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 Oregon Secretary of State, Respondent, and **JEANNE ATKINS**, **SUSAN CHURCH**, **NADIA DAHAB**, **JANE SQUIRES**, **JENNIFER LYNCH**, and **DAVID GUTTERMAN**, Intervenor-Respondents.	Case No. 21CV40180 **INTERVENOR-RESPONDENTS' RESPONSE TO PETITIONERS' MEMORANDUM**

Pursuant to the Orders of the Presiding Judge dated October 14, 2021, and November 4, 2021, Intervenor-Respondents Jeanne Atkins, Susan Church, Nadia Dahab, Jane Squires, Jennifer Lynch, and David Gutterman submit the following Response to the Memorandum in Support of Petition filed by Petitioners Beverly Clarno, Gary Wilhelms, James L. Wilcox, and Larry Campbell.

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INTRODUCTION

Having failed to produce compelling evidence to support their claims of an unlawful partisan gerrymander, Petitioners resort to misdirection—exaggerating isolated pieces of evidence beyond recognition, ignoring countervailing evidence in the record, and mischaracterizing precedent. Their memorandum is an elaborate sleight-of-hand; by hiding behind legalese and relying on hypothetical horribles, they hope to distract the Panel from the voluminous evidentiary record and detailed findings of the Special Master. But no amount of legal or factual distortion can obscure the reality of this case: Petitioners have failed to establish that the Legislative Assembly drew Oregon's new congressional districts in violation of the Oregon Constitution or state law.

Intervenor-Respondents agree with Petitioners on one point: Oregon's 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 Washington, D.C. But the evidence in this case proves that the requirements of the Oregon Constitution and state law were vindicated this cycle, not violated; the Enacted Map reflects Oregon's previous congressional maps in both design and effect, resulted from a deliberative process and careful application of neutral criteria, and provides no significant partisan advantage to either political party. Accordingly, Intervenor-Respondents respectfully urge the Panel to do what SB 259 requires: because the "legislatively adopted reapportionment plan . . . complies with all applicable statutes and the United States and Oregon Constitutions," the Panel "must affirm the plan."

ARGUMENT

I. The Enacted Map is consistent with Oregon's previous congressional maps in both design and partisan effect.

Petitioners neither engage nor refute the evidence that the Enacted Map is consistent with Oregon's previous congressional maps, in terms of both design and overall partisan effect. Instead, they paint an alternative—and ultimately fantastical—picture in which the Enacted Map is an aberration, the result of unbridled partisanship and undemocratic maneuvering. But as the evidence shows and the Special Master found, this is simply not the case.

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As Intervenor-Respondents observe in their memorandum, the contours of the new congressional districts reflect the historic boundaries of past districts. *See* Intervenor-Respondents' Memorandum in Opposition to Petition ("Intervenors' Mem") 13–16 (Nov 10, 2021). This fidelity to previous plans is particularly apparent when considering the Enacted Map's division of the Portland area. The division of Portland 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 Portland among multiple districts, *see infra* at 11–12; Intervenors' Mem 17–20, 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 Portland, 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 Cnty Cir Ct Oct 25, 2001);[1] *see also* Ex 3017-U. Ten years later, bipartisan votes of the Legislative Assembly approved a congressional plan that again split the Portland area among multiple districts. *See* Intervenors' Mem 15; Ex 3017-R; Ex 3017-Q. Far from reflecting illicit partisan motivation, the Enacted Map's treatment of the Portland area—and the state as a whole—is consistent with maps adopted with both judicial imprimatur and bipartisan support.

The Enacted Map's consistency with previous districts extends to the plan's overall partisan effect. As the unrebutted testimony of Dr. Paul Gronke demonstrates, the Enacted Map's efficiency gap—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." Special Master's Recommended Findings of Fact & Report ("FOF") ¶ 265 (Nov 5, 2021) (quoting Ex 3002 ¶ 25 (declaration of Dr. Gronke)). "Dr. Gronke similarly found that, converting the efficiency gap into

[1] For the Panel's convenience, the *Perrin* slip opinion is attached as Exhibit 3028 to the declaration of Jeremy A. Carp, filed with Intervenor-Respondents' memorandum.

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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 declination, 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.'" *Id.* ¶¶ 266–67 (alterations in original) (quoting Ex 3002 ¶¶ 26–27 (declaration 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—"specifically, '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.'" *Id.* ¶ 269 (quoting Ex 3002 ¶ 30 (declaration 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.

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.

II. Petitioners have failed to prove that the Legislative Assembly drew the Enacted Map with impermissible partisan intent.

Petitioners hinge much of their case on what they view as compelling evidence of the Legislative Assembly's unlawful partisan intent. But their arguments suffer from numerous legal and factual deficiencies. The legal standard they propose ignores binding 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 intent, the Legislative Assembly drew the enacted map based on public input and neutral criteria—resulting in a fair map without improper partisan effect.

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A. Petitioners improperly apply their own legal standard.

Petitioners propose a test for partisan intent based on the U.S. Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 US 252, 97 S Ct 555, 50 L Ed 2d 450 (1977). *See* Petitioners' Mem 13–16. In so doing, they disregard precedent from the Oregon Supreme Court dictating how courts should apply ORS 188.010(2). Although Petitioners briefly quote *Hartung v. Bradbury*, 332 Or 570, 33 P3d 972 (2001), they ignore the Court's relevant analysis. After quoting the text of ORS 188.010 and emphasizing that, "[b]y its terms," the statute requires "consider[ation]" of all subsections in the statute, the Court explained the appropriate standard of review:

> [T]his court will void a reapportionment plan only if we can say from the record that the [Legislative Assembly] either did not consider one or more criteria or, having considered them all, made a choice or choices that no reasonable [mapmaker] would have made. A party challenging a reapportionment plan has the burden to show that one of those circumstances is present.

Id. at 585–87.[2]

Here, there is no indication in the record that the Legislative Assembly failed to consider any of ORS 188.010's enumerated criteria; to the contrary, there is ample evidence that they considered each and, as the Special Master found, drew congressional districts that reflected them. *See* Intervenors' Mem 16–17. Nor is there any evidence that the Legislative Assembly made unreasonable choices in the application of ORS 188.010; for the reasons discussed in Intervenor-Respondents' memorandum and demonstrated throughout their evidentiary submissions, 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. *See id.* at 17–31. Straightforward application of *Hartung*—the most

[2] Although *Hartung* focused on legislative redistricting undertaken by the Secretary of State, its analysis is equally applicable here, since ORS 188.010 applies without distinction to "[t]he Legislative Assembly or the Secretary of State, whichever is applicable."

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on-point decision of the Oregon Supreme Court—thus forecloses Petitioners' claim under ORS 188.010(2).

Even if *Arlington Heights* provided the appropriate standard for Petitioners' statutory or constitutional claims,[3] they misapply it. As Petitioners themselves note, *Arlington Heights* requires a thoughtful, holistic analysis; "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Petitioners' Mem 14 (quoting *Arlington Heights*, 429 US at 266). But although Petitioners list the relevant considerations, they proceed to ignore them—or at least misinterpret what they reveal in this case. Proper application of the *Arlington Heights* factors demonstrates that the Legislative Assembly did *not* act with impermissible partisan intent:

- "The impact of the official action," *Arlington Heights*, 429 US at 266: As the evidentiary record readily proves, the Enacted Map thoughtfully applies ORS 188.010's neutral criteria. *See, e.g.*, Intervenors' Mem 16–31; FOF ¶¶ 33–35, 68, 87, 107, 121, 140, 161, 169, 173, 182, 189, 202, 210. And the expert testimony demonstrated that the Enacted Map provides no pronounced advantage to either political party. *See, e.g.*, FOF ¶¶ 223–87; *infra* at 15–17.
- "The historical background of the decision," *Arlington Heights*, 429 US at 267: As discussed above, the Enacted Map reasonably builds upon Oregon's past maps. *See supra* at 1–3; *see also* Intervenors' Mem 13–16. Given this consistency with maps adopted by courts and bipartisan legislative majorities, the historical background certainly does not

[3] Petitioners, incidentally, suggest that "courts generally use the factors articulated in [*Arlington Heights*]" when "attempting to show that decision-makers acted with a particular impermissible intent." Petitioners' Mem 13. But they neglect to mention that, as one of the cases on which they rely noted, whether the "motivating factor" standard applies in partisan gerrymandering cases is far from settled. *See Ohio A. Philip Randolph Inst. v. Householder*, 373 F Supp 3d 978, 1094–95 (SD Ohio) (three-judge panel) (observing that "district courts have not uniformly adopted either the 'motivating factor' or 'predominant purpose' standard for intent in partisan-gerrymandering cases" and ultimately "electing the predominant-purpose standard"), *vacated on other grounds sub nom Chabot v. Ohio A. Philip Randolph Inst.*, ___ US ___, 140 S Ct 102, 205 L Ed 2d 1 (2019).

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"reveal[] a series of official actions taken for invidious purposes." *Arlington Heights*, 429 US at 267.

- "The specific sequence of events leading up to the challenged decision," *Arlington Heights*, 429 US at 267: The evidentiary record indicates that, after first introducing a plan and then soliciting input from the public and other lawmakers, legislative Democrats revised their initial congressional map in light of the feedback they received—revisions that even legislative Republicans recognized. *See* Intervenors' Mem 4–5; *see also, e.g.*, Ex 3018-A at 11:18–21 (statement of Sen. Knopp).
- "Departures from the normal procedural sequence," *Arlington Heights*, 429 US at 267: As Intervenor-Respondents have noted, House Speaker Tina Kotek's decision to reconstitute the House Redistricting Committee—a fact on which Petitioners extensively rely—was a response to Republican intransigence and consistent with her prerogatives under the House's internal rules. *See infra* at 8–9; Intervenors' Mem 3–4, 32 n.6.
- "The legislative or administrative history," especially "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports," *Arlington Heights*, 429 US at 268: As amply chronicled in the evidentiary record, contemporaneous statements made by members of the Legislative Assembly demonstrate that public testimony and ORS 188.010's neutral criteria informed the creation of the Enacted Map. *See* Intervenors' Mem 2–5, 16–31.

The *Arlington Heights* factors, in short, lead to the conclusion that the Enacted Map was the product of reasonable deliberation and application of neutral principles, not an effort by legislative Democrats to engage in partisan gerrymandering.

B. Petitioners systematically ignore and mischaracterize the evidentiary record.

The weight of the evidentiary record notwithstanding, Petitioners attempt to create the impression of improper motivation by repeatedly mischaracterizing the facts and ignoring countervailing evidence in the record.

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1. The party-line votes that passed the Enacted Map are not dispositive of partisan intent.

Petitioners suggest that passage of the Enacted Map on party-line votes in both chambers of the Legislative Assembly "is enough to end this case." Petitioners' Mem 7. But they cite no authority holding that the party-line passage of a redistricting plan is dispositive evidence of partisan intent.[4] Nor could they—such a holding would turn democratic principles on their head, allowing even a legislative superminority to threaten an enactment's constitutionality merely by withholding its support, and thus exercise de facto veto power over any new map.

Moreover, Petitioners' inference—that the partisan split here means improper motive—lacks any support in the record. The legislative record indicates why Democratic leaders drew the Enacted Map as they did: to vindicate neutral principles. *See* Ex 3017-A (floor letter of Sen. Taylor); Ex 3018-A at 6:17–21 (statement of Sen. Taylor); Ex 3018-E at 8:3–11:17 (statement of Rep. Salinas); Ex 3018-D at 4:8–6:25 (statement of Rep. Salinas). Based on this record, Democratic lawmakers might have voted "aye" and Republicans voted "nay" for any number of reasons, including disagreement over the policy choices made in applying ORS 188.010's neutral criteria.

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[4] Petitioners claim that "every court to have decided a partisan gerrymandering claim, so far as Petitioners are aware, has found that when a legislature adopts a map along a party-line vote, that legislature has acted with partisan intent to advance that party's interests." Petitioners' Mem 15. But none of the cases on which they rely for their party-line-vote argument found this evidence to be dispositive—if it was even considered it at all. *See Ohio A. Philip Randolph Inst. v. Householder*, 373 F Supp 3d 978, 1099–1105 (SD Ohio) (three-judge panel) (examining "[s]everal different types of evidence [that] come together to tell a cohesive story of a map-drawing process dominated by partisan intent," but *not* considering party-line votes), *vacated on other grounds sub nom Chabot v. Ohio A. Philip Randolph Inst.*, ___ US ___, 140 S Ct 102, 205 L Ed 2d 1 (2019); *Whitford v. Gill*, 218 F Supp 3d 837, 890–96 (WD Wis 2016) (three-judge panel) (similar), *vacated on other grounds*, ___ US ___, 138 S Ct 1916, 201 L Ed 2d 313 (2018); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa 1, 123–28, 178 A3d 737, 818–21 (2018) (similar); *League of Women Voters of Fla. v. Detzner*, 172 So 3d 363, 391–93 (Fla 2015) (similar); *Common Cause v. Rucho*, 318 F Supp 3d 777, 869 (MDNC 2018) (three-judge panel) (including party-lines votes among many pieces of evidence in its *Arlington Heights* analysis), *vacated on other grounds*, ___ US ___, 139 S Ct 2484, 204 L Ed 2d 931 (2019).

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Petitioners also overlook evidence that does not fit the narrative they propose. Though they characterize the Enacted Map as a Democratic effort "with no input or support from Republicans," Petitioners' Mem 17, they neglect to mention the political leverage that Republican lawmakers *did* wield: they threatened to deprive the House of a quorum by walking out, deprived the House of a quorum and blocked passage of a congressional redistricting plan on September 25, 2021, and returned two days later only after Democratic leaders proposed an amended plan. *See* FOF ¶¶ 12–14; Petitioners' Answer to Petition in Intervention ¶¶ 26, 28, 30 (Nov 8, 2021). And Republican legislators not only returned to grant a quorum—they voted to suspend House and Senate rules to enable passage of the Enacted Map. *See* Ex 3018-C at 3:9–25, 5:7–12; Ex 3018-A at 2:18–5:20. Whatever Republican lawmakers' reasons for offering passive support to the Enacted Map, they acceded to passage when they could have blocked it. Claiming it passed with only Democratic support thus paints an incomplete picture that omits Republican legislators' leverage and participation.

2. Speaker Kotek properly exercised her prerogative to reconstitute the House Redistricting Committee.

Likewise, Petitioners maintain "that Speaker Kotek reneg[ing] on her promise to provide equal representation on the Committee when she replaced the House Redistricting Committee with the House Committee on Congressional Redistricting provides further support for the Legislative Assembly's partisan intent." Petitioners' Mem 20. Setting aside the Presiding Judge's ruling that Speaker Kotek's decision is not relevant to Petitioners' claims, *see* Order on Non-Parties' Motion to Quash 3–4 (Oct 21, 2021), it is not probative of partisan intent. Speaker Kotek was well within her prerogatives to reconstitute the committee. *See* Ex 3017-N at 12 (special session rules of 81st Legislative Assembly indicating that "members of all committees . . . shall be appointed by the Speaker"). And Petitioners offer no evidence whatsoever that her motivation for doing so was to provide electoral advantage to Democrats. Indeed, Speaker Kotek's reasons for reconstituting the committee are in the legislative record: Republican committee members refused to engage in good-faith negotiations. *See* Intervenors' Mem 3. The competing inference that Petitioners draw—that

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Speaker Kotek must have restructured the committee because she knew the redistricting plan was biased—is utterly without support in the record.

3. Democratic legislators did not refuse to negotiate.

Petitioners assert—again, without evidentiary support—that Democratic leaders refused to negotiate with Republicans. *See* Petitioners' Mem 12, 20–21. And again, the record supports the opposite inference. Republicans returned from their walkout, granting a quorum and voting in favor of rules suspension, after a new map was introduced that accommodated public testimony and certain Republican demands. *See* Ex 3018-A at 14:21–15:23 (statement of Sen. Findley) (acknowledging that "[SB] 881A reflects a lot of that [public] testimony" and that "this bill answered several of the things I spoke about last week," referring to changes that addressed his criticisms of the original bill). The record also indicates that it was Republican legislators, not Democrats, who refused to negotiate. *See* Video Recording, House, SB 881, Sept 20, 2021, at 2:29:03 (statement of Rep. Salinas).

4. Democratic legislators were not "focused obsessively on the partisan-rating metrics of their map."

Unable to find any evidentiary basis for their claims in the legislative record, Petitioners attempt to prove their case by misrepresenting the deposition testimony of Melissa Unger, executive director of Service Employees International Union ("SEIU") Local 503. Petitioners contend that Ms. Unger's testimony proves that Democratic lawmakers were "singularly focused" on measuring and achieving a partisan outcome. Petitioners' Mem 10, 18; *see also id.* at 8, 42. But Ms. Unger described no such conversations or considerations; instead, she testified that lawmakers—*after they had drawn and released the Plan A map*—read news articles about how the map was being received, the perceived impacts of the map, and whether, based on those factors, Republican lawmakers would show up to vote on the map. FOF ¶¶ 218, 220–22; Ex 1045 at 55–59, 63–64, 68–69, 71–75 (deposition of M. Unger).

While it is certainly true that Ms. Unger and other members of SEIU had conversations with Democratic lawmakers, Ms. Unger explained that, at the time those conversations were

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happening, *The Oregonian*, Oregon Public Broadcasting, and national news outlets were reporting on the congressional redistricting process and the respective maps introduced by the two parties. FOF ¶¶ 220–22; Ex 1045 at 61, 64, 68–69 (deposition of M. Unger). Ms. Unger, who testified that she was "not involved in the details of the map, the actual, like, districts," spoke to legislators about information that was being publicly reported—which, she said, the entire "ecosystem" of the State Capitol was discussing at the time. Ex 1045 at 58, 63–64 (deposition of M. Unger); *see also* FOF ¶ 218. Despite Petitioners' attempt to characterize Ms. Unger's conversations with Democratic legislators as some kind of backroom deal, she in fact described her conversations as not being about any specific redistricting decisions, and instead about whether the amended map Democrats ultimately offered for negotiation would get Republicans to the floor for a vote. FOF ¶ 218; Ex 1045 at 55–59, 63–64, 69, 71–75 (deposition of M. Unger). Indeed, Ms. Unger testified that she did not know about the Enacted Map until it was already the subject of negotiations between Democratic and Republican leaders. Ex 1045 at 69:1–9 (deposition of M. Unger).

Far from proving that Democrats acted with partisan intent, Ms. Unger's testimony establishes the rather unsurprising fact that legislators read the newspaper and engaged in conversations about potential legislative outcomes—specifically, whether Republicans would deny their colleagues a quorum to prevent a bill's passage. There is no statement in Ms. Unger's testimony to support the conclusion that she and Democratic leaders discussed whether the Enacted Map would achieve a particular political outcome. Moreover, insofar as Ms. Unger discussed local and national assessments of the proposed maps, these conversations necessarily occurred *after* Democrats had released their Plan A map—peculiar timing if the intent of Democratic lawmakers was to rely on purported measures of partisan effect when drawing that same map.

5. The Legislative Assembly made reasonable line-drawing decisions by dividing the Portland area among multiple districts and placing Bend in the Fifth Congressional District.

Petitioners repeatedly cite two particular mapmaking decisions—the division of the Portland area among four congressional districts and the inclusion of Bend in the Fifth

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Congressional District—as evidence that the Legislative Assembly drew the Enacted Map to benefit Democrats. *See* Petitioners' Mem 11, 18–19. But as discussed at length in Intervenor-Respondents' memorandum, these decisions were reasonable and reflected both neutral redistricting criteria and testimony received by lawmakers. *See* Intervenors' Mem 17–20, 27–31.

Far from constituting unlawful "cracking" for partisan ends, the division of Portland repeats the same choice that Oregon's mapmakers have made for decades. As discussed above, previous congressional maps—which were adopted by court order or bipartisan legislative compromise—similarly divided the Portland area among multiple districts that included interconnected urban, suburban, and rural communities along transportation routes feeding into the city. *See supra* at 2. The view that Oregonians are well served by districts that blend interconnected urban, suburban, and rural communities along transportation routes that radiate out from the city is not a post-hoc rationalization invented to justify partisan choices; it dates back to at least the 1970s and has guided congressional redistricting ever since. *See* Ex 3004-A ¶¶ 3–8 (declaration of L. AuCoin). Indeed, this very subject was litigated in the 2001 congressional redistricting case, with Judge Maurer adopting the view that, in the then-First Congressional District, the "'traditional cohesiveness' between Portland's westside neighborhoods and their counterparts in the suburbs to the west, should not be disrupted"; in the then-Third Congressional District, the "travel, recreation, and employment patterns of individual living in northern Clackamas County on the east side bear strong similarity to those of the individuals living in eastern Multnomah County"; and in the then-Fifth Congressional District, Southwest Portland "shares commonalities and transportation links with the cities to its south, [and so] its placement in the Fifth District does not violate the statute." *Perrin*, slip op at 7, 9. Judge Maurer was certainly not motivated by impermissible partisan intent when reaching these conclusions, just as map drawers in 1981, 1991, and 2011—and 2021—were not either.[5]

[5] Indeed, Judge Maurer's related conclusion that "the importance of city and county lines diminishes in large metropolitan areas where regional concerns transcend those of individual cities

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The Enacted Map does contain some new features that distinguish it from prior maps, most notably in its placement of Bend and surrounding communities in the Fifth Congressional District. But though this feature is a departure from prior decades' congressional maps, it is no less based on legitimate, neutral criteria. The Legislative Assembly's recognition of Bend's differences from Eastern Oregon, and its similarities with the Willamette Valley, reflects genuine demographic and economic changes, not partisan gamesmanship. The testimony of Oregonians on both sides of the Bend/Eastern Oregon divide support this view, which is perhaps best illustrated by the exclusion of Bend from proposals to join Eastern Oregon communities with Idaho—referenced both in the legislative record and in the witness testimony submitted in this case. *See* FOF ¶ 126; Ex 3018-J at 46:21–47:1 (testimony of C. Peterson) ("We have very little in common with eastern Oregonians who want to become part of the State of Idaho."). As Anthony Broadman, a Bend city councilor, stated, "Bend's difference from Eastern Oregon and commonality with the Willamette Valley is real and is widely acknowledged, even by people in other Eastern Oregon communities who don't want to live in the same state as us." Ex 3014 ¶ 5 (declaration of A. Broadman). Moreover, although the Petition contends that Bend and the Willamette Valley are not connected by a significant transportation link, *see* Petition ¶ 101 (Oct 11, 2021), this assertion was rightly rejected by the Special Master. *See* FOF ¶¶ 190–95. OR-22 and US-20 together make up one of the state's most important and highly traveled routes connecting the Willamette Valley with Eastern Oregon. *Compare* Ex 3017-W at 115–16 (reflecting traffic volumes on North Santiam Highway through Detroit), *with id.* at 86 (reflecting comparable traffic volumes on Warm Springs Highway (US-26) through Warm Springs). Unquestionably, this transportation route represents a real and meaningful connection between communities and forms a legitimate basis for the Legislative Assembly's redistricting decision.

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and counties," *Perrin*, slip op at 8, recurred in *Hartung*, where the Oregon Supreme Court acknowledged the Secretary of State's position that "[c]ounties in the tri-county Portland Metropolitan area play a relatively small role in the lives of residents" and concluded that this view guided a reasonable application of the neutral redistricting criteria. 332 Or at 590–91.

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6. The Enacted Map does not dilute rural votes.

Finally, Oregon Farm Bureau Federation ("OFB") suggests that "the Enacted Map ensures that rural votes will be outnumbered by urban votes by putting them into districts with Portland voters, who traditionally support Democratic candidates." Brief of *Amicus Curiae* Oregon Farm Bureau Federation ("OFB Br") 4 (Nov 10, 2021). To the contrary, the Enacted Map 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. Former Congressman Les AuCoin, through legislative testimony and a witness declaration, described his focus on and effective representative of rural issues as a member from a blended district. Ex 3004-A ¶¶ 6–7 (declaration of L. AuCoin). And notably, Susan Sokol-Blosser—a founder of Oregon wine country—explained that the new Sixth Congressional District elevates agricultural communities of common interest in Yamhill, Polk, and western Marion counties, where wine grapes, berries, hazelnuts, and nursery products are grown. Ex 3015 ¶¶ 3–7.[6]

C. Evidence that the Legislative Assembly applied neutral criteria and that the Enacted Map has no pronounced partisan effect is probative of intent.

Petitioners claim that the Legislative Assembly's compliance with neutral redistricting criteria has little relevance in this matter, *see* Petitioners' Mem 22–24, but their contentions have no merit. While compliance with traditional redistricting principles might not constitute a safe harbor against partisan gerrymandering claims, there can be little denying—as courts have routinely recognized—that adherence to neutral criteria can serve as helpful evidence from which proper motives can be inferred. *See, e.g.*, *Shaw v. Reno*, 509 US 630, 647, 113 S Ct 2816, 125 L Ed 2d 511 (1993) (explaining that "traditional districting principles . . . are important not because

[6] Ironically, although OFB emphasizes the purported distinctions between urban and rural voters, *see, e.g.*, OFB Br 12–13, it nonetheless objects to a congressional plan that excludes the urban communities of Bend and Hood River from the largely rural Second Congressional District. Indeed, Representative Andrea Salinas noted that, in drawing that district, the Legislative Assembly "respected the voices of many or our rural neighbors who have asked for a district that will have a uniquely rural voice." Ex 3018-C at 9:19–21 (statement of Rep. Salinas).

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they are constitutionally required . . . but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered"); *Vieth v. Jubelirer*, 541 US 267, 339, 124 S Ct 1769, 158 L Ed 2d 546 (2004) (Stevens, J., dissenting) (recommending that courts evaluating partisan gerrymandering claims "ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles"). Indeed, by calling out particular line-drawing choices they do not like—such as the division of the Portland area and placement of Bend—as evidence of partisan gerrymandering, Petitioners themselves put in question the Legislative Assembly's justifications for these choices.

Petitioners further suggest that expert evidence of partisan *effect* is not probative of whether the Legislative Assembly acted with partisan *intent*. *See* Petitioners' Mem 24–26. Again, Petitioners ignore precedent—including the very cases on which they extensively rely. "Plaintiffs may prove discriminatory partisan intent using a combination of direct and indirect evidence because 'invidious discriminatory purpose may often be inferred from the totality of the relevant facts.'" *Ohio A. Philip Randolph Inst. v. Householder*, 373 F Supp 3d 978, 1096 (SD Ohio) (three-judge panel) (quoting *Common Cause v. Rucho*, 318 F Supp 3d 777, 862 (MDNC 2018) (three-judge panel)), *vacated on other grounds sub nom Chabot v. Ohio A. Philip Randolph Inst.*, ___ US ___, 140 S Ct 102, 205 L Ed 2d 1 (2019). Such "[i]ndirect evidence [] includes statistical evidence that demonstrates 'a clear pattern' of partisan bias that would be unlikely to occur without partisan intent or evidence that the supporters of one political party were consistently treated differently than the supporters of another." *Id.* (quoting *Arlington Heights*, 429 US at 266); *see also League of United Latin Am. Citizens v. Perry*, 548 US 399, 418, 126 S Ct 2594, 165 L Ed 2d 609 (2006) (plurality op). Notably, the Special Master recognized the particular value of this evidence in this matter: "Because of the court's rulings on legislative privilege, no expert can support a conclusion of [partisan] intent directly . . . . Rather, as in most often the case in litigation, subjective intent of one or more persons must be based on permissible inferences from the objective facts available."

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FOF 15. Both generally and especially in this matter, the ultimate effect of an official decision is probative evidence of the intent with which it was made.[7]

III. Measures of the Enacted Map's efficiency gap fail to prove impermissible partisan effect.

The expert testimony in this case—and the Special Master's findings of fact—effectively foreclose any argument that the Enacted Map exhibits significant bias against Republican voters. Petitioners' acrobatic efforts to circumvent these conclusive findings all fall flat.

First, Petitioners conveniently suggest that every objective measure or analysis that refutes their theory is too confusing or difficult for the Panel's consideration, demonstrating little confidence in the Panel's ability to draw straightforward inferences from clear evidence. Second, Petitioners misconstrue Respondent's prior advocacy in other litigation to propose a bright-line rule against any map with a projected efficiency gap greater than 7 percent—without disclosing that Respondent never argued for such a rule and that there is good reason not to apply such a rule in Oregon. And third, Petitioners entirely ignore their own expert's supplemental report, which illustrates that the efficiency gap under the Enacted Map is very likely to be *below* 7 percent.

A. There is no reason to ignore probative and credible evidence that the Enacted Map exhibits low levels of partisan bias.

As Dr. Devin Caughey testified—and as the Special Master found—every mathematical indicator of a map's partisan advantage is "subject to statistical uncertainty, and so any given estimate should be interpreted as evidence of partisan gerrymandering only if its degree of uncertainty justifies such an inference. This is especially true when a plan includes fewer than seven seats, as Oregon's does." FOF ¶ 281 (citing Ex 3001 ¶ 12 (Declaration of Dr. Caughey)).

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[7] Petitioners also claim that "[u]nder Oregon law . . . partisan effect is not relevant to a claim arising under ORS § 188.010(2), which only prohibits subjective partisan intent," and cite to *Hartung* for this proposition. Petitioners' Mem 15. But *Hartung* says nothing of the sort; there, the Oregon Supreme Court observed that "the mere fact that a particular reapportionment may result in a shift in political control of some legislative districts . . . falls short of demonstrating" an impermissible partisan purpose under ORS 188.010(2). 332 Or at 599. That partisan effect alone is not *sufficient* to demonstrate partisan intent does not mean that it is not *relevant* to the inquiry. *Hartung* certainly says nothing to the contrary.

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Because various indicators might capture different aspects or consequences of gerrymandering, *id.*, the most rigorous and comprehensive analysis of a redistricting plan's partisan bias should consider multiple indicators—to the extent they are reasonable to use in a given state—to determine whether an inference of gerrymandering is justified. If each of the indicators points in the same direction and calculates a high level of bias, the inference of gerrymandering might be strong. But where the appropriate indicators disagree about which party benefits from a map, while predicting any such advantage to be small, then the inference of gerrymandering is null. The latter, of course, is the case here: of four common indicators of partisan gerrymandering, two suggest that the map favors Republicans and two suggest that the map favors Democrats, and the "absolute magnitude of bias under the Enacted Map is unusually small." *Id.* ¶ 286.

Contrary to Petitioners' argument, just because evidence is unhelpful for *them* does not render it unhelpful for the Panel. They complain that the holistic inquiry endorsed by the Special Master is "unpredictable and entirely unadministrable." Petitioners' Mem 31. But the *method* is not unpredictable—common measures of gerrymandering suggest the direction and strength of a map's partisan advantage, and a simple review can confirm whether the measures reach consistent conclusions. The only "unpredictable" element here is whether the Enacted Map is likely to favor Democrats or Republicans, as the various measures "assign substantial probabilities to both pro-Democratic and pro-Republican bias." FOF ¶ 286. And that unpredictability is highly probative—it directly refutes Petitioners' allegations of a partisan gerrymander.[8]

To their credit, part of what Petitioners argue is true: the efficiency gap is not a "perfect measure" of partisan advantage, and indeed "*any* metric will be particularly imperfect in a State with Oregon's population." Petitioners' Mem 30; *see also* FOF ¶ 238 ("The efficiency gap alone

[8] Petitioners' concerns about administrability are not compelling either. They boast that the efficiency gap can be "easy to calculate," Petitioners' Mem 30, but this case confirms that there is no shortage of experts fluent in statistical methods ready to assist judicial factfinders using a range of measures. While the parties dispute which calculations should be performed, no one has contested the computational accuracy of any reported figures.

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may not 'measure the partisan fairness of a proposed electoral map.'" (quoting Ex 2300 at 9 (Declaration of Dr. Katz))). But having concluded that no methodology can identify the entire elephant, they urge the Panel to blind its inquiry to all but a hind leg.[9] Such myopia poorly serves this judicial task and should be rejected.

B. Petitioners' proposed test is drawn from litigation that they strip of all context.

Petitioners' proposal that a redistricting map is categorically unlawful if its projected efficiency gap exceeds 7 percent, *see* Petitioners' Mem 29, requires several layers of obfuscation.

Petitioners propose that this bright-line rule is "fair" to apply to Oregon's maps because of the Oregon Attorney General's prior contributions as amicus curiae in Wisconsin and North Carolina litigation. *Id.* But Petitioners have produced no evidence (and the Special Master did not make any findings) that the Attorney General has ever endorsed a 7 percent rule for any state under any law, let alone for Oregon under its constitution. Instead, the amicus briefs that Petitioners cite simply urged federal courts to adopt a "purpose-and-effects test" to identify unlawful gerrymandering. *See* Ex 1024; Ex 1025. This test, the briefs explained, would not rely on the efficiency gap alone—and would certainly not rely on a discrete threshold of wasted votes. Instead, the appropriate test "would have to look at a *full range of metrics*, including not only analyses of available election results, but also projections of the map's likely effect over the course of the whole decade until the next redistricting." Ex 1024 at 16 (emphasis added). And "even a large efficiency gap is not a problem if it can be explained by something other than intentional partisan entrenchment for the long-term," such as geographic clustering of one party's members or a significant frequency of uncontested elections. *Id.* at 16–17; *see also* Ex 1025 at 15 (explaining that "if a State's election results in a single year yielded a high efficiency gap, that alone would not likely satisfy the effects prong"). Oregon supplies the perfect illustration of when efficiency gap analysis alone might be unreliable: in addition to having fewer than seven seats, the state

[9] *Cf.* John Godfrey Saxe, *The Blind Men and the Elephant* (1873), https://www.commonlit.org/texts/the-blind-men-and-the-elephant.

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features a geographic distribution of Democrats and Republicans that renders a completely neutral plan infeasible. *See* FOF ¶ 269.

Even though Oregon never proposed a 7 percent rule in other litigation, Petitioners argue that the State "supported before the [U.S. Supreme Court] plaintiffs [] who argued that any efficiency gap above 7% is a sufficient level of proof of partisan gerrymandering." Petitioners' Mem 29. Setting aside the preposterous notion that an amicus necessarily adopts and endorses every position by any party with aligned interests, Petitioners' argument is again inconsistent with their source. They cite to *Whitford v. Gill*, 218 F Supp 3d 837, 860–61, 905–06. (WD Wis 2016), *see* Petitioners' Mem 29, but these very pincites distinguish that case from this one. *Whitford* involved the mid-decade adjudication of a map that had already been in place for the 2012 and 2014 elections. Because Wisconsin's enacted map had resulted in large efficiency gaps in those two elections, the plaintiffs' experts testified that the efficiency gap was likely to endure for the rest of the decade. *See id.* at 860–61, 905–06.

Accordingly, all Petitioners can say is that, despite *also* disclaiming exclusive reliance on the efficiency gap, the State previously supported federal partisan gerrymandering claims in Wisconsin where the plaintiffs' experts testified that an enacted map with a high efficiency gap in one observed election was likely to maintain a high efficiency gap in future elections. It is simply dishonest to suggest that this is the same thing as Oregon endorsing a prohibition against any new map that can be projected to have an efficiency gap greater than 7 percent.

C. Whether the Enacted Map will result in an efficiency gap above 7 percent is uncertain.

The evidence makes clear that the Enacted Map's efficiency gap estimate varies significantly depending on the elections on which the calculation is based. This fact highlights the uncertainty of the efficiency gap estimate on which Petitioners' entire statistical case rests.

The most reliable measure of partisan symmetry, as the Special Master found, is the "full seats-vote curve," FOF ¶ 235, which examines the expected partisan advantage of every possible election outcome. The efficiency gap is much narrower; rather than measuring "partisan symmetry

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or any other quantity of the seats-votes curve," *id.* ¶ 237, the efficiency gap calculates the number of votes that were "wasted" in a given election. But "estimates of the efficiency gap under difference election scenarios are highly sensitive to the size of the statewide vote," *id.* ¶ 285, and the measure might not be reliable in a small state with a wide variety of historical election scenarios, like Oregon.

Petitioners' expert submitted calculations that illustrate how volatile the efficiency gap can be under the same map in the same state under different election scenarios. First, Dr. Thomas Brunell estimated a 19.85 percent efficiency gap under the Enacted Map by analyzing results from three previous presidential elections. *Id.* ¶ 301. Because this method was clearly unreliable, Dr. Brunell was directed by the Special Master to reconstruct his analysis from all Oregon statewide elections from 2012 to 2020, and his estimation of the Enacted Map's efficiency gap "shrunk significantly—by over 60%—to 7.76%." *Id.* This new figure certainly provides a *more* reliable efficiency gap estimate than his first attempt, and it closely tracks figures that other experts derived from similar election data. *See id.* ¶ 243 (finding that Dr. Caughey estimated that Enacted Map's efficiency gap would be 8.5 percent in election where Democrats win 54 percent of statewide vote, which was derived from average of previous decade's election results). But the "average" statewide election from 2012 to 2020 might not reflect an actual congressional election from 2022 to 2030.

As Dr. Brunell's supplemental calculations show, the "average" election of Democrats enjoying a 7.76 percent efficiency gap was never actually observed. *See* Ex 1049 at 21 & Table 55 (supplemental report of Dr. Brunell). Instead, calculations of the Enacted Map's efficiency gap under previous election scenarios range from 23.8 percent in favor of Republicans (using the 2016 secretary of state election results) to 21.24 percent in favor of Democrats (using the 2016 presidential election results). The critical question, then, is *which* election scenarios are likely to be repeated in the next decade's congressional races. Simple adjustments based on reasonable hypotheses reduce the estimated efficiency gap below the 7 percent threshold:

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- 2012 election results reflecting the state as it existed nine years ago are arguably stale. Eliminating those results from Dr. Brunell's computation reduces the average efficiency gap estimate to 6.52 percent.
- The previous map saw three presidential elections and two midterm elections; the enacted map will be in place for two midterm elections and three presidential elections. Because the electorate is different in presidential and midterm years, *see* Oct. 27 Hearing Tr at 214:18–21, this provides an independent reason to remove data from one of the presidential cycles to provide a more balanced analysis. Again, removing the 2012 election data from the calculation reduces the efficiency gap estimate below 7 percent.
- In presidential elections, nominees are selected by voters outside of Oregon and presidential candidates invest few resources campaigning in Oregon, rendering those results unlikely to match congressional races. Removing the three presidential results from Dr. Brunell's dataset reduces the average efficiency gap estimate to 5.34 percent.
- Combining these approaches—removing all 2012 election data and the 2016 and 2020 presidential data from Dr. Brunell's dataset—reduces the average efficiency gap estimate to 4.4 percent.
- In his original report, Dr. Brunell explained that he chose results from elections that were "well funded, hard fought, and feature the same two candidates across the state." Ex 1006 at 2 (expert report of Dr. Brunell). The recent elections in Oregon that arguably fit this description best are the recent elections for governor and secretary of state. Estimating the Enacted Map's efficiency gap using results from these elections over the past decade averages to a 3.4 percent efficiency gap in favor of *Republicans*. Selecting only these elections from 2014 to 2020 increases the pro-Republican bias to 4.85 percent.

The purpose of this exercise is simply to illustrate that even if this Panel were to endorse Petitioners' requested rule against any map with an efficiency gap greater than 7 percent, Petitioners' own evidence fails to prove that the Enacted Map necessarily flunks that test. As the

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Special Master explained, the efficiency gap is "estimated to shrink the closer that the major parties come to even competition in Oregon, and the efficiency gap is predicted to be almost exactly zero in the case of a statewide tie." FOF ¶ 285. And that is certainly a plausible scenario; "[t]he Republican candidate for Oregon Secretary of State won a majority of the statewide vote as recently as 2016, and the usual fluctuation of the major parties' fortunes suggests that Democrats' successes in recent cycles are likely to dissipate in future elections." *Id.* ¶ 279.

Ultimately, the Panel need not select the perfect slate of past election data to predict the Enacted Map's efficiency gap down to the tenth of a percentage point. Instead, it should weigh estimates of the Enacted Map's modest and uncertain efficiency gap in combination with other common measures to determine if Petitioners have proven that the Enacted Map will guarantee a significant and durable advantage to the Democratic Party. Plainly, they have not; the Enacted Map reveals no pronounced partisan effect for Democrats or anyone else.

IV. Petitioners' remedial map is wholly inadequate.

Petitioners proposed remedial map—which they themselves only ambivalently endorse, *see* Petitioners' Mem 34—should be disregarded by the Panel.

First, Petitioners' map lacks the foundation and support needed to determine whether it complies with applicable law. *See* FOF ¶ 307 ("Petitioners have presented almost no evidence that the proposed plan complies with the ORS 188.010(1) criteria."); Intervenors' Mem 36–37. The only evidence Petitioners submitted to substantiate their map came in the report of their expert, Dr. Brunell, *see* Ex 1006—and even he addressed only partisan metrics, which Dr. Jonathan Katz effectively undermined, *see* FOF ¶¶ 309–11; city and county splits, which Dr. Brunell admitted was data that he "copied and pasted . . . from counsel," *id.* ¶ 291; and compactness, which is not a relevant criterion under ORS 188.010. Absent from the record is any evidence of whether Petitioners' map reflects the other requirements under ORS 188.010 and the Oregon and United States constitutions. *Cf.* SB 259 § 1(8)(a) ("A reapportionment plan adopted by the panel under this paragraph must comply with all applicable statutes and the United States and Oregon

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Constitutions."). In *Hartung*, the Oregon Supreme Court was confronted with a similarly unsupported alternative proposal. There, the petitioners "fail[ed] to submit even the most basic information about their proposed district (such as population), nor d[id] they discuss how their proposed change would affect" other districts. *Hartung*, 332 Or at 589–90. "Under those circumstances," the Court concluded, "their proposal is not an alternative that the court will consider." *Id.* at 590. The Panel should adopt the same position here.

Second, and more fundamentally, Petitioners' map has not been subject to any public consideration or legislative deliberation. As discussed above and throughout Intervenor-Respondents' memorandum—and as found by the Special Master—the Legislative Assembly received thousands of pieces of testimony and drew a congressional map that reflected neutral criteria and the input of hundreds of Oregonians. Petitioners now ask this Panel to discard a map that readily complies with all statutory and constitutional mandates and replace it with an alternative of unclear origin and uncertain neutrality.

No remedial map is ultimately necessary in this case, since there is no evidence of any unlawfulness that requires remediation. But Petitioners' slapdash, unsupported map nevertheless serves as useful evidence of one thing: the overall infirmity of their case.

V. Petitioners' evidentiary arguments lack merit.

As a final matter, Intervenor-Respondents briefly address Petitioners' requests for evidentiary rulings. *See* Petitioners' Mem 34–49.

A. Elements of Representative Bonham's testimony were correctly excluded as inadmissible hearsay and lacking personal knowledge.

The declaration and live testimony of Representative Daniel Bonham were rife with assertions based on hearsay and for which he has no personal knowledge—as he admitted during his testimony. See Hearing Tr, Oct 27, 2021, at 105:7–11 ("No. I never had a direct conversation with Speaker Kotek, no."); *id.* at 112:6–14 ("Yeah, I did not personally speak with Senate President Courtney, no."); *id.* at 121:12–18 ("If [House Republican leader Christine Drazan] had received the map before the map was sent to me, I would not be aware of that."); *id.* at 125:8–13 ("Q. . . .

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Is it correct that you do not have personal knowledge of every conversation that every Republican member of the [L]egislative [A]ssembly had regarding the enacted map; is that correct? A. Yeah, I think that would be difficult to have knowledge of every conversation."); *id.* at 126:13–16 ("Q. Were you present for all of [Leader Drazan's] conversations with the Democratic leadership? A. I think it's fair to say that I wouldn't know."). Intervenor-Respondents previously submitted objections to the declaration and testimony of Representative Bonham on these bases, and now stand on those previously stated objections and supporting analysis. *See* Intervenor-Respondents' Objections to Special Master's Tentative Findings of Fact & Parties' Evidentiary Submissions 6–11 (Nov 2, 2021).

B. The FiveThirtyEight.com report cannot be considered for what it asserts.

Petitioners apparently agree that the FiveThirtyEight.com report cannot be offered or considered for the truth of what it asserts, and now suggest that they are offering it only as evidence that some members of the Legislative Assembly were aware of it. *See* Petitioners' Mem 41–42. Intervenor-Respondents do not see the relevance of the document if it is offered only for that purpose. *See* OEC 402.

C. The Princeton Gerrymandering Project report cannot be considered for what it asserts.

Petitioners' explanation of the admissibility of the Princeton Gerrymandering Project report is hard to understand; they seem to contend that the document is not hearsay because it is offered for a narrow hearsay purpose. *See* Petitioners' Mem 42–43. But narrow hearsay is still hearsay. *See* OEC 802. If the report is offered to show that its conclusion is different from other tests of partisan effects, it is offered for the truth of what it asserts.

D. Petitioners' defense of Dr. Brunell is not persuasive.

Finally, Petitioners claim that the Special Master's criticisms of Dr. Brunell were "unfair" because they agree with their own expert and disagree with the Special Master. Petitioners' Mem 43–49. Intervenor-Respondents do not understand this to be a proper objection. Petitioners incorrectly state that they "have relied upon Professor Brunell's analysis only for his calculations

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of the efficiency gap and for his description of how to calculate the efficiency gap, and no party has questioned either aspect of Professor Brunell's report and testimony on these points." *Id.* at 43 (citation omitted). To the contrary, Intervenor-Respondents have indeed questioned these aspects of his report. Dr. Brunell's initial report calculated the efficiency gap at 19.85 percent based on unreliable methods. When he recalculated the same metric using the broader dataset directed by the Special Master, the result was 7.76 percent—over 60 percent lower than he had previously reported. This disparity is enough to cast serious doubt on the reliability of his conclusions.

Petitioners defend Dr. Brunell's original method of relying exclusively on presidential results to estimate the Enacted Map's efficiency gap based on his conclusion that "Presidential elections were most indicative of future electoral results and 'good to gauge the underlying partisanship of the state.'" Petitioners' Mem 47 (quoting Ex. 1006 at 2 (original report of Dr. Brunell)). But as Petitioners' counsel conceded, Dr. Brunell previously criticized experts for not using comprehensive sets of statewide election data in their analyses of partisan gerrymandering claims. *See* Hearing Tr, Oct 27, 2021, at 256:21–257:3. Because the Special Master ordered Dr. Brunell to rerun his calculations with additional election data, he did not permit further inquiry into the reliability of presidential results to model the partisanship of a state's electorate. *See id.* at 254:22–255:3, 257:7–25. Petitioners' attempt to rehabilitate Dr. Brunell's original methodology should not be permitted now. Had cross-examination proceeded on this issue, Intervenor-Respondents would have shown that Dr. Brunell has specifically criticized reliance on presidential results for these purposes where, as in Oregon, there is a "disjuncture between the national Republican party and the [in-state] Republicans," such that the national Republican Party nominates candidates who underperform in-state Republican candidates. Transcript of Proceedings at 33:2–16, *Vieth v. Pennsylvania*, No 1:CV-01-2439 (MD Pa Mar 14, 2002), ECF No 122. Presidential results in Oregon clearly are not indicative of Republican candidates' performance in statewide races. Dr. Brunell's methods—including his reliance on cherry-picked presidential results—were unreliable, and the Special Master's conclusion should not be revisited.

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CONCLUSION

Petitioners have failed to prove by a preponderance of the evidence—or any standard—that the Enacted Map was created with unlawful partisan intent or otherwise constitutes a partisan gerrymander. They cannot remedy their evidentiary shortcomings at this late hour by rewriting the law and the facts. The record in this case, both on its own and as thoughtfully and thoroughly considered by the Special Master, clearly demonstrates that the Enacted Map was the product of a fair, deliberative process and reflects neutral redistricting criteria. In bringing this challenge, Petitioners are, "[a]t bottom, . . . seeking to substitute their judgment for that of the" Legislative Assembly. *Hartung*, 332 Or at 590. Intervenor-Respondents respectfully submit that the Panel should reject that gambit, consider the extensive evidentiary record, and affirm the Enacted Map.

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DATED: November 12, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **INTERVENOR-RESPONDENTS' RESPONSE TO PETITIONERS' MEMORANDUM** on the following:

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to be sent by the following indicated method or methods, on the date set forth below:

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