

IN THE SUPREME COURT OF THE STATE OF OREGON

State ex rel REPRESENTATIVE
TINA KOTEK and SENATOR
PETER COURTNEY, on behalf of the
Oregon Legislative Assembly,

Plaintiffs-Relators,

v.

SHEMIA FAGAN, Oregon Secretary
of State,

Defendant.

MANDAMUS PROCEEDING

SC S068364

SECRETARY OF STATE SHEMIA FAGAN'S MEMORANDUM IN
OPPOSITION TO PETITION FOR A PREEMPTORY OR ALTERNATIVE
WRIT OF MANDAMUS

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**SECRETARY OF STATE SHEMIA FAGAN'S MEMORANDUM IN
OPPOSITION TO PETITION FOR A PREEMPTORY OR
ALTERNATIVE WRIT OF MANDAMUS**

INTRODUCTION

Article IV, section 6, requires the Legislative Assembly to enact a redistricting map by July 1, 2021, but the census data on which it usually relies may not be available until September 30. There is no dispute that final district lines should be evaluated in light of census data, and that the delay thus poses a significant challenge for the Legislative Assembly in drawing the map. But it does not justify the extraordinary remedy that it seeks here: an order from this court rewriting the constitution and leaving state legislative district boundaries in limbo until July 1, 2022, and enjoining the Secretary of State from carrying out her own constitutional duties in a timely manner.

This court should deny the petition for two reasons. First, the delay in receiving 2020 census data does not prevent the Legislative Assembly from carrying out its constitutional duty to prepare a map by July 1. As this court has already recognized, the map does not have to be based on census data alone. What matters is whether the districts reflect actual population; while the census may be the most accurate and well-accepted evidence of population, it is not the only source of accurate or reliable information. For example, the Legislative Assembly can use reliable data from the U.S. Census Bureau's Oregon partner,

the Population Research Center. Even if all of that data is not yet compiled, there are several months to do so before the July 1 deadline. And when the census data becomes available, it will be straightforward to compare it to the data the Legislative Assembly used and determine if any corrections must be made to the map. That review can occur on the schedule the constitution sets, which will ensure that the final map is in place by January 2022 as the constitution requires.

Census data is important in the redistricting process, and it likely will be the best evidence of whether districts reflect actual population figures. But that does not mean that the Legislative Assembly needs census data to draw a map that meets constitutional and statutory requirements. If the data it uses turns out to be close enough to the census data, the map will be lawful. If there are material discrepancies, the existing review process allows an opportunity to correct the map. The expected delay in receiving the census data does not warrant disregarding the constitutional deadlines for redistricting.

Second, the relief sought in the mandamus petition would have adverse consequences for upcoming elections. The constitution's January 1, 2022, deadline for a final map is designed to allow as much time for redistricting as possible without destabilizing elections processes. If this court were to grant the relief the Legislative Assembly seeks, the map might not be finalized until July 2022—well after the May 2022 primary. The resulting cost, confusion,

and instability to Oregon's electoral process could be staggering. As the state's chief elections officer, the Secretary of State is responsible for "obtain[ing] and maintain[ing] uniformity in the application, operation and interpretation of the election laws." ORS 246.110. To fulfill her own official duties, the Secretary urges this court to avoid granting relief that would disrupt the primary election.

Although this court has the discretion to deny the petition without explanation, the Secretary respectfully suggests that (if the court agrees with the Secretary) it would be appropriate for the court to confirm that in the absence of official census data, the redistricting maps can be based on other reliable evidence, and that the court will use its constitutional authority to review the map to reconcile any discrepancies if the final census data differs meaningfully from the data used. Such confirmation would reduce uncertainty for all participants in the redistricting process and avoid consuming judicial resources when the parties seek clarification elsewhere.

ARGUMENT

A. Mandamus is inappropriate because the Legislative Assembly can carry out redistricting following the constitutional process.

A writ of mandamus is an extraordinary remedy to compel an official to perform an act that "the law specially enjoins." ORS 34.110. It is inappropriate if there "is a plain, speedy and adequate remedy in the ordinary course of the law." *Id.* Although a court may decide complicated legal matters on

mandamus, the relator's right must be "clearly founded in, or granted by, law."

State ex rel. Maizels v. Juba, 254 Or 323, 329, 460 P2d 850 (1969).

Here, the mandamus petition seeks to prohibit the Secretary from carrying out her constitutional duty to prepare a redistricting map if the Legislative Assembly does not enact one. (Pet 8). It also seeks an order extending the constitutional deadline for the Legislative Assembly to enact a map and authorizing it to do so in a special rather than a regular legislative session. (Pet 8–9). The petition does not argue that any of that relief involves an act that the law "specially enjoins" the Secretary to take. It instead argues that the relief is warranted because of a looming "constitutional crisis": The Legislative Assembly must either fail to carry out redistricting or use "outdated data," risking a violation of federal law or the Equal Protection Clause. (Pet 2).

Both of those contentions are misplaced. Neither the law nor practicality prevents the Legislative Assembly from carrying out redistricting by July 1, with reliable non-census data that state and local governments use regularly for important matters. That approach should not create inaccuracies in the final maps, because existing data is reliable and because the review process the constitution specifies will leave an opportunity to use census data to fine-tune the maps before they become final in January 2022.

The Legislative Assembly is mistaken to contend that it has been "prevented from reapportioning districts." (Mem 5). While the U.S. Census

Bureau’s failure to provide on-time 2020 census data is undoubtedly challenging, it is not fatal. The Oregon Constitution empowers the Legislative Assembly to enact maps before July 1. And nothing prevents it from using reliable non-census data, which already exists or can be readily compiled, when census data is unavailable.

1. The Legislative Assembly may use other reliable sources of information when census data is lacking.

Nothing in the Oregon Constitution or this court’s case law specifically requires the Legislative Assembly to use census data when redistricting. Article IV, section 6, of the Oregon Constitution provides in part that “[a]t the odd-numbered year regular session of the Legislative Assembly next following an enumeration of the inhabitants by the United States Government, the number of Senators and Representatives shall be fixed by law and apportioned among legislative districts according to population.” Or Const, Art IV, § 6(1). While the *timing* of the redistricting is tied to the federal census, the districts themselves must be drawn “according to population”—not according to census data. Census data is often the best evidence of population, but for constitutional purposes, the ultimate fact of population is what matters, not the source of evidence.

This court recognized as much in *Hartung v. Bradbury*, 332 Or 570, 33 P3d 972 (2001), when it required mapmakers to seek out another reliable source

of data proactively when reliable census data was unavailable. In *Hartung*, a previous Secretary of State filed a plan premised on faulty census data that reported zero population for the area of the 2,000-inmate Sheridan prison. The Secretary failed to seek out other data because he believed that Article IV, Section 6, required him to use only census data. But the court rejected that interpretation, stating that Article IV, Section 6 simply requires an accurate apportionment “according to population,” whether based on census data or other reliable sources of information. *Hartung*, 332 Or at 598 (Article IV, Section 6 does not “require [determining] population solely by reference to the to the official census published by the United States Census Bureau.”). In light of the dearth of reliable census data accounting for the Sheridan prison, the court determined that the Secretary erred as a matter of law in failing to seek out other reliable sources of data. *Id.* The court ordered the Secretary to seek out other data and use it to revise the redistricting plan. *Id.*

The detailed 2020 census data on which the Legislative Assembly would usually rely will likely not be available until after its constitutional deadline—July 1—for enacting a redistricting map. But that does not prevent the Legislative Assembly from enacting a map so long as it can obtain reliable data that allows it to draw districts “according to population.”

2. Reliable data from the Population Research Center can supplement missing census data until it arrives.

Fortunately, the Legislative Assembly has access to reliable data that can supplement the delayed 2020 census data.

The Population Research Center (PRC), housed at Portland State University, is Oregon's primary demographic research center. The PRC's mission includes working in partnership with the U.S. Census Bureau as Oregon's designated agency in the Federal-State Cooperative Program for Local Population Estimates. *See* <https://www.pdx.edu/population-research/our-mission>. The PRC is also the Governor's appointed lead agency for the Oregon State Data Center (SDC), the U.S. Census Bureau's cooperative program with the states. *See* <https://www.pdx.edu/population-research/state-data-center>.

PRC data is used for a host of state government functions. As required by ORS 190.520, the Population Research Center (PRC) produces certified annual population estimates for Oregon and its counties and cities, as well as estimates by age and sex for the state and its counties. ORS 190.540 provides that the PRC's certified population estimates are the official and exclusive population measure that the Legislative Assembly uses to determine allocation of certain per-capita tax revenues for each relevant city and county. ORS 190.590 requires state and local governments to provide the PRC any information it requires to make its estimates.

ORS 195.033 also requires the PRC to produce official area population forecasts which local governments use for coordinated land use planning. The PRC makes the supporting data and methodologies for its forecasts publicly available; they are subject to formal public objections and review by the Department of Land Conservation and Development. The PRC's population forecasts are subject to the rules of the Land Conservation and Development Commission.

Through the SDC, PRC demographers regularly prepare tailored demographic tabulations that help local, regional, and state government entities with fiscal planning, grant applications, and expansion decisions. *See* <https://www.pdx.edu/population-research/our-mission>; <https://www.pdx.edu/population-research/research-areas>. The PRC's demographers also prepare population analysis and report on statewide and local populations. *Id.*

The PRC's reports frequently pull together diverse sources of data to prepare reports about changing populations. These data sources include population and housing data from the U.S. Census Bureau, birth data from the Oregon Center for Health Statistics, city and county population estimates produced by PRC, employment trends and forecasts from the Oregon Employment Department, housing development data, planning documents, and

spatial data from local jurisdictions, among other things.¹ *See*

<https://www.pdx.edu/population-research/about-population-estimates>.

In light of the PRC's considerable skill and the time necessary to prepare the most useful data set for redistricting, the Secretary is already in the process of commissioning the PRC to compile a data set specifically to support redistricting, whenever it may occur. The commissioned data set would estimate the total population of each census block in Oregon by combining block-level counts of housing unit and group quarters, block group or tract level total population and demographic characteristics, and city or county level population estimates. The purpose of the data set is to provide total population counts that can be aggregated into balanced districts exhibiting less than 10% deviation from absolute equality among areas.² An additional goal is to include indicative data on racial and ethnic composition of the population. Use of such a "best available" data set is consistent with recommendations of the National Conference of State Legislatures. Ben Williams, "5 Ways to Handle Census Delays and Redistricting Deadlines," *State Legislatures Magazine*, Jan 28,

¹ The PRC's reports, including statewide school enrollment data, are available at <https://pdxscholar.library.pdx.edu/prc/>.

² That 10% standard is significant because the U.S. Supreme Court uses it as an indicator of whether a redistricting plan, on its face, violates the federal Equal Protection Clause. *Harris v. Arizona Redistricting Comm'n*, 578 US ____ 136 S Ct 1301, 1307, 194 L Ed 2d 497 (2016).

2021, *available at* <https://www.ncsl.org/research/redistricting/5-ways-to-handle-census-delays-and-redistricting-deadlines-magazine2021.aspx>.

That data can be honed even further on April 1, 2021, when the U.S. Census releases official 2020 population data related to apportionment of congressional seats among the states. *See* <https://2020census.gov/en/important-dates.html>. Because the census and PRC use similar software, PRC should be able to determine any deviation between its data set and the census very quickly after census data is released.

In short, while PRC data may not mirror census data precisely, it presents a wealth of reliable information, which should grow in detail and accuracy as other information is released. Based on this data, the Legislative Assembly could produce—before July 1—a redistricting map that is largely, or even entirely, accurate.

The Legislative Assembly does not dispute that the PRC has the ability to compile highly accurate data within the constitutional timeframe for it to draw maps. It asserts that “no alternative adequate data set *currently* exists.” (Pet 8 (emphasis added)). But the relevant question is not whether the data currently exists; it is whether the data can be compiled in time for maps to be drawn by July 1. As discussed above, if the Legislative Assembly engages PRC promptly, there is still sufficient time to obtain that data before the constitutional deadline.

3. The U.S. Census Bureau data is slated to arrive in time to inform the final redistricting plan.

The Legislative Assembly argues that there is a “risk” that a reapportionment based on data other than final census figures will turn out to violate federal law because the districts are misdrawn. (Pet 2). Of course, that is always a risk no matter what data the Legislative Assembly uses; but as explained above, that risk is low because the PRC data is reliable. And there are also opportunities to mitigate that risk by comparing PRC data with census data before the map is final. As the Legislative Assembly notes, the U.S. Census Bureau has announced that its redistricting data will be available by September 30. (Pet 5). The existing constitutional timeline provides opportunities to incorporate that late-arriving data into a final redistricting plan.

Article IV, Section 6’s schedule is as follows:

July 1, 2021	Legislative Assembly must enact a redistricting plan, or the responsibility moves to the Secretary of State. § 6 (3).
August 1, 2021	The latest date any elector may petition the court to review the Legislative Assembly’s plan. § 6 (2)(a).
September 1, 2021	If the court determines the plan is lawful, it must dismiss the petition by this date. § 6 (2)(b).
September 15, 2021	If the court determines the plan is unlawful, it must issue an opinion and order by this date, specifying how the plan is unlawful. The order shall direct the Secretary to draft a lawful plan. § 6 (2)(c).
November 1, 2021	The Secretary must conduct a public hearing, transcribe the hearing, and file a corrected reapportionment with the court by this date. § 6 (2)(d).

November 15, 2021	The court must review the corrected plan by this date and determine whether it is lawful; it may further correct the plan if necessary. § 6 (2)(b).
January 1, 2022	The reapportionment becomes operative for the purposes of electing senators and representatives to the “next term of office that commences after the applicable deadline for making a final reapportionment under this section.” § 6 (6)(b).

The constitutional schedule provides a path to incorporate the census data even if it is not released until the very last day the Census Bureau promised, September 30. An elector (including the Senate President or Speaker) could file a preemptive “placeholder” challenge by August 1, and by September 15 this court could direct the Secretary to revise the plan *if* there are material discrepancies between the data the Legislative Assembly used and the final census data. The Secretary would then have until November 1 to make the required corrections and return them to the Supreme Court for final review.

To be sure, that approach would require taking a broad view of this court’s authority to correct the maps under section 6(2)(c). But it would require far less departure from the plain text of the constitutional provision than the mandamus petition seeks here. Most importantly, it would preserve the constitutional deadlines and avoid derailing the 2022 primary schedule, as discussed further below.

All that presumes that there will be a need to make corrections when the census data arrives. But that puts the conclusion before the evidence. It asks

this court to determine—months in advance and without the benefit of relevant data or any specific violation—that the use of non-census data will necessarily result in a misapportioned plan.

But that speculation offers the court no solid ground on which to grant extraordinary mandamus relief. Today, we can only make guesses (however well educated) about whether and in what respects the Legislative Assembly’s map might be misapportioned. In contrast, the constitutionally prescribed schedule allows the court to address an issue in a targeted way, with the benefit of concrete demographic evidence.

There may be ways other than the placeholder petitions discussed above to follow the constitutional schedule—or something reasonably close to it—and incorporate the final census data. The Secretary supports an alternative path that allows participation by Oregon electors as the constitution requires and that this court deems constitutionally appropriate as long as it ensures a final map by January 1, 2022. At a minimum, however, the discussion here shows that the disruption to the schedule that the mandamus petition requests is not necessary. The Legislative Assembly offers no explanation for why a later, more informed, evidence-based judicial review is insufficient, particularly when there are far

less practically and legally disruptive methods to accomplish the ultimate goal: preparing constitutionally compliant maps by January 2022.³

B. The Legislative Assembly’s request risks Oregon failing to enact a lawful map in time for the May 2022 primary election.

The Legislative Assembly’s petition fails to grapple with the likely consequences of its postponement request. The existing constitutional timeline has been carefully developed to allow electors the maximum opportunity to examine and challenge redistricting maps, while also ensuring that a properly apportioned map is in place for the May 2022 primary election as required by federal law. *See* Joint Legislative Committee’s Argument in Favor of Measure No. 2, 1986 Voters’ Pamphlet at 8, *available at* <https://digital.osl.state.or.us/islandora/object/osl%3A64373/datastream/OBJ/download/1986.pdf> (arguing for the 1986 amendment to Article IV, section 6, because “Federal regulations and case law have outdated our Constitutional guidelines for reapportionment in Oregon.”); *Grove v. Emison*, 507 US 25, 36

³ In the unlikely event that the final maps include errors that census data illuminate and that were not corrected through the constitutional review process, the Legislative Assembly is not without recourse. Nothing in Article IV, section 6, expressly prohibits mid-decade redistricting. And even if it implicitly forbids mid-decade redistricting without good reason, that prohibition likely would give way if redistricting were needed to correct maps that fail to comply with the requirements of the Equal Protection Clause or Voting Rights Act. *Cf. Hartung*, 332 Or at 582 (holding that the state constitutional prohibition against dividing counties in redistricting gives way to the Equal Protection Clause’s one-person, one-vote requirement).

(1993) (noting that a federal “District Court would have been justified in adopting its own plan if it had been apparent that the [State], ... would not develop a redistricting plan in time for the primaries”).

The Legislative Assembly’s requested postponement would unbalance that carefully calibrated system, jeopardizing the Secretary’s ability to conduct an orderly May 2022 primary election with final updated maps as Article IV, Section 6, envisions. Those risks provide further reason for this court to deny the extraordinary mandamus relief requested.

1. Article IV, section 6, was designed to produce timely reapportionment maps to support stable and predictable elections.

In seeking to extend its own time to act, the Legislative Assembly is overlooking the larger picture. Article IV, section 6, was expressly designed to produce timely maps, whether or not the Legislative Assembly enacts a timely reapportionment plan. By granting the Legislative Assembly’s request, this court could create the very instability that Article IV, section 6, seeks to prevent.

In 1952, the voters approved Measure 18, a constitutional amendment based on a referral from the Legislative Assembly. 1952 Voters’ Pamphlet at 79, *available at* <https://digital.osl.state.or.us/islandora/object/osl%3A64383/datastream/OBJ/view>. The referral introduced a strict timeline for reapportionment and

reapportionment review and appointed the Secretary of State as a backstop to conduct redistricting in the event the Legislative Assembly did not accomplish the job. *Id.* The reason for the referral was clearly stated: At the time, the Legislative Assembly had not conducted redistricting in forty years. The aging district maps failed to reflect a changing population. The votes of people in different districts varied in strength, which likely violated the federal Equal Protection Clause. The referral sought to balance the Legislative Assembly's important role in redistricting with Oregon's need to have accurate and timely maps. The referral passed overwhelmingly.⁴

Thirty-four years later, in 1986, the voters again amended Article IV, section 6, by passing Measure 2. 1986 Voters' Pamphlet, *supra*, at 8. The measure made several changes to reapportionment timing. The previous two reapportionments were not final by the then-existing November deadline. The measure extended the deadline to December to allow more time for Supreme Court review. *Id.* But it also clarified that reapportionments take effect on

⁴ The vote was 357,550 in favor and 194,292 against. Oregon Blue Book, Initiative, Referendum, and Recall, at 13, *available at* <https://sos.oregon.gov/blue-book/Documents/elections/initiative.pdf>.

January 1 as to those races in the year following reapportionment. *Id.* That measure also passed by a resounding margin.⁵

The purpose of the latter change was to avoid excluding viable candidates from elections following a reapportionment. *Id.* Previously, candidates were qualified if they lived in the district for at least a year before the election. *Id.* That created a dilemma: A qualified candidate could plan to run in her home district on November 1, but reapportionment could move district boundaries and exclude her residence from that district by December 1, requiring her to run in a different district entirely. The amendment ensures stability and predictability: Now candidates can wait until district boundaries are settled before they make the important decision to run for election.

Together, the 1952 and 1986 amendments demonstrate the delicate balance that Article IV, section 6 strikes between two competing values: thoroughness and finality. The process must be thorough to ensure legally compliant maps. But it must also result in final maps by a date certain, to secure predictable and certain elections.

⁵ The vote was 637,410 in favor and 291,355 against. Oregon Blue Book, Initiative, Referendum, and Recall, at 18, *available at* <https://sos.oregon.gov/blue-book/Documents/elections/initiative.pdf>.

2. **The Legislative Assembly’s requested remedy would create instability and unpredictability in the May 2022 primary.**
 - a. **The requested postponement could push a final redistricting plan until July 2022.**

As the Legislative Assembly appropriately noted, if this court were to move the time for the Legislative Assembly to act, it should proportionally move the deadlines for the rest of the reapportionment process. Memo at 2 n. 1. This would mean postponing the entire redistricting process by six months, as follows:

Requested deadline	Article IV, § 6 deadline	
January 1, 2022 ⁶	July 1, 2021	Legislative Assembly must enact a plan, or the responsibility moves to the Secretary of State. § 6 (3). ⁷
February 1, 2022	August 1, 2021	The latest date any elector may petition the court to review the Legislative Assembly’s plan. § 6 (2)(a).

⁶ The Legislative Assembly has requested that this court order the Secretary “to extend[] the Article IV, Section 6 deadline for the Legislative Assembly to reapportion districts until three calendar months after the 2020 Census data is released.” Petition at 9. The Census Bureau has delayed redistricting data until September 30, 2021. Petition at 1. Three calendar months thereafter is December 30, 2021. But to avoid the confusion of comparing the requested end-of-month dates with the constitutional beginning-of-month dates, the Secretary presents that date here as January 1, 2022.

⁷ The deadlines in this chart assume the Legislative Assembly passes a redistricting plan by the extended deadline. The Article IV, section 6, process extends even later if the Legislative Assembly does not pass a plan, and the Secretary of State is charged with creating one.

March 1, 2022	September 1, 2021	If the court determines the plan is lawful, it must dismiss the petition by this date. § 6 (2)(b).
March 8, 2022 is the last day to declare candidacy for the May 2022 primary election. ⁸		
March 10, 2022 is the last day to submit candidates' voters' pamphlet statements for the May 2022 primary election.		
March 15, 2022	September 15, 2021	If the court determines the plan is unlawful, it must issue an opinion and order by this date, specifying how the plan is unlawful. The order shall direct the Secretary to draft a lawful plan. § 6 (2)(c).
April 2, 2022 is the last day to print and mail ballots to military and overseas voters.		
May 1, 2022	November 1, 2021	The Secretary must conduct a public hearing, transcribe the hearing, and file a corrected reapportionment with the court by this date. § 6 (2)(d).
May 3, 2022 is the last day to mail ballots to voters.		
May 8, 2022 is the deadline to establish residency in a district to be qualified as a candidate for the November 2022 general election.		
May 15, 2022	November 15, 2021	The court must review the corrected plan by this date and determine whether it is lawful; it may further correct the plan if necessary. § 6 (2)(b).
May 17, 2022 is the date of the 2022 primary election.		

⁸ As described in Exhibit 1 to the Declaration of Brenda Bayes, the change in reapportionment deadlines could affect scores of deadlines related to the May 2022 primary election. The Secretary presents the most important deadlines for reference here.

July 1, 2022	January 1, 2022	The reapportionment becomes operative for the purposes of electing senators and representatives to the “next term of office that commences after the applicable deadline for making a final reapportionment under this section.” § 6 (6)(b).
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In sum, even if the Legislative Assembly enacted a redistricting map by the end of 2021, this court might not complete its review of that map until after the filing deadline for the May 2022 primary. That, in turn, could invite federal intervention to impose a redistricting plan to ensure the 2022 elections comport with the one-person, one-vote requirement of the Equal Protection Clause. *See Growe*, 507 US at 36–37 (noting a federal court may impose a redistricting plan if the State is “unwilling or unable to adopt” a properly apportioned map).

Even if the May 17 date for the 2022 primary set by ORS 254.056 were superseded or enjoined, that primary can be delayed only for so long before running into the beginning of the November 2022 general election calendar. And moving that primary at all is highly undesirable: It would upend the reasonable expectations of candidates and campaigns, and confuse Oregon’s voters, who have come to expect to vote at the May primary.

b. History demonstrates that redistricting plans frequently consume the entire time allotted for challenges.

There is genuine reason to be concerned that under the Legislative Assembly’s proposal, the final map will not be known until mid-May 2022—or

later, if the Legislative Assembly does not enact a map and the task falls to the Secretary. While it is theoretically possible that the review process might end with the Legislative Assembly's passage of an unchallenged plan, experience demonstrates that is unlikely. Since the creation of the constitutional timeline in 1952, most redistricting plans have involved significant review and have become final near, or even after, the latest constitutional deadline.

1961 ⁹	The Assembly's plan was held unconstitutional; the court approved the Secretary's final plan on October 27, 1961 . <i>In re Apportionment of Senators & Representatives</i> , 228 Or 575, 365 P2d 1042 (1961). Under then-current Article IV, section 6, the plan was due to be filed November 1, 1971.
1971	The Assembly did not enact a plan; the Secretary filed one, and the court ordered amendments. <i>Hovet v. Myers</i> , 260 Or 152, 489 P2d 684 (1971) (issuing order September 30, 1971). Under then-current Article IV, section 6, the amended plan was due November 1, 1971 . The plan was not filed on time. <i>See</i> 1986 Voters' Pamphlet, <i>supra</i> , at 8 (so noting).

⁹ In 1961, 1971, and 1981, the constitutional deadlines for completing apportionment were earlier, because the 1986 amendment to Article IV, section 6 had not yet been enacted. Before 1986, November 1 was the final date for filing a plan. Thus, all three pre-1986 plans were filed on or after the last possible date.

1981	The Assembly's plan was held unconstitutional; the Secretary submitted a plan, and the court ordered amendments. <i>Cargo v. Paulus</i> , 291 Or 772, 635 P2d 367 (1981). Under then-current Article IV, section 6, the amended plan was due November 1, 1971 . The plan was not filed on time. <i>See</i> 1986 Voters' Pamphlet, <i>supra</i> , at 8 (so noting).
1991	The Assembly did not enact a plan; the Secretary submitted one, and the court ordered amendments. <i>Ater v. Keisling</i> , 312 Or 207, 819 P2d 296 (1991). The court approved the corrected plan on December 12, 1991 . <i>Linder v. Keisling</i> , 312 Or 316, 821 P2d 1089 (1991).
2001	The Governor vetoed the Assembly's redistricting plan, and the Secretary submitted a plan. The court ordered the Secretary to amend the plan by December 1, 2001 . <i>Hartung v. Bradbury</i> , 332 Or 570, 33 P3d 972 (2001).
2011	The Assembly passed a redistricting plan before July 1 . No challenges were filed.

Thus, while it is possible that the Legislative Assembly's plan, if enacted by the end of December, would go unchallenged and come into effect as usual in January 2022, this court should not assume that will happen. History suggests that it is far more likely that litigation would delay final approval of a map enacted in late 2021 until at least mid-2022.

c. Postponing redistricting as requested would likely create uncertainty and disorder in the May 2022 primary.

Under both the U.S. Constitution and the Oregon Constitution, legislative districts must be apportioned “according to population.” Or Const, Art IV, § 6(1); *see also Gray v. Sanders*, 372 US 368, 374–75 (1963) (holding the one-person, one-vote of the federal Constitution applies to primary elections for state legislature). Accordingly, if the State has not finalized a new map in time for the 2022 primary, a federal court may impose a properly apportioned map for that election. *See Growe*, 507 US at 36–37. But delaying the May 2022 primary to accommodate delays in the redistricting process would undermine democratic participation in that election and frustrate its orderly administration.

As the Interim Director of Elections, Brenda Bayes, explains in her declaration, the legislature’s request would affect a host of election and pre-election dates. Declaration of Brenda Bayes (“Bayes Decl”) Bayes Decl ¶ 7, Ex 1. That would be immensely disruptive to an orderly and predictable May 2022 primary election and cause a crisis for the operations of the Elections Division. Bayes Decl ¶ 5.

The 2022 primary election is scheduled for May 17, 2022. Bayes Decl ¶ 7. Preparations for the election begin as early as August 2021 and continue regularly until the election. *Id.* By March 8, 2022, candidates must file their declarations for office. *Id.* By April 2, 2022, county elections

officials must mail overseas ballots. Other out-of-state ballots must be mailed by April 18. *Id.* By April 27, county elections officials begin mailing the voters pamphlet and ballots to most Oregon addresses. *Id.*

If redistricting is postponed, but election statutes remain unchanged, the elections process would suffer enormous uncertainty. Bayes Decl ¶ 8. For example, if the redistricting is not complete until July 2022, candidates might run in a particular district in the May primary election but not be eligible to run in the November general election, when district lines have changed. *Id.* That situation would be particularly challenging, since the Elections Division is required to disqualify any candidate who declares in two districts. ORS 249.013. Bayes Decl ¶ 8 & n 1. Thus, a candidate who declares in her district of residence, and then declares again after her residence is placed in a new district, would be disqualified. *Id.* The district lines could also change after a candidate declares but before the primary election, or even after voters have returned their ballots. Bayes Decl ¶ 8. Any number of difficult scenarios are possible, depending on the timing of the final redistricting. *Id.*

If the Legislative Assembly postpones the May primary to accommodate redistricting, the Elections Division and the county clerks would be hard pressed to run a predictable and transparent elections process. Bayes Decl ¶ 9. Every election-related deadline would have to change. *Id.* Elections officials would need to reprogram computer software and systems to accommodate the

new dates. *Id.* The scale and suddenness of the change would require substantial public employee hours and public dollars. *Id.* And while Elections staff and county clerks would strive to avoid errors, the sheer size of the process creates an environment in which errors are likely. *Id.*

Currently, the March 8 candidate declaration date is more than two months after a redistricting plan is scheduled to take effect. Bayes Decl ¶ 10. If the redistricting is complete by July, as the Legislative Assembly is proposing, the primary election would likely need to move to September to give appropriate notice to potential candidates. *Id.* That is because candidates require time to consider the district in which they might run before declaring their candidacy. *Id.* A September primary risks running into deadlines for the November general election, creating a disruption there as well. *Id.* For example, ORS 253.065 requires clerks to mail overseas ballots 45 days before the November general election. *Id.* A September primary could interfere with that and other critical deadlines. *Id.*

The additional expense of running for office in a district with changing boundaries also poses problems for candidates with fewer resources. *Id.* Such candidates may not have professional assistance to help them address changing deadlines; this could lead to campaign finance reporting violations. *Id.* These difficulties could discourage candidates with fewer resources from running for office altogether. *Id.*

A postponed election could also multiply confusion and misinformation, now and in the future. Bayes Decl ¶ 13. The Elections Division and county clerks spend substantial time and resources educating voters and candidates about elections and elections-related processes. *Id.* There is often confusion about election dates and related deadlines, even when dates remain unchanged. *Id.* Changing election dates would likely cause even more confusion. *Id.* The difficulties are not limited to candidates, voters, and elections officials. Bayes Decl ¶ 12. All stakeholders who have an interest in the elections would likely experience substantial confusion and cost. *Id.*

Changing election dates could also increase the opportunity for misinformation. Bayes Decl ¶ 13. For example, ill-intentioned actors can dissuade voters unfavorable to their cause from voting by publishing misinformation about election dates. *Id.* Voters expect elections on a regular schedule; changing those dates once spreads doubt about whether dates are changed in the future. *Id.*

In short, forcing an election to occur in the shadow of redistricting creates a host of complications for voters, candidates, and the system overall. In particular, any postponement that substantially shortens the time for candidates to consider their assigned district and make an informed decision about whether to run is likely to invite these problems—problems that the Oregon Constitution’s redistricting provisions were designed to avoid.

CONCLUSION

This court should deny the mandamus petition. Although the Legislative Assembly faces unprecedented challenges in enacting a timely redistricting map, it has not shown that this court needs to intervene at this time. There is still a reasonable possibility of performing redistricting within the existing constitutional framework. And the remedy that the Legislative Assembly requests, which would go beyond any traditional exercise of mandamus authority, threatens substantial harm to Oregon's upcoming elections.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF OREGON

State ex rel Representative Tina
Kotek and Senator Peter
Courtney, on behalf of the Oregon
Legislative Assembly,

Plaintiffs-Relators,

v.

Oregon Secretary of State
Shemia Fagan,

Defendant-Adverse Party.

Supreme Court No. S068364

DECLARATION OF
BRENDA BAYES

1. I am the Interim Director of the Elections Division of the Secretary of State. Previously, I was the Deputy Director from 2006 to 2018.

2. I have over 28 years of elections administration experience in Oregon. In addition to being the Deputy Director, I acted as the Interim Elections Director twice during my tenure. In 2016, I received the Certified Elections Registration Administrator (CERA) certification from the National Association of Election Officials. In addition, I am a graduate of the MBA program from Willamette University in Public Management.

3. The Elections Division is the filing officer that accepts declarations of candidacy for all statewide offices and legislative seats. It is responsible for preparing the voters' pamphlet and for certifying the results of elections, among other things. The Elections Division works closely with all 36 county clerks and elections administrators to conduct elections that are fair, predictable, and comply with Oregon law.

4. I understand that, in this matter, the Legislative Assembly is seeking to postpone the date by which a final redistricting plan is ready, to as late as July 2022.

5. In my opinion, the proposed postponement would be immensely disruptive to an orderly and predictable elections process in May 2022 and cause a crisis for the operations of the Elections Division.

6. I have prepared the calendar attached as Exhibit 1, which includes the key deadlines that the postponement would affect, together with the statutes that set those deadlines.

7. The 2022 primary election is scheduled for May 17, 2022. By statute, our preparations for the election begin as early as August 2021 and continue regularly until the election. Key deadlines are as follows:

- By March 8, 2022, candidates must file their declarations for office.
- By April 2, 2022, county elections officials must mail overseas ballots. Other out-of-state ballots must be mailed by April 18.
- By April 27, 2022, county elections officials begin mailing the voters' pamphlet and ballots to most Oregon addresses.

8. If redistricting is postponed, but election statutes remain unchanged, our elections process would suffer enormous uncertainty. For example, if redistricting is not complete until July, candidates might run in a particular district in the May primary election but not be eligible to run in the November general election, when district lines have changed. The district lines could change after a candidate declares but before the primary election.¹ The district lines could change after voters have returned their ballots. Any number of difficult scenarios are possible, depending on the timing of the final redistricting.

9. If the May primary election is also postponed, the Elections Division and the county clerks would be hard pressed to run a predictable and transparent elections process. Every deadline listed in

¹ This situation would be particularly challenging, since the Elections Division is required to disqualify any candidate who declares in two districts. ORS 249.013. Thus, a candidate who declares in her district of residence, and then declares again after her residence is placed in a new district, would be disqualified.

Exhibit 1 would have to change. Elections officials would need to reprogram computer software and systems to accommodate the new dates. The scale and suddenness of the change would require substantial public employee hours and public dollars. And while we would strive to avoid errors, the sheer size of the process creates an environment in which errors are likely to occur.

10. Currently, the March 8 candidate declaration date is more than two months after a redistricting plan is scheduled to take effect. If redistricting is complete by July, as the Legislative Assembly is proposing, the primary election would likely need to move to September to give appropriate notice to potential candidates. This is because candidates require time to consider the district in which they might run before declaring their candidacy. A September primary risks running into deadlines for the November general election, creating a domino effect of chaos for both elections. For example, ORS 253.065 requires clerks to mail overseas ballots 45 days before the November general election. A September primary could interfere with that and other critical deadlines. From my experience as an Elections Director managing campaign finance regulations, I know that even the smallest

aces require substantial resources. Running for office in a district with changing boundaries would likely require even more resources.

Changing election dates could also cause disproportionate harm to candidates with fewer resources. Such candidates may not have professional assistance to help them address changing deadlines; this could lead to campaign finance reporting violations. In addition, moving the election date could also discourage candidates with fewer resources from running for office altogether.

11. The Elections Division and county clerks spend substantial time and resources educating voters and candidates about elections and elections-related processes. There is often confusion about election dates and related deadlines, even when dates remain unchanged. Changing election dates would likely cause even more confusion.

12. The difficulties are not limited to candidates, voters, and elections officials. All stakeholders who have an interest in the elections would likely experience substantial confusion and cost.

13. Changing election dates could also increase the opportunity for misinformation. For example, ill-intentioned actors can dissuade voters unfavorable to their cause from voting by publishing

misinformation about election dates. Voters expect elections on a regular schedule; changing those dates once spreads doubt about whether dates are changed in the future.

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.



Brenda Bayes
Interim Director
Oregon Elections Division

03/17/2021

Date

EXHIBIT

1

Date	Description	Actor	Reference	Calculation	Election
August 19, 2021	Deadline for Secretary of State to determine major political party ballot access.	State Elections Division	248.006	-271	Primary
September 8, 2021	Last day to determine required number of precinct committeepersons.	County Elections Official	248.015	-251	Primary
September 9, 2021	First day for major party or nonpartisan candidate to file declaration of candidacy or nominating petition. Includes precinct committeeperson.	Public	249.037	-250	Primary
September 9, 2021	Last day for partisan candidate to register as member of major political party to satisfy 180 day membership requirement.	Public	249.046	-180	Primary Filing Deadline
September 9, 2021	First day to file state voters' pamphlet candidate statement or measure argument prospective petition.	Public	OAR 165-016-0000	-250	Primary
November 16, 2021	First day for political party to request free statewide voter file from Secretary of State.	Public	247.940		Primary -6 months
January 1, 2022	Last day for candidates for State Senator or State Representative to become inhabitant of the district they intend to be elected to.	Public	OR CONST. ART. IV		General
January 3, 2022	Last day to deliver to district elections authority, board member update form. Adjusted under ORS 187.010(3).	County Elections Official	255.069	-135	Primary
January 10, 2022	Last day to file measure arguments for county voters' pamphlet.	Public	OAR 165-022-0010	2 business	Notice Deadline
January 12, 2022	Last day for district elections authority to return board member updates.	Elections Official	255.069	-125	Primary
January 17, 2022	First day to file candidate statements or measure arguments for state voters' pamphlet.	Public	251.065	-120	Primary
January 18, 2022	Last day for legislative officials or chief petitioners to appoint proponents to explanatory statement committees. Adjusted under ORS 246.021.	Public	251.205	-120	Primary
January 19, 2022	Last day for Secretary of State to appoint opponents and, if necessary, proponents to explanatory statement committees.	State Elections Division	251.205	-118	Primary
January 26, 2022	Last day for explanatory statement committees to select fifth members.	Public	251.205	-111	Primary
January 27, 2022	Last day to publish/mail notice of district board election.	County Elections Official	255.075	-110	Primary
January 27, 2022	First day for district candidate to file declaration of candidacy or nominating petition.	Public	255.235	-110	Primary
January 28, 2022	Last day for Secretary of State to appoint fifth member to explanatory statement committee, if committee does not.	State Elections Division	251.205	-109	Primary
February 7, 2022	Last day to file explanatory statements, financial estimates and any statements explaining estimates.	Public	250.127; 251.215; 251.225	-99	Primary

February 11, 2022	Last day to conduct hearings on explanatory statements, financial estimates and any statements explaining estimates.	State Elections Division	250.127; 251.215	-95	Primary
February 15, 2022	Last day to cancel voters based on information from US Postal Service records.	County Elections Official	247.296	-91	Primary
February 16, 2022	Last day to prepare and mail submarine ballot to military and overseas voters.	County Elections Official	253.565	-90	Primary
February 16, 2022	Last day for major political party to file rules opening primary election.	Public	254.365	-90	Primary
February 16, 2022	Last day to file revised explanatory statements, financial estimates and any statements explaining estimates.	Public	250.127; 251.215	-90	Primary
February 18, 2022	Last day for Secretary of State to file financial estimates and any statements explaining estimates, if financial estimate committee does not.	State Elections Division	250.127	-88	Primary
February 22, 2022	Last day for Secretary of State to notify county clerks of open primary. Adjusted under ORS 187.010(3).	State Elections Division	OAR 165-007-0030	-85	Primary
February 22, 2022	Last day to notify Secretary of State of intent to publish or not publish county voters' pamphlet.	County Elections Official	OAR 165-007-0030	-84	Primary
February 22, 2022	Last day to petition Supreme Court to review explanatory statements or process used to adopt financial estimates and any statements explaining estimates. Adjusted under ORS 246.021.	Public	ORAP Rule 11.30; 250.131; 251.235	5	Revision Deadline
February 25, 2022	Last day to file text of referral or prepared ballot title in order for ballot title challenge period to be complete by the filing deadline. Applicable to counties, cities and districts.	Governing Body	OAR 165-014-0005	-81	Primary
March 8, 2022	Last day for major party or nonpartisan candidate to file declaration of candidacy or nominating petition.	Public	249.037	-70	Primary
March 8, 2022	Last day for district candidate to file declaration of candidacy, nominating petition or to withdraw.	Public	255.235	-70	Primary
March 9, 2022	Last day for Secretary of State to complete random ordering of alphabet to determine candidate name placement.	State Elections Division	254.155	-69	Primary
March 10, 2022	Last day for Secretary of State to distribute random alphabet.	State Elections Division	254.155	-68	Primary
March 10, 2022	Last day to file or withdraw candidate statements or measure arguments for state voters' pamphlet.	Public	251.065; 251.245; 251.255; 251.285	-68	Primary
March 10, 2022	Last day for candidate, who files candidacy with county clerk, to file statement for county voters' pamphlet.	Public	OAR 165-022-0010	-68	Primary
March 11, 2022	Last day for candidate, other than district candidate, to withdraw.	Public	249.170	-67	Primary
March 15, 2022	Last day to review state voters' pamphlet filings for statutory compliance.	State Elections Division	251.087; 251.260	3 business	VP Filing Deadline

March 16, 2022	Material submitted for state voters' pamphlet available for public inspection.	Public	251.145	4 business	VP Filing Deadline
March 16, 2022	Candidate voters' pamphlet statements, for candidates who file candidacy with county clerk, available for public inspection.	Public	251.430	4 business	VP Filing Deadline
March 17, 2022	Last day to notify candidates and measure argument filers of required corrections to state voters' pamphlet material.	State Elections Division	251.087; 251.260	5 business	VP Filing Deadline
March 17, 2022	Last day for Secretary of State and city elections official to file ballot statement.	State Elections Division	254.085; 254.095	-61	Primary
March 17, 2022	Last day to file or withdraw notice of measure election and any required explanatory statement.	Governing Body	254.095; 254.103; 255.085; OAR 165-022-0010	-61	Primary
March 21, 2022	Last day for candidate or measure argument filer to correct state voters' pamphlet material.	Public	251.087; 251.260	7 business	VP Filing Deadline
March 21, 2022	Last day for candidate, who files candidacy with governing body other than county clerk, to file statement for county voters' pamphlet.	Public	OAR 165-022- 0010	-57	Primary
March 21, 2022	Last day to file measure arguments for county voters' pamphlet.	Public	OAR 165-022- 0010	2 business	Notice Deadline
March 25, 2022	Candidate statements, for candidates who file candidacy with governing body other than county clerk, and measure arguments available for public inspection.	Public	251.430	4 business	VP Filing Deadline
April 2, 2022	Last day to print and mail ballots to military and overseas voters.	County Elections Official	253.065	-45	Primary
April 5, 2022	Seven day campaign finance transaction reporting begins.	Public	260.057	-42	Primary
April 18, 2022	Last day to establish or divide precincts. Adjusted under ORS 187.010(3).	County Elections Official	246.410	-30	Primary
April 18, 2022	First day to mail ballots to voters with a non-Oregon mailing address who are not military or overseas voters.	County Elections Official	253.065; 254.470	-29	Primary
April 18, 2022	Last day to designate official ballot dropsites. Adjusted under ORS 187.010(3).	County Elections Official	OAR 165-007- 0030	-30	Primary
April 26, 2022	Last day to register to vote or change party affiliation. Registration cards postmarked by this date or submitted online no later than 11:59 pm are valid.	Public	247.025; 247.203	-21	Primary
April 27, 2022	Last day to mail state voters' pamphlet.	State Elections Division	251.175	-20	Primary
April 27, 2022	First day to mail ballots to voters.	County Elections Official	254.470	-20	Primary
April 29, 2022	Last day to mail ballots to voters without daily mail service.	County Elections Official	254.470	-18	Primary

May 2, 2022	Last day for political party to request free statewide voter file from Secretary of State.	Public	247.940	-15	Primary
May 3, 2022	Last day to distribute county voters' pamphlet.	County Elections Official	251.315	-14	Primary
May 3, 2022	Last day to mail ballots to voters.	County Elections Official	254.470	-14	Primary
May 10, 2022	Last day to conduct public certification test of vote tally system.	County Elections Official	254.235	-7	Primary
May 10, 2022	First day to open return identification envelopes and to scan ballots in accordance with security plan approved by Secretary of State.	County Elections Official	254.478	-7	Primary
May 12, 2022	Last day absentee or replacement ballots are required to be mailed to voters.	County Elections Official	247.307; 253.545; 254.470	-5	Primary
May 17, 2022	County Clerk's office open 7 am - 8 pm. Official dropsites open until 8 pm, for minimum of 8 hours.	Public	254.470	Election Day	Primary
May 17, 2022	Last day to file write-in declaration or write-in nomination for precinct committeeperson. Must be filed no later than 8 pm.	Public	248.019	Election Day	Primary
May 17, 2022	Seven day campaign finance transaction reporting ends.	Public	260.057	Election Day	Primary
May 25, 2022	Information identifying voters with ballots challenged for missing or non-matching signatures available for public inspection.	Public	254.431	8	Primary
May 31, 2022	Last day to resolve ballot challenges.	Public	254.426	14	Primary
June 1, 2022	First day to file declaration of candidacy or nominating petition for local offices filled at general election.	Public	221.180	15	General
June 1, 2022	First day for nonaffiliated and minor political party candidates to file certificates of nomination for general election.	Public	249.722	15	General
June 6, 2022	Last day to mail acceptance of office forms or certificates of election to precinct committeepersons.	County Elections Official	248.023	20	Primary
June 6, 2022	Last day to prepare and deliver abstracts to appropriate elections officials.	County Elections Official	254.545; 255.295	20	Primary
June 10, 2022	Precinct committeepersons take office.	Public	248.015	24	Primary
June 13, 2022	Last day for precinct committeepersons elected by write-in to file acceptance forms.	Public	248.023	27	Primary
June 16, 2022	Last day to issue proclamation if provisions of two or more approved county measures conflict.	County Elections Official	254.545	30	Primary
June 16, 2022	Last day for Governor to issue measure proclamation and declare into law measures approved by voters.	Public	254.555	30	Primary
June 16, 2022	Last day to prepare and electronically deliver precinct level results and Ballot Count Report to Secretary of State.	County Elections Official	254.074; 254.545; OAR 165-007-0030	30	Primary

June 16, 2022	Last day for Secretary of State to canvass votes, prepare and deliver register of nomination, certificates of election and issue proclamation declaring election of candidates.	State Elections Division	254.555; 260.245	30	Primary
June 16, 2022	Effective date of voter approved measures, unless otherwise specified for later implementation.	Public	OR CONST. ART. IV	30	Primary
June 17, 2022	Last day to declare other precinct committee person offices vacant and to furnish list of newly elected precinct committee persons to chairman of county and state central committees.	County Elections Official	248.023	31	Primary
June 17, 2022	Last day for elections official to prepare and deliver acceptance of office form to individuals nominated or elected by write-in.	Elections Official	254.548	31	Primary
June 21, 2022	Last day to file recount demand.	Public	258.161	35	Primary
June 27, 2022	Last day for individuals nominated or elected by write-in to file acceptance forms.	Public	254.548	41	Primary
June 27, 2022	Last day for city elections official to canvass votes for city measures and issue proclamation if provisions of two or more approved measures conflict. Adjusted under ORS 187.010(3).	Elections Official	254.565	40	Primary
June 27, 2022	Last day to file contest of election, if no recount. Adjusted under ORS 246.021.	Public	258.036	40	Primary
July 1, 2022	Last day to deliver a certificate of nomination or election to individuals who filed write-in acceptance forms and, if applicable, issue a proclamation declaring the election of those individuals.	Elections Official	254.548	45	Primary
July 1, 2022	Last day for district elections authority to determine result of election.	Public	255.295	45	Primary
July 15, 2022	Election Day Report due.	County Elections Official	DIR. 2006-7		Biennial
August 10, 2022	Last day to determine minor political party ballot access.	State Elections Division	248.008	-90	General
August 15, 2022	Last day to file complaint of alleged election law violation. If violation occurred after election, deadline is 90 days after date of alleged violation.	Public	260.345	90	Primary
September 1, 2022	Last day to notify by first class mail, candidates who have failed to file primary election campaign finance statements, that candidate's name may only be placed on general election ballot if all statements are filed.	State Elections Division	260.241	-68	General
September 8, 2022	Last day to determine candidates that failed to file primary election campaign finance statements. Candidate's name may only be placed on general election ballot if statements have been filed.	State Elections Division	260.241	-61	General

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on March 17, 2021, I directed the original Secretary of State Shemia Fagan's Memorandum in Opposition to Petition for a Preemptory or Alternative Writ of Mandamus to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Anna Marie Joyce, Harry Wilson, and Stephen F. Deatherage, attorneys for relators, by using the court's electronic filing system.

/s/ P.K. Runkles-Pearson

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