

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHRISTOPHER PENTICO, a qualified elector
of the State of Idaho,

Petitioner,

v.

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

Respondents.

Supreme Court No. 49351-2021

PETITIONER'S OPENING BRIEF

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TABLE OF CONTENTS

Table of Cases and Authorities.....3

I. Statement of the Case.....4

II. Issues Presented.....6

III. Standard of Review.....7

IV. Argument.....7

A. The Commission violated Art. III, Sec. 2(4) of the Idaho Constitution and Idaho Code § 72-1508 by not filing its final report and proposed congressional redistricting plan with the Idaho Secretary of State within ninety (90) days of its organization.....7

B. The congressional redistricting plan adopted by the Commission violates Idaho Code § 72-1506(7) because it does not retain local voting precinct boundary lines..10

C. Petitioner is entitled to an award of his reasonable attorney fees and costs pursuant to Idaho Code §§ 12-117 and 12-121.....10

 1. **Petitioner is entitled to an award of his reasonable attorney fees and costs pursuant to Idaho Code § 12-117 because the Commission acted without a reasonable basis in fact or law.....13**

 2. **Petitioner is entitled to an award of his reasonable attorney's fees and costs pursuant to Idaho Code § 12-121 because any defense offered by the Commission would be frivolous, unreasonable, and without foundation.....14**

V. Conclusion.....15

TABLE OF CASES AND AUTHORITIES

CASES

City of Sandpoint v. Sandpoint Independent Highway Dist., 139 Idaho 65, 72 P.3d 905 (Idaho 2003).....9

In re Doe, 326 P.3d 347 (Idaho 2014).....9

Local 1494 of Intern. Ass’n of Firefighters v. City of Coeur d’Alene, 99 Idaho 630, 586 P.2d 1346 (Idaho 1978).....12

Matter of Adoption of Chaney, 126 Idaho 554, 887 P.2d 1061, (Idaho 995).....12

Saint Alphonsus Reg’l Med. Ctr. v. Gooding Cnty., 159 Idaho 84, 356 P.3d 377 (Idaho 2015)...12

Twin Falls Cnty. v. Idaho Comm’n on Redistricting, 152 Idaho 346, 271 P.3d 1202 (Idaho 2012).....8

IDAHO CONSTITUTIONAL PROVISIONS

Idaho Constitution, Art. III, Sec. 2.....4, 6, 7, 15

Idaho Constitution, Art. III, Sec. 4.....3

STATUTES AND RULES

Idaho Code § 12-117.....2, 3, 13, 15

Idaho Code § 12-121.....2, 3, 13, 14, 15

Idaho Code § 34-306.....11

Idaho Code § 72-1501.....3, 4, 8, 9

Idaho Code § 72-1506.....2, 5, 6, 7, 10, 11, 12, 13, 14, 15

Idaho Code § 72-1508.....2, 7, 8, 9, 14, 15

Idaho Code § 72-1509.....7

Idaho Code § 73-113.....9

I. STATEMENT OF THE CASE

The United States Census Bureau released the results of Idaho's 2020 census on August 12, 2021. The census demonstrated that Idaho's population has increased from 1,567,582 in 2010 to 1,839,106 in 2020, requiring a reapportionment of legislative and congressional districts. The same day, and pursuant to Art. III, Sec. 2 of the Idaho Constitution and Idaho Code § 72-1501, Respondent Secretary of State Lawrence Denney issued his Order Establishing Commission for Reapportionment, naming the members of the commission and authorizing them to begin their work. The Idaho Commission for Reapportionment (hereinafter also referred to as the "Commission") held its first meeting on September 1, 2021, and its final report and proposed plan(s) had to be filed in the Idaho Secretary of State's office by November 10, 2021, to comply with the timing requirements set forth by the Idaho Constitution and Idaho Code.

From September 1 through October 18, 33 congressional redistricting maps were submitted by members of the public for consideration by the Commission. On September 25, 2021, Petitioner Christopher Pentico submitted his proposed plan, designated C039. (See: <https://legislature.idaho.gov/wp-content/uploads/redistricting/2021/maps/C039.pdf>). Mr. Pentico's plan has a zero-person deviation between the proposed First and Second Congressional Districts, which are both contiguous. Additionally, Mr. Pentico's plan divides only Ada County, and splits no precincts, thus fulfilling all constitutional and statutory criteria for congressional redistricting.

The Commission held public meetings and took public comment on the proposed plan until November 3, 2021. At the November 3, 2021 meeting, Co-Chairman Dan Schmidt suggested that the Commission seriously consider plan C036, a plan submitted by a member of the public. (See: <https://legislature.idaho.gov/wp->

[content/uploads/redistricting/2021/211103_cfr_1000AM-Minutes.pdf](https://legislature.idaho.gov/wp-content/uploads/redistricting/2021/211103_cfr_1000AM-Minutes.pdf); and see:

<https://legislature.idaho.gov/wp-content/uploads/redistricting/2021/maps/C036.pdf>). Schmidt noted that the plan had a deviation of 102 people and did not split any counties. Commissioner Briane “Nels” Mitchell agreed with Schmidt and emphasized the importance of keeping counties whole. Commission Co-Chairman Bart Davis said he wanted to pursue a different plan to achieve a “zero percent” population deviation, and “not for political reasons.” Davis then edited plan C01, stating that he could achieve a zero deviation with his adjustments (though this was done only by splitting voting precincts). (See: (<https://legislature.idaho.gov/wp-content/uploads/redistricting/2021/maps/C01.pdf>)).

At the November 5, 2021 meeting, Co-Chairman Davis asked for unanimous consent to remove the public portal for Maptitude (the Commission’s district mapping software) from the Commission’s website. Davis’ motion passed without objection. Davis then moved for a determination by the Commission that it could not complete its duties for congressional districts by fully complying with the requirements of Idaho Code § 72-1506(7); this motion passed 5-1, with Commissioner Mitchell voting “no.” Davis then moved that the precincts listed in the report attached to the motion be divided as provided in plan C03. Again, the motion passed 5-1, with Commissioner Mitchell voting “no.” (See: https://legislature.idaho.gov/wp-content/uploads/redistricting/2021/211105_cfr_0330PM-Minutes.pdf, and see: <https://legislature.idaho.gov/wp-content/uploads/redistricting/2021/maps/C03.pdf>).

At the Commission’s November 10, 2021 meeting (the day the Commission’s plan was required to be filed with the Idaho Secretary of State), Co-Chairman Davis informed the Commission that a potential Open Meetings Law violation had occurred on November 5, in that the location of the meeting may not have been sufficiently clear. To remedy any potential

violation, Davis suggested retaking the votes taken at the November 5 meeting. Commissioner Eric Redman moved for a determination by the Commission that it could not complete its duties in adopting a congressional plan by fully complying with the requirements of Idaho Code § 72-1506(7); this motion passed 5-1, with Commissioner Mitchell voting “no.” Redman then moved that the local voting precinct boundaries in the report titled “Political Subdivision Splits Between Congressional Districts” attached to the motion be divided as provided in plan C03. Redman’s motion passed 5-1, with Commissioner Mitchell again voting “no.” (See: https://legislature.idaho.gov/wp-content/uploads/redistricting/2021/211110_cfr_0100PM-Minutes.pdf).

Redman then moved that the Commission adopt plan C03 as Idaho’s congressional redistricting plan. The motion passed 4-2, with Co-Chairman Dan Schmidt and Commissioner Mitchell voting “no.” Near the end of the meeting, Commission Budget and Policy Analyst Keith Bybee indicated that the staff would need time to “polish up” the Commission’s Final Report, after which it would be ready for delivery to the Secretary of State. The Commission decided that Commissioner Redman, along with the staff, would deliver the Final Report to the office of the Idaho Secretary of State. For reasons unknown, the Final Report was not filed with the Idaho Secretary of State until November 12, 2021.

Petitioner Christopher Pentico timely filed his Petition for Review of the congressional redistricting plan adopted by the Commission on December 15, 2021.

II. ISSUES PRESENTED

A. Did the Idaho Commission for Reapportionment violate Art. III, Sec. 2 of the Idaho Constitution by failing to file, within ninety (90) days of its organization, its proposed congressional redistricting plan with the office of the Idaho Secretary of State?

B. Did the Idaho Commission for Reapportionment violate Idaho Code § 72-1508 by failing to file, within ninety (90) days of its organization, its Final Report with the office of the Idaho Secretary of State?

C. Did the Idaho Commission for Reapportionment violate Idaho Code § 72-1506(7) by not retaining local voting precinct boundary lines in its proposed congressional redistricting plan?

III. STANDARD OF REVIEW

Pursuant to Art. III, Sec. 2 of the Idaho Constitution and Idaho Code 72-1509, the Idaho Supreme Court has original jurisdiction over this matter.

IV. ARGUMENT

A. The Commission violated Art. III, Sec. 2 of the Idaho Constitution and Idaho Code § 72-1508 by not filing its final report and proposed congressional redistricting plan with the Idaho Secretary of State within ninety (90) days of its organization.

On November 8, 1994, Idaho voters ratified an amendment to Article III, Section 2 of the Constitution of the State of Idaho to transfer redistricting from the state legislature to an appointed, bipartisan commission (Respondent Idaho Commission for Reapportionment, also referred to herein as the “Commission”). Art. III, Sec. 2, subsection 2 provides that, “Whenever there is reason to reapportion the legislature or to provide for new congressional district boundaries in the state, or both, because of a new federal census or because of a decision of a court of competent jurisdiction, a commission for reapportionment shall be formed on order of the secretary of state.” Art. III, Sec. 2, subsection 4 further provides that,

Within ninety days after the commission has been organized or the necessary census data are available, whichever is later, the commission shall file a proposed plan for apportioning the senate and house of representatives of the legislature with the office of the secretary of state. At the same time, with the same effect, the commission shall prepare and file a plan for congressional districts.

Subsequent to the adoption of the constitutional amendment creating the Commission, the Idaho Legislature enacted statutes confirming and further spelling out the Commission's authority and duties. Among these are Idaho Code § 72-1501, which provides, in relevant part, that “[a] commission for reapportionment shall be organized, upon the order of the secretary of state, in the event that:...[i]n a year ending in one (1), a new federal census is available, in which case an order shall be issued no earlier than June 1.” Additionally, Idaho Code § 72-1508 mandates that, “[t]he final report of the commission shall be filed with the office of the secretary of state not more than ninety (90) days after the commission has been organized.”

As a result of the 2010 federal census, then-Secretary of State Ben Ysursa formed a commission for reapportionment on June 7, 2011. Despite holding fourteen public hearings around the state, that commission was unable to agree on a plan for either legislative or congressional redistricting before the expiration of the ninety-day time limit on September 6, 2011. *Twin Falls Cnty. v. Idaho Comm'n on Redistricting*, 152 Idaho 346, 271 P.3d 1202, 1203 (Idaho 2012). Recognizing that the commission as-constituted could not comply with the requirements of the Idaho Constitution or of Idaho Code, then-Secretary Ysursa issued an order forming a new commission on September 13, 2011.

Here, Respondent Lawrence Denney, the Secretary of State of Idaho, issued his *Order Establishing Commission for Reapportionment* on August 12, 2021. To comply with I.C. § 72-1508, the Commission would have had to file its final report with the office of the secretary of state no later than Wednesday, November 10, 2021. The Minutes of the Commission for Wednesday, November 10, 2021 reflect that, after the Commission voted to approve its final report containing its proposed congressional redistricting plan, the Commission decided that Commissioner Eric Redman and the Commission’s staff would deliver the final report to the Secretary of State. For unknown reasons, this did not occur. The date stamp affixed to the Commission’s final report indicates that it was not received by the office of the Secretary of State until 3:12 p.m. on Friday, November 12, 2021.

The plain language of Idaho Code § 72-1501 is unambiguous in declaring that a commission for reapportionment is “organized *upon the order of the secretary of state*” [emphasis added]; in this case, that order was issued on August 12, 2021. Idaho Code § 73-113(1) provides that, “[t]he language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction. The literal words of a statute are the best guide to determining legislative intent.” This Court has held that, “[i]nterpretation of a statute begins with an examination of the statute’s literal words. Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction.” *In re Doe*, 326 P.3d 347, 351 (Idaho 2014). “The literal words of the statute ‘must be given their plain, usual, and ordinary meaning; ... [i]f the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.’” *Id.*, quoting *City of Sandpoint v. Sandpoint Independent Highway Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003).

However, this is not a mere technical issue; rather, there are strong public policy considerations underlying the constitutional and statutory requirement that the Commission file its proposed redistricting plan(s) within ninety days of its organization upon order of the secretary of state. First and most obviously, it promotes the timely conduct of the reapportionment process by providing a hard deadline, after which its final report and proposed plan(s) will be void. If, for example, the “organization” of the Commission were set on whatever date it first chooses to meet, there would be nothing preventing the Commission from delaying and dithering indefinitely, irretrievably gumming up Idaho’s democratic machinery. The ninety-day time limit from the Secretary of State’s order sends a clear message to the Commission: “Be about the people’s business, and quickly.”

The ninety-day time limit from the Commission’s organization upon the Order of the Secretary of State also recognizes the severe deleterious effects of any delay on the primary election calendar. Without appropriate advance knowledge of district boundaries, candidate filing, campaigning, preparation of ballots, review of candidates by voters, etc. all become exponentially more difficult or even impossible. Compression and/or delay of the primary election calendar interferes with the exercise of the electoral franchise and the First Amendment right to free political speech by prospective candidates, particularly non-incumbent challengers who seek to effectively compete against incumbents.

B. The congressional redistricting plan adopted by the Commission violates Idaho Code § 72-1506(7) because it does not retain local voting precinct boundary lines.

The Idaho Legislature has set forth various criteria governing legislative and congressional redistricting plans considered and adopted by the Commission, which are enumerated in Idaho Code § 72-1506. Among these are requirements that districts be substantially equal in population

and seek to comply with all applicable federal standards and statutes, that the division of counties in creating districts be avoided whenever possible, and minimized when it is not possible, and that to the extent a county must be divided, the number of divisions per county be minimized. In addition, Idaho Code § 72-1506(7) provides that,

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.

[emphasis added]

The Commission, in Section 5 of its Final Report's "General Congressional Plan Findings" (p. 97), acknowledged the above statutory requirement to retain local voting precinct boundary lines. Because the Commission's preferred plan, C03, splits six Ada County precincts, it does not comply with I.C. § 72-1506(7). The Commission voted 5-1, on November 5 and November 10, to make a determination that the Commission could not complete its duties as to congressional districts by fully complying with the statute, and the body adopted C03 despite its precinct splits.

Unfortunately, the Commission lacked the power to make such a determination with respect to congressional districts and thereby exempt itself from the prohibition on splitting precincts contained in I.C. § 72-1506(7). The plain language of the statute clearly provides that such a determination can only be made as to legislative districts. Even if the statute were not

immediately plain and unambiguous, the inclusion of the phrase “legislative districts” immediately defeats the idea that the Commission can make such a finding with respect to congressional districts.

In such circumstances [when a statute is silent on a particular topic], this jurisdiction has generally subscribed to the rule of statutory construction which states, *Expressio unius est exclusio alterius*: Furthermore, ‘It is a universally recognized rule of the construction that, where a constitution or statute specifies certain things, the designation of such things excludes all others.

Local 1494 of Intern. Ass’n of Firefighters v. City of Coeur d’Alene, 99 Idaho 630, 639, 586 P.2d 1346, 1355 (Idaho 1978) [internal citations omitted].

This Court has consistently held that it “cannot insert into statutes terms or provisions which are obviously not there.” *Matter of Adoption of Chaney*, 126 Idaho 554, 558, 887 P.2d 1061, 1065 (Idaho 1995). Additionally, “this Court has been reluctant to second-guess the wisdom of a statute and has been unwilling to insert words into a statute that the Court believes the legislature left out, be it intentionally or inadvertently. *Saint Alphonsus Reg’l Med. Ctr. v. Gooding Cnty.*, 159 Idaho 84, 356 P.3d 377, 382 (Idaho 2015).

The Legislature’s choice of wording when drafting Idaho Code § 72-1506(7) must be given legal effect. Given the huge difference between the size of Idaho legislative and congressional districts, it is not difficult to imagine policy reasons behind allowing the Commission leeway to split voting precincts in drawing the former but not the latter.

Even if the Commission's determination were not legally erroneous, it would be factually incorrect. The Commission had before it at least one map, that submitted by the Petitioner, which not only met Co-Chairman Davis' stated preference for a zero-percent population deviation, but exceeded it by having a zero-*person* population deviation. Not only that, but Mr. Pentico's map satisfied all the other constitutional and statutory criteria, including that it did not split any voting precinct. If Davis' aims were "not political," as he claimed, why would he and four other members of the Commission ignore an objectively better map which had been sitting right in front of them since the last week of September?

C. Petitioner is entitled to an award of his reasonable attorney fees and costs pursuant to Idaho Code §§ 12-117 and 12-121.

1. Petitioner is entitled to an award of his reasonable attorney fees and costs pursuant to Idaho Code § 12-117 because the Commission acted without a reasonable basis in fact or law.

Idaho Code § 12-117(1) provides that,

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political division and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

The ninety (90) day time limit for filing of the Commission’s Final Report with the Secretary of State is plain and unambiguous in both the Idaho Constitution as well as in Idaho Code § 72-1508. Likewise, the fact that the prohibition on splitting voting precincts is absolute except with respect to legislative redistricting is plainly evident in Idaho Code § 72-1506(7). The Commission acted without reasonable basis in fact or law and, as such, should be ordered to pay Mr. Pentico’s reasonable attorney fees and costs incurred in rectifying these violations.

2. Petitioner is entitled to an award of his reasonable attorney's fees and costs pursuant to Idaho Code § 12-121 because any defense offered by the Commission would be frivolous, unreasonable, and without foundation.

Idaho Code § 12-121 provides that, “In any civil action, the judge may award reasonable attorney’s fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation.” For the reasons stated above, any defense by the Commission of the legal merits is without foundation. However, the facts indicate that such a defense would also be frivolous and unreasonable.

Here, the Commission was apparently aware of the November 10, 2021 deadline, as it held its last meeting on that date, adopted its flawed congressional redistricting plan, and stated that one of its members would deliver the Final Report to the Secretary of State after some last-minute “polishing” by staff. Additionally, the minutes of the meeting on that date reflect that, “The commissioners [sic] provided concluding remarks.” The fact that two members of the Commission are licensed attorneys, and one of its Co-Chairmen served in the Idaho State Senate from 1998 to 2017 and was Senate Majority Leader from 2002 to 2017 make it even more difficult to argue that the Commission’s violations of the Idaho Constitution and Idaho Code were unknowing.¹

¹ It is noted by Petitioner that Commissioner Mitchell voted against the Commission’s illegal “opt-out” of the provisions of Idaho Code § 72-1506(7) and the splitting of voting precincts.

Because any defense of its illegal actions by the Commission would be frivolous, unreasonable, and without foundation, Mr. Pentico should be awarded his reasonable attorney fees and costs incurred in pursuing this action.

V. CONCLUSION

The Commission's failure to file its Final Report and proposed redistricting plan(s) with the office of the Secretary of State within ninety (90) days of its organization violates Art. III, Sec. 2 of the Idaho Constitution and Idaho Code § 72-1508, while its proposed congressional redistricting plan, C03, violates Idaho Code § 72-1506(7). For the foregoing reasons, Petitioner Christopher Pentico respectfully requests that this honorable Court declare congressional redistricting plan C03 unlawful and unconstitutional, and issue a Writ of Prohibition restraining the Idaho Secretary of State from transmitting a copy of the Commission's final report and proposed plans to the President of the Idaho Senate and the Speaker of the Idaho House of Representatives. Further, Petitioner respectfully requests that the Court remand with instruction to the Commission to adopt a congressional redistricting plan which meets all statutory and constitutional criteria for congressional reapportionment. Finally, Petitioner requests an award of his reasonable attorney fees and costs pursuant to Idaho Code §§ 12-117 and 12-121.

DATED this 27th day of December, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2021, a true and correct copy of the foregoing PETITIONER'S OPENING BRIEF was served upon the following persons by the method(s) indicated below:

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