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 HANSEN, the CITY OF FILER, the CITY OF BUHL; TETON COUNTY, a political subdivision of the State of Idaho, and the BOARD OF TETON COUNY 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

Petitioners,

vs.

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

Respondents.

Docket No. 39373-2011

BRIEF OF AMICUS CURIAE

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Redistricting and Ben Ysursa, Secretary of the State of Idaho

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TABLE OF CONTENTS

Table of Contents i

Table of Cases and Authorities ii

I. INTRODUCTION 1

II. ARGUMENT 2

A. UNLESS A COMMISSION DRAWS THE LEGISLATIVE LINES FOR AN IMPERMISSIBLE PURPOSE, THE COMMISSION'S DECISION SHOULD NOT BE SUPPLANTED BY OTHER PLANS 2

B. THE CLERKS ASK THE COURT TO ACT IN AN EXPEDITIOUS MANNER SO THAT THE CLERKS CAN FULFILL THEIR STATUTORY DUTIES REGARDING ELECTIONS 5

III. CONCLUSION 8

Certificate of Service 10

TABLE OF CASES AND AUTHORITIES

Cases:

Bingham County v. Idaho Com'n for Reapportionment, 137 Idaho 870, 55 P.3d 863 (2002) 2, 5

Bonneville County v. Ysursa, 142 Idaho 464, 129 P.3d 1213 (2005) 4

Reynolds v. Sims, 377 U.S. 533 (1964) 2, 4

Smith v. Idaho Com'n on Redistricting, 136 Idaho 542, 38 P.3d 121 (2001) 2

Authorities:

2010 Census Results, *available at* www.legislature.idaho .gov/redistricting/census_data.htm. 2, 3, 4

Idaho Constitution Article III § 2 1

Idaho Constitution Article III § 4 2

Idaho Constitution Article III § 5 1

Idaho Code § 72-1506 1

Idaho Code § 34-704 8

Legislative District Plans, available at http://www.legislature.idaho.gov/redistricting /proposed_plans.htm 5

Order, In Re: Constitutionality of Idaho Legislative Reapportionment Plan of 2002 (2002 Plan L97) and of 2002 Congressional Reapportionment Plan Supreme Court Docket No. 39127-2011 6

Voter's Pamphlet, available at http://www.legislature.Idaho.gov/redistricting/FAQs.htm 5

I. INTRODUCTION

The expression of the principle – "one person, one vote" – might be a simple concept; however, achieving equal representation for equal numbers of people can be a deceptively onerous task. In Idaho, pursuant to the 1994 voter ratification of amendment to Idaho Constitution Article III, §§ 2 and 5, the allocation of representation amongst the citizenry is a task that belongs to a bi-partisan citizen commission on reapportionment.

This commission, which cannot be composed of elected or appointed officials and whose members are precluded for five years from serving in the legislature, has the unenviable task of drawing – through an open process – congressional and legislative districts based on census data while trying to maintain communities of interest and not divide counties. ID CONST. art. III § 2; I.C. § 72-1506.

By its very nature, the reapportionment task contemplates a variety of approaches and a commensurate number of potential conclusions. Although any conclusion might have some merit that another approach lacks, and vice versa, the cumulative effect of the constitutional and statutory provisions governing the formation, operation and decision making of the commission does not provide for any "correct" conclusion.

II. ARGUMENT

A. UNLESS A COMMISSION DRAWS THE LEGISLATIVE LINES FOR AN IMPERMISSIBLE PURPOSE, THE COMMISSION'S DECISION SHOULD NOT BE SUPPLANTED BY OTHER PLANS.

Article III § 4 of the Idaho Constitution provides for at least 30 legislative districts and not more than 35 legislative districts. "The Equal Protection Clause requires states to 'make an honest and good faith effort to construct [legislative] districts . . . as nearly of equal population as is practicable.'" *Smith v. Idaho Com'n on Redistricting*, 136 Idaho 542, 544, 38 P.3d 121, 123 (2001) (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)). Mathematically, it would be a simple task for the Idaho Commission on Reapportionment ("Commission") to meet the requirements of the Equal Protection Clause by placing 44,788 people[1] in each of Idaho's 35 legislative districts. However, in addition to the requirements of the Equal Protection Clause, the Idaho Constitution provides that the Commission cannot divide counties unless such division is necessary to comply with the standards of equal protection. *See Bingham County v. Idaho Com'n for Reapportionment*, 137 Idaho 870, 55 P.3d 863 (2002). The Commission's redistricting task is made very difficult because there are 44 counties with varying population densities, and 35 legislative districts. When the population centers of the state are factored into the equation, the options for the Commission not to divide counties become even more limited. When Ada County's population[2] is brought into the mix, of those 35 legislative districts a portion

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[1] Idaho's population is 1,567,581. 2010 Census Results, *available at* www.legislature.idaho.gov/redistricting/census_data.htm.

[2] Ada County has a population of 392,365. 2010 Census Results, *available at* www.legislature.idaho.gov/redistricting/census_data.htm. The perfect number for each legislative district is 44,788. Using the perfect number for division would mean that Ada County must have at least 8.76 districts.

of nine must go to Ada County, which results in 26 legislative districts available for 43 counties. Canyon County's population[3] further reduces the number of legislative districts available because at least four of the legislative districts must go to Canyon County.[4] If four go to Canyon County, 22 legislative districts are left for the remaining 42 counties. Kootenai County's population[5] requires at least three districts,[6] which in turn lowers the number of districts to 19 districts for the remaining 41 counties. Bonneville County's population[7] requires at least two districts[8] leaving 17 districts for 40 counties. Bingham County's population[9] requires at least one district,[10] leaving 16 districts for 39 counties. Bannock County's population[11] requires at least one district[12] but its population edges it closer to two, leaving 14 districts for 38 counties. Twin Falls

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[3] Canyon County has a population of 188,923. 2010 Census Results, *available at* www.legislature.idaho.gov/redistricting/census_data.htm. The perfect number for each legislative district is 44,788. Utilizing the perfect number for district division would mean that Canyon County must have at least 4.2 districts.

[4] If Canyon County is given only four districts, the remaining 9,771 Canyon County residents must be split off and joined with another county.

[5] Kootenai County has a population of 138,494. 2010 Census Results, *available at* www.legislature.idaho. gov/redistricting/census_data.htm. The perfect number for each legislative district is 44,788. Under the perfect number scenario Kootenai County would be entitled to at least 3.09 districts.

[6] If Kootenai County is given only three districts, the remaining 4130 Kootenai County residents must be split off and joined with another county.

[7] Bonneville County has a population of 104,234. 2010 Census Results, *available at* www.legislature.idaho.gov/redistricting/census_data.htm. The perfect number for each legislative district is 44,788. Utilizing the perfect number would mean that Bonneville County must have at least 2.32 districts.

[8] If Bonneville County is given only two districts, the remaining 14,658 Bonneville County residents must be split off and joined with another county.

[9] Bingham County has a population of 45,607. 2010 Census Results, *available at* www.legislature.idaho.gov/redistricting/census_data.htm. The perfect number for each legislative district is 44,788. Utilizing the perfect number would mean that Bingham County must have at least 1.018 districts.

[10] If Bingham County is given only one district, the remaining 819 Bingham County residents must be split off and joined with another county.

[11] Bannock County has a population of 82,839. 2010 Census Results, *available at* www.legislature.idaho.gov/redistricting/census_data.htm. The perfect number for each legislative district is 44,788. Utilizing the perfect number would mean that Bannock County must have at least 1.84 districts.

[12] If Bannock County is given only one district, the remaining 38,051 Bannock County residents must be split off and joined with another county.

County's population,[13] like Bannock County's requires at least one district[14] but edges closer to two, which leaves 12 districts for the remaining 36 counties. Clearly, fitting the population of Idaho neatly into 35 districts while not dividing counties is an extremely difficult and complex task. Since it is so difficult, the United States Supreme Court has determined that "precise mathematical equality in each district is not attainable." *Bonneville County v. Ysursa*, 142 Idaho 464, 467, 129 P.3d 1213, 1216 (2005) (citing *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)).

Because precise district equality is not attainable, a plan is presumptively constitutional if it contains an overall population deviation of less than 10% between districts. *Bonneville County*, 142 Idaho at 467, 129 P.3d at 1216 (2005). This allowable deviation provides the Commission with some flexibility to make decisions to meet the United States constitutional policy of one person one vote, and the Idaho Constitution restriction of not splitting counties unless it is necessary to meet the standards of equal protection. It also assists the Commission in trying to keep communities of interest intact.

The presumptive constitutionality of a plan containing an overall population deviation of less than 10% does not relieve the Commission of the burden of making difficult choices. The lines for legislative districts have to be drawn somewhere, and they have to be based on constitutional or rational state purposes. The Commission chose to draw the legislative and congressional lines comprising Plan L87 in a certain way. Could the legislative lines have been

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[13] Twin Falls County has a population of 77,230. 2010 Census Results, *available at* www.legislature.idaho.gov/redistricting/census_data.htm. The perfect number for each legislative district is 44,788. Utilizing the perfect number would mean that Twin Falls County must have at least 1.72 districts.

[14] If Twin Falls County is given only one district, the remaining 32,442 Twin Falls County residents must be split off and joined with another county.

drawn differently? Certainly, as indicated by the 88 plans developed by the first Commission. *See* Legislative District Plans, available at http://www.legislature.idaho.gov/redistricting/proposed_plans.htm. Could the line for the congressional districts be drawn differently to keep Ada County from being the only county to be split? Probably. Even though there are many ideas regarding how the legislative and congressional districts can be drawn, the Idaho Constitution places the decision regarding where to draw the lines in the hands of the bi-partisan citizen Commission. As long as the Commission does not draw the lines for an impermissible purpose, the Commission's decision should not be supplanted by other ideas or plans. The Clerks of Ada County and Canyon County ("Clerks") support the Commissions' decisions that have been vetted in a public process and have not been made for an impermissible reason, such as attempting to dilute the right to vote. In such cases, the Court should decline to substitute its judgment, or that of any political or legal entity, for that of the commission.

B. THE CLERKS ASK THE COURT TO ACT IN AN EXPEDITIOUS MANNER SO THAT THE CLERKS CAN FULFILL THEIR STATUTORY DUTIES REGARDING ELECTIONS

The Supreme Court was given original jurisdiction so "that challenges would be heard immediately . . . and final results would be expedited." Voter's Pamphlet, available at http://www.legislature.Idaho.gov/redistricting/FAQs.htm. This Court noted in *Bingham County* that if there were delays that interfered with the time limits for candidate filing, the Court would consider requests for remedial orders. *Bingham County*, 137 Idaho at 878, 55 P.3d at 871.

The current situation for the Clerks is unusual. The 2002 apportionment plan ("Plan L97") was declared unconstitutional and void based on the 2010 United States Census results on

October 6, 2011. *Order, In Re: Constitutionality of Idaho Legislative Reapportionment Plan of 2002 (2002 Plan L97) and of 2002 Congressional Reapportionment Plan* [hereinafter "*Order*"], Supreme Court Docket No. 39127-2011. Based on the Court's 2011 *Order*, Plan L97 is no longer the fall back position in the event that Plan L87 is found to be unconstitutional. Without Plans L97 or L87 to follow, the Clerks will be without authority to perform certain of their duties. Because of the time constraints outlined below, the Clerks ask the Court to act expeditiously, and should Plan L87 be declared unconstitutional, ask the Court to provide guidance regarding the standard to be utilized in their preparations for candidate filing and the May primary election.

The Clerks are well into the process of preparing for the February 27, 2012 filing deadline utilizing Plan L87. Plan L87 divides Ada County into nine legislative districts and Canyon County into five legislative districts. Within these legislative districts are precincts. As redistricting serves to redistribute citizens among legislative districts, this is also the time when county commissioners oversee the Clerks' redistribution of voters among precincts. The primary criteria used in the creation of precinct boundaries are congressional and legislative district boundaries. Thus, new district boundaries in Ada and Canyon County necessitate the redrawing of precinct boundaries within these counties. Following the filing of Plan L87, each county was provided maps and Geographic Information System ("GIS") data from the Commission to be used in updating the ISVRS. Ada County GIS has finished a four-week effort to align the current 141 Ada County precincts within the Plan L87 legislative districts. On December 15, 2011, the

Ada County Clerk held a public meeting on the alignment of the 144 Ada County precincts based on the GIS data information.

Ada County is now preparing to input the GIS information it into the ISVRS. As a security measure, the ISVRS was designed so that only one person from the Clerk's Office in Ada County and only one person from the Clerk's Office in Canyon County can work in the ISVRS at a time. While the Commission produces a map of the districts, that information must be distilled into street and address information before it can be entered into the ISVRS. This process is analogous taking a picture, separating it into pixels, and then rebuilding the picture one pixel at a time. The picture is not complete and ready to be viewed until all the pixels have been assembled. In the case of the ISVRS, an address range is the equivalent of a pixel. For example, Plan L87 uses the section of North Meridian Road between West Chinden Boulevard and West McMillian Road as a new boundary between Legislative Districts 14 and 20. The reflection of this in address ranges is that addresses on the even side of North Meridian Road between house numbers 4800 – 6398 are located in Congressional District 1, Legislative District 20, and precinct 132. Conversely, the addresses on the odd side of North Meridian Road. between house numbers 4801 – 6399 are located in Congressional District 1, Legislative District 14, and precinct 130. The remaining address ranges on North Meridian Road are further segmented and fall within different districts and precincts than these; based on Plan L87. Address ranges like these are the pixels that are used to rebuild the new district information in the ISVRS. Any address range, whether on a boundary or within a district, must be updated if any aspect of the precinct or district information relating to it has changed. Completion is achieved only when all

addresses where a voter could register have been properly categorized. Updating the address ranges is what updates the actual voter information. The one person in Ada County allowed to update the ISVRS must take the four weeks worth of GIS information and recreate Plan L87 one pixel at a time; a far more protracted task.

All federal, state, county and precinct candidates must file for candidacy on or before February 27, 2012. I.C. § 34-704. In order for a person to file in the correct district or precinct in Ada and Canyon Counties, a candidate must know the boundaries of the legislative district or precincts as defined by the ISVRS system. The ISVRS system depends on the Clerks having sufficient time to enter and proof the data that defines the districts and precincts. Because the Clerks need sufficient time to prepare, the Clerks respectfully ask the Court to act quickly so the Clerks can fulfill their statutory dueis.

III. CONCLUSION

The voters of the state adopted a constitutional amendment to allow a bi-partisan six-member commission to determine where to draw legislative and congressional lines. Absent more than a 10 percent deviation and absent an impermissible motive, the Clerks ask the Court to support Commission decisions which are vetted in a public forum.

The Clerks do not suggest that the Court should find Plan L87 constitutional merely for the sake of expediency. Given that the Court has found the 2002 apportionment Plan L97 unconstitutional and void based on the 2010 United States Census results and might now find

Plan L87 unconstitutional, the Clerks respectfully request guidance regarding the standard to use in preparing for the upcoming candidate filing and primary.

DATED this 21st day of December 2011.

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Ada County Prosecuting Attorney

By: _____
Lorna K. Jorgensen
Deputy Prosecuting Attorney

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December 2011, I served a true and correct copy of the foregoing AMICUS CURIAE BRIEF to the following person by the following method:

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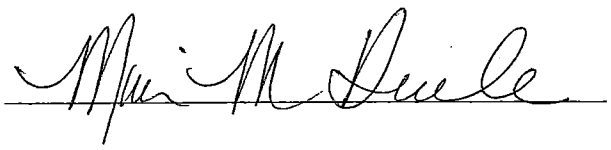

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