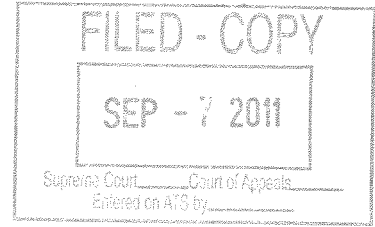


LAWRENCE WASDEN
ATTORNEY GENERAL

BRIAN KANE (ISB No. 6264)
Assistant Chief Deputy Attorney General

STEVEN L. OLSEN (ISB No. 3586)
Chief of Civil Litigation Division

MICHAEL S. GILMORE (ISB No. 1625)
MEGAN MOONEY (ISB No. 7750)
Deputy Attorneys General
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 334-4130
E-mail: yyyy@ag.idaho.gov



COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

In Re the Constitutionality of Idaho)	Case No. <u>39127</u>
Legislative Reapportionment Plan of 2002)	
(2002 Plan L97) and of 2002 Congressional)	SECRETARY OF STATE'S VERIFIED
Reapportionment Plan)	ORIGINAL JURISDICTION
)	CHALLENGE AND PETITION FOR
)	WRIT OF MANDAMUS

Comes now Idaho Secretary of State, Ben Ysursa, in his capacity as Chief Elections Officer of the State of Idaho, see Idaho Code § 34-201, and as the officer whose office is the repository for Idaho Legislative and Congressional Reapportionment plans, see Idaho Const., Article III, § 2(4), and Idaho Code § 72-1508 , who hereby:

- (a) files an Original Jurisdiction challenge under Idaho Const., Article III, § 2(4), to the currently effective Legislative Reapportionment Plan of 2002;
- (b) petitions this Court for a Judgment declaring the Idaho Legislative and Congressional Reapportionment Plans of 2002 unconstitutional because they have population deviations of 95.73% and 14.84% under the 2010 Census, which violate the one-person, one-vote requirement of the Fourteenth Amendment's Equal Protection Clause, and
- (c) petitions this Court for a Writ of Mandamus to the 2011 Commission for Reapportionment to reconvene and to submit plans meeting Federal and State Constitutional requirements as expeditiously as possible and no later than sixty days after the Court's order.

**THE SUPREME COURT HAS ORIGINAL JURISDICTION OVER A LEGISLATIVE
APPORTIONMENT CHALLENGE AND PETITION FOR A WRIT OF MANDAMUS**

1. Idaho Const., Article III, § 2(5) directs: “The Supreme Court shall have original jurisdiction over actions involving challenges to legislative apportionment.” This Original Jurisdiction Challenge is a “challenge[] to legislative apportionment” under Article III, § 2(5).

2. The last sentence of Article V, § 9, provides: “The Supreme Court shall also have original jurisdiction to issue writs of mandamus ... and all writs necessary or proper to the complete exercise of its appellate jurisdiction.” This Petition for a Writ of Mandamus is associated with the Original Jurisdiction Challenge and is necessary to carry out the judgment of the Court under that Original Jurisdiction Challenge.

ABSENT ADOPTION OF A NEW PLAN, PLAN 2002 L97 REMAINS IN PLACE.

3. Currently, 2002 Plan L97 apportions Idaho Legislative Districts. 2002 Plan L97 remains in effect until a new plan is filed. Idaho Const., Article III, § 2. As provided in Article III, § 2(2), a new plan is now required based upon the results of the 2010 Census. Consistent with the 2010 Census, the Commission for Reapportionment was convened on June 7, 2011. See Exhibit 1, Order of Secretary of State, dated June 7, 2011. Pursuant to Idaho Const., Article III, § 2 (4) and Idaho Code § 72-1508 the Commission had 90 days in which to file a new plan. Absent the filing of a new plan, 2002 Plan L97 remains in effect.

4. As of the close of business, September 6, 2011, no plan for Legislative Reapportionment or for Congressional Reapportionment based upon the 2010 Census has been filed with the Secretary of State's Office. The initial time for the Commission for Reapportionment to file its plans based upon the 2010 Census has expired.

**NO REASONABLE DEFENSE CAN BE OFFERED FOR USE OF 2002 PLAN L97 IN
THE 2012 PRIMARY AND GENERAL ELECTIONS**

5. This Court has held that the first requirement of any plan for reapportionment is compliance with “one person, one vote.” *Bingham County v. Idaho Com’n for Reapportionment*, 137 Idaho 870, 872, 55 P.3d 863, 865 (2002). A redistricting plan that deviates more than 10% in population among the districts is *prima facie* unconstitutional under the Equal Protection

Clause. *Id.*, citing *Brown v. Thompson*, 462 U.S. 835, 842-43, 103 S.Ct. 2690, 2695-96 (1983). “The ultimate inquiry,” after a *prima facie* case of discrimination is shown, is “whether the [Legislative reapportionment] plan ‘may reasonably be said to advance a rational state policy’ and, if so, ‘whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.’” *Id.* at 843, 103 S.Ct. at 2696 (quoting *Mahan v. Howell*, 410 U.S. 315, 328, 93 S.Ct. 979, 987 (1973)).

6. Currently effective 2002 Plan L97 has a total population deviation of 95.73%, far exceeding 10%. Exhibit 2, page one of which is taken from the Commission for Reapportionment’s website, shows population deviations in the current Legislative and Congressional districts as shown by the 2010 Census. The 2011 Commission has offered no state policy or findings of fact to justify using either plan for the 2012 primary and general elections. Absent such findings of fact or articulated State policies, 2002 Plan L97 is constitutionally indefensible for use in the 2012 primary and general elections. The Court should enter a judgment on this Original Jurisdiction Challenge finding that 2002 Plan L97 is unconstitutional for use in the 2012 primary and general elections. As part of its pendant jurisdiction, the Court should also enter a judgment that the 2002 Congressional apportionment plan is likewise unconstitutional.

**THE COMMISSION FOR REAPPORTIONMENT SHOULD BE MANDATED TO ADOPT
PLANS**

7. The Idaho Constitution tasks the Commission for Reapportionment with apportioning the Legislature and Idaho’s Congressional delegation. Idaho Const., Article III, § 2(2). It limits the time within which the Commission must submit a plan to 90 days. *Id.*, Article III, § 2(4). The 90 days has expired, and no plans have been submitted. The Secretary of State asks the Court to defer to the Commission to provide it the fullest opportunity possible to comply with the Constitution’s directive that the Commission apportion Legislative and Congressional districts. Alternative means of apportionment should only be considered as a last resort. The Idaho Secretary of State respectfully requests the Court to issue a Writ of Mandamus reconvening the Commission with the mandate to submit Legislative and Congressional plans as expeditiously as

possible, but in no event more than 60 days later.

CLARIFICATION IS NECESSARY TO ASSIST THE COMMISSION

8. To adopt a plan, the Idaho Constitution requires a $\frac{2}{3}$ vote of the Commission for Reapportionment. Idaho Const., Article III, § 2(4). The Commission has six members, any four of whom are a $\frac{2}{3}$ -majority sufficient to approve a plan. However, the Legislature amended Idaho Code § 72-1506 to require 5 votes of the Commission with regard to two criteria: splitting precincts and establishing Legislative districts whose counties are not connected by State or Federal highways. The two 5-vote requirements permit a statutory veto of the constitutional majority of 4 votes to approve a plan because if a single precinct is split, or if a State or Federal highway does not “directly” connect counties in the Legislative district, the plan would require a five-vote supermajority instead of the Constitutional four-vote majority for approval.

9. The Commission could benefit from clarification of the *Bingham County* principles to the statutory amendments. Specifically, the 5-vote requirement adds to the $\frac{2}{3}$ (4-vote) requirement in Article III, § 2(4). In *Bingham County*, the Court expressly stated: “[I]f the State Constitution and a statute conflict, the State Constitutional provision prevails.” 137 Idaho at 874, 55 P.3d at 867. This Court elaborated: “[T]he other considerations set forth in § 72-1506 are subordinate to the limitations of Article III, § 5.” *Id.*

10. This Court has observed: “[O]ur state, mountainous and expansive and sparsely populated, is divided into three regions: north, southwest, and southeast. *Hellar v. Cenarrusa*, 106 Idaho 571, 580, 682 P.2d 524, 533 (1984). Coupling the Fourteenth Amendment’s requirement under the Equal Protection Clause with the Idaho Constitution’s requirement that counties not be divided and combined with other counties in Legislative districts, except when necessary to comply with the Equal Protection Clause, makes a difficult task more formidable when confronted with Idaho’s challenging topographic, geographic, and population features. *Bonneville County v. Ysursa*, 142 Idaho 464, 471, 129 P.3d 1213, 1220 (2005). Due to these well known features, apportionment of the Idaho Legislature in a manner consistent with the United States

Constitution (one person, one vote) and the Idaho Constitution (division of counties to form Legislative districts with other counties only as necessary) is formidable. Additional statutory factors further limiting the ability and discretion of the Commission may make apportionment of the Legislature unachievable under the added voting requirements. Clarification and direction will greatly assist the Commission by permitting it the opportunity to focus on those factors most important to a legally defensible Legislative apportionment plan.

11. The Secretary of State respectfully asks this Court to affirm the hierarchy of priorities in a constitutional apportionment: (1) Equal Protection, One-Person, One Vote (U.S. Constitution); (2) Legislative districts should not combine portions of one county with one or more other counties more than necessary to comply with Equal Protection (Idaho Constitution, Article III, § 5); and (3) Other statutory requirements as permissible after compliance with the preceding Constitutional requirements. The Commission may benefit from a clear statement whether four votes as provided by Article III, § 2(4) may approve a plan, or whether § 72-1506(7)'s and -(9)'s 5 vote requirements are necessary if precincts are split or counties within a Legislative district are not connected by federal or state highways.

PRAYER FOR RELIEF

The Secretary of State respectfully requests that the Court:

- (a) accept and consider this Original Jurisdiction Challenge to the existing Legislative and Congressional apportionment,
- (b) declare that and issue judgment that the 2002 Legislative and Congressional apportionments are unconstitutional for use in the 2012 primary and general elections,
- (c) order that the Commission on Reapportionment reconvene to prepare and submit Legislative and Congressional reapportionment plans as expeditiously as possible and no later than within 60 days of this Court's Order, subject to such direction as this Court may order; and
- (d) order all such further relief as provided in law and equity.

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

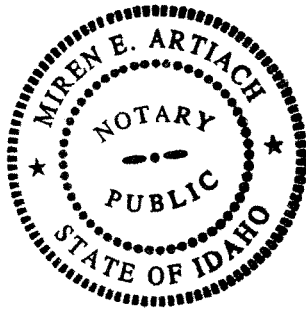
Your affiant, the Hon. Ben Ysursa, Secretary of State of the State of Idaho, being first duly sworn upon oath, and states upon personal knowledge as follows:

I am Ben Ysursa. I am the duly qualified Secretary of State of the State of Idaho. I have reviewed this Secretary of State’s Verified Original Jurisdiction Challenge and Petition for Writ of Mandamus, and in particular the allegations of fact contained in Paragraphs 3, 4 and 6, and state that I have personal knowledge of those facts and that they are true to the best of my knowledge.

Dated this 7th day of September, 2011.

Ben Ysursa
BEN YSURSA
Secretary of State

SUBSCRIBED AND SWORN to before me this 7th day of September, 2011.



Miren E. Artiach
Notary Public
Residing at: Boise, Idaho
My Commission Expires: 7-15-2012

Exhibit 1

Order of the Secretary of State Establishing Commission for Reapportionment

State of Idaho



Office of the Secretary of State

Order

Establishing Commission for Reapportionment

WHEREAS, Article III Section Two of the Idaho State Constitution provides for the establishment of a Commission For Reapportionment under certain conditions; and

WHEREAS, the official results of the 2010 federal census have been received by the State of Idaho; and

WHEREAS, the census figures indicate that the current legislative and congressional districts are not within constitutional parameters; and

WHEREAS, the appointing authorities specified in Article III Section Two of the Idaho State Constitution have submitted their designations;

NOW, THEREFORE, I, Ben Ysursa, Secretary of State of the State of Idaho, by the authority vested in me under Article III, Section Two of the Idaho State Constitution, and Section 72-1501, Idaho Code, do hereby establish the Commission For Reapportionment. The initial members of the commission are as follows:

Allen Andersen	of Pocatello, Idaho
Lou Esposito	of Boise, Idaho
Lorna Finman	of Rathrum, Idaho
Evan Frasure	of Pocatello, Idaho
Julie Kane	of Lapwai, Idaho
George R. Moses	of Boise, Idaho

IN TESTIMONY WHEREOF, I have hereunto

set my hand and affixed the Great Seal of the State of Idaho. Done at Boise, the Capital of Idaho, this Seventh day of June, in the year of our Lord, Two Thousand and Eleven, and of the Independence of the United States of America, the Two Hundred and Thirty-fifth.



Ben Ysursa
Secretary of State

Exhibit 2

Populations of Current Legislative and Congressional Districts as Shown by the 2010 Census

ID	District	Population	18+ Population	District	Population	18+ Population
1601	Congressional District 1	841930	614313	Legislative District 1	40210	30955
1602	Congressional District 2	725652	524197	Legislative District 2	35917	28172
				Legislative District 3	45166	33772
				Legislative District 4	44634	34470
				Legislative District 5	46466	34257
				Legislative District 6	37244	30275
				Legislative District 7	39265	30750
				Legislative District 8	38711	30953
				Legislative District 9	38220	28040
				Legislative District 10	48958	33383
				Legislative District 11	51062	36017
				Legislative District 12	45474	31378
				Legislative District 13	58725	40266
				Legislative District 14	76940	51045
				Legislative District 15	40177	30311
				Legislative District 16	36855	29112
				Legislative District 17	37314	30323
				Legislative District 18	39282	29843
				Legislative District 19	40219	32638
				Legislative District 20	50201	35215
				Legislative District 21	71377	50172
				Legislative District 22	34066	24882
				Legislative District 23	45710	32815
				Legislative District 24	43046	31428
				Legislative District 25	43165	31460
				Legislative District 26	42443	29602
				Legislative District 27	38757	26197
				Legislative District 28	41905	28133
				Legislative District 29	44248	31025
				Legislative District 30	38591	29100
				Legislative District 31	45173	31009
				Legislative District 32	56073	36985
				Legislative District 33	38893	28178
				Legislative District 34	49686	35915
				Legislative District 35	43409	30434

District	Population	Diff. from Ave	Pct Diff from Ave
Congressional District 1	841,930	58,139	7.42%
Congressional District 2	725,652	-58,139	-7.42%
Average	783,791		
Maximum	841,930	58,139	7.42%
Minimum	725,652	-58,139	-7.42%
=	116,278	116,278	14.84%

District	Population	Diff. from Average	Pct. Diff. from Ave.
Leg. Dist. 1	40,210	-4,578	-10.22%
Leg. Dist. 2	35,917	-8,871	-19.81%
Leg. Dist. 3	45,166	378	0.84%
Leg. Dist. 4	44,634	-154	-0.34%
Leg. Dist. 5	46,466	1,678	3.75%
Leg. Dist. 6	37,244	-7,544	-16.84%
Leg. Dist. 7	39,265	-5,523	-12.33%
Leg. Dist. 8	38,711	-6,077	-13.57%
Leg. Dist. 9	38,220	-6,568	-14.66%
Leg. Dist. 10	48,958	4,170	9.31%
Leg. Dist. 11	51,062	6,274	14.01%
Leg. Dist. 12	45,474	686	1.53%
Leg. Dist. 13	58,725	13,937	31.12%
Leg. Dist. 14	76,940	32,152	71.79%
Leg. Dist. 15	40,177	-4,611	-10.30%
Leg. Dist. 16	36,855	-7,933	-17.71%
Leg. Dist. 17	37,314	-7,474	-16.69%
Leg. Dist. 18	39,282	-5,506	-12.29%
Leg. Dist. 19	40,219	-4,569	-10.20%
Leg. Dist. 20	50,201	5,413	12.09%
Leg. Dist. 21	71,377	26,589	59.37%
Leg. Dist. 22	34,066	-10,722	-23.94%
Leg. Dist. 23	45,710	922	2.06%
Leg. Dist. 24	43,046	-1,742	-3.89%
Leg. Dist. 25	43,165	-1,623	-3.62%
Leg. Dist. 26	42,443	-2,345	-5.24%
Leg. Dist. 27	38,757	-6,031	-13.47%
Leg. Dist. 28	41,905	-2,883	-6.44%
Leg. Dist. 29	44,248	-540	-1.21%
Leg. Dist. 30	38,591	-6,197	-13.84%
Leg. Dist. 31	45,173	385	0.86%
Leg. Dist. 32	56,073	11,285	25.20%
Leg. Dist. 33	38,893	-5,895	-13.16%
Leg. Dist. 34	49,686	4,898	10.94%
Leg. Dist. 35	43,409	-1,379	-3.08%
Average	44,788		
Maximum	76,940	32,152	71.79%
Minimum	34,066	-10,722	-23.94%
Deviation	42,874	42,874	95.73%