegitimate factors were used. *Harris*, 578 U.S. at 1310. Petitioners did not challenge the other plans; therefore, it is the Commission's burden to provide evidence to substantiate its assumptions that illegitimate factors were used.

If the Commission is challenging other plans as unconstitutional, it is the Commission's burden under the law of the Equal Protection Clause, not Petitioners' burden, to demonstrate discrimination, arbitrariness and irrational polices of the other plans. The

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[5] The January Decision states: "We hold that the Commission's determination that plans put forth by Petitioners did not satisfy equal protection was reasonable." January Decision at 20. Only Durst put forth a Plan. The other Petitioners did not put forth plans or support any of the plans put forth.

Commission's stated assumptions[6] that the other Plans "have significant defects and stand on dubious equal protection grounds" is not evidence. Final Report at 13. Further, the Commission undermines its own stated assumptions about equal protection violations when it states: "The Commission does not mean to imply that anyone who submitted a seven-county-split plan did so for improper purposes." January Decision at 16 (quoting Final Report at 15). Allowing the Commission to reasonably determine that the opposing plans are "constitutionally suspect" because they are close to the 10% deviation does not comport with the requirements of federal law.

C. Changes to the Idaho Constitution should occur through the process outlined in Art. XX § 1 and should be adopted by the people pursuant to Art. XX § 4.

"When interpreting constitutional provisions, the fundamental object 'is to ascertain the intent of the drafters by reading the words as written, employing [the words] natural and ordinary meaning, and construing [the words] to fulfill the intent of the drafters.'"[7] The natural and ordinary meaning of the word "statute" and construing "statute" to fulfill the intent

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[6] There is no evidence to support the Commission's assumption: "The plain purpose of L075 is to achieve a seven-county-split plan."

[7] *State v. Winkler*, 167 Idaho 527, 531, 473 P.3d 796, 800 (2020) (quoting *Sweeney v. Otter*, 119 Idaho 135, 139, 804 P.2d 308, 312 (1990).

of the Idaho Legislature constitutional amendment does not include the word "Commission."

In 1986, the question presented on the ballot to the citizens of the state was shall the Idaho Constitution be amended "to provide that counties shall be divided only to the extent determined necessary by statute to comply with the Constitution of the United States." *See* HRJ Res. 4, Sec. 4, 48th Legislature 1986. The focus of the constitutional amendment was to not divide counties unnecessarily.

In 1994, the Idaho Legislature adopted SJR 105 which proposed to amend the Constitution to establish a Commission on Reapportionment. At the same time in 1994, the Legislature could have put forward an amendment to change Article III § 5 of the Constitution. The Legislature did not put forward an amendment, and there is an assumption by the courts "'that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed.'" *Saint Alphonsus Regional Medical Center v. Gooding County*, 159 Idaho 84, 87, 356 P.3d 377, 380 (2015) (quoting *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 150, 879 P.2d 1078, 1083 (1994)). Assuming that the Legislature knew of the prior 1986 Constitutional Amendment, the Legislature chose not to amend Art. III § 5 at the same time it was amending Art. III § 2. The Legislature instead focused only on Art. III § 2 and proposed a barebones constitutional amendment to establish the Commission while leaving the structure of the Commission and the

criteria for redistricting to the Legislature to be established through statute. Art III § 2(3) states:

> The legislature shall enact laws providing for the implementation of the provisions of this section, including terms of commission members, the method of filling vacancies on the commission, additional qualifications for commissioners and additional standards to govern the commission. The legislature shall appropriate funds to enable the commission to carry out its duties.[8]

After the constitutional amendment allowing a Reapportionment Committee was ratified by the people of Idaho, the Legislative Council Committee on Apportionment was tasked in 1995 with fulfilling the requirements of the constitutional amendment. In the Legislative Council Committee on Reapportionment's Final Report, it recommended that the draft legislation "establish statutory criteria to govern redistricting plans to be developed by the commission." (Attached as Exhibit C) And the Legislature did just that in enacting § 72-1506[9] which states in relevant part:

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[8] Compare Idaho's limited constitutional provision to the Constitutions of Arizona (attached as Exhibit A) and Michigan (attached as Exhibit B) where their respective state constitutions contain all the details and criteria related to their Reapportionment Commissions.

[9] Hearing on S. 1392 Before the H. Comm. on State Affairs, 1996 Leg., 60th Sess, (Statement of Vice Chairman Bill Deal, "There is also a section detailing criteria to govern proposed redistricting plan"), attached as Exhibit E; see also S. 1392, 53rd Leg., 2d Reg. Sess. (1996), attached as Exhibit F.

> 72-1506. Criteria Governing Plans. Congressional and legislative redistricting plans considered by the commission, and plans adopted by the commission, shall be governed by the following [8] criteria.[10]

Legislative oversight is what was put forward to the people in the Constitutional amendment establishing a Commission, and it is what the citizens adopted. It is not unusual for the Legislature to enact statutes that govern constitutionally created entities.[11] Having Legislative enactments govern an unelected, unaccountable entity is not unfettered discretion. In fact, the Legislature continues to govern the Commission by amending the statutes that are applicable to the Commission. *See* S. 1184, 60th Leg., 1st Reg. Sess. (2009) ("Division of counties shall be avoided whenever possible. In the event that a county must be divided, the

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[10] Two sections addressed divisions of counties. "(5) Division of counties should be avoided whenever possible. Counties 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. In the event that a county must be divided, the number of such divisions, per county, should be kept to a minimum. (6) To the extent that counties must be divided to create districts, such districts shall be composed of contiguous counties." *See* Exhibit F. This appears contrary to the statement that "No mention was made of implementing any of the provisions in Art. III section 5." January Decision at 10.

[11] For example, see Arts. XI, XII, XIV, XV, and XVIII of the Idaho Constitution where there are specific references to the general laws to be provided by the Legislature for constitutionally created entities.

number of such divisions, per county, should be kept to a minimum), attached as Exhibit D.

In addition to the historical context of legislative intent, the actual word "statute" is not of uncertain meaning, but instead has a plain and unambiguous meaning. "What it meant when adopted it still means for purposes of interpretation." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). A "statute" is a law passed by the duly elected senate and house of representatives. The precedent in the state of Idaho is that legislative authority to enact statutes cannot be delegated. By replacing the word "statute" with the word "Commission," the Court is changing a term that means law with a term that means an unelected, unaccountable body. This occurs outside the normal process of making text revisions to the Idaho Constitution through the constitutional amendment process which must be ratified by the citizens.

The Chief Justice of the U.S. Supreme Court has addressed the issue of changing words in the Constitution, when the majority of the Court changed the word "Legislature" to the word "people." The Chief Justice expressed concern regarding amending the text of the Constitution, not through the process outlined in the Constitution, but by judicial decision. *Arizona State Legislature v. Arizona Independent Redistricing Com'n* 576 U.S. 787, 834 (2015) (5-4 decision) (Roberts, C.J; Scalia, J. Thomas, J. and Alito, J. dissenting). Further, the dissent was concerned about "an unelected, unaccountable institution that permanently and totally

displaces the legislature from the redistricting process." *Id*. at 848.

The U.S. Supreme Court gives deference to another branch of government, i.e., the legislature in creating apportionment plans. *Miller v. Johnson*, 515 U.S. 900 (1995). The Court has further summarized its precedent as follows: "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Arizona State Legislature*, 576 U.S. at 808. An unelected, unaccountable entity is not entitled to the same level of deference as is enjoyed by one of the three branches of government, i.e., the legislative body that makes the laws. Any amendment to the Idaho Constitution that changes the structure of power in such a dramatic way must be initiated by the Legislature (Art. XX § 1) and adopted by the people (Art. XX § 4).

D. Ada County, with the support of Amici Eagle and Canyon County, met its burden demonstrating that L03 was unconstitutional under the Equal Protection Clause because the Commission's Plan was arbitrary, discriminatory and based on irrational polices.

The "one person one vote" language in isolation fails to capture the idea that people are voting for a representative who they expect will represent their interests in making laws. *See Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Many years after *Sims*, the U.S.

Supreme Court discussed how the Equal Protection Clause applies to the manner of its exercise.

> Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. *See*, *e.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1996) ('[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.') It must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizens' vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Bush v. Gore, 531 U.S. 98, 104-05 (2000) (quoting *Sims*, 377 U.S. at 555).

The Commission states that the ideal district size of "'52,546 must serve as the Commission's polestar, and each deviation in each district from that number must result from service to a rational state policy, legitimately applied.'" January Decision at 14 (quoting Final Report). The problem is that the Commission removed an ideal district from Ada County and an ideal district from Canyon County with no rational state policy legitimately applied. The information regarding how almost 40% of the state's population is treated is hidden in the Final Report. To ferret out the information requires calculation of the Commission's numbers. As was demonstrated in Ada County's briefing,

the evidence supports the finding that Ada County and Canyon County were treated in an arbitrary and disparate manner from all other counties.

First, only in Ada County and Canyon County were ideal size districts broken up and distributed to rural areas. Bannock County's one ideal district remained intact, Bonneville's two ideal districts remained intact, Kootenai's three ideal districts remained intact, Twin Falls' one ideal district remained intact, and Madison's one ideal district remained intact. The only counties where the Commission chose to break up ideal districts was in the area of the state that is urban and has almost 40% of the population.

Number of Ideal Internal Legislative Districts Based on Population & Commission Internal Divisions

County Population	No. of Ideal Internal Legislative Districts Based on Population	Population Remaining After Ideal Population Distribution of 52,913 into Legislative Internal Districts	Commission No. of Legislative Districts	Commission Population Remaining After Forming Internal Legislative Districts
Ada 494,967÷52,546	**9 (note – currently Ada has 9 districts)**	**22,053**	**8**	**75,859**
Bannock 87,018÷52,546	1	34,472	1	33,754
Bonneville 123,064÷52,546	2	17,972	2	20,497
Canyon 231,105÷52,546	**4**	**20,921**	**3**	**70,678**
Kootenai 171,362÷52,546	3	13,724	3	15,082
Twin Falls 90,046÷52,546	1	37,500	1	36,446
Madison 52,913÷52,546	1	367	1	0

The Commission's action was arbitrary and treated the urban areas differently than all other counties with populations sufficient to form internal ideal districts. This action denies this urban area equal protection under the law in its representation. " 'The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of representative government.' " *Gore*, 531 U.S. at 107 (quoting *Moore v. Ogilvie*, 394 U.S. 819 (1969)).

In discussing *Cox v. Larios*, 542 U.S. 947 (2004),[12] the U.S. Supreme Court noted that when no legitimate purpose can explain districts, the formation is likely from illegitimate factors. *Harris*, 578 U.S. at 1310. The Commission stated no legitimate purpose for its treatment of Ada and Canyon Counties in its Final Report, during briefing before this Court, or at oral argument.[13] In the Final Report the Commission provides

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[12] The Commission invokes *Larios* to support its position, but the *Larios* decision actually supports Ada County. The deviations in *Larios* were a "concerted effort to allow rural and inner-city Atlanta regions of the state to hold on to their legislative influence (at the expense of suburban Atlanta), even as the rate of population growth in those areas was substantially lower than that of other parts of the state." *Larios v. Cox*, 300 F.Supp.2d, 1320, 1342 (N.D. Ga. 2004). The parsing out of Ada and Canyon County citizens allows rural counties to hold on to legislative influence, even though their population growth is lower than in southwest Idaho.

[13] The Final Report presents evidence of the Commission's arbitrary and illegitimate decisions. As the chart illustrates, Ada County currently has 9 legislative districts and currently has the population for 9 legislative districts. The Commission argues that nine districts "would deviate a great deal from the ideal district size" and they had to "make a good faith effort to achieve ideal district size." What is hidden here is that 22,053 Ada County

the correct standard, that a right to vote cannot be diluted and there needs to be consistent application, but fails to properly apply this standard. Final Report at 6. The Commission argues generally that Northern Idaho would be underpopulated if other plans were adopted. January Decision at 18 (citing Final Report). The Commission implies that this is a negative attribute; however, underpopulation of districts actually benefits those districts because it can allow for growth and keep like-minded voters together.

Perhaps realizing that a statewide explanation is insufficient to explain the disparate treatment of Ada and Canyon Counties, the Commission next argues that Eagle and Emmett are communities of interest so putting them in one legislative district makes sense. Final Report, at 54. That Eagle and Emmett are communities of interest was strongly disputed by the Mayor of Eagle in the City of Eagle's amicus brief, as well as in Ada County's briefing. The Commission's argument that Emmett and Eagle were in the same sports division as a basis for forming the legislative district was equally unpersuasive. The Commission's argument that Gem County "is not so 'sparsely

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citizens could have been combined with 20,921 Canyon County citizens and Owyhee County to form a district. And that is what the Commission did with all other counties, it combined the excess numbers left over after an ideal district size and combined those excess numbers with neighboring counties. In no other instance, except Ada and Canyon Counties, did the Commission eliminate ideal districts that could have been internally established in a county.

populated' " is insufficient to support the Commission's policy of combining rural areas with urban areas.

Even the judiciary acknowledges that Ada County is different than its rural neighbors. Administrative Fourth District Judge Stephen Hippler noted in testimony to the Legislature asking for more judges in Ada County that "[a]pproximately 40% of the state's population now lives in Ada County . . and the county has grown 30% just in the past decade" Kelcie Mosleley-Morris, *Ada County judge to legislators: We need more judges to decrease Idaho's court backlogs*. Idaho Capital Sun, February 2, 2022. Further, Judge Hippler stated: " 'Ada County civil cases tend to be substantially more complex than cases in other counties because it's the home base of large companies, hospitals and government agencies. These entities tend to breed more complex litigation.' "

The U.S. Constitution, the Idaho Constitution and the Idaho Legislature, through statute, sets the policies for redistricting, not the Commission. The Commission's policy of treating urban counties differently is outside the bounds of both Constitutions and the duly enacted statutes. The Commission's disparate treatment and irrational policies have effectively disenfranchised 105,000 urban voters and removed two legislative districts that were already enjoyed by the urban counties. This irrational policy has the impact of ensuring that the like-minded voters who share urban concerns, like complex litigation, are having their votes diluted in choosing those who represent them in

making laws. This is impermissible under the Equal Protection Clause.

III. CONCLUSION

Ada County respectfully petitions the Court for rehearing for the reasons outlined above. First, the expanded scope and role of the Commission in constitutional matters, as outlined in the January Decision, should have further briefing and argument.

Second, Ada County filed its petition based on well-established law, and under well-established law, met its burden in demonstrating that the Commission made arbitrary and discriminatory decisions that will have negative impacts on the representation of Ada and Canyon Counties for the next ten years.

DATED this 23 day of February, 2022.

JAN M. BENNETTS
Ada County Prosecuting Attorney

By: /s/ Lorna K. Jorgensen
Lorna K. Jorgensen
Deputy Prosecuting Attorney

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Attorneys for Petitioner Ada County

IN THE SUPREME COURT
OF THE STATE OF IDAHO

BRANDEN JOHN DURST, a qualified elector of the State of Idaho, Petitioner, and CANYON COUNTY, a duly formed and existing county pursuant to the laws and Constitution of the State of Idaho, Intervenor-Petitioner, v. IDAHO COMMISSION FOR REAPPORTIONMENT, and LAWERENCE DENNEY,	**Supreme Court Docket No. 49261-2021** **Consolidated Cases Nos. 49267-2021, 49295-2021, and 49353-2021** **ADA COUNTY'S PETITION FOR REHEARING PURSUANT TO IDAHO APPELLATE RULE 42**

Secretary of State of the State of Idaho, in his official capacity,

Respondents.

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

Petitioner,

v.

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

Respondents.

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 Chairman of the 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.

COMES NOW, Petitioner, Ada County, by and through its counsel of record, the Ada County Prosecuting Attorney's Office, Civil Division and pursuant to Idaho Appellate Rule 42, and respectfully petitions the Court for rehearing of its decision issued on January 27, 2022 in the above captioned matter.

By this Petition, Petitioner Ada County seeks a rehearing on the following issues:

- Whether a state can impose stricter requirements in determining compliance with Equal Protection.
- Whether the U.S. Constitution permits a state court to delegate to a state administrative body largely unreviewable responsibility for interpreting the Equal Protection Clause of the 14th Amendment.
- Whether the parameters of constitutional interpretation allow a court to go beyond " 'reading the words as written, employing [the words] natural and ordinary meaning, and construing [the words] to fulfill the intent of the drafters' "[1], and allowing textual changes without a constitutional amendment.
- Whether Ada County, with the support of Amici Eagle and Canyon County, met its burden demonstrating that L03 was unconstitutional under the Equal Protection Clause because the Commission on Reapportionment's ("Commission") Plan was arbitrary, discriminatory, and based on irrational policies.

Rather than deciding whether the Commission's Plan complies with the Equal Protection Clause, the Court states that instead it "must determine whether the Commission 'reasonably determined' the number of counties that must be divided to comply with the

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[1] *State v. Winkler*, 167 Idaho 527, 531, 473 P.3d 796, 800 (2020) (quoting *Sweeney v. Otter*, 119 Idaho 135, 139, 804 P.2d 308, 312 (1990).

Equal Protection Clause."[2] Further, the Court puts the responsibility on Petitioners to show, not that the other Plans submitted to the Commission were unconstitutional, but that "the Commission unreasonably determined these plans did not comply with equal protection."[3] The Court appears to be placing a state restriction on the federal constitution. Rather than determining if a plan is constitutional, the Court is adding an additional step where first the Court must decide whether the Commission made a reasonable determination of constitutionality before the Court can reach the constitutional question of a Plan. Such authority over the federal constitution has not been delegated to a state body that is unelected and unaccountable.

The Court stated in its opinion that it is "skeptical of any effort to seemingly allow a 'statute' to control our interpretation of the Constitution in any respect."[4] However, the Court does not appear to have the same skepticism regarding allowing the Commission to control the Court's interpretation of the Constitution. The Commission determined that the other plans "would likely violate the Equal Protection Clause" and the Court deferred to the Commission's interpretation whether the plans were constitutional. The Constitution is the "fundamental and paramount law of the nation" and it is the judicial department that determines what the law is. *Marbury v Madison*, 5 U.S. 137 (1803).

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[2] Decision at 10.

[3] Decision at 13.

[4] Decision at 8.

This power to determine the meaning of the Equal Protection Clause, and its compliance, cannot be delegated to a Commission under state law. The Commission had no authority to make a determination that the other Plans presented to the Commission were unconstitutional. And the Commission should not receive any deference in making those determinations since it is not part of the judicial branch.

When the Idaho Legislature put forward SJR 105 in 1994 to establish the Commission, it could have put all the structure of the Commission in the Idaho Constitution, as Arizona and Michigan, did when they created their Reapportionment Commissions. The Idaho Legislature did not do that; instead, it specifically provided that the Commission structure, duties, and criteria for redistricting would be implemented through statutes passed by the Legislature. This in effect allowed the Legislature to retain control over the Commission. And this structure of having an unelected body be accountable to the Legislature is the structure that the citizens of the state of Idaho ratified. After the ratification, in 1996, the Legislature enacted a new chapter, Chapter 15, Title 72, codified as Idaho Code §§ 72-1501 et al.[5] These statutory enactments are not mere guidance as has been suggested. In its January opinion, the Court substituted the word "statute" (law)[6] with the word "Commission." The term "statute" is not of uncertain meaning, but instead has a plain and unambiguous meaning. "What it meant when adopted it

[5] Some provisions were amended in 2009.

[6] Black's Law Dictionary defines statute as "A law passed by a legislative body." P. 1633.

still means for purposes of interpretation." *Hawke v. Smith (No. 1)*, 253 U.S. 227 (1920). A "statute" is a law passed by the duly elected senate and house of representatives. The precedent in the state of Idaho is that legislative authority to enact statutes cannot be delegated. By replacing the word "statute" with "Commission," the Court is changing a term that means law with a term that means body that is unelected and unaccountable. This occurs outside the normal process of making text revisions to the Idaho Constitution through the constitutional amendment process which is ratified by the citizens.

Ada County argued in its initial brief, in its reply brief, and at oral argument that Ada County and Canyon County "were facing unequal treatment,"[7] that "L03 does not serve equal protection,"[8] and provided evidence of the arbitrary and disparate treatment that valued other persons' votes outside of the southwest urban area as well as the irrational polices of the Commission. More specifically, Ada County argued that the Commission's actions "appear[ed] to be for the improper purpose of diluting the strength of the rapidly growing urban areas"[9] and that cannibalizing the "two urban counties, with almost forty percent (40%) of the state's population, does not comport with equal protection."[10] The Commission failed to address the evidence of disparate treatment provided by Ada County

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[7] Ada County's Brief in Support of Petition at 7.

[8] Ada County's Brief in Support of Petition at 9.

[9] Ada County's Brief in Support of Petition at 12.

[10] Ada County's Reply Brief at 6.

in its briefing or at oral argument nor did the Commission provide any explanation as to why the area of the state with almost 40% of the population was treated differently than other areas of the state. Ada County met its burden. It was the Commission that failed to reapportion in a manner that was not arbitrary, discriminatory, and based on irrational policies developed by the Commission.

The grounds and reasons set forth herein are not exhaustive and will be further set forth in Petitioner's Brief in Support of Petition for Rehearing to be subsequently filed.

DATED this 17th day of February, 2022.

JAN M. BENNETTS
Ada County Prosecuting Attorney

By: /s/ Lorna K. Jorgensen
Lorna K. Jorgensen
Deputy Prosecuting Attorney

IN THE SUPREME COURT
OF THE STATE OF IDAHO

BRANDEN JOHN DURST, 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.	**Supreme Court Docket No. 49261-2021** **(Consolidated Cases 49261-2021 and 49267-2021)**
ADA COUNTY, a duly formed and existing county pursuant to the laws and Constitution of the State of Idaho, Petitioner, v. IDAHO COMMISSION FOR REAPPORTIONMENT, and LAWERENCE DENNEY, Secretary of State of the State of Idaho, in his official capacity, Respondents.	

PETITIONER ADA COUNTY'S BRIEF

* * *

III. ARGUMENT

A. Plans L03, L075, L076 and L079 all meet the equal protection standard.

In 1964 when *Reynolds v Sims*, 377 U.S. 533 (1964) was decided, the United States Supreme Court was focused on the lack of reapportionment of Alabama since 1901. At issue was the "strangle hold" that rural Alabama had over urban areas.[3] The U.S. Supreme Court found "Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies". *Id.* at 567. However, the requirement is to "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." *Id.* at 577.

It was almost twenty years later in 1983, that the U.S. Supreme Court held in a state legislative apportionment case that "a maximum population deviation

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[3] "Bullock County, with a population of only 13,462, and Henry County with a population of only 15,286, each were allocated two seats in the Alabama House, whereas Mobile County, with a population of 314,301, was given only three seats, and Jefferson County with 634,846 people had only seven representatives." *Reynolds v. Sims*, 377 U.S. 533, 545-46 (1964).

under 10%" is a "minor deviation" that is "insufficient to make out a prima facie case of invidious discrimination." *Brown v. Thomson*, 462, U.S. 835, 842 (1983). Interestingly, in the same decision, the U.S. Supreme Court allowed more that 10% deviations in Wyoming finding it was "justified on the basis of Wyoming's longstanding and legitimate policy of preserving county boundaries." *Id.* at 847. On the same day, June 22, 1983, the U.S. Supreme Court also issued a congressional reapportionment decision, *Karcher v. Daggett*, 462 U.S. 725 (1983) (White, J., Powell, J. and Rehnquist, J. dissenting). Although the Court struck down New Jersey's congressional reapportionment plan, the dissenting Justices argued against striking the congressional plan, utilizing the Court's established case law for state legislative apportionment. *Id.* at 780. The dissenting Justices noted that the Court had "taken a more sensible approach" to state legislative apportionment. *Id.* (citing *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Register*, 412 U.S. 755 (1973). The dissent summarized prior case law that recognized that small deviations were not a *prima facie* constitutional violation and that the Court had "upheld plans with reasonable variances that were necessary to account for political subdivisions." *Id.* at 780-81 (citing *Mahan v. Howell*, 410 U.S. 315 (1973). Here there are plans other than L03 that meet the 10% deviation requirement AND preserve county boundaries which is a sensible approach, accounting for the political boundaries of counties.

This Court has also recognized that precision is not attainable and that deviations are allowed. *Bonneville County v. Ysursa*, 142 Idaho 464, 467, 129 P.3d 1213, 1216 (2005) (citing to *Reynolds*, 377 U.S. at 577; *Brown*, 462 U.S. at 842-43 (1983); (*Twin Falls*, 152 Idaho at 349, 271 P.3d at 1205 "The commission is not required to draw legislative districts that all have precisely the same population numbers").

The Commission set its goal as "no district should deviate more than five percent, either over or under, from the ideal district size" and ultimately settled on a "5.84% maximum deviation." Final Report, at 2, 11. Curiously, the Commission did not focus on meeting the Equal Protection Clause **and** dividing as few counties as possible. Because other proposed plans split fewer counties and still met equal protection standards, the Commission had to address the other plans that divided fewer counties.[4] The Commission stated that "seven-county split plans are discriminatory under the Equal Protection Clause, as they consistently and significantly underpopulate [sic] districts in North Idaho

[4] If a redistricting plan with a deviation of less than 10% is challenged, the burden is on the challenger to "demonstrate that the deviation results from some unconstitutional or irrational state purpose." *Bonneville County v. Ysursa*, 142 Idaho 464, 468, 129 P.3d 1213, 1217 (2005); *see also Rodriguez v. Pataki*, 308 F.Supp.2d 346, 365 (S.D.N.Y. 2004). Since the Commission is challenging Plans L075, L076 and L079 in its Final Report, the Commission has the burden to demonstrate an unconstitutional or irrational purpose of those plans. On page 15 of the Final Report, it states: "the Commission does not mean to imply that anyone who submitted a seven-county-split plan did so for improper purposes."

at the expense of voters in other parts of the state, such that the weight of a person's vote depends on the location in the state where that person lives." Final Report, at 29. The *Bonneville County* Court, in its decision, cited to a regional deviation case which found "that in the absence of evidence of an unconstitutional or irrational state purpose for deviating from mathematical equality, a plan that arguably favored one region of the state but remained within the ten percent margin was not unconstitutional. 142 Idaho at 469, 129 P.3d at 1218.

The Commission's criticisms of the other plans with seven-county splits stated its concern with effects of the seven-county split plans on North Idaho. The Commission's Plan, L03, fails to address the concerns of how Ada and Canyon Counties were split in the Commission's plan. "Obviously, to the extent that a county contains more people than allowed in a legislative district. the county must be split. However, this 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 (emphasis added). An ideal district number for Ada County is nine districts, which Ada County currently has, but Ada County was divided into eight districts and the rest of Ada County (15%) was aligned with other county districts. The same occurred with Canyon County. An ideal district number for Canyon County is four districts, but Canyon County was divided into three districts and the rest of the

County (30%) was aligned with other county districts. The Commission is treating the largest urban areas of the Treasure Valley differently than all other urban areas in the state. There are 105,092 citizens in Canyon and Ada Counties facing unequal treatment because they are being deprived of a legislative district in each of their own counties.[5]

[5] "The fact than an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote." *Reynolds*, 377 U.S. at 567.

Number of Ideal Internal Legislative Districts Based on Population & Commission Internal Divisions

County Population	No. of Ideal Internal Legislative Districts Based on Population	Population Remaining After Ideal Population Distribution of 52,913 into Legislative Internal Districts	Commission No. of Legislative Districts	Commission Population Remaining After Forming Internal Legislative Districts
Ada 494,967÷52,546	**9 (note – currently Ada has 9 districts)**	**22,053**	**8**	**75,859**
Bannock 87,018÷52,546	1	34,472	1	33,754
Bonneville 123,064÷52,546	2	17,972	2	20,497
Canyon 231,105÷52,546	**4**	**20,921**	**3**	**70,678**
Kootenai 171,362÷52,546	3	13,724	3	15,082
Twin Falls 90,046÷52,546	1	37,500	1	36,446
Madison 52,913÷52,546	1	367	1	0

The mathematical deviations in Plans L03, L075, L076 and L079 are insufficient to make a prima facie case that they are unconstitutional, and the Commission admits on page 15 of the Final Report, that "the Commission does not mean to imply that anyone who submitted a seven-county-split plan did so for improper purposes."

The Commission argues that counties can only be split to comply with equal protection. Final Report, at 16. The Commission then argues that there is no equal protection justification for splitting Bonner County more than once (*Id.*), but the Commission somehow finds equal protection is served by externally dividing Ada County three times and removing an entire legislative district that Ada County currently has. The Commission also finds that equal protection is served by externally dividing Canyon County three times and depriving Canyon County of a legislative district. Although L03 meets the 10% deviation criteria, L03 does not serve equal protection because of its treatment of Ada and Canyon Counties. There are 105,092 citizens that should have had their own legislative districts (Ada and Canyon)[6] but instead have been parsed out of their own counties and have been joined with other counties.

* * *

[6] Ada County and Canyon County should each have an additional district. This is the number of people who should be in those districts.

CONSTITUTION OF THE STATE OF IDAHO
ARTICLE III LEGISLATIVE DEPARTMENT

Section 1. LEGISLATIVE POWER – ENACTING CLAUSE – REFERENDUM – INITIATIVE. The legislative power of the state shall be vested in a senate and house of representatives. The enacting clause of every bill shall be as follows: "Be it enacted by the Legislature of the State of Idaho."

The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature. This power is known as the referendum, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection.

The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.

Section 2. MEMBERSHIP OF HOUSE AND SENATE. (1) Following the decennial census of 2020 and in each legislature thereafter, the senate shall consist of thirty-five members. The legislature may fix the number of members of the house of representatives at not

more than two times as many representatives as there are senators. The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may, from time to time, be divided by law.

(2) Whenever there is reason to reapportion the legislature or to provide for new congressional district boundaries in the state, or both, because of a new federal census or because of a decision of a court of competent jurisdiction, a commission for reapportionment shall be formed on order of the secretary of state. The commission shall be composed of six members. The leaders of the two largest political parties of each house of the legislature shall each designate one member and the state chairmen of the two largest political parties, determined by the vote cast for governor in the last gubernatorial election, shall each designate one member. In the event any appointing authority does not select the members within fifteen calendar days following the secretary of state's order to form the commission, such members shall be appointed by the Supreme Court. No member of the commission may be an elected or appointed official in the state of Idaho at the time of designation or selection.

(3) The legislature shall enact laws providing for the implementation of the provisions of this section, including terms of commission members, the method of filling vacancies on the commission, additional qualifications for commissioners and additional standards to govern the commission. The legislature shall appropriate funds to enable the commission to carry out its duties.

(4) Within ninety days after the commission has been organized or the necessary census data are available, whichever is later, the commission shall file a proposed plan for apportioning the senate and house of representatives of the legislature with the office of the secretary of state. At the same time, and with the same effect, the commission shall prepare and file a plan for congressional districts. Any final action of the commission on a proposed plan shall be approved by a vote of two-thirds of the members of the commission. All deliberations of the commission shall be open to the public.

(5) The legislative districts created by the commission shall be in effect for all elections held after the plan is filed and until a new plan is required and filed, unless amended by court order. The Supreme Court shall have original jurisdiction over actions involving challenges to legislative apportionment.

(6) A member of the commission shall be precluded from serving in either house of the legislature for five years following such member's service on the commission.

Section 5. SENATORIAL AND REPRESENTATIVE DISTRICTS. A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided to create senatorial and representative districts which comply with the

constitution of the United States. A county may be divided into more than one legislative district when districts are wholly contained within a single county. No floterial district shall be created. Multi-member districts may be created in any district composed of more than one county only to the extent that two representatives may be elected from a district from which one senator is elected. The provisions of this section shall apply to any apportionment adopted following the 1990 decennial census.

CHAPTER 15
COMMISSION FOR REAPPORTIONMENT

72-1506. CRITERIA GOVERNING PLANS. Congressional and legislative redistricting plans considered by the commission, and plans adopted by the commission, shall be governed by the following criteria:

(1) The total state population as reported by the U.S. census bureau, and the population of subunits determined therefrom, shall be exclusive permissible data.

(2) To the maximum extent possible, districts shall preserve traditional neighborhoods and local communities of interest.

(3) Districts shall be substantially equal in population and should seek to comply with all applicable federal standards and statutes.

(4) To the maximum extent possible, the plan should avoid drawing districts that are oddly shaped.

(5) 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.

(6) To the extent that counties must be divided to create districts, such districts shall be composed of contiguous counties.

(7) District boundaries shall retain the local voting precinct boundary lines to the extent those lines

comply with the provisions of section 34-306, Idaho Code. When the commission determines, by an affirmative vote of at least five (5) members recorded in its minutes, that it cannot complete its duties for a legislative district by fully complying with the provisions of this subsection, this subsection shall not apply to the commission or legislative redistricting plan it shall adopt.

(8) Counties shall not be divided to protect a particular political party or a particular incumbent.

(9) When a legislative district contains more than one (1) county or a portion of a county, the counties or portion of a county in the district shall be directly connected by roads and highways which are designated as part of the interstate highway system, the United States highway system or the state highway system. When the commission determines, by an affirmative vote of at least five (5) members recorded in its minutes, that it cannot complete its duties for a legislative district by fully complying with the provisions of this subsection, this subsection shall not apply to the commission or legislative redistricting plan it shall adopt.

CHAPTER 15
COMMISSION FOR REAPPORTIONMENT

72–1509. CHALLENGES — SUPREME COURT RULES. (1) Within the time and in the manner prescribed by rule of the supreme court, any registered voter, incorporated city or county in this state may appeal to the supreme court a congressional or legislative redistricting plan adopted by the commission.

(2) The commission shall prepare, process and transmit to the supreme court such documents of the proceedings of the commission as may be provided by rule of the supreme court.