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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MARION

**BEVERLY CLARNO, GARY  
WILHELMS, JAMES L. WILCOX, and  
LARRY CAMPBELL,**

Petitioners,

v.

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

Respondent,

and

**JEANNE ATKINS, SUSAN CHURCH,  
NADIA DAHAB, JANE SQUIRES,  
JENNIFER LYNCH, and DAVID  
GUTTERMAN,**

Intervenor-  
Respondents.

Case No. 21CV40180

**UNOPPOSED  
MOTION TO INTERVENE**

Pursuant to Oregon Laws 2021,  
Chapter 419 (SB 259 (2021)),  
Section 1(4); and ORCP 33 B & C

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1 **UTCR 5.010 CERTIFICATION**

2 Conferral on the instant motion is not required by UTCR 5.010. Nonetheless, counsel for  
3 putative Intervenor-Respondents, Thomas R. Johnson and Misha Isaak, made a good-faith effort  
4 to confer with counsel for Petitioners, Shawn Lindsey, and counsel for Respondent, Brian  
5 Marshall, and no parties oppose the motion.

6 **MOTION**

7 Intervenor-Respondents Jeanne Atkins, Susan Church, Nadia Dahab, Jane Squires,  
8 Jennifer Lynch, and David Gutterman hereby move this Court to intervene in the above-captioned  
9 proceeding, pursuant to ORCP 33 B and Oregon Laws 2021, chapter 419 (2021) (“SB 259”),  
10 section 1(4), or in the alternative, pursuant to ORCP 33 C.

11 **POINTS AND AUTHORITIES**

12 **I. Legal Standards**

13 Oregon Rule of Civil Procedure 33 establishes the standards and procedure for  
14 intervention. The rule creates “a distinction between intervention of right and permissive  
15 intervention.” *Samuels v. Hubbard*, 71 Or App 481, 485, 692 P2d 700 (1984), *rev den*, 299 Or 118  
16 (1985). Where the law confers a right to intervene, “any person shall be permitted to intervene in  
17 an action.” ORCP 33 B. On the other hand, where no source of law confers a right to intervene,  
18 “any person who has an interest in the matter in litigation” may intervene “by leave of court.”  
19 ORCP 33 C. “In exercising its discretion, the court shall consider whether the intervention will  
20 unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.*

21 **II. Intervenor-Respondents are entitled to intervene as of right under SB 259.**

22 SB 259 authorizes any Oregon elector to intervene in this action. Intervenor-Respondents  
23 are all Oregon electors and, therefore, may intervene in this action as of right.

24 In the 2013 legislative session, the Legislative Assembly enacted HB 2686 (2013)—  
25 codified at ORS 188.125—to establish a process for litigation of congressional district boundaries  
26 after the decennial census. The process was designed to provide a consolidated forum for any

1 Oregon elector to participate in litigation over congressional district boundaries. The statute creates  
2 the role of “petitioner” for individuals who wish to challenge a legislatively adopted  
3 reapportionment plan or, where no plan is enacted, for individuals who wish to propose a plan. *See*  
4 ORS 188.125(2), (5)(b). Any Oregon elector may be a petitioner. *Id.* Likewise, the statute creates  
5 the role of “intervenor” for individuals who wish to defend a legislatively adopted reapportionment  
6 plan or oppose a petitioner’s proposed reapportionment plan. *See* ORS 188.125(4), (5)(c). And any  
7 Oregon elector may be an intervenor. *Id.*

8         ORS 188.125 does not contemplate a “motion to intervene.” That is, the statute does not  
9 prescribe a process for asking for authorization to participate in the litigation. Rather, just as “[a]n  
10 elector may file a petition” to challenge a legislatively adopted reapportionment plan as a matter  
11 of right, ORS 188.125(2), in parallel, “[a]n elector may file a petition . . . to intervene in a petition”  
12 that challenges a legislatively adopted reapportionment plan as a matter of right, ORS 188.125(4).  
13 Both the original petition and intervention petition are pleadings that establish their proponents’  
14 automatic participation in the litigation.

15         This structure makes good sense. HB 2686 was designed to facilitate public participation  
16 in the litigation process. Where a reapportionment plan has been adopted by the Legislative  
17 Assembly, the plan inevitably will have advocates and detractors. HB 2686 created mechanisms  
18 for both sides to participate and be heard in the litigation.

19         Public participation was preeminent in the Legislative Assembly’s consideration of  
20 amendments to ORS 188.125 earlier this year. The purpose of SB 259 was to adapt the timeline of  
21 ORS 188.125 to accommodate the delay in census data caused by the COVID-19 pandemic.  
22 Legislators engaged in a robust discussion of how to allocate the compressed timeline so as to  
23 maximize public participation. *See, e.g.,* Video, House Committee on Rules, SB 259, June 2, 2021,  
24 at 19:30–20:48 (statement of Rep. Barbara Smith-Warner) (advocating for amendment to avoid  
25 “squeez[ing] people out of the [litigation] process once it’s started”). The policy of maximizing  
26

1 opportunity for public participation, which carried from HB 2686 to SB 259, explains the  
2 Legislative Assembly’s choice to authorize intervention as of right by any elector.

3 In addition to promoting the policy of public participation, HB 2686 established a right of  
4 intervention to complement the role of the Secretary of State (the “Secretary”) as respondent.  
5 Though the statute casts the Secretary as respondent in a redistricting challenge, the Secretary’s  
6 interests are not necessarily the same as the interests of intervenors. While the Secretary,  
7 represented by the Oregon Department of Justice, is motivated to promote the institutional interests  
8 of the State, intervenors are members of the public who are motivated to promote the interests of  
9 themselves and their communities. One can easily imagine instances where the interests of the  
10 Secretary and intervenors diverge—even where both are defending a legislatively approved plan.  
11 Intervenors might argue that a new legislatively approved redistricting map cures defects in the  
12 preexisting map, where the Secretary might not want to acknowledge defects in the predecessor  
13 law. Intervenors might argue that a community of common interest is created by poor state  
14 services, such as a badly maintained transportation route that binds together a community; the  
15 Secretary might not want to put forward a defense along these lines. Thus, the statute allows an  
16 intervenor to participate on equal footing with the petitioner and the respondent.

17 Intervenor-Respondents may intervene as of right under SB 259 and, accordingly, are  
18 authorized to intervene here.

19 **III. In the alternative, Intervenor-Respondents request permissive intervention.**

20 If the Court concludes that SB 259 does not create a right of intervention, Intervenor-  
21 Respondents nonetheless request leave of the Court to intervene. The controlling rule provides:  
22 “At any time before trial, any person who has an interest in the matter in litigation may, by leave  
23 of court, intervene.” ORCP 33 C. “In exercising its discretion, the court shall consider whether the  
24 intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

25 *Id.*

26

1 ORCP 33 sets a low bar for permissive intervention: putative intervenors must show only  
2 that they “ha[ve] an interest in the matter in litigation.” ORCP 33 C. SB 259, which provides the  
3 statutory framework for this proceeding, sets a presumption that any Oregon elector will overcome  
4 this low hurdle. *See* SB 259 § 1(4) (“An elector may file a petition . . . to intervene in a petition  
5 filed under subsection (2) of this section.”). This is consistent with the statute’s creation of a right  
6 of action for any elector to initiate redistricting litigation with a petition. *See id.* § 1(2) (“An elector  
7 may file a petition . . . to . . . [c]hallenge a legislatively adopted reapportionment plan . . .”).  
8 Stated differently, even if the statute does not create a right of intervention—as Intervenor-  
9 Respondents contend it does—it certainly sets a presumption that individual electors have an  
10 interest sufficient to justify participation in this proceeding.

11 Here, all six Intervenor-Respondents “ha[ve] an interest in the matter in litigation.” ORCP  
12 33 C. Indeed, their interest in the litigation is the same as the interest of Petitioners. All six  
13 Intervenor-Respondents are Oregon electors, each from different congressional districts, with  
14 interests in how their respective districts are constituted. ORS 188.010 directs that the Legislative  
15 Assembly consider certain criteria—such as not dividing communities of common interest—  
16 because these criteria affect representation. Members of Congress are accountable to their  
17 constituents and so the concerns of the “communities of common interest” in their districts drive  
18 their priorities and agenda. Thus, Intervenor-Respondents, like all electors, have an interest in  
19 being joined in districts with, and not separated from, their fellow community members.

20 Intervenor-Respondents’ interests are particularly acute where an additional congressional  
21 district is added to Oregon’s map. For instance, Intervenor-Respondent Jeanne Atkins lives in  
22 Washington County, one of the state’s highest-growth areas. It is thus in her interest that this area  
23 benefit from additional representation with the creation of a new district. A map that packs  
24 Washington County into a single district would not reflect its growth and would undermine the  
25 interests of Ms. Atkins.

26

1 Intervention will not “unduly delay or prejudice the adjudication of the rights of the original  
2 parties.” ORCP 33 C. With respect to delay, this proceeding is on an expedited schedule prescribed  
3 by statute. Its course and timing will be the same regardless of Intervenor-Respondents’  
4 participation, and Intervenor-Respondents will follow any and all scheduling orders issued by the  
5 Court. Moreover, this motion is timely and complies with the Court-ordered deadline for  
6 intervention. Thus, intervention has not caused and will not cause delay.<sup>1</sup>

7 Intervention will not cause prejudice either. Petitioners and Respondent will have the same  
8 rights, prerogatives, and opportunities to present evidence and argument in support of their  
9 respective positions regardless of Intervenor-Respondents’ participation.

10 Accordingly, if the Court concludes that SB 259 does not confer a right of intervention,  
11 Intervenor-Respondents nonetheless request permissive intervention.

## 12 CONCLUSION

13 For the foregoing reasons, Intervenor-Respondents respectfully request that their motion  
14 to intervene be granted.

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19 <sup>1</sup> Indeed, only Petitioners seek further delay, and their recent Motion to Amend the Scheduling  
20 Order to provide additional time for document discovery and depositions should be denied. The  
21 Legislative Assembly prescribed a tight timeline for this litigation, *see* SB 259 §§ 1(4), 1(10)(a),  
22 and this Court’s Scheduling Order of October 14, 2021 sets the expeditious pace necessary to  
23 comply with the statutory deadlines. The Legislative Assembly clearly was not contemplating  
24 extensive discovery when it conceived of this fast-tracked judicial process; SB 259 provides only  
25 for the Court’s “recei[pt of] written memoranda and supporting evidence . . . and a date to hear  
26 oral arguments.” *See id.* § 1(9)(a). And instead of prosecuting discovery as early as  
September 27—when the challenged redistricting plan was enacted—Petitioners waited two full  
weeks to file their petition, and then an additional four days—until after 5 p.m. on October 15, a  
Friday—to serve their first discovery requests and subpoenas. Accordingly, Petitioners should be  
neither heard to complain about the tight timeline nor allowed to shift the burdens of their own  
delays onto the Court and the other litigants.

1 DATED: October 18, 2021

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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing **MOTION TO INTERVENE** on the following:

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to be sent by the following indicated method or methods, on the date set forth below:

- by **sending via the court’s electronic filing system**
- by **email**
- by **mail**
- by **hand delivery**

DATED: October 18, 2021

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