To: Jonathan Cervas, Ph.D. & Bernard Grofman, Ph.D.

From: Scott Matsuda

Date: 10/21/2022

Case Briefing **[OREGON]**

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| **Citation** | * *Clarno v. Fagan*, No. 21-CV-40180, 2021 WL 5632370 (Or. Cir. Ct. Nov. 24, 2021). |
| **Judicial Breakdown / Partisan or Nonpartisan** | * On behalf of the Special Judicial Panel (SJP), Senior Judge Mary M. James issued the unanimous opinion, joined by Senior Judges Katherine Tennyson, Paula Brownhill, and Richard L. Barron, and Senior Judge W.D. Cramer, Jr. |
| **Procedural History** | * On 10/11/2021, Petitioners filed a petition challenging the validity of the 2021 Oregon congressional redistricting plan (SB 881).   + Petitioners asked that their alternative plan be adopted, and alleged:     - (1) that SB 881 violates ORS 188.010(2) (“[n]o district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person”), because SB 881 was enacted for the purpose of favoring the Democratic Party, Democratic incumbent legislators, and “other person[s]” affiliated with the Democratic Party.     - (2) that SB 881 violates Article 1, sections 8 and 26 of the Oregon Constitution, which guarantee freedom of expression and assembly, respectively, which together prohibit partisan gerrymandering.     - (3) that SB 881 violates Article I, section 20, and Article II, section 1—the Privileges and Immunities Clause and the Free and Equal Elections Clause—of the Oregon Constitution, which “prohibit[s] the Oregon State Legislature from drawing and adopting a partisan gerrymandered redistricting map.”     - (4) that SB 881 violates ORS 188.010(1) (requiring consideration of five criteria: contiguity, equal population, existing geographic or political boundaries, communities of common interest, and transportation links). * Pursuant to 2021 Oregon Laws, Chapter 419 (SB 259), § 1(6), the Chief Justice of the Oregon Supreme Court appointed a SJP to hear the petition.   + The SJP, in turn and pursuant to SB 259 § 1(7)(c), requested appointment of a Special Master, Senior Judge Henry C. Breithaupt, to receive evidence and to prepare recommended findings of fact in 21CV40180. * The Presiding Judge adopted the Special Master’s Recommended Findings of Fact as more fully set out in her Order on Evidentiary and Procedural Matters dated November 15, 2021. * The SJP adopted the Special Master’s Recommended Findings of Fact and incorporated them by reference into this Opinion. |
| **Disposition** | * Plaintiffs’ petition is dismissed. |
| **Facts** | * N/a. |
| **Issue(s) or**  **Question(s)**  **Presented** | * Whether the Petitioners failed to demonstrate that the legislatively adopted congressional reapportionment plan, SB 881, does not comply with all applicable statutes and the United States and Oregon Constitutions in any of the ways they have asserted. |
| **The Rule(s)** | * ORS 188.010   + (1) Each district, as nearly as practicable, shall:     - (a) Be contiguous;     - (b) Be of equal population;     - (c) Utilize existing geographic or political boundaries;     - (d) Not divide communities of common interest; and     - (e) Be connected by transportation links.   + (2) No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.   + (3) No district shall be drawn for the purpose of diluting the voting strength of any language or ethnic minority group.   + (4) Two state House of Representative districts shall be wholly included within a single state senatorial district. * Freedom of Expression Clause, Or. Const. art. I, § 8. * Freedom of Assembly Clause, Or. Const. art. I, § 26. * Privileges and Immunities Clause, Or. Const. art. I, § 20. * Free and Equal Elections Clause, Or. Const. art. II, § 1. * SB 259 Standard   + SB 259 does not allow the SJP to substitute its own will for the will of the legislature, nor does it direct the SJP to adopt the best or most fair redistricting plan.   + The SJP must affirm a legislatively adopted redistricting plan “if the plan complies with all applicable statutes and the United States and Oregon Constitutions.”   + The SJP may create its own reapportionment plan only if the legislatively adopted reapportionment plan fails in one of those respects. * ***Hartung* Standard of Review**   + The SJP will void the Legislative Assembly’s plan only if we can say, based on the record, that     - Prong 1: that body either did not consider one or more of the ORS 188.010 criteria set out in ORS 188.010, or,     - Prong 2: having considered them all, made a choice or choices that no reasonable legislature would have made.   + The party challenging a reapportionment plan has the burden to show that one of those circumstances is present. |
| **Holding(s)** | * The Circuit Court held that the Petitioners failed to demonstrate that the legislatively adopted congressional reapportionment plan, SB 881, does not comply with all applicable statutes and the United States and Oregon Constitutions in any of the ways they have asserted. |
| **Rationale** | * **The plan satisfies the first prong of the *Hartung* test**   + The fact that some Service Employees International Union Local 503 (SEIU) members were aware that publicly available modeling tools rating various proposed maps were discussed with some members of the Legislative Assembly, was insufficient to show the Legislative Assembly failed to consider any statutory criteria.   + When considered in the light of the facts related to ORS 188.010(1), it is clear that there were logical reasons for drawing district lines in the manner that SB 881 did.     - Evidence that the Legislative Assembly drew district lines to keep specific communities of interest together rebuts claims that the Legislative Assembly had a partisan purpose.       * The Legislative Assembly heard and received a remarkable volume of evidence from Oregon citizens, considered it, and made adjustments to the draft maps in response to public testimony.   + The metrics for the enacted map demonstrate that the map is well within the range of historic maps that have been adopted by prior legislative assemblies or courts.     - That evidence demonstrated that the enacted map was well within the range of plans that legislatures and courts have adopted in Oregon for the past 50 years and that the enacted map is more favorable to Republicans than any map since 1990. * **The plan satisfies the second prong of the *Hartung* test**   + Petitioners hinge much of their case on what they view as compelling evidence of the Legislative Assembly’s unlawful partisan purpose, but their arguments suffer from numerous legal and factual deficiencies.     - The legal standard they propose ignores Oregon precedent and misapplies the caselaw on which they do rely and the evidence they point to is exaggerated, mischaracterized, or both.     - Ultimately, the extensive record in this case establishes that, far from being motivated by partisan purpose, the Legislative Assembly drew the enacted map based on public input and neutral criteria—resulting in a fair map that was not drawn for a partisan purpose.     - The Legislative Assembly had sound reasons for the various line-drawing choices they made, including and especially the decisions to divide the Portland area among four districts and place Bend in the Fifth Congressional District.   + The Court rejected Petitioners’ request that it adopt a per se rule that a party-line vote is enough to establish a violation of Oregon law     - We respect the legislative process in Oregon and decline to adopt the cynical view that all politics are dirty politics.     - Such a standard would vest in the minority party absolute control of whether a plan will be presumed to unlawfully favor a political party.       * A minority party could simply vote against any plan along party lines, regardless of the merits of the plan, and thereby create a presumption of improper purpose.       * Thus, we conclude that the details of the vote do not tell us anything about the quality of the plan.   + The contours of the new congressional districts reflect, to the extent possible, the historic boundaries of past districts.     - The division of the Portland area among four congressional districts is a key theme of Petitioners’ case. . . . [b]ut even setting aside the neutral justifications for dividing the Portland area among multiple districts, Petitioners ignore that this mapmaking decision has long been a feature of Oregon’s congressional maps.       * Far from reflecting a partisan purpose, the enacted map’s treatment of the Portland area—and the state as a whole—is consistent with prior maps adopted with both judicial imprimatur and bipartisan support.   + Petitioners have not proven that the enacted plan will have an impermissible partisan effect.     - The enacted map’s consistency with previous maps demonstrates the plan’s lack of impermissible partisan effect.     - Testimony of Dr. Paul Gronke demonstrates, the enacted map’s efficiency gap—Petitioners’ preferred metric for measuring partisan bias—“falls well within the range of plans that have been used in the state for the past fifty years.”     - Dr. Gronke’s conclusions strongly suggest that any measurable bias is not the result of partisan machinations, since this same bias can be measured in maps enacted by the judiciary and bipartisan majorities of the Legislative Assembly—which are unlikely to enact congressional plans for political advantage.     - There is no evidence that rural interests were disrespected.       * To the contrary, SB 881 amplifies rural voices by including substantial rural and agricultural communities in all six of Oregon’s congressional districts, thus ensuring that each of Oregon’s members of Congress represents rural interests and concerns.     - Although Petitioners urge the SJP to adopt a per se test that any plan with at least a 7% efficiency gap score has an impermissible level of partisan effect, this per se test has several shortcomings.       * Although Petitioners claim that the test is easy to calculate and administer, the record in this case belies that claim.         + Experts in the case assessed the efficiency gap score of the map and came to varying conclusions.         + Even if we were tempted to adopt the efficiency gap analysis as the basis for determining whether a map has an impermissible partisan effect, we cannot conclude from the record what the appropriate inputs ought to be.         + The metric is easily manipulated, dependent on the types of past election results that measure vote distribution which go into the calculation of votes that do not contribute to an election win between the two parties. * **Having reached the conclusion that Petitioners have failed to meet their burden of proof as to partisan purpose or effect, the SJP dismisses both of Petitioners’ constitutional claims without further discussion.** |