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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Melanie Gagnepain, Deputy Clerk

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.

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.

Supreme Court Docket No. 49261-2021

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

CHIEF J. ALLAN, a registered voter of theState of Idaho and Chairman of the Coeur d'Alene, Tribe, and DEVON BOYER, a registered voter of the State of Idaho and 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 REPLY BRIEF TO RESPONDENTS' CORRECTED RESPONSE BRIEF

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I. INTRODUCTION

The question before the Court, as submitted by Petitioners, is whether Plan L03 of the Idaho Commission on Reapportionment ("Commission") violates the Idaho Constitution by unnecessarily splitting counties.

The lengthy response from the Commission devotes many pages to discussing the Commission, casting aspersions on Petitioners, and citing to non-binding district court law outside of Idaho and outside of the Ninth Circuit.[1] None of those arguments are persuasive. When the Commission turns its attention to the question before the Court—whether Plan L03 violates the Idaho Constitution—its arguments fail because Plan L03 divides eight (8) counties when other plans, that are valid on federal equal protection grounds, only divide seven (7) counties. In addition, Plan L03 divides counties externally 15 times when other plans only divide counties externally 14 times in violation of the Idaho Constitution. As further explained below, Plan L03 violates the Idaho Constitution's prohibition on unnecessarily dividing counties.

II. ARGUMENT

A. The Commission's L03 Reapportionment Plan Violates the Idaho Constitution by Unnecessarily Dividing Counties

The Commission's singular focus on the Equal Protection Clause and a deviation of no more than five percent (5%), with no consideration for Idaho's Constitution is misplaced. Resp.Brief at 5. Attempting to get as close to zero percent (0%) deviation, as the Commission suggests, without considering Idaho's constitutional requirement for contiguous counties, can lead to absurd results. Resp. Brief at 10, *see* Durst Dec., Ex. F which has a population deviation of 2.02% with non-contiguous counties. In regard to deviation, the United States Supreme Court

[1] "[T]his Court is not bound by the holdings of other jurisdictions." *Tricore Investments, LLC v. Estate of Warren through Warren*, 168 Idaho 596, 485 P.3d 92, 121 (2021).

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). Thus, as the United States Supreme Court has recently held, the Commission was not bound by its focus on five percent (5%) and could have split fewer counties and still achieved equal protection under the 14th Amendment.

The United States Constitution and the Idaho Constitution should be read together for a reapportionment plan that provides equal protection while at the same time protecting county boundaries. They are not mutually exclusive. The United States Supreme Court has recognized that some deviation and political boundaries are both important considerations in the reapportionment process. In *Harris*, the U.S. Supreme Court noted that in its prior cases, "legitimate considerations can include a state's interest in maintaining the integrity of political subdivisions." *Id*. at 1306. The Court further noted that it affirmed a Georgia Federal District Court's decision, finding that a deviation of less than 10% violated equal protection when the deviation "'did not result from any attempt to create districts that were compact or contiguous, or to keep counties whole, or to preserve the cores of prior districts.'" *Id*. at 1310 (quoting *Cox v. Larios*, 542 U.S. 947, 949 (2004)).[2]

[2] The issue in *Larios* was "illegimate factors." *Harris*, at 1310. Here the Commission has stated on page 15 of the Final Report, that "the Commission does not mean to imply that anyone who

The Commission's deviation is less than ten percent (10%) but its singular focus on a five percent (5%) deviation is not the result of an attempt to keep counties whole or to preserve cores of prior districts. The Commission's proposal chooses to split more counties than necessary in violation of Idaho's Constitution and takes away one of Ada County's present districts, and one of Canyon County's present districts.[3] In an attempt to demonstrate that the Commission's eight county splits is better than the plans with fewer county splits, the Respondents argue that the Commission found other plans had flaws. The issue is not the Commission's perceived flaws of the other plans but instead the number of county splits necessary to still be in compliance with the Equal Protection Clause. The Commission itself stated that it did not mean to imply that anyone who submitted a seven-county-split plan did so for improper purposes. *See* Final Report at 15.

Ada County does not support any of the plans that have been presented; instead, as stated in Ada County's Petition, Ada County is asking this Court to remand the matter back to the Commission for review and revision so there are fewer county splits. Pet. at 6. Ada County is asking for a remand because the number of county splits in L03 is unconstitutional as there are other plans that were presented to the Commission that met the Equal Protection Clause and only split seven counties.[4] This Court could not have been clearer in its *Twin Falls* decision regarding county splits.

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submitted a seven-county-split plan did so for improper purposes." Further the Commission never argues that the seven county split deviations were not related to compact or contiguous districts, keeping counties whole or preserving the cores of prior district.

[3] Intervenor-Petitioner Canyon County's Opening Brief at 2.

[4] Respondents' statement of the law is that the Petitioners must identify "a competing plan that divides fewer counties and complies with the Equal Protection Clause." Resp. Brief at 16 (citing *Twin Falls*, 152 Idaho at 350, 271 P.3d at 1206). This is exactly what Petitioner has done. There are other plans that were presented to the Commission that divided fewer counties (including externally) and have less than a ten percent (10%) deviation. In addition, Petitioner Durst's Plan only splits seven (7) counties and joins those counties externally with other counties. Durst's Plan does not divide Ada County externally and join it with other counties.

> 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. It could not be said that dividing one more county was necessary to comply with the Constitution. . . . If, for example, only seven counties needed to be divided in order to comply, then a plan that divides eight counties would violate these constitutional and statutory provisions.

Twin Falls, 152 Idaho at 349-350, 271 P.3d at 1205-1206. Respondents invite this Court to overturn its *Twin Falls* decision as "unworkable and unwise." Resp. Brief at 28. "'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.'" *Gomez v. Crookham Company*, 166 Idaho 249, 259, 457 P.3d 901, 911 (2019) (quoting *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72,77, 803 P.2d 978, 983 (1990)). This is not a case where precedent is manifestly wrong.[5] The *Twin Falls* decision actually mirrors what the Idaho Constitution requires, that counties be divided "'only to the extent it is reasonably determined . . . that counties must be divided.'" *Twin Falls*, 152 Idaho at 249, 271 P.3d at 1205. The Respondent Commission characterizes the *Twin Falls* decision as unworkable and unwise because the decision limits the discretion of the Commission on Reapportionment. "This constitutional provision [Art. III § 5] is a restriction on the commissioner's discretion, not a grant of discretion." *Id*. at 351, 1207. The Commission cannot be granted more discretion than the Idaho Constitution provides, a limitation that the Idaho electorate chose when they voted in favor of the

[5] In state legislative apportionment cases, allowing focus on political boundaries is well-established in the law. *Harris v. Arizona Independent Redistricting Com'n*, 578 U.S. 253, 136 S.Ct. 1301, 1306, (2016) (unanimous decision) ("legitimate considerations can include a state's interest in maintaining the integrity of political subdivisions"); *Brown v. Thomson*, 462, U.S. 835, 847 (1983) (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"); *Karcher v. Daggett*, 462 U.S. 725, 780-81 (1983) (White, J., Powell, J. and Rehnquist, J. dissenting) (the dissent summarized prior legislative apportionment case law that recognized the Court had "upheld plans with reasonable variances that were necessary to account for political subdivisions").

constitutional amendment limiting county splits. *See* Pet. Ada County's Opening Brief at 9-10.

In addition, even though the *Twin Falls* decision is clear, Respondents still argue that the other plans that only divide seven counties "impermissibly demonstrate regional favoritism." Resp. Brief at 24. As more fully described in the next section, this argument fails because L03 impermissibly favors other areas of the state at the expense of Ada and Canyon Counties (almost forty percent (40%) of the state's population) and deprives almost 150,000 people, fifteen percent (15%) of Ada County residents and thirty percent (30%) of Canyon County residents, of legislators that would represent their urban interests.

B. The Commission's L03 Reapportionment Plan Has Excessive External County Splits that Undermine Voters in Urban Counties

Contrary to Respondents' arguments of "effectuating rational state policies" by dividing Ada and Canyon Counties, cannibalizing counties is not a rational state policy, and it is unconstitutional. The Idaho Constitution takes precedence over the Commission's policy. The 1986 amendment to the Idaho Constitution provides in relevant part:

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

Article III § 5. The Court has interpreted this provision to mean:

> 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.* Whether desirable or not, that is the meaning of Article III, § 5. *A county may not be divided and parsed out to areas outside the county to achieve ideal district size, if that goal is attainable without extending the district outside the county*.

Bingham County, 137 Idaho at 874, 55 P.3d at 867 (emphasis added).[6] Following the directive of the Court in *Bingham County*, the ideal district size in Ada County could have been achieved by nine internal divisions, with 22,053 residents remaining. The ideal district size in Canyon County could have been achieved by four internal districts with 20,921 people remaining. Instead, the Commission chose to externally divide Ada County three times and deprive 75,000 (15%) Ada County residents of their own legislative representation. The Commission also chose to externally divide Canyon County three times and deprive 70,000 (30.5%) of Canyon County residents of their own legislative representation. As the Court stated: "A county may not be divided and parsed out to areas outside the county to achieve ideal district size, if that goal is attainable without extending the district outside the county." *Id*. The goal was achievable, but the Commission chose to divide and parse the populous and urban counties. The Commission made the decisions because of its unnecessary and singular focus on a five percent (5%) deviation, as well as its decision to favor other areas of the state at the expense of Ada and Canyon Counties. The cannibalization of these two urban counties, with almost forty percent (40%) of the state's population, does not comport with equal protection or the Idaho Constitution. If the Court allows the excessive external splits to stand, there will be no limitation on future reapportionment commissions. They will feel free to split counties excessively and parse representation of county residents to areas outside a resident's

[6] The Commission acknowledged that "internal divisions, which create districts wholly contained within a county, are favored over external division, which create districts that combine part of the county with another county." Final Report at 8 (citing Idaho Constitution Art. III § 5 and *Bingham County*. Respondents' Brief at 39, contradicts the Commission's position, instead arguing that the *Bingham County* decision has been changed to weaken "any preferences for internal divisions." In addition, to the Commission's citation in its Final Report, the Constitution expresses a preference for internal divisions. "*A county may be divided into more than one legislative district when districts are wholly contained within a single county."* Article III § 5. Idaho Code § 72-1506(5) supports the Constitution: "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."

county.

The Commission states that its focus on the five percent (5%) deviation was "to reduce preferential treatment for people in one district at the expense of people in other districts." Resp. Brief at 6. The Commission failed to achieve its goal of reducing preferential treatment. The single focus of five percent (5%) deviation was at the expense of counties, particularly Ada and Canyon Counties. Ada County currently has nine legislative districts, and after the most recent census results still has an "ideal" population that merits nine legislative districts rather than eight (8). Canyon County currently has four legislative districts, and after the most recent census still has an "ideal" population that merits four (4) legislative districts rather than three (3).

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 Internal Legislative Districts	Commission Population Remaining After Forming Internal Legislative Districts
Ada 494,967÷52,546	**9 (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 (currently Canyon has 4 districts)**	**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 chart summarizes how Ada County and Canyon County, which comprise almost 40 percent (39.4%) of the State's population, were treated by the Commission. Even though the urban counties' populations merited nine (9) legislative districts (Ada County) and four (4) legislative districts (Canyon County), the Commission chose to deprive 146,537 residents of their own representation by proposing only eight (8) districts for Ada County and only three (3) districts for Canyon County. If the Commission had chosen to formulate a plan truly based on population, it would have been necessary to combine only approximately 42,974 from both Ada (4.5% rather than 15%) and Canyon (9% rather than 30.5%) Counties with adjoining rural counties.

This is not to say that the rural counties interests are less important than urban counties interests. The interests of the two are just different, and each needs representation that reflects their individual interests and concerns. Ada County and Canyon County are entitled to legislators that represent the interests of the urban constituency.

The Commission takes issue with the fact that the Board of Ada County Commissioners is interested in protecting the 494,967 Ada County residents which comprise more than a quarter of the state's population (26.9%). *See* Resp. Brief at 3-4. Added with Canyon County, it is almost 40% of the state's population (39.4%). At no time did Ada County advocate for disenfranchising 75,859 Ada County residents by parsing them out through three external county splits.[7] And contrary to Respondents' assertion that Ada County conceded that the Commission was correct in splitting Ada County, Ada County Commissioner Rod Beck testified on behalf of the entire three-member Board at the Commission's meeting in Eagle Idaho on September 17, 2021. Audio Transcript 38:43-43:30, available at https://legislature.idaho.gov/redistricting/2021.[8] Chair Beck,

[7] Respondents have asserted that Ada County conceded that seven county splits were necessary. Resp. Brief at 21. That assertion is not accurate. *See* Pet.Ada County's Opening Brief at 2 n2 quoting Final Report at 20.

[8] The quality of the audio for the meeting in Eagle is poor; however, the audible parts of

on behalf of the Board of Ada County Commissioners, advocated for only one Ada County external split. He testified that the County was entitled to nine (9) legislative districts but recognized that there were not enough residents in Ada County for ten (10) districts. He reiterated several times that Ada County wanted nine (9) whole districts and the remaining residents should be kept with a community of interest, like Melba or Canyon County. He also indicated that if the County was not treated fairly in the reapportionment process, the County would be forced to bring suit. This is far from conceding that the Commission's splits of Ada County were correct.

After reviewing L03, the Board of Ada County Commissioners determined that not only was Ada County treated unfairly in the process by the number of external splits but that its urban neighbor, Canyon County also had an excessive number of external county splits. Looking at the total number of county splits and the number of external county splits in L03, there are other plans that have fewer county splits (7 as opposed to 8) as well as fewer external county splits (14 as opposed to 15). Not only does the number of county divisions violate the Idaho Constitution but the divisions are also in violation of Idaho Code § 72-1506(5) which states: "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."

III. CONCLUSION

Maintaining county boundaries and meeting equal protection requirements are not mutually exclusive concepts. There were plans submitted to the Commission that had a deviation of less than ten percent (10%), and as the Commission noted were not submitted for an improper purpose. These same plans divided counties fewer times than L03. Because L03 divided more counties than necessary and excessively externally divided Ada and Canyon Counties, depriving

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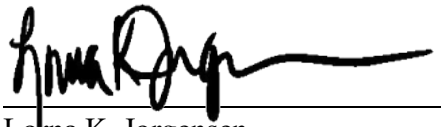
Commissioner Beck's testimony are cited here.

the residents of their own local representation, the Court should remand the apportionment map back to the Commission, and direct the Commission to prepare a map that complies with both the federal and state constitutions.

DATED this 23rd day of December, 2021.

JAN M. BENNETTS
Ada County Prosecuting Attorney

By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 23, 2021, I filed the foregoing electronically through the iCourt E-File system, which caused the following parties or counsel to be served by electronic means.

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