IN THE SUPREME COURT OF THE STATE OF IDAHO

BENEWAH COUNTY, a political subdivision of the State of Idaho, and the **BOARD OF BENEWAH COMMISSIONERS; BONNER COUNTY**, a political subdivision of the State of Idaho, and the **BOARD OF COMMISSIONERS OF BONNER COUNTY**, a political subdivision of the State of Idaho; **BOUNDARY COUNTY**, a political subdivision of the State of Idaho, and the **BOARD OF BOUNDARY COUNTY**; **CLEARWATER COUNTY**, a political subdivision of the State of Idaho, and the **BOARD OF CLEARWATER COMMISSIONERS**; **IDAHO COUNTY**, a political subdivision of the State of Idaho, and the **BOARD OF IDAHO COUNTY COMMISSIONERS**; **LEWIS COUNTY**, a political subdivision of the State of Idaho, and the **BOARD OF LEWIS COUNTY COMMISSIONERS**; **SHOSHONE COUNTY**, a political subdivision of the State of Idaho, and the **BOARD OR SHOSHONE COUNTY COMMISSIONERS**; and **CITIZENS FOR EQUITABLE REDISTRICTING**, an Idaho non-profit Association, Petitioners, v. **IDAHO COMMISSION FOR REAPPORTIONMENT** and **BEN YSURSA**, Secretary of State of the State of Idaho, Respondents.	)	**Supreme Court Docket No. 39432-2011**

RESPONDENTS' BRIEF

HON. LAWRENCE G. WASDEN
Attorney General
BRIAN KANE
Assistant Chief Deputy Attorney General
P.O. Box 83720
Boise, ID 83720
Attorneys for Respondents

CHRIST T. TROUPIS
TROUPIS LAW OFFICE
1299 E. Iron Eagle, Suite 130
P.O. Box 2408
Eagle, ID 83616

Attorneys for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions

Statutes

Court Rule

I. STATEMENT OF THE CASE

This is an original proceeding under Idaho Constitution, Article III, § 2(5), challenging the redistricting of several legislative districts contained in Plan L87 adopted by the Idaho Commission for Reapportionment (the "Commission").

All of the relevant facts are contained in the maps, tables, and findings provided as:

(1) Exhibits or Attachments to the Parties' materials in Appeal No. 39373-2011 (*Twin Falls County et al. v. Idaho Commission on Redistricting*),[1]

(2) materials provided in this challenge, or

(3) materials that are judicially noticeable on the Commission's website.

Respondents object later in this Brief to some so-called "facts" contained in Petitioners' supporting Affidavits.

Respondents contend that Plan L87 should be upheld by this Court, as explained in greater detail below, based upon the following points:

1. Petitioners lack standing to assert injuries to counties and voters who are not a party to this lawsuit.
2. With a total plan deviation of 9.92%, Plan L87 is presumptively constitutional under the Equal Protection Clause of the 14th Amendment.
3. Counties were split no more than necessary to comply with the Idaho State Constitutional Requirements.
4. The Commission appropriately considered communities of interest.
5. No district is any more oddly shaped than the State of Idaho and its Counties.

---

[1] The Court may take judicial notice of materials in the record of related appeals. *See Desfosses v. Desfosses*, 120 Idaho 354, 359, 815 P.2d 1094, 1099 (Ct. App. 1991) (Court of Appeals took judicial notice of record in related appeal); *City of Caldwell v. Roark*, 98 Idaho 897, 899 n.1, 575 P.2d 495, 497 n.1 (1978) (this Court took judicial notice of record in prior appeal).

Background. Absent an order from this Court requiring an earlier reapportionment, the Idaho Legislature is reapportioned every ten years upon the release of a new federal census. Idaho Const., Art. III, § 2(2). The results of the federal census of 2010 were released in the spring of 2011, which required the convening of a Commission for Reapportionment ("Commission") in 2011. On June 7, 2011, the First Commission for Reapportionment was convened and sworn in by Secretary of State Ysursa. On September 6, 2011, that Commission expired without approving any plan, although it had considered more than 80 full and partial plans.

The Secretary of State then sought guidance from this Court because (1) no Commission had ever before convened without adopting a plan and (2) 2002 Plan L97, which still apportioned the Idaho Legislature, was constitutionally deficient because it had a deviation of approximately 96%. On September 9, 2011, this Court issued an order indicating that the Secretary of State could convene a new Commission because the First Commission had failed to adopt any plan.

The Secretary of State then issued an order establishing a second Commission for Reapportionment following the 2010 census. The second Commission was composed of members who had not previously served on a Commission for Reapportionment because Idaho Code § 72-1502 prohibited members who had served on the First Commission from being appointed to the Second Commission. On September 28, 2011, the Second Commission was sworn in and began its work. It adopted all of the work of the First Commission, including the plans submitted to it and the testimony from previous Commission meetings and public hearings around the State.[2] In

[2] The following table shows the number and geographical diversity of the public hearings held:

Location	Date	Internet Link to Public Meeting Minutes
Boise	Oct. 7, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_1007_boisemin.pdf (7 pages of single-spaced, small font minutes)
Coeur d'Alene	Oct. 6, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_1006_coeurdalenemin.pdf (9 pages)
Idaho Falls	Oct. 5, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_1005_idahofallsmin.pdf (9 pages)

addition, the Second Commission held public hearings in Idaho Falls, Coeur d'Alene, and Boise. See note 2 below. Following consideration of the previous Commission's work, testimony at the public hearings, and various plans submitted to it, the second Commission unanimously adopted Plan L87 by a 6-0 vote.

Nature of Petitioners' Challenge. Petitioners are seven North Idaho Counties and their Boards of County Commissioners — Benewah, Bonner, Boundary, Clearwater, Idaho, Lewis, and Shoshone — and the non-profit corporation Citizens for Equitable Redistricting. Surprisingly, six of the seven Petitioning Counties are wholly contained within one Legislative District:

Meridian	July 13, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_0713_meridianmin.pdf (5 pages)
Hailey	June 30, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_0630_haileymin.pdf (3 pages)
Twin Falls	June 29, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_0629_twinfallsmin.pdf (4 pages)
Burley	June 28, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_0628_burleymin.pdf (3 pages)
Moscow	June 23, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_0623_moscowmin.pdf (4 pages)
Lewiston	June 23, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_0623_lewistonmin.pdf (4 pages)
Sandpoint	June 22, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_0622_sandpointmin.pdf (3 pages)
Coeur d'Alene	June 22, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_0622_cdamin.pdf (4 pages)
Soda Springs	June 16, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_0616_sodaspringsmin.pdf (2 pages)
Pocatello	June 15, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_0615_pocatellomin.pdf (5 pages)
Idaho Falls	June 15, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_0615_idahofallsmin.pdf (4 pages)
Rexburg	June 14, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_0614_rexburgmin.pdf (3 pages)
Caldwell	June 8, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_0608_caldwellmin.pdf (3 pages)
Boise	June 7, 2011	http://www.legislature.idaho.gov/redistricting/meetings/redistricting_0607_boisemin.pdf (2 pages)

Boundary County in District 1, Benewah County in District 5, Lewis County in District 6, and Shoshone, Clearwater and Idaho Counties in District 7. *Findings and Conclusions for Legislative Plan 87* ("*Findings*"), ¶¶ 12, 16, 17 and 18. The only Petitioning County that is divided — Bonner County — is the one that must be divided because of the mathematics of equal representation and the peculiarity of geography:

> One of these counties (Bonner) must be divided and combined with contiguous counties because one neighboring county (Boundary) is not contiguous to any other county. Boundary County is so small it cannot constitute a district by itself which satisfies the one person/one vote requirement and when Bonner and Boundary Counties are combined undivided, they are too large to constitute a district which complies with the one person/one vote requirement.

Findings, ¶ 8.d.

Although the Commission adopted its *Findings*, heard and adopted a substantial record of public testimony, and had under consideration 88 full and partial Legislative apportionment plans, Petitioners' challenge to Plan L87 does not address the public testimony regarding their Counties and barely addresses the plans under consideration by the Commission regarding their Counties. The only facts that Petitioners recite regarding their own Counties are that Bonner County is one of eleven counties divided by Plan L87, that it "combines Idaho and Clearwater Counties with Shoshone County although there is no direct road connection between Shoshone County and Idaho and Clearwater Counties," Petitioners' Brief, page 7, and the following summary of the Plan L87's effects on pages 11-12, which urges division of Benewah and Nez Perce Counties, which were not divided by the Second Commission, in the manner divided by Plan L82:

> Plan 87 combines Shoshone County with Idaho and Clearwater Counties although there is no direct road connection between all three counties. In order to travel from Clearwater County to Shoshone County, a person must leave the district and the trip can take more than seven hours one-way to complete. Shoshone County does not have a community of interest with Idaho and Clearwater

> [C]ounties and depending upon where its elected representatives reside one or more of these counties could not be effectively represented under this plan.
>
> … Benewah County is dominated by the city of Moscow, while Plan 82 links Shoshone County and Benewah [C]ounty and the rural part of Kootenai [County] and rural part of Latah County, preserving these rural communities of interest and not violating the road rules of Idaho Code § 72-1506.
>
> Under Plan L87 … Lewis County is dominated by the city of Lewiston, while Plan L82 combines Lewis County with the rural part of Nez Perce [County], and all of Clearwater and Idaho Counties, thus preserving a community of interest in these predominantly rural counties. Additionally, the vast majority of the Nez Perce Indian Reservation is kept wholly intact.
>
> Although Bonner County is split under all of the proposed plans, and Boundary Count[y] is not split under any of the proposed plans, both of … these counties are adversely impacted by the adoption of Plan L87.

On the other hand, in contrast to Petitioners' lament that Counties other than their own were not split to their liking, *e.g.*, by combining rural parts of Latah and Nez Perce Counties with Petitioners' Counties as proposed in Plan L82, the majority of Petitioners' recitation of facts addresses county splits in Twin Falls County, *id.* at 8; Teton and Fremont Counties, *id.* at 8-9; Owyhee County, *id.* at 9-10; Canyon and Gem Counties, *id.* at 10; Kootenai County, *id.* at 10-11; and Bingham and Bannock Counties, *id.* at 11. Petitioners do not explain why they like Plan L82's division of Kootenai County with other counties, see quote above, but not Plan L87's. Neither do they explain why Plan L87's division of Bonner County "adversely impacted" Boundary and Bonner Counties, but Plan L82's does not.

Petitioners simply substitute their own plan, discretion, and preferences for those of the Commission. This Court should resist such a challenge to the Constitution's requirement that reapportionment be completed by a citizen's Commission for Reapportionment. In simplest terms, Petitioners claim that Plan L87's district lines were drawn without any support in an un-reasonable manner. But these claims ignore the district-by-district findings of the Commission

adopted with Plan L87. In particular, the Commission made a number of findings relating to the unique geography and population distribution of Idaho. *Findings*, ¶¶ 6-10. Petitioners' Petition and Brief fail to acknowledge or account for any of the Commission's findings.

In short, Petitioners simply seek to substitute their judgment for that of the Commission, an approach expressly rejected by this Court in *Bonneville County v. Ysursa*, 142 Idaho 464, 472, 129 P.3d 1213, 1221 (2005): "We simply cannot micromanage all the difficult steps the Commission must take in performing the high-wire act that is legislative district drawing." Based upon the record, the public hearings and plans considered, and the Commission's findings, no plausible argument can be advanced that the Commission acted arbitrarily or capriciously. Instead, the Commission carefully weighed factors and testimony that were often in conflict. Therefore, the Petition should be denied.

II. ISSUES ON APPEAL

Is the Commission's Legislative Redistricting Plan L87 constitutional?

Should the Court consider the Affidavits of Speaker Denney and former Commissioner Esposito?

Are Respondents entitled to attorneys' fees?

III. STANDARD OF REVIEW

A. The Commission's Plan Is Presumptively Constitutional Under The Federal Constitution And The Burden Is On The Petitioners To Prove Otherwise

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires states to "make an honest and good faith effort to construct districts … as nearly of equal population as is practicable." *Smith v. Idaho Comm'n on Redistricting*, 136 Idaho 542, 544, 38 P.3d 121, 123 (2001), quoting *Reynolds v. Simms*, 377 U.S. 533, 577 (1964). This principle is referred to as the "one-person, one-vote" requirement.

Courts recognize that precise mathematical equality in each legislative district within a state is not attainable; therefore, minor deviations are allowed. *Bonneville County*, 142 Idaho at 467, 129 P.3d at 1216, citing *Reynolds* and *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). If a plan's maximum population deviation is less than ten percent,[3] the plan is presumptively constitutional under the Fourteenth Amendment's Equal Protection Clause. *Id.*, citing *Hellar v. Cenarrusa*, 106 Idaho 586, 589, 682 P.2d 539, 542 (1984). When a plan is presumptively constitutional, the burden is upon the challenger to prove that the deviation resulted from an unconstitutional or irrational State purpose or that voting strength has been diluted. *Id.*, citing *Karcher v. Daggett*, 462 U.S. 725, 740-44 (1983). Merely demonstrating that an alternative plan with a lower overall maximum population deviation could be used is not itself sufficient to require invalidation of a plan. *Gafney v. Cummings*, 412 U.S. 735, 740-750 (1973).

B. The Commission Is Entitled To Deference

Reapportionment in Idaho was formerly a legislative function, requiring the Legislature to adopt a plan after every decennial census. This function was contentious, lengthy and fraught with litigation, which resulted in the adoption of a Constitutional Amendment assigning reapportionment to a citizen's commission. As a body created by a constitutional amendment, which requires approval of two-thirds of both houses, as well as a majority of electors, the Commission truly represents the "will of the people," and should therefore be afforded as much deference as legally permissible. In short, this Commission should be afforded equal deference to that of a Legislature conducting reapportionment, if not greater. Reapportioning the Legislature is a legis-

---

[3] Maximum population deviation expresses the difference between the least populous district and most populous district in terms of the percentage those districts deviate from the ideal district size. The ideal district size is calculated by dividing the total population by the number of districts. For example, if among thirty-five districts, the least populous district is four percent below the ideal, and the most populous district is four percent above the ideal, the maximum population deviation would be 4% - (-4%), or 8%. *Bonneville County v. Ysursa*, 142 Idaho 464, 467 n.1 129 P.3d 1213, 1216 n.1 (2005).

lative task that Courts should make every effort not to pre-empt. *Wise v. Lipscomb*, 437 U.S. 535, 539-540 (1978); *Caesar v. Williams*, 84 Idaho 254, 268-69, 371 P.2d 241, 249 (1962).

The burden of showing the unconstitutionality of a statute is upon the party asserting it. *Stuart v. State*, 149 Idaho 35, 40, 232 P.3d 813, 818 (2010). Every reasonable presumption must be indulged in favor of the constitutionality of a statute. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 90, 982 P.2d 917, 925 (1999). By analogy, this same deference has been afforded the Commission for Reapportionment when it exercises the State's legislative power regarding apportionment of the Legislature. In *Hellar* the Court noted that apportioning the State Legislature "is, in the first instance, a matter of legislative discretion and judgment." 106 Idaho at 588, 682 P.2d at 541. The Court extended the same allowance for discretion and judgment vested in the Legislature to the Commission unless limited by constitution or statute. *Bonneville County*, 142 Idaho at 472, n.8, 129 P.3d at 1221.

C. The Affidavits Of Speaker Of The House Denney And Of Former Reapportionment Commissioner Esposito Should Not Be Considered In This Challenge

Speaker of the House of Representatives Lawerence Denney and former Reapportionment Commissioner Lou Esposito, who was a member of the First 2010 Census Reapportionment Commission, submitted Affidavits in support of Petitioners' Challenge. Respondents object to the Court considering either of these Affidavits for the following reasons:

First, the Speaker's Affidavit addresses legislative intent and his view that former Commissioner Esposito should not be barred from serving on a future Reapportionment Commission if a Reapportionment Commission is reconvened following the Court' decision in Petitioners' Challenge. This Court's decision in *Gillihan v. Gump*, 140 Idaho 264, 92 P.3d 514 (2004), *overruled on other grounds*, *Gonzalez v. Thacker*, 148 Idaho 879, 882, 231 P.3d 524, 527 (2009), teaches that the Affidavit of a Legislator cannot be considered in construing the meaning of a

statute. The general rule, and the Idaho rule as well, is that the beliefs of individual legislators do not establish legislative intent. *Gillihan*, 140 Idaho at 268, 92 P.3d at 518. *Gillihan* cited with approval the Oregon case of *Salem Keizer Ass'n of Classified Employees v. Salem Keizer School Dist. 24J*, 186 Or. App. 19, 61 P.3d 970 (2003), which set forth the reasoning for rejection of single–legislator, post-enactment statements of intent. These statements are not indicative of legislative intent because:

1. They are not part of the legislative record;

2. They are isolated statements of a single legislator representing only that legislator's views of the issue; and

3. The statements are made after the fact without any evidence that other legislators are even aware of them, let alone agree with them.

140 Idaho at 268-69, 92 P.3d at 518-19. Consistent with this reasoning, the Speaker's affidavit should be rejected.

Second, former Reapportionment Commissioner Esposito's Affidavit is doubly objectionable to the extent that it describes the statute or the Legislative Plans that were before the First or the Second Reapportionment Commission: (a) his observations are post-consideration statements not agreed to by the other Commissioners or even presented to the other Commissioners for inclusion in the Commission's record, and (b) his description of what other Commissioners said is hearsay and inadmissible as evidence. Former Commissioner Esposito, as a member of the failed First Commission for Reapportionment, holds no special status or knowledge from which to offer his opinions as to the exercise of the Second Commission for Reapportionment's constitutional and statutory discretion and ultimate adoption of Plan L87.

Idaho Code § 72-1502 is clear and does not require an affidavit to explain it. It limits former Commissioner Esposito's service to a single commission. When the First Commission expired without adopting a Plan, and therefore had no basis on which it could be reconvened

under the statute, the only Commission that may be reconvened, if necessary, is the Second Commission. This interpretation is consistent with this Court's order in Docket Nos. 39127-2011 & 39128-2011, ¶¶ 3-4 (Secretary of State can organize a new Commission).

IV. ARGUMENT

A. Petitioners Have Standing Only To Challenge Legislative Districts That Contain All Or Portions Of Counties That They Represent

Standing is a fundamental prerequisite to invoking this Court's jurisdiction. "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989). In order to satisfy the requirement of standing, the petitioners must "allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Id*. The petitioners must "establish a peculiar or personal injury that is different than that suffered by any other member of the public." *Selkirk-Priest Basin Ass'n v. State*, 128 Idaho 831, 834, 919 P.2d 1032, 1035 (1996). In this original jurisdiction challenge, the application of these standing principles means that Petitioners do not have standing to challenge the apportionment of legislative districts in which neither they nor their constituents reside.

As explained below, none of the seven Petitioning Counties claims, or could they claim, a federal constitutional equal protection injury to themselves because L87's maximum deviation of all of the legislative districts in Idaho is less than 10%. As to the Idaho Constitution, six of the seven Counties — Benewah, Boundary, Clearwater, Idaho, Shoshone and Nez Perce — do not and cannot claim a state constitutional injury to themselves because they are all wholly within one legislative district or another. Bonner County remains. Because it is the only county contiguous to Boundary County, it must be partially combined with Boundary County to create one legislative district meeting the one-person, one-vote Federal Equal Protection criterion. Thus, no

Petitioning County alleged an injury in fact to itself under the Idaho Constitution. Without such allegations, none of the seven Counties has standing to assert its sovereign interests in this suit.

Instead, as explained below, Petitioners focus on claims of injuries suffered by third parties — namely counties not parties to this challenge that were split by Plan L87. Courts should be reluctant to resolve a controversy on the basis of third parties not involved in the litigation. *Singleton v. Wulff*, 428 U.S. 106, 113 (1976). Two reasons underlie this hesitance:

1. Courts should not adjudicate rights unnecessarily; and
2. The holders of rights either do not wish to assert them, or can enjoy them regardless of the litigation.

Id. at 114, citing *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936). The general rule followed by the United States Supreme Court is: "Ordinarily, one may not claim standing in this Court to vindicate the Constitutional Rights of some third party." *Singleton v. Wulff*, 428 U.S. at 114.

The United States Supreme Court has recognized an exception in which third party rights may be asserted by others if three conditions exist:

1. The litigant must have suffered some injury in fact providing a concrete interest in the outcome of the litigation;
2. The litigant must have a close relationship with the third party; and
3. There must exist some hindrance to the third party's ability to protect their own interests.

Powers v. Ohio, 499 U.S. 400, 411 (1991). Petitioners fail to meet all three criteria.

First, in this challenge, the only Petitioning County that is split is Bonner, which based on geography and equal protection requirement unequivocally must be split. Boundary, Benewah, Lewis, Shoshone, Clearwater and Idaho Counties are not split; they therefore can show no injury under either the equal protection one-person, one-vote requirement, or the anti-county

splitting terms of Article III, § 5.

Second, there is no "close" relationship between these seven Petitioning Counties and other Counties. They are separate sovereign entities with unique interests that are not only different from, but also inconsistent with, those of non-party counties. The existence of inconsistent interests is discussed immediately below. Certainly, there is no *legal* relationship among them that allows the Petitioning Counties to represent other counties' interests without the latter's approval.

Third, there is no hindrance to the non-party counties protecting their own interests. Twin Falls, Teton, Owyhee, and Kootenai Counties brought their own challenge; Canyon and Ada Counties submitted an *amicus curia* brief supporting the Commission's work. *See* Supreme Court #39373-2011 & *Brief of Amicus Curiae*. To the extent the Petitioning Counties discuss Canyon County, they appear to be doing so contrary to Canyon County's position.

Thus, these Petitioners have no standing to allege, as they do on pages 8-11 of their Opening Brief, that Twin Falls, Teton, Fremont, Owyhee, Canyon, Gem, Kootenai, Bannock, Bingham, or Bonneville Counties were illegally split, or to argue, as they do on pages 14-17, that Plan L87 unnecessarily divided or gerrymandered the other Counties. These Petitioners have no federal or Idaho constitutional claim of their own with regard to either equal protection or county splits (since none of the Petitioning Counties except Bonner is split) because the Commission kept Benewah, Bonner, Boundary, Clearwater, Lewis, Nez Perce and Shoshone Counties intact, so they cannot challenge the splitting of other counties. Based upon the above, the Petitioners' challenge to Plan L87 should be dismissed in its entirety for lack of standing.

B. Plan L87 Satisfies Federal Constitutional Requirements

If Petitioners are able to overcome the significant threshold standing hurdle raised above, Plan L87 remains constitutionally defensible. As discussed in detail above, the Equal Protection

Clause of the Fourteenth Amendment requires that, in order for a legislative redistricting plan to be presumptively constitutional, it must have a maximum population deviation of less than 10%. Plan L87 adopted by the Commission for Reapportionment complies with this one-person, one-vote requirement by having a total population deviation of 9.92%.[4] With this compliance, Plan L87 is presumptively constitutional. Based upon this presumption, Petitioners have the burden to prove that the deviation resulted from an unconstitutional or irrational state purpose or that voting strength has been diluted. *See Karcher*, 462 U.S. at 740-44.

Petitioners have not demonstrated any unconstitutional or irrational state purpose behind the 9.92% deviation. Instead, Petitioners appear to contend that because the 9.92% is close to the 10% threshold, Plan L87 should lose its presumptive constitutionality. Opening Brief, page 16. This argument is contrary to the law adopted by the United States Supreme Court and the Idaho Supreme Court. Further, as described in detail below, Petitioners have not demonstrated that the Commission drew their districts with an unconstitutional or irrational state purpose.

C. Plan L87 Satisfies State Constitutional And Statutory Requirements

1. Idaho's redistricting requirements

In addition to the United States Constitution's one-person, one-vote requirement, the Commission for Reapportionment must also comply with Idaho's Constitutional and statutory requirements. Idaho Constitution, Article III, § 5 establishes the following requirements for the

---

[4] The Second 2010 Census Commission is the first to present the Court with a plan within acceptable population deviation within its initial filing. During the previous reapportionment, the 2000 Census Commission submitted plans of 10.69% and 11.79% before reaching consensus on a 9.71% plan. *Smith v. Idaho Commission on Redistricting*, 136 Idaho 542, 544, 38 P.3d 121, 123 (2001); *Bingham County v. Idaho Comm'n for Reapportionment*, 137 Idaho 870, 871-72, 55 P.3d 863, 864-65 (2002); *Bonneville County v. Ysursa*, 142 Idaho 464, 468, 129 P.3d 1213, 1217 (2005). Before creation of the Citizens Commission, plans were submitted that had deviation as high as 33%, and involved multimember and floterial districts, ultimately resulting in a court adopted plan (14-B) with a 9.65% deviation. *Hellar v. Cenarrusa*, 106 Idaho 586, 682 P.2d 539 (1984). Indeed, this dilemma has existed since statehood, when the very first reapportionment act was struck down because Idaho had grown from 16 to 18 counties without providing representation of the two new counties. *Ballentine v. Willey*, 3 Idaho 496, 31 P. 994 (1893).

Commission to follow regarding equal protection and county lines:

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

In 1996, the Idaho Legislature enacted Idaho Code § 72-1506 to provide additional standards to the Commission in its difficult task. That section of the Idaho Code, as it appeared at the time the second Commission adopted Plan L87, is set forth below:

> **72-1506. Criteria governing plans. —** Congressional and legislative redistricting plans considered by the commission, and plans adopted by the commission, shall be governed by the following criteria:
>
> (1) The total state population as reported by the U.S. census bureau, and the population of subunits determined therefrom, shall be exclusive permissible data.
>
> (2) To the maximum extent possible, districts shall preserve traditional neighborhoods and local communities of interest.
>
> (3) Districts shall be substantially equal in population and should seek to comply with all applicable federal standards and statutes.
>
> (4) To the maximum extent possible, the plan should avoid drawing districts that are oddly shaped.
>
> (5) Division of counties shall be avoided whenever possible. In the event that a county must be divided, the number of such divisions, per county, should be kept to a minimum.
>
> (6) To the extent that counties must be divided to create districts, such districts shall be composed of contiguous counties.

> (7) District boundaries shall retain the local voting precinct boundary lines to the extent those lines comply with the provisions of section 34-306, Idaho Code. When the commission determines, by an affirmative vote of at least five (5) members recorded in its minutes, that it cannot complete its duties for a legislative district by fully complying with the provisions of this subsection, this subsection shall not apply to the commission or legislative redistricting plan it shall adopt.
>
> (8) Counties shall not be divided to protect a particular political party or a particular incumbent.
>
> (9) When a legislative district contains more than one (1) county or a portion of a county, the counties or portion of a county in the district shall be directly connected by roads and highways which are designated as part of the interstate highway system, the United States highway system or the state highway system. When the commission determines, by an affirmative vote of at least five (5) members recorded in its minutes, that it cannot complete its duties for a legislative district by fully complying with the provisions of this subsection, this subsection shall not apply to the commission or legislative redistricting plan it shall adopt.

The Court has held that Article III, § 5 is the Commission's starting point. *Bingham County*, 137 Idaho at 874, 55 P.3d at 867. In other words, a plan may split counties and combine a portion of a county with another county only when necessary to meet the one-person, one-vote requirement. *Id*. However, if it is necessary to go outside county boundaries to form a district, Idaho Code § 72-1506's requirements should be considered. *Id*. Despite Petitioners' arguments to the contrary, Plan L87 complies with Idaho's constitutional and statutory requirements.

2. Counties were split no more than necessary to ensure that Plan L87 complied with one-person, one-vote requirement and to accommodate the extensive demographic, geographic and topographic limitations within the State of Idaho

Petitioners' core argument on pages 16-17 is that Plan L87 is unconstitutional because Plan L82 has a lower deviation and splits fewer counties. As they say on page 17:

> Plan 82 has less population deviation statewide than Plan L87, 8.76% vs. 9.92%. It has less population deviation within North

> Idaho Districts 1-7, 4.23% vs. 8.00%. Plan L82 does not have any precinct splits, or no road violations and reserves communities of interest in Benewah, Clearwater, Idaho, Latah, Nez Perce, and Shoshone Counties that are adversely affected by Plan 87.

This argument relies on a false premise — namely, that reapportionment is little more than a mathematical exercise. If this premise were true, then there would be no need for a Commission because the numbers could simply be inserted into a computer, the lowest deviation and county split would be printed out, and that plan would be adopted. But this is not the system that the citizens chose. Instead, the citizens of Idaho created a Commission for Reapportionment to address the issues raised by legislative redistricting and to exercise judgment in creating a redistricting plan. *See Bonneville County*, 142 Idaho at 472 n.8, 129 P.3d at 1221 n.8.

As this Court recognized, it is apparent in a state with 44 counties and 35 legislative districts that combining counties or portions of counties is necessary to comply with the one-person, one-vote requirement and to complete the legislative redistricting process. *Bingham County*, 137 Idaho at 875, 55 P.3d at 868. This conclusion is supported by the fact that the population of Idaho is not evenly distributed among the counties.

When the Commission is faced with the choice of splitting one county or another to meet the one-person, one-vote requirement, the decision regarding which county to split is vested with the Commission. *Bonneville County*, 142 Idaho at 472, 129 P.3d at 1221. Once the Commission has exercised this discretion, the inquiry is limited to whether "the split was done to effectuate an improper purpose or whether it dilutes the right to vote." *Id*. Neither has been shown in this case. It is important to note that Petitioners have not shown that Plan L87 is the result of an improper or irrational purpose; instead, they propose different exercises of discretion regarding county splits. The counties that were split by the Commission were split in order to comply with the one-person, one-vote requirement, to preserve communities of interest, and to create

compact districts in the face of Idaho's geographic challenges.

The Commission's Findings began by redrawing legislative districts in the northern part of the State and working their way south.[5] This approach recognized the extreme geographic limitations in the State's northern panhandle — namely, only Bonner County is contiguous to Boundary County, and counties north of and including Idaho County are confined to a limited number of possible configurations that take into account the statutory and constitutional criteria. These geographic limitations, combined with some counties' sparse populations, required the Commission to decide what counties to split and which counties to combine to meet the one-person, one-vote requirement. In making these decisions, the Commission considered many factors, including geography, population, and communities of interest, to create legislative districts that make sense and comply with constitutional and statutory requirements. The Commission, as the body entrusted by the people to redistrict Idaho, should have discretion to make these difficult decisions and to draw a legislative map that best serves the interests of the people.

Thus, the Court should reject Part I of Petitioners' Argument, pages 14-17, because, in the final analysis, regarding Petitioners, it does nothing more than argue that the Northern Counties could have been apportioned into seven Legislative Districts differently than L87 apportioned them. The Court should reject Part II of Petitioners' Argument, pages 17-19, because it quotes black-letter law, but does not suggest how Plan L87 violates any of that black-letter law.

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

As for Part III of Petitioners' Argument, pages 19-25, most of the argument rehashes the

---

[5] *See Findings* 12-46, in which *Finding* 12 is for District 1, which contains Boundary County and part of Bonner County, *Finding* 13 is District 2, which contains the rest of Bonner County and part of Kootenai County, *Finding* 14 is for District 3, which is wholly within Kootenai County, and so on.

Opening Brief in *Twin Falls County et al. v. Idaho Commission on Redistricting*, Appeal No. 39373-2011. That appeal was argued on January 5, 2012. There is no point in this brief discussing Counties other than the seven Counties that are Petitioners in this challenge because Petitioners do not have standing with regard to any of No, 39373's Counties or their residents.

Part III of the Argument first discusses one of the Counties that is a Petitioner in this challenge on page 23, one page past its midway point. Even then, the Argument does not identify any harm to a Petitioning County, focusing instead upon Kootenai County: "In the 7th District, 5,155 Kootenai County citizens are artificially connected to citizens in Shoshone, Clearwater, and Idaho Counties. There is no direct economic connection between Kootenai County and the citizens[6] in this widely scattered, rural, and lightly populated district." How does combining some residents of Kootenai County into a Legislative District with Shoshone, Clearwater, or Idaho Counties violate a constitutional or statutory right of residents of the latter three Counties, who are the Petitioners in this challenge? Petitioners do not say. Their silence is no basis for overturning Plan L87.

Petitioners state at pages 23-24 that "[t]he Redistricting Commission did not consider the traditional neighborhoods and local communities of interest" in several counties, including Shoshone, Idaho, Clearwater, Benewah, and Lewis Counties. But this statement is inconsistent with *Findings*, ¶¶ 16-18.[7] These Findings contain precisely the articulation of communities of interest

---

6 This quotation thrice refers to "citizens", but Census data report residents, not citizenship.

7 Findings 16-18 provide many references to communities of interest (emphasis added):

> 16. District 5 (Benewah County and Latah County). District 5 is comprised of the entirety of Benewah County and Latah County. Separately, Benewah County and Latah County do not have a large enough population to constitute an entire legislative district. Therefore, combining Benewah County and Latah County is necessary to meet the one person one vote requirement. ***Further, combining these counties keeps communities of interest intact.*** Idaho's major state highway, Highway 95 runs the entire length of the District 5. Additionally, this district contains the largest concentration of Coeur d'Alene Tribal members attainable while balancing the constitutional requirements for reappor-

that Petitioners argue are missing. This argument is not a ground for overturning L87.

Petitioners also argue on page 24 that District 7, which contains all of Shoshone, Clearwater and Idaho Counties, *see Findings*, ¶ 18, footnote 7, *supra*, is too small because it has a

---

tionment. ***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 the Native American Tribes located within its borders. District 5 contains 46,529 people with a deviation of 3.89% from the ideal district.

17. District 6 (Lewis County and Nez Perce County). District 6 contains all of Lewis County and Nez Perce County. Separately, Lewis County and Nez Perce County do not have enough population to constitute an entire legislative district. As Nez Perce County is bounded by Oregon and Washington on the west, the only contiguous county that could be combined with Nez Perce County to make compact legislative district is Lewis County. ***Further, this legislative district also includes the majority of the Nez Perce Tribe, a traditional community of interest.*** 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 the Native American Tribes located within its borders. District 6 contains 43,086 people with a deviation of -3.80% from the ideal district.

18. District 7 (Kootenai County (part), Shoshone County, Clearwater County, and Idaho County). District 7 includes a portion of Kootenai County, the entirety of Shoshone County, the entirety of Clearwater County and the entirety of Idaho County. The portion of Kootenai County that is included is clearly distinguished by roads surrounding Coeur d'Alene and Highway 95. In order to meet the one person one vote requirement, the Commission combined this portion 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.*** This part of Kootenai County and Shoshone County are combined with Clearwater County which is contiguous to Shoshone County and Idaho County which is contiguous to Clearwater County, maintaining the integrity of the Idaho county line that runs across the entire state of Idaho.

This district is evidence of the great difficulty in creating legislative districts in a state the size and shape of Idaho with its diverse landscape and comparatively sparse population density. The Commission recognizes that this district is large and not ideal; however, it is necessary to meet the one person one vote requirement and is consistent with other Idaho constitutional and statutory requirements. It is particularly revealing that this district comprised of a massive geographical area is still population light, which clearly reflects the disparity between population and county land size evident throughout Idaho. District 7 includes 42,948 people with a deviation of -4.11% from the ideal district.

deviation of 5.24% below the ideal size. But District 7's small population does not ***harm*** these three Counties; it ***advantages*** them. They are not aggrieved by District 7's size and have no basis to state a claim based upon a benefit bestowed upon them.

Lastly, Petitioners argue on page 24 that several counties, including Benewah, Lewis, Shoshone, Idaho and Clearwater Counties, "are discriminated against in that those counties are divided in such a way that those citizens in the parts that are carved away and arbitrarily combined with other counties will have little influence as a cohesive electorate." This statement is demonstrably untrue for these five counties because Benewah, Lewis, Shoshone, Idaho and Clearwater Counties are not divided in any way by L87; each is wholly contained in one Legislative District. *See* Findings 16-18, footnote 7, *supra*.

Counties must be split to comply with one-person, one-vote requirement. Based upon the filings before this Court, it is uncontested that Idaho cannot be apportioned and comply with the requirements of one-person, one-vote without splitting some counties. Because some counties must be split to comply with one-person, one-vote, the Commission must be provided the discretion and latitude to determine which counties are split and in what manner. This discretion is significant because every county split incurs a cost, while a county that remains whole receives a benefit. As reflected in Plan L87 and its Findings and Conclusions, the Commission strove to equalize the assignment of these costs and benefits throughout the state, preferring no region over another, but inevitably splitting some counties while preserving others.

At the inception of our state, the Court recognized:

> One of the very foundation principles of our government is that of equal representation, and the legislature is prohibited from enacting an apportionment law which does not give to the people of one county substantially equal representation to that given each other county in the state, based either upon the entire or voting population or upon some other just and fair basis.

Ballentine v. Willey, 3 Idaho 496, 506, 31 P.994, 997 (1893). In short, the Commission sought to

temper the costs of county splits, by spreading their application throughout the state.

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). Plan L87's *Findings* reveal that the Commission sought to keep communities of interest intact and 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.

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.

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.

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 L87 does not contain oddly shaped districts

Petitioners argue at page 24: "District 7 is oddly shaped because it connects Shoshone County with Clearwater and Idaho counties, creating a district that has no interior connecting roads between Shoshone County and the other Counties. It extends from Wallace in Shoshone County to Riggins in Idaho County a driving distance of approximately 260 miles, and touches the Idaho borders with both Oregon and Montana."

First, it is of no consequence that there are no roads connecting Shoshone County with the rest of District 7. *Findings*, ¶ 3(c), recited that the Commission complied with Idaho Code § 72-1506(9) and its provision regarding connecting highways within a Legislative District: "The Commission also found that it could not complete its duties by fully complying with the provisions of Idaho Code section 72-1506(9). Therefore, on October 14, 2011, all six Commissioners voted unanimously to waive the requirement that all counties included in a district be connected by state highways." Thus, the statutory criteria regarding highways and districts were satisfied.

Next, regarding the "oddly-shaped" issue, Idaho is not a square state comprised of square

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 Plan L87. The shape of District 7 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.

The final attack regarding oddly shaped districts appears to be on the geographical size of districts. But size alone is not a violation. As noted above, Petitioners must show shoestrings, elongations, or dispersion. *Bingham County*, 137 Idaho at 876, 55 P.3d at 869; *see also Shaw v. Reno*, 509 U.S. 630, 647 (1993); *Diaz v. Silver*, 978 F. Supp. 96, 118 (E.D.N.Y. 1997), *aff'd*, 522 U.S. 801 (1997). As the Commission identified within its findings:

> The federal one person/one vote requirement, the Idaho Constitution's limitation on the number of districts, the Idaho Constitution's limitation on the division of counties in the formation of legislative districts, and these unique physical features necessarily result in the creation of a few legislative districts that are not ideal under any redistricting plan.

Findings, ¶ 6.

District 7, which includes all of Idaho, Clearwater, and Shoshone Counties, is an example of this difficulty. Even with its huge size, it is one of the lower populated districts, with a deviation of -4.11%. District 7 reflects the significant problem for reapportionment that the boundaries of the State create, particularly in the panhandle. As noted above, Petitioners challenge District 7 because it is long (extends 260 miles) and touches both the Montana and Oregon borders. But no plan that places Idaho County wholly within one district can fail to create a district that touches both the Montana and Oregon borders because Idaho County itself touches both borders.

As Petitioners' references to Plan L82 demonstrate, they simply choose another set of communities of interest to serve, not the communities chosen by the Commission. Petitioners have no evidence to show that their balancing of community interests is anything more than an alternative balancing of interests that they wish to have this Court substitute for the Commission's balancing. But *Bonneville County* teaches that the balancing is for the Commission, not for this Court or for challengers to the Commission's legislative apportionment plan.

D. The Appropriate Relief, If Any, Is Remand To The Existing Commission.

Petitioners ask this Court, in the event Plan L87 is found unconstitutional, to adopt Plan L82 with respect to the Northern Idaho Counties, Opening Brief, page 26, or to reconvene the First Commission on Reapportionment, which expired on September 6, 2011 without adopting any plan, see Petition, Prayer for Relief D, page 16. In support of the latter request, Petitioners submitted the affidavit of Speaker of the House Lawerence Denney. As previously noted, that request should be denied.

V. ATTORNEYS' FEES

Respondents respectfully request that attorneys' fees and costs be awarded to them based on the Petitioners' lack of standing, which would have been revealed in a reasonable inquiry into the law of standing. *See* Idaho Appellate Rule 41 (claim for attorneys' fees must appear in a party's first brief on appeal); Idaho Code § 12-121, as construed in *Coward v. Hadley*, 150 Idaho 282, 290-91, 246 P.3d 391, 399-400 (2010) (Court may award attorneys' fees on appeal under §12-121 when appeal was brought frivolously, unreasonably, or without foundation). Bringing a challenge on behalf of seven Counties that did not have any colorable claims of violation of Federal Equal Protection rights or State anti-count splitting rights was frivolous, unreasonable and without foundation. Respondents should receive attorneys' fees.

VI. CONCLUSION

This proceeding, as well as that in No. 38373-2011, underscores the need for this Court to provide a definitive construction of the first sentence in Article III, § 5.[8] If it requires the Commission to adopt a reapportionment plan that satisfies federal constitutional standards relevant to the one person, one vote doctrine and minimizes the number of instances where one portion of a county is separated and joined with all or a portion of another county—"county divisions"—the Court should so state plainly. Under that construction, the Commission's discretion would be limited to determining which reapportionment plan containing the minimum number of county divisions is most appropriate under the criteria identified in § 72-1506. The Commission's determination with respect to application of those criteria would control in any subsequent challenge before this Court absent a showing that the division "was done to effectuate an improper purpose or whether it dilutes the right to vote." *Bonneville County*, 142 Idaho at 472, 129 P.3d at 1221.

As discussed above, Respondents do not so construe Article III, § 5. They understand the term "reasonably determined" in Article III, § 5 to mean "reasonably determined" in accordance with applicable statute, instantly § 72-1506. Respondents further understand *Bonneville County* to accord deference to the Commission's determination of the appropriate weight to be given the criteria in that section unless the requisite showing of improper purpose or vote dilution. Clarification of this core difference over the construction of Article III, § 5 is essential to facilitate the Commission's decisionmaking consistent with state constitutional requirements. Under Respondents' understanding of the relevant constitutional and statutory provisions,

---

[8] Respondents note that § 72-1506 does not prioritize the several factors identified in subsections (2), (4) and (5). Each subsection instead is qualified by either "[t]o the maximum extent" (subsections (2) and (4)) or "whenever possible" or "to a minimum" (subsection (7)). There is, in other words, no statutory basis upon which to assign *primacy* to subsection (5). Any such primacy instead must derive from Article III, § 5.

Petitioners simply ask this Court to substitute their judgment for that of the Commission. But weighing the relative merits of plans is the Second Commission's job, not Petitioners' job. They should not be permitted to "Monday Morning Quarterback" Plan L87 and substitute their preferences for those of the Commission.

Respondents respectfully ask this Court to uphold Plan L87 in its entirety and to allow it to be implemented as adopted. They further ask for attorneys' fees on appeal.

Respectfully submitted this 6th day of January 2012.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

/s/ *Brian Kane*
By: BRIAN KANE
Assistant Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of January 2012, I caused to be served a true and correct copy of the foregoing by the following method to:

Christ T. Troupis
Troupis Law Office
1299 E. Iron Eagle, Suite 130
P.O. Box 2408
Eagle, ID 83616

☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail, Return Receipt Requested
☐ Overnight Mail
☐ Facsimile:
☒ E-mail: ctroupis@troupislaw.com

/s/ *Brian Kane*
BRIAN KANE