Hearing date: March 4th, 2022
Hearing time: 9:00 am
Judge/Calendar:
Mary Sue Wilson / Civil

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

WASHINGTON COALITION FOR OPEN GOVERNMENT, Plaintiff, v. THE STATE OF WASHINGTON, a state government, acting through THE WASHINGTON STATE REDISTRICTING COMMISSION, a Washington State Agency; and SARAH AUGUSTINE, APRIL SIMS, PAUL GRAVES, BRADY PIÑERO WALKINSHAW, and JOE FAIN, in their individual capacities as Commissioners of the Washington State Redistricting Commission, Defendants.	No. 21-2-02069-34 CONSENT DECREE AND FINAL JUDGMENT
ARTHUR WEST, Plaintiff, v. WASHINGTON STATE REDISTRICTING COMMISSION, et al., Defendants.	No. 21-2-01949-34 CONSENT DECREE AND FINAL JUDGMENT

I. INTRODUCTION

The above-named parties come before the Court, by and through their attorneys of record,

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and stipulate to entry of the following findings of fact, conclusions of law, and final judgment or decree:

II. FACTUAL FINDINGS

2.1. On December 9, 2021, Plaintiff Washington Coalition for Open Government ("WCOG") filed its Complaint pursuant to Washington's Uniform Declaratory Judgments Act (the "UDJA"), Washington's Open Public Meetings Act ("OPMA"), and article II, § 43 of the Washington Constitution against Defendants the State of Washington, the Washington State Redistricting Commission (the "Commission"), and its five Commissioners. On November 16, 2021, Plaintiff Arthur West filed his Complaint against the Commission, its Commissioners, and the State of Washington pursuant to OPMA and the UDJA.

2.2. Plaintiffs conducted discovery, including taking the depositions of the five Commissioners. The parties conferred regarding material facts of relevance to these proceedings, which are set forth below.

2.3. The conduct at issue in these related matters involves state redistricting as those duties and responsibilities are set forth at article II, section 43 of the Washington Constitution, RCW 44.05, and WAC 417.

2.4. Washington voters established the current redistricting process by constitutional amendment in 1983.

2.5. Article II, section 43 of the Constitution provides a process for establishing a five-member bipartisan redistricting commission in every year ending in one.

2.6. 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.

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2.7. In 2021, Joseph Fain, Paul Graves, April Sims, and Brady Piñero Walkinshaw were appointed as the four voting members of the Commission (the "voting Commissioners").

2.8. The Commissioners unanimously selected Sarah Augustine to serve as the non-voting Chair of the Commission.

2.9. At least three voting Commissioners are necessary to constitute a quorum.

2.10. At a Commission meeting on January 27, 2021, an Assistant Attorney General ("AAG") gave an OPMA presentation to the Commission. The AAG instructed the Commissioners that OPMA training was required and stated that his presentation would not include "enough detail . . . to satisfy both" OPMA's and the Public Records Act's training requirements. The AAG encouraged Commissioners to complete the requisite training to include review of the self-guided trainings on the AGO website, but not all of them did so.

2.11. To finalize its redistricting work, the Commission held a virtual public meeting on November 15, 2021, the Commission's deadline both to approve a redistricting plan (under article II, section 43(6) of the Washington Constitution) and to submit the plan to the legislature (under RCW 44.05.100(1)). In the event of a failure by the Commission to approve a redistricting plan by the deadline, jurisdiction falls to the Washington Supreme Court to adopt a plan by April 30, 2022. *See* Wash. Const. art. II, § 43(6).

2.12. Commission staff booked meeting space for the Commissioners in Federal Way, starting on Saturday, November 13, 2021. Commissioners Graves and Sims spent part of the day on November 13 together in Federal Way working on the legislative redistricting plan, facilitated at times by Commissioner Augustine. Commissioners Fain and Walkinshaw arrived in Federal Way on Sunday, November 14, spending part of the day working on the congressional redistricting plan.

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2.13. On November 14 and 15, 2021, the Commissioners, some Commission staff, and legislative caucus staff undertook negotiations and redistricting work at the Hampton Inn in Federal Way. When meeting with one another, the voting Commissioners met in two-Commissioner "dyads" to avoid constituting a quorum. Each dyad was composed of one Democratic-appointed Commissioner and one Republican-appointed Commissioner. One dyad worked to develop a proposal for the congressional redistricting plan while the other worked to develop a proposal for the legislative redistricting plan.

2.14. Over the course of November 14 and 15, 2021, the Democratic-appointed Commissioners communicated with one another and with caucus staff on their dyads' negotiations, as did the Republican-appointed Commissioners. Many (though not all) of those communications occurred outside open public meetings of the whole Commission and outside of public view—whether in person or by text message, email, telephone, or videoconference. Caucus staff also communicated by instant messaging.

2.15. On November 15, 2021, the Commission convened a regular business meeting at 7:00 p.m. via Zoom. The agenda for that meeting was to discuss and adopt a final redistricting plan. The Commission's deadline to approve a final redistricting plan was midnight. The public could observe the meeting via YouTube or TVW.

2.16. Within minutes of the Commission convening its regular meeting, the Commissioners exited the public forum to continue their redistricting plan negotiations.

2.17. The Commissioners returned to the public meeting to provide updates six times throughout the evening. In total, the regular meeting was offline for more than four hours, with Commissioners working in two-Commissioner dyads to develop redistricting plan proposals to bring before the full Commission. The Republican-appointed Commissioners communicated with

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one another and with caucus staff on their dyads' negotiations, as did the Democratic-appointed Commissioners.

2.18. The Commissioners developed proposals based on past election data, geographic boundaries, and other criteria. Caucus staff worked to translate those proposals into actual maps. The caucus staff did not complete final legislative or congressional district maps before the midnight deadline.

2.19. The Commissioners had no final maps when, a few minutes before midnight, the Commissioners returned to the public meeting to take "action." When returning on November 15, 2021 and into November 16, 2021, the voting Commissioners unanimously adopted four motions without discussion: approval of a final congressional plan, approval of a final legislative plan, approval of a resolution, and approval of a transmittal letter. At the time of the motions, there were no final congressional or legislative maps in existence for the Commissioners to approve that reflected district boundaries. The Commissioners did not, at the time of the votes, articulate district boundaries in any motion. Each commissioner voted to approve what he or she understood were frameworks agreed upon by each dyad to bring to a public vote in earlier negotiations. The frameworks were not expressed in any final writing. Each commissioner had his or her own understanding of the frameworks. The frameworks did not include definite district boundaries, legal descriptions of district boundaries, or shapefiles. More work was needed to express the districts in a final, recordable form.

2.20. OPMA provides, in relevant part: "No governing body of the public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public." RCW 42.30.060(1). OPMA also provides, in relevant part: "No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot." RCW

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42.30.060(2). The Commission publicly voted. The parties agree that the Commission did not "adopt any ordinance, resolution, rule, regulation, order, or directive" at a meeting that was not "open to the public" under RCW 42.30.060(1). The parties dispute whether a vote on an unpublished framework constitutes a "vote by secret ballot" under RCW 42.30.060(2).

2.21. The Commission did not take a vote on or otherwise approve the final maps before e-mailing a resolution, transmittal letter, congressional map, and legislative map to the Supreme Court on November 16, 2021.

2.22. The Commission did not transmit any report, plan, map, resolution, nor transmittal letter to the Legislature on November 15, 2021.

2.23. Shortly after midnight on November 16, 2021, the four voting Commissioners and the Chair were all present in a large ballroom at the Hampton Inn in Federal Way. Commissioners observed and gave input while caucus staff completed a final legislative map and a final congressional map.

2.24. While in the ballroom in the early morning of November 16, 2021, the Commissioners discussed how to communicate with the media. The Commissioners discussed acknowledging that they had not met the deadline and did not finalize the maps until after the deadline.

2.25. The Commissioners also discussed when the final maps should be posted to the Commission's website. The congressional map was posted to the website early in the morning of November 16, 2021, without the corresponding legislative map, which was not yet complete. At the request of some Commissioners, the Commission temporarily took down the congressional map from the Commission's website. When the legislative map was complete, in the afternoon or evening of November 16, 2021, both it and the congressional map together were posted to the

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Commission's website.

2.26. The Commission's transmittal to the Legislature on November 16, 2021 at 12:13 a.m. did not include final maps expressing agreed upon boundaries.

2.27. The Commission finalized the congressional district boundaries in a map and corresponding descriptions in the early morning of November 16, 2021.

2.28. The Commission finalized the legislative district boundaries in a map and corresponding descriptions in the afternoon or evening of November 16, 2021.

2.29. On November 16, 2021, the Commission transmitted by email its final redistricting plan with legislative and congressional district maps to the Chief Justice of the Washington Supreme Court. Acknowledging the Commission's failure to adopt a redistricting plan by the midnight deadline, Commissioner Augustine's letter expressed the "hope of all commissioners that" the enclosed maps would "be given due consideration" by the Court.

2.30. On November 18, 2021, the Supreme Court directed Commissioner Augustine to file a sworn declaration "with a detailed timeline of the events of November 15, 2021, and November 16, 2021, relevant to the commission's compliance with its obligations under article II, section 43 subsections (6) and (11) of the Washington State Constitution and RCW 44.05.100." On November 22, Commissioner Augustine submitted her declaration. WCOG asserts Commissioner Augustine's declaration was not accurate.

2.31. On December 3, 2021 before this matter came before it, the Supreme Court issued an order "accept[ing] the facts attested to by the chair of the Commission as accurate," and "conclud[ing] it is not necessary for the court to assume responsibility for adoption of redistricting maps under the present circumstances." The Court further concluded that "the Commission complied with its obligation under article II, subsection 43(6) of the Washington Constitution to

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'complete redistricting' by [November 15, 2021], and it substantially complied with the essential purpose of RCW 44.05.100 to approve and transmit a plan to the legislature by that date."

2.32. On December 10, 2021, Plaintiff WCOG filed an original action in the Supreme Court (No. 100483-4) with substantially similar allegations and claims as in its Complaint in this matter. Separately, on December 14, 2021, Plaintiff Arthur West filed in the Supreme Court an "Original Action to Determine the Validity of the 2021 Washington State Redistricting Plan" (No. 100469-9). Both WCOG's and West's original actions sought relief that included invalidation of the final congressional and legislative redistricting plans adopted by the Commission and transmitted to the Supreme Court.

2.33. On January 6, 2022, the Supreme Court, over the parties' joint request, declined to exercise original jurisdiction over WCOG's or West's claims, dismissing both actions.

2.34. The Washington Constitution mandates specific deadlines for the completion of the decennial redistricting process. Const. art. II, § 43(6)–(7). The Commission must complete redistricting no later than November 15 of each year ending in one, but if three of the voting members of the Commission fails to approve a redistricting plan, the Supreme Court must adopt a plan by April 30 of each year ending in two. The Legislature may amend the redistricting plan but must do so within 30 days of session after receiving the Commission's redistricting plan. Challenges to redistricting decisions that may affect those constitutional deadlines are time-sensitive.

2.35. On February 8, 2022, the Legislature passed House Concurrent Resolution 4407, adopting an amended version of the plan submitted to it by the Commission on November 16, 2021.

2.36. Under RCW 44.05.110(2) the Commission shall cease to exist on July 1, 2022,

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unless its term is extended by the Supreme Court.

2.37 The parties agree that "Commission" for purposes of this Consent Decree means the state agency acting on behalf of the State of Washington as presently and hereafter constituted under state statute such that this Consent Decree is binding even after the Commission as presently constituted ceases to exist until later reconstituted under RCW 44.05.

III. CONCLUSIONS OF LAW

3.1. OPMA applies to the Washington State Redistricting Commission and its Commissioners.

3.2. The Commission and its Commissioners violated OPMA and the Commission's corresponding rules regarding transparency.

3.3. OPMA mandates training on its requirements. *See* RCW 42.30.205. Not all of the Commissioners satisfied OPMA's training requirements.

3.4. The Commission and its Commissioners violated OPMA by conducting "serial meetings" on November 14 and 15, 2021, when Commissioners and caucus staff in the "congressional plan dyad" communicated about their negotiations to the Commissioners and caucus staff in the "legislative plan" dyad, and vice-versa. While the dyad model does not in and of itself violate OPMA because three voting commissioners constitute a quorum, OPMA does require any substantive discussion or deliberation on Commission business among a Commission majority to occur in open public meetings.

3.5. The Commission and its Commissioners violated OPMA when taking official action without a public vote where at least three voting Commissioners affirmed such action. The official actions taken without a public vote included the decisions on November 16, 2021 regarding the posting of final legislative and congressional maps to the Commission's website,

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communications to the media, and communications to the Supreme Court.

3.6. The voting Commissioners, who all served the Commission as volunteers have attested under oath in deposition to the subjective belief that their actions to develop and complete a redistricting plan complied with all applicable laws, including OPMA. Yet objectively, the evidence shows that not all Commissioners completed adequate training on OPMA's provisions, as the statute itself requires, and that in the absence of such training and with the pressures of the statutory deadline looming, the Commission failed to act in a manner consistent with OPMA and its own rules.

IV. JUDGMENT - DECREE

The parties having stipulated to entry of this Consent Decree, the Court having entered the above findings of fact and conclusions of law, and otherwise being fully advised in the premises it is hereby Ordered, Adjudged and Decreed as follows:

4.1. **TRAINING**: Commission staff and the Commissioners shall complete open government training sufficient to comply with the training requirements of RCW 42.30.205 no later than July 1, 2022.

4.2. All future Commissions and its staff and Commissioners shall complete open government training sufficient to comply with the training requirements of RCW 42.30.205 within thirty days of hiring or appointment.

4.3. **OPEN MEETINGS**:

4.3.1 The Commission may not convene a public meeting and then recess to enable Commissioners to deliberate among themselves, except for those matters expressly authorized under OPMA for executive session.

4.3.2 The Commission may not vote on the adoption of a final redistricting plan in

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private. The Commission may not negotiate an agreed upon framework for a final redistricting plan in private.

4.3.3 Before the Commission considers any motion to approve a final redistricting plan, the Commission shall make publicly available the plan that is the subject of the motion, inclusive of the congressional and legislative district maps that depict the boundaries contemplated by the motion.

4.3.4 Any final redistricting plan approved in conformance with article II, section 43(6) of the Constitution shall include completed final maps showing the division of the state into congressional or legislative districts and complete descriptions of each district using official census units, such as tracts and blocks, sufficient to codify the plan, at the time of any vote to approve the plan.

4.3.5 The Commission shall open for comment by the Commissioners any motion to approve a final redistricting plan prior to voting on the motion.

4.3.6 The Commission shall exercise reasonable diligence to adopt rules effectuating the requirements of this subsection by July 1, 2022.

4.4 **THE REDISTRICTING PLAN UNDER OPMA**: Based upon the Supreme Court's December 3, 2021 Order No. 25700-B-676 affirming the Redistricting Plan transmitted to it on November 16, 2021; the Supreme Court's decision that "the primary purpose of achieving a timely redistricting plan would be impeded, not advanced, by rejecting the Commission's completed work"; WCOG's express interests in transparency and not merits of the maps; the Supreme Court's January 6, 2022 Order declining original jurisdiction to hear WCOG's complaint; and the Legislature's adoption of the Redistricting Plan as amended on February 8, 2022, which per RCW 44.05.100(3) shall be in effect until the effective date of the plan based upon the next

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succeeding federal decennial census or until a modified plan takes effect as provided in RCW 44.05.120(6); WCOG's and West's requested relief to invalidate the Redistricting Plan under OPMA is denied.

4.5 **PENALTIES:** Pursuant to RCW 42.30.120(1), each Commissioner shall pay $500.00 ($2,500.00 total) to WCOG ($1,250.00) and West ($1,250.00).

4.6 **WCOG'S PETITION FOR JUDICIAL REVIEW**: WCOG's Petition for Judicial Review, *Washington State Coalition for Open Government v. State*, No. 22-2-00065-34 (Thurston Cnty. Super. Ct.), shall be dismissed voluntarily upon Commission approval of rules in conformance with this Decree and Judgment. The parties agree the petition for judicial review shall be stayed pending adoption of agency rules before the Commission ceases to exist in July.

4.7 **ATTORNEY'S FEES AND COSTS**: Pursuant to RCW 42.30.120(4), within 14 days of entry of this decree, the Commission shall pay to WCOG reasonable attorney's fees and costs incurred up to the date this Stipulation is fully executed by the parties in the amount of $106,743.00 for attorney's fees and $13,428.78 for costs. The rates of $450.00 for Attorney Mell, $250.00 for Attorney Mell's paralegals, and $275.00 for Attorney Bruner are reasonable and the time incurred of 202.8 hours for Attorney Mell, 38 hours for Attorney Bruner, and 13.2 hours for Attorney Mell's paralegals, as well as the costs incurred, were reasonably necessarily incurred to achieve this outcome.

4.8 **ENFORCEMENT**: The Superior Court retains jurisdiction to enforce the terms of this Consent Decree.

4.9 **FINAL JUDGMENT**: Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute final judgment of the Court as to WCOG; Arthur West;

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the Commission; Commissioners Sarah Augustine, Joe Fain, Paul Graves, April Sims, and Brady Piñero Walkinshaw; and the State of Washington.

Dated this ____ day of February, 2022 at Olympia, WA.

_____
Honorable Mary Sue Wilson
Superior Court Judge

DATED this 23rd day of February, 2022.

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