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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.

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**

MOTION TO MAKE MORE DEFINITE AND
CERTAIN (ORCP 21D)

ORS 20.140 - State fees deferred at filing

UTCR CONFERRAL INFORMATION

Pursuant to UTCR 5.010, counsel for Respondent certifies that before filing this motion, Respondent’s counsel conferred in good faith with Petitioners’ counsel about the issues raised in this motion. The parties could not resolve the issues raised in this motion without the assistance of the Court.

MOTION

Pursuant to ORCP 21 D, Respondent respectfully moves this Court for an Order to require Petitioners to make more definite and certain the following allegations in the Petition by Thursday, October 21, by specifying any congressional district plan they will urge the Court to adopt:

“104. It is practicable to draw an alternative redistricting map that complies with ORS § 188.010(1) in which congressional districts are contiguous and of equal population, are apportioned to utilize existing geographic or political boundaries, do not divide communities of common interest, and are connected by transportation links.

1 105. Wherefore, Petitioners pray that the Court award them the following relief: ... c. Adopt
2 a congressional district plan that complies with the Oregon Constitution and Statutes. SB
259-B § 1(8)(a)....”

3 LEGAL STANDARD

4 When a petition’s allegations are unclear, the proper procedure is to move for an order
5 requiring the petition to be more definite and certain. *See Bahr v. Marion Cty.*, 38 Or App 597,
6 602, 590 P2d 1240 (1979), *appeal after remand* 47 Or App 627, 614 P2d 1224 (1980). “Any
7 vagueness, uncertainty or ambiguity in the allegations of a complaint should be attacked by a
8 pretrial motion to make more definite and certain” *Galego v. Knudsen*, 282 Or 155, 159
9 (1978). ORCP 21 D provides that “the court may require the pleading to be made definite and
10 certain by amendment when the allegations of a pleading are so indefinite or uncertain that the
11 precise nature of the charge, defense, or reply is not apparent.”

12 ARGUMENT

13 The Court should require Petitioners to identify the alternative “congressional district
14 plan” that they ask the Court to order. *See* Petition ¶ 105(c). Without knowing what map
15 Petitioners have in mind, Respondent cannot present evidence to respond to the relief that
16 Petitioners seek.

17 Petitioners allege that the redistricting plan enacted by the Oregon Legislative Assembly
18 violates ORS 188.010(1) because the plan “needlessly splits counties, needlessly splits
19 communities of interest; needlessly ignores other political and geographic boundaries; and
20 needlessly draws districts not connected by transportation links.” Petition ¶ 98. Petitioners also
21 allege “[i]t is practicable to draw an alternative redistricting map that complies with ORS
22 § 188.010(1) in which congressional districts are contiguous and of equal population, are
23 apportioned to utilize existing geographic or political boundaries, do not divide communities of
24 common interest, and are connected by transportation links.” Petition ¶ 104.

25 But Petitioners do not allege how the Legislative Assembly could have drafted a plan
26 that more “nearly” complies with the criteria enumerated in ORS 188.010(1). Petition ¶ 104.

1 Nor do they provide any details about the redistricting plan Petitioners will urge the Court to
2 adopt. Petition ¶ 105(c).

3 The handful of details Petitioners allege only illustrate the vagueness of their Petition.
4 For example, Petitioners allege it is unlawful for District 5 to include any portion of Deschutes
5 County or Multnomah County. Petition ¶¶ 50, 65, 67–68. Redrawing the map to those
6 specifications would leave District 5 with hundreds of thousands fewer people than needed to
7 meet the federal constitutional requirement for districts of equal population. *See Karcher v.*
8 *Daggett*, 462 U.S. 725, 730–31 (1983) (requiring congressional districts to be “as
9 nearly as practicable” to equally populous).

10 The Petition is silent about how the Court should expand District 5 to meet the equal
11 population requirement. Given Petitioners’ claim that the northern border of District 5 is too far
12 north and the eastern border is too far east, presumably they seek to expand District 5 south into
13 District 4, westward into District 6, or both. But doing so would in turn require expanding
14 Districts 4 and 6 elsewhere to keep all six districts with equal population.

15 To allow both sides to prepare to present evidence, the rules provide that a petition must
16 contain “[a] plain and concise statement of the ultimate facts constituting a claim for relief” and
17 “[a] demand of the relief which the party claims[.]” ORCP 18. By failing to state facts showing
18 that the Legislative Assembly could have drafted a plan that more “nearly” complies with the
19 criteria enumerated in ORS 188.010(1), the Petition fails to make a “statement of the ultimate
20 facts constituting a claim for relief.” *See* ORCP 18 A. By failing to state how the Court should
21 draft a plan, the Petition fails to specify the “demand of the relief which the party claims.” *See*
22 ORCP 18 B.

23 This fundamental tenant of Petitioners’ case must be disclosed in enough time for
24 Respondent to submit evidence objection to Petitioners’ proposed remedy. Under the Court’s
25 scheduling order, all parties submit their evidence by Monday, October 25. Last week,
26 Petitioners themselves proposed the deadline of Thursday, October 21, to disclose the map they

1 urge the Court to adopt. *See* Declaration of Brian Simmonds Marshall (Oct. 17, 2021) ¶ 2 &
2 Attachs. B at 18–19 (filed with Response to Motion to Amend Scheduling Order). The Court
3 should require Petitioners to do so by that deadline.

4 Whether through amending the scheduling order or by granting this motion, the Court
5 should require Petitioners to give Respondent fair notice of the remedy they seek.

6 **CONCLUSION**

7 For these reasons, Respondent requests that the motion be granted and Petitioners be
8 required to make their Petition more definite and certain by October 21 by specifying any
9 “congressional district plan” they ask the Court to order. The plan should be disclosed in the
10 same standard electronic formats the Legislative Assembly has provided for the enacted
11 redistricting plan, SB 881, through its redistricting website,
12 <https://www.oregonlegislature.gov/redistricting/>.

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14 DATED October 18, 2021.

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Respectfully submitted,

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ELLEN F. ROSENBLUM
Attorney General

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s/ Brian Simmonds Marshall
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I certify that on October 18, 2021, I served the foregoing MOTION TO MAKE MORE DEFINITE AND CERTAIN (ORCP 21D) upon the parties hereto by the method indicated below, and addressed to the following:

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