IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

BEVERLY CLARNO, **GARY WILHELMS**, **JAMES L. WILCOX**, and **LARRY CAMPBELL**, Petitioners, v. **SHEMIA FAGAN**, in her official capacity as Secretary of State of Oregon, Respondent, **JEANNA ATKINS**, **SUSAN CHURCH**, **NADIA DAHAB**, **JANE SQUIRES**, **JENNIFER LYNCH**, and **DAVID GUTTERMAN**, Intervenors.	Case No. 21CV40180 **Senior Judge Mary M. James, Presiding Judge of Special Judicial Panel** **Senior Judge Henry C. Breithaupt, Special Master to Special Judicial Panel** **PETITIONERS' MEMORANDUM IN SUPPORT OF PETITION AND IN SUPPORT OF THEIR REQUEST FOR EVIDENTIARY AND PROCEDURAL RULINGS**

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

TABLE OF CONTENTS

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

TABLE OF AUTHORITIES

Cases

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

Statutes And Rules

Constitutional Provisions

Other Authorities

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

INTRODUCTION

When the United States Supreme Court exited the field of partisan gerrymandering in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), it made clear that States have the authority to address this issue if they so desired. *Id.* at 2507–08. The present case is among the first in the Nation since *Rucho* to test whether States, including state courts, will be able to pick up that mantle. If Respondent prevails in the present case, and a map as plainly partisan as SB 881-A survives, Oregon's prohibitions against partisan gerrymandering will effectively be a dead letter, and will serve as powerful evidence throughout the Nation that judicial enforcement against partisan gerrymandering will not occur at the state level after *Rucho*.

This case involves two legal questions—the first question is easy, while the second question is more challenging; however, this Special Judicial Panel need only answer the first, straightforward question to invalidate SB 881-A. As to the first question, the Democratic Party politicians who control the Legislative Assembly plainly acted with the ***subjective*** "purpose of favoring [the Democratic] political party," ORS § 188.010(2), when they enacted SB 881-A along a party-line vote, which is enough to end this case. Any contrary argument would ask this Panel to believe "naive[ly]," *Vieth v. Jubelirer*, 541 U.S. 267, 350 (2004) (Souter, J., dissenting), and contrary to the record here, that Democratic Party legislators overcame the universally acknowledged tendency to seek to advance their party's interest in redistricting, particularly when in control of the relevant legislative body. Petitioners are unaware of any case, anywhere in the country, that has ever held that a redistricting map adopted by a party-line vote by a legislature was not drawn with partisan intent, and there is no record basis for this Panel to become the first here. As to the second question, to adjudicate Petitioners' constitutional claims, this Panel may decide that it must also consider whether the map that Democratic legislators enacted had an ***objective*** partisan effect. This partisan-effect inquiry is challenging because it requires this Panel to do something that no Oregon court has done, and which courts in other states and at the federal

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

level have struggled to do: adopt an objective theory of partisan fairness that is predictable, administrable, and fair.

As to ORS § 188.010(2) and the issue of partisan intent, Democratic Party politicians here did what legislators in control of legislative bodies have often done, going back to our Nation's founding: seek to advance their party's fortunes through their redistricting authority. The legally relevant difference, of course, is that Oregon has taken the public-spirited step of specifically outlawing the drawing of district lines with the "purpose of favoring any political party," *id.*, thus requiring the Legislative Assembly to avoid the natural temptation to advance the dominant party's interests in redistricting. But these politicians did nothing to avoid this temptation and, instead, drew SB 881-A to advance their party's interests. The partisan-gerrymandering playbook that these politicians followed is familiar. They drew SB 881-A unilaterally, refusing to compromise with the minority, out-of-power party. They then proposed and adopted a map that pulled heavily Democratic voters—in places such as Portland—into multiple districts, in order to give their party's candidates an advantage in those districts. And they focused obsessively on the partisan-rating metrics of their map from public, nonpartisan institutions—including FiveThirtyEight.com—and each such public source in the record showed that the SB 881-A dramatically favored the Democratic Party. These majority-control legislators then enacted this map on a party-line vote, as their Republican colleagues decried what had just occurred.

As to the Oregon Constitution, assuming that this Special Judicial Panel follows the approaches taken by courts in other states and in federal court before *Rucho* about how to adjudicate claims that a map is an unlawful partisan gerrymander under broadly worded constitutional language, this Panel will also need to decide whether—as an objective matter—the map has too much partisan effect, based upon a fair and administrable measure of partisan fairness. Petitioners respectfully submit that SB 881-A has an impermissible partisan effect because its efficiency gap is over 7% in favor of Democrats. While the experts in this case proposed various different metrics of partisan fairness, Petitioners submit that the 7%-efficiency-gap approach as a

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

measure of impermissible partisan effect is the most administrable test, which would be entirely fair to apply to the State of Oregon given Oregon's position in the United States Supreme Court when certain plaintiffs accused other States of engaging in partisan gerrymandering.

This Special Judicial Panel should thus hold that SB 881-A is unlawful and unconstitutional and then adopt a neutral map as a remedy under SB 259-B § 1(8)(a).

FACTUAL STATEMENT

As a result of the 2020 decennial Census, Oregon gained a sixth congressional district. Special Master's Recommended Findings Of Fact And Report ("SMFOF") ¶ 2; Stipulation of Facts ("SOF") ¶ 15. On April 7, 2021, Oregon House Speaker Tina Kotek (D-Portland) promised Republican legislative members that redistricting in 2021 would be a bipartisan effort, splitting membership of the House Redistricting Committee evenly between Republicans and Democrats. Ex. 1002, Declaration of Beverly Clarno ("Clarno Decl.") ¶ 14; Ex. 1027, Video Clip 2. On September 3, Representative Andrea Salinas, on behalf of the Democratic members of the House Redistricting Committee, proposed a new congressional map—"Plan A"—and Representative Shelly Boshart Davis, on behalf of the Republican Committee members, proposed a new congressional map—"Plan B." SMFOF ¶ 8; SOF ¶ 20. On September 20, Senator Courtney introduced Plan A in the Oregon Senate as Senate Bill 881 (2021) ("SB 881"), SMFOF ¶ 10; SOF ¶ 21, which the Senate then passed on a party-line vote. SMFOF ¶ 11; SOF ¶ 22. That same day, Speaker Kotek replaced the House Redistricting Committee with the House Committee on Congressional Redistricting, consisting of two Democrats and only one Republican, reneging on her promise of equal representation. Ex. 1002, Clarno Decl. ¶ 14; Ex. 1027, Video Clip 2. Thereafter, Democratic leaders created SB 881-A. Ex. 1008, Map of SB 881-A. On September 27, the House and Senate adopted SB 881-A on a strict Democratic-only party-line vote. SMFOF ¶¶ 14–15; SOF ¶ 25–26, and Governor Kate Brown signed the bill, now referred to as SB 881-A, into law, SMFOF ¶ 16; SOF ¶ 27. Republicans decried the enactment of SB 881-A as a partisan gerrymander contemporaneously with these party-line votes. *See* Ex. 1043, Statement of Senate

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

Republican Leader; Ex. 1044, Statement of Oregon House Republican Caucus; Ex. 1028, Video Clip 3; Ex. 1039, Video Clip 14; Ex. 1040, Video Clip 15; Ex. 1042, Video Clip 17.

During the map drawing process, Democratic Party leaders who controlled the redistricting process were mindful of—indeed, as the undisputed evidence shows, singularly focused upon—publicly available sources that rate the partisanship of proposed maps and conduct modeling to grade those maps in terms of which party the maps favor, including FiveThirtyEight.com. Ex. 1045, Deposition of Melissa Unger ("Unger Dep.") at 61, 63–66, 68–69. Those Democratic Party leaders discussed the modeling of the various proposed maps prior to the enactment of SB 881-A, including with Melissa Unger, the Executive Director of the Service Employees International Union ("SEIU") Local 503. Ex. 1045, Unger Dep. at 33, 76, 80–81. These discussions related to expectations as to the number of seats Democrats were likely to secure under each map, looking at the maps' efficiency-gap metrics[1] at publicly available sources, such as FiveThirtyEight.com. Ex. 1045, Unger Dep. at 63–66, 76, 80–81. *All* "[p]ublic" sources" "confirm that the efficiency gap" of SB 881-A—the most common measure of partisan fairness, Ex. 2300, Declaration & Expert Report of Jonathan N. Katz ("Katz Report") at 9; Ex. 3002, Declaration of Paul Gronke ("Gronke Decl.") at 5; Ex. 3001, Declaration of Devin Caughey ("Caughey Decl.") at 15, which Oregon has endorsed, Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (U.S. Mar. 8, 2019), at 15[2]—"favors Democrats," SMFOF ¶ 242. Specifically, FiveThirtyEight reported that SB 881-A provided Democrats with a 17.2% advantage, Ex. 1022, FiveThirtyEight Congressional Map Assessment, whereas PlanScore reported an advantage of 8.5%, Ex. 2703, PlanScore Oregon Congressional Plan SB 881A Assessment; *see also* SMFOF ¶ 242.

[1] The State of Oregon has already endorsed the efficiency gap as a sufficient method of evidence for proving that a map is favorable to one party over another. Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (U.S. Mar. 8, 2019), at 14.

[2] Available at https://www.supremecourt.gov/DocketPDF/18/18-422/91410/20190308171933052_Common%20Cause%20FInal.pdf.

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

SB 881-A contains two core features designed to favor Democratic Party candidates for Congress. First, SB 881-A divides Portland and the Greater Portland Area across four districts, Ex. 1009, SB 881-A Portland Map; Ex. 1010, SB 881-A Greater Portland Area Map, to spread those Democratic voters from Portland into multiple districts, thereby increasing the odds of Democratic congressional representation, Ex. 1002, Clarno Decl. ¶¶ 16–20; Ex. 1009, SB 881-A Portland Map; Ex. 1010, SB 881-A Greater Portland Area Map; Ex. 3017-B, Written Testimony by Alex Riedlinger at 1–2; Ex. 3017-B Written Testimony by Kuko Mofor, at 56–57; Ex. 3017-E, Written Testimony by Brian Ettling, at 4; Ex. 1004, Clarno Dep., 14:16–15:17; Ex. 1028, Video Clip 3; Ex. 1029, Video Clip 4; Ex. 1031, Video Clip 6; Ex. 1039, Video Clip 14; Ex. 3018-S, 9/8/21 Hearing at 74:2–4 ; Ex. 3018-K, 9/13/21 Hearing, at 31:11–18; Ex. 3018-K 9/13/21 Hearing at 50:13–20.[3] Second, SB 881-A cut District Five cut across the Cascades from the west to include Bend, a city east of the Cascades, Ex. 1008, Map of SB 881-A—also unlike any districts in previously adopted Congressional maps, Ex. 1004, Clarno Dep., 12:21–13:20; Ex. 1015,; Exhibit 3017-I, Written Testimony submitted by Cristal DeJarnac, at 1; Ex. 3017-I, Written Testimony submitted by Nancy Boever, at 3; Exhibit 3017-B, Written Testimony by Joshua Berger, at 50–51; Ex. 1030, Video Clip 5; Ex. 1036, Video Clip 11; Ex. 3018-J, 9/13/21 Hearing at 70:5–8; Ex. 3018-G, 9/20/21 Hearing at 15:20–16:7; 2011 SB 990 Oregon Congressional Map, *available at* https://www.oregonlegislature.gov/la/2011_Redistricting/SB_990_Congressional.pdf—thereby drawing additional Democratic voters into District Five to further bolster Democrats chances, Ex. 1002, Clarno Decl. ¶¶ 16–20.[4]

Representative Daniel Bonham had a first-hand view of the process leading to the enactment of SB 881-A, in light of his service on the Oregon House Redistricting Committee and

[3] *See also* Transcript of 10/27/21 Hearing, at 128, 131 (testimony of Representative Bonham); *infra* Part IV.A.

[4] *See also* Transcript of 10/27/21 Hearing, at 128, 131, 162, 172–74 (testimony of Representative Bonham); *infra* Part IV.A.

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

his leadership role within the Republican caucus in the Legislative Assembly on all redistricting matters. Ex. 1003, Declaration of Representative Daniel Bonham ("Bonham Decl.") ¶¶ 2–3; Transcript of 10/27/21 Hearing, at 102.[5] Representative Bonham explained that both parties' Committee members worked towards drafting proposed congressional maps for release to the public. Ex. 1003, Bonham Decl. ¶¶ 7–9. The Democratic Committee members' proposal, Plan A, was plainly a partisan-gerrymandered map, designed with the overarching goal of providing Democrats with an advantage in any subsequent congressional elections by unnecessarily splitting the Democratic strongholds of Portland and the Greater Portland Area across four of the six districts (First, Third, Fifth, and Sixth). Ex. 1003, Bonham Decl. ¶¶ 10–11. Despite such a clearly partisan map, Republican Committee members were nevertheless committed to negotiating with Democratic Committee members to reach a compromise map, but Democratic Committee members refused to negotiate. Ex. 1003, Bonham Decl. ¶¶ 13–16; Transcript of 10/27/21 Hearing, at 113–14, 127–29, 160. When Representative Bonham and his Republican colleagues attempted to negotiate, the Democratic members informed them that they would not consider any negotiations on the congressional maps, nor would they accept any Republican input. Ex. 1003, Bonham Decl. ¶¶ 15–16, 28, 32; Transcript of 10/27/21 Hearing, at 116, 119. Senate President Peter Courtney told Representative Bonham that the "*maps were the maps*," without any Republican contributions. Transcript of 10/27/21 Hearing at 162 (emphasis added). Democrats then moved forward with SB 881-A, Ex. 1003, Bonham Decl. ¶¶ 27–29, while Legislative Assembly Republicans continued to explain that SB 881-A was an egregious partisan gerrymander, Ex. 1003, Bonham Decl. ¶ 30. The *only* reason that Legislative Assembly

[5] While the Special Master excluded Representative Bonham's declaration and testimony, because that decision was in error, *see infra* Part IV.A, Petitioners continue to cite it in this Memorandum. If the Special Judicial Panel agrees with the Special Master, however, it should simply disregard the portions in this Memorandum where Petitioners discuss Representative Bonham's declaration and testimony. Petitioners have endeavored to place Representative Bonham's declaration and testimony separately, so as to allow this approach.

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

Republicans appeared on the House floor to vote against SB 881-A—thereby creating a quorum—was their fear that Secretary of State Shemia Fagan would draw a state legislative map even *less* favorable to Republicans, if the Republicans denied quorum by not appearing to vote against SB 881-A. Ex. 1003, Bonham Decl. ¶¶ 35–37; Transcript of 10/27/21 Hearing, at 128–30.

ARGUMENT

I. The Legislative Assembly Violated ORS § 188.010(2) Because It Adopted SB 881-A With The "Purpose of Favoring" The Democratic Party

A. To Prevail On Their ORS § 188.010(2) Claim, Petitioners Need Only Show—By A Preponderance of the Evidence—That Legislators Who Engaged In The Highly Political Act Of Redistricting Acted With Partisan Intent

ORS § 188.010(2) bans the Legislative Assembly from drawing any district "for the purpose of favoring any party, incumbent legislator or other person." ORS § 188.010(2). To prove a claim under ORS § 188.010(2), a plaintiff need only show that the Assembly "had an improper purpose," such as "favoring one political party over another." *Hartung v. Bradbury*, 332 Or. 570, 599 (2001). Courts may "infer from a record that [the Legislative Assembly] had the purpose of favoring one particular political party over another," so long as the record provides more than "the mere fact that a particular reapportionment may result in a shift in political control of some . . . districts." *Id.* Petitioners' burden is a "preponderance of the evidence, and when there is contradictory evidence, the burden of proof is met when a party demonstrates that a fact or allegation is more likely true than not." SMFOF, p. 2 (citing ORS § 10.095(5)).

When attempting to show that decision-makers acted with a particular impermissible intent, courts generally use the factors articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), originally designed for the race-discrimination context. Under this test to prove intent, Petitioners must show by a preponderance of the evidence that the decision to advance the partisan electoral interests of the Oregon Democratic Party was "a motivating factor in the decision." *Id.* at 265–66. They need not show that discriminatory intent

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

was the "sole[ ]" or "the 'dominant' or 'primary'" consideration. *Id.* at 265. And determining whether such intent was a "motivating factor" requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. Relevant considerations for this determination include: (1) "[t]he impact of the official action" and whether it falls "more heavily" on one group than another; (2) "[t]he historical background of the decision"; (3) "[t]he specific sequence of events leading up to the challenged decision"; (4) "[d]epartures from the normal procedural sequence"; and (5) "[t]he legislative or administrative history," especially "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* 266–68 (citations omitted). Courts analyzing partisan-gerrymandering claims routinely rely upon the *Arlington Heights* factors to decide if the legislature had an impermissible partisan intent in enacting redistricting legislation. *See, e.g.*, *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1094–96 (S.D. Ohio 2019), *vacated and remanded*, 140 S. Ct. 102 (2019); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 862 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019); *Whitford v. Gill*, 218 F. Supp. 3d 837, 887–89 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018).

While establishing discriminatory purpose under the *Arlington Heights* factors can be challenging when the allegation is that the legislature acted with an impermissible intent that is rightly and universally condemned in our society—such as racial discrimination—that showing is far less difficult, as a practical matter, when the allegation is that inherently partisan legislators acted with partisan intent. As Justice Souter has explained—in sentiments with which no Justice and, indeed, no one even casually familiar with the realities of legislative redistricting could disagree—"under a plan devised by a single major party, proving intent should not be hard, . . . politicians not being politically disinterested or characteristically naive." *Vieth*, 541 U.S. at 347–50 (Souter, J., dissenting). After all, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Davis v. Bandemer*, 478 U.S. 109, 129 (1986) (plurality op). Legislators have drawn

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

districts to advance their own party's interest since the Nation's founding, *see Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (Alito, J., concurring in part and dissenting in part), because "[l]egislators want to win reelection handily and to have their party obtain as many seats as possible," Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & Pol. 331, 336 (2007); *see* Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 Am. Pol. Sci. Rev. no. 3, Sept. 1994, at 541, 542.

Given the ubiquity of partisan favoritism when it comes to legislatures controlled by one party drawing districts, 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. *See, e.g.*, *Ohio A. Philip Randolph Inst.*, 373 F. Supp. 3d at 1093–96; *Common Cause*, 318 F. Supp. 3d at 861–64; *Whitford*, 218 F. Supp. 3d at 887–90; *League of Women Voters v. Commonwealth*, 178 A.3d 737, 817 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 390–93 (Fla. 2015). To the extent that partisan-gerrymandering claims have failed, it has been because the court concluded that it could not come up with a proper measure of partisan effect, under broadly worded constitutional provisions. *See, e.g.*, *Rucho*, 139 S. Ct. at 2506–08. Under Oregon law, however, partisan effect is not relevant to a claim arising under ORS § 188.010(2), which only prohibits subjective partisan intent. *See Hartung*, 332 Or. at 599.[6]

When the Legislative Assembly adopted ORS § 188.010(2)'s prohibition, it placed an unusual, high-minded burden on itself to act *without* partisan intent, in the context of what has through our Nation's history been a highly partisan redistricting process, conducted by partisan legislators. Through ORS § 188.010(2), the Legislative Assembly proudly announced to the

[6] The Oregon Supreme Court's holdings on lack of partisan intent all dealt with the Secretary of State. *See Hartung*, 332 Or. at 599; *Ater v. Keisling*, 312 Or. 207, 221–22 (1991). Under the Oregon Constitution, the Secretary serves in a neutral, nonpartisan "backup" role to the Legislative Assembly redistricting process. Or. Const. art. IV, § 6(3); *see generally Hovet v. Myers*, 260 Or. 152, 160 (1971).

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

people of Oregon that it would hold itself to a loftier, nonpartisan standard. Thereafter, Oregon boasted to the United States Supreme Court that "exclusive or near exclusive focus on partisan ends is not an inevitable feature of redistricting," while touting ORS § 188.010(2) as prohibiting Oregon "from drawing district lines for the purpose of favoring or disfavoring a political party." Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (Mar. 8, 2019), at 17–18 (also citing similar prohibitions from certain other States);[7] Ex. 1024, States' Amici Brief in *Gill v. Whitford*, No. 16-1161 (U.S. Sept. 5, 2017), at 18–19 (same).[8]

Finally, in a pending case challenging the state legislative districts before the Oregon Supreme Court, the Legislative Assembly argued that SB 882—the sister redistricting bill to SB 881-A—implicitly repealed ORS § 188.010(2) to the extent that SB 881-A violates ORS § 188.010(2). *See* Respondent's Answering Brief, at 36–41, *Calderwood v. Oregon Legislative Assembly*, No. S068989 (Or. Nov. 5, 2021). This argument is a starting (to put it mildly) repudiation of what the State of Oregon told the United States Supreme Court with regard to ORS § 188.010(2). *See* Ex. 1024, States' Amici Brief in *Gill v. Whitford*, No. 16-1161 (U.S. Sept. 5, 2017), at 18–19; Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (Mar. 8, 2019), at 18. And it is meritless, in any event, under the doctrine against implicit repeal, *see Vill. at Main St. Phase II, LLC v. Dep't of Revenue*, 356 Or. 164, 182 (2014), and the Oregon Constitution's repeated admonitions that redistricting must proceed according to "all law applicable," Or. Const. art. IV, §§ 6(2)(b)–(d), (3)(a), (c), (d). Further, in the present case, neither Respondent nor Intervenors have claimed that SB 881-A impliedly repealed ORS § 188.010(2) in their Answer or Intervention Petition, and thus they have waived any such argument for purposes of this case. *See* ORCP 19; *Fox v. Collins*, 213 Or. App. 451, 460–61 (2007).

[7] Available at https://www.supremecourt.gov/DocketPDF/18/18-422/91410/20190308171933052_Common%20Cause%20FInal.pdf.

[8] Available at https://www.scotusblog.com/wp-content/uploads/2017/09/16-1161-bsac-states-of-oregon.pdf.

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

B. The Democratic Politicians Who Control The Legislative Assembly Adopted SB-881A With Partisan Intent

The record in this case establishes that the Legislative Assembly enacted SB 881-A with partisan intent—or "for the purpose of favoring any political party," ORS § 188.010(2)—under a straightforward application of the *Arlington Heights* factors.

Legislative Democrats showed that they had a partisan "purpose" as a "motivating factor" in enacting SB 881-A. *Arlington Heights*, 429 U.S. at 265–66. The Democrats who control the Legislative Assembly drafted, composed, supported, and voted on SB 881-A with no input or support from Republicans. Democrats in the Legislative Assembly released their own "Plan A" map, which the Senate approved on a straight party-line vote, SMFOF ¶¶ 8, 11; SOF ¶ 20, 22; Ex. 1027, Video Clip 2. After the House lacked a quorum to vote on the "Plan A" map, SMFOF ¶ 13, Democrats gained a quorum to vote on SB 881-A by tying that vote to SB 882 (covering state legislative districts), and then passing SB 881-A on a party-line vote. SMFOF ¶¶ 12, 14; SOF ¶ 25. And in the Senate, the Democrats passed SB 881-A on a party-line vote, SMFOF ¶ 15; SOF ¶ 26, after which Democratic Governor Kate Brown signed SB 881-A into law, SMFOF ¶ 16; SOF ¶ 27. Republican leaders decried the enactment of SB 881-A as a partisan gerrymander contemporaneously with these party-line votes, *see* Ex. 1043, Statement of Senate Republican Leader, noting that the maps were "rigged" in the Democrats' favor and that the Democrats had "gerrymandered Oregonians out of their shot at fair elections for the next decade," Ex. 1044, Statement of Oregon House Republican Caucus; *see also* Ex. 1028, Video Clip 3; Ex. 1039, Video Clip 14; Ex. 1040, Video Clip 15; Ex. 1042, Video Clip 17. Given the low bar for proving partisan intent for "redistricting [ ] done by a legislature," *Bandemer*, 478 U.S. at 129 (plurality op.), these facts showing a one-party process, provide strong proof of partisan intent, *Arlington Heights*, 429 U.S. at 265–66. Put another way, this "specific sequence of events" regarding SB 881-A's enactment and its "legislative . . . history" provide ample evidence for partisan intent. *Id*. at 267.

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

Further supporting a finding of partisan intent, the undisputed evidence establishes that the Legislative Assembly Democrats were singularly focused on what publicly available metrics provided by institutions like FiveThirtyEight were saying about SB 881-A, and those metrics all showed that SB 881-A drastically favored Democrats. Melissa Unger testified that Democratic Party leaders—including the lead Democrats on the House's redistricting efforts, Speaker Kotek (with Lindsey O'Brien, her chief of staff) and Representative Salinas—frequently considered the ratings that these metrics gave to SB 881-A. Ex. 1045, Unger Dep. at 33, 61, 63–66, 68–69, 75, 80–81. These discussions centered on the number of seats that Democrats and Republicans were likely to secure under each map and the modeling of certain publicly available assessments of SB 881-A, such as by FiveThirtyEight and PlanScore. Ex. 1045, Unger Dep. at 61, 68–69, 80–81. In turn, *all* public sources in the record—most prominently, FiveThirtyEight and Plan Score—explained to the public that SB 881-A would greatly favor the Democrats under the efficiency-gap metric, which is the most commonly used method to measure partisan advantage. Ex. 2300, Katz Report at 9; Ex. 3002, Gronke Decl. at 5; Ex. 3001, Caughey Decl. at 15; *see Arlington Heights*, 429 U.S. at 266–68. FiveThirtyEight reported that SB 881-A provide Democrats with a remarkable 17.2% advantage in wasted votes as measured by the efficiency gap, Ex. 1022, FiveThirtyEight Congressional Map Assessment, whereas Plan Score reported an advantage of 8.5% on that same metrics, Ex. 2703, PlanScore Oregon Congressional Plan SB 881A Assessment; *see also* SMFOF ¶ 242. Again, *all* independent, "[p]ublic sources" "confirm that the efficiency gap of [SB 881-A] favors Democrats." SMFOF ¶ 242.

There is no dispute in this case as to how Democratic Party leaders made SB 881-A more favorable to Democrats (even if, as explained below, *see infra* Part I.C., Democratic Party leaders achieved these partisan objections while arguably complying with traditional redistricting criteria at the same time, *see* ORS § 188.010(1)). *See Arlington Heights*, 429 U.S. at 266 ("impact of the official action"). SB 881-A splits the heavily Democratic Portland and Great Portland Area into four separate districts, spreading solidly Democratic Party voters into all of these districts in order

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

to increase Democratic candidates' fortunes in those districts. Ex. 1009, SB 881-A Portland Map; Ex. 1002, Clarno Decl. ¶¶ 16–20; Ex. 1009, SB 881-A Portland Map; Ex. 1010, SB 881-A Greater Portland Area Map; Ex. 3017-B, Written Testimony by Alex Riedlinger at 1–2; Ex. 3017-B, Written Testimony by Kuko Mofor, at 56–57; Ex. 3017-E, Written Testimony by Brian Ettling, at 4; Ex. 1004, Clarno Dep., 14:16–15:17; Ex. 1028, Video Clip 3; Ex. 1029, Video Clip 4; Ex. 1031, Video Clip 6; Ex. 1039, Video Clip 14; Ex. 3018-S, 9/8/21 Hearing at 74:2–4 ; Ex. 3018-K, 9/13/21 Hearing, at 31:11–18; Ex. 3018-K, 9/13/21 Hearing at 50:13–20.[9] Similarly, SB 881-A lumps in Bend with portions of far-away Portland, pulling the heavy Democratic Bend region into District Five to help Democrats' chances in that district.[10] Ex. 1008, SB 881-A Map; Ex. 1002, Clarno Decl. ¶¶ 16–20; Ex. 1004, Clarno Dep., at 12:21–13:20; Ex. 1015, Petitioners' Remedial Map Portland Area; Ex. 1016, Petitioners' Remedial Map Greater Portland Area; Exhibit 3017-I, Written Testimony submitted by Cristal DeJarnac, at 1; Ex. 3017-I, Written Testimony submitted by Nancy Boever, at 3; Exhibit 3017-B, Written Testimony by Joshua Berger, at 50–51; Ex. 1030, Video Clip 5; Ex. 1036, Video Clip 11; Ex. 3018-J, 9/13/21 Hearing at 70:5–8; Ex. 3018-G, 9/20/21 Hearing at 15:20–16:7.

One way to see why the Democrats' violation of ORS § 188.010(2) is so obvious is to consider any court would conclude if a group of petitioners developed similar facts under ORS

[9] *See also* Transcript of 10/27/21 Hearing, at 128, 131 (testimony of Representative Bonham); *infra* Part IV.A. Or, as the New York Times put it just three days ago: "All right. Cracking and packing—is that it? No, there are other tricks. Take Oregon's new congressional maps. The state gained a seat in reapportionment, and the Democrats who control the State Legislature decided to grab it. They broke up heavily Democratic Portland—carved up into three districts since 2011—into four districts, forking outward into rural areas in the state. That should give the party a 5-to-1 advantage in the congressional delegation." Nick Corasaniti, et al., *How Maps Reshape American Politics: We Answer Your Most Pressing Questions About Redistricting And Gerrymandering*, N.Y. Times (Nov. 7, 2021) (formatting altered), available at https://www.nytimes.com/interactive/2021/11/07/us/politics/redistricting-maps-explained.html. This kind of thing occurs, the New York Times explained, "when one party controls both of a state's legislative chambers and the governor's office." *Id.*; *see generally State v. Eastep*, 361 Or. 746, 752 (2017) (relying on a New York Times article); *In re Custody of Ross*, 291 Or. 263, 278 (1981) (same).

[10] *See also* Transcript of 10/27/21 Hearing, at 128, 131, 162, 172–74 (testimony of Representative Bonham); *infra* Part IV.A.

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

§ 188.010(3)—which provides that "[n]o district shall be drawn for the purpose of diluting the voting strength of any language or ethnic minority group." If these hypothetical petitioners accused the Legislative Assembly of violating ORS § 188.010(3) by doing all of the same things to a minority group that the Democratic Party politicians did to Republicans in this case, the result under *Arlington Heights* would be inescapable. In other words, if the record showed evidence that a group of legislators who controlled the Legislative Assembly—(a) excluded legislators of a minority group from negotiations; (b) ensured consideration of a map fell unilaterally to them, without minority-group input; (c) looked obsessively at public websites that all rated the proposed map diluted minority-group voters using the common method of analyzing minority-group vote dilution; and (d) pulled addition white voters into districts in a manner that undermined minority-group voting strength, contrary to how prior maps had been drawn—that would *easily* satisfy an *Arlington Heights* inquiry. *See Arlington Heights*, 429 U.S. at 266–68; *see also* Ex. 1002, Clarno Decl. ¶ 14; Ex. 1027, Video Clip 2. And the present case is, if anything, easier than the hypothetical just articulated because legislators have a well-known incentive to favor their political party, *see supra* pp. 14–15, which is usually not true with regard to race. And while racial discrimination is more morally repugnant than partisan discrimination, the legislative prohibitions are identical, as matter of statutory text. *Compare* ORS § 188.010(3), *with* ORS § 188.010(2).

While the preceding evidence sufficiently establishes the Democrats' impermissible partisan intent when enacting SB 881-A, that Speaker Kotek reneged 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, under the *Arlington Heights* factors, Transcript of 10/27/21 Hearing, at 96–99; Ex. 1003, Bonham Decl. ¶¶ 1, 19–20; Ex. 1002, Clarno Decl. ¶ 14; Ex. 1027, Video Clip 2—just as such a move would be relevant under ORS § 188.010(3). Although Petitioners recognize that the Presiding Judge did not find this fact legally relevant in her ruling on SEIU's motion to quash, Petitioners raise it here in the hopes that the Special Judicial Panel will take a

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

different view because—respectfully—Petitioners believe that Speaker Kotek's actions are highly relevant. *See* 10/21/2021 Order on Non-Parties' Motion to Quash; Protective Order, pp. 3–4. Petitioners respectfully submit that if the Legislative Assembly changed the composition of a committee specifically to eliminate a minority member from the committee who voiced opposition to a proposed map because that "dilut[ed] the voting strength of a[ ] language or ethnic minority group," ORS § 188.010(3), courts would consider that purposeful removal of that member as salient in conducting the racial intent analysis under *Arlington Heights* factors, notwithstanding that "[d]eterminations regarding composition of committees" is a "discretionary act[ ] governing the internal procedures of the legislative branch." 10/21/2021 Order on Non-Parties' Motion to Quash; Protective Order, p. 4 (citations omitted).

Additionally, the testimony of Representative Bonham further confirms the partisan nature of these proceedings and the Democrats' partisan intent in enacting SB 881-A, although that testimony is not necessary for this Special Judicial Panel to conclude that Democrats enacted SB 881-A with impermissible partisan intent. Representative Bonham explained that while Republican members of the Legislative Assembly and the House Redistricting Committee were willing and eager to negotiate on a compromise map, the Democrats in charge of the Legislative Assembly rebuffed them. Ex. 1003, Bonham Decl. ¶¶ 14–15. Democrats told Representative Bonham that "any consideration of negotiating a compromise map between Plan A and the Republicans' proposed map was out of the question" and that Democrats simply would not "accept[ ] any Republican changes to the Democrats' map." Ex. 1003, Bonham Decl. ¶¶ 15–16. Even after Democrats floated new maps—including what ultimately became SB 881-A—they *still* refused to negotiate at all or to accept any Republican input on the substance of the redistricting plans. Ex. 1003, Bonham Decl. ¶ 27–29, 32; Transcript of 10/27/21 Hearing, at 104–07, 109–10. To underscore that Republicans had no role in the process, Senate President Peter Courtney told Representative Bonham that the "maps were the maps" and that the Democrats would be moving forward with them. Transcript of 10/27/21 Hearing 161–62.

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

C. Whether SB 881-A Complies With Traditional Redistricting Criteria, Including Those Embodied In ORS § 188.010(1), Provides No Defense To A Showing Of Partisan Intent

Respondent argued before the Special Master that SB 881-A's claimed compliance with traditional redistricting criteria, including those in ORS § 188.010(1), rebutted Petitioners' claim that SB 881-A violated ORS § 188.010(2). Respondent's Proposed Findings of Fact at 4–61, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 29, 2021). While Petitioners believe that SB 881-A suffers from significant difficulties under ORS § 188.010(1), including because of its unnecessary splitting up of Portland and the Greater Portland Area, *see supra* pp. 11, 18–19,[11] they have not chosen to press their ORS § 188.010(1) claim, *see* Order Approving Motion to Dismiss Petitioners' Fourth Claim for Relief with Prejudice, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Nov. 1, 2021). Thus, with regard to ORS § 188.010(1), Petitioners merely respectfully submit that Respondent's arguments and the Special Master's findings of fact as to SB 881-A's claimed compliance with these criteria provide no defense to Petitioners' claim under ORS § 188.010(2), for two independent reasons.

First, Oregon law provides that compliance with traditional redistricting criteria does not satisfy the separate prohibition against drawing a redistricting map with partisan intent. ORS § 188.010(1) outlines certain traditional redistricting criteria, requiring that the map drawer consider and ensure "as nearly as practicable" that each district is "contiguous," "of equal population," constructed consistent with "existing geographic or political boundaries," designed not to split "communities of common interest," and "connected by transportation links." *Id.* ORS § 188.010(2), in turn, instructs that "[n]o district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person." *Id.* These are *separate* mandates on the

[11] Contrary to the Special Master's seeming suggestion, SMFOF, pp. 4–5, Petitioners explicitly and unambiguously made these same points about SB 881-A in their Proposed Statement of Facts, Petitioners' Proposed Findings of Fact, ¶¶ 137–39, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 29, 2021).

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

Legislative Assembly. That is, the Legislative Assembly's compliance with one section of the statute does not relieve it from compliance under the second. *See Dish Network Corp. v. Dep't of Revenue*, 364 Or. 254, 278 (2019) ("[I]f possible, we should avoid interpreting statutory enactments in a way that makes parts of them superfluous or redundant."); *Owens v. Maass*, 323 Or. 430, 437 (1996) ("[C]ourt[s] must construe different provisions of a legislative enactment so as to give effect to each provision."). If this Panel were to interpret ORS § 188.010(1) and (2) as Respondent suggests, that would "render[ ] [ORS § 188.010(2)] meaningless." *State v. Cloutier*, 351 Or. 68, 98 (2011). Notably, reliance on ORS § 188.010(1) as a shield against other claimed legal violations would plainly not pass muster in the similar context of redistricting done "for the purpose of diluting the voting strength of any language or ethnic minority group." ORS § 188.010(3); *see supra* pp. 19–20. The claimed fact that the map complied with the ORS § 188.010(1) criteria would be no defense against a showing that the Legislative Assembly drew the map with the intent to dilute the votes of minority voters, *supra* pp. 19–20. As a matter of statutory text, the same results must obtain with regard to ORS § 188.010(2).

Second, compliance with traditional redistricting factors is not a defense to allegations of partisan intent, as Oregon told the U.S. Supreme Court in supporting the plaintiffs in *Whitford v. Gill*, 218 F. Supp.3d 837 (W.D. Wis. 2016), while attacking a map adopted by one of its sister States. In that case, map drawers "were attentive to [the] traditional districting criteria," in the same way—and to the same extent—that Respondent now claims SB 881-A adheres to ORS § 188.010(1). 218 F. Supp.3d at 849. Nevertheless, the district court held that modern technology allowed map drawers to create maps that comply with all the traditional criteria and yet still, intentionally, impose a partisan gerrymander just as effectively. *See Whitford*, 218 F. Supp. 3d at 889. Accordingly, these criteria played no role in the court's consideration of partisan intent. *Id*. at 888–89. Oregon thereafter supported affirmance of this decision in an *amicus* brief before the United States Supreme Court, arguing that "[p]lanners developed Act 43 through a process in which they commissioned a number of redistricting plans—*all of which complied with traditional*

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

neutral redistricting criteria—and then manipulated the political boundaries on those maps to assess the partisan advantage that the modified boundaries would provide." Ex. 1024, States' Amici Brief in *Gill v. Whitford*, No. 16-1161 (U.S. Sept. 5, 2017), at 12–13 (emphasis added).

Oregon should not be heard to now defend its own map on a basis that it explicitly rejected before the United States Supreme Court when it was attacking a map adopted by a sister State, just four years ago. After all, given the many possible ways that a map drawer can satisfy traditional criteria, such as those in ORS § 188.010(1), it is trivially easy for a legislature to achieve fully *both* compliance with traditional criteria *and* "favoring [the] party" in control of the Legislative Assembly majority at the same time, *see* ORS § 188.010(2), (and, by the way, also "diluting the voting strength of any language or ethnic minority group," ORS § 188.010(3)). That is why courts have not treated compliance with these criteria as a defense to a partisan-intent allegation, and Respondent offers no reason for this Panel to take a different approach here. *See e.g.*, *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring) (compliance with traditional redistricting criteria cannot satisfy "independent judicial standards for measuring a burden on representational rights."); *League of Women Voters*, 178 A.3d at 817 ("[A]dvances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral "floor" criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative."); *Rucho*, 318 F. Supp. 3d at 883 ("[A] state redistricting body can engage in unconstitutional partisan gerrymandering even if it complies with the traditional redistricting criteri[a]" so "compliance with traditional redistricting criteria is not a safe harbor from a partisan gerrymandering claim[.]" (citation omitted)).

D. The Experts That Respondent And Intervenors Presented Only Purported To Offer Evidence On Partisan Effect, Not Partisan Intent

In the present case, Respondent and Intervenors submitted certain expert testimony—from Professors Katz, Gronke, and Caughey—on the issue of partisan effect, which Petitioners discuss

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

below, in the constitutional section of this Memorandum. *See infra* Part II.C. For purposes of ORS § 188.010(2), it is important to note that all of these experts explicitly disclaimed that they had any opinion on the partisan intent of the map drawers when analyzing SB 881-A and other maps in this case. *See* Transcript of 10/28/21 Hearing, at 50, 77–78, 175–76.

The most straightforward reason that these experts did not opine on the issue of partisan intent is that there is no evidence in the record that Democratic Party legislators who control the Legislative Assembly considered anything like these experts' favored metrics or analyses. These experts spent the bulk of their expert reports and testimony opining on SB 881-A's rating using measures that revolve around "partisan symmetry" or partisan bias. Ex. 2300, Katz Report, at 9; Ex. 3001, Caughey Decl., at 7–11; *see also* Ex. 3002, Gronke Decl., at 15–16. In these analyses, Professors Katz, Gronke, and Caughey generally relied upon "counter-factual" election results—such as a future 58% Republican statewide vote-share, or even a future Oregon with complete parity between the parties—making conclusions about partisan *effect* in counterfactual scenarios. *See* Caughey Decl. at 8–11. The record, on the other hand, notes that Democratic Legislative Assembly leadership consulted the FiveThirtyEight analyses of the various maps that they were considering, Ex. 1045, Unger Dep. at 76, 80–81, which measured each map based upon the efficiency gap, *not* these other measures of partisan symmetry or partisan bias, *see supra* pp. 10.

Professors Caughey's and Gronke's discussions of "mean-median difference" and "declination" also do not support Respondent's or Intervenors' position on the issue of partisan intent. Ex. 3001, Caughey Decl. at 11–14; Ex. 3002, Gronke Decl. at 14–16. The mean-median difference operates under the assumption that future elections will be perfectly tied, not based upon any real-world expectations for electoral breakdowns in near-future elections. Ex. 3001, Caughey Decl. at 11–12; Ex. 3002, Gronke Decl. at 15–16. Declination is only relevant "when the gerrymandering party is unsure whether it will hold a statewide majority in the future," Ex. 3001, Caughey Decl. at 14, and there is no evidence whatsoever that Oregon Democrats involved in drafting SB 881-A were focused on their future likelihood of maintaining a statewide majority,

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

Transcript of 10/28/21 Hearing, at 184–85. Similarly, Professor Gronke's review of SB 881-A side by side with historical maps and comparison of their respective levels of partisanship is plainly irrelevant to the question of the *current* Assembly's partisan intent, as even Professor Gronke acknowledged. Transcript of 10/28/21 Hearing, at 175–76.

The Special Master's discussion regarding these experts and their relevance to partisan intent is, with all respect, legally wrong. *See* SMFOF, pp. 12–16. The Special Master concluded that all of the various metrics should be considered to determine whether the Legislative Assembly had partisan intent in enacting SB 881-A because consideration of all tests is necessary to confirm the reliability of these metrics, given that "no expert can support a conclusion on [partisan] intent directly." SMOF pp. 15–16. But this ignores that the evidence presented only shows that the Democratic legislators in charge of the redistricting efforts were considering publicly available sources—such as FiveThirtyEight—presenting the efficiency gap analysis of SB 881-A and other maps. Ex. 1045, Unger Dep. at 76, 80–81; Ex. 1022, FiveThirtyEight Congressional Map Assessment, at 2; Ex. 2703, PlanScore Oregon Congressional Plan SB 881A Assessment.

II. The Legislative Assembly Violated The Oregon Constitution

A. The Oregon Constitution Prohibits Partisan Gerrymandering

The Oregon Constitution prohibits partisan gerrymandering, a practice that is "incompatible with democratic principles." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015) (brackets omitted; citations omitted). Article I, Section 8 of the Oregon Constitution provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." Or. Const. art. I, § 8; *see generally State v. Henry*, 302 Or. 510, 513–14 (1987). Article I, Section 26 guarantees that "[n]o law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of greviances (sic)." Or. Const. art. I, § 26; *see State v.*

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

Babson, 355 Or. 383, 428–32 (2014). Or. Const. art. I, §§ 8, 26. Similarly, Article I, Section 20 provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens," Or. Const. art. I, § 20; *see State v. Savastano*, 354 Or. 64, 73–97 (2013), and Article II, Section 1 guarantees that "[a]ll elections shall be free and equal," Or. Const. art. II, § 1; *see also Libertarian Party of Or. v. Roberts*, 305 Or. 238, 248 (1988); *Ladd v. Holmes*, 40 Or. 167, 178 (1901).

These provisions operate to protect the rights of Oregon voters to participate meaningfully in the political process, to express political views, to affiliate or support a political party, and to cast a vote—they thereby prohibit the Legislative Assembly from reapportioning Oregon voters into a partisan-gerrymandered map. A partisan-gerrymandered map such as SB 881-A violates these constitutional provisions by harming voters who favor the out-of-power political party, injuring them for associating with that party, targeting them based upon their political views and voluntary association, undermining them for expressing their political beliefs, and discouraging them from campaigning for like-minded candidates. Ex. 1002, Clarno Decl. ¶¶ 16–21.

In a recent decision regarding Pennsylvania's nearly identically worded Free and Equal Elections Clause, *League of Women Voters v. Commonwealth*, the Pennsylvania Supreme Court explained its analytical process for adjudicating partisan gerrymandering claims arising under that provision. 178 A.3d at 97–123; *see* Pa. Const. art. I, § 5 ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the exercise of the right of suffrage."). In concluding that the 2011 maps adopted by the Republican-controlled legislature constituted an unconstitutional partisan gerrymander, the court cited favorably the trial court's conclusion that such a claim under the Pennsylvania Free and Equal Elections Clause required proof of "intentional discrimination against an identifiable political group and that there was an actual discriminatory effect on that group." *League of Women* Voters, 178 A.3d at 70. Many courts, including federal courts before the Supreme Court's decision in *Rucho* ended partisan gerrymandering litigation at the federal level, used a similar version of this intent-plus-effects test.

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

See, e.g., *Bandemer*, 478 U.S. at 127 (plurality op.); *Householder*, 367 F. Supp. 3d at 707–09; *Benisek v. Lamone*, 348 F. Supp. 3d 493, 515 (D. Md. 2018); *Rucho*, 318 F. Supp. 3d at 860–69; *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596–98 (D. Md. 2016).

It is the prerogative of the Oregon courts to decide whether to hold that the Oregon Constitution prohibits partisan gerrymandering *and* whether that prohibition mirrors ORS § 188.010(2)'s partisan-intent-only test, or whether an unconstitutional partisan gerrymander must involve a showing of both partisan intent and partisan effect, as courts in other jurisdictions have held for broadly worded constitutional provisions. However, that difficult decision is largely academic at this point in time because ORS § 188.010(2) would require invalidating a map drawn with partisan intent, without any inquiry into partisan effect. *See supra* Part I.A. Nevertheless, Petitioners have brought these constitutional claims and continue to press them here, so they argue below why they would prevail under the more demanding intent-plus-effects standard.

B. The Legislative Assembly Adopted SB 881-A With Partisan Intent

The Legislative Assembly adopted SB 881-A with the purpose of favoring the Democratic Party. *See supra* Part I.B. If this Special Judicial Panel holds that the Oregon Constitution prohibits partisanship gerrymandering on partisan-intent-only grounds, then SB 881-A would be unconstitutional for the same reasons as articulated above.

C. SB 881-A Has Impermissible Partisan Effect Because It Has An Efficiency Gap Of More Than 7% On Any Measure Of That Metric

1. Petitioners acknowledge that measuring the "best" approach to partisan effect is very difficult. Courts around the country have been inconsistent in their approaches, and the U.S. Supreme Court threw concluded that no possible measure of too much partisan effect was judicially administrable in the federal courts. *Rucho*, 139 S. Ct. at 2506–08. The reasons that this issue has been so challenging are largely two-fold: (a) prevailing views regarding the "best" partisan fairness metrics are ever changing and evolving, and (b) adopting any approach that relies

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

upon metrics intending to use future predictions of electoral conditions makes it near impossible for any legislature or court to know what is prohibited and what is permitted.

Given these difficulties, Petitioners here urge that if this Special Judicial Panel holds that a showing of too much partisan effect (and not just partisan intent) is an element of a constitutional claim, then the test for that element should be: when a map has an efficiency gap of greater than 7% based upon all statewide elections from a prior decennial period, that map has an impermissible partisan effect. Petitioners submit that this should be the test for two principal reasons:

First, the efficiency gap is the most commonly used method to measure partisan advantage, as Plaintiffs' and Intervenor's experts agree, Ex. 2300, Katz Report at 9; *accord* Ex. 3002, Gronke Decl. at 4; Ex. 3001, Caughey Decl. at 14–15, and one that the State of Oregon has endorsed when targeting maps drawn by other States, Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (U.S. Mar. 8, 2019), at 15. The efficiency gap is keyed to determining the number of "wasted" votes that each party has in an election, thereby determining how map drawers "pack" or "crack" districts to ensure that the majority party wins a sufficient number of districts. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering And The Efficiency Gap*, 82 U. Chi. L. Rev. 831, 849–52 (2015). To do so, the efficiency gap looks at *actual, past elections* and calculates "the difference between the parties' respective wasted votes, divided by the total number of votes cast in the election," counting as "wasted" "any vote for a losing candidate," as well as "any vote beyond the 50 percent threshold needed (in a two-candidate race) to win a seat." *Id.* at 851, 857 (emphasis omitted); *see also* Ex. 1006, Brunell Report at 2. The State of Oregon has praised this metric as a valid measure for "provid[ing] evidence" that a State's map has a partisan effect, Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (Mar. 8, 2019), at 15, and it has supported before the Court plaintiffs there who argued that any efficiency gap above 7% is a sufficient level of proof of partisan gerrymandering, Ex. 1024, States' Amici Brief in *Gill v. Whitford*, No. 16-1161 (U.S. Sept. 5, 2017); *Whitford*, 218 F. Supp. 3d at 860–61, 905–06. Given Oregon's prior position, a 7% efficiency gap test would be fair to apply to Oregon's own maps.

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

Second, the efficiency gap can be easy to calculate for both the Legislative Assembly and the courts, especially if the courts clearly set out which past elections should be used to calculate this metric. Stephanopoulos & McGhee, *supra*, at 856–57; Transcript of 10/27/21 Hearing, at 309. The efficiency gap "can be calculated using actual election results, without the need for any further assumptions," which is particularly helpful when there is no "high likelihood that election outcomes will change substantially in the near future." Stephanopoulos & McGhee, *supra*, at 855; *see also* Ex. 3001, Caughey Decl. at 15 (praising efficiency gap due to the "ease with which it can be calculated from observed election results"). To understand if a map violates the 7% efficiency-gap rule, the Legislative Assembly or a court would merely need to perform a straightforward mathematical analysis, which is generally not subject to serious dispute. Again, Oregon proposed this very approach before the United States Supreme Court, asking the Court to endorse this "particular metric[ ]" for a measure of partisan "effect" because it would allow States "to model those metrics and ensure that their maps stay within the bounds" of the efficiency gap's analysis. Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (U.S. Mar. 8, 2019), at 15.

Petitioners do not argue that the efficiency gap is a perfect measure; no such perfect measure exists or likely will ever exist. Further, "as recognized by all of the experts, the challenge of proper analysis" under *any* metric will be particularly imperfect in a State with Oregon's population. SMFOF, p. 16. So, the best that this Special Judicial Panel can do is pick a measure that is broadly used, easily calculable, and well-recognized by the State of Oregon. Petitioners respectfully submit that only the efficiency gap fits that bill, with a 7% test being grounded in an approach that Oregon supported when another State's redistricting map was at stake.

2. "Under every measure of the efficiency gap . . . the experts have offered" in this case, SB 881-A "favors Democrats," SMFOF ¶ 241, at above this 7% level. When Professor Brunell analyzed "all statewide elections in Oregon between 2012 to 2020," he determined that SB 881-A maintained a noted Democratic advantage under the efficiency gap metric of 7.76%, meaning that Republicans would expect to waste 7.76% more votes than Democrats under this map. Ex. 1049,

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

Brunell Supp. Report, at 1, 21. And when Professor Brunell calculated SB 881-A using only the largescale, well-funded Presidential elections of 2012, 2016, and 2020, SB 881-A's partisan discrimination was even higher. Ex. 1006, Brunell Report, at 2, 6–8. Using this more limited data set, the SB 881-A districts resulted in an average efficiency-gap advantage to Democrats of 19.85%. Ex. 1006, Brunell Report, at 6–8. Professors Gronke's and Caughey's analysis of SB 881-A under the efficiency gap confirms SB 881-A's pro-Democratic efficiency gap. *See* Ex. 3001, Caughey Decl., at 14–16; Ex. 3002, Gronke Decl., at 12–13. Each of these experts who analyzed SB 881-A on this measure—relying upon PlanScore's data—concluded that it provided Democrats with at least an 8.5% efficiency gap advantage. Gronke Decl. at 11; Caughey Decl. at 14; *accord* Ex. 2703, PlanScore Oregon Congressional Plan SB 881A Assessment, at 1, 3. Simply put, by *every* measure of the efficiency gap presented by both sides, SB 881-A provides a "legally significant" partisan advantage to Oregon Democrats. *Whitford*, 218 F. Supp. 3d at 860–61.

3. The alternative approaches suggested by the experts presented by Respondent and Intervenor—while unquestionably academically interesting—fail to provide a useful, judicially administrable measure for partisan effect. And combining all experts' approaches together with the efficiency gap, as the Special Master proposed, *see* SMFOF, pp. 15–16, makes a bad situation even worse, making the partisan-effect inquiry unpredictable and entirely unadministrable.

As an initial and broadly applicable problem, the approaches that Professors Katz, Gronke, and Caughey put forward do not analyze any version of partisan fairness that is likely to apply in the real world during the subsequent decade when the map is to govern. Rather, their opinions and testimony largely analyze the partisan fairness based on the concept of mirroring fairness through partisan symmetry. Ex. 2300, Katz Report, at 7; Ex. 3001, Caughey Decl. at 5–11. Such a complicated symmetry analysis involves "predicting counter-factual election results," Ex. 2300, Katz Report, at 9, by looking at "the difference between the two parties' seat shares when each *receives the same statewide vote share*," Ex. 3001, Caughey Decl. at 4 (emphasis added). These experts performed this analysis by looking not only at the actual results of recent statewide

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

elections, Ex. 2300, Katz Report, at 12; Ex. 3001, Caughey Decl. at 7, but also at hypothetical scenarios in which the Oregon Republicans attain either statewide parity with the Oregon Democrats or a substantial statewide majority, Ex. 2300, Katz Report at 16–17; Ex. 3001, Caughey Decl. at 8. That does not focus on Oregon's actual electorate, or even a reasonable projection of it, but on hypothetical voting splits in the State that do not exist and that have not even been predicted to occur in the near future. Transcript of 10/28/21 Hearing, at 99–101, 165–67.[12]

Further, such analyses require complicated calculations to determine their values, Transcript of 10/28/21 Hearing, at 99–101, 165–67; Ex. 2300, Katz Report, at 12, 16–17; Ex. 3001, Caughey Decl. at 7–9, making them difficult for courts and the Legislative Assembly to apply in a consistent, predictable manner. These analyses required "sophisticated statistical model[s]," Ex. 3001, Caughey Decl. at 11, involving complex "regression analysis," Ex. 2300, Katz Report at 12. These experts admitted as much in live testimony, noting that their conclusions relied in part upon hypothetical situations in which Oregon's electorate might vote in radically different percentages than in the most recent past, based on a hypothetical partisan sway. Transcript of 10/28/21 Hearing, at 41–42, 49–50, 163–67, 181–82, 184–85.

Similarly misplaced are these experts' abbreviated analyses of approaches like mean-median difference, declination, and partisan bias, all of which also require the application of hypotheticals such as where "Republican candidates won 50% of the statewide vote," Ex. 3002, Gronke Decl. at 16; *see also* Ex. 3001, Caughey Decl. at 12–14, and so are similarly unhelpful

[12] The Special Master criticized Petitioners for raising this point, claiming that Petitioners never questioned these experts on this issue during cross-examination, which was the only opportunity that Petitioners had to grapple with these experts in these unusual proceedings. SMFOF, p. 14. Petitioners unambiguously questioned each of these experts on just this very point, and these experts each acknowledged that their analyses were largely based upon hypothetical situations in which Oregon's electorate might vote in radically different percentages than in the recent past. Transcript of 10/28/21 Hearing, at 41–43, 48–49, 97–100, 162–67, 181–82, 184–85. Petitioners respectfully request that this Panel review those transcript pages to determine if the Special Master's criticism on this front is warranted.

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

when determining whether SB 881-A has an *actual* partisan effect in the real world, *contra* SMFOF, ¶¶ 267–70, 281–83. Declination is only a meaningful measure of gerrymandering when "the gerrymandering party is unsure whether it will hold a statewide majority in the future," Ex. 3001, Caughey Decl. at 14, but there is no explanation of why or whether the Oregon Democrats would actually be "unsure" about their future statewide majority. Importantly, none of Respondent's and Intervenors' experts inform the Special Judicial Panel about the actual partisan impact of the maps, and the Special Master acknowledged that Respondent's and Intervenors' analysis showing no pro-Democratic bias generally relied upon what would occur in hypothetical "competitive elections," SMFOF, ¶ 276; *see id.* ¶ 285 ("any Democratic advantage under the Enacted Map is estimated to shrink the closer that the major parties come to even competition in Oregon"), not in elections of the sort that have occurred in recent years, with substantial Democratic majorities. These conclusions have little relevance to the partisan effect of SB 881-A for any real-world applications of SB 881-A.

Finally, the Special Master's approach—considering all approaches and results together, SMFOF, pp. 15–16—is entirely unmanageable. By considering all of various and competing measures, the Special Master's approach would foist upon the State of Oregon the same practical problems that led the U.S. Supreme Court to no longer decide partisan-gerrymandering claims. *See Rucho*, 139 S. Ct. at 2506–08. The Special Master's approach would either: (a) require lawmakers to consider all measures of partisan effect in order to ensure that the proposed map does not run afoul of any of these competing (and sometimes contradictory) metrics, or (b) would insulate all maps from constitutional scrutiny, no matter how intentionally gerrymandered, because of how unlikely it is that any map would violate every single metric. For example, someone could look at some subset of the analyses that Respondent's and Intervenors' experts favor, combined with the efficiency gap, and conclude that SB 881-A scores well on partisan fairness. Or another person could look at the combination of metrics that the Princeton Gerrymander Project considered and conclude that SB 881-A is an "F" in terms of partisan fairness. *See, e.g.*, Ex. 1023, Princeton

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

Gerrymander Project Congressional Map Grade. The Special Master—and, indeed, Petitioners and Intervenors—offer no predictable, administrable method for the Legislative Assembly or a court to conduct that analysis, which means that there would be no meaningful standard.

III. This Special Judicial Panel Should Adopt A Remedial Map Under SB 259-B § 1(8)(a), With An Efficiency Gap As Close To Zero As Is Practicable

Petitioners have proposed a map that exhibits greater partisan fairness, as measured by the efficiency gap. Ex. 1014, Proposed Neutral Map. Using data from all statewide elections from 2012 to 2020, the efficiency gap of the Proposed Neutral Map is -1.03%, which is very close to neutral. *See* Ex. 1049, Brunell Supp. Report, at 21. Petitioners understand that Respondent or their experts may not like some aspects of Petitioners' map. Petitioners are ordinary citizens who did their level best to put a neutral map before this Special Judicial Panel, but they appreciate that it is ultimately this Panel's obligation, under SB 259-B § 1(8)(a), to adopt any remedial map. Petitioners would thus welcome Respondent, Intervenors or any other interested parties submitting their own competing remedial maps, with as close to an efficiency gap of 0 as possible. That would be the most straightforward way to cure the partisan intent underlying SB 881-A, as an efficiency gap of near 0 would connote a map that was fair to both major parties over the actual statewide election results that obtained in Oregon over the last decade, under an approach that the State of Oregon has endorsed when another State's map was at stake. *See* Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (U.S. Mar. 8, 2019), at 15.

IV. Requests For Evidentiary Rulings

A. Representative Bonham's Testimony Is Admissible

Although Respondent only requested the exclusion of certain paragraphs of Representative Bonham's declaration and portions of his hearing testimony on Debate Clause grounds, Respondent's Memorandum Of Law In Support Of Respondent's Objections To Petitioner's Evidentiary Submissions, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Nov. 2, 2021), the Special Master excluded all Representative Bonham's evidence under that Clause, on

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

the apparent theory that a legislator can never offer any testimony whatsoever in a case, even as to their experience and perceptions, SMFOF, pp. 5–12. But neither the Debate Clause nor any rule of evidence prohibit the Special Judicial Panel's consideration of Representative Bonham's declaration and testimony, which provide powerful, additional support for Petitioners' claims of impermissible partisan intent by the Legislative Assembly in enacting SB 881-A.

1. Article IV, Section 9 of the Oregon Constitution, the Debate Clause, provides in pertinent part that no member shall, "for words uttered in debate in either house, *be questioned in any other place*." Or. Const. art. IV, § 9 (emphasis added). When viewing this constitutional provision "as a whole," the Oregon Supreme Court has determined "two related purposes" for this privilege: (1) "allow[ing] legislators to perform their legislative functions *without being interrupted or distracted* by arrest, civil process, or other questioning," and (2) "allow[ing] legislators to perform their legislative functions without fear of retribution in the form of '*be[ing] questioned* in any other place' by either another branch of government or the public." *State v. Babson*, 355 Or. 383, 419 (2014) (emphases added; citation omitted; third alteration in original). Oregon courts have never applied that Clause to stop a willing legislator from testifying or submitting his own declaration in a case—and they have long considered this privilege to be an individual one, held by each legislator. *See id.* at 419, 427; *Adamson v. Bonesteele*, 295 Or. 815, 824 (1983); *accord* 49 Or. Op. Atty. Gen. 167, 1999 WL 98010, at *5 (Feb. 24, 1999) (discussing this as a privilege/immunity that "members enjoy"); *id.* at *4 n.6 (noting that the Debate Clause "insulate[s] legislators" in certain contexts). Indeed, in the *Babson* decision, the Oregon Supreme Court noted without any concern in a dispute over such privilege that "Senator Courtney and Representative Hunt each filed affidavits" of their own volition. 355 Or. at 427.

2. Here, Representative Bonham has freely offered his own testimony, and nothing in the Debate Clause prohibits him from doing so. Since the Debate Clause is meant to protect legislators like Representative Bonham from "'be[ing] questioned in any other place' by either another branch of government or the public," and from being "unnecessarily burden[ed]" by the "judicial process,"

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

Babson, 355 Or. at 419, 427 (quoting Or. Const. art. IV, § 9) (first brackets in original), he is free to provide his declaration or testimony at his own option. That is what the Debate Clause provides—protection of *unwilling* "member[s]" from "be[ing] questioned in any other place" about their "words uttered" in furtherance of official legislative acts. Or. Const. art. IV, § 9.

To that end, nothing in the Debate Clause precludes the admission of statements made by Democratic Party members to Representative Bonham, which is the only evidence that Respondent sought to have excluded on this ground in her motion. *See supra* pp. 34–35. Permitting Representative Bonham to testify does not risk "interrupt[ing] or distract[ing]" any other legislator's "perform[ance] [of] their legislative functions" by civil process or any other questioning, or require them to "be questioned" in "any other place," *Babson*, 355 Or. at 419 (brackets omitted), as Petitioners do not seek to depose, cross-examine, or otherwise question any other legislator as a result of Representative Bonham's willing decision to testify in this case.

The Presiding Judge's rulings on discovery motions similarly confirms this result. In relevant part, the Presiding Judge allowed Petitioners to depose and seek documents from various third parties who spoke to members of the Legislative Assembly during the redistricting process, and to do so specifically regarding their communications with the Legislative Assembly. *See* Order on Non-Parties' Motion to Quash, at 2, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 21, 2021). The Presiding Judge did *not* permit Petitioners to seek *this same exact information*—communications between legislators with third parties—from unwilling legislators themselves under the Debate Clause. Order on Legislative Assembly's Motion to Quash, at 1–2, 5–7, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 20, 2021). It follows that the Debate Clause—as read by the Presiding Judge—serves to protect unwilling "member[s]" from "be[ing] questioned" against their will, Or. Const., art. IV, § 9, but does nothing to prohibit Petitioners from obtaining the evidence in some other manner, such as from third parties or willing legislators. Permitting the admission of evidence from third parties who spoke with legislators,

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

but stifling the willing testimony of a sitting legislator who wishes to testify about just such statements that the legislator heard turns the Debate Clause on its head.

3. The Special Master's contrary conclusion is, with all respect, incorrect. Oregon courts have long characterized the Debate Clause privilege as one personal to each legislator. In *Adamson v. Bonesteele*, 295 Or. 815 (1983), the Oregon Supreme Court, framed the limits of the privilege as follows: "[t]he privilege does not *protect a legislator* who" acts "outside of his legislative function." *Id.* at 824 (quoting Restatement (Second) of Torts, § 590 *cmt. a* (1977)) (emphasis added). Similarly, in *Babson*, the Court explained the purposes of the rule as protecting "*individual* legislators," not the Legislative Assembly. 355 Or. at 427; *see id.* at 419. The Oregon Attorney General has long understood the privilege similarly, concluding that the privilege is one that "members enjoy" and explaining that it "insulate[s]" legislators from invasion by the courts or other government entities. 49 Or. Op. Atty. Gen. 167, 1999 WL 98010, *4 n.6, *5 (Feb. 24, 1999).

The Special Master's reliance on two inapposite, out-of-state cases does not support a contrary result. *See* SMFOF, pp. 8–10 (citing *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984), and *Montgomery Cty. v. Schooley*, 97 Md. App. 107 (Ct. Spec. App. 1993)). In *Holmes*, the court held that the privilege underlying the Rhode Island "speech in debate clause" could not "be waived" by any individual legislator because the "privilege is institutional in its protection of the Legislature, ensuring the separation of powers." *Holmes*, 475 A.2d at 985 (citation omitted). But that reasoning fails under Oregon's Debate Clause, because the Oregon Supreme Court has long understood the purposes of our independent legislative privilege to be personal, protecting *individual legislators* from certain compelled testimony and questioning. *Babson*, 355 Or. at 419; *Adamson*, 295 Or. at 824. No better is the Special Master's reliance on *Schooley*. *See* SMFOF, p. 10 (citing *Schooley*, 97 Md. App. 120–21). *Schooley* found a limited exception to its general rule that "legislative immunity or privilege can only be asserted by the officer who possesses it, and not by others," and held that in the particular setting of that case, where an individual councilman explicitly took no position on the issue, the council itself could raise the privilege. *Schooley*, 97 Md. App. at 119–

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

20, 21 (citation omitted; emphasis removed). Thus, the *Schooley* court did not face or decide the issue here: whether the court can muzzle a willing legislator from testifying.

4. The Special Master also erred in recommending exclusion of portions of Representative Bonham's testimony on the alternative grounds of hearsay, relevance, or foundation, SMFOF, pp 3–4 (citing to ¶¶ 5–6, 10–16, 19–21, 27–35, and 37 of Representative Bonham's declaration). Under these principles, all of these portions of Representative Bonham's testimony are admissible. Evidence is relevant "if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the [evidence].'" *Bergstrom v. Assocs. for Women's Health of S. Or., LLC*, 283 Or. App. 601, 606 (2017) (quoting OEC 401). And a witness has a sufficient foundation to testify to a matter so long as "the witness has personal knowledge of the matter," meaning that he "had an adequate opportunity to observe or otherwise personally perceive the facts to which the witness will testify, and did, in fact, observe or perceive them, thereby gaining personal knowledge of the facts." *State v. Lawson*, 352 Or. 724, 752–53 (2012) (citation omitted). Representative Bonham's testimony easily clears these minimal hurdles.

In paragraphs 5 and 6 of his Declaration, Representative Bonham explained that "[o]n April 7, 2021, Republicans reached a compromise with Speaker Kotek, who agreed to provide Republicans equal membership on the Committee," and "[t]his was done to ensure that the Committee recommended a neutral, non-gerrymandered map that was fair to all Oregonians." Ex. 1003, Bonham Decl. ¶ 5. Representative Bonham, as a leader within the Republican caucus in the Legislative Assembly and a member of the House Redistricting Committee responsible for "determining the approach that Legislative Assembly Republicans w[ould] follow," Ex. 1003, Bonham Decl. ¶ 3; *see also* Transcript of 10/27/21 Hearing, at 166–68, has the "personal knowledge," OEC 602; *Lawson*, 352 Or. at 752–53, to testify about what House Republicans did with respect to the Committee, and why they did it. His testimony that he "became concerned that [Speaker Kotek] might break her word and change the composition of the Committee in order to

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

push through gerrymandered maps," Ex. 1003, Bonham Decl. ¶ 6, is relevant to explain the "sequence of events" and "[d]epartures from the normal procedural sequence" leading up to the enactment of the maps, *Arlington Heights*, 429 U.S. at 267, and Representative Bonham has personal knowledge to testify to the concerns of Legislative Assembly Republicans consistent with his leadership role in that caucus, Ex. 1003, Bonham Decl. ¶ 3.

In paragraphs 10–12, Representative Bonham explained, consistent with his own personal knowledge and perception, *Lawson*, 352 Or. at 752–53, of the "Plan A" map that it "was plainly a partisan gerrymandered map, designed to create a disproportionately Democratic advantage," with its "most problematic aspect . . . [being] that it unnecessarily broke up Portland and the Greater Portland Area, which are traditionally Democratic strongholds, into four districts: the First, Third, Fifth, and Sixth, in order to give the Democratic Party an advantage in congressional races," and as a result, he was unsurprised that "non-partisan third parties—such as FiveThirtyEight—immediately rated Plan A as a very clear pro-Democratic Party gerrymander." Ex. 1003, Bonham Decl. ¶¶ 10–12. Each of these statements is consistent with his knowledge and perception as an Oregon legislator and member of the redistricting committee and caucus, and whether the Democrats' maps were gerrymandered and had a partisan effect is clearly relevant to Petitioners' claims of unlawful partisan gerrymandering.

Similarly admissible is Representative Bonham's testimony that Republicans were "disappointed with the Democrats' Plan A" map but "wanted to negotiate to reach a compromise map with [their] Democrat colleagues," that Republicans "were absolutely willing and, indeed, exceedingly eager to accept a compromise map, had Democratic Members been willing to negotiate in good faith," that "Democrats never once attempted to negotiate with Republicans on the congressional map," and that Democrats drew multiple maps "without any Republican input or negotiations," or expectations that any Republican negotiations would be allowed. Ex. 1003, Bonham Decl. ¶¶ 13–15, 27–30, 32. Again, this testimony comes from his "personal knowledge" and experiences, OEC 602; *Lawson*, 352 Or. at 752–53, on the redistricting committee and in

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

Republican leadership as point man on redistricting issues, Ex. 1003, Bonham Decl. ¶ 3, and is relevant to partisan intent, *Arlington Heights*, 429 U.S. at 267. Representative Bonham's testimony that Democrats made clear they "would not be accepting any Republican changes to the Democrats' map," Ex. 1003, Bonham Decl. ¶ 16, and that Representative Marty Wilde told him Democrats knew their 5-1 Democrat favored map was at risk of being "challenged and invalidated in court as a partisan gerrymander," Ex. 1003, Bonham Decl. ¶ 31.

Paragraphs 19 to 21 of Representative Bonham's declaration—noting that "Speaker Kotek created two new committees: an eight-member House Committee on State Legislative Redistricting and a three-member House Committee on Congressional Redistricting," which had "two Democrats (Representative Salinas and Representative Campos) and one Republican (Representative Boshart Davis)," and the new committee "convened" to "vote SB 881 out of committee" without Representative Boshart Davis's attendance, Ex. 1003, Bonham Decl., ¶¶ 19–21—present no relevancy or foundation issues, as these are plainly relevant to the issue of partisan intent, and he has personal knowledge of the committee actions given his prior membership and status as a leader in the Republican caucus, Ex. 1003, Bonham Decl. ¶ 3.

Representative Bonham's testimony that Legislative Assembly Republicans only provided quorum for a vote on SB 881-A because of fears of possible worse maps—both SB 881-A and SB 882, on state legislative districts—drawn by Secretary of State Shemia Fagan should the Legislature fail, Ex. 1003, Bonham Decl. ¶¶ 33–35, also comes from his direct knowledge as a Republican redistricting leader, *see* OEC 602, and this evidence is relevant to explain the legislative "procedural sequence" "leading up to" the enactment of SB 881-A, *Arlington Heights*, 429 U.S. at 267. Thus, each of these statements is admissible and the Special Master's decision to exclude each on foundation or relevance grounds is incorrect.

Finally, none of Representative Bonham's testimony is excludable as hearsay. *See* SMFOF, pp. 3–4. "The 'state-of-mind' exception [ ] admits statements of existing mental or emotional condition to prove the mental or emotional condition of the declarant at the time the

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

statements were made." *State v. Blaylock*, 267 Or. App. 455, 461 (2014) (citation omitted). Statements made regarding a declarant's existing state of mind as to their "intent, plan, motive, [or] design" are admissible as exceptions to the hearsay rule. OEC 803(3). That is, a statement which "reasonably supports an inference as to the declarant's state of mind . . . constitutes an assertion of the declarant's state of mind for purposes of OEC 803(3)." *State v. Clegg*, 332 Or. 432, 441 (2001). "A statement of the declarant's then-existing intent or plan expressly is included as an example of a statement of the declarant's state of mind in OEC 803(3)." *Id.* Any statements of Representative Bonham's to which Respondent could possibly object on hearsay grounds fall within this exception, given that Representative Bonham's testimony was about the state of mind, intent, and plans of legislators. Nor was the Special Master correct that Representative Bonham's testimony regarding these other declarants' states of mind was "offered to prove facts" of the matter stated. *See* SMFOF, pp. 3–4. Rather, each such assertion was offered only to show the "intent, plan, motive, [or] design," OEC 803(3), of the legislators at issue.

B. The Rating of SB 881-A By FiveThirtyEight.com Is Admissible

Oregon codified the common-law definition of hearsay in OEC 801(3), *see State v. Cazares-Mendez*, 350 Or. 491, 504–05 (2011), which defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, *offered in evidence to prove the truth of the matter asserted*," OEC 801(3) (emphasis added). "[T]he hearsay or nonhearsay character of a statement is determined by the purpose for which it is offered," and "if an out-of-court statement is offered not to prove the truth of the matter, but for some other purpose, it is not hearsay and therefore not excluded." *Sullivan v. Popoff*, 274 Or. App. 222, 233 n.7 (2015). For example, the Oregon Supreme Court has allowed a party to read excerpts of documents to a jury, so long as they are for the limited purpose of showing a defendant had "knowledge" or "notice" of a fact, and not for their truth. *Oberg v. Honda Motor Co.*, 316 Or. 263, 269–70 (1993), *rev'd on other grounds*, 512 U.S. 415 (1994); *see also State v. Coleman*, 130 Or. App. 656, 666 (1994)

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

(allowing admission of the contents of a written bulletin found in witness's house because it was "offered to show someone's knowledge, and not to prove the truth of the matter asserted").

Here, as this Special Judicial Panel can see from this Memorandum, 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. *See supra* p. 18. As Petitioners have explained, legislative Democrats were focused upon the publicly available efficiency gap scores of their proposed maps, discussing particularly the FiveThirtyEight.com scoring. *See supra* p. 18. Thus, Petitioners do not rely upon the FiveThirtyEight analysis to establish the truth of any of its conclusions—such as whether SB 881-A *actually* provides Oregon Democrats with a large efficiency gap advantage. *See* Ex. 1022, FiveThirtyEight Congressional Map Assessment, at 2. Petitioners have established SB 881-A's pro-Democratic Party efficiency gap exclusively through both the calculations of Professor Brunell and the calculations of the experts presented by Respondent and the Intervenors, which all show a more-than-7% efficiency gap for SB 881-A. *See supra* pp. 10, 18. 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. This evidence is highly relevant and important in discerning Democrats' *intent* in passing a partisan gerrymandered map. Given this fact, and the limited nature for which Petitioners have offered the FiveThirtyEight analysis in this Memorandum, Special Judicial Panel should not exclude this evidence on hearsay grounds. *Id.*; *Sullivan*, 274 Or. App. at 234 n.7.

C. The Princeton Gerrymandering Project Rating Is Admissible

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

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

an all-things-consider test for impermissible partisan effect leads to differing outcomes. *See supra* 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 Sullivan*, 274 Or. App. at 234 n.7. Given that limited usage, the Project's "F" analysis of SB 881-A is plainly admissible.

D. The Special Master's Criticisms Of Professor Brunell Were Unfair

The Special Master properly rejected Respondent's motion to exclude Professor Brunell's testimony, finding him to be qualified, and his reports and testimony to "helpful" to the case. SMFOF, p. 16. In this Memorandum, Petitioners have relied upon Professor Brunell's analysis only for his calculations of the efficiency gap and for his description of how to calculate the efficiency gap, *see supra* pp. 30–31, and no party has questioned either aspect of Professor Brunell's report and testimony on these points. Having said that, Professor Brunell is a nationally recognized expert who has written numerous articles and a book on redistricting and elections, and has testified in many cases for twenty years. Ex. 1005, Declaration of Professor Thomas L. Brunell, ¶¶ 3–10. Accordingly, Petitioners feel duty bound to defend Professor Brunell from the Special Master's unfair criticisms. Below, Petitioners list each of the paragraphs that the Special Master criticized Professor Brunell for in his tentative Findings of Fact. Petitioners responded to each of those criticisms (also reproduced below), and the Special Master retained each of these criticisms without addressing Petitioners' points in his Recommended Findings Of Fact And Report. *See* SMFOF ¶¶ 289–300. Petitioners respectfully submit that the Special Master incorrectly failed to grapple with Petitioners' responses, or offer any basis for disagreeing with those responses:

* * *

"

279. While I find Dr. Brunell generally to be a credible witness, the methodology he employs, and therefore the conclusions he reached, lack credibility and are therefore unreliable.

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

Objection. Dr. Brunell's Methodology is well-established within the field. The efficiency gap and proportionality are standard methodologies in political science. *See, e.g.*, Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015) (efficiency gap); Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate Over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503 (2018) (efficiency gap); Eric M. McGhee, *Measuring Efficiency in Redistricting*, 16 Election L.J., No. 4, 2017, at 417 (efficiency gap); Bernard Tamas, *American Disproportionality: A Historical Analysis of Partisan Bias in Elections to the U.S. House of Representatives*, 18 Election L.J., No. 1, 2019, at 47–62; John Loosemore & Victor J. Hanby, *The Theoretical Limits of Maximum Distortion: Some Analytic Expressions for Electoral Systems*, 1 Brit. J. of Pol. Sci., No. 4, Oct. 1971, at 467–77 (proportionality); Michael Gallagher, *Proportionality, Disproportionality and Electoral Systems*, 10 Electoral Studies Iss. 1, 33–51 (1991) (proportionality).

280. Several of Dr. Brunell's conclusions lack even a minimum of academic or methodological rigor. He was unprepared to testify about several components of his submissions. For example:

Objection. Dr. Brunell's methodology is well-established within the field. Dr. Brunell used and calculated the efficiency gap consistent with the standard rigor of the methodology, using data provided by data aggregators and maps created by up-to-date technology. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015); Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate Over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503 (2018); Eric M. McGhee, *Measuring Efficiency in Redistricting*, 16 Election L.J., No. 4, 2017, at 417. Moreover, Plan Score and 538 both rely on efficiency gap as a measure of partisan advantage, underscoring both its general acceptability in the field and the ease with which it can convey gerrymandering. Ex. 1022; Ex. 3001, Caughey Decl. at 15 & n.36.

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

281. Dr. Brunell reported compactness scores and the number of county and municipal splits for the Enacted Map and two other maps he purported to compare. Ex. 1006 at 8-9 (report of Dr. Brunell). But Dr. Brunell testified that he merely copied and pasted these figures from counsel— he did not otherwise know where the figures came from—and he never examined or verified the calculations that he reported. See Hearing Tr (rough), Oct 27, 2021, at 168–169, 264–65.

Objection. Most academics/experts that testify on these matters do not use mapping software—demographers draw the maps and the academics analyze the partisan effects of where the lines were drawn. This means that the particular shape of the districts, other than analyzing compactness, do not matter. This also means that Dr. Brunell, and all other academic experts, are provided data—election data, demographic data, data on specific aspect of proposed districts (such as county splits and compactness)—for which they cannot possibly verify the accuracy. No one "verified" the accuracy of all the election data they used. Rather, both Dr. Gronke and Dr. Caughey used Plan Score data that they did not independently verify before analyzing the efficiency gap scores used in their reports. *See* Ex. 3001, Caughey Decl. at 2; Ex. 3002, Gronke Decl. at 2. Moreover, no one has objected to the accuracy or correctness of Dr. Brunell's data to date.

282. Dr. Brunell attached an alternative congressional map to his report, but he testified that he knew little about the map. *See* Hearing Tr (rough), Oct 27, 2021, at 218, 268–72. He could not explain basic features of the map, such as the relevance of white lines that were drawn across it, nor could he explain whether the map complied with statutory redistricting criteria. See Hearing Tr (rough), Oct 27, 2021, at 268–72.

Objection. Dr. Brunell knew what he needed to know about the alternative map to conduct the relevant analysis for his report. The white lines on the map shown to Dr. Brunell were never established as having anything to do with a valid redistricting consideration. *See* Transcript of 10/27/21 Hearing, at 285–88. Dr. Brunell's concern lies with the underlying data, not the map

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

itself. And no party has ever established [t]hat those white lines had any bearing on the redistricting criteria at issue. *See* Transcript of 10/27/21 Hearing, at 285–88.

283. Dr. Brunell's report and testimony is further weakened by apparent inconsistencies in Dr. Brunell's approach. For example:

Objection. Dr. Brunell's testimony was not inconsistent. The alleged inconsistencies are based upon taking Dr. Brunell's quotes out of context from his expansive catalogue of academic writing.

284. Dr. Brunell reported county splits as a typical method of quantifying how well a map preserves communities of interest, but admitted previously criticizing the notion that a county is a good proxy for a community of interest. Compare Ex. 1006 at 9 (report of Dr. Brunell), with Hearing Tr (rough), Oct 27, 2021, at 175–76.

Objection. This is incorrect. A "community of interest" can mean many things, and in some cases can be difficult to quantify. But one simple method or proxy to consider whether a map potentially took liberties with communities of interest might be to determine the number of counties and cities that were split. Transcript of 10/27/21 Hearing, at 187–91. In any event, compliance with traditional redistricting criteria does not provide any defense against an allegation or showing of either partisan intent or partisan effect.

285. Dr. Brunell reported compactness as a "measure of interest" when comparing potential maps, but admitted his view that stressing compactness is a mistake. Compare Ex. 1006 at 8 (report of Dr. Brunell) with Hearing Tr (rough), Oct 27, 2021, at 187.

Objection. Dr. Brunell stress[ed] that overly relying on compactness as "the full treatment" would be a mistake, but when politicians "draw really, really oddly shaped funny districts . . . everyone wonders what's going on there," and compactness as a measure can quantify that oddity. Transcript of 10/27/21 Hearing, at 200.

286. Dr. Brunell reported that Democrats are "likely" to win in five of the six congressional districts under the Enacted Map, but he could not describe with any specificity or

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

confidence how likely such a scenario would be. Compare Ex. 1006 at 9 (report of Dr. Brunell) with Hearing Tr (rough), Oct 27, 2021, at 197–98.

Objection. When one examines the Presidential elections that Dr. Brunell initially analyzed, the Democrats carried five out of six Districts consistently and with generally safe margins. And Dr. Brunell acknowledged in his reports and testimony that while that was not true for all other statewide elections, he concluded that the Presidential elections were most indicative of future electoral results and "good to gauge the underlying partisanship of the state." Ex. 1006, Brunell Report, at 2; *see* Transcript of 10/27/21 Hearing, at 321. Moreover, Dr. Brunell acknowledged that it was "possible for Republicans to win more than one seat," as that was not "an impossibility," although he did not think it likely under SB 881-A. Transcript of 10/27/21 Hearing, at 224.

287. Dr. Brunell reported that the Enacted Map favors the Democratic Party because he expects Democrats to win a seat share disproportionate to their vote share, but he testified that in America's electoral system of single member, winner-take-all districts, is it common for the majority party to win a share of the elected seats that is more than their proportional share of the vote. Compare Ex. 1006 at 4 (report of Dr. Brunell), with Hearing Tr (rough), Oct 27, 2021, at 211, 250–51.

Objection. While there is a winner's bonus and Dr. Brunell acknowledged as much in his testimony, it is not clear how big the bonus should be. Transcript of 10/27/21 Hearing, at 303. Indeed, this is part of the attractiveness of the efficiency gap because it builds the winner's bonus into its calculation and then measures partisan advantage on top of that built-in bonus. Transcript of 10/27/21 Hearing, at 318–19.

288. In addition to these problems, the credibility of Dr. Brunell's report and conclusions suffers from other shortcomings. For example:

Objection. Dr. Brunell's testimony does not suffer from any significant shortcomings, especially in comparison to the other expert opinions provided in this case.

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

289. Dr. Brunell's report failed to cite any academic or peer-reviewed sources. Hearing Tr (rough), Oct 27, 2021, at 212, 242.

Objection. Given the expedited nature of this litigation, Dr. Brunell did not include citations to academic or peer-reviewed sources, but his failure to do so was not indicative of a failure to consult such literature. Rather Dr. Brunell's analysis is consistent with multiple lines of literature in partisan gerrymandering. *See, e.g.*, Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015) (efficiency gap); Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate Over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503 (2018) (efficiency gap); Eric M. McGhee, *Measuring Efficiency in Redistricting*, 16 Election L.J., No. 4, 2017, at 417 (efficiency gap); Bernard Tamas, *American Disproportionality: A Historical Analysis of Partisan Bias in Elections to the U.S. House of Representatives*, 18 Election L.J., No. 1, 2019, at 47–62; John Loosemore & Victor J. Hanby, *The Theoretical Limits of Maximum Distortion: Some Analytic Expressions for Electoral Systems*, 1 Brit. J. of Pol. Sci., No. 4, Oct. 1971, at 467–77 (proportionality); Michael Gallagher, *Proportionality, Disproportionality and Electoral Systems*, 10 Electoral Studies Iss. 1, 33–51 (1991) (proportionality). Similarly, Dr. Katz acknowledged that time constraints affected his ability to analyze additional data, so the pace of this litigation was equally challenging on expert witnesses. *See* Transcript of 10/28/21, Vol. 2, Hearing, at 71–72.

290. Dr. Brunell declined to share limitations of his conclusions, such as the fact that any efficiency gap estimate is likely to be especially volatile in a state with only six congressional seats. See Hearing Tr (rough), Oct 27, 2021 at 216–17, 250–51.

Objection. In his supplemental report, Dr. Brunell analyzed all statewide elections for the relevant period, and was the only expert to do so. *See* [Ex. 1049] Brunell Supp. Report at 2–21. Given the fulsomeness of his analysis, the Court had ample information to determine any supposed "limitations" of Dr. Brunell's conclusions. Moreover, as previously noted, the seat share is chunkier in Oregon because of the small number of seats as multiple experts acknowledged in this

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

case, affecting all analyses of partisan advantage, not merely Dr. Brunell's. *See* Ex. 2300, Katz Report, at 13; Transcript of 10/27/21 Hearing, at 232."

* * *

See Petitioners' Objections to Special Master's Tentative Findings of Fact, at 184–191, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Nov. 2, 2021) (bold, all caps, and internal cross-references omitted).

CONCLUSION

This Special Judicial Panel should grant the Petition and create a reapportionment plan, like Petitioners' proffered neutral map, that is not infected with the intent to partisan gerrymander.

DATED: November 10, 2021.

TROUTMAN PEPPER HAMILTON SANDERS LLP

Misha Tseytlin*
Sean T.H. Dutton*
227 W. Monroe Street, Ste. 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
Attorneys for Petitioners
**admitted pro hac vice*

Jack Altura*
Two California Plaza
350 South Grand Avenue, Ste. 3400
Los Angeles, CA 90071
(213) 928-9800
(213) 928-9850 (fax)
Attorneys for Petitioners
**admitted pro hac vice*

HARRIS BERNE CHRISTENSEN LLP

By: s/Shawn M. Lindsay
Shawn M. Lindsay, OSB #020695
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
(503) 968-1475
(503) 968-2003
shawn@hbclawyers.com
Attorneys for Petitioners

Trial Attorney:
Shawn M. Lindsay, OSB #020695

CERTIFICATE OF SERVICE

I certify that I served a true and complete copy of the foregoing **PETITIONERS' MEMORANDUM IN SUPPORT OF PETITION on the date below as follows:**

Brian Simmonds Marshall Brian.S.Marshall@doj.state.or.us Sadie Forzley Sadie.Forzley@doj.state.or.us Alexander C. Jones Alex.Jones@doj.state.or.us Department of Justice 100 SW Market Street Portland, OR 97201 *Attorneys for Respondent*	☒ Oregon's Electronic Court Service ☒ Email ☐ Facsimile ☐ First-class mail, postage prepaid ☐ Overnight courier, delivery prepaid ☐ Hand-delivery
Thomas R. Johnson, TRJohnson@perkinscoie.com Misha Isaak MIsaak@perkinscoie.com Jeremy A. Carp JCarp@perkinscoie.com Garmai Gorlorwulu, GGorlorwulu@perkinscoie.com Perkins Coie LLP 1120 N.W. Couch Street, Tenth Floor Portland, OR 97209-4128 *Attorneys for Intervenor/Respondents*	☐ Oregon's Electronic Court Service ☒ Email ☐ Facsimile ☐ First-class mail, postage prepaid ☐ Overnight courier, delivery prepaid ☐ Hand-delivery
Abha Khanna AKhanna@elias.law Jonathan P. Hawley JHawley@elias.law Elias Law Group LLP 1700 Seventh Avenue, Suite 2100 Seattle, WA 98101 *Attorneys for Intervenor/ Respondents*	☐ Oregon's Electronic Court Service ☒ Email ☐ Facsimile ☐ First-class mail, postage prepaid ☐ Overnight courier, delivery prepaid ☐ Hand-delivery
Aria C. Branch Jacob D. Shelly Elias Law Group LLP 10 G Street NE, Suite 600 Washington, D.C. 20002 *Attorneys for Intervenor/ Respondents*	☐ Oregon's Electronic Court Service ☒ Email ☐ Facsimile ☐ First-class mail, postage prepaid ☐ Overnight courier, delivery prepaid ☐ Hand-delivery

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003

DATED this 10th day of November 2021.

HARRIS BERNE CHRISTENSEN LLP

By: s/Shawn M. Lindsay
Shawn M. Lindsay, OSB #020695
Of Attorneys for Petitioners

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
P: 503.968.1475 | F: 503.968.2003