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

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

Petitioners,

v.

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

Respondents.

Case No. 49353-2021

PETITIONERS' OPENING BRIEF

IN SUPPORT OF THEIR PETITION FOR A WRIT OF PROHIBITION

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Nature of the Case

On November 12, 2021, the Idaho Commission for Reapportionment filed its Final Report with the Secretary of State. In its Report, the Commission adopted Plan L03 as the final plan to redraw the boundaries of Idaho's 35 legislative districts. Plan L03 violates Article III, § 5 of the Idaho Constitution and Idaho Code § 72-1506.

The Chairmen of the Coeur d'Alene and Shoshone-Bannock Tribes (the Tribes), agree with Ada County and Petitioner Branden Durst that the Commission violated a state constitutional command to split counties as little as possible during the redistricting process. But the Commission compounded its error by ignoring the Tribes' requests to respect their sovereignty. Focusing instead on trying to reach the smallest statistical deviation among districts – a goal that the Equal Protection Clause does not require – the Commission adopted a plan that factures the Tribes' Reservations and dilutes their voting strength. In doing so, the Commission rejected plans that would have resulted in fewer county divisions (seven versus eight) and complied with the Equal Protection Clause, while still respecting the Tribes' communities of interest as required under I.C. § 72-1506(2). This Court should order the Commission to come up with a new plan that complies with the United States Constitution and the Idaho Constitution *and* that respects the Tribes' compelling and long-standing sovereign interests.

Statement of Facts

A. The Coeur d'Alene and Shoshone-Bannock Tribes are sovereign nations.

Tribes are sovereign nations on self-governing reservations. They were in this region for thousands of years before the State of Idaho was added to the Union.

The Shoshone and Bannock Tribes lived and seasonally ranged over millions of acres throughout the Pacific Northwest, including Washington, Oregon, Idaho, Montana, Wyoming, Utah and Nevada. (Boyer Dec., ¶ 7.) The Coeur d'Alene Tribe once inhabited more than 3.5 million acres in what is now northern Idaho, northeastern Washington, and western Montana. (Allan Dec., ¶ 5.) Over time, the Tribes' homelands shrunk as non-Indian settlers moved into the area, and the United States pushed them onto reservations. (Boyer Dec., ¶ 8-14.) (Allen Dec., ¶ 7-13.)

In 1868, the Shoshone-Bannock Tribes entered into the Treaty of Fort Bridger, which freed approximately 55 million acres to the United States and set aside the Fort Hall area as a reservation. (Boyer Dec., ¶ 8.) That Treaty, which provided no compensation to the Tribes, gave the United States prime agricultural land in the Snake River valley and included the land on which some of the most prosperous and growing cities in Idaho sit today, including Boise, Twin Falls, and Pocatello. (Boyer Dec., ¶ 9-10.)

In 1887, the Coeur d'Alene Tribe agreed to cede its historical territory while setting aside a reservation of about 600,000 acres. (Allan Dec., ¶ 7.) The agreement

opened up the Silver Valley for mining and other non-Indian economic development that would eventually net billions of dollars. (Allan Dec., ¶ 8.) The Tribe received $150,000, or about eight cents per acre. (Allan Dec., ¶ 9.) At the time, its Reservation still encompassed land on which the present cities of Coeur d'Alene, Post Falls, Harrison, and Saint Maries now exist. (Allan Dec., ¶ 10.) That tribal land, too, would disappear. Two years later, the Tribe ceded the northern portion of its land. *Id*.

But both Tribes have persisted and flourished. Today, the Shoshone-Bannock Tribes' reservation boundaries include about 540,000 acres in southeastern Idaho and is governed by the Fort Hall Business Council in Fort Hall, Idaho. (Boyer Dec., ¶ 14.) The Coeur d'Alene Tribe now has a Reservation of about 345,000 acres, with a Tribal Council that sits in Plummer. (Allan Dec., ¶ 13, 17.) Both Tribes are self-governing sovereigns over their respective reservations. (Boyer Dec., ¶ 2, 21.) (Allan Dec., ¶ 2.) They have tribally-ratified constitutions that have been approved by the United States Secretary of the Interior. (Allan Dec., ¶ 14,15.) They have meaningful tribal governments that seek to promote economic development, education, and the health of their members. (Allan Dec., ¶ 19, 20.) They each add millions of dollars in economic activity to the State. (Allan Dec., ¶ 17, 18.) (Boyer Dec., ¶ 15,16.)

These and other tribes within Idaho's boundaries are distinct political and cultural entities – communities of interests – that are entitled to have a strong voice in the redistricting process. (Boyer Dec., ¶ 21.) (Allan Dec., ¶ 19.)

B. The Commission disregarded the Tribes' interests in the redistricting process.

The Idaho Redistricting Commission is tasked with creating new state legislative and federal congressional redistricting plans, when the results of a new federal census are available, under Article III, § 2 of the Idaho Constitution and Idaho Code § 72-1501. The United States Census Bureau released its Census 2020 results in August of 2021. Idaho's total state population was reported as 1,839,106. Thirty-five legislative districts are required, and the state's reported census population must be allocated among those thirty-five districts. An exact allocation of 1,839,106 people in thirty-five districts would result in 52,546 people in each district.

Both Tribes participated fully in the redistricting process. As detailed in the Declaration of Chief J. Allan, Chairman of the Coeur d'Alene Tribe, tribal leadership met with the Commission and urged the Commission to adopt a plan that would respect it as a community of interest, to the maximum extent possible, and within the boundaries of the 14th Amendment and Idaho's restrictions regarding the splitting of counties. (Allan Dec., ¶ 23-30.). Likewise the leadership of the Shoshone-Bannock Tribes met with the Commission on their Fort Hall Reservation. (Boyer Dec., ¶ 24, 25.) They provided the Commission with detailed information concerning their interests and urged, to the maximum extent possible, that they remain whole within a single district in the new redistricting plan. (Boyer Dec., ¶ 24-34.)

The Tribes are communities of interest under Idaho redistricting law. I.C. §72-1506(2). The Commission expressly acknowledged that indeed the Tribes are communities of interest, finding "that communities of interest include, but are not limited to, cities, tribal reservations, and at times, neighboring cities or counties." (Report, at 25.) In its comments, it stated that the Coeur d'Alene Tribe was a "very important community of interest." (Report, Appendix 12, p. 45). Likewise, the Commission expressed its regret with its redistricting treatment of the Shoshone-Bannock Tribes in a remarkable footnote as it grappled with what it characterized as an impractical problem:

> 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 it impracticable for both equal protection and county integrity reasons. The Commission details the problem for possible consideration by Idaho policymakers in the Letter to Appointing Authorities, Appendix XV.

Report, p. 25, fn. 65. As discussed in the Argument section of this brief, that statement is incorrect.

Plan L03 adopted by the Commission splintered the Shoshone-Bannock Tribes into three legislative districts: District 30, consisting of Bingham and Butte counties; District 28, composed of Power, Franklin and Bannock counties; and District 35, comprised of Teton, Caribou, Bear Lake, Bonneville and Bannock counties. All said, these three legislative districts span no less than 10 counties. (Boyer Dec., ¶ 30.) The division of the reservation between District 28 and 30 intentionally but indifferently

divides the two largest population clusters on the reservation. Plan L03 splits the Shoshone-Bannock Reservation's primary hub and population in half. (Boyer Dec., ¶ 31.)

Likewise, Plan L03 divided the Coeur d'Alene Tribe into two districts. District 2 consists of a portion of Bonner County, a portion of Kootenai County, and all of Benewah, Shoshone, and Clearwater counties. District 5 is an internal district in Kootenai County. (Allan Dec., ¶ 14.)

Plan L03 decimates and dilutes any electoral influence of the Tribes and disenfranchises them from the political process. This challenge is essential so that the Tribes can have the opportunity to participate in the electoral process and influence elections and legislative policy.

The Court should remand the redistricting process to the Commission with the instruction that it create a plan with a seven county split as Idaho's Constitution requires, and to the maximum extent possible preserve the Tribes as sovereign nations who are communities of interest protected under Idaho's redistricting statute.

ISSUES PRESENTED

I.

The Commission erred in striving for exact proportionality among legislative districts while ignoring other compelling state, county, and tribal interests.

II.

The Commission violated Article III, § 5 of the Idaho Constitution by failing to adopt a plan that both complies with the Equal Protection Clause of the Fourteenth Amendment and results in fewer county divisions.

III.

The Commission violated Idaho Code § 72-1506(2) by not taking the Tribes' longstanding communities of interest into account before adopting its final plan.

IV.

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

ORIGINAL JURISDICTION

The Court has original jurisdiction over actions involving legislative apportionment under Article III, § 2(5) of the Idaho Constitution.

ARGUMENT

I.

The Commission erred in striving for exact proportionality among legislative districts while ignoring other compelling state, county, and tribal interests.

In its Final Report, the Commission wrote that its primary goal was to achieve the smallest maximum deviation among all legislative districts as possible. (Report, p. 10.) Using the latest census data, it divided Idaho's 2020 population of 1,839,106 by 35 districts to reach 52,546 people per district as the "ideal district size." (*Id*.) The Commission determined this number was its "polestar." (*Id*.) It wrote that the Equal Protection Clause "requires staying *as close as possible* to the ideal district size while still effectuating state policy." (*Id*. at 11.) (Emphasis added.) The Commission then set an arbitrary goal of a maximum deviation of 5%:

> The Commissioners agreed that in no instance would they craft a district that deviated more than 5% over or under the ideal district size, unless the district was an outlier and there was an extraordinarily compelling reason for the larger deviation.

(*Id*.) The Commission's final plan resulted in a maximum deviation of 5.84%. (*Id*.)

The Commission misinterpreted and misapplied the United States Supreme Court's one person, one vote jurisprudence. The Equal Protection Clause does *not* require an obsessive focus on reaching the smallest statistical deviation among a state's legislative districts. The Commission lost its way, disregarding mandatory state constitutional commands and giving short-shrift to the Tribes as longstanding communities of interest.

In *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), the United States Supreme Court applied the doctrine of one person, one vote to state legislative bodies. It held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id*. at 569.

But the *Reynolds* Court recognized that purity in redistricting was not attainable: "mathematical nicety is not a constitutional requisite." 377 U.S. at 569. According to the Court, the Equal Protection Clause requires only that "a State make an honest and good faith effort to construct districts ... as nearly of equal population *as is practicable* ..." *Id*. at 577 (emphasis added). That is so because "it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." *Id*. "Mathematical exactness or precision is hardly a workable constitutional requirement" *Id*. The Court recognized some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives such as

"maintain[ing] the integrity of various political subdivisions" and "provid[ing] for compact districts of contiguous territory." 377 U.S. at 578.

Absent evidence of arbitrariness or intentional discrimination, minor deviations from mathematical equality in the state redistricting process are insufficient to even state a claim under the Equal Protection Clause. *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (citing *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973)). An apportionment plan with a maximum population deviation under 10% generally falls within the category of a "minor deviation" that does not concern the U.S. Constitution. *Brown*, 462 U.S. at 842 (citing *Connor v. Finch*, 431 U.S. 407, 418 (1977) and *White v. Regester*, 412 U.S. 755, 764 (1973)).

Yet, the Commission still worried that "a maximum population deviation under 10% is no safe harbor, however." (Report, p. 7.) It wrote that "a redistricting plan with a maximum population deviation under 10% will be held unconstitutional if the individual right to vote in one part of the state is substantially diluted compared to the individual right to vote in another part of the state." (*Id*.) To support that sentence, it cited *Bonneville County v. Ysursa*, 142 Idaho 464, 129 P.3d 1213 (2005).

But *Bonneville County* actually *upheld* a map despite the petitioners' argument that it had created a "regional deviation" favoring north Idaho. 142 Idaho at 471. True, the Court did quote *Reynolds* for the proposition that "a plan will be held unconstitutional where the individual right to vote in one part of a state 'is in

substantial fashion diluted when compared with votes of citizens living in other parts of the State.'" 142 Idaho at 468. But we know from U.S. Supreme Court caselaw that a deviation is not "substantial" for Fourteenth Amendment purposes when it is below 10%. *See*, *e.g.*, *Brown*, 462 U.S. at 842.

A map with a maximum deviation that is less than 10% among legislative districts is presumptively constitutional. *Hellar v. Cenarrusa*, 106 Idaho 586, 589, 682 P.2d 539, 542 (1984). To find otherwise, challengers must shoulder a heavy burden to show that the map "results from some unconstitutional or irrational state purpose." *Bonneville County*, 142 Idaho 464 at 468. It is for that same reason that the Commission should not have relied on *Larios v. Cox*, 300 F.Supp.2d. 1320 (N.D. Georgia 2004). (Report, p. 7, n.26.) There, the district court struck down a plan with a below 10% deviation, but the plan was created through an intentional, deliberate, and systematic discriminatory policy of favoring rural and inner-city interests at the expense of suburban areas. *Id.* at 1327, 1340. In other words the record supported a particular intent to draw a map that diluted voting power. In *Bonneville County* this Court found *Larios* unhelpful because it involved an admitted attempt to gerrymander, which is nothing like the facts before the Court. 142 Idaho 464 at 471.

The Commission's march toward mathematical purity was even more misguided when one considers that discrepancies well above 10% can survive review if they are justified by longstanding state traditions and interests. *Brown v. Thomson* offers a good

example. In *Brown*, the Supreme Court affirmed Wyoming's redistricting plan that permitted one county to have its own legislative district even though its population was 60% below the mean and this created a maximum deviation of 89% between districts. *Brown*, 462 U.S. at 848. In doing so, the Court noted that Wyoming had a state constitutional policy since statehood of using counties as representative districts and ensuring that each county has one representative, which the Court deemed "substantial and legitimate state concerns." *Id*. at 845. Preserving the integrity of a state's political subdivisions "may justify an apportionment plan which departs from numerical equality." *Id*. (quoting *Abate v. Mundt*, 403 U.S. 182, 185 (1971)); *see also Mahan v. Howell*, 410 U.S. 315, 329 (1973) (approving a state-legislative map with maximum population deviation of 16% to accommodate the State's interest in "maintaining the integrity of political subdivision lines").[1]

[1] The Tribes contend that a maximum deviation at precisely 10%, such as in Plan L079, is presumptively constitutional as a non-substantial statistical deviation. The Supreme Court has used imprecise language in some of its opinions on what to do at precisely 10%. *Evenwel v. Abbott,* 578 U.S. ___, 136 S.Ct. 1120, 1124 (2016)("[m]aximum deviations *above* 10% are presumptively impermissible") with *Harris v. Arizona Indep. Redistricting Commn*., 578 U.S. ___, 137 S.Ct. 1301, 1307 (2016) (noting that challenges to "deviations *under* 10% will succeed only rarely, in unusual cases.") (emphases added).

But the point of the Supreme Court's state's redistricting case law is that mathematical perfection is not required, and there is no bright line cut-off. It has held that minor deviations – which it has defined as being in the area of 10% and below – are of no constitutional concern unless some other impermissible motive exists. *E.g*., *White v. Regester*, 412 U.S. 755, 763-64 (1973) (finding that a maximum deviation of 9.9% did not support an equal protection violation). Even those slightly above 10% will not violate the Equal Protection Clause when the state advances strong legitimate policy interests.

In short, the Commission erred in following a polestar that does not exist. Contrary to the Commission's misguided belief that a "[c]ommitment to equal protection requires aiming for 0% deviation, not 10%," it does not. (Report, p.15.) Though the Commission cited *Reynolds* and the cases that followed, it misinterpreted the lessons from that precedent. Indeed, it appears that the Commission may have conflated the constitutional standard for redrawing *state legislative* districts with the standard for redrawing *federal congressional* districts. It is true that a congressional redistricting scheme requires more mathematical precision, but that is because it must adhere to Article I, § 2, of the United States Constitution rather than the more forgiving Equal Protection Clause. *White v. Regester*, 412 U.S. 755, 763 (1973).

Had the Commission liberated itself from a straight-jacket of its own making, it would have been free to correctly apply the foundational principles of Idaho's state law. The foremost of these is Article III, § 5's constitutional requirement that "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."

II.

The Commission violated Article III, § 5 of the Idaho Constitution by failing to adopt a plan that both complies with the Equal Protection Clause of the Fourteenth Amendment and results in fewer county divisions.

The Commission cited the Idaho constitutional requirement that counties should be divided only to the extent necessary to comply with the United States Constitution, *see* Report, pp. 7-8, but Plan L03 violates that very provision.

As the United States Supreme Court has acknowledged about Wyoming's interests in *Brown v. Thomson*, *see* 462 U.S. at 845, 848, Article III, § 5 of the Idaho Constitution codifies Idaho's historic tradition of preserving counties as distinct political entities that must be honored during the reapportionment process.

This Court has strictly construed that constitutional provision. During the last reapportionment process, the Court emphasized that "[a] county can be divided *solely* for one reason—'to the extent it is reasonably determined by statute that counties must be divided to ... comply with the constitution of the United States.'" *Twin Falls County v. Idaho Comm'n on Redistricting*, 152 Idaho 346, 349, 271 P.3d 1202, 1205 (2012) (citing Idaho Const., Art. III, § 5) (emphasis in original). The Court held that, to comply with the Idaho Constitution, a redistricting plan must divide as few of Idaho's counties as possible: "[t]hat constitutional provision requires that the total number of divided counties in a legislative redistricting plan shall be the minimum number required to

comply with the Federal Constitution." 152 Idaho at 351. That is, "[i]f one plan that complies with the Federal Constitution divides eight counties and another that also complies divides nine counties, then the extent that counties must be divided in order to comply with the Federal Constitution is only eight counties." *Id*. at 349.

Plan L03 divides eight Idaho counties, but it is possible to divide only seven and still comply with the one person, one vote requirement of the United States Constitution. Since that is true, the Commission erred in not adopting one of those plans. The public offered plans that split only seven counties, and several of those had a maximum deviation of 10% or below, including L078 (9.83%) and L079 (10%). Plans L078 and L079 also respect the Tribes as communities of interest and merit remand for closer review.[2]

The Commission rejected these plans out-of-hand due to its myopic concern about reaching the smallest maximum deviation possible and avoiding supposed regional disparities. (Report, p. 29.) As agued in Issue I, though, the United States Constitution did not require those goals. What's more, even if a plan has a maximum deviation slightly above 10%, the Supreme Court has made clear that there is significant play in the joints to take into account state tradition and policy. *See*, *e.g*., *Brown*, 462 U.S. at 845, 848; *Mahan*, 410 U.S. at 329; *Abate*, 403 U.S. at 185. One strong long standing state

[2] Appendix 12 to the Report contains maps of proposed plans and related comments to the Commission. Many of the seven-district plans were designed to keep the Tribes intact as communities of interest. *See*, *e.g*. L078, L079 and comments on these proposed plans found at page 50 of 134 of Appendix 12.

tradition and policy in Idaho is retaining county integrity to the maximum extent possible during redistricting.

The Commission expressly found that none of the seven-county split plans were motivated by an unconstitutional purpose. (Report, p. 15.) As such, none of the plans at 10% or below could have armed a potential challenger with a claim under the Fourteenth Amendment.

Just as in *Twin Falls County*, it is possible to divide fewer counties and still comply with the United States Constitution. The Commission abused its discretion in adopting Plan L03.

III.

The Commission violated Idaho Code § 72-1506(2) by not taking the Tribes' longstanding communities of interest into account before adopting its final plan.

This Court in *Twin Falls County* set out a three-step process for the Commission. First, it must adopt a plan that complies with the Equal Protection Clause of the United States Constitution. *Twin Falls County*, 152 Idaho at 349. Second, it must adopt a plan that complies with Article III, § 5 of the Idaho Constitution. *Id*. at 350. And, third, it must consider and weigh the mandatory and discretionary factors in I.C. § 72-1506. *Id* at 351. One of those mandatory factors is that, "[t]o the maximum extent possible, districts shall preserve traditional neighborhoods and local communities of interest." I.C. § 72-1506(2).

By not adopting a plan with fewer than eight county splits, the Commission ran aground at the second step. It compounded that error by failing to take into account tribal reservations as "traditional neighborhoods and local communities of interest." In fact, tribes and their reservations go well beyond "traditional neighborhoods and local communities of interest." They are sovereign nations that are situated within the borders of the State. Despite paying lip service to this statutory mandate, the Commission gave the Tribes no respect in adopting Plan L03. [3]

As but one example, the division of the Shonshone-Bannock reservation between District 28 and 30 intentionally divides the two largest population clusters on the reservation. The Commission's Plan L03 splits the Reservation's primary hub and population in half. About half of the Tribal population is in Bingham County and the other half is in Bannock County. (Boyer Dec., ¶ 31.) Likewise, Plan L03 fractures the Coeur d'Alene Tribe into two and places it in District 2, a far flung collection of counties with which the Tribe has few relationships or shared interests. [4]

Nearly 200 years ago the Supreme Court held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is

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[3] In its Report, dozens of times the Commission writes like a mantra "The Commission finds that this district preserves traditional neighborhoods and local communities of interest to the maximum extent possible" but the Report shows no evidence of this effort.

[4] I.C. § 72-1506(4) also requires the Commission to avoid, to the maximum extent possible, drawing oddly shaped districts such as District 2.

exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." *Worcester v. Georgia*, 6 Pet. 515, 557 (1832). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973) (citing *Rice v. Olson*, 324 U.S. 786, 789 (1945)). The Idaho Constitution even contains a disclaimer of title to Indian lands, which was a condition of statehood. *See* Article. XXI, § 19 of the Idaho Constitution.

Though federal Indian policy since then has taken many turns, it is settled that tribes are "'distinct, independent political communities, retaining their original natural rights.'" *Tavares v. Whitehouse*, 851 F.3d 863, 869 (9th Cir. 2017) (citing *Worcester v. Georgia*). While they may lack some of "the full attributes of sovereignty," they certainly "retain the power of self-government." *See id.* (citation omitted).

The Coeur d'Alene and Shoshone-Bannock Tribes have had a presence in this area for thousands of years before Idaho joined the Union. Over time, they were pressured to give up much of their land in exchange for little more than the Government's broken promises. *Cf. McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (noting the Government's history of broken promises to Tribes.)

Yet they have persevered. They have retained their cultural, spiritual, ancestral and economic ties within their respective Tribes. They have vibrant and thriving communities on their Reservations. The Shoshone-Bannock Tribes' economic activity

adds hundreds of millions of dollars annually to the economy of southeast Idaho, 4,400 jobs, and draws significant economic activity into Idaho from out-of-state. The Coeur d'Alene Tribe's economic impact tops $330 million per year and its operations generate approximately $13 million in taxes to the state, county, and local governments.

It is self-evident that the Tribes' interests in unity and maintaining their voting power should receive the same respect, if not more, than Idaho's counties or cities do during the redistricting process. Other state courts have appreciated and respected the special status of tribes in their redistricting efforts. *E.g. Hippert v. Ritchie*, 813 N.W.2d 374, 384–85 (Minn. 2012) (noting with specificity that the legislative districts demonstrated a respect for the reservation boundaries of all federally recognized Indian tribes in an effort to keep them intact); *see also Arizona Minority Coalition for Fair Redistricting v. Arizona,* 121 P.3d 843, 867-68 (2005)(assessing what it meant to respect two tribes' conflicting redistricting interests). This Court should require the Idaho Commission to do the same.

At the very least, I.C. § 72-1506(2) demands that the Commission, *to the maximum extent possible*, keep their communities of interest intact when drawing legislative districts. Surely that legislative command means more than cutting and pasting the language of the statute's mandate into a redistricting report while the Tribes were sliced and diced and robbed of any electoral influence. Here there is no indication that *any* effort was made to keep the Tribes' intact as communities of interest, let alone a sincere

effort to the maximum extent possible. Proposed plans 078 and 079, and likely others, would have done that while also complying with the Fourteenth Amendment and Article III, § 5 of the Idaho Constitution. Those plans have maximum deviations of 10% or less (L078 (9.83%) and L079 (10%)). They split seven counties instead of eight. And they place the Coeur d'Alene reservation within a single legislative district while also putting the bulk of the Shoshone-Bannock's population in one district with Bingham County, which is those Tribes' preference.

The Tribes are not asking this Court to adopt one particular plan or the other. They highlight these plans simply to show that it is possible to devise a plan that complies with all of the mandatory constitutional and the mandatory statutory factors that the Commission must consider. The Commission came up short in its initial attempt. It should try again.

IV.

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

The Tribes request an award of attorney fees under the private attorney general doctrine. Three factors are to be considered under this doctrine: (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision. *Reclaim Idaho v. Denney*, 497

P.3d 160, 194 (2021). The Court has awarded fees in redistricting challenges in the past. *See Smith v. Idaho Comm'n on Redistricting*, 136 Idaho 542, 546, 38 P.3d 121, 125 (2001) where the Court held that the private attorney general doctrine was applicable, even without a factual record, where petitioners "pursued the vindication of [a] right vigorously and the pursuit of such benefited a large number of Idahoans."

A result in Petitioners' favor would benefit all Idahoans by requiring the Commission to comply with the Idaho Constitution and statutes that govern redistricting. Those laws are intended to result in a fair and equitable distribution of electoral power throughout the State. Because the Attorney General is defending the Commission, he is unable to vindicate the rights of the people in this action. If the challenge to the Commission's plan is successful, Petitioners respectfully request an award of reasonable fees.

CONCLUSION

This Court should issue a writ against the Idaho Secretary of State that prohibits him from transmitting a copy of the Commission's Plan L03 to the Idaho Senate and the Speaker of the House. It should further remand the case to the Commission for it to reconsider reapportionment with instructions that it must adopt a constitutional plan that avoids dividing, to the maximum extent possible, the Tribes' strong communities of interest.

Respectfully submitted on this 16th day of December.

/s/ Craig H. Durham
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/s/ Deborah A. Ferguson
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CERTIFICATE OF SERVICE

This Brief has been served on the following on this 16th day of December, 2021, by filing through the Court's e-filing and serve system:

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