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IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

FLORENTINA FLORES DE VEGA,
HTOO LER PAW, HEATHER
FRANKLIN, VICKI POTROTTA,
WARREN CHAN, BRENDA COOK,
LISA EXTEROVICH, KINNARI SHAH,
ABDELKADIR ABDELKADIR
MOKRANI, DIANA OROPEZA, DAVID
KNELL, BRITTNEY CIANI, STACEY
QUINTERO, KATHY SELVAGGIO,
TRACY SOLORZANO, TERRY
PATTERSON and ERIN LACERRA, on
behalf of themselves and all others
similarly situated,

Petitioners,

v.

OREGON EMPLOYMENT
DEPARTMENT and DAVID
GERSTENFELD,

Respondents.

Case No. 20CV23377

**PETITIONERS' RESPONSE TO MOTION
TO DISMISS (ORCP 21)**

ORAL ARGUMENT REQUESTED

1 **UTCR 5.050 Information**

2 Oral argument requested: Yes

3 Time request: 30 minutes

4 Reporting services requested: Yes

5 **INTRODUCTION**

6 Respondents make three arguments in their Motion to Dismiss. First, Respondents assert
7 that this Court lacks jurisdiction over Petitioners’ First and Second Claims because Respondents
8 have “acted on” all of Petitioners’ applications for unemployment benefits. Respondents’
9 Motion to Dismiss, “Resp. MTD,” 1:4. That argument fails. ORS 14.175 expressly gives courts
10 jurisdiction to hear moot claims against a public body when the challenged policy or practice
11 continues in effect and is likely to evade judicial review in the future. Respondents assert that
12 ORS 14.175 applies only to “unlawful *actions*” and not to agency “*inaction*” like the delay
13 Petitioners challenge here. Resp. MTD 6:21-22 (emphasis in original). That is not what the
14 statute says. ORS 14.175 applies to challenges to an “act, policy or practice” of a public body.
15 Petitioners challenge OED’s practice of months-long, widespread delay in paying or denying
16 claims for benefits. That practice remains in effect and is harming tens of thousands of
17 individuals who are still waiting. If Respondents obtain dismissal of this action by selectively
18 fast-tracking Petitioners’ applications for payment, the challenged practice will evade judicial
19 review. Furthermore, several Petitioners are still waiting to receive full payment; until they
20 receive such payment (or a denial) for each week claimed, their claims are not moot.
21

22 Respondents next assert that this court lacks authority under ORS 183.490 to order OED
23 to make its unemployment benefits application system accessible for claimants with Limited
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1 English Proficiency (“LEP”). Resp. MTD, 8:19-9:7. That argument also fails. ORS 183.490
2 allows a challenge to agency action unlawfully delayed or unreasonably withheld. Petitioners
3 allege that OED has failed to comply with a clear legal duty, the obligation to provide LEP
4 claimants with reasonable access to the unemployment benefits system, leading to unreasonably
5 delayed agency action (for LEP claimants who manage to submit an application) and to
6 unlawfully withheld agency action (for LEP claimants who cannot even get through the door).
7 This Court has authority under ORS 183.490 to direct OED to act by making its application
8 system available to LEP claimants because equal access to the application is necessary for those
9 applicants to receive the agency action to which they are entitled.
10

11 In the alternative, Respondents contend that Petitioners have failed to state a claim for
12 relief in their Third Claim because the Amended Petition acknowledges that OED has taken
13 some steps to expand language access to its application systems. Resp. MTD, 9:20-10:6. This
14 argument ignores Petitioners’ allegations that, despite those steps, LEP claimants do not have
15 equal access to the unemployment benefits system, and that they suffer application delays or
16 cannot apply at all as a result. The fact that Respondents have taken some action to make their
17 application system more accessible does not shield them from judicial review of a claim that
18 many applicants still do not have access.
19

20 Petitioners respectfully request that the Court deny Respondents’ Motion to Dismiss in its
21 entirety.
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1 **POINTS AND AUTHORITIES**

2 **I. Legal Standard**

3 In deciding Respondents’ motion to dismiss Petitioners’ First and Second Claims for lack
4 of subject matter jurisdiction, the Court is not limited to the allegations of the Amended Petition,
5 but also may consider facts outside the pleadings. *Black v. Arizala*, 337 Or 250, 265 (2004).
6 However, in adjudicating the motion to dismiss Petitioners’ Third Claim for failure to state a
7 claim cognizable under ORS 183.490, the Court must accept as true all well-pleaded factual
8 allegations and give Petitioners the benefit of any favorable inferences that may reasonably be
9 drawn from those allegations. *Bailey v. Lewis Farm, Inc.*, 343 Or 276, 278 (2007). What
10 follows is a summary of relevant facts alleged in the Amended Petition to Compel Agency
11 Action (“Amended Petition”) and of additional facts introduced by declaration in support of this
12 response.
13

14 **II. Factual and Procedural Background**

15 **A. Petitioners’ First and Second Claims for Relief**

16 Petitioners’ First and Second Claims for Relief ask the Court to order Respondents to act
17 promptly on applications for several types of unemployment benefits. In the Amended Petition
18 and throughout this brief, Petitioners will refer to the different types of benefits with the
19 following acronyms:
20

- 21 • “Regular UI” refers to the traditional unemployment insurance benefits administered
22 by OED;
- 23 • “PUA” refers to Pandemic Unemployment Assistance, a COVID-19 program, which
24 makes unemployment benefits available to individuals who do not qualify for Regular
25 UI, for example self-employed and contract workers, Amended Petition ¶ 42(c);
26

- 1 • “PEUC” refers to Pandemic Emergency Unemployment Compensation, another
2 COVID-19 program, which extends by 13 weeks the duration Regular UI is available,
3 *id.* ¶ 42(b);
- 4 • “PUC” refers to Pandemic Unemployment Compensation, another COVID-19
5 program, which increased by \$600 the amount of weekly unemployment benefits paid
6 from late March through July 2020, *id.* ¶ 42(a);
- 7 • “EB” refers to Extended Benefits, a program that predates the COVID-19 emergency
8 and provides, for those eligible for Regular UI, up to 20 weeks of additional
9 unemployment benefits during periods of high unemployment in Oregon, *id.* ¶ 44.

10 Respondents assert they have “processed” 99% of claims for unemployment benefits
11 received during 2020. Respondents’ Reply in Support of Motion for Protective Order, “Resp.
12 PO Reply”, 6:6-8. Respondents do not define “processed,” which does not mean a final decision
13 on a claim. In a large percentage of cases, “processed” means that OED is still working on the
14 claim and likely will continue to work on it for several months more. Amended Petition ¶ 52.
15 For example, OED estimates that post-processing assignment to an adjudicator will result in a
16 delay of 12 to 14 *more* weeks, in addition to the weeks or months the individual waited for the
17 application to be processed, before the claim is paid or denied. *See Oregon Employment*
18 *Department, Frequently Asked Questions, Check on my claim/claim status, Question 9,*
19 <https://unemployment.oregon.gov/frequently-asked-questions> (last visited Sept. 4, 2020). When
20 the Amended Petition was filed, most Petitioners had been waiting more than 15 weeks for
21 payment or denial, often because they had been placed in adjudication. *Id.* ¶¶ 48, 52-53, 65, 146,
22 150-52.

23 Petitioners’ First and Second Claims also ask the Court to order Respondents to act with
24 alacrity on applications for PUA. *See id.* ¶ 59. PUA is available to individuals who are
25 ineligible for Regular UI, for example self-employed workers or contract workers. *Id.* ¶¶ 42, 61.
26

1 Respondents force many PUA applicants to first apply for Regular UI and wait for weeks or
2 months to have their applications denied before they are considered for PUA. *Id.* ¶ 63. As a
3 result, the lengthy and burdensome Regular UI application process has also burdened PUA
4 applicants. *Id.* ¶ 65. Even after a Regular UI denial, there has been widespread unreasonable
5 delay in paying or denying PUA applications. OED has made much of “processing” the PUA
6 backlog but, as noted above, “processed” does not mean paid. Tens of thousands of Oregonians
7 who waited months for their claims to be processed now face an additional months-long wait in
8 adjudication. *See* Mike Rogoway, *Oregon ‘solidly on track’ to clear backlog of unprocessed*
9 *jobless claims, but tens of thousands still waiting for checks*, The Oregonian/OregonLive (Jul.
10 29, 2020), [https://www.oregonlive.com/business/2020/07/oregon-solidly-on-track-to-clear-](https://www.oregonlive.com/business/2020/07/oregon-solidly-on-track-to-clear-backlog-of-unprocessed-jobless-claims-but-tens-of-thousands-still-waiting-for-checks.html)
11 [backlog-of-unprocessed-jobless-claims-but-tens-of-thousands-still-waiting-for-checks.html](https://www.oregonlive.com/business/2020/07/oregon-solidly-on-track-to-clear-backlog-of-unprocessed-jobless-claims-but-tens-of-thousands-still-waiting-for-checks.html).
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14 Lastly, Petitioners’ First and Second Claims ask the Court to order Respondents to act
15 promptly on applications for PEUC and EB, which extend Regular UI benefits by 13 and up to
16 20 weeks, respectively. Amended Petition ¶¶ 68, 70. Because the only eligibility requirement
17 differentiating PEUC/EB from Regular UI is the requirement to exhaust 26 weeks of Regular UI,
18 Respondents could automatically transition people from to PEUC or EB when they exhaust their
19 original benefits. *See id.* ¶ 71. Instead, Respondents have forced people to submit new
20 applications for PEUC or EB after exhausting their Regular UI, which has resulted in
21 interruptions in benefit payments lasting weeks or months. *Id.* ¶ 72.
22

23 While thousands of applicants are still waiting months to receive their Regular UI, PUA,
24 PEUC, and EB benefits, Respondents have selectively fast-tracked the claims of Petitioners in
25 this lawsuit. Petitioners initiated this action on July 7, 2020. At that time, twelve of the thirteen
26

1 Petitioners had not been paid any benefits. Petition to Compel Agency Action ¶¶ 79, 85, 88, 89,
2 91, 93, 99, 100, 104, 109, 112, 115. The remaining Petitioner, Brenda Cook, had been paid some
3 benefits, but was not receiving ongoing weekly payments. *Id.* ¶ 96. By the time Petitioners filed
4 the Amended Petition on July 27, 2020, adding four new petitioners and class allegations, OED
5 had paid two of the original thirteen Petitioners in full and another seven had received partial
6 payments, Amended Petition ¶¶ 89, 91, 94, 97, 101, 105, 110, 114, 117.

8 Today, a majority of the seventeen Petitioners have been paid in full for all weeks
9 claimed. However, that is not the case for all Petitioners. For example, Petitioner Florentina
10 Flores de Vega has not been paid for any weeks, Resp. MTD 3:18-21; Petitioners Stacey
11 Quintero and Brenda Cook have received the \$205 weekly minimum in PUA benefits and are
12 waiting for OED to pay them their full benefit amounts based on their 2019 income, Declaration
13 of Stacey Quintero ¶¶ 6-8 and Declaration of Brenda Cook ¶¶ 4-6; and Petitioner Vicki Petrotta
14 received some of the unemployment benefits payments she applied for, but is entirely missing
15 payment for some weeks, Declaration of Vicki Petrotta ¶ 5.

17 **B. Petitioners' Third Claim for Relief**

18 Petitioners' Third Claim asks the Court to order Respondents to provide reasonable
19 access to the unemployment benefits system to applicants with limited English proficiency
20 ("LEP"). The UI application that may be filled out and submitted online, which is the most
21 efficient and most used method for applying, is available only in English. Amended Petition ¶
22 55. Thus, LEP claimants must call OED or an OED contractor and apply over the phone, or
23 download a paper copy of the UI application in Spanish, fill it out, and mail it to OED. *Id.*
24 Callers often spend hours on hold because phone line staffing and hours are insufficient to meet
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1 demand. *Id.* ¶ 50. Furthermore, when a caller is fortunate enough to get through to OED on the
2 phone, there often are no bilingual staff or interpreters available to assist LEP claimants. *Id.*
3 ¶ 58. As a result, LEP claimants often wait for hours on hold only to hear that nobody who
4 speaks their language is available to assist them. *Id.* ¶ 54.

5
6 Petitioner Florentina Flores de Vega, for example, cannot speak, read, or write in English.
7 *Id.* ¶ 79. In approximately mid-March, she went to the Woodburn WorkSource Office to apply
8 for unemployment, but the office was closed. After numerous phone calls, getting only busy
9 signals, Ms. Flores de Vega learned of another number to call. In early June, Ms. Flores de Vega
10 finally spoke with someone at the WorkSource office and was told that someone who spoke
11 Spanish would call her back later that week, but the promised call did not come. *Id.* ¶ 81. When
12 an employee from OED finally called Ms. Flores de Vega back, she had found a new job, and the
13 employee did not inform her that she could still apply for unemployment benefits for those
14 weeks that she was unemployed. *Id.* ¶ 82. As a result, Ms. Flores de Vega did not understand
15 that she could apply for unemployment benefits retroactively. *Id.* ¶¶ 82-83.

16
17 Ms. Flores de Vega later learned that she could apply for the retroactive benefits, but she
18 was unable to do so on her own because of the language barriers. She did not successfully
19 submit her application until an attorney assisted her in completing her application for PUA. Ms.
20 Flores de Vega submitted her application on August 28, 2020. Declaration of Olga Bautista ¶ 4.

21
22 Unfortunately, the inequity for LEP applicants does not end when they have submitted
23 their initial application. For example, Petitioner Htoo Ler Paw, who speaks Karen and does not
24 understand English, applied for UI through the online English application on approximately
25 March 20 with the help of her former manager, who speaks both English and Karen. Amended
26

1 Petition ¶ 85. Several weeks after she applied for unemployment benefits, Ms. Paw received a
2 document from OED asking that she send them a copy of her green card. *Id.* ¶ 87. She mailed a
3 copy of her green card. *Id.* The following week, she received another letter from OED asking
4 for a copy of her green card, and she complied again. *Id.* This pattern continued, and Ms. Paw
5 mailed a copy of her green card a total of five times without receiving any payments. *Id.* Ms.
6 Paw called OED repeatedly to attempt to resolve the issue, but a Karen interpreter was never
7 available. *Id.* She did not receive any payments until after Respondents knew she was a named
8 Petitioner in this putative class action. *Id.* ¶ 90; *see also* Declaration of Lindsy Leahy in Support
9 of Resp. MTD 2:24-26.
10

11 **III. Argument**

12 **A. This Court has Subject Matter Jurisdiction over Petitioners’ First and** 13 **Second Claims**

14 Respondents argue that the Court lacks subject matter jurisdiction over Petitioners’ First
15 and Second Claims, because they finally received some benefit payments after this case was
16 filed. Resp. MTD, 8:9-13. Respondents carry the burden to establish that the case is moot. *See*
17 *Brummett v. Psychiatric Security Review Bd.*, 315 Or 402, 407 (1993).
18

19 **i. Petitioners’ Claims Are Capable of Repetition Yet Evading Review**

20 ORS 14.175 grants courts jurisdiction over certain moot claims against public bodies.
21 The statute provides that, “[i]n any action in which a party alleges that an act, policy or practice
22 of a public body . . . is unconstitutional or otherwise contrary to law,” the court

23 may issue a judgment on the validity of the challenged act, policy or practice even
24 though the specific act, policy or practice giving rise to the action no longer has a
25 practical effect on the party if the court determines that:

- 26 (1) The party had standing to commence the action;

1
2 (2) The act challenged by the party is capable of repetition, or the policy
or practice challenged by the party continues in effect; and

3 (3) The challenged policy or practice, or similar acts, are likely to evade
4 judicial review in the future.

5 ORS 14.175. A challenged practice is “likely to evade judicial review” if it is too short in
6 duration to be fully litigated before it ceases or expires. *See Penn v. Board of Parole and Post-
7 Prison Supervision*, 365 Or. 607, 623 (2019).

8 When interpreting ORS 14.175, Oregon courts look to federal law, because ORS 14.175
9 borrowed and codified the judicially created “capable of repetition” doctrine. *See Couey v.
10 Atkins*, 357 Or. 460, 480-81 (2015) (explaining that the doctrine has “deep roots” in nineteenth
11 century case law and was first recognized in a 1911 U.S. Supreme Court case). Some federal
12 courts have adopted a rule of thumb that the third “likely to evade judicial review” prong of the
13 test is satisfied if it will take at least two years to obtain a final judicial decision on a challenge to
14 a federal administrative action. *E. Or. Mining Ass’n v. DEQ*, 360 Or 10, 17-18 (2016). In
15 addition, according to federal courts, an act is likely to evade judicial review if, in a putative
16 class action, the defendant can “pick[] off lead plaintiffs[’]” claims by providing them with
17 relief. *See, e.g., Al Otro Lado Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1303 (S.D. Cal. 2018).
18 Providing a form of injunctive relief to the class representatives is a potential “buy-off” strategy
19 that effectively renders transitory the claims they seek to assert on behalf of the class. *Id.* at
20 1304.
21
22

23 Petitioners’ First and Second Claims for Relief satisfy each of the three elements of ORS
24 14.175. First, Petitioners had standing to commence the action because they had been waiting
25 for months without a decision on their claims for unemployment benefits, and they had not been
26

1 paid all benefits they were due, when they filed this action. Second, Respondents have continued
2 their practice of delaying decisions on claims for unemployment benefits. *See* Kate Davidson,
3 *Oregon unemployment problems under microscope at legislative hearing*, Oregon Public
4 Broadcasting (Sept. 1, 2020) (legislative testimony of Respondent David Gerstenfeld
5 acknowledging that more than 50,000 people are still waiting for final decisions on their claims
6 for benefits), [https://www.opb.org/article/2020/09/01/unemployment-benefits-oregon-senate-](https://www.opb.org/article/2020/09/01/unemployment-benefits-oregon-senate-hearing/)
7 [hearing/](https://www.opb.org/article/2020/09/01/unemployment-benefits-oregon-senate-hearing/); Bill Poehler, *Employment department failure ‘one of the largest disasters in state*
8 *government history’*, Salem Statesman Journal (Sept. 3, 2020),
9 [https://www.statesmanjournal.com/story/news/2020/09/03/oregon-employment-department-](https://www.statesmanjournal.com/story/news/2020/09/03/oregon-employment-department-committee-state-unemployment/5708619002/)
10 [committee-state-unemployment/5708619002/](https://www.statesmanjournal.com/story/news/2020/09/03/oregon-employment-department-committee-state-unemployment/5708619002/). Third, the challenged practice is likely to evade
11 judicial review because this case is not likely to be resolved, including appeals, in the several
12 months of delay experienced by the individual Petitioners. *See Eastern Or. Mining*, 360 Or at
13 17-18. The challenged practice is also likely to evade judicial review because of the risk
14 Respondents will pick off named Petitioners; while tens of thousands of applicants continue to
15 wait, OED has paid benefits to all but one Petitioner, and has paid most Petitioners in full. *See*
16 Resp. MTD 3:17-5:24; *Al Otro Lado*, 327 F. Supp. 3d at 1303. Therefore, Petitioners’ First and
17 Second Claims fall within ORS 14.175 and should not be dismissed.

20 Respondents, however, argue that “ORS 14.175 applies only to unconstitutional or
21 unlawful *actions*,” and that Petitioners’ claims fail because they challenge *inaction*. Resp. MTD,
22 6:21-22 (emphasis in original). That is transparently wrong; ORS 14.175 explicitly applies to an
23 “act, policy or practice.” The use of “policy” and “practice” in addition to “act” is strong
24 evidence that policies and practices include more than just actions. *See* ORS 174.010 (stating
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1 that “where there are several provisions or particulars” of a statute, the construction of the statute
2 must, “if possible . . . give effect to all [provisions].”); *LandWatch Lane Cty. v. Lane Cty*, 364
3 Or. 724, 738 (2019).¹ Furthermore, ample case law acknowledges that widespread delay may
4 amount to a policy or practice. *See, e.g., Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir.
5 1997); *Lyons v. Multnomah Cty.*, 2017 U.S. Dist. LEXIS 157813, *26 (D. Or. July 27, 2017).

7 Respondents also note that “[n]o case has applied ORS 14.175 to a claim to redress
8 agency inaction pursuant to ORS 18[3].490.” Resp. MTD 6:22-25. That is true only because no
9 Oregon courts have addressed the issue. And federal cases have applied the “capable of
10 repetition” doctrine to claims alleging agency inaction. *See, e.g., Al Otro Lado*, 327 F. Supp. 3d
11 at 1303. Accordingly, Respondents’ argument that ORS 14.175 does not apply to claims
12 alleging inaction should be rejected, too.

13
14 **ii. Petitioners’ Claims Are Not Moot Because Respondents Have Not**
15 **Issued Complete and Final Decisions on Many of Petitioners’**
16 **Applications for Unemployment Benefits**

17 Respondents’ mootness argument—that they have adjudicated Petitioners’ applications
18 for unemployment, thereby “grant[ing] the only relief that the Court could grant as to the first
19 and second claims”—also fails on its own terms as to several Petitioners. Resp. MTD, 8:13-14.

20 ¹ Read in isolation, the phrase “[t]he challenged policy or practice, or similar acts” in ORS
21 14.175(3) may sound as though “policy or practice” means a particular type of act, not inaction,
22 on the theory that “acts” could not be “similar” to a “policy or practice” if the policy or practice
23 were one of inaction. In context, however, it is clear that “similar” is intended to describe future
24 acts that are similar to the originally challenged acts, not future acts that are similar to “the
25 challenged policy or practice.” The phrase “similar acts” is necessary because, when a claim is
26 moot, the challenged act itself will often have expired. By contrast, “the challenged policy or
practice” must “continue[] in effect” to satisfy ORS 14.175(2), so the challenged policy or
practice itself might be “likely to evade judicial review.” Thus, ORS 14.175(3) is satisfied if the
challenged policy, the challenged practice, or acts similar to the originally challenged act are
likely to evade judicial review.

1 For example, Petitioner Florentina Flores de Vega attempted to apply for benefits in March and
2 has not received any payments despite submitting a complete application on August 28, 2020,
3 Declaration of Olga Bautista ¶ 4; Petitioners Brenda Cook and Stacey Quintero have received
4 only the minimum weekly amount of PUA (\$205) and have been waiting for more than 7 and 9
5 weeks, respectively, since submitting documentation that they are entitled to a higher weekly
6 amount, Declaration of Stacey Quintero ¶¶ 6-8 and Declaration of Brenda Cook ¶¶ 4-6; and
7 Petitioner Vicki Petrotta is missing payment for several weeks of benefits, Declaration of Vicki
8 Petrotta ¶ 5. Plainly, the claims of these Petitioners are not moot.

10 **B. Petitioners’ Third Claim Is Within the Scope of Claims Authorized by ORS
11 183.490**

12 Respondents have moved to dismiss Petitioners’ Third Claim for failure to state a claim,
13 pursuant to ORCP 21A(8). Resp. MTD, 1:8-13. As observed above, when deciding a motion to
14 dismiss pursuant to ORCP 21A(8), a court accepts as true all well-pleaded allegations and gives
15 the petitioner the benefit of favorable inferences that may be drawn from those allegations.
16 *Bailey v. Lewis Farm, Inc.*, 343 Or 276, 278 (2007).

17 **i. The Agency Action Petitioners Seek in Their Third Claim Is Access to
18 the Unemployment Benefits System for LEP Claimants**

19 ORS 183.490 allows a court to “compel an agency to act where it has unlawfully refused
20 to act or make a decision or unreasonably delayed taking action or making a decision.”
21 Petitioners’ Third Claim for Relief—which asks the Court to compel OED to provide LEP
22 claimants reasonable access to the unemployment benefits application system—falls squarely
23 within that statute.

24 Respondents’ Motion to Dismiss characterizes Petitioners’ Third Claim for relief as a
25 request for “specific policies,” “specific action,” to “compel the agency to act in a specific way.”
26

1 Resp. MTD, 7:23-24, 9:7, 10:27. To be clear, Petitioners’ Third Claim for relief does not ask the
2 Court to order Respondents to implement any specific policies or actions. Rather, it merely asks
3 the Court to order the agency to act with alacrity in affording non-English speakers access to the
4 benefits application process. Amended Petition, *Prayer*.

5
6 OED has a legal obligation to act on all applications for unemployment benefits in a
7 reasonably prompt manner. *See Cal. Dep’t of Human Res. Dev. v. Java*, 402 U.S. 121, 131
8 (1971). Section 602 of Title VI of the Civil Rights Act prohibits exclusion from participation on
9 the ground of national origin in any federally assisted program. 42 U.S.C. § 2000d. Language-
10 based exclusion constitutes a form of national origin discrimination under Title VI. *See, e.g.,*
11 *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (applying Title VI to claims that Chinese-speaking
12 students received fewer benefits than English-speaking students in San Francisco public
13 schools); *United States v. Maricopa Cty.*, 915 F. Supp. 1073, 1079 (D. Ariz. 2012)
14 (“longstanding case law, federal regulations and agency interpretation of federal regulations hold
15 language-based discrimination constitutes a form of national origin discrimination under Title
16 VI”).

17
18 Respondents do not dispute that they are legally obligated to provide equal access to LEP
19 claimants. Instead, they argue that ORS 183.490 does not give this court authority to order them
20 to provide that access. No reported Oregon cases involve denial-of-access claims under ORS
21 183.490. But federal courts, applying 5 USC § 706(1), the parallel provision of the federal APA,
22 have held that such claims are viable. *Cf. AFSCME, Local 2043 v. City of Lebanon*, 360 Or 809,
23 825 (2017) (approving consideration of federal case law addressing the interpretation of a federal
24 statute when construing the meaning of a textually similar provision of Oregon law). For
25
26

1 example, in *Al Otro Lado*, the plaintiffs asserted that they and a class of similarly situated
2 individuals were being denied access to the asylum application system at the U.S.-Mexico
3 border. 327 F. Supp. 3d at 1292-93. The court held that the plaintiffs had stated cognizable
4 claims to compel agency action unlawfully withheld or unreasonably delayed. *Id.* at 1311.
5

6 Petitioners allege that LEP claimants face language barriers so burdensome that some
7 people, such as Petitioner Florentina Flores de Vega, are unable to even submit an application
8 without assistance. *See* Amended Petition ¶¶ 10, 54-58, 79-83. They further allege that these
9 language barriers lead to additional delays in making final decisions on applications like the one
10 submitted by Petitioner Htoo Ler Paw. *Id.* ¶¶ 9, 54-58, 84-89. Thus, Petitioners have adequately
11 alleged that Respondents' failure to meet their obligation to provide reasonable access to LEP
12 claimants has prevented those claimants from accessing the unemployment benefits application
13 system. At this stage of the proceedings, those allegations must be taken as true. Petitioners
14 further allege that, if OED were to provide equal access to its application systems as required by
15 law, LEP claimants would receive benefits (or denials and the right to appeal) more quickly.
16 Thus, a court order requiring OED to comply with this clear legal duty is a proper request under
17 ORS 183.490. If such a targeted order were beyond the court's authority under ORS 183.490,
18 then an entire group of Oregonians would have no meaningful way to enforce their right to a
19 timely decision on their claims for unemployment benefits. That is not what the Oregon
20 Legislature intended.
21
22

23 **ii. The Order Petitioners Seek in Their Third Claim Is a Proper Order**
24 **to Act with Alacrity**

25 Respondents also that argue that ORS 183.490 does not support any claim asking a court
26 to tell an agency "how" to act. *Resp. MTD*, 8:20 (emphasis omitted). In support of that position,

1 Respondents cite *Mendieta v. State by & Through Division of State Lands*, 148 Or App 586
2 (1997). The holding of that case—that ORS 183.490 does not allow a plaintiff to challenge an
3 agency’s final order—is clearly inapposite because Petitioners have not challenged an agency’s
4 final order. *Mendieta*, 148 Or App at 598. Without proper context, however, some particular
5 sentences in *Mendieta* may appear to support Respondents’ position. More specifically,
6 *Mendieta* rejects the position that “ORS 183.490 authorizes courts to compel administrative
7 agencies not merely to act, but also to act correctly[,]” and it endorses a rule that the statute “is
8 limited to compelling an agency to proceed with greater alacrity, not to proceed in a particular
9 manner.” *Id.* at 598 (emphasis, citations and internal quotation marks omitted).

11 The context of these statements, however, demonstrates that the court was drawing a
12 distinction between the court’s authority to compel an agency to act (or to act more quickly),
13 pursuant to ORS 183.490, and the court’s authority to review the substance of agency decisions
14 in contested and non-contested cases, pursuant to other provisions of the Oregon APA. The
15 court was disapproving of prior cases brought under ORS 183.490, in which courts had
16 effectively overridden agency’s final orders. *Id.* at 595-98. The court also explained that it is
17 “no surprise” that ORS 183.490 “does not mention affording relief for erroneous agency
18 action[,]” because “the APA elsewhere expressly provides for review in those circumstances”
19 under ORS 183.482 and 183.484. *Id.* at 594. That explanation demonstrates that the court’s
20 discussion was aimed at the contrast between judicial review of an agency’s failure to act and
21 judicial review of an agency’s final order. Here, the whole point of Petitioners’ Third Claim for
22 Relief is that they have been unable to get the final agency orders (payment or denial of claims
23 for unemployment benefits) that they seek. Thus, *Mendieta*’s rule does not require dismissal.

1 Petitioners do not seek equal access to the unemployment benefits application system as
2 an end in itself. Equal access is, rather, a *means* to the agency action that has been unlawfully
3 withheld or unreasonably delayed: payment or denial of claims for unemployment benefits. Ms.
4 Flores de Vega and similarly situated LEP applicants plainly cannot seek judicial review of the
5 substance of OED’s decision on their claims for benefits because OED has not made such a
6 decision; indeed, they assert that OED has effectively refused to accept some of their claims.
7 ORS 183.490 gives this Court the power to remedy these delays and denials of agency action. In
8 this context, an order to provide equal access to OED’s benefits application system *is* an order to
9 act with alacrity.

11 **iii. Respondents’ Limited Steps to Improve Language Access Do Not**
12 **Shield Their Failure to Afford Access to LEP Claimants from Judicial**
13 **Review**

14 Respondents next argue that, because the Amended Petition describes some steps OED
15 has taken to improve access for LEP claimants, this Court cannot compel them to take further
16 steps to fulfill that duty. Resp. MTD, 10:8-9. In support of that position, they cite *State v.*
17 *Oregon Health & Sciences University* (“OHSU”), 205 Or App 64, 75 (2006). As Respondents
18 note, that case held that ORS 183.490 does not provide a remedy for tortious or unlawful actions
19 because those actions are affirmative misconduct, and ORS 183.490 provides a remedy only for
20 agency inaction. Resp. MTD 9:8-19 (citing *OHSU*, 205 Or App at 75). That holding is
21 inapposite because Petitioners do not seek relief from an agency’s tort, breach of contract, or
22 other affirmative misconduct. *See id.* Instead, Petitioners seek relief from the agency’s inaction
23 and delay in providing LEP claimants with reasonable access to unemployment benefits.

25 Respondents also cite *Salibello v. Oregon Board of Optometry*, 276 Or App 363 (2016),
26

1 in support of their position that “a claim is moot where the agency has already acted.” Resp.
2 MTD, 6:17-18. *Salibello* contradicts Respondents’ position. In that case, the agency had
3 investigated a complaint against the petitioner. *Id.* at 365. The petitioner claimed that the
4 agency had a duty to disclose its “investigation documents” which, he claimed, included a full
5 summary of the investigation against him. *Id.* at 367. The agency had already taken some steps
6 to fulfill its duty to disclose the substance of its investigation, including sending the petitioner a
7 five-paragraph summary. *Id.* at 366. The court held that ORS 183.490 allowed the petitioner to
8 pursue his demand for the full investigation summary, at least to the extent the agency had not
9 issued a final decision about whether he was entitled to that summary. *Id.* at 370. Thus, ORS
10 183.490 provided a process for the petitioner to compel the agency to take further action to fulfill
11 its legal duty to disclose investigation documents, even though the agency had already taken
12 some action to fulfill that duty. *See id.*

15 Here, Petitioners allege that Petitioner Florentina Flores de Vega, Petitioner Htoo Ler
16 Paw and a class of similarly situated LEP applicants have been denied equal access to the
17 unemployment benefits application system. At the motion to dismiss stage, it does not matter if
18 OED has taken some steps to afford that access, because Petitioners allege that they are being
19 denied timely agency action *notwithstanding* those steps. This Court has the authority to compel
20 OED to fulfill its legal duty to make reasonably prompt decisions on *all* claims for
21 unemployment benefits by providing access to LEP claimants. Like in *Salibello*, that fact that
22 the agency has already taken some steps toward fulfilling that duty does not deprive the court of
23 jurisdiction to order relief.

25 ///

1 **iv. Petitioners’ Requests for Relief Are Permitted Under ORS 183.490**
2 **Because They Seek an Order Directing the Agency to Take Discrete,**
3 **Legally Required Action**

4 Although *Mendieta* makes clear that an order to act with alacrity cannot be an order
5 directing an agency to change the substance of its decision, neither *Mendieta* nor any other
6 Oregon case explores in depth what constitutes an order to act with alacrity. However, federal
7 cases interpreting 5 USC § 706(1)—which, as noted above, is very similar to ORS 183.490—
8 have addressed this issue.

9 In *Norton v. Southern Utah Wilderness Alliance (“SUWA”)*, 542 U.S. 55, 64 (2004), the
10 Supreme Court explained that the APA does not permit petitioners to seek “*wholesale*
11 improvement of [a] program by court decree” and must “direct its attack against some particular
12 ‘agency action’ that causes it harm.” In *SUWA*, the Court discussed its decision in *Lujan v.*
13 *National Wildlife Federation*, 497 U.S. 871 (1990). In that case, the National Wildlife
14 Federation sought a court order requiring the Bureau of Land Management to take a number of
15 actions to protect public lands, including revising its land use plans and considering multiple-use
16 land designation. *SUWA*, 542 U.S. at 65. The Court held that it lacked authority to issue such an
17 order because the agency was not required by law to take the actions requested. *Id.*

18 By contrast, the APA does give courts authority to direct program-wide agency action
19 when there *is* a discrete requirement to act *and* the agency is systematically refusing to take that
20 action (or is systematically delaying in taking that action) for a group of individuals. *See Al Otro*
21 *Lado, Inc.*, 327 F. Supp. 3d at 1312-13. Such relief may, where appropriate, be ordered on a
22 class-wide basis because discrete agency action is required as to each member of the class. *See*
23 *id.*

1 *Al Otro Lado* is illustrative. The plaintiffs in that case alleged that U.S. Customs and
2 Border Patrol had a practice of refusing to give certain asylum seekers access to the asylum
3 process. *Id.* at 1311. This practice took multiple forms: some plaintiffs alleged that the agency
4 had told them they could not seek asylum in the United States, while others alleged that, during
5 their initial interviews, agency officials coerced them into saying (untruthfully) that they were
6 not afraid of being persecuted in their home countries. *Id.* at 1292. The agency moved to
7 dismiss, contending that the APA was not a vehicle for asserting “pattern or practice” claims
8 against a federal agency. *Id.* at 1311. The court rejected that argument, noting that the plaintiffs
9 had provided examples of specific incidents in which they had been denied access to the asylum
10 process and cited numerous reports from non-governmental organizations documenting hundreds
11 of examples of similar denials. *Id.* at 1313. Because each plaintiff (and each putative class
12 member) had a discrete and legally enforceable right to access the asylum process, the court
13 concluded that the plaintiffs’ claims could proceed consistent with *SUWA*. The programmatic
14 nature of the relief sought was “merely a feature of the class action nature of th[e] case.” *Id.*

17 Here, as in *Al Otro Lado*, Petitioners seek a court order directing the agency to take
18 actions that are discrete and legally required. Like the putative class representatives in *Al Otro*
19 *Lado*, Petitioners in this putative class action have merely asked OED to act in accordance with
20 established legal requirements in taking agency action: in this case, providing equal access to the
21 unemployment benefits application system, accepting applications, and promptly paying or
22 denying those claims. *See Al Otro Lado*, 327 F. Supp. 3d at 1312-13. Accordingly, this Court
23 should deny Respondents’ motion to dismiss Petitioners’ Third Claim.

25 ///

1 **CONCLUSION**

2 For the reasons discussed above, Petitioners respectfully request that the Court deny
3 Respondents' Motion to Dismiss in its entirety.
4

5
6 DATED: September 8, 2020
7

8 By:

/s/ Kelsey Heilman

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19 Attorneys for Petitioners/Trial Attorneys
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IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

FLORENTINA FLORES DE VEGA,
HTOO LER PAW, HEATHER
FRANKLIN, VICKI POTROTTA,
WARREN CHAN, BRENDA COOK,
LISA EXTEROVICH, KINNARI SHAH,
ABDELKADIR ABDELKADIR
MOKRANI, DIANA OROPEZA, DAVID
KNELL, BRITTNEY CIANI, STACEY
QUINTERO, KATHY SELVAGGIO,
TRACY SOLORZANO, TERRY
PATTERSON, and ERIN LACERRA, on
behalf of themselves and all others
similarly situated,

Petitioners,

v.

OREGON EMPLOYMENT
DEPARTMENT and DAVID
GERSTENFELD,

Respondents.

Case No. 20CV23377

**DECLARATION OF OLGA BAUTISTA IN
SUPPORT OF PETITIONERS' RESPONSE
TO RESPONDENTS' MOTION TO DISMISS**

I, OLGA BAUTISTA, hereby declare:

1. I am an outreach worker at the Woodburn office of the Legal Aid Services of Oregon Farmworker Program.

- 1 2. My office is representing Florentina Flores de Vega on the limited matter of
2 helping her to apply for unemployment benefits. My office does not represent
3 Ms. Flores de Vega in the above referenced class action litigation.
4
5 3. I have been helping to work with Ms. Flores de Vega as I speak her native
6 language, Mixteco Alto.
7
8 4. My office helped Ms. Flores de Vega file her application for unemployment
9 benefits on August 28, 2020. We helped Ms. Flores de Vega fill out the paper
10 application and then we submitted her application on that date via fax to the
11 Oregon Employment Department.

11 **I hereby declare that the above statement is true to the best of my knowledge and belief,**
12 **and that I understand it is made for use as evidence in court and is subject to penalty of**
13 **perjury.**

14 09/04/2020

15 Date



15 Olga Bautista

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IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

FLORENTINA FLORES DE VEGA,
HTOO LER PAW, HEATHER
FRANKLIN, VICKI POTROTTA,
WARREN CHAN, BRENDA COOK,
LISA EXTEROVICH, KINNARI SHAH,
ABDELKADIR ABDELKADIR
MOKRANI, DIANA OROPEZA, DAVID
KNELL, BRITTNEY CIANI, STACEY
QUINTERO, KATHY SELVAGGIO,
TRACY SOLORZANO, TERRY
PATTERSON, and ERIN LACERRA, on
behalf of themselves and all others
similarly situated,

Petitioners,

v.

OREGON EMPLOYMENT
DEPARTMENT and DAVID
GERSTENFELD,

Respondents.

Case No. 20CV23377

**DECLARATION OF VICKI PETROTTA IN
SUPPORT OF PETITIONERS' RESPONSE
TO RESPONDENTS' MOTION TO DISMISS**

I, VICKI PETROTTA, hereby declare:

1. I am one of the petitioners in this matter.
2. I am a resident of Washington County.

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3. I work as a housecleaner. My work slowed down tremendously due to COVID 19 in March. I applied for unemployment benefits in April of this year.

4. I was receiving confusing notices from the OED and not receiving any benefits for months. I tried to reach the OED but I could not get through by phone. I was worried and anxious because my income was so low and I was not receiving unemployment benefits.

5. Almost immediately after this lawsuit was filed with my name as a Petitioner in the case, I suddenly received about 6 weeks worth of unemployment benefits. Since then, I received payment for two additional weeks.

I believe that I have not been paid benefits that I am owed for weeks at the end of March and the beginning of April. Additionally, I am still waiting for payment of benefits for approximately 4 weeks in July and August that I have claimed, but have not been processed yet.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty of perjury.

Sept 4 2020
Date

Vicki J. Petrotta
Vicki Petrotta

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IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

FLORENTINA FLORES DE VEGA,
HTOO LER PAW, HEATHER
FRANKLIN, VICKI POTROTTA,
WARREN CHAN, BRENDA COOK,
LISA EXTEROVICH, KINNARI SHAH,
ABDELKADIR ABDELKADIR
MOKRANI, DIANA OROPEZA, DAVID
KNELL, BRITTNEY CIANI, STACEY
QUINTERO, KATHY SELVAGGIO,
TRACY SOLORZANO, TERRY
PATTERSON, and ERIN LACERRA, on
behalf of themselves and all others
similarly situated,

Petitioners,

v.

OREGON EMPLOYMENT
DEPARTMENT and DAVID
GERSTENFELD,

Case No. 20CV23377

**DECLARATION OF BRENDA COOK IN
SUPPORT OF PETITIONERS' RESPONSE
TO RESPONDENTS' MOTION TO DISMISS**

1 Respondents.
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4 I, BRENDA COOK, hereby declare:


- 5 1. I am one of the petitioners in this matter.
- 6 2. I am the owner of B Rustic & Restoration. I work with salvaged products and
7 reclaimed wood to create furniture, art, signage, and other products. I opened my
8 business in September 2019.
- 9 3. I first received Pandemic Unemployment Assistance (“PUA”) payments from the
10 Oregon Employment Department (“OED”) on May 22, 2020. I received irregular
11 payments in June and July. I received regular weekly payments in August.
- 12 4. As of today, I have been partially paid for all weeks I have claimed through the
13 week ending August 29, 2020. For each week, I have received \$205, which I
14 believe is the minimum PUA payment. For weeks through the end of July 2020, I
15 also received a \$600 supplemental PUC payment.
- 16 5. Based on my 2019 net income, I believe I am eligible for more than the minimum
17 PUA payment.
- 18 6. I submitted my 2019 tax documents to OED 7 weeks ago, on July 18, 2020. I
19 have not received any information from OED about whether I qualify for more
20 than the \$205 PUA minimum, nor have I received confirmation from OED that it
21 received the documents I submitted.
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I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty of perjury.

09/04/2020

Date



Brenda Cook

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IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

FLORENTINA FLORES DE VEGA,
HTOO LER PAW, HEATHER
FRANKLIN, VICKI POTROTTA,
WARREN CHAN, BRENDA COOK,
LISA EXTEROVICH, KINNARI SHAH,
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KNELL, BRITTNEY CIANI, STACEY
QUINTERO, KATHY SELVAGGIO,
TRACY SOLORZANO, TERRY
PATTERSON, and ERIN LACERRA, on
behalf of themselves and all others
similarly situated,

Petitioners,

v.

OREGON EMPLOYMENT
DEPARTMENT and DAVID
GERSTENFELD,

Case No. 20CV23377

**DECLARATION OF STACEY QUINTERO
IN SUPPORT OF PETITIONERS'
RESPONSE TO RESPONDENTS' MOTION
TO DISMISS**

1 Respondents.
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4 I, STACEY QUINTERO, hereby declare:

- 5 1. I am one of the petitioners in this matter.
- 6 2. I am the co-owner of QB's Cleaning & Windows. We specialize in post-
7 construction cleanup.
- 8 3. To the best of my recollection, I applied for Pandemic Unemployment Assistance
9 ("PUA") in late April 2020, shortly after the Oregon Employment Department
10 ("OED") began accepting applications for that program.
- 11 4. When I joined this lawsuit on July 24, I had neither received notice that my
12 application had been approved nor received any payments. At that point, I had
13 been waiting more than 12 weeks (since applying) and more than 18 weeks (since
14 my business closed due to COVID-19) for benefits.
- 15 5. In late July, I received payment for 17 weeks of benefits. I received irregular
16 payments during the month of August.
- 17 6. As of today, I have been partially paid for all weeks I have claimed through the
18 week ending August 29, 2020. For each week, I have received \$205, which I
19 believe is the minimum PUA payment. For weeks through the end of July 2020, I
20 also received a \$600 supplemental PUC payment.
- 21 7. Based on my 2019 net income, I believe I am eligible for more than the minimum
22 PUA payment.
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8. I submitted my 2019 tax documents to OED more than 9 weeks ago, on June 29, 2020. I have not received any information from OED about whether I qualify for more than the \$205 PUA minimum, nor have I received confirmation from OED that it received the documents I submitted.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty of perjury.

09/08/2020



Date

Stacey Quintero

CERTIFICATE OF SERVICE

I, Kelsey Heilman, certify that I served a copy of the foregoing:

**PETITIONERS' RESPONSE TO RESPONDENTS' MOTION TO DISMISS (ORCP 21)
and the DECLARATIONS OF OLGA BAUTISTA, BRENDA COOK, VICKI
PETROTTA, and STACEY QUINTERO**

on the following parties:

David Gerstenfeld
Oregon Employment Department
c/o Justin Kidd
Oregon Department of Justice
Justin.Kidd@doj.state.Orus

By the following indicated method(s) set forth below:

- Electronic by the Court's e-filing system pursuant to UTCR at the parties' email addresses as recorded on the date of service in the e-filing system
- Email
- Hand delivery
- U.S. mail
- Facsimile

I declare under penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct.

DATED: September 8, 2020

OREGON LAW CENTER

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