

No. 100469-9

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

ARTHUR WEST,

Petitioner,

v.

WASHINGTON STATE  
REDISTRICTING  
COMMISSION, et al.,

Respondents.

RESPONDENTS  
REDISTRICTING  
COMMISSION AND  
INDIVIDUAL  
COMMISSIONERS'  
MOTION TO ACCEPT  
JURISDICTION,  
CONSOLIDATE  
ACTIONS, AND STAY  
TRIAL COURT  
PROCEEDINGS

**I. INTRODUCTION**

The validity of the legislative and congressional redistricting plans adopted by Respondent Washington State Redistricting Commission (Commission) will determine what steps the legislature and this Court may take in the coming weeks to establish a clear election process in 2022. On one hand, if this Court agrees with Respondents that the plans are valid, then the Constitution vests authority in the legislature to approve

amendments within thirty days of the start of session on January 10, 2022. On the other hand, if the plans are invalid, then this Court must start its own process to adopt a redistricting plan—a process that may take a significant amount of time and must conclude by April 30, 2022. In either case, time is of the essence for final judicial resolution. Only after such resolution can the legislative and judicial branches carry out their constitutional duties.

Petitioners Arthur West and Washington Coalition for Open Government (WCOG) each have filed two separate actions challenging the validity of the redistricting plans based on alleged violations of the Open Public Meetings Act, ch. 42.30 RCW (OPMA). Each Petitioner has filed an original action in this Court. And each Petitioner has filed a parallel action in Thurston County Superior Court. *See Wash. Coal. for Open Gov't v. State of Washington, et al.*, No. 21-2-02069-34 (Thurston Cnty. Super. Ct.); *West v. Wash. State Redistricting Comm'n, et al.*, No. 21-2-01949-34 (Thurston Cnty. Super Ct.).

Thus, there are four active cases that seek to invalidate the redistricting plans.

The Washington Constitution vests this Court with original jurisdiction in all cases regarding redistricting. Const. art. II, § 43(10). In light of this grant of original jurisdiction and the urgent nature of the legal question, Respondents respectfully request that the Court (1) accept jurisdiction of the two original actions filed in this Court to the extent they challenge the validity of the plans, (2) consolidate the actions into one proceeding, and (3) stay the two cases filed in Thurston County Superior Court in their entirety due to the overlap in legal issues and the fact that development of the remaining issues in those cases will depend on the proceedings in this Court.<sup>1</sup>

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<sup>1</sup> In its Initial Statement, the Commission indicated it would move to transfer jurisdiction over Petitioners' challenges to the validity of the plans in the trial court to this Court. On reconsideration, transfer is not necessary. If the Court accepts original jurisdiction of the two actions filed in this Court, then a stay of trial court proceedings will have the same effect. This Court will hear and rule on the relevant legal issues and that ruling will be binding on the trial court. If the Court prefers to

## II. STATEMENT OF FACTS

### A. The 2021 Redistricting Process and Redistricting Plan

Washington voters established the current redistricting process by constitutional amendment in 1983. Amend. 74, 1983 Substitute Senate Joint Resolution No. 103, p. 2202. Article II, section 43 provides a process for establishing a five-member bipartisan redistricting commission in every year ending in one. Const. art. II, § 43(2). Each of the four legislative leaders of the two largest political parties in each house of the legislature appoints a single member to the Commission, and those four voting members choose a fifth, non-voting member to serve as the Commission's Chair. *Id.*

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formally transfer jurisdiction as well, however, Respondents would have no objection. While transferring jurisdiction of issues pending in trial courts is not expressly contemplated by the Rules of Appellate Procedure, those Rules are “liberally interpreted to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a). And this Court “may waive or alter the provisions of any of the[] rules in order to serve the ends of justice.” RAP 1.2(c).

This year, Joseph Fain, Paul Graves, April Sims, and Brady Piñero Walkinshaw were appointed as the four voting members of the 2021 Redistricting Commission (the “commissioners”). West Compl. ¶ 2.3; WCOG Compl. ¶ 1.4. The commissioners unanimously selected Sarah Augustine to serve as the non-voting Chair of the Commission (the “Chair”). *See* Redistricting Comm’n Mtg. (Jan. 30, 2021) (7:17–12:40 mark), *video recording available at* <https://tvw.org/video/washington-state-redistricting-commission-2021011518/>.

The Commission faced unprecedented challenges in the redistricting process this year. In addition to adapting the redistricting process to an online environment due to the COVID-19 pandemic, the timeframe for redistricting was substantially compressed for several reasons. First, the U.S. Census Bureau delayed delivery of federal census data until August 16, 2021—five months later than usual. *See* U.S. Census

Bureau, *Redistricting Data: What to Expect and When* (July 28, 2021), <https://www.census.gov/newsroom/blogs/director/2021/07/redistricting-data.html>. Second, after the last redistricting process in 2011, Washington voters adopted a constitutional amendment accelerating the deadline for the Commission to approve redistricting plans to November 15—six weeks earlier than before. *See* Supreme Court Order, No. 25700-B-676 at 3 (Dec. 3, 2021). Third, the legislature passed a new law in 2019 requiring adjustment of federal census data for redistricting purposes for certain persons who are incarcerated or involuntarily committed in state facilities. *See* Laws of 2019, ch. 456, § 1 (codified at RCW 44.05.140).

In the face of these challenges, the Commission received and considered historic levels of public input on redistricting. *See* Declaration of Sarah Augustine, filed Nov. 22, 2021 (“Augustine Decl.”) ¶ 4. In total, the Commission held 17 public outreach meetings and 22 regular business meetings, providing extensive opportunities for public comment on redistricting. *Id.*

Throughout the year, more than 400 state residents delivered live public testimony about maps or about the Commission's process. *Id.* And after adopting the first-ever Tribal Consultation Policy for a redistricting commission, commissioners and staff communicated with individual Tribes to learn about their interests in the redistricting process. *Id.*

Each commissioner also published his or her own proposed congressional and legislative redistricting maps in late September 2021.<sup>2</sup> Throughout the redistricting process, the commissioners relied on their staff to generate draft district maps using redistricting software. Commissioners received more than 2,750 comments on their draft maps or on the 2010 redistricting maps. *See* Augustine Decl. ¶ 4. The Commission also received more than 3,000 emails, website comments, letters, and

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<sup>2</sup> This Court may take judicial notice of the existence of these public records under ER 201(b)(2) and (d). The maps are available at <https://www.redistricting.wa.gov/commissioner-proposed-maps> and <https://www.redistricting.wa.gov/proposed-congressional-maps>.

voicemails. *Id.* The public created 1,300 maps for consideration by the Commission. *Id.*

After receiving unprecedented public input, the commissioners scheduled a public meeting for November 15, 2021—the statutory deadline—to vote on legislative and congressional redistricting plans. That public meeting started at 7:00 p.m. and was broadcast live on TVW. *See* Augustine Decl. ¶ 8; <https://www.tvw.org/watch/?eventID=2021111165>.<sup>3</sup> It is undisputed that the commissioners did not remain in the broadcast public meeting the entire time. Instead, they conducted discussions in two-commissioner “dyads” and consulted with staff charged with drafting district maps, reappearing in the public meeting periodically to provide updates. WCOG Compl. ¶¶ 3.8, 3.10; West Compl. ¶¶ 3.1, 3.3, 3.4. At least three commissioners are necessary to constitute a quorum of the Commission. RCW 44.05.080(1).

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<sup>3</sup> Last visited December 8, 2021.



The commissioners returned to the public meeting at close to midnight for a vote on the redistricting plans. Augustine Decl. ¶ 9; West Compl. ¶ 3.7; WCOG Compl. ¶ 3.26. At 11:59:28 p.m., during the public meeting, the commissioners voted unanimously to adopt a final congressional districting plan. Augustine Decl. ¶ 9; WCOG Compl. ¶ 3.26.; West Compl. ¶ 3.2, 3.9. At 11:59:47 p.m., the commissioners voted unanimously to approve a final legislative districting plan. Augustine Decl. ¶ 10; WCOG Compl. ¶ 3.26.; West Compl. ¶ 3.8, 3.9. After midnight on November 16, 2021, the Commission approved a transmittal letter to the legislature and a separate, formal resolution affirming the vote. Augustine Decl. ¶¶ 11–12; WCOG Compl. ¶ 3.26.

The Commission did not transfer the redistricting plans to the legislature on November 15, 2021, but Commission staff worked through the night to create final maps consistent with the commissioners' unanimous agreement. Augustine Decl. ¶¶ 14–20. The following day, on November 16, the commissioners

publicly acknowledged that they had not transmitted the approved plans to the legislature in time, and also stated their understanding that, as a result, jurisdiction over redistricting had passed to this Court. Augustine Decl. ¶ 3. That same day, the Chair sent a letter to the Chief Justice urging this Court to adopt the Commission's final congressional and legislative maps, which were enclosed. *See* Ltr. from S. Augustine to González, C.J., Nov. 16, 2021.

Whether the Commission approved redistricting plans by the deadline is of constitutional importance. Redistricting may occur in one of just two ways under the Washington Constitution. First, the legislatively-appointed, bipartisan commission has until November 15 of the year following the decennial census to approve a plan. Const. art. II, § 43(6). If it does so, then the Constitution vests power in the legislature to amend the commission-adopted plan, provided that it does so by a two-thirds vote in each house and the amendment does not include more than two percent of the population in any given district. *Id.*

§ 43(7); RCW 44.05.100(2). Second, and only if the commission “fail[s] to approve a plan” by November 15, it falls to this Court to adopt a plan by April 30 of the following year. Const. art. II, § 43(7); RCW 44.05.100(4).

On November 18, 2021, the Chief Justice issued an order directing the Chair to submit a sworn declaration providing a timeline of the events on November 15 and 16 relevant to the Commission’s compliance with the deadlines in article II, section 43 of the Washington State Constitution and RCW 44.05.100. *See* Supreme Court Order, No. 25700-B-675 (Nov. 18, 2021). On November 21, the Chair complied with the Chief Justice’s order.

On December 3, 2021, this Court issued an Order “declin[ing] to exercise its authority under article II, subsection 43(6) and chapter 44.05 RCW to adopt a redistricting plan” based on the Court’s conclusion that “the plan adopted by the Washington State Redistricting Commission met the constitutional deadline and substantially complied with the statutory deadline to transmit the matter to the legislature.”

Supreme Court Order, No. 25700-B-676 at 4 (Dec. 3, 2021). The Court further ordered that the “Washington State Redistricting Commission shall complete any remaining tasks necessary to complete its work so that the process for finalizing the redistricting plan set forth in article II, section 43 and chapter 44.05 RCW may proceed.” *Id.* The Court noted that it “ha[d] not evaluated and does not render any opinion on the plan’s compliance with any statutory and constitutional requirements other than the November 15 deadline.” *Id.*

**B. Petitioners’ Challenges to the Adopted Plans**

Arthur West filed a complaint in Thurston County Superior Court under the OPMA and the Uniform Declaratory Judgments Act against the Commission and each of the individual Commissioners on November 16, 2021, and an amended complaint on November 22. *See West v. Wash. State Redistricting Comm’n, et al.*, No. 21-2-01949-34 (Thurston Cnty. Super Ct.). On December 14, West filed an original action in this Court (“West Complaint”), raising largely the same

allegations as his Thurston County lawsuit but focused on the validity of the plan. West alleges that the commissioners violated the OPMA by leaving the November 15 open public meeting a number of times to allegedly conduct secret negotiations and straw polls to reach agreement on the redistricting plans. *See* West Compl. ¶¶ 3.13–3.14. West also acknowledges, however, that the Commissioners voted on and adopted redistricting plans during the broadcast portions of the public meeting. *Id.* ¶ 3.8–3.9.

Separately from West, on December 10, 2021, Petitioner WCOG filed a lawsuit in Thurston County and a substantially identical “Complaint for Declaratory Relief” in this Court (“WCOG Complaint”). WCOG similarly alleges that the commissioners violated the OPMA by “engag[ing] in secret negotiations to draft and come to agreement about the proposed legislative and congressional district maps.” WCOG Compl. ¶ 4.26. Like West, however, WCOG acknowledges that

the Commission voted on the redistricting plans in the broadcast portion of the public meeting. *Id.* ¶ 3.26.

Both West’s petition and WCOG’s complaint seek, among other requested relief, a judgment deeming the adopted redistricting plans null and void. West Compl. ¶ 5.1; WCOG Compl. at 19. In addition, both Petitioners seek to hold the Commissioners personally liable under the OPMA. *See* WCOG Compl. at 19; Compl. at 19, *Wash. Coal. for Open Gov’t v. State of Washington, et al.*, No. 21-2-02069-34 (Thurston Cnty. Super. Ct.); First Amended Compl. §§ 5.3–5.4, *West v. Wash. State Redistricting Comm’n, et al.*, No. 21-2-01949-34 (Thurston Cnty. Super Ct.).

### III. ARGUMENT

#### A. This Court Should Accept Original Jurisdiction of All Claims Challenging the Validity of the Plans

Petitioners’ central claims boil down to a simple question: are the Commission-approved redistricting plans valid? This Court has “original jurisdiction to hear and decide all cases involving congressional and legislative redistricting.” Const. art.

II, § 43(10). The Court therefore has original jurisdiction over Petitioners’ actions filed in this Court and in Thurston County insofar as they challenge the validity of the redistricting plans adopted by the Commission. The Court should assume exclusive jurisdiction over those claims to adjudicate them efficiently and with finality.

Consistent with the constitutional grant of original jurisdiction, there are several reasons for this Court to resolve the legal question whether valid Commission-approved plans exists now. First, it is a threshold issue that determines what comes next in the constitutional redistricting process. The people empowered the legislature to *amend* a redistricting plan only if it is adopted by the Commission—and even in that situation only by a two-thirds vote of each house of the legislature “by the end of the thirtieth day of the first session convened after the commission has submitted its plan to the legislature.” Const. art. II, § 43(7). In this case, the legislature convenes in a short-session on January 10, 2022. The legislature is not empowered

to create a redistricting plan in the first instance, nor is it authorized to amend a plan adopted by this Court. *See id.*; RCW 44.05.080, .100. If the Court ultimately were to hold that any alleged OPMA violations void the plan, then the legislature would have no input in the redistricting process. Rather, jurisdiction of redistricting would transfer to this Court, which must undertake its own process and produce a plan by April 30, 2022. Const. art. II, § 43(6).

Second, only this Court can provide a timely and final resolution of the legal question. In the normal course, it is proper for issues to be winnowed and adjudicated by trial courts before proceeding on appeal. But here, that normal process would take far too long. This Court has also already recognized the importance of expeditiously achieving finality in redistricting because of the interlocking duties of the Commission, the legislature, and this Court over redistricting matters. Specifically, this Court has noted that timing over redistricting is so important that voters amended the Constitution after last



decade's redistricting process "to move the Commission's deadline for completing redistricting from January 1 to November 15 in order to allow adequate time for the steps that must follow." Supreme Court Order, No. 25700-B-676 at 3 (Dec. 3, 2021).

Not only would the above constitutional deadlines pass before the issue came on appeal, but voters and candidates would be left in limbo for an extended period of time, potentially interfering with the 2022 election cycle. Article II, section 43(11) provides that "[l]egislative and congressional districts may not be changed or established except pursuant to this section." Thus, the ability to proceed with timely and orderly elections depends on the validity of the plan adopted. The 2022 election season begins in earnest in May, including for congressional and legislative races. *See* RCW 29A.24.050. The filing window opens on May 16, 2022, and closes on May 20. Wash. Sec'y of State, *Dates and Deadlines 2022*, <https://www.sos.wa.gov/elections/dates-and-deadlines.aspx>.

The deadline to submit Voters' Pamphlet statements falls a week later on May 27, 2022. *Id.* Prospective candidates, the Secretary of State's Office, county election officials, and the electorate need time to make decisions and preparations in advance of the 2022 election.<sup>4</sup>

There simply is not enough time for the normal process of trial court discovery and summary judgment, followed by briefing, argument, consideration, and ruling by this Court. Indeed, given the timeline required to provide guidance to the legislature whether it can amend the plan, there is not even sufficient time to conduct limited proceedings in the trial court and then proceed on appeal. Original jurisdiction in this Court addresses this concern and should be accepted.

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<sup>4</sup> RCW 44.05.130 confirms the legislature's intent for this Court to resolve challenges to final redistricting plans so as to avoid disruption to the election cycle, requiring challenges to final redistricting plans take precedence over "all other matters."

**B. The Court Should Consolidate West’s and WCOG’s Challenges to the Validity of the Districting Plans**

RAP 3.3(b) expressly directs a party to move for consolidation of two or more cases where, as here, “consolidation would save time and expense and provide for a fair review of the cases.” Here, consolidation would serve these purposes. In each action, Petitioners seek nullification of the plans based on virtually identical claims that the Commission violated the OPMA on November 15 and 16, 2021. Because the factual allegations, legal theories, and relief requested are the same, handling the actions separately would only result in significant duplication of effort and the potential for confusion. This Court should consolidate the related actions into a single proceeding before this Court to facilitate the expedited resolution of Petitioners’ challenges to the validity of the plans.

**C. Proceedings in Thurston County Superior Court Should Be Stayed Pending This Court’s Determination of the Validity of the Redistricting Plans**

This Court should also stay all proceedings in Thurston County Superior Court pending the Court’s resolution of the

consolidated cases. In the Thurston County actions, Petitioners seek not only nullification of the plans but also civil penalties against the individual Commissioners based on the *same* alleged OPMA violations. Absent a stay, the parties will be litigating substantially the same issues in the superior court as in this Court. A stay of the overlapping OPMA claims in Thurston County is necessary to avoid interference with this Court's adjudication of the validity of the plans.

The Rules of Appellate Procedure expressly recognize this Court's broad authority to issue orders to preserve its ability to effectively and fairly decide the cases before it. Under RAP 7.3, the Court has authority to "perform all acts necessary or appropriate to secure the fair and orderly review of a case." Consistent with that broad authority, RAP 8.3 specifically authorizes the Court "to issue orders, before or after acceptance of review or in an original action . . . to insure effective and equitable review, including authority to grant injunctive . . . relief to a party."

The Court should exercise this authority and issue a stay to ensure it can adjudicate Petitioners' challenges to the validity of the redistricting plans in the orderly and expedient manner these unique circumstances require. All parties agree that this Court's resolution of whether the plans are valid is of the utmost importance. The briefest delay of the individual claims against the Commissioners will not harm Petitioners. But any interference with this Court's resolution of the claims before it could thwart the redistricting process and impede much-needed legal certainty as to the validity of the existing plans.

#### **IV. CONCLUSION**

For the foregoing reasons, this Court should (1) accept original jurisdiction of all claims challenging the validity of the plans, (2) consolidate Petitioners' actions into one proceeding, and (3) stay all further proceedings in the superior court pending this Court's adjudication of the consolidated cases.

This document contains 3,297 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 23rd day of December, 2021.

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