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3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MARION

6 BEVERLY CLARNO, GARY WILHELMS,
7 JAMES L. WILCOX, and LARRY
8 CAMPBELL,

9 Petitioners,

10 v.

11 SHEMIA FAGAN, in her official capacity as
12 Secretary of State of Oregon,

13 Respondent.

Case No. 21CV40180

**Senior Judge Mary M. James, Presiding Judge
of Special Judicial Panel
Senior Judge Henry C. Breithaupt, Special
Master to Special Judicial Panel**

RESPONSE TO MOTION TO AMEND
SCHEDULING ORDER

ORS 20.140 - State fees deferred at filing

14 **I. INTRODUCTION**

15 Respondent opposes Petitioners' motion to amend the scheduling order. If the Special
16 Master does not need the full period provided by the Court's order to prepare findings of fact,
17 any additional time in the schedule should be devoted to allowing parties an opportunity to rebut
18 the initial evidentiary submissions made on October 25.

19 In weighing the equities of any amendment to the scheduling order, the Court should
20 consider how Petitioners' litigation decisions have intensified the inherent challenges of the
21 statutory deadlines to resolve this case. Petitioners filed their Petition Monday, October 11, two
22 weeks after the legislation they challenge was enacted. Petitioners first served discovery on
23 Friday, October 15, at 5:03 p.m. Petitioners could have used those three weeks to seek the
24 extensive discovery they contend is essential to prove their case.

25 Petitioners' motion should be denied.
26

II. ARGUMENT

A. Additional time for discovery is unnecessary.

Much of the discovery Petitioners intend to seek is barred under the Debate Clause of the Oregon Constitution, Art IV, § 9. Respondent therefore disagrees that more time should be devoted to discovery given the extraordinarily compressed schedule required by SB 259. Petitioners seek to take six depositions of sitting legislators and six depositions of SEIU witnesses in two days (October 21–22)—and require the putative deponents to also respond to extensive requests for electronic discovery at that time.

Petitioners' subpoenas seeking documents and depositions from the Legislative Assembly are barred by the Debate Clause of Article IV, section 9, of the Oregon Constitution. That provision creates a legislative privilege that "applies when legislators are communicating in carrying out their legislative functions." *State v. Babson*, 355 Or 383, 418 (2014). Other state courts applying similar constitutional provisions have consistently upheld assertions of legislative privilege in cases alleging gerrymandering. *See, e.g., Holmes v. Farmer*, 475 A2d 976, 984 (RI 1984) (holding testimony about the "actions or motivations" of Rhode Island legislators in "proposing, passing, or voting upon" a redistricting plan was privileged); *Edwards v. Vesilind*, 292 Va 510, 516–17, 536, 790 SE2d 469, 473, 483–84 (2016) (holding documents and communications relating to Virginia "Senators' partisan considerations affecting the shape or composition of the districts or adjacent districts, including impact on incumbents," "development and prioritization of the criteria used to draft and modify the districts," and "map files and plans proposed, considered, or adopted" were privileged). The discovery that Petitioners wish legislators to produce concerns legislators' acts, communications, and motives in the enactment of SB 881. That is part of their legislative functions and is therefore privileged under the Debate Clause.

For that reason, the Legislative Assembly and the six legislators will move to quash under ORCP 55 A(7)(b) and for a protective order under ORCP 36 C, today, October 18.

1 Petitioners are also seeking deposition and document discovery from two SEIU locals
2 and four individuals who, based on counsel's internet searches, appear to be employed by those
3 unions. It is not clear why Petitioners need two organizational depositions under ORCP 39 C(6)
4 and depositions of four individuals from the same organizations. Even so, under the schedule
5 established by Petitioners' subpoenas, depositions would be completed by the deadline to submit
6 evidence under the Court's order.

7 Petitioners are correct that the extensive electronic discovery they seek cannot be
8 produced in a week. As they note, the subpoenas they served are barred by the 14-day notice
9 requirement of ORCP 55 C(3)(b). But Petitioners' proposed schedule would not allow enough
10 time for the document discovery they seek either. That is largely a problem of Petitioners' own
11 making: they started discovery too late and now cast far too wide a net.

12 **B. If the order is amended, it should allow the parties to rebut other parties' proof.**

13 **1. Rebuttal of initial evidentiary submissions should be allowed.**

14 Respondent recognizes that the Special Master needs time to prepare findings of fact by
15 November 5 under the Court's scheduling order. That said, Respondent also has a strong interest
16 in a fair opportunity to test and rebut Petitioners' evidence. The Court's scheduling order does
17 not specify when that would occur without a further order of the Special Master or the Court.
18 Thus, if the scheduling order is amended at all because the Special Master does not require the
19 time allowed to prepare findings of fact, Respondent requests that the parties be permitted to
20 submit evidence to rebut initial evidentiary submissions by November 1 at 10 a.m.

21 **2. Petitioners should be required to disclose their proposed remedial map.**

22 The draft joint motion Petitioners proposed to Respondent Friday morning included a
23 proposed deadline for disclosing their proposed remedial map by Thursday, October 21. See
24 Declaration of Brian Simmonds Marshall, ¶ 2 & Attach. A at 1, Attach. B at 2 ln. 18–19. But
25 they omit that deadline from this motion. Respondent is moving simultaneously with the filing
26 of this motion for an order requiring a more definite statement under ORCP 21 D.

1 Whether by granting that motion, or through an amended scheduling order, the Court
2 should require Petitioners to disclose their proposed remedial map promptly because it is
3 necessary to evaluate and defend their claims and their proposed remedy. Petitioners ask the
4 Court to “[a]dopt a congressional district plan that complies with the Oregon Constitution and
5 statutes.” Petition ¶ 105(c). But the Petition provides few clues about the remedy they seek. By
6 not providing a proposed remedial map, the Petition has not provided a “demand of the relief
7 which the party claims.” *See* ORCP 18 B. A proposed remedial map is necessary to evaluate the
8 remedy that Petitioners seek, so the Court should require disclosure on the timeline Petitioners
9 themselves proposed.

10 **C. Respondent does not oppose petitioners’ reasonable logistical requests.**

11 Respondent does not object to the common-sense logistical provisions Petitioners outline
12 in their motion, like conducting depositions (if any) by videoconference, providing documents
13 electronically, or conferring to resolve scheduling issues. In Respondent’s view, the parties
14 could agree to those provisions without the Court’s involvement.

15 **D. Respondent does not oppose Petitioners’ request to reschedule oral argument.**

16 Respondent does not oppose Petitioners’ request to reschedule oral argument to
17 November 16.

1 **CERTIFICATE OF SERVICE**

2 I certify that on October 18, 2021, I served the foregoing RESPONSE TO MOTION
3 TO AMEND SCHEDULING ORDER upon the parties hereto by the method indicated below,
4 and addressed to the following:

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