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, vs. SHEMIA FAGAN, in her official capacity as Secretary of State of Oregon Respondent, vs. JEANNE ATKINS, SUSAN CHURCH, NADIA DAHAB, JANE SQUIRES, JENNIFER LYNCH, AND DAVID GUTTERMAN. Intervenors.	Case No. 21CV40180 PRESIDING JUDGE'S ORDER ON EVIDENTIARY AND PROCEDURAL MATTERS

After consideration of:

- Special Master's Recommended Findings of Fact and Report;
- Petitioners' Memorandum in Support of Petition and in Support of their Request for Evidentiary and Procedural Rulings;
- Intervenor-Respondents' Memorandum in Opposition to Petition;
- Respondent's Evidentiary Motion and Memorandum;

- Declaration of Jeremy A. Carp in Support of Intervenor-Respondents' Memorandum in Opposition to Petition;
- Petitioners' Response Memorandum in Support of Petition and in Opposition to Respondent's Evidentiary Motion;
- Intervenor-Respondents' Response to Petitioners' Memorandum;
- Respondent's Combined Response to Petitioners' Memorandum in Support of Petition and Evidentiary Arguments; and
- The Declaration of Alex C. Jones;

The Presiding Judge of the Special Judicial Panel, Hon. Mary Mertens James, issues the following order finding facts and deciding the parties' requests for procedural and evidentiary rulings:

Order

The Special Master's Recommended Findings of Fact are wholly accepted without substitution or addition. All of the Special Master's procedural and evidentiary rulings are upheld. The Special Master's procedural and evidentiary rulings are further supplemented as set forth in the opinion below.

Opinion

A. Procedural Rulings

1. Respondent's legal arguments regarding implicit supersession of ORS 188.010 by the Legislative Assembly are not a defense and were therefore not required to be plead in Respondent's Answer as argued by Petitioners. The question of whether and how to resolve a conflict between statutes is one of statutory interpretation. Arguments regarding statutory interpretation are appropriately raised in memoranda of law, and

failure to raise such arguments earlier does not constitute a waiver. Further, Petitioners are not prejudiced as Respondent did in fact plead affirmative defenses of failure to state a claim (Respondent's First Affirmative Defense) and nonjusticiability (Respondent's Fourth Affirmative Defense). This procedural ruling does not constitute an opinion on the merits of the implicit supersession argument.

B. Evidentiary Rulings

1. Representative Bonham's testimony and declaration were properly excluded under the Debate Clause of the Oregon Constitution and under the alternative evidentiary objections made by Respondent and Intervenors.

I adopt the reasoning and evidentiary rulings of the Special Master on the declaration and testimony of Bonham, with the clarification that all of the declaration and hearing testimony of Bonham are excluded on grounds of the Debate Clause legislative privilege of the Oregon Constitution, and the specific portions of the declaration and testimony identified by Respondent are excluded based on the alternative objections of hearsay, relevance, and foundation.

Petitioners have not demonstrated that the state-of-mind hearsay exception applies for an admissible purpose. Under OEC 803(3), a hearsay statement is admissible if it is a "statement of the declarant's then-existing intent or plan." *State v. Clegg*, 332 Or 432, 441 (2001). However, hearsay statements do not come within the exception when they are "offered to prove the facts underlying the declarant's state of mind." *State v. Bement*, 363 Or 760, 765 (2018). Further, "[e]vidence which is not relevant is not admissible." OEC 402. It is not for the Panel to scrutinize the political process of the Legislative Assembly, and such evidence is therefore irrelevant.

Petitioners have not demonstrated an otherwise relevant state-of-mind use of the evidence offered through Representative Bonham.

2. Dr. Brunell's expert testimony is admissible under *O'Key*, but certain deficiencies of the testimony go to the weight of the evidence.

Petitioners rely on Dr. Brunell's expert analysis and testimony for the purpose of explaining the efficiency gap and calculating it for the enacted map. Pet. Resp. Mem., 33. The Special Master's relevant criticism of Dr. Brunell does not extend to his inclusion of the efficiency gap, but rather focuses on Dr. Brunell's methodology, which does not include other metrics of partisan fairness, such as partisan symmetry.[1] Dr. Brunell's testimony is helpful because it "assist[s] the trier of fact to understand the evidence[.]" OEC 702. Indeed, under the factors articulated in *State v. O'Key*, 321 Or 285 (1995), the testimony is probative, even if it is outweighed by the opinions of other experts. That is, using the efficiency gap as a measure of partisan fairness is generally accepted in the field of political science (even if not the preferred or exclusive method), Dr. Brunell is qualified as an expert in the field, there exists sufficient specialized literature on the subject – notwithstanding Dr. Brunell's failure to reference it in his report and testimony – measuring efficiency gap is not novel, and there is little if any reliance on subjective interpretation by Dr. Brunell. Inclusion of the evidence does not "impair rather than help the trier of fact", and "truthfinding is better served by admission[.]" *Id.* at 299. The Special Judicial Panel may consider the opinion of Dr. Brunell alongside the opinions of the other experts in this case, and arguments raised by Respondent and Intervenors go to the weight of the evidence.

[1] The Special Master also criticizes Dr. Brunell for opinions not relied on by Petitioners, such as his analysis of proportionality and use of unverified evidence of county splits.

3. FiveThirtyEight.com ratings and Princeton Gerrymandering Project Ratings of Plan A or SB 881A are inadmissible hearsay.

The Special Master correctly excluded the FiveThirtyEight.com ratings and Princeton Gerrymandering Project Ratings of Plan A or SB 881A as inadmissible hearsay. *See* Petitioners' exhibits 1022 & 1023.

a. FiveThirtyEight.com Rating (Exhibit 1022)

Respondent has objected to the admission of Exhibit 1022 as hearsay. On its face, Exhibit 1022 is an out of court statement, so the burden shifts to Petitioners to prove that the exhibit is being offered for a non-hearsay purpose.

Petitioners argue that Exhibit 1022 should come into evidence because,

> Petitioners rely upon the FiveThirtyEight.com analysis of SB 881-A not for the truth of its contents or analysis, so it is admissible as outside the definition of hearsay: explaining what measures legislative Democrats were reviewing while drafting the various maps, SB 881-A included. . . Petitioners have relied upon FiveThirtyEight only to show that Democratic leaders knew such analyses of SB 881-A showed that the plan drastically favored Democrats, Ex. 1045, Unger Dep. at 61, 63-66, 68-69, and nevertheless pressed forward with their vote on that map, *see Oberg,* 316 Or. at 269-70; *Coleman,* 130 Or. App. at 666.

See Petitioners' Memorandum in Support of Petition, 42.

The Presiding Judge is not convinced that Petitioners have met their burden for proving a non-hearsay purpose for admission of Exhibit 1022 and Exhibit 1022 is therefore excluded.

b. Princeton Gerrymandering Project Ratings (Exhibit 1023)

Similarly, Respondent has objected to the admission of Exhibit 1023 as hearsay. On its face, Exhibit 1023 is an out of court statement, so the burden shifts to Petitioners to prove that the exhibit is being offered for a non-hearsay purpose.

Petitioners argue that Exhibit 1023 should come into evidence because,

> Petitioners' reliance on the Princeton Gerrymandering Project's rating of SB 881-A as an "F" of partisan fairness is even more limited, and thus not subject to a hearsay objection. Petitioners only rely upon the Princeton Gerrymandering Project grade to illustrate that adopting an all-things-consider test for impermissible partisan effect leads to differing outcomes. See supra 2 pp. 33-34. Petitioners do not rely upon the Project's analysis of the truth of its conclusion that SB 881-A is actually an "F" on partisan fairness.

See Petitioners' Memorandum in Support of Petition, 42-43.

"[I]llustrat[ing] that adopting an all-things-consider test for impermissible partisan effect leads to differing outcomes" inherently relies on the document for the truth of what is asserted in the document, namely, calculations of partisan bias. The Presiding Judge is not convinced that Petitioners have met their burden for proving a non-hearsay purpose for admission of Exhibit 1023 and Exhibit 1023 is therefore excluded.

4. State of Oregon Amici Briefs in *Gill v. Whitford* and *Rucho v. Common Cause* are admissible. See Petitioners' exhibits 1024 & 1025.

State of Oregon Amici Briefs in *Gill v. Whitford,* No. 16-1161 (U.S. Sept. 5, 2017) and *Rucho v. Common Cause*, No. 18-422 (Mar. 8, 2019) are relevant to Petitioners' judicial estoppel arguments regarding State of Oregon's prior positions on the efficiency gap and a possible legal standard for adjudicating partisan fairness. The amici briefs are not evidence with respect to the factual questions of whether SB 881 is a lawful enactment. Respondent's and Intervenors' arguments go to adjudication of the merits of Petitioners' judicial estoppel arguments, which is a matter for the Special Judicial Panel.

5. News articles, academic journal articles, screenshots, offers of proof, and other documents that were not offered or entered into evidence will not be considered by the Special Judicial Panel.

All evidence was required to be submitted to the Special Master by October 25th. *See* Special Master's Scheduling Order, October 20, 2021, ¶2. "Written memoranda . . . and *supporting evidence consistent with the Special Master's recommended findings of fact"* were due on November 10, 2021 at 11:00am. *See* Presiding Judge's Amended Scheduling Order, October 20, 2021, p.3, as amended by Order on Parties' Joint Motion to Amend Scheduling Order, ¶1. The Panel will not consider evidence that was not offered, or that was submitted after the deadlines in the Amended Scheduling Order, including news articles and treatises from Petitioners and screenshots from Respondent. *See* Declaration of Alex Jones, November 12, 2021.

Evidence not in the record will not be considered by the Special Judicial Panel, including offers of proof on expert testimony. *See* Respondent's Combined Response, page 26, fn 85. The parties misunderstood the scope of the Amended Scheduling Order to exclude expert rebuttal testimony on redirect examination. In Oregon, witnesses are normally excluded from observing the proceeding, other than expert witnesses, who are typically allowed to observe other witnesses and comment on other witness testimony. The purpose for permitting experts to view and observe is to allow the experts to make observations and address evidence that they wish to controvert. Nothing in the Amended Scheduling Order was intended to limit this traditional role for expert testimony or to exclude them from giving rebuttal testimony regarding the opinions of other experts. Nevertheless, the parties proceeded without expert rebuttal. The parties relied on this plan and agreed to disallow cross-examination of offers of proof. *See* Oct. 28 Hearing Transcript, 158:2-8. Because the offer of proof cited by Respondent was not submitted as evidence and was not objected to in the objections to

the proposed findings addressed to the Special Master or renewed with the Presiding Judge, it will not be considered by the Special Judicial Panel.

6. Statements of legislators and other portions of the legislative record are admissible.

All objections to the inclusion of portions of the legislative record, including to "Video clip 17" (Petitioners' Exhibit 1042), statements by Republican leader Fred Girod (Petitioners' Exhibit 1043), and the Oregon House Republican Caucus (Petitioners' Exhibit 1044) were overruled by the Special Master and those rulings are upheld by the Presiding Judge. The Presiding Judge notes that the panel could take judicial notice of these portions of the legislative record and therefore declines to exclude them on hearsay grounds. Although the Presiding Judge is admitting all submissions within the legislative record, the Presiding Judge recognizes that, when these portions refer to statements by opponents of SB 881-A, they are self-serving, limited to the opinions, views, and recollections of individual legislators and have only a minimal level of relevance to the intent of the Legislative Assembly as a whole. Respondent's and Intervenors' arguments go to the weight of the evidence, and adjudication of the merits of Petitioners' claims of partisan bias is ultimately a matter for the Special Judicial Panel.

The Presiding Judge, having finalized rulings on all of parties' evidentiary and procedural objections, admonishes all parties to base their November 16, 2021 oral arguments on findings of fact that are in the record, as abrogated by the rulings herein.

11/15/2021 9:09:42 AM

IT IS SO ORDERED.

Senior Judge Mary M. James