

**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,

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

Petitioner,

v.

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

Respondents,

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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,

Supreme Court Dkt. Nos. 49261-2021

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

Respondents,

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CHIEF J. ALLAN, a registered voter of the State of Idaho and Chairman of the Coeur d'Alene, Tribe, and DEVON BOYER, a registered voter of the State of Idaho and the Shoshone-Bannock Tribes,

Petitioners,

v.

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

Respondents.

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**RESPONDENTS IDAHO COMMISSION FOR REAPPORTIONMENT AND  
LAWRENCE DENNEY'S RESPONSE BRIEF TO PETITIONERS  
CHIEF J. ALLAN AND DEVON BOYER**

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## I. INTRODUCTION

Petitioners Chairmen Allan and Boyer advance erroneous constitutional arguments and demonstrate a fundamental misunderstanding of the reapportionment analysis the Idaho Commission for Reapportionment (“Commission”) actually employed as cover for the core of their claims: a belief that reservations should be given preferential treatment over all other political communities. Chairmen Allan and Boyer first ignore the importance of the Equal Protection Clause in the U.S. Constitution, ridiculing the Commission’s “honest and good faith effort to construct districts . . . as nearly of equal population as is practicable,” *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), and mischaracterizing the Commission’s work as a mindless search for the lowest possible deviation. But the Commission did not set an arbitrary 5% goal nor did it seek to get to 0% deviation. The Commission properly worked within the framework of the Equal Protection Clause’s presumption of constitutionality to strive for a balanced deviation of no more than +5% or less than -5%, unless justified by compelling reasons. By doing so, the Commission avoided fatal equal protection infirmities, such as the regional favoritism demonstrated by the seven-county-split maps like Plan L079. It is Petitioners’ desire to cast aside the pursuit of equality required by the Equal Protection Clause in favor of drawing a map as close to a 10% deviation as possible that is constitutionally infirm, not the other way around.

Chairmen Allan and Boyer next misapply the Idaho Constitution. They assert that Plan L078 divides seven counties and thus must be adopted over Plan L03. In reality, Plan L078 divides eight counties—the same as Plan L03—meaning the Commission had discretion to adopt Plan



L03. And as the Commission explained in its prior briefing, Plan L079 appears impermissibly drawn solely to have a 10% deviation while also engaging in regional favoritism by under-populating the six northernmost districts and over-populating almost every other district. Petitioners' belated briefing-stage endorsement of these seven-county-split maps does not serve their end of forcing the Commission back to the drawing board to draw districts they like better.

Given that neither the U.S. nor the Idaho Constitution required the Commission to select Plan L078 or Plan L079, the "Commission had a choice to make" about how to balance the various statutory preferences including "keeping intact [communities] of interest." *Bonneville County v. Ysursa*, 142 Idaho 464, 472, 129 P.3d 1213, 1221 (2005). There are "no outright prohibitions against splitting an Indian reservation," so the Commission treated the reservations the same as all other political communities, balanced the competing interests around the entire state, and drew the districts accordingly. *Id.* at 475, 129 P.3d at 1221. Indeed, Chairman Allan and another representative of the Coeur d'Alene Tribe told the Commission that they desired splitting the tribe into two districts, when at least one Commissioner had intended to explore keeping the tribe together. And Chairman Boyer advocated for plans that split the Shoshone-Bannock Tribes between three and even four districts. Yet, now Chairmen Allan and Boyer sue the Commission for splitting the Coeur d'Alene Tribe into two districts and the Shoshone-Bannock Tribes into three districts. They would apparently prefer districts drawn a bit more to their liking, so they ask the Court to micromanage the redistricting process and supplant their discretion over the Commission's discretion at the expense of other communities of interest. That request is improper, and Chairmen Allan and Boyer's claims fail.

## II. STATEMENT OF THE CASE

This is an original proceeding filed by Petitioners Chairman Chief J. Allan and Chairman Devon Boyer under article III, section 2(5) of the Idaho Constitution and Idaho Code § 72-1509(1) challenging legislative redistricting Plan L03. For the sake of brevity, Respondents incorporate the Statement of the Case previously set forth in the Corrected Respondents Idaho Commission for Reapportionment's and Lawrence Denney's Response Brief ("Corrected Response Brief to Durst and Ada County"). *See id.* at 2–14. Respondents add the following statements unique to Chairmen Allan and Boyer and the challenged portions of Plan L03.

### **A. Chairman Allan advocated before the Commission for dividing the Coeur d' Alene Tribe between two districts.**

Chairman Allan is a registered voter from the state of Idaho and the Chairman of the Tribal Council of the Coeur d'Alene Tribe.<sup>1</sup> Verified Petition for Review of the Idaho Commission for Reapportionment's Plan L03 and for a Writ of Prohibition ("Allan Petition") at ¶ 3. The Coeur d'Alene Tribe exercises sovereignty over a 350,000 acre reservation located in northern Idaho. *Id.* The Coeur d'Alene Reservation is located in Benewah and Kootenai Counties. Allan Petition at ¶ 12; Final Report, Appendix ("App.") XI at 7. Chairman Allan does not identify the total population of the Coeur d'Alene Tribe living on the reservation, nor the number of non-tribal members who live on the reservation, nor the distribution of the tribe's on-reservation population

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<sup>1</sup> Despite making arguments about tribal interests, rather than his own, Chairman Allan does not represent that he brings a claim on behalf of the Coeur d'Alene Tribe. Allan Petition at ¶ 3; Declaration of Chief J. Allan in Support of a Verified Petition for a Writ of Prohibition, at ¶¶ 1-3.

between Benewah and Kootenai Counties. *See* Declaration of Chief J. Allan in Support of a Verified Petition for a Writ of Prohibition.

Chairman Allan spoke to the Commission at the September 23, 2021 meeting in Plummer. Final Report, App. III, Sept. 23, 2021 Plummer Minutes (1:00 p.m.). Chairman Allan stated that the tribe was working well the way the plan was currently set up with the tribe split between two districts.<sup>2</sup> *Id.* at 1. Chairman Allan testified there had never been a connection to cities such as Moscow or Clearwater; he wanted to keep the connection between Kootenai County and the Post Falls area. *Id.* At that meeting, Co-Chair Davis indicated he wished to explore keeping the tribe as self-contained as possible, such as in one legislative district, and asked Chairman Allan for clarification. *Id.* Chairman Allan responded that he “liked the tribe being split between two districts/counties.” *Id.* He added that lots of tribal members were split between two counties, so a two-county split made sense. Co-Chair Davis expressed his appreciation for the testimony, “noting he would have gone in another direction with it.” *Id.* Tyrel Stevenson, Legislative Director for the Coeur d’Alene Tribe, provided testimony that the tribe was largely employed in Post Falls and Coeur d’Alene and that there was a community of interest based on that connection. *Id.* at 2. Like Chairman Allan, Mr. Stevenson did not advocate a singular community of interest defined by the boundaries of the Coeur d’Alene Reservation. *Id.*

The Commissioners took Chairman Allan’s testimony to heart. *Id.* (“[Co-chair] Schmidt echoed [Co-chair] Davis’s prior comment that the commission had thought the tribe would like to

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<sup>2</sup> The prior legislative redistricting plan divided the Coeur d’Alene Reservation between one district in Benewah County and two districts in Kootenai County. Final Report, App. XIV at 3.

be kept together in one district, but that Chief Allan’s testimony stated that was not the case”); Final Report, App. III, Sept. 23, 2021 Moscow Minutes (7:00 p.m.) (In response to Hailey Lewis’s testimony that the tribes could be “better represented by one district, rather than being split among three as in the current configuration,” Co-chair Schmidt “replied that the commission felt it was important to try and keep tribal populations in one district, but the chairman of the Coeur d’Alene Tribe mentioned that the tribal population felt it could actually have better representation by being in multiple districts.”).

On November 3, 2021, Chairman Allan submitted a letter to the Commission expressing disagreement with Plan L02 and describing Plan L01 as “present[ing] a far more sensible apportionment of North Idaho”. Final Report, App. XIII at 191-92. Just like Plan L03, Plan L01 divided the Coeur d’Alene Reservation between two districts. *Compare* Final Report, App. XI at 7 (Plan L03) (dividing reservation land between District 5 (part of Kootenai County) and District 2 (part of Kootenai, part of Bonner, Shoshone, Benewah and Clearwater Counties)) *with* Final Report, App. XI at 5 (Plan L01) (dividing reservation land between District 5 (part of Kootenai County) and District 2 (part of Kootenai, Clearwater, Shoshone and Benewah Counties)).

**B. Consistent with Chairman Allan’s expressed wishes, the Commission divided the Coeur d’Alene Reservation into two districts.**

The Commission divided the Coeur d’Alene Reservation between Districts 2 and 5 when it adopted Plan L03.

District 2 in Plan L03 contains portions of Bonner and Kootenai Counties and all of Benewah, Shoshone and Clearwater Counties. Final Report at 31. District 2 has a total population

of 52,071, deviating by -0.9% from ideal district size. Final Report at 31-32. It is unclear how many tribal members are included in this district, but only 5,556 Bonner County residents and 15,082 Kootenai County residents are included in this district with the populations of the three whole counties. *Id.* at 32. Chairman Allan fails to identify the number of tribal members that are included in District 2. *See generally* Allan Petition.

The Commission determined that the creation of District 2, a geographically large, multicounty district, was necessitated by “equal protection standards and the Idaho Constitution’s requirement to keep counties whole where possible.” Final Report at 32. Benewah, Shoshone and Clearwater Counties were all too small to form self-contained districts, requiring combination with other counties to form districts of acceptable size. *Id.* at 32. Together, Benewah, Shoshone, and Clearwater Counties have a total population of 31,433 and therefore must be combined with more populous areas. Final Report, App. V at 5. A portion of Bonner County was therefore combined with these counties to lend necessary population and to distribute excess population from the Boundary-Bonner County district (a portion of Bonner County had to be combined with Boundary County to create a district with Boundary County, as described more fully in the Final Report and in Respondents’ prior briefing). Corrected Response Brief to Durst and Ada County at 7-8; Final Report at 21-23, 32-33 (Findings 3.E and 4.A). A portion of Kootenai County was combined

because Kootenai County had to be split externally,<sup>3</sup> and the excess population had to be combined with a contiguous county. *Id.*

The Commission recognized District 2 combined multiple communities of interest. Final Report at 32. However, it found “that the areas included in District 2—primarily rural or small communities—share similar legislative concerns. The Commission further [found] that this district preserves traditional neighborhoods and local communities of interest to the maximum extent possible.” *Id.* Throughout its report, the Commission found that “communities of interest” meant, among other things, “tribal reservations.”<sup>4</sup> *Id.* at 25.

District 5 in Plan L03 is an internal district in Kootenai County, a product of the need to divide Kootenai County to reach acceptable district size and the Idaho Constitution’s mandate to minimize county splits. Final Report at 37-38. It has a population of 51,943, with a deviation of -1.15% from ideal district size. *Id.* at 37. “District 5 includes most of Post Falls, which, as a city, is a community of interest.” *Id.* It “also includes five rural precincts with a total population of 8,303, which must be combined with a nearby urban population to reach an adequate district

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<sup>3</sup> If Kootenai County had been made into three wholly internal districts, the districts would be over-populated by 8.7% deviation. Final Report at 21. Four wholly internal districts would each be under-populated by -18.5% deviation. Final Report at 21–22.

<sup>4</sup> Petitioners misattribute a comment made in a third-party submission by Dan English to the Commission. *See* Petitioners’ Opening Brief (“Allan Brief”) at 5; Final Report, App. XII at 45. This is not to say that the Commission did not take the tribes’ interests seriously, because it patently did. *See, e.g.*, Final Report at 25 n.62.

size.” *Id.* The Commission found that “this district preserves traditional neighborhoods and local communities of interest [i.e. tribal reservations] to the maximum extent possible.” *Id.*

**C. Chairman Boyer advocated before the Commission for plans that divided the Fort Hall Reservation into three and four districts.**

Chairman Boyer is a registered voter from the state of Idaho and the Chairman of the Fort Hall Business Council, the governing body for the Shoshone-Bannock Tribes.<sup>5</sup> Allan Petition at ¶ 4. The Shoshone-Bannock Tribes exercise sovereignty over a 544,000 acre reservation located in southeastern Idaho—the Fort Hall Reservation. *Id.* The reservation falls within Bingham, Power, Bannock, and Caribou Counties. Declaration of Devon Boyer in Support of a Verified Petition for a Writ of Prohibition (“Decl. Boyer”) at ¶ 18.

Chairman Boyer spoke to the Commission at its meeting at the Fort Hall Reservation on October 6, 2021. Final Report, App. III, Oct. 6, 2021 Fort Hall Minutes (1:00 p.m.). Chairman Boyer proposed a minority legislative district based on Idaho’s tribal reservations that would provide a nonvoting member to the Idaho legislature. *Id.* at 2. He further stated that the tribes would prefer more representation. *Id.* Commissioner Mitchell inquired if the reservation was in four counties and as to the population of the tribe, and Chairman Boyer stated the numbers would be provided to the Commission. *Id.*

The Shoshone-Bannock Tribes submitted a white paper to the Commission on October 13, 2021 apparently commenting on Plan L01, which represented that the Business Council was

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<sup>5</sup> As with Chairman Allan, Chairman Boyer does not represent that he is acting on behalf of the Shoshone-Bannock Tribes.

“leaning toward aligning with Bingham County, based on strong relations with the county,” supported extending District 29 to the Fort Hall Reservation via the eastern or western side of Bannock County, and supported extending District 29 west to include the western and southern portions of the Fort Hall Reservation.<sup>6</sup> Ex. A to Decl. Boyer at 1. Instead of identifying tribal population on the reservation by county by individual (the Census data was not yet available to the tribes), the white paper identified the number of tribal residences on the reservation by county. *Id.* at 2-3. It also stated that about half of reservation voters lived in Bingham County and about half of reservation voters lived in either Bannock or Power County. *Id.* at 3. It noted that “not all tribal members live on the reservation” and that off-reservation constituents had different interests than on-reservation constituents. *Id.* The white paper also identified that the estimated on-reservation population of approximately 5,800 people included “tribal members, non-tribal members and non-Indians.” *Id.* The white paper identified Plan L014, which split ten counties and had a 9.73% deviation, as an attractive option. *Id.* at 4; L014 County Splits Report; L014 Population Summary Report. Plan L014 divided the Fort Hall Reservation into three districts. Final Report, App. XII at 56 (Districts 29, 27, and 30). Contrary to Petitioners’ current arguments, the white paper acknowledged that Idaho law “does not recognize Indian reservation boundaries in the reapportionment process.” Ex. A to Decl. Boyer at 4.

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<sup>6</sup> As a result of an administrative oversight, neither the October 13, 2021 white paper nor the Business Council’s subsequent letter to the Commission were included with the other public submissions in Appendix XIII to the Final Report.



The Business Council later submitted a letter to the Commission objecting to the proposed Plan L02. Ex. B to Decl. Boyer. The Business Council objected to the boundary between proposed Districts 28 and 30. It advocated for pulling the boundary of the district containing Bingham County south to include the Fort Hall population living in Bannock County near the border with Bingham County. *Id.* The Business Council identified Plan L082 as a plan that achieved its desired goal while splitting only eight counties. *Id.* Plan L082 had a 9.62% deviation and divided the Fort Hall Reservation between four districts. L082 Population Summary Report; Final Report, App. XII at 124 (Districts 31, 32, 29, and 27).

**D. The Commission reasonably distributed the Fort Hall Reservation into three districts.**

The Commission “sincerely wished to accommodate the request of the Shoshone-Bannock Tribes to combine most of the reservation in a district with Bingham County” but found that the superior requirements of the U.S. and Idaho Constitutions prevented it from doing so. Final Report at 25 n.62; *see also id.* at 112. The Commission adopted Plan L03, in which the Fort Hall Reservation is contained in just three districts (Districts 28, 30 and 35). *See* Final Report, App. XI at 7.

District 28 is a multicounty district that combines Power and Franklin Counties and a portion of Bannock County. Final Report at 81. The district’s population is 51,270, which deviates -2.43% from ideal district size. *Id.* The Commission found that “equal protection standards and the Idaho Constitution’s requirement to keep counties whole where possible” necessitated the creation of this district, which combined multiple communities of interest. *Id.* at 82. The Commission’s findings are set forth in greater detail in the Respondents Idaho Commission for

Reapportionment’s and Lawrence Denney’s Response Brief to Petitioner Spencer Stucki (“Response Brief to Stucki”); in brief, the population distribution of eastern Idaho is such that the populous counties are clustered together and surrounded by less populous counties, meaning that the population of the more populous counties must be broken into multiple districts and combined with population in less populous counties, and the geography limits available combinations. Response Brief to Stucki at 11–12; *see also* Final Report at 82-83.

District 30 is composed of Bingham and Butte Counties. Final Report at 86. Its population is 50,566, which deviates -3.77% from ideal district size. *Id.* The two counties had to be combined to create a district with acceptable population. *Id.* at 86–87. The Commission again found that equal protection standards and the Idaho Constitution’s requirement to keep counties whole to the extent possible required the creation of this district, which combined multiple communities of interest. *Id.* at 86. The Commission found that “this district preserves traditional neighborhoods and local communities of interest [including tribal reservations] to the maximum extent possible.” *Id.* at 25, 86.

District 35 is composed of three counties—Teton, Caribou and Bear Lake—and portions of Bonneville and Bannock Counties. Final Report at 93. It has a population of 50,982 for a deviation of -2.98%. *Id.* This district was again driven by the population clusters in eastern Idaho, the Idaho Constitution’s requirements to minimize county divisions where possible, and Idaho’s geographic and political boundaries. *Id.* at 94. As discussed in greater detail in the Response Brief to Stucki, Bonneville and Bannock Counties had to be split externally because of their populations and they had to be combined with under-populated contiguous counties—Bear Lake, Caribou, and

Bonneville. Response Brief to Stucki at 10–11; *see also* Final Report at 94. While this district combined multiple communities of interest, the Commission found that “the areas included in District 35, primarily small and rural communities, share similar legislative concerns.” Final Report at 94. The Commission found, “this district preserves traditional neighborhoods and local communities of interest to the maximum extent possible.” *Id.*

Now, apparently dissatisfied with the districts the Commission drew in Plan L03, Chairmen Allan and Boyer seize on new arguments and previously ignored plans to argue that the Court should scrap Plan L03 and order the Commission back to the drawing board. The Court should reject this opportunistic and meritless challenge.

### **III. STANDARD OF REVIEW**

Respondents incorporate the Legal Standard for Redistricting as set forth in their Corrected Response Brief to Durst and Ada County. *Id.* at 14–16. In short, the legal hierarchy that governs redistricting is as follows. First, the Plan must comply with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, which requires districts to be as equal in population as practicable while allowing for some deviation to achieve a legitimate state consideration. *Twin Falls County v. Idaho Com’n on Redistricting*, 152 Idaho 346, 348, 271 P.3d 1202, 1204 (2012); *see also* Corrected Response Brief to Durst and Ada County at 16–19. Second, the Plan must comply with the requirements of the Idaho Constitution, which prohibits the division of counties except to the extent necessary to meet the requirements of the U.S. Constitution. *Twin Falls County*, 152 Idaho at 349, 271 P.3d at 1205. Finally, the Plan must comply with Idaho’s statutes to the extent that it is able given the constitutional requirements. *Id.*

#### IV. ARGUMENT

##### A. Chairmen Allan and Boyer misunderstand the Equal Protection Clause and the analysis the Commission employed.

Chairmen Allan and Boyer’s arguments related to the Equal Protection Clause rest only on their misreading and mischaracterization of the Commission’s Final Report and the case law governing the Equal Protection Clause’s one-person, one-vote requirement.<sup>7</sup> Once one actually reads the Final Report and the case law, it is clear that Petitioners’ arguments are baseless.

The Commission did not mindlessly bind itself to reaching “the smallest maximum deviation [ ] possible.” Petitioners’ Opening Brief (“Allan Brief”) at 8. Chairmen Allan and Boyer admit that, as carefully detailed in the Final Report and discussed in Respondents’ Corrected Response Brief to Durst and Ada County, the Equal Protection Clause requires the Commission to put forth an “honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.” *Reynolds*, 377 U.S. at 577; Final Report at 5–7; Allan Brief at 9–10. And that was what the Commission did. The Commission correctly “determined that a good faith effort to

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<sup>7</sup> Indeed, Chairmen Allan and Boyer’s misunderstanding of the Commission’s analysis of the equal protection issue is so great it could only be intentional. For example, they mischaracterize the Commission’s description of its struggle to accommodate the Shoshone-Bannock Tribes by representing that the Commission characterized the issue as an “impractical problem.” Allan Brief, at 5. “Impractical” means “not wise to put into or keep in practice or effect.” *Impractical*, MERRIAM-WEBSTER.COM DICTIONARY <https://www.merriam-webster.com/dictionary/impractical> (last visited December 30, 2021). “Impracticable,” the word the Commission actually used, means “not practicable: incapable of being performed or accomplished by the means employed or at the command.” *Impracticable*, MERRIAM-WEBSTER.COM DICTIONARY <https://www.merriam-webster.com/dictionary/impracticable> (last visited December 30, 2021); Final Report at 25 n.65. In other words, the Commission did not say that it was unwise to accommodate the Shoshone-Bannock Tribes. It said that it was impossible to do so in light of the constraints placed upon it by the U.S. and the Idaho Constitutions.

achieve voter equality . . . required staying as close *as possible* to the ideal district size *while still effectuating state policy*.” Final Report at 10–11 (emphasis added).

The Commission expressly rejected any strict numerical touchstone. *See* Final Report at 6 (“This constitutional requirement for substantial equality does not demand an ‘unrealistic overemphasis on raw population figures’ or a ‘mere nose count’ in the districts”); *id.* at 7 (discussing the impropriety of using a 10% deviation “safe harbor”). Creating a framework to work through the redistricting puzzle, the Commission quite reasonably worked from the presumption that it would not craft a district of greater than 5% (positive or negative) deviation without a compelling justification given its concerns that a district with greater than 5% deviation either way would put pressure on other districts to have minimal deviations and that creating lopsided deviations would result in arbitrary and inconsistent applications of state policy and regional favoritism. *Id.* at 11. By no means did the Commission set an arbitrary numerically-based restriction. *Id.*

Despite admitting that *Reynolds v. Sims* required the Commission to strive for equality, rather than a strict numerical threshold, Chairmen Allan and Boyer make the very mistake they accuse the Commission of making, arguing that the Commission should instead have been striving to hit an arbitrary 10% deviation. *See* Allan Brief at 10–11. Petitioners force together unrelated strands of case law to incorrectly argue that a deviation at or below 10% is a safe harbor. *Id.* (taking two different uses of the phrase “substantial” in two different cases to incorrectly argue that a 10% deviation demonstrates compliance with the Equal Protection Clause). As Respondents explained in their response to Petitioners Durst and Ada County and as the Commission explained in its Final

Report, this myopic focus on a 10% deviation is improper. Final Report at 7. For the sake of brevity, the Commission hereby incorporates the relevant portions of its prior briefing. *See* Corrected Response Brief to Durst and Ada County at 16–19, 23–24. In 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.” *Bonneville County*, 142 Idaho at 468, 129 P.3d at 1217. In fact, 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. Allan Brief at 10; *see, e.g., Perez v. Abbott*, 250 F. Supp. 3d 123, 202 (W.D. Tex. 2017); *Kueber v. City of San Antonio*, 197 F. Supp. 3d 917, 926 (W.D. Tex. 2016). The 10% line is an evidentiary burden-shifting threshold, nothing more.

But Chairmen Allan and Boyer don’t stop at 10% deviation. They apparently would have the Commission adopt a state redistricting plan with up to an 89% deviation based on a misreading of the U.S. Supreme Court’s decision in *Brown v. Thompson*, 462 U.S. 835, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983). Allan Brief at 11–12. The U.S. Supreme Court expressly disclaimed the very ruling Petitioners argue. In *Brown v. Thompson*, the Court addressed a challenge that was specifically limited to the alleged dilution of voting power from one representative being assigned to a specific county. *Id.* at 846. The Court did not decide “whether a 16% average deviation and an 89% maximum deviation, considering the state apportionment plan as a whole, [was] constitutionally permissible. Rather, the issue was whether Wyoming’s policy of preserving county boundaries justif[ied] the additional deviations from population equality resulting from the

provision of representation to Niobrara County.” *Id.* Indeed, the Idaho Supreme Court has repeatedly struck down plans with greater than 10% deviation on equal protection grounds. *Smith v. Idaho Com’n on Redistricting*, 136 Idaho 542, 545 (2001) (10.69%); *Bingham County v. Idaho Com’n on Reapportionment*, 137 Idaho 870, 877, 55 P.3d 863, 871 (2002) (11.79%); *Hellar v. Cenarrusa*, 106 Idaho 586, 590 (1984) (32.94%).

The Commission properly recognized and utilized the “play in the joints” allowed by the Equal Protection Clause to achieve state policy goals. *See* Final Report at 7-9. The Commission deviated from equal population “in service to” the “rational” state policy of minimizing county splits, “legitimately applied,” and ultimately concluded that the fewest number of counties it could split and still comply with the Equal Protection Clause was eight, as discussed in the Final Report, the Corrected Response Brief to Durst and Ada County, and below. *Id.* at 10–19; Corrected Response Brief to Durst and Ada County at 21–37. Far from demanding 0% deviation, the Commission determined that external splits were required to avoid substantial single district deviations, such as 65.6%, 55.3% and -14.3%, and to ensure that the policy of minimizing county splits was not applied in an arbitrary fashion or in a fashion that would result in regional favoritism.<sup>8</sup> Final Report at 13–25; *see also* Appendix A to this brief (demonstrating the regional favoritism inherent in the seven-county-split plans). When the Commission encountered tension

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<sup>8</sup> Petitioners’ argument about improper purpose is unclear. They appear to be arguing that the Commission should have evaluated whether it was acting with an improper purpose to determine whether it could have exceeded a 10% deviation. *See* Allan Brief at 11. But again, 10% deviation is neither a safe harbor nor an appropriate goal for the purposes of Equal Protection. The Commission drew districts as close to equal as practicable while minimizing the number of county splits necessary to comply with the Equal Protection Clause.

between the Equal Protection Clause and the Idaho Constitution’s requirement to minimize county divisions, it correctly deferred to the superior requirements of the Equal Protection Clause. Final Report at 24; *Twin Falls County*, 152 Idaho at 348, 271 P.3d at 1204 (“The United States Constitution is the paramount authority; the requirements of the Idaho Constitution rank second . . .”). The Commission’s efforts ensure every Idahoan has as close to an equal vote as practicable, regardless of where he or she lives, while still effectuating the Idaho Constitution’s preference for minimizing county divisions.

**B. Plan L03 satisfies Idaho’s constitutional requirement of splitting only the number of counties necessary to comply with the Equal Protection Clause.**

Despite Chairman Boyer’s advocacy before the Commission for Plan L014 (ten counties split) and Plan L082 (eight counties split) and Chairman Allan’s advocacy for Plan L01 (eight counties split), Chairmen Allan and Boyer now advocate for Plans L078 and L079—apparently because they believe these are seven-county-split maps that will force the Commission back to the drawing board.<sup>9</sup> But neither Plan L078 nor Plan L079 provide a basis for this Court to set aside Plan L03.

Plan L078 cannot justify setting aside Plan L03 as it splits eight counties: Ada, Bannock, Bonner, Bonneville, Canyon, Kootenai, Nez Perce, and Twin Falls. The Commission has discretion to select between plans that split the same number of counties. *Twin Falls*, 152 Idaho at 351, 271 P.3d at 1207. The Commission did not violate article III, section 5 of the Idaho

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<sup>9</sup> The fatal flaws with the other seven-county-split plans submitted to the Commission are described in Respondents’ Corrected Response Brief to Durst and Ada County. *Id.* at 23–32; see also Appendix A to this brief.



Constitution by selecting Plan L03 over Plan L078. And even if Plan L078 split seven counties, it violates equal protection, as demonstrated by (1) the fact that it was apparently drawn to fall just below 10% deviation and (2) the regional favoritism seen in the under-population of northern and southeastern Idaho districts compared to the over-population in southwestern Idaho districts. *See* Final Report, App. XII at 120; L078 Population Summary Report; Appendix A to this brief at 6.

As for Plan L079, while it splits one fewer county than Plan L03, the Commission is required to split fewer counties only when a competing plan demonstrates that fewer counties can be split while complying with the Equal Protection Clause. *Twin Falls*, 152 Idaho at 349, 271 P.3d at 1205. As the Commission has already explained, the Commission reasonably concluded that Plan L079 violated the Equal Protection Clause, not because of any improper focus by the Commission on reaching the smallest deviation possible, but because, among other things, it appears to (1) have been drawn solely to create districts just under 10% deviation instead of to create districts with as equal population as practicable, and (2) to engage in regional favoritism by under-populating districts in northern Idaho and over-populating districts in southern Idaho. Corrected Response Brief to Petitioners Durst and Ada County at 23–32; *see also* Appendix A at 7. As previously discussed in the Response Brief to Durst and Ada County, the Commission’s lack of tools to evaluate whether Plan L079’s districts were drawn for an improper purpose does not immunize Plan L079 from scrutiny under the Equal Protection Clause just because Plan L079 skirted in at 10% deviation. *See* Corrected Response Brief to Petitioners Durst and Ada County at 27–32. Plan L079 reasonably caused the Commission to conclude that it was invalid under the U.S. Constitution. That is sufficient for the Commission and this Court to conclude that there was

no evidence before the Commission that it could have split fewer than eight counties and still complied with the Equal Protection Clause.

**C. Plan L03 complies with Idaho Code § 72-1506.**

Given that Plan L03 complies with the U.S. and Idaho Constitutions, this challenge really boils down to whether the Commission properly preserved the reservations as local communities of interest. Petitioners' request is an improper request to "micromanage all the difficult steps the Commission must take in performing the high-wire act that is legislative district drawing." *Bonneville County*, 142 Idaho at 472, 129 P.3d at 1221.

But even if the Court felt inclined to micromanage, Chairmen Allan and Boyer's challenge fails. Idaho Code does not mandate that the Commission must preserve all local communities; it directs the Commission to preserve them to "the maximum extent possible." Idaho Code § 72-1506(2). Contrary to Petitioners' assertion, the Commission did carefully consider the tribes' communities of interest. The Commission found that it had preserved the tribal reservations at issue to the extent practicable in light of the superior requirements of the U.S. and Idaho Constitutions. Final Report at 25, 32, 37-38, 82-83, 86, 94. Petitioners' beef is with the law governing redistricting, not the Commission's good faith efforts.

As previously discussed, Idaho is composed of 44 counties but can only be reapportioned into 35 legislative districts. Those districts must be drawn to contain populations as close to equal population as practicable while splitting counties only to the extent necessary to comply with the Equal Protection Clause. The Idaho Constitution prohibits splitting counties for the purpose of keeping reservations whole. In *Twin Falls County*, the Court struck down a plan wherein the

Commission “had placed great emphasis on keeping traditional Native American populations intact throughout Idaho” because the Commission had split counties for a reason other than compliance with the U.S. Constitution. Appendix B<sup>10</sup> at 10–11, 19–20 (internal pagination); *Twin Falls County*, 152 Idaho at 349-51, 271 P.3d at 1205-07. Thus, for example, keeping the Fort Hall Reservation—which lies in Bingham, Bannock, Power and Caribou Counties—whole would have violated the Idaho Constitution because it would have required an additional county split to do so. *Twin Falls*, 152 Idaho at 349, 271 P.3d at 1205. It also would have violated the Idaho Constitution for the Commission to split Bannock County to place the northern half of the Fort Hall Reservation that lies in Bannock County in a district with Bingham County because this division would have been for the prohibited purpose of keeping a community of interest whole, not for the purpose of complying with the Equal Protection Clause. *See id.*

It is impossible to draw a plan that perfectly preserves every community of interest. Rather, the “Commission had a choice to make” about how to balance the needs of all communities while considering the other statutory guidelines as well. *Bonneville County*, 142 Idaho at 472, 129 P.3d at 1221. When balancing those interests, reservations must be treated the same as all other communities. There are “no outright prohibitions against splitting an Indian reservation.” *Id.* at 475, 129 P.3d at 1221. Petitioners’ suggestion that reservations are entitled to a greater right to preservation, like counties are granted in the Idaho Constitution, has no basis in Idaho redistricting law.

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<sup>10</sup> Appendix B is composed of the relevant pages of the Petitioner’s brief and the Respondents’ brief filed in *Twin Falls County*.

The plans for which Chairmen Allen and Boyer now advocate show the impossibility of keeping the reservations whole. Plan L078 keeps the Coeur d’Alene Reservation whole, but it divides the Fort Hall Reservation into three districts, just as Plan L03 does. It splits the Nez Perce Reservation into two districts. Plan L079 splits the Coeur d’Alene Reservation into two districts and the Fort Hall Reservation into three. It splits the Nez Perce Reservation into two districts.

And comparing the plans for which Chairman Boyer advocated before the Commission against Plan L03, Plans L014, L082 and L03 all keep the western half of the Fort Hall Reservation contained in Power County intact. *Compare* Plans L014 and L082 *with* Plan L03. The plans differ in whether the western half of the reservation is separated from the northern half or the northern half is separated into two districts.<sup>11</sup> Plan L03 combines the western half of the Fort Hall Reservation with about half of the northern half of the Fort Hall Reservation into one district (i.e. roughly three quarters of the reservation land is in one district and one quarter is in a different district). Plans L014 and L082 keep much of the northern half of the Fort Hall Reservation intact at the expense of separating the western half of the Reservation from the northern half (i.e. roughly separating the Reservation evenly into two districts).

In short, Chairmen Allan and Boyer seem to contend that only their preferred splits of their reservations are appropriate. But it is impossible to split all of Idaho’s communities of interest in only the way(s) that the community prefers. Preserving certain parts of the reservations as communities of interest has ripple effects across the state. For example, District 35 in Plan L078

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<sup>11</sup> All three plans split off the nose of the Reservation that is in Caribou County into another district.

creates a district larger than Idaho County. Surely the local communities of interest in Boise County would object to being combined with the far-distant communities of interest in Clark and Jefferson Counties. And what about Ada County, which is externally divided twice in Plans L078 and L079? Based on his current challenge, Petitioner Durst would have something to say about this. The Commission must be afforded the deference to balance the interests of all of the communities of interest across the state to the maximum extent possible once the U.S. and Idaho Constitutions are satisfied.

Chairmen Allan and Boyer’s conflicting preferences show how delicate and difficult it is to preserve local communities. As mentioned, they have been inconsistent in how or if they should be divided. When Chairman Allan testified to the Commission he welcomed more splits within Coeur d’Alene Reservation, as opposed to being consolidated into one district. Chairman Boyer advocated before the Commission for plans that divided the Fort Hall Reservation into three or four districts. While the Chairmen may now feel differently, this demonstrates the ever-shifting nature of the redistricting process and why this Court should not “micromanage all the difficult steps the Commission must take in performing the high-wire act that is legislative district drawing.” *Bonneville County*, 142 Idaho at 472, 129 P.3d at 1221.

**D. Chairmen Allan and Boyer are not entitled to attorney’s fees.**

In their petition, Chairmen Allan and Boyer claim an award of reasonable attorney’s fees under the private attorney general doctrine and Idaho Code §§ 12-117 and -121, while, in briefing, they only argue the private attorney general doctrine. Allan Petition at 11; Allan Brief at 20–21. In

any case, Chairmen Allan and Boyer are not entitled to attorney fees for many of the reasons that Petitioner Durst is not entitled to attorney fees.

- i. Petitioners are not entitled to attorney’s fees under Idaho Code § 12-117 against Idaho Secretary of State Denney.

Idaho Code § 12-117 allows for an award of reasonable attorney’s fees to a prevailing party if the non-prevailing party acted without a reasonable basis in fact or law and the proceedings involved a state agency or a political subdivision and a person. Chairmen Allan and Boyer cannot recover attorney fees against the Secretary of State because he is not a “state agency” or a “political subdivision” for purposes of Idaho Code § 12-117. *Coeur d’Alene Tribe v. Denney*, 161 Idaho 508, 524, 387 P.3d 761, 777 (2015). Accordingly, any claim for attorney fees against the Idaho Secretary of State under Idaho Code § 12-117 fails.

- ii. Petitioners are not entitled to attorney’s fees under Idaho Code §§ 12-117 or -121 against the Commission or under Idaho Code § 12-121 against Idaho Secretary of State Denney.

“The standard for awarding attorney fees under Idaho Code section 12-121 is essentially the same as that under Idaho Code section 12-117.” *Coeur d’Alene Tribe*, 161 Idaho at 525, 387 P.3d at 778. Under Idaho Code § 12-117, the focus is on the “reasonableness of the losing party’s actions.” *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). Where a legitimate question is presented, attorney fees are inappropriate. *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2011). Idaho Code § 12-121 may allow for an award in a mandamus proceeding “when this court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation.” *Coeur*

*d'Alene Tribe*, 161 Idaho at 524-26, 387 P.3d at 777–79. “Fees will generally not be awarded for arguments that are based on a good faith legal argument.” *Regan v. Denney*, 165 Idaho 15, 27, 437 P.3d 15, 27 (2019).

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

iii. Petitioners are not entitled to attorney’s fees under the private attorney general doctrine.

Chairmen Allan and Boyer are not entitled to attorney fees under the private attorney general doctrine because (1) they cannot prevail on the merits, *Joki v. State*, 162 Idaho 5, 394 P.3d 48, 54 (2017), and (2) there is no evidence that private enforcement was necessary or was pursued at significant burden to the petitioners. *Smith*, 136 Idaho at 545, 38 P.3d at 124. As with Durst, Chairmen Allan and Boyer have presented no argument that private enforcement was necessary. *See* Allan Brief at 21. Both Ada and Canyon Counties, political subdivisions, have challenged Plan L03, even relying upon the same plans that Chairmen Allan and Boyer argue, demonstrating that private enforcement was not necessary. And the Chairmen present no argument that they pursued this challenge at a significant burden to themselves. *Id.* Finally, while Chairmen Allan and Boyer contend this suit would benefit all Idahoans, their own briefing and arguments reflect that their challenge is brought only to benefit the Coeur d’Alene and Shoshone-Bannock Tribes.

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## V. CONCLUSION

For the foregoing reasons, Respondents request that the Court declare the final legislative redistricting plan adopted by the Commission constitutional. Respondents further request that the Court refuse to issue the requested writ of prohibition, that it decline to remand this matter to the Commission, and that the Court deny all other relief requested by Chairmen Allan and Boyer.

DATED this 30<sup>th</sup> day of December, 2021.

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL

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



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 30, 2021, I filed the foregoing electronically through the iCourt E-File system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notification of Service.

Lorna K. Jorgensen  
Leon Samuels  
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Deputy Prosecuting Attorneys  
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[lsamuels@adacounty.id.gov](mailto:lsamuels@adacounty.id.gov)  
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*Counsel for Petitioners Chief Allan and  
Devon Boyer*

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Deputy Prosecuting Attorney  
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*Attorneys for Intervenor-Petitioner*

I HEREBY FURTHER CERTIFY that on December 30, 2021, I served the following party to be served by electronic means (personal email) and via U.S. Mail, First Class.

Spencer E. Stucki  
5046 Independence Ave.  
Chubbuck, ID 83202  
[commffelect@gmail.com](mailto:commffelect@gmail.com)

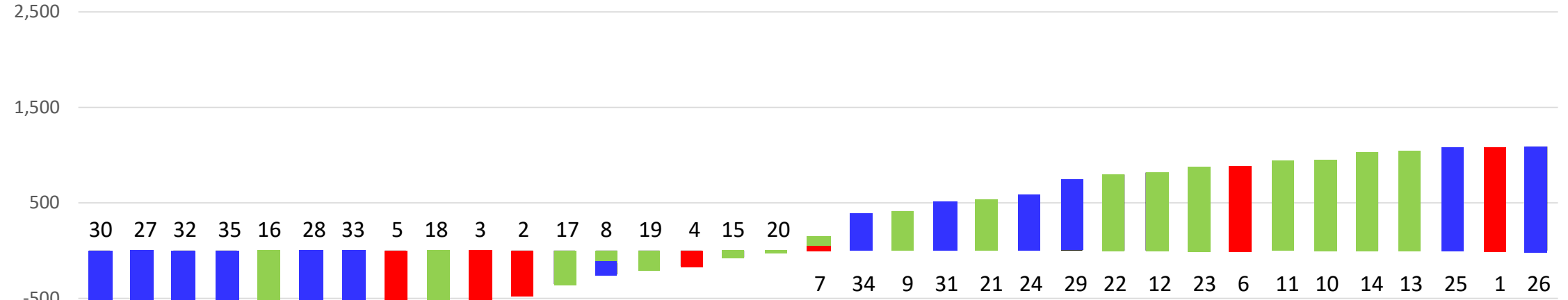
*Pro Se Petitioner*

/s/ Megan A. Larrondo  
Megan A. Larrondo  
DEPUTY ATTORNEY GENERAL

**RESPONDENTS IDAHO COMMISSION FOR  
REAPPORTIONMENT AND LAWRENCE DENNEY'S  
RESPONSE BRIEF TO PETITIONERS  
CHIEF J. ALLAN AND DEVON BOYER**

**APPENDIX A**

# Population Deviation L03



■ Districts in Boundary, Bonner, Kootenai, Benewah, Shoshone, Clearwater, Latah, Nez Perce, Lewis, Idaho

■ Districts in Adams, Valley, Washington, Payette, Gem, Canyon, Ada, Owyhee, Elmore, Boise

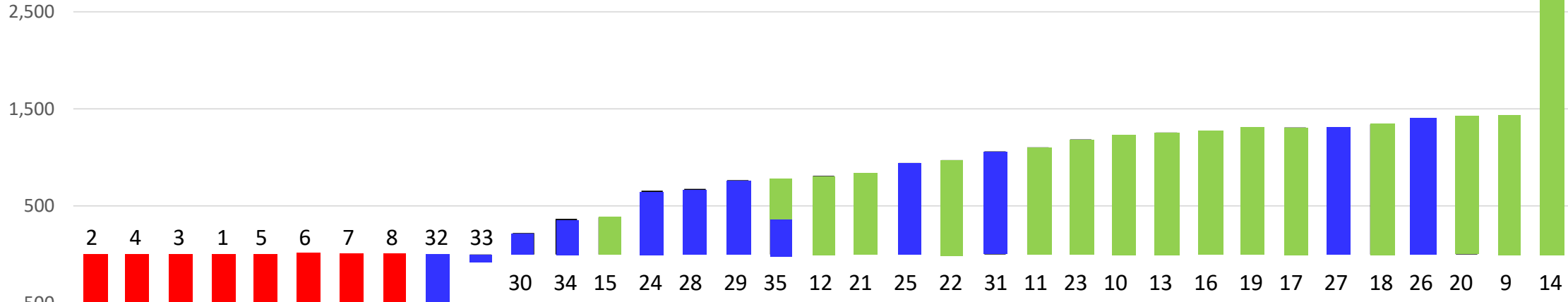
■ Districts in Custer, Lemhi, Blaine, Camas, Gooding, Twin Falls, Jerome, Lincoln, Minidoka, Cassia, Oneida, Power, Bannock, Bingham, Butte, Clark, Jefferson, Fremont, Madison, Teton, Bonneville, Bear Lake, Caribou, Franklin

Maximum	1,090	2.07%
Minimum	(1,980)	-3.77%
Range	3,070	5.84%

No. Districts > 0	18
No. Districts < 0	17

<b>Total Counties Split L03 = 8</b>
Ada
Bannock
Bonner
Bonneville
Canyon
Kootenai
Nez Perce
Twin Falls

# Population Deviation L071



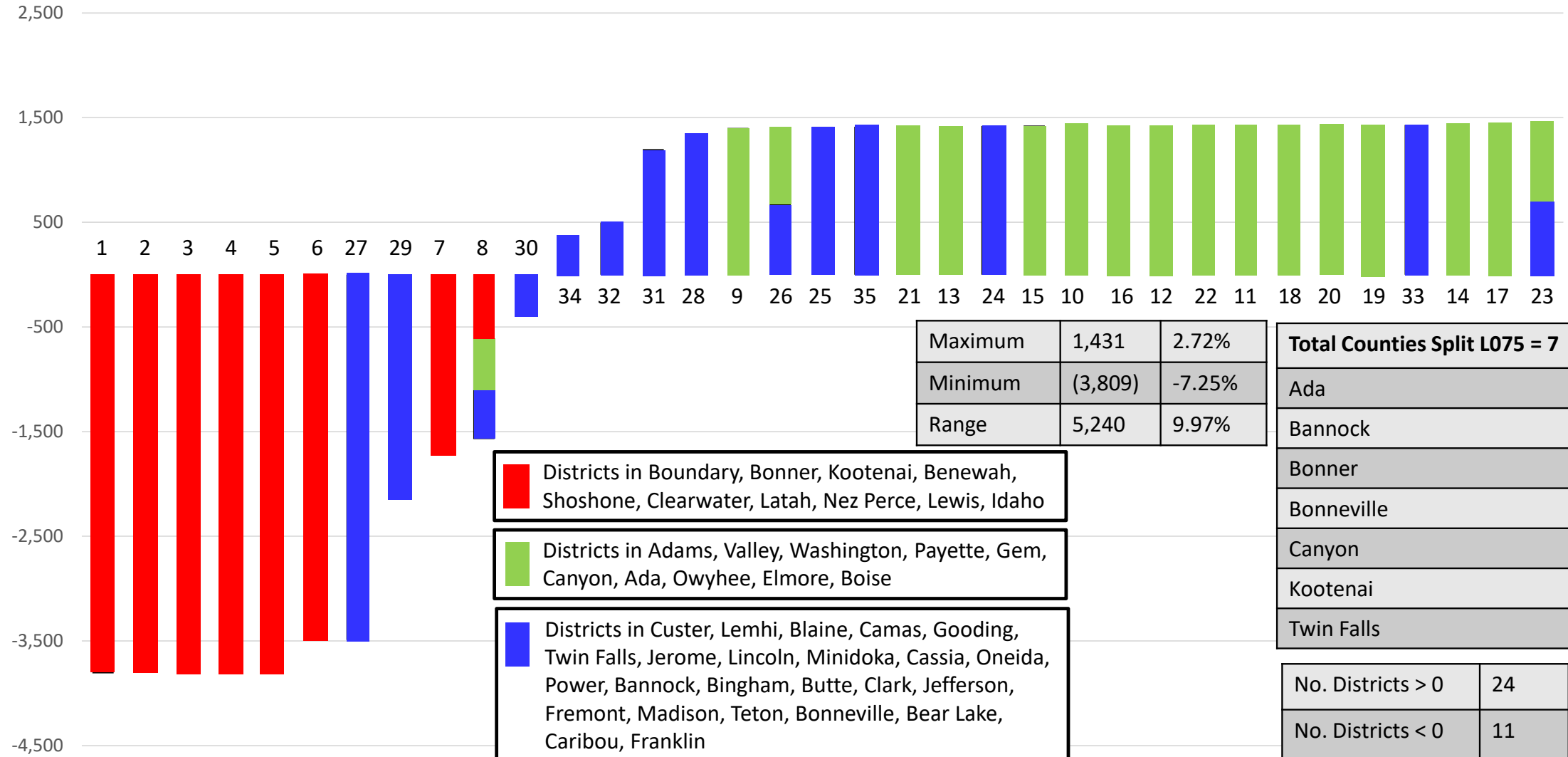
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	Districts in Adams, Valley, Washington, Payette, Gem, Canyon, Ada, Owyhee, Elmore, Boise
	Districts in Custer, Lemhi, Blaine, Camas, Gooding, Twin Falls, Jerome, Lincoln, Minidoka, Cassia, Oneida, Power, Bannock, Bingham, Butte, Clark, Jefferson, Fremont, Madison, Teton, Bonneville, Bear Lake, Caribou, Franklin

Maximum	2,868	5.46%
Minimum	(3,815)	-7.26%
Range	6,683	12.72%

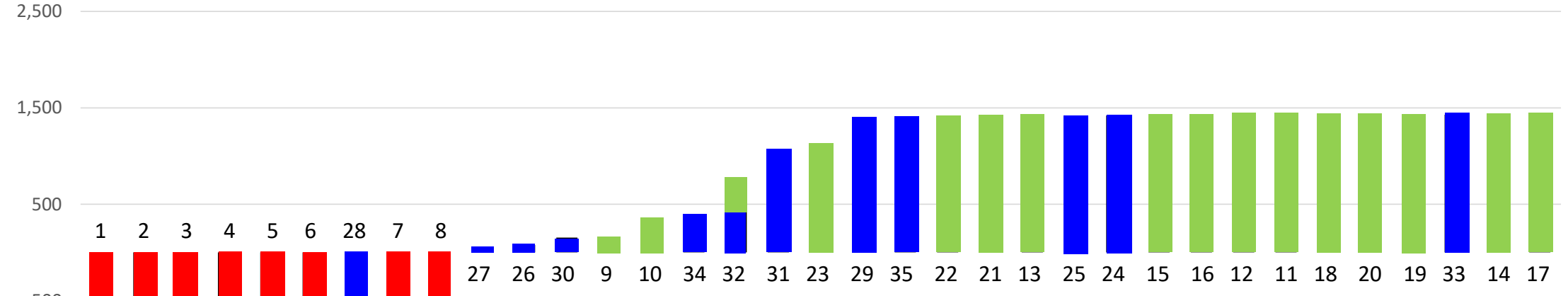
No. Districts > 0	25
No. Districts < 0	10

<b>Total Counties Split L071 = 7</b>
Ada
Bannock
Bonner
Bonneville
Canyon
Kootenai
Twin Falls

# Population Deviation L075



# Population Deviation L076



Maximum	1,431	2.72%
Minimum	(3,809)	-7.25%
Range	5,240	9.97%

**Red** Districts in Boundary, Bonner, Kootenai, Benewah, Shoshone, Clearwater, Latah, Nez Perce, Lewis, Idaho

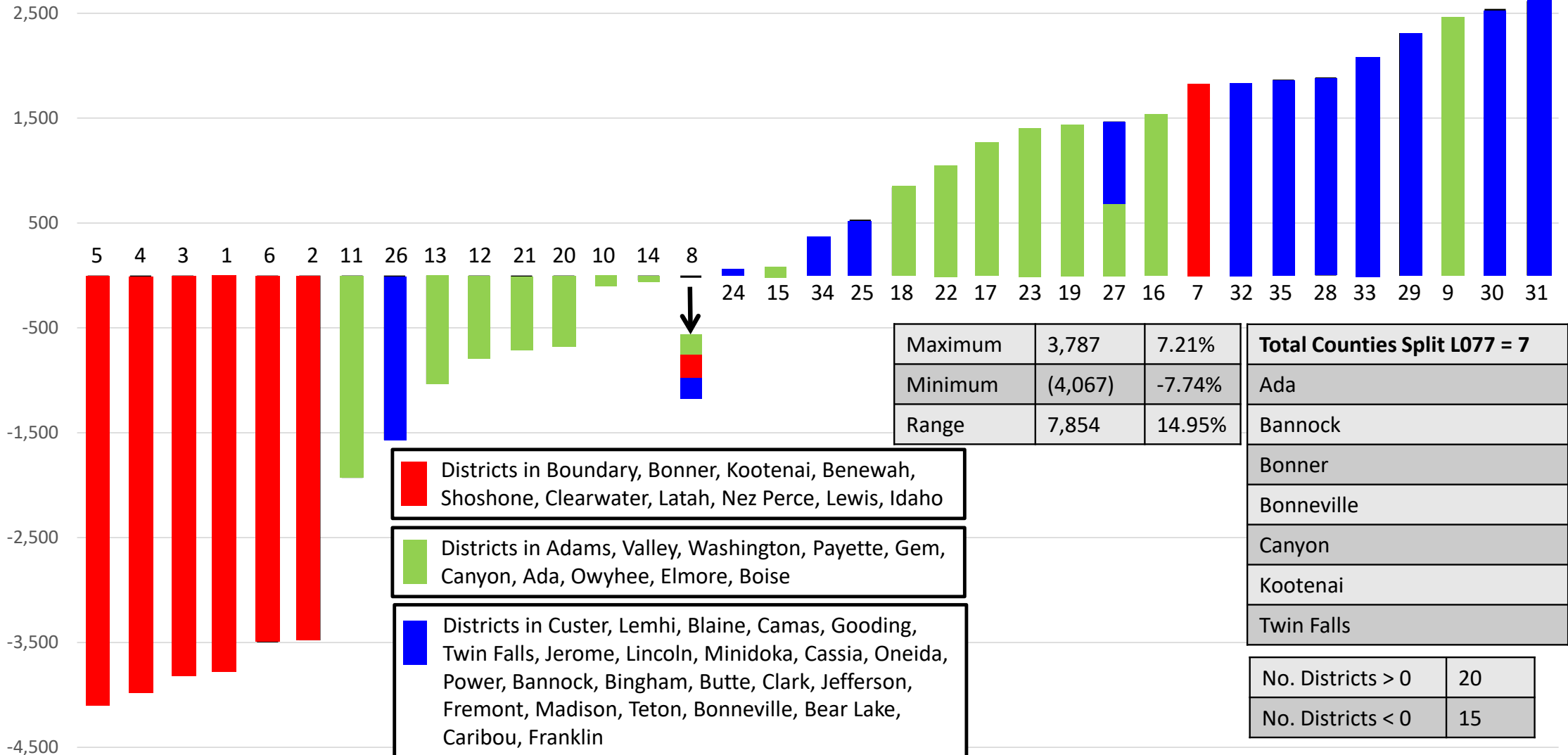
**Green** Districts in Adams, Valley, Washington, Payette, Gem, Canyon, Ada, Owyhee, Elmore, Boise

**Blue** Districts in Custer, Lemhi, Blaine, Camas, Gooding, Twin Falls, Jerome, Lincoln, Minidoka, Cassia, Oneida, Power, Bannock, Bingham, Butte, Clark, Jefferson, Fremont, Madison, Teton, Bonneville, Bear Lake, Caribou, Franklin

<b>Total Counties Split L076 = 7</b>	
Ada	
Bannock	
Bonner	
Bonneville	
Canyon	
Kootenai	
Twin Falls	

No. Districts > 0	26
No. Districts < 0	9

# Population Deviation L077



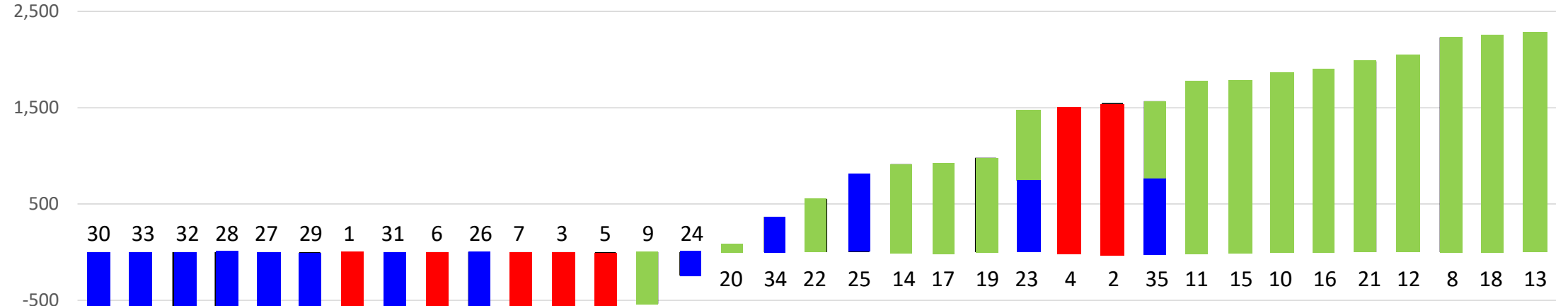
Maximum	3,787	7.21%
Minimum	(4,067)	-7.74%
Range	7,854	14.95%

<b>Total Counties Split L077 = 7</b>	
Ada	
Bannock	
Bonner	
Bonneville	
Canyon	
Kootenai	
Twin Falls	

- Districts in Boundary, Bonner, Kootenai, Benewah, Shoshone, Clearwater, Latah, Nez Perce, Lewis, Idaho
- Districts in Adams, Valley, Washington, Payette, Gem, Canyon, Ada, Owyhee, Elmore, Boise
- Districts in Custer, Lemhi, Blaine, Camas, Gooding, Twin Falls, Jerome, Lincoln, Minidoka, Cassia, Oneida, Power, Bannock, Bingham, Butte, Clark, Jefferson, Fremont, Madison, Teton, Bonneville, Bear Lake, Caribou, Franklin

No. Districts > 0	20
No. Districts < 0	15

# Population Deviation L078



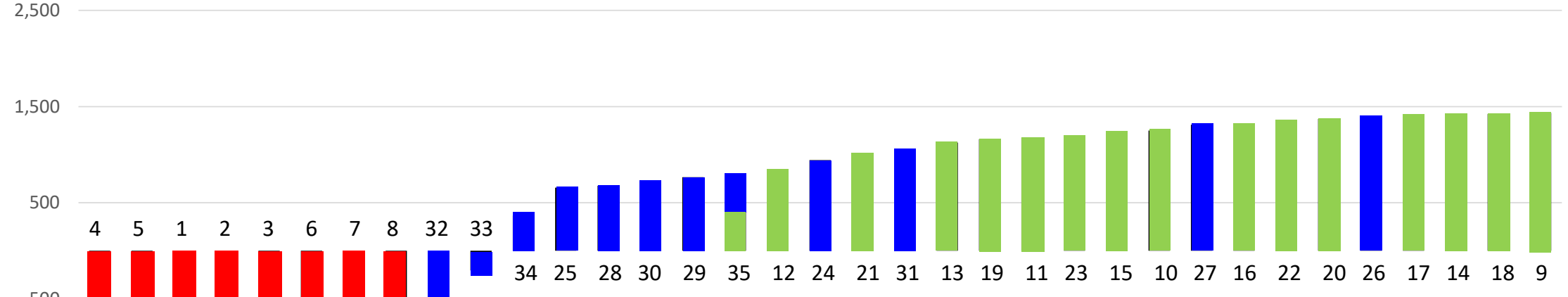
Maximum	2,268	4.32%
Minimum	(2,896)	-5.51%
Range	5,164	9.83%

- Districts in Boundary, Bonner, Kootenai, Benewah, Shoshone, Clearwater, Latah, Nez Perce, Lewis, Idaho
- Districts in Adams, Valley, Washington, Payette, Gem, Canyon, Ada, Owyhee, Elmore, Boise
- Districts in Custer, Lemhi, Blaine, Camas, Gooding, Twin Falls, Jerome, Lincoln, Minidoka, Cassia, Oneida, Power, Bannock, Bingham, Butte, Clark, Jefferson, Fremont, Madison, Teton, Bonneville, Bear Lake, Caribou, Franklin

<b>Total Counties Split L078 = 8</b>	
Ada	
Bannock	
Bonner	
Bonneville	
Canyon	
Kootenai	
Nez Perce	
Twin Falls	
No. Districts > 0	20
No. Districts < 0	15



# Population Deviation L079



Maximum	1,432	2.73%
Minimum	(3,818)	-7.27%
Range	5,250	10%

■ Districts in Boundary, Bonner, Kootenai, Benewah, Shoshone, Clearwater, Latah, Nez Perce, Lewis, Idaho

■ Districts in Adams, Valley, Washington, Payette, Gem, Canyon, Ada, Owyhee, Elmore, Boise

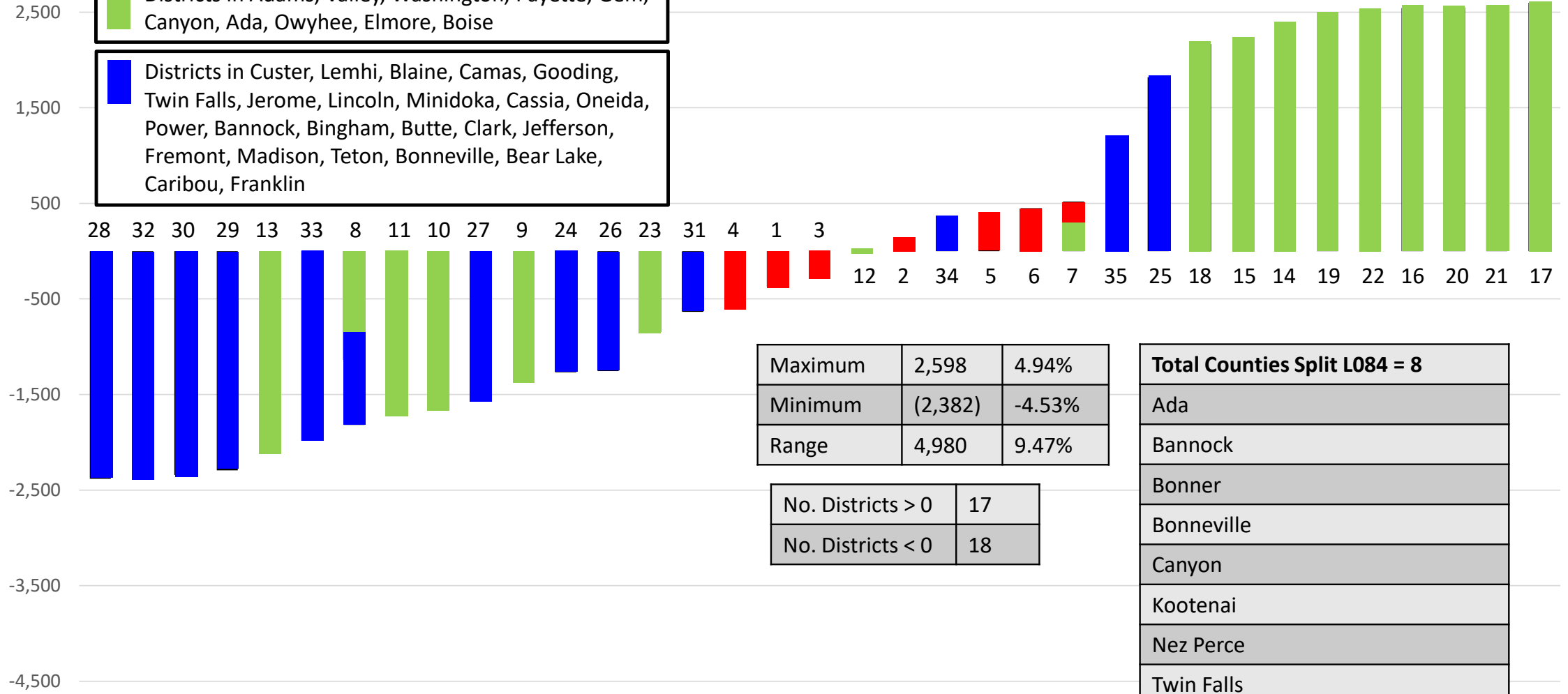
■ Districts in Custer, Lemhi, Blaine, Camas, Gooding, Twin Falls, Jerome, Lincoln, Minidoka, Cassia, Oneida, Power, Bannock, Bingham, Butte, Clark, Jefferson, Fremont, Madison, Teton, Bonneville, Bear Lake, Caribou, Franklin

<b>Total Counties Split L079 = 7</b>	
Ada	
Bannock	
Bonner	
Bonneville	
Canyon	
Kootenai	
Twin Falls	

No. Districts > 0	25
No. Districts < 0	10

# Population Deviation L084

- Districts in Boundary, Bonner, Kootenai, Benewah, Shoshone, Clearwater, Latah, Nez Perce, Lewis, Idaho
- Districts in Adams, Valley, Washington, Payette, Gem, Canyon, Ada, Owyhee, Elmore, Boise
- Districts in Custer, Lemhi, Blaine, Camas, Gooding, Twin Falls, Jerome, Lincoln, Minidoka, Cassia, Oneida, Power, Bannock, Bingham, Butte, Clark, Jefferson, Fremont, Madison, Teton, Bonneville, Bear Lake, Caribou, Franklin



Maximum	2,598	4.94%
Minimum	(2,382)	-4.53%
Range	4,980	9.47%

No. Districts > 0	17
No. Districts < 0	18

<b>Total Counties Split L084 = 8</b>
Ada
Bannock
Bonner
Bonneville
Canyon
Kootenai
Nez Perce
Twin Falls

**RESPONDENTS IDAHO COMMISSION FOR  
REAPPORTIONMENT AND LAWRENCE DENNEY'S  
RESPONSE BRIEF TO PETITIONERS CHIEF J.  
ALLAN AND DEVON BOYER**

**APPENDIX B**

RECEIVED

DEC 07 2011

OFFICE OF THE  
ATTORNEY GENERAL

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**TWIN FALLS COUNTY**, a political  
subdivision of the State of Idaho, and the  
**BOARD OF TWIN FALLS COUNTY**  
**COMMISSIONERS**, the **CITY OF**  
**TWIN FALLS**, the **CITY OF HANSEN**,  
the **CITY OF FILER**, the **CITY OF BUHL**;  
**TETON COUNTY**, a political subdivision  
of the State of Idaho, and the **BOARD OF**  
**TETON COUNTY COMMISSIONERS**;  
**OWYHEE COUNTY**, a political  
subdivision of the State of Idaho, and the  
**BOARD OF OWYHEE COUNTY**  
**COMMISSIONERS**; and **KOOTENAI**  
**COUNTY**, a political subdivision of the State  
of Idaho, and the **BOARD OF**  
**KOOTENAI COUNTY COMMISSIONERS**

Supreme Court #39373-2011

Petitioners,

vs.

**IDAHO COMMISSION ON**  
**REDISTRICTING** and Ben **YSURSA**,  
Secretary of State of the State of Idaho

Respondents.

**PETITIONER'S BRIEF**

**IN SUPPORT OF PETITION CHALLENGING LEGISLATIVE REDISTRICTING,  
APPLICATION OF INJUNCTIVE RELIEF, AND APPLICATION FOR WRIT OF  
PROHIBITION**

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Ben Ysursa, Secretary of the State of Idaho

County, Bingham County, and Kootenai County into a multiple number of districts, not wholly contained within their own counties?

**B.** Did the Redistricting Commission violate Idaho Code §72-1506(5) by dividing Twin Falls County, Owyhee County, Bingham County, and Kootenai County to an extent which is not reasonably necessary to meet the requirements of the U.S. Constitution equal population mandate, and by not keeping the division of the counties to a minimum?

**C.** Did the Redistricting Commission violate Idaho Code § 72-1506(2) by dividing counties in a way that fails to preserve traditional neighborhoods and communities of interest?

**D.** Did the Redistricting Commission violate Idaho Code §72-1506(3) by adopting a plan that creates districts which are not substantially equal in population and does not comply with applicable U.S. Constitutional mandates?

**E.** Did the Redistricting Commission violate Idaho Code §72-1506(4) by adopting a plan that creates districts that are oddly shaped?

**V. ARGUMENT**

**A. The Redistricting Commission violated Idaho Constitution Article III §5 by dividing Twin Falls County, Fremont County, Gem County, Owyhee County, Canyon County, Bingham County, and Kootenai County into a multiple number of districts, not wholly contained within their own counties.**

In perhaps the clearest statement regarding constitutional principles of one person, one

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neighbors that requires a split in some county in that region. Plan L87 and the Petitioner's Plan both split Teton County, although Plan L87 also splits its precincts.

vote, the Court stated, “In our Republic, representation in state government is governed by the principle of one person, one vote.... It also means that districts cannot be drawn so that they effectively dilute the right to vote.” *Bonneville County v. Ysursa*, 142 Idaho 464,466, 129 P. 3<sup>rd</sup> 1213, 1215 (Idaho 2005).

Article III §5 of the Idaho Constitution clearly and unambiguously states a prohibition against unnecessarily dividing counties:

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. (Emphasis added.)

The Supreme Court acknowledged the Constitution’s clarity on this issue ten years ago in another case during the last redistricting process:

Article III § 5 of the Idaho Constitution limits the division of counties to create legislative districts to those situations in which splitting the county is necessary to meet standards of equal protection; that is, one person, one vote. 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 passed out to areas outside the county to achieve ideal district size, if that goal is attainable without extending the district outside the county.* (Emphasis added.)

*Bingham County v. Idaho Com 'n for Reapportionment*, 137 Idaho 870, 874, 55 P. 3<sup>rd</sup> 863, 867 (Idaho 2002). The Court went on to say that, “A plan must begin with the premise that the counties will not be split unless it is necessary to meet standards of equal protection.” *Id.* The Court reaffirmed this interpretation clearly in *Bonneville County v. Ysursa*, 142 Idaho at 471, 129 P. 3<sup>rd</sup> at 1220.

In clear violation of this constitutional provision, the Reapportionment Commission unnecessarily divided Twin Falls County, Fremont County, Gem County, Owyhee County, Canyon County, Bingham County, and Kootenai County into a multiple number of districts, which extend outside those counties. While it is correct that Twin Falls County, Canyon County, and Kootenai County each need to be divided into more than one district, the Redistricting Commission is not justified in dividing Twin Falls County and Canyon County each into three districts and Kootenai County into four districts and combining them with other counties. Likewise, Gem County, Bingham County, Fremont County, and Owyhee County, whose population does not necessitate a division, were unnecessarily split into two districts and combined into districts with other counties. Plan L87 disenfranchises these counties’ citizens by gerrymandering these districts to eliminate the impact of the county electorate.

With respect to the multiple splits of Twin Falls County, the Commission justified the splits in its Findings and Conclusions (Exhibit 1) by saying that they are needed to meet the “one

vote requirement.”<sup>3</sup> (Exhibit 1, paragraphs 34, 35, 38) The Commission does not otherwise explain why it ignores Article III, §5 of the Idaho Constitution. The problem is, of course, that once the Commission plan gets off track and begins to make a habit of unnecessarily dividing counties, the problem compounds and the continued ignoring of county lines becomes justified by the “one vote requirement.” This circular logic continues throughout the Commission’s Findings and Conclusions.

The Commission justifies its division of Bingham County in its Findings and Conclusions (Exhibit 1, paragraphs 39 and 42) by claiming it is necessary to forsake the Idaho Constitution to preserve the Fort Hall Indian Reservation as a traditional community of interest. The Commission says it, “placed great emphasis on keeping traditional Native American populations intact throughout Idaho and believes that the protection of these communities of interest is a legitimate and significant state interest.” (Exhibit 1, Paragraph 39) This oft repeated justification, while laudable, is nowhere justified in Idaho statute as a reason to divide otherwise sufficiently-sized counties into multiple districts. In *Bonneville County v. Ysursa*, 142 Idaho 464, 466, 129 P. 3<sup>rd</sup> 1213, 1215 (Idaho 2005), this issue was directly addressed when that Commission divided counties in order to keep the Coeur d’Alene reservation intact. The Court stated that the Secretary of State’s defense of the division in order to keep the reservation intact was “misplaced.” *Id.*, at 471, 129 P.3<sup>rd</sup> at 1220. “[W]e can find no outright prohibitions against splitting an Indian reservation.” *Id.*, at 472, 129 P.3<sup>rd</sup> at 1221.

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<sup>3</sup> The Commission also uses its desire to keep Native American Reservations intact as a justification for District 34’s makeup. This issue is dealt with below in our discussion of the unconstitutional splitting of Bingham County.



Curiously, in Paragraph 8a of its Findings and Conclusions, the commission recognizes that Bingham County<sup>4</sup> “has a population that it can constitute a single district by itself without combining with any other county or portion of another county.” So, even though Bingham County has a population of 46,607 – in itself almost exactly the population of an ideal district, the Commission chopped it up.

The Petitioner’s Plan in Petition Exhibit E not only shows how unnecessary it is to divide these counties, but proposes a statewide plan that complies with the Idaho Constitution and, additionally, better complies with the federal one person, one vote mandate.

Failure to abide by the requirements of Article III §5 of the Idaho Constitution renders Plan L87 unconstitutional and illegal, and establishes that the adoption of Plan L87 by the Commission on Redistricting was done in an arbitrary and capricious manner.

**B. The Redistricting Commission violated Idaho Code §72-1506(5) by dividing Twin Falls County, Owyhee County, Bingham County, and Kootenai County to an extent which is not reasonably necessary to meet the requirements of the U.S. Constitution equal population mandate, and by not keeping the division of the counties to a minimum.**

Idaho Code §72-1506(5) requires that:

Divisions 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*. (Emphasis added.)

Since the last redistricting process commenced in 2001, the Idaho Legislature strengthened the statutory language of Idaho Code §72-1506(5) in 2009, including the change, “Divisions of

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<sup>4</sup> Ironically, Bingham County is the same county which successfully sued the Commission when it was unconstitutionally split during the last redistricting process.

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

<b>TWIN FALLS COUNTY</b> , a political	)	
Subdivision of the State of Idaho, and the	)	
<b>BOARD OF TWIN FALLS COUNTY</b>	)	<b>Supreme Court</b>
<b>COMMISSIONERS</b> , the <b>CITY OF</b>	)	<b>Docket No. 38373-2011</b>
<b>TWIN FALLS</b> , the <b>CITY OF HANSEN</b> ,	)	
the <b>CITY OF FILER</b> , the <b>CITY OF BUHL</b> ,	)	
<b>TETON COUNTY</b> , a political subdivision	)	
Of the State of Idaho, and the <b>BOARD OF</b>	)	
<b>TETON COUNTY COMMISSIONERS</b> ,	)	
<b>OWYHEE COUNTY</b> , a political subdivision	)	
of the State of Idaho, and the <b>BOARD OF</b>	)	
<b>OWYHEE COUNTY COMMISSIONERS</b> ,	)	
And <b>KOOTENAI COUNTY</b> , a political	)	
Subdivision of the State of Idaho, and the	)	
<b>BOARD OF KOOTENAI COUNTY</b>	)	
<b>COMMISSIONERS</b> ,	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	
<b>IDAHO COMMISSION ON</b>	)	
<b>REDISTRICTING</b> and Ben <b>YSURSA</b> ,	)	
Secretary of State of the State of Idaho,	)	
	)	
Respondents	)	

**RESPONDENTS' BRIEF  
IN OPPOSITION TO PETITION CHALLENGING LEGISLATIVE  
REDISTRICTING, APPLICATION OF INJUNCTIVE RELIEF, AND  
APPLICATION FOR WRIT OF PROHIBITION**

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Comparing Petitioners' plan, two obvious examples arise. First, Petitioners cast Gem County, whose population generally works, travels, and lives to its immediate south and west in Ada and Canyon Counties, into a sprawling northeastern district that reaches all the way to the Montana border. Second, Petitioners challenge Plan L 87's District 7 due to its size and combination of Kootenai County, offering instead to extend a district already challenged as too large, even farther north. This extension is offered in spite of the Commission's findings that Bonner County shares a border with Kootenai County, and Kootenai County is connected by an interstate highway to Shoshone County. In sum, Petitioners' claims are that their respective county interests are more significant than other county's interests. Any effort to elevate one county's interests to the sacrifice of another's should be resisted by this Court. As reflected in this Brief and in the Findings of the Commission, each county was considered with all other counties resulting in pragmatic legally sufficient county divisions.

3. In deciding how to split counties, the Commission appropriately considered and consistently preserved communities of interest

As noted above, when counties must be split to comply with the one-person, one-vote requirement, the Commission should, to the extent possible, "preserve traditional neighborhoods and local communities of interest." Idaho Code § 72-1506(2). Although the statute does not define what these terms mean, the United States Supreme Court has given examples of communities of interest in Equal Protection analysis, including whether residents in the area at issue regard themselves as a community, whether the areas are urban or rural, and whether parts of the district have common transportation and media sources. *Bingham County*, 137 Idaho at 877, 55 P.3d at 870, citing *Lawyer v. Dep't of Justice*, 521 U.S. 567, 581-82 (1997), and *Bush v. Vera*, 517 U.S. 952, 966 (1996). L 87's *Findings* reveal that the Commission sought to keep communities of interest intact and specifically identified many communities of interest on a district-by-

district basis, particularly noting its efforts to keep cities and rural areas intact, to maintain commercial corridors along highways, and to attempt to keep the majority of Native American tribes in the same districts.

As Twin Falls County Prosecutor Mr. Loeb stated about the broad discretion regarding communities of interest: there may be problems with dividing the city of Twin Falls because that may be a community of interest, but community of interest was hard to define because the county may be a community of interest, not the city. *Minutes*, Boise Public Hearing, October 7, 2011, Appendix C to this Brief. In ¶ 35, the Commission acknowledged Mr. Loeb's point and said: "District 24 consists of the majority of the city of Twin Falls, a traditional community of interest entirely contained within Twin Falls County." Additional public testimony advocated for separating the urban area of Twin Falls and the more rural areas outside the city. See Testimony of Jared Larsen, *Minutes*, Burley Public Meeting, June 28, 2011, Appendix D to this Brief; Testimony of Jerry Marcantonio, Bob Sojka, Scott McClure, Leroy Hayes, Deborah Silver, Twin Falls Public Meeting, June 29, 2011, Appendix A to this Brief.

Consistent with *Bingham County's* reference to the United States Supreme Court's examples and the testimony at public hearings around the State, the Commission attempted to keep urban as well as rural areas together. Specifically, the *Findings* reflect that it attempted to keep cities intact in:

District 2, which keeps the majority of Hayden Lake intact (*Findings*, ¶ 13),

District 3, which contains the majority of Post Falls and Rathdrum (*Findings*, ¶ 14),

District 4, which contains the majority of Coeur d'Alene (*Findings*, ¶ 15),

District 9, which includes Parma and Middleton (*Findings*, ¶ 20),

District 29, which contains the majority of Pocatello (*Findings*, ¶ 40),

District 32, including the majority of Driggs and Victor (*Findings*, ¶ 43),

District 33, which includes the majority of Idaho Falls (*Findings*, ¶ 44), and

District 34, which was drawn to keep the cities of Teton and St. Anthony intact (*Findings*, ¶ 45).

The Commission's Findings also reflect its effort to join portions of counties that were connected by major roads and highways in order to maintain communities of interest that are connected along corridors of commerce. For example, in District 7, the Commission joined part of Kootenai County with Shoshone County "because they are connected by I-90, a major interstate that runs east to west across the district. This major corridor ties the two counties together creating a community of interest and a flow of commerce through the area." *Findings*, ¶ 18.

District 11 was also drawn to maintain the connection between Canyon and Owyhee County. *Findings*, ¶ 22. Specifically, the Commission found "[t]he portions of both Canyon and Owyhee County are tied together by Highway 95 that runs throughout the district as well as several of their roads which creates a corridor for commerce and a commonality of interest between the two counties." *Findings*, ¶ 22. Additionally, when looking at District 28, the Commission combined Oneida and portions of Bannock and Bingham Counties based on their commonalities, including transportation/commercial corridor and the presence of the Fort Hall Indian Reservation shared by Bannock and Bingham Counties. *Findings*, ¶ 39.

Finally, the Commission attempted to keep the majority of Native American populations intact. Specifically, with respect to the Coeur d'Alene Tribe, the Nez Perce Tribe, the Duck Valley Indian Reservation, and the Fort Hall Indian Reservation the Commission stated:

The Commission has placed great emphasis on keeping traditional Native American populations intact throughout Idaho and believes that the protection of these communities of interest is a legitimate and significant state interest. This approach is consistent with Idaho's historical effort to work with Native American Tribes located within its borders.

*Findings*, ¶¶ 5, 6, 23, 39. Testimony at the public hearings further supported this approach. Testimony of Laverne Beech, Minutes, Idaho Falls Public Hearing, October 5, 2011, Appendix A to this Brief. Testimony of Helo Hancock, Minutes, Coeur d'Alene Public Hearing, October 6, 2011, Appendix B to this Brief.

Consideration and protection of these communities of interest was an exercise of the Commission's discretion and therefore should be upheld. Petitioners should not be permitted to substitute their judgment regarding what constituted important communities of interest for the Commission, particularly when the Commission had the benefit of listening to and reviewing hours of public testimony with respect to these issues.

4. Plan L 87 does not contain oddly shaped districts

Idaho is not a square state comprised of squarely shaped counties of comparable populations. In *Bingham County*, the Court stated that to determine whether a District is oddly shaped, the Court will look for "shoestring, odd shaped narrow districts, or the dispersion of urban populations into rural areas." 137 Idaho at 876, 55 P.3d at 869. Petitioners failed to allege that any of these conditions are present in L 87. The closest that they have come is in ¶ 62 of their Petition with regard to District 35, in which they state it has "nearly an hourglass shape." See also Opening Brief, page 19. Petitioners do not represent any residents of District 35, which contains Clark, Custer, Lemhi and Jefferson Counties and part of Fremont County, so they have no standing to bring this challenge. However, even if they had standing, that hourglass shape is the result of adhering to county lines in a portion of the State dominated by geographical expanse but lacking in population. Importantly, that shape is in part due to very sparsely populated counties. This Court has never held that district boundaries that follow county lines are "oddly shaped" for purposes of reapportionment analysis.