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Attorneys for Respondents

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Petitioner,

v.

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

Respondents.

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

Petitioner,

Supreme Court Dkt. No. 49261-2021

**MOTION TO CONSOLIDATE
AND ALIGN BRIEFING
SCHEDULE**

Supreme Court Dkt. No. 49267-2021

v.

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

Respondents.

Respondents respectfully move the Court to consolidate Docket Nos. 49261-2021 and 49267-2021, two original actions challenging on substantially similar grounds the legislative redistricting plan adopted by the Commission for Reapportionment on November 5, 2021 and reaffirmed on November 10, 2021. Respondents further ask the Court to issue a new briefing schedule to align briefing for the consolidated cases.

I. BACKGROUND FACTS

As the Court knows, after a federal census, Idaho law permits a commission for reapportionment to be formed to reapportion the legislature and set new congressional districts. Idaho Const. Art. III, § 2. Following the 2020 census, an Idaho Commission for Reapportionment (“Commission”) was formed. The Commission adopted Plan L03 as Idaho’s legislative redistricting plan on November 5, 2021 and it reaffirmed its adoption on November 10, 2021,¹ well in advance of the 90-day deadline imposed by Idaho Code § 72-1508. The Commission’s final report was filed with the Secretary of State on November 12, 2021. Challenges to Plan L03 may be filed with this Court until December 17, 2021. Idaho Code § 72-1509(1); Idaho Appellate Rule 5(b).

¹ The adoption of the Plan L03 was reaffirmed on November 10, 2021 out of an abundance of caution regarding a potential open meetings law violation.

Branden Durst (Docket No. 49261-2021) and Ada County (Docket No. 49267-2021) have filed separate petitions challenging Plan L03 on substantially similar grounds. Both challenges turn on the way Plan L03 divides certain Idaho counties. Neither Durst nor Ada County filed briefs in support of their petitions. Under the briefing schedules set by the Court for the respective challenges, Respondents must file their brief responding to the Durst Petition by November 29, 2021 and their brief responding to the Ada County Petition by December 3, 2021. *See* Scheduling Order, *Durst v. Idaho Commission for Reapportionment*, issued November 15, 2021 and Scheduling Order, *Ada County v. Idaho Commission for Reapportionment*, issued November 19, 2021. In each case, Petitioners have 14 days from the filing of the Respondents' Brief to file their reply briefs. *Id.*

II. ARGUMENT

A. **This Court should consolidate the two cases challenging Plan L03 because common questions of law and fact predominate.**

Consolidating Docket Nos. 49261-2021 and 49267-2021 is proper because the two petitions involve common questions of both law and fact. Idaho Rule of Civil Procedure 42(a). Consolidation of briefing and argument would streamline the review of Plan L03 by avoiding duplication of effort, which would preserve the parties' and the Court's resources.

While neither petitioner filed an opening brief, based on the petitions, it appears they both take issue with how the Commission divided counties to meet the competing requirements of the U.S. Constitution, Idaho Constitution, and Idaho Code. Durst and Ada County both argue that Plan L03 is unconstitutional under the Idaho Constitution because it divides more counties than is allegedly necessary. *Petition for Review, Durst v. Idaho Commission for Reapportionment et. al*, Docket No. 49261-2021, at ¶ 16; *Petition Challenging the Constitutionality of Reapportionment Plan L03 and Request for Writ of Prohibition and Remand, Ada County v. Idaho Commission for*

Reapportionment et al., Docket No. 49267-2021, at First Cause of Action. Durst and Ada County appear to believe that Plan L03 violates the Idaho Constitution by dividing too many counties. Ada County appears to further believe that Plan L03 violates Idaho Code § 72-1506 by combining portions of Ada County with too many other counties. *Id.* at Second Cause of Action.

Splitting counties is necessary to satisfy the Equal Protection Clause of the United States Constitution, as granting equal political power to geographical units with unequal populations unlawfully dilutes the votes of citizens living in more populated areas. *See Angle v. Miller*, 673 F.3d 1122, 1128 (9th Cir. 2012). But Article III, Section 5 of the Idaho Constitution provides that “a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided,” and Idaho Code § 72-1506(5) provides that when “a county must be divided, the number of such divisions, per county, should be kept to a minimum.”

To resolve the two Petitions, this Court will need to answer common questions about, among other things, what it means to divide a county, what the Equal Protection Clause demands, what the Idaho Constitution demands, what Idaho Code demands, what level of deference is owed to the Commission, and whether the Commission properly exercised its discretion in adopting Plan L03. For this reason, Respondents anticipate substantial overlap in their briefs—currently due one week apart—responding to the Durst and the Ada Count Petitions. Given those common questions of law and fact, it is proper to consolidate the cases for briefing and oral argument.

B. The Court should align the briefing schedule for the consolidated case.

After consolidating the cases, this Court should set a new briefing schedule. The current briefing schedules do not require Petitioners to file an opening brief, and they require Respondents to file substantially overlapping responsive briefing one week apart in the two cases.

Petitioners should be given time to file an opening brief. Both Petitioners request the issuance of special writs in the form of writs of prohibition to the Idaho Secretary of State. Idaho Appellate Rule 5(c) provides that “special writs shall issue only upon petitions verified by the party beneficially interested therein and upon briefs in support thereof filed with the Clerk of the Supreme Court.” As neither Petitioner has filed a brief in support of their Petition, they should be given time to do so. Such a filing would be in accordance with the Idaho Appellate Rules, it would allow Petitioners to better present their arguments to the Court, and it would allow Respondents to better understand Petitioners’ arguments. For example, Petitioner Durst would be able to explain why it is his interpretation that the governing law is only concerned with external, as opposed to internal, county splits. Such a filing would be consistent with the procedure previously applied by the Court. *See Twin Falls County v. Idaho Com’n on Redistricting*, 152 Idaho 346, 347, 271 P.3d 1202, 1203 (2012) (“On November 16, 2011, Petitioners filed this proceeding challenging Plan L 87. On November 23, 2011, this Court gave Petitioners fourteen days within which to file their opening brief, Respondents fourteen days thereafter within which to file a responding brief, and Petitioners seven days thereafter within which to file a reply brief.”).

Respondents therefore respectfully propose the following briefing schedule for the consolidated case: Petitioners shall be required to file their opening briefs on November 30, 2021. Respondents shall have 14 days from that date to file one responsive brief responding to both opening briefs, and Petitioners shall have seven days therefrom to file their reply briefs.

III. CONCLUSION

For these reasons, Respondents respectfully request that the Court enter an order consolidating Docket Nos. 49261-2021 and 49267-2021 and setting the proposed aligned briefing

schedule. Should the motion be denied, Respondents request at a minimum that both Petitioners be ordered to file briefing before Respondents' responsive brief is due.

Respectfully submitted this 19th day of November, 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 November 19th, 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.

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