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

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

Petitioner,

and

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

Intervenor-Petitioner,

v.

IDAHO COMMISSION FOR REAPPORTIONMENT, and 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,

v.

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

Respondents.

Supreme Court Docket No. 49261-2021

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

SPENCER STUCKI, registered voter pursuant to the laws and Constitution 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.

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

Petitioners,

v.

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

Respondents.

INTERVENOR-PETITIONER CANYON COUNTY'S OPENING BRIEF

BRYAN F. TAYLOR
Canyon County Prosecuting Attorney
ALEXIS KLEMPEL
Deputy Prosecuting Attorney
1115 Albany Street
Caldwell, Idaho 83605
civilefile@canyoncounty.id.gov
Attorneys for Intervenor-Petitioner

JAN M. BENNETTS
Ada County Prosecuting Attorney
LORNA K. JORGENSEN
LEON J. SAMUELS
Deputy Prosecuting Attorneys
200 W. Front Street, Room 3191
Boise, Idaho 83702
civilpafiles@adaweb.net
Attorneys for Petitioner Ada County

BRYAN D. SMITH
BRYAN N. ZOLLINGER
Smith, Driscoll & Associates, PLLC
414 Shoup Avenue
PO Box 50731
Idaho Falls, Idaho 83405
bds@eidaholaw.com
Attorneys for Petitioner Branden Durst

SPENCER E. STUCKI
5046 Independence Avenue
Chubbuck, Idaho 83202
commffelect@gmail.com
Pro Se Petitioner

DEBORAH FERGUSON
CRAIG H. DURHAM
223 North 6th Street, Ste. 325
Boise, Idaho 83702
daf@fergusondurham.com
chd@fergusondurham.com
Attorneys for Petitioner Chief J. Allan and Devon Boyer

HON. LAWRENCE G. WASDEN
Idaho Attorney General
BRIAN P. KANE
Chief Deputy
STEVEN L. OLSEN
Chief of Civil Litigation
MEGAN A. LARRONDO
ROBERT A. BERRY
CORY M. CARONE
Deputy Attorneys General
PO Box 83720
Boise, ID 83720-0010
megan.larrondo@ag.idaho.gov
robert.berry@ag.idaho.gov
cory.carone@ag.idaho.gov
Attorneys for Respondents

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STATEMENT OF THE CASE

In this consolidated original action, Petitioners challenge the lawfulness of a legislative apportionment map known as Map L03 adopted by one of the Respondents, the Idaho Commission for Reapportionment ("Commission"). These challenges are brought pursuant to Article III, section 2(5) of the Idaho Constitution, Idaho Code section 72-1509(1), and Idaho Appellate Rule 5(b).

Intervenor-Petitioner Canyon County ("Petitioner Canyon County") herein adopts by reference, pursuant to Idaho Appellate Rule 35(h), Section I of Petitioner Ada County's Brief. *See* (Petitioner Ada County's Brief ("Br.") at 1-4.) In addition, Petitioner Canyon County offers the following facts.

In its Final Report, the Commission recognized its duty to comply with equal protection standards and minimize county divisions as "threshold standards" for creating a legislative apportionment map. (Final Report at 10.) On the topic of county divisions, the Commission wrote, "When a county must be divided to create legislative districts, *internal divisions*, which create districts wholly contained within a county, are favored over *external divisions*, which create districts that combine part of the county with another county." (*Id*. at 8 (emphasis in original).)

With its threshold standards in mind, the Commission evaluated not only Map L03, but also several maps submitted by the public. (*Id*. at 11-12.) The Commission found that three

maps—L075, L076, and L079—had maximum population deviations of ten percent or less.[1] (*Id*. at 13.) The Commission further noted, however, that those plans "stand on dubious equal protection grounds" but did not find that any were submitted "for improper purposes." (*Id*. at 13, 15.) The Commission's foremost concern appears to be that Maps L075, L076, and L079 are all underpopulated districts one through six in Northern Idaho. (*Id*. at 13, 16-18.) In each of those maps, districts one through six are made up of Boundary, Bonner, Kootenai, Shoshone, Benewah, and Latah counties. *See* (Maps L075, L076, and L079 attached to Petitioner Canyon County's and Petitioner Ada County's petitions). Those six counties have a combined population of 272, 744, or 15.9 percent of the state's population. *See* Idaho Legislature, *Population Count by County*, https://legislature.idaho.gov/wp-content/uploads/redistricting/2021/Counties.pdf (accessed Dec. 20, 2021).

Ultimately, the Commission adopted Map L03 which apportions three wholly internal districts in Canyon County and divides the remaining thirty percent of Canyon County residents among three external districts. *See* (Final Report at 44-53, 71-73). Previously, Canyon County had four wholly internal districts. *See* Idaho Legislature, *Map L93* (adopted in 2012) https://legislature.idaho.gov/wp-content/uploads/redistricting/2011/L93.pdf (accessed Dec. 20, 2021).

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[1] "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.)'" (Final Report at 6 (quoting *Bonneville County v. Ysursa*, 142 Idaho 464, 474 n.1 (2005).)

ISSUES PRESENTED

1. To comply with state and federal constitutional standards, a legislative apportionment plan generally may not have a maximum deviation over ten percent and must divide as few counties as possible. Map L03 divides eight counties, but other maps with maximum deviations under ten percent divide seven. Is Map L03 constitutional?

2. In Idaho, a legislative apportionment plan may only divide counties to comply with equal protection standards. Some counties must be divided once to comply. Does the Idaho Constitution prohibit additional divisions that are not necessary to comply with equal protection standards?

ATTORNEY FEES

To the extent that the Court interprets the provisions of Idaho Code section 12-117(4) to be mandatory, Petitioner Canyon County requests reasonable attorney's fees, witness fees, and other reasonable expenses as required by law.

ARGUMENT

It is clear from the Commission's Final Report that the Commission worked diligently in crafting Map L03. What Justice Jim Jones wrote of the 2012 Commission is equally true of the Commission here: "the Commission performed in an exemplary fashion […]. It made detailed findings of fact, clearly explaining how the plan was developed, the steps it took to comply with one-person, one-vote requirements, its rationale for dividing or splitting counties, and how it applied the legislative guidelines in I.C. § 73-1506." *Twin Falls*, 152 Idaho at 351-52 (J. Jones, J., dissenting). Petitioner Canyon County does not wish to minimize the Commission's work, but rather asks this Court to hold that more leeway exists in the one-person, one-vote requirements

than was applied by the Commission, and that properly applying that leeway allows for fewer divided counties, better complying with the Idaho Constitution.

I. Map L03 violates the Idaho Constitution because it divides more counties than required to meet federal equal protection standards.

Because maps exist which divide only seven counties and still comply with equal protection standards, Map L03—which divides eight counties—is unconstitutional. This is not to suggest, however, that the Commission be required to adopt one of those existing maps rather than create a new map or modify a different existing map. The Idaho Constitution requires:

> A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, *and a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided to create senatorial and representative districts which comply with the constitution of the United States*. A county may be divided into more than one legislative district when districts are wholly contained within a single county. No floterial district shall be created. Multi-member districts may be created in any district composed of more than one county only to the extent that two representatives may be elected from a district from which one senator is elected. The provisions of this section shall apply to any apportionment adopted following the 1990 decennial census.

Idaho Const. Art. III, § 5 (emphasis added). The emphasized provision "prohibits the division of counties *except* to meet the constitutional standards of equal protection." *Twin Falls County v. Idaho Comm'n on Redistricting*, 152 Idaho 346 (2012) (quoting *Bonneville County v. Ysura*, 142 Idaho 464, 471 (2005)) (emphasis added).

Meeting equal protection standards means one person, one vote, but "[m]athematical exactness or precision" is not required. *Reynolds v. Sims*, 377 U.S. 533, 558, 577 (1964). In the absence of illegitimate considerations in creating a reapportionment plan, a plan with a

maximum population deviation under ten percent—considered a "minor" deviation—complies with equal protection standards. *Harris v. Arizona Independent Redistricting Comm'n*, 578 U.S. 253, 136 S.Ct. 1301, 1307 (2016). For this reason, "attacks on deviations under 10% will succeed only rarely, in unusual cases." *Id.* (noting that states need not justify deviations of 9.9%).

Even plans with deviations over 10% may be constitutionally permissible when created to achieve a rational state purpose. *See Brown v. Thompson*, 462 U.S. 835, 843-44 (1983). Rational state purposes include maintaining political subdivisions like counties. *See, e.g., Reynolds v. Sims*, 377 U.S. at 575, 578 (1964); *Abate v. Mundt*, 403 U.S. 182, 185 (1971) (holding that "a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality"). Thus, Idaho's constitutional mandate against dividing counties may in some instances justify a maximum deviation over 10% and conform such a plan to equal protection standards. This mandate is similar to the type of justification considered by the United States Supreme Court in *Brown*.

In *Brown*, the Court considered an apportionment plan which sought to comply with the Wyoming State Constitution's requirement that each county have at least one legislator in each house. *Id.* at 837. The plan in question had an average deviation of sixteen percent and a maximum deviation of ninety percent because it provided the state's least populous county with its own legislator rather than combining that county with another to form a legislative district. *Id.* at 838-39. The Supreme Court affirmed the district court's determination that dilution of votes was *de minimis* under the plan even though the deviation was "more than minor." *Id.* at 841, 843. In so holding, the Court reasoned, "There also can be no question that Wyoming's constitutional

policy—followed since statehood—of using counties as representative districts and ensuring that each county has one representative is supported by substantial and legitimate state concerns." *Id*. at 843. The Court also noted that Wyoming had pursued its state interest in a consistent manner "free from any taint of arbitrariness or discrimination." *Id*. (internal citation omitted). This general principle that state constitutional policies related to political subdivisions, applied consistently, constitute legitimate state concerns that justify deviations from a strict one-person, one-vote plan rings true in Idaho. Like Wyoming, Idaho has a constitutional policy related to county representation that has been followed since statehood. *Twin Falls*, 152 Idaho at 347-48 (2012).

In *Twin Falls*, the Idaho Supreme Court considered the issue of maintaining political subdivisions and the balance between Article III, section 5 of the Idaho Constitution and equal protection standards. There, the redistricting plan adopted by the commission had a maximum population deviation under ten percent and divided twelve counties. *Twin Falls*, 152 Idaho at 350. Other plans also complied with equal protection standards but divided fewer counties. *Id*. The *Twin Falls* Court, therefore, held that the adopted plan was unconstitutional under the Idaho Constitution because it divided more counties than required. *Id*. In reaching this decision, the Court opined,

> If 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. It could not be said that dividing one more county was necessary to comply with the Constitution.

Id. The Court further noted that while the commission had discretion to decide which of two counties it must split, it did not have discretion to decide how many counties to divide. *Id*. at 351.

Here, the Commission was presented with at least three maps which more successfully pursued Idaho's constitutional interest in keeping counties intact and at least two of which *prima facie* complied with the Equal Protection Clause of the United States Constitution. There is no evidence that population was not the starting point and controlling criterion—along with maintaining county boundaries—for any of those maps, *see Reynolds*, 377 U.S. at 567, 578, nor is there any evidence that any of those plans were created for some irrational or improper purpose. In spite of this lack of evidence, the Commission concluded that maps L075, L076, and L079 "stand on dubious equal protection grounds." (Final Report at 13.) Though the Commission may have no burden as a "challenger" to prove those plans are unconstitutional, this Court should not assume the Commission's conclusion is correct. Rather, given that the plans are *prima facie* constitutional and neither this Court nor the Commission know of any evidence to rebut that presumption, *Twin Falls* controls—if "only seven counties needed to be divided in order to comply [with equal protection standards], then a plan that divides eight counties would violate [the Idaho Constitution]." *Twin Falls*, 152 Idaho at 350.

Respondents appear to ask this Court to defer to the Commission in all respects, including adopting its conclusion regarding the constitutionality of Maps L075, L076, and L079. In Respondents' brief in response to Petitioners Ada County and Braden Durst, this request is often made with no authority, but Respondents do twice rely on the Court's decision in *Bonneville County*. (Respondents' Br. filed on December 16, 2021 ("Respondents' Br.") at 16,

31.) This reliance, however, is misplaced. The *Bonneville County* Court was referring first to the statutory precinct splitting prohibition—a prohibition which does not apply if a redistricting commission makes the determination required by Idaho Code section 72-1506(7)—and second to a commission's decision of which of two counties to split where one must be split. *Bonneville County*, 142 Idaho at 472, 474. As noted in *Twin Falls*, the *Bonneville County* Court was not implying that a commission has "the discretion to exceed the limits imposed by either the Constitution or a statute." *Twin Falls*, 152 Idaho at 351. Though the Commission fills a legislative role, it cannot be said that this Court would defer to the legislature's statement that a particular statute is constitutional, nor should it defer to the Commission's conclusion that its map is constitutional and others are not. *Cf. Bonneville County*, 142 Idaho at 472, n.8 ("We believe the same discretion and judgment that was vested in the Legislature when it was drawing districts applies to the Commission, *unless otherwise limited by statute or the constitution*.") (emphasis added).

Respondents attempt to bolster the Commission's conclusion in two ways, but both attempts fail. First, Respondents argue that Map L075 "extremely" underpopulates northern Idaho and that all three maps show regional favoritism. (Respondents' Br. at 24.) There are two fatal flaws in this conclusion. The first is the degree to which Respondents believe these seven-county-split maps underpopulate northern Idaho. In all three maps, the five northern counties plus Latah County make up districts one through six. These six counties make up 15.9 percent of the state's population. Containing six of the state's thirty-five legislative districts, these northern Idaho residents would elect 17.1 percent of the state's legislature. This difference of just over

one percent can properly be described as "de minimis" not "extreme." *Cf. Brown*, 462 U.S. at 847 (affirming that a difference of 0.69 percent in the ratio of legislators elected by seven counties under one apportionment plan versus another is "de minimis"). Additionally, the maximum population deviation in all three maps is less than ten percent and therefore minor. *Harris*, 136 S.Ct. at 1307 ("We have defined as 'minor deviations' those in 'an apportionment plan with a maximum population deviation under 10%.") (internal citation omitted). Respondents admit as much. (Respondents' Br. at 18 ("A minor deviation is a maximum population deviation under 10%.").)

The second flaw in Respondents' regional favoritism argument is that they have offered—and the Court has previously found—"no authority for the argument that the Commission had a duty to spread negative deviations as evenly as possible across the state." *Bonneville County*, 142 Idaho at 470. Likewise, in evaluating whether a map could be drawn to divide fewer counties, "a regional deviation, by itself, is not enough to overcome the presumption of constitutionality." *See id*. Again, Respondents admit as much. (Respondents' Br. at 25 ("[I]t is enough to strike down a map as a violation of equal protection if the map demonstrates regional under and overpopulation *and* there is evidence that the drafter intended to protect a specific region.") (emphasis added).) Here, there is no evidence that the drafters of maps L075, L076, or L079 "intentionally favored one region to the detriment of another." *Id*.

In a second attempt to bolster the Commission's conclusion regarding maps L075, L076, and L079, Respondents' argue that the maps "appear to have been drawn to get to or just under the 10% deviation and stop, which itself suggests a violation of the Equal Protection Clause."

(Respondents' Br. at 23.) This criticism, too, fails. While the *sole* redistricting criteria cannot constitutionally be achieving less than ten percent maximum deviation, *see Perez v. Abbott*, 250 F. Supp. 3d. 123, 202 (W.D. Tex. 2017); *Larios v. Cox*, 300 F. Supp. 2d. 1320, 1341 (N.D. Ga. 2004), there is no evidence of that being a sole or even predominant factor in Maps L075, L076, or L079. Rather, those maps better pursue the constitutionally acceptable criteria of maintaining political subdivisions than does Map L03.

Still, in their effort to discredit those maps, Respondents ask this Court to unequally apply two principles in their favor. First, Respondents argue that the Court should disregard the number of times a county is divided externally (Respondents' Br. at 1), yet they criticize Maps L075, L076, and L079 because each splits certain counties more times than Map L03 does (Respondents' Br. at 26-27). Second and relatedly, Respondents criticize Map L084 as violating the Equal Protection Clause because it "avoids dividing Ada County externally at the expense of dividing Bonneville County externally one more time than is necessary" (Respondents' Br. at 36), yet immediately thereafter Respondents tell this Court, "The total number of times that Plan L03 divides counties externally compared to other plans *is irrelevant* to determining whether the Commission complied with the Idaho Constitution" (*id.* (emphasis added)). If Respondents' criticism of Map L084 is a fair one, then the reverse could just as fairly be said: Map L03 violates the Equal Protection Clause because it externally divides Bonneville County one less time at the expense of dividing Ada County. Petitioner Canyon County does not believe this to be the case, but Respondents' arguments are unavailing.

It is clear that a strict one-person, one-vote standard must yield to other legitimate and substantial state interests at some point. It is also clear that, in most instances, this point extends to ten percent maximum deviation. Therefore, under Idaho's Constitution and to the extent a maximum deviation under ten percent can still be achieved, the Commission was required to pursue the legitimate and substantial state interest of keeping counties undivided rather than pursuing their more stringent sub-six percent maximum deviation at the expense of county cohesion. Because the presumptively constitutional maps discussed above divide fewer counties than Map L03 and because this Court has no evidence that these maps in fact violate the Equal Protection Clause, Map L03 is unconstitutional under the Idaho Constitution.

II. The Court should clarify or expand the interpretation of the Idaho Constitution to consider the number of times an individual county is externally divided.

Because considering external divisions is supported by both common sense and the Court's decision in *Bingham County v. Idaho Commission for Reapportionment*, 137 Idaho 870 (2002), this Court should hold that the Idaho Constitution concerns not only the number of counties that are divided but also the number of times those counties are divided externally. In *Bingham County* the Court addressed the number of times a county is split stating, "However, to the extent possible, counties should not be split, or the splits should be kept to the minimum possible while meeting equal protection standards." *Id*. at 875. Interpreting Article III, section 5 of the Idaho Constitution, the Court also addressed the practice of parsing out portions of a county: "A county may not be divided and parsed out to areas outside the county to achieve ideal

district size, if that goal is attainable without extending the district outside the county." *Id*. at 874.

This idea that favoring the internal split of a county over an external split or parsing out is in line with the text of the Idaho Constitution. Article III, section 5 (emphasis added) states, in part,

> 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*.

The emphasized sentence appears to qualify the preceding prohibition and could reasonably be interpreted to mean that the county divisions required for equal protection can only be internal, not external. That interpretation may not be possible to strictly follow, but that does not mean that the number of times a county is divided is irrelevant as Respondents claim. (Respondents' Br. at 36.)

Were the Court to follow Respondents' interpretation of the Idaho Constitution, it would lead to absurd results. Under Respondents' interpretation, because Canyon County has too many residents to divide it internally into ideally-sized districts, Canyon County must be divided; and because Canyon County must be divided, it can be parsed out a dozen times or more if desired. In other words, if a county must be divided once, then there is no longer any prohibition on dividing it further. That is not the law. As the Court explained in *Bingham County*,

> "Obviously, to the extent that a county contains more people than allowed in a legislative district, the county must be split. However, this does not mean that a county may be divided and aligned with other counties to achieve ideal district size if that ideal district size may be achieved by internal division of the county."

Id. at 874. Thus, the Commission and the Court should consider the number of times a county is externally divided or parsed out. This consideration comports with the legitimate state interests of maintaining political subdivisions as opposed to breaking up those political subdivisions to combine with others as occurred in Map L03.

Here, that dividing and aligning to achieve ideal district size is precisely what happened with Canyon County. Petitioner Ada County explained these and other parsings in section B2 of its brief, adopted herein by reference pursuant to Idaho Appellate Rule 35(h). (Petitioner Ada County's Br. at 11-13.) As noted by Petitioner Ada County, Map L03 parses out thirty percent of Canyon County's residents to form districts with other counties. (*Id*. at 12.) This left Canyon County with only three wholly internal districts. By contrast, Canyon County previously had four wholly internal districts. *See* Idaho Legislature, *Map L93* (adopted in 2012) https://legislature.idaho.gov/wp-content/uploads/redistricting/2011/L93.pdf (accessed Dec. 20, 2021). This decrease in internal districts came despite Canyon County's population growing by twenty-two percent—more than the state average. Idaho Legislature, *Population Count by County*, https://legislature.idaho.gov/wp-content/uploads/redistricting/2021/Counties.pdf (accessed Dec. 20, 2021). Because political subdivisions like counties provide a sense of community that "tends to foster effective representation," *Carstens v. Lamm*, 543 F. Supp. 68, 88 (D. Colo. 1982), the decrease in internal districts could appear to voters like a decrease in representation.

In line with *Bingham County*, the Commission found that Canyon County must be divided due to an extra 20,921 residents after predicting ideally-sized internal districts. (Final Report at 21.) While *Bingham County* certainly allows for that split of nine percent of Canyon County residents, sufficient justification does not exist to parse out more than three times that many residents. The Commission explained these extra splits by referring to its general finding that Canyon County must be divided. *See* (Final Report at 46 ("The rationale for splitting Canyon County externally was provided in General Legislative Plan Finding 3.D."), 48 ("In General Legislative Plan Findings 3.A. and 3.D. above, the Commission explained its rationale for dividing Ada and Canyon Counties externally.").) However, this general explanation is insufficient to justify violating the constitutional instruction that Canyon County "may be divided into more than one legislative district when districts are wholly contained within a single county." Other rationales, like combining communities with similar legislative concerns, *see* (Final Report at 72), are necessarily secondary to the constitutional requirement to maintain counties. *See Bingham County*, 137 Idaho at 876 (holding that, however laudatory, statutory goals "are subordinate to the threshold standard of Article III, § 5 that counties may not be divided unnecessarily"); (Final Report at 72).

CONCLUSION

For the foregoing reasons, Petitioner Canyon County requests that this Court declare that Map L03 unconstitutional, issue a Writ of Prohibition, and remand this matter to the Commission for review and revision.

Respectfully submitted this 22nd day of December, 2021.

/s/ Alexis Klempel

ALEXIS KLEMPEL
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that on a true and correct copy of the foregoing **INTERVENOR-PETITIONER CANYON COUNTY'S OPENING BRIEF** was served on the following in the manner indicated on this 22nd day of December, 2021.

Idaho Commission for Reapportionment PO Box 83720 Boise, Idaho 83720 redistricting@redistricting.idaho.gov	[ ] U.S. Mail [x] Email [x] Efile [ ] Hand Delivery
Lawrence Denney Idaho Secretary of State 450 N. 4th Street Boise, ID 83702 elections@sos.idaho.gov	[ ] U.S. Mail [x] Email [x] Efile [ ] Hand Delivery
Idaho Attorney General Counsel for Respondents Office of the Attorney General PO Box 83720 Boise, Idaho 83720 megan.larrondo@ag.idaho.gov robert.berry@ag.idaho.gov cory.carone@ag.idaho.gov	[ ] U.S. Mail [x] Email [x] Efile [ ] Hand Delivery
Lorna K. Jorgensen Leon Samuels Ada County Prosecutor's Office 200 W. Front Street, Room 3191 Boise, Idaho 83702 civilpafiles@adaweb.net	[ ] U.S. Mail [x] Email [x] Efile [ ] Hand Delivery

Bryan D. Smith & Bryan N. Zollinger Smith, Driscoll & Associates, PLLC 414 Shoup Ave. PO Box 50731 Idaho Falls, Idaho 83405 bcs@eidaholaw.com	[ ] U.S. Mail [x] Email [x] Efile [ ] Hand Delivery
Spencer E. Stucki 5046 Independence Avenue Chubbuck, Idaho 83202 commffelect@gmail.com	[ ] U.S. Mail [x] Email [ ] Efile [ ] Hand Delivery
Deborah Ferguson Craig H. Durham 223 North 6th Street, Ste. 325 Boise, Idaho 83702 daf@fergusondurham.com chd@fergusondurham.com	[ ] U.S. Mail [x] Email [x] Efile [ ] Hand Delivery
Victor S. Villegas, ISB No. 5860 Borton-Lakey Law & Policy 141 E. Carlton Ave. Meridian, Idaho 83642 victor@borton-lakey.com	[ ] U.S. Mail [x] Email [x] Efile [ ] Hand Delivery

/s/ Alexis Klempel

ALEXIS KLEMPEL
Deputy Prosecuting Attorney