

1
2
3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MARION

6 BEVERLY CLARNO, GARY WILHELMS,
7 JAMES L. WILCOX, and LARRY
8 CAMPBELL,

9 Petitioners,

10 v.

11 SHEMIA FAGAN, in her official capacity as
12 Secretary of State of Oregon,

13 Respondent.

Case No. 21CV40180

**Senior Judge Mary M. James, Presiding Judge
of Special Judicial Panel
Senior Judge Henry C. Breithaupt, Special
Master to Special Judicial Panel**

RESPONDENT'S ANSWER TO PETITION AND
AFFIRMATIVE DEFENSES

ORS 20.140 - State fees deferred at filing

14
15 Respondent, by and through the undersigned counsel, answers the Petition as follows:

16 1.

17 Paragraph 1 consists of legal conclusions and references to legal authorities, which speak
18 for themselves. No response is required or provided.

19 2.

20 Paragraph 2 consists of legal conclusions, opinions, and references to legal authorities,
21 which speak for themselves. No response is required or provided.

22 3.

23 Paragraph 3 consists of legal conclusions and references to legal authorities, which speak
24 for themselves. No response is required or provided.

1 4.

2 As to the allegations in paragraph 4, Respondent admits only that the House Redistricting
3 Committee for the 2021 regular legislative session was comprised of three Republican and three
4 Democratic members, as was the 2021-2022 House Interim Committee on Redistricting. The
5 allegation that there are applicable “statutory and constitutional mandates” is a legal conclusion
6 to which no response is required or provided. The allegations that “Democrat[ic] members of the
7 Oregon Legislative Assembly at first appeared to recognize these statutory and constitutional
8 mandates” and that there is a “commonly understood tendency for a single party’s politicians to
9 favor their own party when drawing redistricting maps” are opinions to which no response is
10 required or provided. To the extent that a response is required for any of these allegations, they
11 are denied. The remaining allegations in paragraph 4 are denied.

12 5.

13 As to the allegations in paragraph 5, Respondent lacks information sufficient to admit or
14 deny allegations regarding the subjective beliefs, actions, motivations, and private
15 communications of legislators and others and therefore denies those allegations on that basis.

16 6.

17 As to the allegations in paragraph 6, Respondent lacks information sufficient to admit or
18 deny allegations regarding the subjective beliefs, opinions, actions, and private communications
19 of individual legislators and therefore denies those allegations on that basis.

20 7.

21 As to the allegations in paragraph 7, Respondent admits only that the House Redistricting
22 Committee was reconstituted for the 2021 1st Special Session with two Democratic members
23 and one Republican member. As to remaining allegations, Respondent lacks information
24 sufficient to admit or deny allegations regarding the subjective personal beliefs and motivations
25 of individual, unnamed legislators and therefore denies those allegations on that basis.

1 8.

2 As to the allegations in paragraph 8, Respondent admits that on September 27, 2021, the
3 House Redistricting Committee approved SB 881 on a 2-1 vote with Democratic Representatives
4 Campos and Salinas voting in favor and Republican Representative Boshart Davis voting
5 against. Respondent admits that on that same day SB 881 was sent to the House, which adopted
6 the amendments requested by Senator Courtney and passed SB 881 on a 33-16 vote, with 11
7 members excused, with the positions of individual members described as follows:

8 Voted in favor: Alonso Leon, Bynum, Campos, Clem, Dexter, Evans, Fahey, Gomberg,
9 Grayber, Holvey, Hudson, Kropf, Lively, Marsh, McLain, Meek, Neron, Nosse, Pham, Power,
10 Prusak, Rayfield, Reardon, Reynolds, Ruiz, Salinas, Sanchez, Smith Warner, Sollman,
11 Valderrama, Williams, Witt, Speaker Kotek

12 Voted against: Breese-Iverson, Cate, Drazan, Goodwin, Hayden, Levy, Moore-Green,
13 Noble, Owens, Reschke, Scharf, Smith DB, Smith G, Wallan, Weber, Zika

14 Excused: Bonham, Boshart Davis, Helm, Lewis, Morgan, Nathanson, Post, Schouten,
15 Stark, Wilde, Wright.

16 Respondent admits that the House Redistricting Committee did not hold public hearings
17 during the 2021 1st Special Session. Respondent denies all remaining allegations in paragraph 8.

18 9.

19 Paragraph 9 consists of legal conclusions and opinions, to which no response is required
20 or provided.

21 10.

22 As to the allegations in paragraph 10, Respondent's counsel has retained a qualified
23 expert who is available and willing to testify to admissible facts and opinions regarding election
24 forecasts; no further response is required or provided. To the extent a response is required,
25 Respondent denies the allegations of paragraph 10.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

11.

Paragraph 11 consists of legal conclusions and opinions, to which no response is required or provided.

12.

Paragraph 12 consists of legal conclusions and opinions, to which no response is required or provided.

13.

Respondent admits the allegations in paragraph 13.

14.

Respondent admits the allegations in paragraph 14.

15.

Respondent admits the allegations in paragraph 15.

16.

Respondent admits the allegations in paragraph 16.

17.

As to the allegations in paragraph 17, the State admits only that Respondent Shemia Fagan is the Oregon Secretary of State. The remaining allegations in paragraph 17 purport to describe this action, and no response is required or provided.

18.

Paragraph 18 consists of legal conclusions, to which no response is required or provided.

19.

Respondent admits the allegations in paragraph 19.

20.

Respondent admits the allegations in paragraph 20.

21.

As to the allegations in paragraph 21, Respondent lacks information sufficient to admit or deny allegations regarding the subjective beliefs, opinions, private communications, or actions of Speaker Kotek and Republican legislative members and therefore denies those allegations on that basis.

22.

As to the allegations in paragraph 22, Respondent admits that the House Redistricting Committee is made up of members of the Oregon House who review redistricting plans before those plans are approved by the full Legislative Assembly, and that its general responsibilities generally include considering redistricting maps for Oregon's state legislative and congressional district boundaries.

23.

The allegations in paragraph 23 consist of opinions to which no response is required or provided. In addition, Respondent lacks information sufficient to admit or deny allegations regarding the subjective mental state of unnamed "Democrats and Democratic aligned special-interest groups" and therefore denies those allegations on that basis.

24.

As to paragraph 24, Respondent admits only that the alleged quote by Congressman Schrader appeared in a June 21, 2021 *Politico* article. Respondent lacks information sufficient to admit or deny whether Congressman Schrader in fact made the statement as alleged, and therefore denies those allegations on that basis. The remaining allegations are either opinion or seek to characterize the article, which is the best evidence of its contents, to which no response is required or provided.

1 25.

2 As to paragraph 25, Respondent admits only that the alleged quote by Congressman
3 DeFazio appeared in a June 21, 2021 *Politico* article. Respondent lacks information sufficient to
4 admit or deny whether Congressman DeFazio in fact made the statement as alleged, and
5 therefore denies those allegations on that basis. The remaining allegations are either opinion or
6 seek to characterize the article, which is the best evidence of its contents, to which no response is
7 required or provided.

8 26.

9 Respondent lacks information sufficient to admit or deny allegations of paragraph 26, and
10 therefore denies those allegations on that basis.

11 27.

12 Respondent admits the allegations in paragraph 27.

13 28.

14 Respondent admits the allegations in paragraph 28.

15 29.

16 As to the allegations in paragraph 29, Respondent admits only that Republican and
17 Democratic members of the House Redistricting Committee proposed different maps,
18 incorporates the responses to the allegations in paragraphs 5, 6, and 21, and denies the remaining
19 allegations.

20 30.

21 Respondent admits the allegations in paragraph 30.

22 31.

23 Respondent admits the allegations in paragraph 31.

24 32.

25 Respondent denies the allegations in paragraph 32.

1 33.

2 As to the allegations in paragraph 33, Respondent incorporates the response to paragraph
3 8 and admits that the Oregon Senate passed SB 881 on a 18-6 vote, with 6 members excused,
4 with the positions of individual senators described as follows:

5 Voted in favor: Beyer, Burdick, Dembrow, Frederick, Gelser Blouin, Golden, Gorsek,
6 Jama, Johnson, Lieber, Manning Jr, Patterson, Prozanski, Riley, Steiner Hayward, Taylor,
7 Wagner, President Courtney

8 Voted against: Anderson, Findley, Girod, Kennemer, Knopp, Thomsen

9 Excused: Boquist, Hansell, Heard, Linthicum, Robinson, Thatcher

10 Respondent denies the remaining allegations in paragraph 33.

11 34.

12 As to the allegations in paragraph 34, Respondent lacks information sufficient to admit or
13 deny allegations regarding the motivations and private communications of individual legislators
14 and therefore denies the allegations on that basis.

15 35.

16 As to the allegations in paragraph 35, Respondent lacks information sufficient to admit or
17 deny allegations regarding the subjective views, opinions, thoughts, and personal conversations
18 of unnamed legislators and therefore denies those allegations on that basis.

19 36.

20 As to allegations in paragraph 36, Respondent incorporates the response to paragraph 21
21 and denies the remaining allegations.

22 37.

23 Respondent admits the allegations in paragraph 37.

24 38.

25 As to the allegations in paragraph 38, Respondent incorporates the responses to
26 paragraphs 5, 21, 36, and 37, and denies the remaining allegations.

1 39.

2 As to the allegations in paragraph 39, Respondent incorporates the response to
3 paragraphs 5, 8, and 21 and denies the remaining allegations.

4 40.

5 As to the allegations in paragraph 40, Respondent incorporates the response to the
6 allegations in paragraph 6 and denies the remaining allegations.

7 41.

8 As the allegations in paragraph 41, Respondent incorporates the responses to paragraphs
9 8 and 10. The remaining allegations in paragraph 41 are denied.

10 42.

11 Respondent admits the allegations in paragraph 42.

12 43.

13 As to the allegations in paragraph 43, Respondent incorporates the response to paragraph
14 10 and denies the remaining allegations.

15 44.

16 Respondent denies the allegations in paragraph 44.

17 45.

18 Respondent denies the allegations in paragraph 45.

19 46.

20 The allegations in paragraph 46 reference and purport to characterize SB 881, which
21 speaks for itself and is itself the best evidence of its own contents, to which no response is
22 required or provided. The State denies any allegations inconsistent with SB 881.

23 47.

24 The allegations in paragraph 47 reference and purport to characterize SB 881, which
25 speaks for itself and its itself the best evidence of its own contents, and no response is required or
26 provided. Respondent denies any allegations inconsistent with SB 881.

1 48.

2 The allegations in paragraph 48 reference and purport to characterize SB 881, which
3 speaks for itself and its itself the best evidence of its own contents, and no response is required or
4 provided. Respondent denies any allegations inconsistent with SB 881.

5 49.

6 As to the allegations in paragraph 49, Respondent admits that parts of Portland are in
7 Districts 1, 3, and 6. Respondent admits that parts of the “Greater Portland Area” are in Districts
8 1, 3, 5, and 6. Respondent admits there are “Democrat[ic] voters” in all parts of Oregon,
9 including within each congressional district. The remaining allegations of paragraph 49 are
10 denied.

11 50.

12 As to the allegations in paragraph 50, Respondent admits that Bend and parts of Portland
13 are in Districts 5. Respondent admits there are “Democrat[ic] voters” in all parts of Oregon,
14 including within District 5. The remaining allegations of paragraph 50 are denied.

15 51.

16 As to the allegations in paragraph 51, Respondent admits that Representative Andrea
17 Salinas, a member of the House Redistricting Committee and a Democratic leader in the
18 Legislative Assembly, has stated publicly “I’m seriously exploring a run to represent our
19 community in Congress. I’ve gotten calls from friends and colleagues all throughout the new
20 sixth congressional district encouraging me to jump into the race.” Respondent’s counsel has
21 retained a qualified expert who is available and willing to testify to admissible facts and opinions
22 regarding election forecasts; no further response is required or provided regarding such
23 allegations. To the extent a response is required to such allegations, Respondent denies the
24 allegations. Respondent denies the remaining allegations in paragraph 51.

25 52.

26 Respondent denies the allegations in paragraph 52.

1 53.

2 As to the allegations in paragraph 53, Respondent admits only that that Petitioners are
3 registered to vote as Republicans. As to the remaining allegations in paragraph 51, Respondent
4 lacks information sufficient to admit or deny allegations regarding how Petitioners vote or their
5 engagement in political activities and therefore denies those allegations on that basis.

6 54.

7 Respondent denies the allegations in paragraph 54.

8 55.

9 Respondent denies the allegations in paragraph 55.

10 56.

11 Respondent denies the allegations in paragraph 56.

12 57.

13 Respondent denies the allegations in paragraph 57.

14 58.

15 In response to paragraph 58, Respondent incorporates the responses to paragraphs 1–57.

16 59.

17 Paragraph 59 contains references to legal authorities, which speak for themselves. No
18 response is required or provided.

19 60.

20 Respondent denies the allegations in paragraph 60.

21 61.

22 Respondent denies the allegations in paragraph 61.

23 62.

24 In response to allegations in paragraph 62, Respondent’s counsel has retained a qualified
25 expert who is available and willing to testify to admissible facts and opinions regarding election
26

1 forecasts; no further response is required or provided. To the extent a response is required,

2 Respondent denies the allegations of paragraph 62.

3 63.

4 Respondent denies the allegations in paragraph 63.

5 64.

6 Respondent denies the allegations in paragraph 64.

7 65.

8 Respondent denies the allegations in paragraph 65.

9 66.

10 Respondent admits the allegations in paragraph 66.

11 67.

12 In response to allegations in paragraph 67, Respondent's counsel has retained a qualified

13 expert who is available and willing to testify to admissible facts and opinions regarding election

14 forecasts; no further response is required or provided. To the extent a response is required,

15 Respondent denies the allegations of paragraph 67.

16 68.

17 The allegations in paragraph 68 reference and purport to characterize SB 881, which
18 speaks for itself and its itself the best evidence of its own contents, and no response is required or
19 provided. Respondent denies any allegations inconsistent with SB 881.

20 69.

21 Respondent denies the allegations in paragraph 69.

22 70.

23 Respondent denies the allegations in paragraph 70.

24 71.

25 Respondent denies the allegations in paragraph 71.

72.

As to the allegations in paragraph 72, Respondent incorporates the responses to paragraphs 8 and 33 and denies the remaining allegations.

73.

As to the allegations in paragraph 73, Respondent incorporates the response to paragraph 8.

74.

As to the allegations in paragraph 74, Respondent incorporates the responses to paragraphs 6, 21, 36, 37, 38, and 39. The remaining allegations in paragraph 74 are denied.

75.

As to the allegations in paragraph 75, Respondent incorporates the responses to paragraphs 21, 23, 24, 25, 26, 34, 36, 37, and 38. The remaining allegations in paragraph 75 are denied.

76.

Respondent denies the allegations in paragraph 76.

77.

In response to paragraph 77, Respondent incorporates the responses to paragraphs 1–76.

78.

Paragraph 78 consists of references to legal authorities, which speak for themselves. No response is required or provided.

79.

Paragraph 79 consists of references to legal authorities, which speak for themselves. No response is required or provided.

80.

Paragraph 80 consists of legal conclusions and references to legal authorities, which speak for themselves. No response is required or provided.

1 81.

2 Paragraph 81 consists of legal conclusions and references to legal authorities, which
3 speak for themselves. No response is required or provided.

4 82.

5 Paragraph 82 consists of legal conclusions and references to legal authorities, which
6 speak for themselves. No response is required or provided.

7 83.

8 Respondent denies the allegations in paragraph 83.

9 84.

10 Respondent denies the allegations in paragraph 84.

11 85.

12 Respondent denies the allegations in paragraph 85.

13 86.

14 As to the allegations in paragraph 86, Respondent incorporates the response to paragraph
15 10 and denies any remaining allegations.

16 87.

17 Respondent denies the allegations in paragraph 87.

18 88.

19 As to paragraph 88, Respondent incorporates the responses to paragraphs 1–87.

20 89.

21 Paragraph 89 consists of references to legal authorities, which speak for themselves. No
22 response is required or provided.

23 90.

24 Paragraph 90 consists of references to legal authorities, which speak for themselves. No
25 response is required or provided.

26

1 91.

2 Paragraph 91 consists of legal conclusions and references to legal authorities, which
3 speak for themselves. No response is required or provided.

4 92.

5 Paragraph 92 consists of legal conclusions and references to legal authorities, which
6 speak for themselves. No response is required or provided.

7 93.

8 Respondent denies the allegations in paragraph 93.

9 94.

10 Respondent denies the allegations in paragraph 94.

11 95.

12 In response to paragraph 95, Respondent incorporates the responses to paragraphs 1–94.

13 96.

14 Paragraph 96 consists of legal conclusions and references to legal authorities, which
15 speak for themselves. No response is required or provided.

16 97.

17 Respondent denies the allegations in paragraph 97.

18 98.

19 Respondent denies the allegations in paragraph 98.

20 99.

21 Respondent denies the allegations in paragraph 99.

22 100.

23 Respondent denies the allegations in paragraph 100.

24 101.

25 Respondent denies the allegations in paragraph 101.

26

1 102.

2 Respondent denies the allegations in paragraph 102.

3 103.

4 Respondent denies the allegations in paragraph 103.

5 104.

6 The allegations in paragraph 104 are opinion, to which no response is required or
7 provided. To the extent a response is required, Respondent denies the allegations in paragraph
8 104.

9 105.

10 As to the prayer (paragraph 105), Respondent denies that Petitioners are entitled to any
11 relief.

12 106.

13 Except as expressly admitted, Respondent denies any remaining allegations of
14 Petitioners' complaint.

15 **AFFIRMATIVE DEFENSES**

16 107.

17 **FIRST AFFIRMATIVE DEFENSE**

18 (Failure to State a Claim, ORCP 21 A(8) – ORS 188.010)

19 Petitioners' first and fourth claims for relief fail to state ultimate facts sufficient to
20 constitute a claim upon which relief could be granted.

21 108.

22 **SECOND AFFIRMATIVE DEFENSE**

23 (Failure to State a Claim, ORCP 21 A(8) – Or. Const., Art. I, Sections 8 and 26)

24 Petitioners' second claim for relief fails to state ultimate facts sufficient to constitute a
25 claim upon which relief could be granted and fails as a matter of law.

26

109.

THIRD AFFIRMATIVE DEFENSE

(Failure to State a Claim, ORCP 21 A(8) – Or. Const., Art. I, S. 20 and Art. II, S. 1)

Petitioners’ third claim for relief fails to state ultimate facts sufficient to constitute a claim upon which relief could be granted and fails as a matter of law.

110.

FOURTH AFFIRMATIVE DEFENSE

(Lack of Subject Matter Jurisdiction, ORCP 21 A(1) – Justiciability)

Petitioners’ claims are nonjusticiable as to the relief they seek.

111.

FIFTH AFFIRMATIVE DEFENSE

(Lack of Subject Matter Jurisdiction, ORCP 21 A(1) – Standing)

Petitioners lack standing to assert their claims.

112.

SIXTH AFFIRMATIVE DEFENSE

(Unlawful Remedy)

Petitioners have not disclosed the “congressional district plan” they seek the Court to “adopt” (§ 105(c)). Respondent may contend that the plan Petitioners ask the Court to order is unlawful or inequitable.

113.

WHEREFORE, having fully answered the Petition, Respondent prays for a judgment against Petitioners affirming the validity and lawfulness of SB 881, dismissing the Petition in its entirety with prejudice, and awarding Respondent the costs and disbursements incurred herein, and for such other and further relief as the Court may deem appropriate.

DATED October 18, 2021.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

s/ Brian Simmonds Marshall
BRIAN SIMMONDS MARSHALL #196129
Senior Assistant Attorney General
SADIE FORZLEY #151025
ALEXANDER C. JONES #213898
Assistant Attorney General
Trial Attorneys
Tel (971) 673-1880
Fax (971) 673-5000
Brian.S.Marshall@doj.state.or.us
Sadie.Forzley@doj.state.or.us
Alex.Jones@doj.state.or.us
Of Attorneys for Respondent

1 **CERTIFICATE OF SERVICE**

2 I certify that on October 18, 2021, I served the foregoing RESPONDENT'S ANSWER
3 TO PETITION AND AFFIRMATIVE DEFENSES upon the parties hereto by the method
4 indicated below, and addressed to the following:

5
6 Shawn M. Lindsay HAND DELIVERY
7 Harris Berne Christensen LLP X MAIL DELIVERY
8 15350 SW Sequoia Parkway, Suite 250 OVERNIGHT MAIL
Portland, OR 97224 X E-MAIL
Of Attorneys for Petitioners X SERVED BY E-FILING

9
10 Misha Tseytlin HAND DELIVERY
11 Troutman Pepper Hamilton Sanders LLP X MAIL DELIVERY
227 W. Monroe Street, Ste. 3900 OVERNIGHT MAIL
Chicago, IL 60606 X E-MAIL
Of Attorneys for Petitioners X SERVED BY E-FILING

13
14 Thomas R. Johnson HAND DELIVERY
15 Misha Isaak X MAIL DELIVERY
Jeremy A. Carp OVERNIGHT MAIL
16 Garmai Gorlorwulu X E-MAIL
Perkins Coie LLP X SERVED BY E-FILING
17 1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Of Attorneys for Proposed Intervenor-
18 *Respondents*

19
20 Abha Khanna HAND DELIVERY
Jonathan P. Hawley X MAIL DELIVERY
21 Elias Law Group LLP OVERNIGHT MAIL
1700 Seventh Avenue, Suite 2100 X E-MAIL
22 Seattle, Washington 98101 X SERVED BY E-FILING
Of Attorneys for Proposed Intervenor-
23 *Respondents*

1 Aria C. Branch
2 Jacob D. Shelly
3 Elias Law Group LLP
4 10 G Street NE, Suite 600
5 Washington, D.C. 20002

6 *Of Attorneys for Proposed Intervenor-*
7 *Respondents*

8 ☐ HAND DELIVERY
9 ☒ MAIL DELIVERY
10 ☐ OVERNIGHT MAIL
11 ☒ E-MAIL
12 ☒ SERVED BY E-FILING

13 *s/ Brian Simmonds Marshall*

14 BRIAN SIMMONDS MARSHALL #196129

15 Senior Assistant Attorney General

16 SADIE FORZLEY #151025

17 ALEXANDER C. JONES #213898

18 Assistant Attorneys General

19 Trial Attorneys

20 Tel (971) 673-1880

21 Fax (971) 673-5000

22 Brian.S.Marshall@doj.state.or.us

23 Sadie.Forzley@doj.state.or.us

24 Alex.Jones@doj.state.or.us

25 Of Attorneys for Respondent