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

7 BEVERLY CLARNO, GARY)
8 WILHELMS, JAMES L. WILCOX, AND)
9 LARRY CAMPBELL,)

10 Petitioners,)

11 vs.)

12 SHEMIA FAGAN, in her official)
13 capacity as Secretary of State of)
14 Oregon)

15 Respondent,)

16 vs.)

17 JEANNE ATKINS, SUSAN CHURCH,)
18 NADIA DAHAB, JANE SQUIRES,)
19 JENNIFER LYNCH, AND DAVID)
20 GUTTERMAN.)

21 Intervenors.)

Case No. 21CV40180

ORDER ON NON-PARTIES' MOTION
TO QUASH; PROTECTIVE ORDER

22 After consideration of Non-Parties Melissa Unger, Len Norwitz, Courtney
23 Graham, Benjamin Morris, SEIU Local 49, and SEIU Local 503's Motion for Protective
24 Order and to Quash Subpoenas dated October 20, 2021 (hereinafter "Non-Parties" or
25 "Non-Parties' Motion") and the Declaration of Steven C. Berman in Support of the Non-
26 Parties' Motion for Protective Order and to Quash Subpoena dated October 20, 2021,
27 Special Judicial Panel Presiding Judge Mary James grants the Non-Parties' Motion for a
28 Protective Order in part and denies it in part.

1 The Non-Parties' Motion is GRANTED in the following particulars, as further
2 described in this Order:

- 3 1. The scope of all deposition topics and requests for documents is limited to events
4 occurring and documents communicated on or after April 26, 2021.
- 5 2. The scope of all deposition topics and requests for documents is limited to
6 communications between Non-Parties and the Legislative Assembly, or a specific
7 member thereof. All requests for production of documents that relate only to internal
8 communications of SEIU, or between Non-Parties are unlikely to lead to the discovery
9 of admissible evidence.
10
- 11 3. Deposition topics and requests for documents may not inquire into the "change in
12 composition of the House Redistricting Committee" as these inquiries appear unlikely to
13 lead to the discovery of admissible evidence.
14

15 The Non-Parties' Motion is DENIED in the following particulars, as further
16 described in this Order:

- 17 1. The Presiding Judge finds good cause to deny Non-Parties' request for oral
18 argument pursuant to UTCR 1.100.
19
- 20 2. Non-Parties' request for attorney fees and costs related to discovery and
21 production of documents is denied.
22
- 23 3. All other requests to prospectively quash deposition subpoenas or further limit
24 requests for production of documents are denied. This denial does not prohibit Non-
25 Parties from raising objections to specific questions or document requests during
26 depositions or production, including objections based on a particular privilege or rule of
27 evidence.
28

1 **Opinion**

2 **Some of Petitioners’ Requests are Outside the Scope of Discovery.**

3 ORCP 36B(1) defines the scope of discovery.

4 *In general.* For all forms of discovery, parties may inquire regarding any
5 matter, not privileged, that is relevant to the claim or defense of the party
6 seeking discovery or to the claim or defense of any other party, including
7 the existence, description, nature, custody, condition, and location of any
8 books, documents, or other tangible things, and the identity and location of
9 persons having knowledge of any discoverable matter. It is not a ground
10 for objection that the information sought will be inadmissible at the trial if
11 the information sought appears reasonably calculated to lead to the
12 discovery of admissible evidence.

13 Several of Petitioners’ Deposition Topics and Requests for Production (See Decl.
14 of Steven C. Berman, attachments) are outside the scope of discovery because they
15 are not reasonably calculated to lead to the discovery of admissible evidence. To the
16 extent that Petitioners’ Deposition Topics and Requests for Production ask for
17 information that was never communicated to the Legislative Assembly, or a specific
18 member thereof, that discovery does not appear reasonably calculated to lead to the
19 discovery of admissible evidence.

20 Petitioners have alleged violation of ORS 188.010(2), these allegations require
21 the Special Judicial Panel, in conjunction with the Special Master, to make findings
22 regarding legislative intent. It’s unclear how the private intentions of third-parties, not
23 communicated to any member of the Legislative Assembly tasked with redistricting
24 pursuant to the U.S. Const. Article I, §4, could have any bearing or relevance to
25 determining legislative intent.

26 The same is true of inquiries regarding the “change in composition of the House
27 Redistricting Committee.” These inquiries are not relevant to a finding regarding
28

1 legislative intent under ORS 188.010(2). Separation of powers of government, pursuant
2 to Or. Const. Article III § 1, is one of the “most basic and fundamental” principles of
3 constitutional law. *State ex rel. Overhulse v. Appling*, 226 Or 575 (1961). It follows that
4 discretionary acts governing the internal procedures of the legislative branch are not
5 subject to scrutiny or control by the judicial branch where those procedures do not
6 conflict with constitutional provisions. *State ex rel. Overhulse v. Appling*, 226 Or. 575,
7 586 (1961). Determinations regarding composition of committees is one such
8 discretionary act.
9

10 In addition, to the extent that Petitioners’ deposition topics or requests for
11 production of documents seek to inquire into events that occurred or documents that
12 were communicated before April 26, 2021, when the U.S. Census Bureau announced
13 that Oregon would receive a sixth Congressional seat, these requests do not appear
14 reasonably calculated to lead to admissible evidence. These inquiries are outside the
15 scope of discovery as defined in ORCP 36B(1) and are subsequently prohibited.
16
17

18 **Some of Petitioners’ Requests are Unduly Burdensome or Oppressive.**

19 ORCP 36C(1) provides in full:

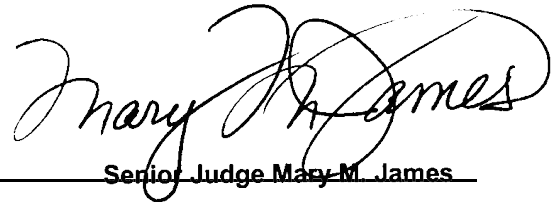
20 *Relief available; grounds for limitation. On motion by a party or by the*
21 **person from whom discovery is sought, and for good cause shown,**
22 **the court in which the action is pending may make any order that**
23 **justice requires to protect a party or person from annoyance,**
24 **embarrassment, oppression, or undue burden or expense,** including
25 one or more of the following: that the discovery not be had; that the
26 discovery may be had only on specified terms and conditions, including a
27 designation of the time or place; that the discovery may be had only by a
28 method of discovery other than that selected by the party seeking
discovery; that certain matters not be inquired into, **or that the scope of**
the discovery be limited to certain matters; that discovery be
conducted with no one present except persons designated by the court;
that a deposition after being sealed be opened only by order of the court;
that a trade secret or other confidential research, development, or

1 commercial information not be disclosed or be disclosed only in a
2 designated way; that the parties simultaneously file specified documents
3 or information enclosed in sealed envelopes to be opened as directed by
4 the court; or that to prevent hardship the party requesting discovery pay to
5 the other party reasonable expenses incurred in attending the deposition
6 or otherwise responding to the request for discovery. (emphasis added).

7 In addition to being outside the scope of discovery, some of Petitioners' requests
8 are unduly burdensome or oppressive given the breadth of the requests and the short
9 period for response. It should be recognized that the short period for response is not
10 wholly within Petitioners' control – these response periods are dictated by the expedited
11 timelines in 2021 Oregon Laws Ch. 419, SB 259 (2021), as further defined by the
12 Special Judicial Panel's scheduling orders. It should be recognized, however, that
13 parties and non-parties alike are faced with a herculean task in responding to discovery
14 requests within these shortened timelines. All discovery requests should therefore be
15 narrowly tailored. I therefore find good cause under ORCP 36C(1) to limit the scope of
16 discovery and set parameters for deposition topics and requests for production, as
17 described elsewhere in this order.

18 IT IS SO ORDERED.

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21 Senior Judge Mary M. James