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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**

DECLARATION OF BRIAN SIMMONDS
MARSHALL IN SUPPORT OF THE RESPONSE
TO PETITIONERS' MOTION TO AMEND
SCHEDULING ORDER

ORS 20.140 - State fees deferred at filing

14
15 I, Brian Simmonds Marshall, declare under penalty of perjury as follows:

16 1. I am employed as a Senior Assistant Attorney General with the Oregon
17 Department of Justice.

18 2. Attachment A to this declaration is a copy of a chain of email correspondence
19 between Misha Tseytlin, counsel to Petitioners, and me concerning this motion on October 15,
20 2021.

3. Attachment B to this declaration is a copy of the proposed joint motion to amend the scheduling order, which was attached to Mr. Tseytlin's email contained in Attachment A.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED October 18, 2021.

s/ Brian Simmonds Marshall
BRIAN SIMMONDS MARSHALL

Lohman Jason

From: Marshall Brian S
Sent: Friday, October 15, 2021 9:57 AM
To: Tseytlin, Misha; shawn@hbclawyers.com
Cc: Forzley Sadie; Jones Alex; Price Aislinn; Lohman Jason
Subject: RE: Clarno et al v Fagan et al - Notice of Appearance (21CV40180)

Misha,

Respondent would oppose this motion. The bulk of the discovery petitioners are seeking is barred under the Debate Clause of the Oregon Constitution, Art. IV, sec. 9. So we do not agree that the additional time is needed for discovery. We also think that any disputes regarding the constitutional barriers to petitioners' requested discovery should be decided with the benefit of briefing, which we would file promptly if petitioners seek discovery barred by the Debate Clause.

From our perspective, if any changes to the schedule are needed, it is to ensure that respondent has a fair opportunity to test and rebut petitioners' evidence, which is complicated by the deadlines requiring the parties to submit their evidence simultaneously.

We don't object to the logistical pieces about Zoom, and we are available for oral argument on November 16.

Can you confirm that petitioners will produce the remedial map by October 21 regardless of the Court's ruling on this motion?

I'm available to confer now at the number below.

Brian Simmonds Marshall

Oregon Department of Justice

503.507.5014 (mobile)

From: Tseytlin, Misha <Misha.Tseytlin@troutman.com>
Sent: Friday, October 15, 2021 8:50 AM
To: Marshall Brian S <Brian.S.Marshall@doj.state.or.us>; shawn@hbclawyers.com
Cc: Forzley Sadie <Sadie.Forzley@doj.state.or.us>; Jones Alex <alex.jones@doj.state.or.us>; Price Aislinn <Aislinn.Price@doj.state.or.us>; Lohman Jason <Jason.Lohman@doj.state.or.us>
Subject: RE: Clarno et al v Fagan et al - Notice of Appearance (21CV40180)
Importance: High

CAUTION EXTERNAL EMAIL* This email originated from outside of DOJ. Treat attachments and links with caution. *CAUTION EXTERNAL EMAIL

Thank you, Brian.

Please see the attached, proposed joint motion to amend the scheduling order, which we hope addresses all of the concerns that we discussed on our call yesterday (including as to the proposed remedial map issue that you referenced below), while remaining as much as possible within the general framework of what the Court ordered yesterday.

Please let us know at your earliest convenience if you are amenable to this, and if you have any revisions that you would propose, as we would like to file as early as possible today.

I tried to keep this entirely non-argumentative, and thus did not cite prior partisan gerrymandering cases with regard to need for discovery in these types of cases, in the hope that we can submit this as a joint motion.

Best,

Misha Tseytlin

Partner

troutman pepper

Direct: 312.759.5947 | Mobile: 608.999.1240 | Internal: 20-5947

misha.tseytlin@troutman.com

From: Marshall Brian S <Brian.S.Marshall@doj.state.or.us>

Sent: Thursday, October 14, 2021 11:54 PM

To: shawn@hbclawyers.com; Tseytlin, Misha <Misha.Tseytlin@troutman.com>

Cc: Forzley Sadie <Sadie.Forzley@doj.state.or.us>; Jones Alex <alex.jones@doj.state.or.us>; Price Aislinn <Aislinn.Price@doj.state.or.us>; Lohman Jason <Jason.Lohman@doj.state.or.us>

Subject: RE: Clarno et al v Fagan et al - Notice of Appearance (21CV40180)

EXTERNAL SENDER

Hi Shawn and Misha,

I trust you saw the scheduling order this afternoon. I want to confirm that plaintiffs will provide their proposed remedial map by October 21 as we discussed earlier today.

Also, could you please copy Alex, Aislinn, and Jason on anything you serve on Sadie and me? Each of them are copied here. We would appreciate it. Thank you.

Brian Simmonds Marshall

Oregon Department of Justice

503.507.5014 (mobile)

From: Lohman Jason <Jason.Lohman@doj.state.or.us>

Sent: Thursday, October 14, 2021 4:39 PM

To: shawn@hbclawyers.com; misha.tseytlin@troutman.com

Cc: Marshall Brian S <Brian.S.Marshall@doj.state.or.us>; Forzley Sadie <Sadie.Forzley@doj.state.or.us>

Subject: Clarno et al v Fagan et al - Notice of Appearance (21CV40180)

Good afternoon Counsel,

Attached please find the electronic service copy of the Notice of Appearance that was filed today in Marion County Circuit Court.

You will also be receiving physical service copies via US mail.

Please advise if you need any additional information.

Thank you,

Jason Lohman

Legal Secretary to Sheila H. Potter | Brian S. Marshall | James S. Smith
Civil Litigation Section | Special Litigation Unit | Trial Division
Oregon Department of Justice
100 SW Market Street, Portland OR 97201
971.673.3878

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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,**

9 Petitioners,

10 v.

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

13 Respondent.

Case No. 21CV40180

**STIPULATED JOINT MOTION TO
AMEND SCHEDULING ORDER**

14 **UTCR 5.010 CERTIFICATION**

15 Counsel for Petitioners and Respondent have conferred by phone and e-mail, and have
16 reached agreement on this stipulated joint motion to amend the Special Judicial Panel's Scheduling
17 Order.

18 **MOTION TO AMEND SCHEDULING ORDER**

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

22 The Panel has already recognized the expedited statutory timelines in 2021 Oregon Law
23 Ch. 419, SB 259 (2021), and found that these timelines are incompatible with certain provisions
24 of the Oregon Rules of Procedure and the Uniform Trial Court Rules. The Special Judicial Panel
25 found good cause to order expedited deadlines, pursuant to ORCP 1A and UTCR 1.100.
26 Consistent with that conclusion, the parties submit that a further modification of those Rules and
the Panel's Scheduling Order is necessary, so that the parties will have time to take discovery in
this case, which is of great public importance to the people of Oregon.

Page 1 – MOTION TO AMEND SCHEDULING ORDER

1
2 The justifications for this requested amendment are that: (1) Petitioners seek document
3 discovery and depositions—including from third parties involved in, and/or who may have
4 information about, the drafting and adopting of SB 881-A—in order to obtain “supporting
5 evidence” for their claims. SB 259-B §1(9)(a). These claims include the allegation that the
6 Legislative Assembly drew congressional district lines in SB 881-A “for the purpose of favoring
7 any political party, incumbent legislator or other person.” ORS § 188.010(2); (2) Respondent
8 seeks discovery related to remedial maps that either Petitioners or any intervenors may proffer to
9 the Special Master and Panel; (3) Petitioners and Respondent require discovery from any witnesses
10 that the opposing side intends to rely upon; (4) counsel for Petitioners, Misha Tseytlin, has oral
11 argument scheduled on November 15, 2021, in the United States Court of Appeals for the Second
12 Circuit in the *Delta Air Lines, Inc. v. Bombardier, Inc.*, No. 21-1028, which was scheduled by that
13 court on September 21, 2021.

14 The parties thus propose the following schedule, as an amendment to the Scheduling Order:

- 15 • The parties are to complete expedited discovery (depositions and document requests) by
16 Wednesday, October 27, 2021.
- 17 • The parties will disclose their witness lists by 10 a.m. on Monday, October 18, 2021.
- 18 • The Petitioners and any intervenors will disclose any remedial maps that they will propose
19 to the Special Master and Panel by 11:59 p.m. on Thursday, October 21, 2021.
- 20 • The notice periods for subpoenas and depositions, pursuant to ORCP 55C and ORCP 36
21 are shortened as follows:
 - 22 ○ The parties will provide notice of depositions—other than those related to proposed
23 remedial maps—by midnight on Monday, October 18, 2021.
 - 24 ○ The parties will issue requests for production of documents and subpoenas duces
25 tecum to parties and third parties—other than those related to proposed remedial
26 maps—by email or in person by 11:59 p.m. on Monday, October 18, 2021.

Page 2 – MOTION TO AMEND SCHEDULING ORDER

- The parties will issue subpoenas related to proposed remedial maps by email or in person by 11:59 p.m. on Friday, October 22, 2021.
 - Subpoenaed persons and entities will produce their witnesses for testimony on or before October 27, 2021, coordinating with the parties' counsel.
- The time to respond to requests for production of documents is shortened pursuant to ORCP 43B(2) and ORCP 55C(3).
 - The parties will issue requests for production of documents and subpoenas duces tecum to parties and third parties—other than those related to proposed remedial maps—by Monday, October 18, 2021.
 - The parties will issue requests for production of documents and subpoenas duces tecum to parties and third parties related to proposed remedial maps by email or in person by Friday, October 22, 2021.
 - Parties and third parties will make all reasonable efforts to respond and produce responsive documents by Wednesday, October 27, 2021.
- All witness testimony will be conducted by a video conference service (such as Zoom) unless agreed upon otherwise by all parties.
- To the maximum extent possible, documents will be made available as electronically stored information.
- The parties will confer closely on any logistical or scheduling issues in order to accommodate this expedited timeline.
- Any objections to subpoenas or document requests will be heard by telephone conference on an expedited basis with the Special Master.
- The date for Supporting Evidence in Support of Petition or in objection to petition is continued to October 29, 2021 at 4:00 p.m., in order to accommodate the revised discovery schedule set forth above.

- 1 • Oral argument on the petition and/or objections shall be continued to 1 p.m. on November
2 16, 2021, or another date convenient for the Panel.
3
4

5 DATED: _____, 2021.

6 **TROUTMAN PEPPER HAMILTON**
7 **SANDERS LLP**

8 Misha Tseytlin*
9 227 W. Monroe Street, Ste. 3900
10 Chicago, IL 60606
11 (608) 999-1240
12 (312) 759-1939 (fax)
13 misha.tseytlin@troutman.com
14 *Attorneys for Petitioners*
15 **pro hac vice application forthcoming*

HARRIS BERNE CHRISTENSEN LLP

By: _____s/Shawn M. Lindsay
Shawn M. Lindsay, OSB #020695
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
(503) 968-1475
(503) 968-2003
shawn@hbclawyers.com
Attorneys for Petitioners

Trial Attorney:
Shawn M. Lindsay, OSB #020695

14 ADD **RESPONDENT SIGNATURE BLOCK**
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26

1 **CERTIFICATE OF SERVICE**

2 I certify that I served a true and complete copy of the foregoing *** on the date below as
3 follows:

4 ***

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

7
8 DATED this _____ day of _____ 2021.

9 **HARRIS BERNE CHRISTENSEN LLP**

10 By: _____ s/Shawn M. Lindsay
11 Shawn M. Lindsay, OSB #020695
12 Of Attorneys for Petitioners
13
14
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Certificate of Service

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

Decl. of Marshall
ATTACHMENT B 5 of 5

1 **CERTIFICATE OF SERVICE**

2 I certify that on October 18, 2021, I served the foregoing DECLARATION OF
3 BRIAN SIMMONDS MARSHALL IN SUPPORT OF THE RESPONSE TO PETITIONERS'
4 MOTION TO AMEND SCHEDULING ORDER upon the parties hereto by the method
5 indicated below, and addressed to the following:

6 Shawn M. Lindsay
7 Harris Berne Christensen LLP
8 15350 SW Sequoia Parkway, Suite 250
9 Portland, OR 97224
Of Attorneys for Petitioners

HAND DELIVERY
X MAIL DELIVERY
 OVERNIGHT MAIL
X E-MAIL
X SERVED BY E-FILING

10 Misha Tseytlin
11 Troutman Pepper Hamilton Sanders LLP
12 227 W. Monroe Street, Ste. 3900
13 Chicago, IL 60606
Of Attorneys for Petitioners

HAND DELIVERY
X MAIL DELIVERY
 OVERNIGHT MAIL
X E-MAIL
X SERVED BY E-FILING

14 s/ Brian Simmonds Marshall
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16 Senior Assistant Attorney General
17 SADIE FORZLEY #151025
18 ALEXANDER C. JONES #213898
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25 Alex.Jones@doj.state.or.us
26 Of Attorneys for Respondent