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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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.

Case No. 49261-2021

Consolidated Case Nos. 49267-2021; 49295-2021; 49353-2021

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.

REPLY BRIEF OF PETITIONERS CHIEF J. ALLAN AND DEVON BOYER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REPLY ISSUES 3

ARGUMENT 4

I. Contrary to Respondents' claims, Petitioners have consistently advocated for the best interests of their Tribes during the redistricting process and in front of this Court. 4

II. The Commission should have considered redistricting plans that divided fewer counties than Plan L03, took into account the tribes' communities of interest, and would still have been presumptively constitutional under the Equal Protection Clause. The Commission erred as a matter of law in adopting Plan L03, and its arguments to the contrary are misplaced. 9

III. The Court should award attorney fees if the Tribes' redistricting challenge is successful. 16

CONCLUSION 17

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Cases

Bonneville County v. Ysursa,
142 Idaho 464, 129 P.3d 1213 (2005) 9, 10, 14, 15

Hellar v. Cenarrusa,
106 Idaho 571, 682 P.2d 524 (1984) 16

Hellar v. Cenarrusa,
106 Idaho 586, 682 P.2d 539 (1984) 16

Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).....13

Larios v. Cox,
300 F.Supp.2d. 1320 (N.D. Georgia 2004).....10

*Rodriguez v. Patak*i,
308 F. Supp.2d 346, 365 (S.D.N.Y 2004).....10, 14

Smith v. Idaho Comm'n on Redistricting,
136 Idaho 542, 38 P.3d 121 (2001) 16

Constitution and Statutes

U.S. Const. amend. XIV, § 1 12

I.C. § 72-1505(4).....13

I.C. § 72-1506(2).....8, 15, 16

Idaho Const., Art. III, 5 5 15

Rules

Idaho Appellate Rule 5(b) 8

INTRODUCTION

Respondents suggest that Petitioners Allan and Boyer are being "opportunistic" by exercising their rights under Idaho law to seek review of the Commission's final redistricting plan in this Court. Respondents devote a large portion of their brief to asserting that Petitioners' statements to the Commission somehow conflict with their arguments here. It is unclear what Respondents believe they gain by impugning the motives and credibility of these Tribes, but they are quite wrong.

Petitioners have never indicated anywhere that they are fine with their reservations being split however the Commission deemed necessary. The Coeur d'Alene Tribe suggested to the Commission that the *current* district was okay because it preserved their community of interest in a way that the Tribe could live with. But the Tribe made clear to the Commission that it wanted its community maintained in the new redistricting plan to the maximum extent possible. The Commission completely ignored that input when it attached part of the Tribe's reservation in Plan L03 to far-flung, rural counties, which is not even close to what the Tribe suggested. That is similarly true of the Shoshone-Bannock Tribes. The final plan cuts the population of their reservation in half, effectively down Main Street in Fort Hall. The Tribes know that some divisions may need to be made, but they must be made with care and with an attempt to preserve their communities to the maximum extent. The Commission did not even try.

The Commission has been exposed for making a clear error of law. It is now blindly throwing darts against the wall hoping that something will stick with this Court. The simple fact is that the Commission strived for mathematical purity – when the Equal Protection Clause did not demand it – while disregarding state constitutional and statutory mandates that required fewer county splits and thoughtful consideration of communities of interest. There is no evidence in this record that maps that divided only seven counties – with a maximum deviation of 10% or below – were motivated by "regional favoritism," or any invidious discrimination. Absent such evidence, no potential challenger could make headway in a lawsuit under the Equal Protection Clause. The Commission erred in concluding otherwise.

The Tribes are not asking this Court to adopt any particular plan, or for the Commission to select from one of the seven-county split maps already proposed. Many more options open up for the Commission to exercise its discretion when it uses the flexibility that it is afforded to mapping state legislative districts under the Equal Protection Clause. The Tribes merely seek a remand to the Commission with instructions to follow the law in redistricting, which includes seriously considering their communities of interest.

REPLY ISSUES

I.

Contrary to Respondents' claims, Petitioners have consistently advocated for the best interests of their Tribes during the redistricting process and in front of this Court.

II.

The Commission should have considered redistricting plans that divided fewer counties than Plan L03, took into account the Tribes' communities of interest, and would still have been presumptively constitutional under the Equal Protection Clause. The Commission erred as a matter of law in adopting Plan L03, and its arguments to the contrary are misplaced.

III.

The Court should award attorney fees if the Tribes' redistricting challenge is successful.

ARGUMENT

I.

Contrary to Respondents' claims, Petitioners have consistently advocated for the best interests of their Tribes during the redistricting process and in front of this Court.

The Tribes have consistently maintained throughout this process that they want their people to be retained together to the maximum extent possible, and if splits are necessary, they want them carefully drawn. Contrary to Respondents' implication, one split is not the same as any other split. The impact of a split can vary immensely. It matters how the boundaries divide population, not acreage. And more congregated, concentrated populations translate into possible electoral influence. Plan L03 ignores the Tribes entirely as communities of interest, splitting them indiscriminately.

Respondents are revising history, not the Tribes. The Commission now contends it gave the Tribes what they asked for, taking their wishes "to heart." Resp. Brf., p. 4. To read Respondents' brief, the Tribes were once satisfied with the Commission's proposals and final plan, but now are "apparently dissatisfied" and have seized on new "opportunistic" arguments to the redistricting challenges. Resp. Brf., p. 12. If that were true, why did the Commission expressed its regret that it could not accommodate the wishes of the Shoshone-Bannock Tribes in its redistricting plan? Final Report, p. 25, fn. 62. This is underscored in the Commission's letter to Idaho's legislative leadership, in which the Commission noted its perceived inability to afford greater protection to

certain communities of interest, like Indian reservations, than is currently allowed by law. *Id*. at Appendix 15.

Respondents' attempt to undermine the Tribes credibility fails as a litigation strategy. We know for a fact the Tribes strenuously objected to the redistricting proposal because Petitioners asked the Commission in writing to reconsider its plans. The Shoshone-Bannock Tribes wrote:

> It is with great disappointment that the Shoshone-Bannock Tribes submit this public comment regarding the Commission's newly proposed map (L02). We object to the boundary drawn between proposed Districts 28 and 30 because it intentionally divides the two largest population clusters on our Reservation also known as the Fort Hall Indian Reservation.
>
> **We respectfully ask that you reconsider our request to be included with the Bingham County legislative district**.
>
> Our objection to the proposed map is based on the following points:….
>
> We realize that you were not assigned an easy task. However, this is the second time we have participated in the public process of redistricting, and it is the second time our input has been ignored. Again, we ask that you reconsider our request to be included with the Bingham County legislative district."

Boyer Declar., Ex. B (bold in original). [1]

[1] The Commission never included the letter from the Fort Hall Business Council requesting reconsideration in the record, or the detailed white paper and its maps and exhibits. Respondents blame "administrative oversight" for the error. Resp. Brf., p. 9, fn. 6. The loss of all the Tribes' materials from the record could also reasonably be construed as a lack of interest in the Tribes' input. Like their materials, they were simply ignored and disregarded.

This hardly demonstrates the Shoshone-Bannock Tribes' prior approval of Plan L03 or pivoting opportunistically late in the game, as the Respondents advise the Court.

Chief Allen was equally frustrated and displeased by the impact of the Commission's redistricting plans on the Coeur d'Alene Tribe. In early November he wrote the Commission:

> "…the L02 proposed map gives us *grave cause for concern*. L01 was bad enough, in that it paired Benewah County with Clearwater and would open the possibility that constituents in Plummer would have a representative in far away Pierce or Weippe. *L02 is far worse*, creating a downright embarrassing gerrymander of a district, …. *I would urge the Commission to reconsider the proposal*."

Appendix 13 to Report, at 191-192 (italics added).

Against this record, it is false to assert the Tribes have jumped on the bandwagon and only now have expressed their sharp disagreement with these plans.

The Tribes understood that under the law the Commission had to keep counties intact and populations largely evenly distributed between districts, acknowledging this may prevent the Commission from placing their respective reservations in single districts. Not surprisingly, as every tribe is unique, much as every county is, each Tribe had a unique perspective on how best to strike a balance.

In discussions with the Coeur D'Alene Tribe through Chief Allen as its Chairman, he expressed his Tribe's relative satisfaction with the current (2010) redistricting plan, and indicated that while it split the reservation, it was into two districts that the Tribe had developed a close connection to over the prior decade and

accordingly it afforded the Tribe some measure of electoral representation. He explicitly told the Commission that the Tribe was working well the way the plan was set up now. Final Report, Appendix 3, subpart 15; Allan Declar., ¶ 25. Respondents' twist this as evidence that the Coeur d'Alene Tribe prefers to be divided rather than left whole and the laughable notion the Tribe indicated it would be fine with any way the Commission wanted to divide it up.

Likewise, Respondents' assertion that Chairman Boyer advocated for plans that divided the Tribes into three and four districts is a distortion. Resp. Brf., p. 8-10. The Tribes' white paper unequivocally states: *"The Business Council requests that the Fort Hall Reservation be identified as a community of interest, and to the highest extent, remain whole in the legislative redistricting process."* Boyer Declar., Ex A. While Chairman Boyer recognized that splits may be required, he consistently advocated that the Tribes' population hub be placed in District 30 in Bingham County. Boyer Declar., ¶25.

Respondents' contention that it "reasonably distributed" the Fort Hall Reservation into three districts suffers from the same thinking error that the Commission applied to the Coeur d'Alene Tribe: all splits have the same impact. Resp. Brf., p. 10. Rather than honor its request to place the reservation into one district, or place the majority of its population in Bingham County, Plan L03 fractured the largest Native American community in the state into three separate legislative districts that

span ten counties, and split the reservation's primary hub and population in half. Boyer Declar., ¶¶ 29, 31.

The leadership of the Tribes demonstrated respect and flexibility toward the Commission, and in return they have been shown neither. The hostility to the Tribes reflected in the Commission's response brief is unfortunate. The Tribes ask the Court to remand to the Commission to develop and consider an array of seven-county splits which are possible when the maximum deviation between districts is broadened up to 10%. This would open up many options and allow the Commission to collaborate with the Tribes, as important communities of interest, and as Idaho law requires under I.C. § 72-1506(2).[2] The Commission turned a blind eye to the interests of the Tribes. There was no balancing; the Commission simply disregarded their concerns. It can and must do better.

[2] The Respondents split hairs with the notion neither of the Tribes' Chairmen alleged in their declarations that they brought their claims on behalf of their respective tribes. (Resp. Brf., p. 3, fn. 1, p. 8, fn. 5.) Respondents later concede that the Chairmen each brought the action on behalf of their Tribe. *Id*. at p. 24. Under Idaho law, standing is a low bar in redistricting suits and *any* registered voter, incorporated city or county has standing to challenge a plan. Idaho Appellate Rule 5(b). Ironically, a sovereign tribe lacks standing under Idaho's rules. The Tribes were overlooked, as is customary. Under Rule 5(b), Chairmen Allan and Boyer had to assert standing in their capacity as registered voters.

II.

The Commission should have considered redistricting plans that divided fewer counties than Plan L03, took into account the Tribes' communities of interest, and would still have been presumptively constitutional under the Equal Protection Clause. The Commission erred as a matter of law in adopting Plan L03, and its arguments to the contrary are misplaced.

A. Respondents continue to ignore the importance of the presumption of constitutionality.

Respondents persist in focusing on the wrong thing. They worry excessively about the lack of a "safe harbor" when the maximum deviation is under 10%. They write, "[i]n short, a 10% deviation does not equate to compliance with the Equal Protection Clause because 'a plan whose maximum population deviation is less than ten percent may nonetheless be found unconstitutional.'" Resp. Brf., p.15.

Granted, anything *may* be found unconstitutional. But the Commission must act in the world of probabilities, not in the realm of perfection. It is not tasked with finding a plan that is bullet-proof against any possible Fourteenth Amendment challenge that someone might dream up, no matter how slim its chances. As a general rule, a plan with a 10% or below maximum deviation is a minor statistical disparity that does not concern the Equal Protection Clause, *absent evidence that the deviation is the result of some unconstitutional or irrational state purpose*. *E.g.*, *Bonneville County v. Ysursa*, 142 Idaho 464,

468, 129 P.3d 1213, 1217 (2005) (citing *Rodriguez v. Pataki*, 308 F. Supp.2d 346, 365 (S.D.N.Y 2004)). It is that critical qualifier that Respondents continue to overlook.

There is no evidence that any maps with seven-county splits at or under a 10% maximum deviation were drawn with an unconstitutional or irrational state purpose. That is why *Larios*, on which Respondents rely for their concern about a lack of a "safe harbor," is so inapposite. *Larios v. Cox*, 300 F.Supp.2d. 1320 (N.D. Georgia 2004). In that case, there was overwhelming evidence that districts were drawn to favor certain groups and to disadvantage others. *Id*. at 1327-28, 1342-49. Nothing remotely close to that exists here.

The Commission admitted as much in its Final Report, writing that "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." Final Report, p. 15. In front of this Court, however, it now claims that language lacks "weight." *See* Resp. Brf. to Ada County and Durst, pp. 27-28. [3]

[3] During its review process, the Commission assumed that the public was acting in good faith, but Respondents' briefing is now replete with assumptions of bad faith. For instance, they take what was, at worst, a typographical mistake in Petitioners' brief regarding the words "impractical" and "impracticable" and spin it into some type of nefarious intent. Resp. Brf., p. 13, fn. 7. Petitioners see no need to get bogged down in that type of back-and-forth. But they will note that the accusation is a little rich given that the Commission brushes aside the plain meaning of the very words that it wrote in its own Final Report as immaterial. And, moreover, it attributes its failure to retain any of the important submissions from the Shoshone-Bannock Tribes as merely an

Respondents are equally mistaken when they equate the mere fact that some seven-county plans are near the 10% mark with proof of arbitrariness. Resp. Brf., p. 15. They claim that "aiming solely for a 10% deviation can, in and of itself, suggest a map is unconstitutional because it can be evidence of the very 'arbitrariness' that Petitioners admit dooms a plan under the Equal Protection Clause." *Id*. These plans were not devised "solely" to hit a 10% deviation. They were proposed *both* to comply with United States Supreme Court case law interpreting the one-person, one-vote doctrine *and* to comply with the Idaho Constitution's requirement that counties be split as little as possible. That is reasoned decision-making, not arbitrariness.

Respondents make a similar error in proclaiming that "[t]he 10% line is an evidentiary burden-shifting threshold, nothing more." Resp. Brf., p. 15. But that burden-shifting line is critical to this endeavor. It means that the Commission can adopt a plan that is at or under 10% for the purpose of complying with reasonable state priorities, and that the plan will be presumptively constitutional under the Equal Protection Clause. Only when a challenger can muster weighty evidence and prove that the Commission adopted its plan with an unconstitutional purpose will the challenger have any chance in court. A plan does not become *more* presumptively constitutional the

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"administrative oversight." Resp. Brf., p. 9, fn. 6. Good faith for me but not for thee, apparently.

smaller the statistical maximum deviation between districts is. Like being pregnant, it is either presumptively constitutional or it is not.

B. Third parties have no burden to establish constitutionality when proposing a plan to the Commission.

Probably because there is no evidence in the record that any seven-county split plan was devised with an improper purpose, Respondents try to conjure some. They question the motives of each of these Petitioners, and they even accuse them of hypocrisy. *See*, *e.g.*, Resp. Brf. to Canyon County, p. 1 ("The law does not reward that hypocrisy."). Out of thin air, they create a burden for third parties to prove before the Commission that they harbor no unconstitutional motive in proposing or favoring plans that split fewer counties than Plan L03. *E.g.*, Resp. Brf. to Ada County and Durst, pp. 16-19, 27-32 (setting out the purported detailed evidentiary process that the Commission would need to go through to ensure all plans submitted by the public are free of unconstitutional taint). Respondents worry that the Commission simply does not have the time or the resources to delve into the motives of third parties who propose various plans to ferret out discriminatory intent. *Id*. These concerns are misplaced.

It is not clear why Respondents believe that the Commission would need to go on this evidentiary frolic and detour, because it wouldn't. Their argument turns constitutional law on its head. The Equal Protection Clause of the Fourteenth Amendment provides that no *state* shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. That language distinguishes

between governmental action and private conduct, which is not subject to the Fourteenth Amendment's prohibitions. *Jackson v. Metro. Edison Co*., 419 U.S. 345, 349 (1974). There is no burden on any third party to establish to the Commission's liking during its redistricting hearings that a proposed plan is constitutional, just as there is no obligation on any citizen making a recommendation to any other governmental body to do so. It is the *Commission*'s actions and intentions as a state actor, and not third parties', that are relevant. If there is no evidence that the Commission has adopted a final plan with an improper motive or intent, then it does not matter why some random member of the public may have proposed it. It follows that the Commission has no duty to dig into the motives of every proposed or potential plan when nothing appears untoward on the surface.

Respondents are chasing ghosts. The Commission does not have, and would not have, any obligation to investigate the motives of third parties, or conduct elaborate evidentiary hearings with discovery and the like, to ensure the constitutionality of every submitted plan. If the contrary were true, public participation would be chilled. Idaho law demands the opposite: it fosters transparency and welcomes the public's input in the process. I.C. § 72-1505(4) ("The commission shall hold meetings in different locations in the state in order to maximize the opportunity for public participation.")

C. Regional disparities, without more, are not unconstitutional.

Which leads to Respondents' concerns about "regional favoritism." Resp. Brf., pp. 1, 2, 14, 16, 18. Respondents accuse the challengers of proposing or favoring seven-county plans that "engage in regional favoritism by under-populating districts in northern Idaho and over-populating districts in southern Idaho." Resp. Brf., p. 18.

Bonneville County v. Ysursa addressed this concern, and not in Respondents' favor. There, various county boards of commissioners, voters, and state representatives, challenged the Commission's final redistricting plan based on the 2000 U.S. Census. 129 P.3d at 1215. They argued that the plan, which had a maximum deviation of 9.71%, favored north Idaho at the expense of southwest and southeast Idaho because the northern districts were underpopulated relative to the other regions. *Id*. at 1217. The plan's maximum deviation was under 10%, so this Court first held that it was presumptively constitutional, but noted that it could still be unconstitutional if "a challenger can demonstrate that the deviation results from some unconstitutional or irrational state purpose." *Id.* (citing *Rodriguez v. Pataki*, 308 F. Supp.2d 346 at 365). It found that the challengers had not done so.

In reaching its conclusion, the Court relied on *Rodriguez* for the principle that, in the absence of evidence of an improper purpose, "a plan that arguably favored one region of the state over another but remained within the ten percent margin was not unconstitutional." 129 P.3d at 1218. Confronting a claim much like the one Respondents

make here, the Court found "no authority for the argument that the Commission had a duty to spread negative deviations as evenly as possibly across the state." *Id*. at 1219. It determined that "a regional deviation, by itself, is not enough to overcome the presumption of constitutionality." *Id*.

In Idaho, this conclusion aligns with common sense and practical realities on the ground. Because of the irregular shape of the state and its uneven population distribution, it is difficult to draw district lines in north Idaho without somewhat under-populating those districts while still complying with the minimal county split requirement and recognizing communities of interest. Regardless, there is simply no evidence that any of the rejected plans before the Commission with a maximum deviation at 10% or below were designed with an intent to favor north Idaho. The more obvious conclusion is that they were drawn with an eye toward complying with the United States Constitution, art. III, § 5 of the Idaho Constitution, and Idaho Code § 72-1506(2).[4] "Regional favoritism" is a red herring that was pulled across the Court's path to distract it from the real issues.

[4] At one point in their brief, Respondents refer to the Court's off-hand statement in *Bonneville County* that "we can find no outright prohibitions against splitting an Indian reservation." Resp. Brf., p. 20 (citing 129 P.3d at 1221.) Of course, Petitioners make no such argument here. They instead argue that they are at least a "community of interest" that must be kept whole to "the maximum extent" possible under Idaho Code § 72-1506(2). That argument was neither made nor decided in *Bonneville County* because the tribes were not parties to that case, as this Court noted. 129 P.3d at 1221.

III.

The Court should award attorney fees if the Tribes' redistricting challenge is successful.

The Tribes have requested an award of attorney fees under the private attorney general doctrine. Just as the Court has done in several other redistricting challenges, if successful, a fee award is appropriate. *Smith v. Idaho Comm'n on Redistricting*, 136 Idaho 542, 545-546, 38 P.3d 121, 124-125 (2001); *Hellar v. Cenarrusa*, 106 Idaho 571,577-579, 682 P.2d 524, 530-532 (1984); *Hellar v. Cenarrusa*, 106 Idaho 586, 591, 682 P.2d 539, 544 (1984). A decision in the Tribes' favor would inure to the benefit of all citizens of this state by ensuring that all districts are drawn in accordance with the Idaho Constitution and statutes.

CONCLUSION

Several plans were before the Commission that were presumptively constitutional under the Fourteenth Amendment and complied with state constitutional and statutory requirements. Many other seven-county split plans could have also been created and reviewed if the Commission exercised the full measure of discretion the Equal Protection Clause affords it, and considered plans with a higher but constitutionally permissible deviation.

Yet, the Commission chose a plan that violates the Idaho Constitution and Idaho Code § 72-1506 to follow an illusory "polestar." Respectfully, this Court should remand

to the Commission for it to try again, this time giving the Tribes the respect that their strong communities deserve under Idaho law.

Respectfully submitted on this 7th day of January 2022.

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CERTIFICATE OF SERVICE

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