

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

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

Petitioners,

v.

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

Respondent.

v.

JEANNE ATKINS, SUSAN CHURCH,
NADIA DAHAB, JANE SQUIRES,
JENNIFER LYNCH, and DAVID
GUTTERMAN,

Intervenors.

Case No. 21CV40180

**OPINION OF THE SPECIAL JUDICIAL
PANEL**

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Opinion

On October 11, 2021, Petitioners filed a petition challenging the validity of 2021 Oregon Laws, Chapter 1 (1st Special Session) (hereinafter “SB 881”). Pursuant to 2021 Oregon Laws, Chapter 419 (hereinafter “SB 259”), § 1(6), the Chief Justice of the Oregon Supreme Court appointed a Special Judicial Panel (SJP) to hear the petition, consisting of Senior Judge Mary M. James, Presiding, Senior Judge Richard L. Barron, Senior Judge Paula J. Brownhill, Senior Judge William D. Cramer, and Senior Judge Katherine E. Tennyson. *See* Chief Justice Order (CJO) 21-045. 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. *See* CJO 21-047. 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 adopts the Special Master’s Recommended Findings of Fact and incorporates them by reference into this Opinion.¹

This matter came before the SJP for oral argument on November 16, 2021. Petitioners, Respondent, and Intervenors appeared by and through their respective attorneys. The parties submitted memoranda of law and responses to memoranda prior to the hearing.

Upon this record, it is the opinion of the SJP that the Petitioners have 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. It follows that their petition must be dismissed. *See* SB 259 § 1(8)(a).

¹ Special Master’s Recommended Findings of Fact and Report (hereinafter “FOF”) ¶ 195 is corrected to read: “Therefore, based on paragraphs 191-194 above, Petitioners’ allegation that District 5 stretches across “mountains that can be impassible during winter conditions,” Pet. ¶¶ 52 & 101, is not supported by the evidence.”

Oregon’s statutory prohibition on partisan gerrymandering is an important democratic safeguard, one that ensures that the state’s citizens are fairly and effectively represented in Salem and, as is the case in Congressional redistricting, in Washington, D.C. ORS 188.010 requires the Legislative Assembly “to consider” a host of competing criteria when apportioning the state into congressional districts:

- (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.

“When the Legislative Assembly is able to achieve agreement in this difficult decennial assignment, that achievement is entitled to be respected if possible.” *McCall v. Legislative Assembly*, 291 Or 663, 685 (1981). “In reviewing a reapportionment plan adopted by the Legislative Assembly, this court will not substitute its judgment about the wisdom of the plan.” *Sheehan/Calderwood v. Legislative Assembly*, 368 Or 739, 744 (2021) (citing *Ater v. Keisling*, 312 Or 207, 213 (1991)).

Senate Bill 259 Standard

The standard of review set out in SB 259 § 1(8)(a) appropriately reflects the level of deference due a legislatively adopted congressional redistricting plan. Notably, 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. *Id.*

The Petition

Petitioners filed a petition challenging the legislatively adopted reapportionment plan and asking the SJP to adopt their alternative plan. *See* Pet. ¶¶ 58-105, *see also* Petitioners’ Ex. 1014 (Petitioners’ alternative plan). Petitioners assert four claims: two claims allege violations of the statutory redistricting considerations under ORS 188.010, and two claims allege violations of four provisions of the Oregon Constitution. Pet. ¶¶ 58-104.

The first claim alleges that SB 881 violates ORS 188.010(2), which provides that “[n]o district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.” Pet. ¶¶ 59-60. Specifically, Petitioners allege that SB 881 was enacted for the purpose of favoring the Democratic Party, Democratic incumbent legislators, and “other person[s]” affiliated with the Democratic Party. Pet. ¶ 60.²

The second claim alleges that SB 881 violates Article 1, sections 8 and 26 of the Oregon Constitution, which guarantee freedom of expression and assembly, respectively. Pet. ¶¶ 78-87. Petitioners allege that those provisions together prohibit partisan gerrymandering. Pet. ¶¶ 78-87.

The third claim alleges 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. Pet. ¶ 89-94. Petitioners allege that both of those provisions “prohibit the Oregon State Legislature from drawing and adopting a partisan gerrymandered redistricting map,” and that SB 881 violates those provisions because it was enacted with impermissible partisan intent and will have an impermissible partisan effect. Pet. ¶¶ 91-93.

² Petitioners allege, but fail to prove, that the SB 881 map was gerrymandered “to permit Representative Andrea Salinas, a member of the House Redistricting Committee and a Democrat leader in the Legislative Assembly, to run for election in District 6.” Pet. ¶ 69. Petitioners have offered no evidence whatsoever to support their allegation and appear to have abandoned it. *See* Petitioners’ Proposed FOF (omitting any proposed finding that map was gerrymandered for Salinas’s benefit).

The fourth claim alleged 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). Pet. ¶¶ 96-97. Petitioners voluntarily dismissed their fourth claim, but the evidence of whether the Legislative Assembly considered these criteria remains relevant as described below. *See* Order dated November 1, 2021. Petitioners do not allege violations of the United States Constitution.

On October 18, 2021, Respondent filed her Answer and Affirmative Defenses, and six Intervenors filed an Intervention Petition in support of SB 881. On November 3, the Presiding Judge granted a request by the Oregon Farm Bureau Federation (OFB) to appear as *amicus curiae*. *See* SB 259 § 1(7)(b). OFB filed a brief on November 10, 2021.

Burden of Proof

Petitioners bear the burden of 1) producing evidence to support their claims that SB 881 does not comply with all applicable statutes and the Oregon Constitution, and 2) proving their claims by a preponderance of the evidence. *See* ORS 40.105 (“A party has the burden of persuasion as to each fact the existence or nonexistence of which the law declares essential to the claim for relief or defense the party is asserting.”); ORS 10.095 (“[I]n civil cases the affirmative of the issue shall be proved, and when the evidence is contradictory, the finding shall be according to the preponderance of evidence[.]”).

Hartung Standard of Review

The SJP will void the Legislative Assembly’s plan only if we can say, based on the record, that that body either did not consider one or more of the ORS 188.010 criteria set out in ORS 188.010, or, having considered them all, made a choice or choices that no reasonable legislature would have made. *Sheehan*, 368 Or at 744 (citing *Hartung v. Bradbury*, 332 Or 570, 587 (2001)). As discussed above, the party challenging a reapportionment plan has the burden to show that one of those circumstances is present. *Id.*

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First Prong

Hartung establishes a two-prong test for compliance with ORS 188.010 criteria. The first prong is whether the Legislative Assembly considered all of the ORS 188.010 criteria.

Petitioners' only statutory claim for relief arises from ORS 188.010(2), which states: "No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person."³ Insofar as Petitioners seek a determination that SB 881 is void in its entirety and have not challenged any one district in particular, they presumably mean to convey that all the legislative districts set out in SB 881 were drawn for purposes that ORS 188.010(2) prohibits.

Petitioner's evidence regarding partisan purpose is only 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. The Legislative Assembly considered input from various sources concerning the likelihood that the maps would get sufficient Republican support to obtain a vote. FOF ¶¶ 218, 220-222. Such evidence is 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 are logical reasons for drawing district lines in the manner that SB 881 did. *See Sheehan*, 368 Or at 759. 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. On this record, 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. Some of the adjustments made to the final map included efforts to keep Portland's historic black neighborhoods within the same district and to avoid splitting tribal reservations into multiple districts. These adjustments remained faithful to the ORS 188.010(1) criteria, and impacted districts containing portions of the Portland area and Bend, among other communities.

³ *See* Petitioners' First Claim for Relief.

The abundance of public scrutiny and input, and consistent presence of legitimate markers for drawing lines refutes the charge that partisan gerrymandering controlled the process. The metrics for the enacted map demonstrate that this map is well within the range of historic maps that have been adopted by prior legislative assemblies or courts. The evidence included expert testimony which compared 50 years of Oregon's history with congressional districting. 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. FOF 264-269. Thus, the plan satisfies the first prong of the *Hartung* test.

Second Prong

The second prong of the *Hartung* analysis requires the SJP to determine whether the Petitioners have met their burden to prove that the Legislative Assembly made a choice or choices that no reasonable legislative assembly would have made.

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.

There is no evidence that the Legislative Assembly made unreasonable choices in the application of ORS 188.010. 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. Straightforward application of *Hartung* thus forecloses Petitioners' claim under ORS 188.010(2).

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Assessing Partisan Purpose

Petitioners argue for a *per se* determination of partisan purpose whenever a reapportionment plan is passed by a party line vote. That is, if only one party voted in favor of the adopted plan, the SJP should presume the plan impermissibly favors that party. We reject Petitioners' request that we adopt a *per se* rule that a party-line vote is enough to establish a violation of Oregon law. Nor do we find that the court is not up to the challenge of giving careful consideration to the record and applying legal constructs to decide whether the congressional districts in SB 881 were drawn for a partisan purpose. We respect the legislative process in Oregon and decline to adopt the cynical view that all politics are dirty politics. That is simply not the Oregon experience or legacy.

We are not inclined to scrutinize the political mechanisms of the legislative process as a fundamental issue of separation of powers. 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. This fidelity to previous plans is particularly apparent when considering the enacted map's division of the Portland area. The division of the Portland area among four congressional districts is a key theme of Petitioners' case. *See, e.g.*, Petitioners' Mem 8, 11-12, 18-19, 22, 39. But 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.

In 2001, Judge Jean Maurer adopted a congressional map in which three of the state's five districts contained parts of the Portland area, explaining that this map "minimize[d] disruption of the existing congressional districts and better complie[d] with the statutory criteria of ORS 188.010." *Perrin v. Kitzhaber*, No. 0107-07021, slip op. at 11 (Multnomah County Cir.

Ct., Oct. 25, 2001). Ten years later, bipartisan votes of the Legislative Assembly approved a congressional plan that again split the Portland area among multiple districts. *See* Ex. 3017-R (showing SB 990 (2011) vote tally); Ex. 3017-Q (historical congressional district maps). By way of illustration, the City of Portland's population does not lend itself to a single district. While over two-thirds of the population (67%) reside in District 3 and nearly one quarter (24%) resides in District 1, whose constituents share affinity with the Port of Portland, the Columbia River, and the North Coast economies, the other two districts include only 8.2% of Portland, and .5%, respectively. Ex. 3018-C, Drazen testimony 56:10-15 (Oregon House floor discussion, Sept. 27, 2021). Petitioners do not explain how the small and diminutive shares of Portland voters within other districts constitutes gerrymandering or would make a difference in elections. 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 sound the same theme in relation to Bend being placed in District 5, which crosses the Cascades. SB 881 is not the first time a congressional district has crossed a mountain range. *See* Ex. 3004-A (Amended Decl. of Les AuCoin, Exhibit 1). Petitioners did not show that the Legislative Assembly did not consider the criteria in ORS 188.010(1) or that its conclusions were those that no reasonable legislature would make.

Assessing Partisan Effect

Petitioners urge us to find that the enacted plan will result in an impermissible partisan effect, and to infer from that effect that the Legislative Assembly drew the districts with a partisan purpose. We address that argument without deciding whether partisan effect can ever be proof of partisan purpose, because we determine that 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. As the testimony of Dr. Paul Gronke demonstrates, the enacted

map's efficiency gap⁴—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." FOF 265. "Dr. Gronke similarly found that, converting the efficiency gap into seats, '[t]he level of "bias" in the [Enacted Map] is comparatively small' and 'within the range of all these past plans,'" while "in terms of declination⁵, the Enacted Map 'is a significant improvement over plans that have been in place since 1990, and the estimated value falls well within the range of plans that have been in place for a half-century.'" FOF 266-67 (alterations in original) (quoting Ex. 3002 ¶¶ 26-27 (Decl. of Dr. Gronke)).

Dr. Gronke's findings are illuminating. They indicate that, because any bias that might exist in the enacted map has recurred for the past half-century, it is likely attributable to Oregon's unique political geography. "[S]pecifically, 'Democratic strength in the state, the geographic concentration of many of the Democratic voters in the Portland metro region and the Willamette Valley, and the geographic concentration of many Republican voters in central and eastern Oregon.'" FOF ¶ 269 (quoting Ex. 3002 ¶ 30 (Decl. of Dr. Gronke)). And his 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.

Turning briefly to issues raised by the *amicus curiae*, it is evident on the record that the Legislative Assembly considered the importance of drawing districts with both rural and urban elements. FOF ¶¶ 59, 62, 101, 156-60. Indeed, because Oregon has only six congressional districts, "each will necessarily include diverse communities of interest. A plan that includes within one district communities having vastly different concerns does not violate either statutory

⁴ "Efficiency gap" measures the difference in "wasted" votes between the two parties. FOF ¶¶ 236-37, 262(a), 284.

⁵ "Declination" expresses the number of votes needed to gain seats for an advantaged political party compared to a disadvantaged party. FOF ¶ 262(b).

or constitutional requirements.” *Perrin v. Kitzhaber*, No 0107-07021, slip op at 6 (Multnomah Cnty Cir Ct, Oct 25, 2001). 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.⁶

In short, neither the enacted map as a whole nor its component parts are novel or anomalous. The new congressional districts instead reflect and build upon previous maps drawn by a variety of mapmakers, while taking into account demographic changes over the last decade and the population growth that necessitated adding a district. FOF ¶¶ 2-3, 36.

Testing Partisan Effect Through Metrics

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. Although Petitioners point to what they see as strengths of this approach, for example, administrability and ease of calculation, 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. Petitioners’ expert, Dr. Thomas Brunell, performed an efficiency gap analysis of SB 881 on two occasions. On the first occasion, Dr. Brunell concluded that the efficiency gap score of the enacted map was 19.85%. On the second occasion, and using a different set of election results as inputs, Dr. Brunell reassessed the efficiency gap score and concluded a rating of 7.76%. *See* Special Master’s Recommended Findings of Fact ¶301. Other experts in the case also assessed the efficiency gap score of the map and came to varying conclusions. Dr. Gronke’s historical comparison confirmed that the enacted map’s estimated efficiency gap “falls well within the range of plans that have been used in the state for the past fifty years.” FOF ¶ 265 (quoting Ex. 3002 ¶ 25 (Decl. of Dr. Gronke)).

⁶ *See* Ex. 3004 (Decl. of Les AuCoin); Ex. 3004-A (Amended Decl. of Les AuCoin); Ex. 3013 (Decl. of Joan Mooney).

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. That is, must an efficiency gap analysis include all statewide races from the prior decade? Should only U.S. Congressional races be considered? Or only Governor's races? Are some election results simply "outliers" that should be thrown out? Other shortcomings of relying on the efficiency gap analysis exist, particularly in a state with fewer than seven electoral districts. FOF ¶¶ 238-239. Respondent and Intervenor's experts agreed. They demonstrated that 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. FOF ¶ 236. The most commonly accepted standard in political science to judge the partisan fairness of voting districts for a legislature is partisan symmetry. The efficiency gap metric does not measure partisan symmetry⁷ or any other quantity of the seats-vote curve. In his testimony and report, Dr. Katz explained why partisan symmetry is accepted and reliable, in contrast to the efficiency gap metric. FOF ¶¶ 231, 237. While "simple math" is understandable at an elementary level, it does not help to analyze Oregon's success in achieving political fairness for voters. Oregon voters deserve the competent, reliable tests Respondent and Intervenor's provided and which courts should expect.

Given these deficiencies, we decline to adopt a 7% efficiency gap threshold as a *per se* measure of improper partisan effect, and we note that no other court has adopted this *per se* test. Instead, we agree with Respondent and Intervenor's that the SJP should consider multiple metrics for measuring partisan effect rather than relying on one imprecise metric. The weight of the expert evidence indicates that the enacted reapportionment plan does not have an impermissible partisan effect. Using well established metrics, the enacted map is well within the range of

⁷ "Partisan symmetry" is the test for whether a districting scheme is neutral with respect to a party and which refers to the share of legislative seats a party can expect to win if it earns a given share of the statewide vote. FOF ¶ 274.

partisan symmetry and fairness measures produced by historic maps of Oregon's congressional districts. FOF ¶ 270.

Based on the adopted findings of fact and the reasoning above, the SJP concludes that Petitioners have failed to meet their burden to prove impermissible partisan effect by a preponderance of the evidence. Petitioners have not demonstrated that the Legislative Assembly made choices that no reasonable legislative assembly would have made. Thus, the plan satisfies the second prong of the *Hartung* test. Having satisfied both prongs, SB 881 passes scrutiny with respect to the ORS 188.010(2) challenge.

Constitutional Claims

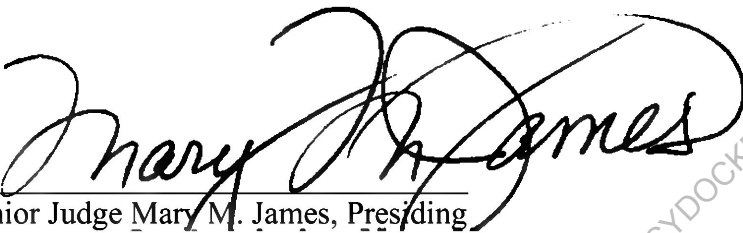
Petitioners allege two constitutional violations. Petitioners' second claim alleges that SB 881 violates Article 1, sections 8 and 26 of the Oregon Constitution, which guarantee freedom of expression and assembly, respectively. Pet. ¶¶ 78-87. Petitioners allege that those provisions together prohibit partisan gerrymandering. Pet. ¶¶ 78-87. The third claim alleges 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. Pet. ¶ 89-94. All parties agree that the test for either of these claims is a partisan purpose plus effects test. 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.

Conclusion


The SJP unanimously concludes that the Petitioners in this case have failed to meet their burden of persuasion on their claims that SB 881 does not comply with all applicable statutes and the Oregon Constitution. The SJP concludes that SB 881, the enacted map, reflects Oregon's previous congressional maps in both design and effect, resulted from a robust deliberative process and careful application of neutral criteria set forth in ORS 188.010(1), and

provides no significant partisan advantage to either political party. To the extent that the process included political posturing and partisan negotiations, such factors are predictable in lawmaking, and did not dominate or derail the efficacy of SB 881 as a lawful construct. Moreover, the extensive expert evidence developed in this case demonstrates that the map “shows no statistically significant partisan bias.” FOF ¶¶ 255, 270.

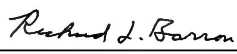
Petitioners have failed to prove that SB 881 does not comply with all applicable statutes and the United States and Oregon Constitutions. It follows that their petition must be dismissed. *See* SB 259 § 1(8)(a).


Senior Judge Mary M. James, Presiding


Senior Judge Katherine Tennyson


W.D. CRAMER, JR.
Circuit Court Judge


Sr. Judge Paula Brownhill


Senior Judge Richard L. Barron
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