

1  
2  
3  
4 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**  
5 **FOR THE COUNTY OF MARION**

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

Case No. 21CV40180

**MOTION TO AMEND SCHEDULING  
ORDER**

Petitioners,

v.

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

11 Respondent.

12 **UTCR 5.010 CERTIFICATION**

13 Counsel for Petitioners and Respondent have conferred by phone and e-mail, but could not  
14 reach agreement on this motion to amend the Special Judicial Panel’s Scheduling Order, with the  
15 exception that Respondent does not oppose rescheduling the date of oral arguments to November  
16 16, 2021, as further explained below

17 **MOTION TO AMEND SCHEDULING ORDER**

18 Petitioners hereby move to amend the Scheduling Order, entered October 14, 2021, by the  
19 Honorable Mary M. James, Senior Judge appointed to the Special Judicial Panel by the Oregon  
20 Supreme Court pursuant to 2021 Oregon Laws Ch. 419, § 1(6).

21 The Panel has already recognized the expedited statutory timelines in 2021 Oregon Law  
22 Ch. 419, SB 259 (2021), and found that these timelines are incompatible with certain provisions  
23 of the Oregon Rules of Civil Procedure and the Uniform Trial Court Rules. The Special Judicial  
24 Panel found good cause to order expedited deadlines, pursuant to ORCP 1A and UTCR 1.100.  
25 Consistent with that conclusion, Petitioners submit that a further modification of those Rules and  
26

1 the Panel’s Scheduling Order is necessary, so that Petitioners will have time to take discovery in  
2 this case, which is of great public importance to the people of Oregon.

3 As further explained below, the justifications for this requested amendment are that: (1)  
4 Petitioners seek document discovery and depositions—including from third parties involved in,  
5 and/or who may have information about, the drafting and adopting of SB 881-A—in order to obtain  
6 “supporting evidence” for their claims. SB 259-B § 1(9)(a). Under the Scheduling Order and the  
7 Oregon Rule of Civil Procedure, there is insufficient time for Petitioners to obtain the discovery  
8 to which they are entitled; (2) counsel for Petitioners, Misha Tseytlin, must appear at oral argument  
9 on November 15, 2021, in the U.S. Court of Appeals for the Second Circuit in the *Delta Air Lines,*  
10 *Inc. v. Bombardier, Inc.*, No. 21-1028, which was scheduled by that court on September 21, 2021.

### 11 **I. Legal Standard**

12 Under Oregon Rule of Civil Procedure 36B(1), “parties may inquire regarding any matter,  
13 not privileged, that is relevant to the claim or defense of the party seeking discovery or to the claim  
14 or defense of any other party,” including but not limited to the existence and location of “any . . .  
15 documents” relevant to a claim, and may seek even inadmissible information so long as it “appears  
16 reasonably calculated to lead to the discovery of admissible evidence.” ORCP 36(B)(1); *see*  
17 *Mouktabis v. M.A.*, 315 Or. App. 22, 27 (Ct. App. 2021). A party can make a request “in broad  
18 terms, because the significance of the material cannot always be determined until it has been  
19 inspected.” *Vaughan v. Taylor*, 79 Or. App. 359, 365 (Ct. App. 1986).

### 20 **II. Argument**

21 Petitioners seek amendment of the Court’s Scheduling Order, including as to the Oregon  
22 Rules of Civil Procedure, to permit them to conduct discovery as to the Legislature’s partisan  
23 intent, which is the *core* issue of Petitioners’ case. Under Oregon law, a mere finding of a map’s  
24 partisan *effect* generally “falls short of demonstrating” the necessary “*purpose* of favoring a  
25 particular party” that ORS § 188.010(2) requires to state a claim. *Hartung v. Bradbury*, 332 Or.  
26 570, 599 (2001) (emphasis added). To that end, Petitioners seek discovery related to the Oregon

1 Legislature’s partisan intent in enacting SB 881-A, including discovery of private parties and  
2 communications between those parties and legislative offices, to support Petitioners’ claims under  
3 ORS § 188.010(2), as well as Article I, Sections 8, 20, and 26, and Article II, Section 1 of the  
4 Oregon Constitution. Partisan intent is the *sole* element that Petitioners must establish for their  
5 claim under ORS § 188.010(2), *Hartung*, 332 Or. at 599, and is one of two necessary elements of  
6 their claims under Article I, Sections 8, 20, and 26, and Article II, Section 1 of the Oregon  
7 Constitution, Or. Const. art. I, §§ 8, 20, 26; *id.* art. II, § 1; *see also* Petition ¶¶ 81–84, 92–94,  
8 *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cnty. Oct. 11, 2021). SB 259-B §1(9)(a),  
9 in turn, specifically envisions this Court “receiv[ing] . . . supporting evidence in support of” the  
10 Petition, meaning that such discovery is plainly “relevant to the claim” Petitioners have raised  
11 before this Court, and Petitioners have a right to seek all such discovery, ORCP 36(B)(1); *see*  
12 *Mouktabis*, 315 Or. App. at 27. Petitioners are aware that Respondents may challenge particular  
13 discovery requests. However, the propriety of any such challenges to Petitioners’ requests can be  
14 adjudicated individually, within the discovery process itself, with adequate, expedited briefing by  
15 the parties. *See, e.g.*, ORCP 36C(1).

16 The importance of discovery regarding legislative intent in partisan gerrymandering cases,  
17 such as this one, is well established, and courts across the nation have acknowledged and  
18 accommodated discovery into partisan legislative intent. *See, e.g.*, *League of Women Voters v.*  
19 *Commonwealth of Pa.*, 178 A.3d 737, 766–67 & n.38 (Pa. 2018) (discussing the parties’ extensive  
20 discovery on “all necessary and appropriate” matters relating to legislators’ “communications”  
21 with both legislative staff and third parties, which established partisan “intent to dilute”); *League*  
22 *of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 392 (Fla. 2015) (relying on evidence that  
23 “political operatives obtained the necessary cooperation and collaboration from the Legislature to  
24 ensure that the redistricting process and the resulting map were tainted with improper partisan  
25 intent” (citations and alterations omitted)); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 497, 518 (D.  
26 Md. 2018), *vacated and remanded sub nom. Rucho v. Common Cause*, 139 S. Ct. 2484 (2019)

1 (noting that, due to “extensive discovery,” “the record is replete with direct evidence of . . . precise  
2 [partisan] purpose,” including documentary and testimonial evidence from elected officials);  
3 *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 640 (M.D.N.C. 2018), *vacated and remanded*, 138  
4 S. Ct. 2679 (2018) (finding relevant and dispositive the “wealth of evidence” the plaintiffs  
5 presented regarding “the facts and circumstances surrounding the drawing and enactment of the  
6 2016 [redistricting] Plan”); *Ohio Organizing Collaborative v. Ohio Redistricting Comm’n*,  
7 No. 2021-1210 (Ohio Oct. 7, 2021) (ordering expedited discovery, including requests for  
8 production of documents and depositions of the Ohio Governor, Ohio Senate President, and Ohio  
9 House Speaker, among other officials, and discovery from nonparties).

10         Simply put, there is currently insufficient time in the Scheduling Order and the Oregon  
11 Rules of Civil Procedure for Petitioners to obtain the discovery to which they are entitled. Under  
12 this Court’s current Scheduling Order, the parties are permitted only six business days to conduct  
13 discovery, and all resulting evidence must be filed with the Special Master “on or before October  
14 25, 2021, at 4 P.M.” *See* 10/14/21 Scheduling Order at 1–2. This is extremely limited and deeply  
15 problematic. Petitioners intend to serve 12 deposition and document subpoenas on October 15,  
16 2021, and due to the tight deadlines, are scheduling six depositions on Thursday, October 21, 2021,  
17 and six depositions on Friday, October 22, 2021. On each day, multiple depositions will need to  
18 be taken simultaneously. This does not account for any depositions Respondents may take, or  
19 allow for contingencies in the case of witnesses who fail to appear, and it does not take into account  
20 Petitioners’ review of any documents third parties provide as responsive to Petitioners’ discovery  
21 requests. Furthermore, and perhaps even more problematically, under default Oregon deadlines  
22 for responses to subpoenas requiring productions of documents, third parties would have “at least  
23 14 days for production of the required documents or things, unless the court orders less time.”  
24 ORCP 55C(3)(b). Thus, without this Court’s amendment of the Scheduling Order, parties may  
25 well not respond to Petitioners’ crucial document requests until October 29, *after* Petitioners are  
26

1 required to file with the Special Master all “Supporting Evidence in Support of Petition.” See  
2 10/14/21 Scheduling Order at 2.

### 3 **III. Proposed Schedule And Amendment To The Scheduling Order**

4 Petitioners thus propose the following schedule, as an amendment to the Scheduling Order:

- 5 • The parties are to complete expedited discovery (depositions and document requests) by  
6 Wednesday, October 27, 2021.
- 7 • The notice periods for subpoenas and depositions, pursuant to ORCP 55C and ORCP 36  
8 are shortened as follows:
  - 9 ○ The parties will provide notice of depositions by 11:59 p.m. on Tuesday, October  
10 19, 2021.
  - 11 ○ The parties will issue requests for production of documents and subpoenas duces  
12 tecum to parties and third parties by email or in person by 11:59 p.m. on Tuesday,  
13 October 19, 2021.
  - 14 ○ Subpoenaed persons and entities will produce their witnesses for testimony on or  
15 before October 27, 2021, coordinating with the parties’ counsel.
- 16 • The time to respond to requests for production of documents is shortened pursuant to  
17 ORCP 43B(2) and ORCP 55C(3).
  - 18 ○ The parties will issue requests for production of documents and subpoenas duces  
19 tecum to parties and third parties by 11:59 p.m. on Tuesday, October 19, 2021.
  - 20 ○ Parties and third parties will respond and produce all responsive documents by  
21 Wednesday, October 27, 2021.
- 22 • All witness testimony will be conducted by a video conference service (such as Zoom)  
23 unless agreed upon otherwise by all parties.
- 24 • To the maximum extent possible, documents will be made available as electronically stored  
25 information.

- 1 • The parties will confer closely on any logistical or scheduling issues in order to  
2 accommodate this expedited timeline.
- 3 • Any objections to subpoenas or document requests will be heard by telephone conference  
4 on an expedited basis with the Special Master.
- 5 • The date for Supporting Evidence in Support of Petition or in objection to petition is  
6 continued to October 29, 2021 at 4:00 p.m., in order to accommodate the revised discovery  
7 schedule, as set forth above.
- 8 • Due to the unavoidable professional conflict of Petitioners' counsel, discussed above, Oral  
9 argument on the petition and/or objections shall be continued to 1:00 p.m. on November  
10 16, 2021, or another date convenient for the Panel.

11 DATED: October 15, 2021.

12 **TROUTMAN PEPPER HAMILTON**  
13 **SANDERS LLP**

14 Misha Tseytlin\*  
15 227 W. Monroe Street, Ste. 3900  
16 Chicago, IL 60606  
17 (608) 999-1240  
18 (312) 759-1939 (fax)  
19 misha.tseytlin@troutman.com  
20 *Attorneys for Petitioners*  
21 *\*pro hac vice application forthcoming*

12 **HARRIS BERNE CHRISTENSEN LLP**

13 By: s/Shawn M. Lindsay  
14 Shawn M. Lindsay, OSB #020695  
15 15350 SW Sequoia Parkway, Suite 250  
16 Portland, OR 97224  
17 (503) 968-1475  
18 (503) 968-2003  
19 shawn@hbclawyers.com  
20 *Attorneys for Petitioners*

21 Trial Attorney:  
22 Shawn M. Lindsay, OSB #020695

1 **CERTIFICATE OF SERVICE**

2 I certify that I served a true and complete copy of the foregoing **MOTION TO AMEND**

3 **SCHEDULING ORDER** on the date below as follows:

4 Brian Simmonds Marshall #196129  
5 Senior Assistant Attorney General  
6 Brian.S.Marshall@doj.state.or.us

- Oregon’s Electronic Court Service
- Email
- Facsimile
- First-class mail, postage prepaid
- Overnight courier, delivery prepaid
- Hand-delivery

7 Sadie Forzley #151025  
8 Assistant Attorney General  
9 Sadie.Forzley@doj.state.or.us

10 *Of Attorneys for Respondent*

11 DATED this 15<sup>th</sup> day of October 2021.

12 **HARRIS BERNE CHRISTENSEN LLP**

13 By: s/Shawn M. Lindsay  
14 Shawn M. Lindsay, OSB #020695  
15 Of Attorneys for Petitioners

RETRIEVED FROM DEMOCRACYDOCKET.COM

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
*Certificate of Service*