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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MARION

6 BEVERLY CLARNO, GARY WILHELMS,
7 JAMES L. WILCOX, and LARRY
8 CAMPBELL,

9 Petitioners,

10 v.

11 SHEMIA FAGAN, in her official capacity as
12 Secretary of State of Oregon,

13 Respondent.

14 v.

15 JEANNE ATKINS, SUSAN CHURCH,
16 NADIA DAHAB, JANE SQUIRES,
17 JENNIFER LYNCH, and DAVID
18 GUTTERMAN,

19 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**

RESPONDENT'S EVIDENTIARY MOTION
AND MEMORANDUM

ORS 20.140 - State fees deferred at filing

20 **MOTION FOR EVIDENTIARY RULINGS**

21 In accordance with the Amended Scheduling Order (Oct. 20, 2021), Respondent moves
22 for rulings on evidentiary objections made before the Special Master. Respondent objected to
23 numerous documents and testimony submitted by Petitioners, and Respondent argued that those
24 submissions were inadmissible under the Oregon Evidence Code (OEC). The Special Master
25 made tentative rulings for some of those objections but deferred on others. Having considered
26 the evidence and heard live testimony, the Special Master has since submitted recommended
findings of fact for the Special Judicial Panel's review, along with recommended evidentiary
rulings. Respondent's evidentiary objections are now properly before this Court for final rulings.

1 Amended Scheduling Order at 3; *see* Or Laws 2021, ch. 419, § 1(6) (SB 259) (“The Chief Justice
2 shall also select one of the appointed judges to preside over the special judicial panel and to
3 make all rulings on procedural and evidentiary matters before the panel.”).

4 Respondent moves for an order adopting in part and rejecting in part the Special Master’s
5 recommendations on Respondent’s objections to Petitioners’ evidentiary submissions.

6 Respondent made objections on the record during the evidentiary hearings on October 27–28 and
7 submitted written objections on November 2. Further, Respondent joined all of Intervenors-
8 respondents’ objections. 10/27/2021 Hrg. Trans. (vol. 1) at 96:16–18.

9 The following chart lists Respondent’s objections made throughout these proceedings.
10 Respondent maintains all objections identified in that chart, as well as any other objections—
11 such as those made on the record or in other filings—that were inadvertently omitted due to these
12 exceedingly expedited proceedings.

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EVIDENTIARY OBJECTIONS CHART BEGINS ON NEXT PAGE

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EXHIBIT	DESCRIPTION	OBJECTION
<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p>	<p>1002</p> <p>¶¶ 12–21</p> <p>Declaration of Beverly Clarno</p>	<p>Relevance (OEC 402): evidence not relevant to any claim or defense. Speaker Kotek’s reasons for committee assignments are irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881. (¶¶12–15). <i>See</i> Order on Non-Parties’ Motion to Quash; Protective Order (Oct. 21, 2021) at 3–4 (holding “composition of committees” “are not relevant to a finding regarding legislative intent under ORS 188.010(2)"); Memorandum § E, below.</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. These paragraphs (¶¶ 13, 16–20) state legal conclusions, which are not the proper subject of testimony and therefore are irrelevant.</p> <p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Pet. Clarno would know Speaker Kotek’s intent with respect to the makeup of the House Redistricting Committee (¶¶ 12–15).</p> <p>Inadmissible lay opinion (OEC 701). Pet. Clarno’s views regarding the effect of and legislative intent behind SB 881 are inadmissible lay opinions.</p> <p>Special Master’s Recommendation: Objection implicitly overruled. SMRFOF at p. 3.</p>

EXHIBIT	DESCRIPTION	OBJECTION
<p>1 1003 ¶ 5 2 (Pets.' Prop. 3 FOF ¶¶ 2, 82)</p>	<p>4 Declaration of 5 Representative 6 Daniel Bonham</p>	<p>7 Lacks foundation for personal knowledge (OEC 602). Lacks foundation for how Rep. Bonham 8 would know Speaker Kotek's intent with respect to the makeup of the House Redistricting 9 Committee.</p> <p>10 Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay 11 exception applies. If reliant on statements of Speaker Kotek, assertion improperly relies on 12 inadmissible hearsay. <i>See</i> Memorandum § D, below.</p> <p>13 Legislative privilege: evidence purports to refer to communications of legislators in carrying out 14 their legislative functions. If reliant on alleged hearsay statements of Speaker Kotek, legislative 15 privilege applies. <i>See</i> Memorandum § A, below.</p> <p>16 Relevance (OEC 402): evidence not relevant to any claim or defense. Speaker Kotek's reason 17 for the even-split committee is irrelevant to whether the Legislative Assembly had partisan intent 18 when it enacted SB 881. Further, committee assignments and other internal legislative matters 19 are categorically irrelevant to this proceeding. <i>See</i> Memorandum § E, below.</p> <p>Special Master's Recommendation: Exhibit 1003 excluded as privileged under the Debate Clause. SMRFOF at p. 3. Objections here sustained on alternative bases of foundation, hearsay, and relevance. SMRFOF at p. 3.</p>
<p>12 1003 ¶ 6 13 (Pets.' Prop. 14 FOF ¶¶ 3, 83)</p>	<p>15 Declaration of 16 Representative 17 Daniel Bonham</p>	<p>18 Relevance (OEC 402): evidence not relevant to any claim or defense. Whether Republican 19 legislators were concerned about possible pressure from Democratic U.S. Congress members is irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881. Post- enactment statements by legislators are irrelevant to legislative intent. <i>See</i> Memorandum § E, below.</p> <p>Lacks foundation for personal knowledge (OEC 602). No non-hearsay basis for Rep. Bonham to testify as to concerns of other Republican legislators.</p> <p>Special Master's Recommendation: Exhibit 1003 excluded as privileged under the Debate Clause. SMRFOF at p. 3. Objections here sustained on alternative bases of relevance and foundation. SMRFOF at p. 3.</p>

EXHIBIT	DESCRIPTION	OBJECTION
<p>1 1003 ¶ 10 2 (Pets.' Prop. 3 FOF ¶¶ 7, 87) 4 5 6 7</p>	<p>Declaration of Representative Daniel Bonham</p>	<p>Lacks foundation for personal knowledge (OEC 602). No foundation laid for how Rep. Bonham would personally know that Plan A was “designed to create a disproportionately Democratic advantage.”</p> <p>Inadmissible lay opinion (OEC 701). To the extent that Rep. Bonham’s assertion is instead his opinion based on the form of the map, it is inadmissible lay opinion.</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Even if it were admissible lay opinion, Rep. Bonham’s personal opinion about Democratic legislators’ intent is irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881. Post-enactment statements by legislators are irrelevant to legislative intent. <i>See</i> Memorandum § E, below.</p> <p>Special Master’s Recommendation: Exhibit 1003 excluded as privileged under the Debate Clause. SMRFOF at p. 3. Objections here sustained on alternative bases of foundation and relevance. SMRFOF at p. 3.</p>
<p>10 1003 ¶ 11 11 (Pets.' Prop. 12 FOF ¶¶ 8, 88, 13 140–41) 14 15 16 17 18 19</p>	<p>Declaration of Representative Daniel Bonham</p>	<p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham would personally know that parts of the greater Portland area, which were apportioned into four separate districts in Plan A, are “traditionally Democratic strongholds.” Also no foundation for how Rep. Bonham personally knows that apportionment into four separate districts was done “unnecessarily.” And to the extent that Rep. Bonham asserts that Democratic legislators did so to give the Democratic Party “an advantage in congressional races,” no foundation for that either.</p> <p>Inadmissible lay opinion (OEC 701). To the extent Rep. Bonham’s assertions are based on generally held beliefs, the assertions are inadmissible lay opinions.</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Even if it were admissible, Rep. Bonham’s lay opinion is irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881. Post-enactment statements by legislators are irrelevant to legislative intent. <i>See</i> Memorandum § E, below.</p> <p>Best-evidence rule (OEC 1002). Enacted map is best evidence of how the districts were drawn.</p> <p>Special Master’s Recommendation: Exhibit 1003 excluded as privileged under the Debate Clause. SMRFOF at p. 3. Objections here sustained on alternative bases of foundation and relevance. SMRFOF at p. 3.</p>

EXHIBIT	DESCRIPTION	OBJECTION
1003 ¶ 12	Declaration of Representative Daniel Bonham	<p>Relevance (OEC 402): evidence not relevant to any claim or defense. Whether Rep. Bonham was unsurprised by out-of-court statements from third parties is irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881.</p> <p>Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. Even if Rep. Bonham’s lack of surprise were relevant, the third-party statements are inadmissible hearsay. <i>See</i> Memorandum § D, below.</p> <p>Special Master’s Recommendation: Exhibit 1003 excluded as privileged under the Debate Clause. SMRFOF at p. 3. Objections here sustained on alternative bases of relevance and hearsay. SMRFOF at p. 3.</p>
1003 ¶¶ 13–16 (Pets.’ Prop. FOF ¶¶ 10, 13, 90, 93)	Declaration of Representative Daniel Bonham	<p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham would personally know that “Democrat[ic legislators] never once attempted to negotiate with Republican[legislators] on the [Plan A] congressional map.”</p> <p>Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. Improperly relies on purported hearsay statements of Democratic committee members, Senate President Courtney, and Senate Democratic Chair Taylor. <i>See</i> Memorandum § D, below.</p> <p>Legislative privilege: evidence purports to refer to communications of legislators in carrying out their legislative functions. Purported hearsay statements are subject to legislative privilege. <i>See</i> Memorandum § A, below.</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Rep. Bonham can only properly assert that Democratic legislators did not attempt to negotiate with him or in his presence. But whether Democratic legislators attempted to negotiate with Rep. Bonham or in his presence specifically is irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881.</p> <p>Special Master’s Recommendation: Exhibit 1003 excluded as privileged under the Debate Clause. SMRFOF at p. 3. Objections here sustained on alternative bases of foundation, hearsay, and relevance. SMRFOF at p. 3.</p>

EXHIBIT	DESCRIPTION	OBJECTION
1003 ¶¶ 19–20 (Pets.’ Prop. FOF ¶¶ 17, 97)	Declaration of Representative Daniel Bonham	<p>Relevance (OEC 402): evidence not relevant to any claim or defense. Speaker Kotek’s committee assignments are irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881. <i>See</i> Memorandum § E, below. That Speaker Kotek took actions that Rep. Bonham “feared” is similarly irrelevant to those merits.</p> <p>Special Master’s Recommendation: Exhibit 1003 excluded as privileged under the Debate Clause. SMRFOF at p. 3. Objections here sustained on alternative basis of relevance. SMRFOF at p. 3.</p>
1003 ¶ 21	Declaration of Representative Daniel Bonham	<p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham would personally know why Rep. Boshart Davis did not attend a vote by the House Committee on Congressional Redistricting.</p> <p>Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. If reliant on statements by Rep. Boshart Davis, then assertions improperly rely on inadmissible hearsay. <i>See</i> Memorandum § D, below.</p> <p>Legislative privilege: evidence purports to refer to communications of legislators in carrying out their legislative functions. Statements by Rep. Boshart Davis, if any, are subject to legislative privilege. <i>See</i> Memorandum § A, below.</p> <p>Special Master’s Recommendation: Exhibit 1003 excluded as privileged under the Debate Clause. SMRFOF at p. 3. Objections here sustained on alternative bases of foundation and hearsay. SMRFOF at p. 3.</p>

EXHIBIT	DESCRIPTION	OBJECTION
1 2 3 4 5 6 7 8 9 1003 ¶ 27	Declaration of Representative Daniel Bonham	<p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham would personally know that Democratic senators had drawn a map “without any Republican input or negotiations.”</p> <p>Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. Assertions rely on purported hearsay statements of Senate President Courtney. <i>See</i> Memorandum § D, below.</p> <p>Legislative privilege: evidence purports to refer to communications of legislators in carrying out their legislative functions. Statements by Senate President Courtney, if any, are subject to legislative privilege. <i>See</i> Memorandum § A, below.</p> <p>Special Master’s Recommendation: Exhibit 1003 excluded as privileged under the Debate Clause. SMRFOF at p. 3. Objections here sustained on alternative bases of foundation and hearsay. SMRFOF at pp. 3–4.</p>
11 12 13 14 15 16 17 18 19 1003 ¶¶ 28–30 (Pets.’ Prop. FOF ¶ 29)	Declaration of Representative Daniel Bonham	<p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham would personally know Democratic legislators’ intent when the Legislative Assembly enacted SB 881. (SB 881-A is the version of SB 881 enacted by the legislature.) Similarly, no foundation for how Rep. Bonham would personally know whether Republican legislators considered the enacted map to be “an egregious partisan gerrymander.”</p> <p>Inadmissible lay opinion (OEC 701). To the extent that Rep. Bonham’s assertions are based on the form of the enacted map, they are inadmissible as lay opinion.</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Even if it were admissible, Rep. Bonham’s opinion about whether the enacted map is “an egregious partisan gerrymander” is irrelevant to whether the Legislative Assembly had a partisan intent when it enacted SB 881 or whether the enacted map has a partisan effect.</p> <p>Special Master’s Recommendation: Exhibit 1003 excluded as privileged under the Debate Clause. SMRFOF at p. 3. Objections here sustained on alternative bases of relevance and foundation. SMRFOF at pp. 3–4.</p>

EXHIBIT	DESCRIPTION	OBJECTION
<p>1 1003 ¶ 29 2 (Pets.' Prop. 3 FOF ¶¶ 22, 4 102)</p>	<p>Declaration of Representative Daniel Bonham</p>	<p>Relevance (OEC 402): evidence not relevant to any claim or defense. Fact that Bend was included within District 5 in the enacted map is irrelevant to whether the Legislative Assembly, which was required to draw new maps that comported with ORS 188.010 and other laws with six congressional districts, had partisan intent when it enacted SB 881 or whether the enacted map has a partisan effect.</p> <p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham would personally know that Bend “traditionally votes for Democrat[ic] politicians.”</p> <p>Best-evidence rule (OEC 1002). The enacted map is the best evidence of how the congressional districts were drawn. The former congressional redistricting map is the best evidence of how congressional districts were previously drawn.</p> <p>Special Master’s Recommendation: Exhibit 1003 excluded as privileged under the Debate Clause. SMRFOF at p. 3. Objections here sustained on alternative bases of relevance and foundation. SMRFOF at pp. 3–4.</p>
<p>10 1003 ¶ 31</p>	<p>Declaration of Representative Daniel Bonham</p>	<p>Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. Assertions rely on purported hearsay statements of Rep. Marty Wilde. <i>See</i> Memorandum § D, below.</p> <p>Legislative privilege: evidence purports to refer to communications of legislators in carrying out their legislative functions. Statements by Rep. Marty Wilde, if any, would be subject to legislative privilege. <i>See</i> Memorandum § A, below.</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Whether Democratic leadership recognized that someone could hypothetically successfully challenge the enacted congressional redistricting map is irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881 or whether the enacted map has a partisan effect.</p> <p>Special Master’s Recommendation: Exhibit 1003 excluded as privileged under the Debate Clause. SMRFOF at p. 3. Objections here sustained on alternative bases of hearsay and relevance. SMRFOF at pp. 3–4.</p>

EXHIBIT	DESCRIPTION	OBJECTION
1003 ¶ 32	Declaration of Representative Daniel Bonham	<p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham would personally know that the relevant maps “were drawn without any Legislative Assembly Republicans’ input whatsoever.”</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Whether the maps were drawn without specifically Rep. Bonham’s input is irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881.</p> <p>Special Master’s Recommendation: Exhibit 1003 excluded as privileged under the Debate Clause. SMRFOF at p. 3. Objections here sustained on alternative bases of foundation and relevance. SMRFOF at pp. 3–4.</p>
1003 ¶¶ 33–35, 37 (Pets.’ Prop. FOF ¶¶ 25, 105)	Declaration of Representative Daniel Bonham	<p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham personally knows each individual Republican legislators’ reasons for appearing to vote. Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. To the extent that Rep. Bonham’s belief is based on statements of other legislators, that is improper because it is based on inadmissible hearsay. <i>See</i> Memorandum § D, below.</p> <p>Legislative privilege: evidence purports to refer to communications of legislators in carrying out their legislative functions. Those statements would further be an improper basis, because they are excluded by legislative privilege. <i>See</i> Memorandum § A, below.</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Rep. Bonham’s belief as to why Republican legislators appeared to vote is irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881. Similarly, Rep. Bonham’s fear that the legislature would fail to enact a state-legislative districting map and his belief that Secretary of State Fagan would draw an unfair map are both irrelevant to those merits.</p> <p>Special Master’s Recommendation: Exhibit 1003 excluded as privileged under the Debate Clause. SMRFOF at p. 3. Objections here sustained on alternative bases of foundation and relevance. SMRFOF at pp. 3–4.</p>

EXHIBIT	DESCRIPTION	OBJECTION
1005	Declaration of Professor Thomas L. Brunell	Objections to Exhibit 1006 incorporated by reference. Special Master's Recommendation: Objection overruled. SMRFOF at p. 16.
1006	Expert Report of Professor Thomas L. Brunell - Data	Inadmissible expert testimony (OEC 702; <i>State v. O'Key</i> , 321 Or 285 (1995)). Use of only presidential elections is unreliable. SMRFOF ¶ 301; 10/27/2021 Hrg. Trans. (vol. 1) at 213:17–220:22 (Dr. Brunell); <i>see</i> Memorandum § F.2, below. Special Master's Recommendation: Objection overruled. SMRFOF at p. 16.
1006	Expert Report of Professor Thomas L. Brunell – Methods	Inadmissible expert testimony (OEC 702; <i>State v. O'Key</i> , 321 Or 285 (1995)). Dr. Brunell's methods are unreliable. SMRFOF ¶ 302; <i>see</i> Memorandum § F.2, below. Special Master's Recommendation: Objection overruled. SMRFOF at p. 16.
1006	Expert Report of Professor Thomas L. Brunell - Proportionality Test	Relevance (OEC 402): evidence not relevant to any claim or defense. Proportionality is not a relevant criterion of partisan fairness because it is typical of single-member district elections, like those for the U.S. House, that the party that wins the largest percentage of votes earns an even greater percentage of seats. <i>See</i> SMRFOF ¶¶ 250 (Dr. Katz), 260 (Dr. Gronke), 297 (Dr. Brunell); Memorandum § F.2, below. Inadmissible expert testimony (OEC 702; <i>State v. O'Key</i> , 321 Or 285 (1995)). Dr. Brunell's methods of testing proportionality are unreliable. SMRFOF ¶ 302; <i>see</i> Memorandum § F.2, below. Special Master's Recommendation: Objection overruled. SMRFOF at pp. 3, 16.
1006	Expert Report of Professor Thomas L. Brunell – Efficiency Gap	Inadmissible expert testimony (OEC 702; <i>State v. O'Key</i> , 321 Or 285 (1995)). Efficiency gap is not a reliable measure of partisan fairness for congressional elections in Oregon. SMRFOF ¶¶ 238–39. In addition, Dr. Brunell's methods of testing proportionality are unreliable. SMRFOF ¶ 302; <i>see</i> Memorandum § F.2, below; <i>see also</i> OEC 403. Special Master's Recommendation: Objection overruled. SMRFOF at p. 16.

EXHIBIT	DESCRIPTION	OBJECTION
1006	Expert Report of Professor Thomas L. Brunell - Compactness Score	Inadmissible expert testimony (OEC 702; <i>State v. Thomas</i> , 279 Or App 98 (2016)). Dr. Brunell was a “mere conduit” for compactness scores. <i>See</i> Memorandum § F.3, below. Special Master’s Recommendation: Objection overruled. SMRFOF at pp. 3, 16.
1006	Expert Report of Professor Thomas L. Brunell – City and County Splits	Inadmissible expert testimony (OEC 702; <i>State v. Thomas</i> , 279 Or App 98 (2016)). Dr. Brunell was a “mere conduit” for city and county splits data. <i>See</i> Memorandum § F.3, below. Special Master’s Recommendation: Objection overruled. SMRFOF at pp. 3, 16.
1006	Expert Report of Professor Thomas L. Brunell – Conclusion	Inadmissible expert testimony (OEC 702; <i>State v. Thomas</i> , 279 Or App 98 (2016)). Same objections as stated above with respect to each aspect of the report summarized in the conclusion. Special Master’s Recommendation: Objection overruled. SMRFOF at pp. 3, 16.
1008	SB 881-A Map	Lack of authentication (OEC 901). Dr. Brunell could not testify that the map was a fair and accurate depiction of the map it is purported to represent. <i>See SMRFOF</i> ¶ 292. Special Master’s Recommendation: Objection implicitly overruled. SMRFOF at p. 3.
1009	SB 881-A Portland Map	<i>See</i> objections to Ex. 1008, above. Special Master’s Recommendation: Objection implicitly overruled. SMRFOF at p. 3.
1010	SB 881-A Greater Portland Area Map	
1011	Plan A (SB 881) Map	
1012	Plan A (SB 881) Portland Map	
1013	Plan A (SB 881) Greater Portland Area Map	
1014	Neutral Map	

EXHIBIT	DESCRIPTION	OBJECTION
1015	Neutral Map Portland Area	<i>See</i> objections to Ex. 1008, above. Special Master's Recommendation: Objection implicitly overruled. SMRFOF at p. 3.
1016	Neutral Map Greater Portland Area	
1022	FiveThirtyEight Congressional Map Assessment	Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. <i>See</i> Memorandum § E, below. Special Master's Recommendation: Objection sustained. SMRFOF at p. 4.
1023	Princeton Gerrymander Project Congressional Map Grade	<i>See</i> objection to Ex. 1022, above. Special Master's Recommendation: Objection sustained. SMRFOF at p. 4.
1024	<i>Gill v. Whitford</i> States Amici Brief	Relevance (OEC 402): evidence not relevant to any claim or defense. <i>See</i> Memorandum § C, below. Special Master's Recommendation: Objection implicitly overruled. SMRFOF at p. 3.
1025	<i>Rucho v. Common Cause</i> States Amici Brief	<i>See</i> objection to Ex. 1024, above. Special Master's Recommendation: Objection implicitly overruled. SMRFOF at p. 3.
1042	Video Clip 17	Objection to hearsay (OEC 802) to the extent the media reports are being offered for the truth of the matter asserted. Special Master's Recommendation: Objection implicitly overruled. SMRFOF at p. 3.

EXHIBIT	DESCRIPTION	OBJECTION
1 2 3 4 5 6 7 8	1043 Senate Republican Leader's 9.27.2021 Statement on the Passage of Gerrymandered Congressional Redistricting Plan	<p>Relevance (OEC 402): evidence not relevant to any claim or defense. The opinions expressed in this press release are irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881 or whether the enacted map has a partisan effect. Post-enactment statements by legislators are irrelevant to legislative intent. <i>See</i> Memorandum § G.1, below.</p> <p>Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. Assertions rely on purported hearsay statements of Senate Republican Leader Fred Girod. <i>See</i> Memorandum § G.1, below.</p> <p>Special Master's Recommendation: Objection implicitly overruled. SMRFOF at p. 3.</p>
9 10 11	1044 Oregon House Republican Caucus 9.27.2021 Statement on Redistricting	<p><i>See</i> objections to Ex. 1043, above.</p> <p>Special Master's Recommendation: Objection implicitly overruled. SMRFOF at 3.</p>
12 13 14 15 16 17 18 19	1045 at 29–30, 32– 34, 37–40 Rough Deposition Transcript of SEIU 503.Melissa Unger	<p>Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. Assertions rely on purported hearsay statements that took place during “discussions” and “conversations” of unspecified members of the Legislative Assembly during a time period spanning several weeks. <i>See</i> Memorandum § G, below.</p> <p>Special Master's Recommendation: Objection implicitly overruled. SMRFOF at p. 3; <i>see also id.</i> at ¶¶ 217–22 (describing deposition testimony).</p>

TRANSCRIPT CITE	WITNESS	OBJECTION
<p>10/27/2021 Hrg. Trans. (vol. 1) at 114:3–116:9, 118:23–119:7, 125:8–126:16</p> <p>(Pets.’ Prop. FOF ¶¶ 10, 90)</p>	<p>Representative Daniel Bonham</p>	<p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham would personally know that, after releasing Plan A, Democratic committee members made no attempts to negotiate with any Republican committee members on any congressional redistricting maps.</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Objection here implicitly overruled. SMRFOF at p. 3; <i>but see id.</i> at pp. 3–4 (sustaining objections to Rep. Bonham’s declaration on grounds alternative to privilege).</p>
<p>10/27/2021 Hrg. Trans. (vol. 1) at 160:8–161:1</p> <p>(Pets.’ Prop. FOF ¶¶ 10, 90)</p>	<p>Representative Daniel Bonham</p>	<p>Relevance (OEC 402): evidence not relevant to any claim or defense. Whether Democratic legislative leadership attempted to negotiate specifically with Rep. Bonham is irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881.</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Objection here implicitly overruled. SMRFOF at p. 3; <i>but see id.</i> at pp. 3–4 (sustaining objections to Rep. Bonham’s declaration on grounds alternative to privilege).</p>
<p>10/27/2021 Hrg. Trans. (vol. 1) at 161:13–162:24</p> <p>(Pets.’ Prop. FOF ¶¶ 12, 92)</p>	<p>Representative Daniel Bonham</p>	<p>Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. Relies on purported hearsay statements of Senate President Courtney. <i>See</i> Memorandum § G, below.</p> <p>Legislative privilege: evidence purports to refer to communications of legislators in carrying out their legislative functions. Senate President Courtney’s statements, if any, are subject to legislative privilege. <i>See</i> Memorandum § A, below.</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Hearsay objection implicitly overruled. SMRFOF at p. 3; <i>but see id.</i> at pp. 3–4 (sustaining objections to Rep. Bonham’s declaration on grounds alternative to privilege).</p>

TRANSCRIPT CITE	WITNESS	OBJECTION
<p>10/27/2021 Hrg. Trans. (vol. 1) at 126:21–129:20</p> <p>(Pets.’ Prop. FOF ¶¶ 13, 93)</p>	<p>Representative Daniel Bonham</p>	<p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham would personally know the internal thoughts of other Republican legislators, specifically whether “[any]body wanted to vote on those maps.”</p> <p>Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. Assertions rely on truth of the matter asserted in purported “conversations” with other legislators. <i>See</i> Memorandum § G, below.</p> <p>Legislative privilege: evidence purports to refer to communications of legislators in carrying out their legislative functions. Statements in conversations, if any, are subject to legislative privilege. <i>See</i> Memorandum § A, below.</p> <p>Inadmissible lay opinion (OEC 701). Rep. Bonham’s views regarding the fairness of the congressional redistricting maps and the intent of those who drew those maps is inadmissible lay opinion.</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Even if it were admissible, Rep. Bonham’s lay opinion is irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881 or whether the enacted map has a partisan effect. Post-enactment statements by legislators are irrelevant to legislative intent. <i>See</i> Memorandum § G, below.</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Other objections here implicitly overruled. SMRFOF at p. 3; <i>but see id.</i> at pp. 3–4 (sustaining objections to Rep. Bonham’s declaration on grounds alternative to privilege).</p>

TRANSCRIPT CITE	WITNESS	OBJECTION
<p>10/27/2021 Hrg. Trans. (vol. 1) at 104:20–107:22, 109:19–110:8</p> <p>(Pets.’ Prop. FOF ¶¶ 17, 97)</p>	<p>Representative Daniel Bonham</p>	<p>Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. Assertions rely on purported hearsay statements, namely “agreements” with and the “word” of Democratic legislators as well as other statements by Democratic legislators and congressional representatives. <i>See</i> Memorandum § G, below.</p> <p>Legislative privilege: evidence purports to refer to communications of legislators in carrying out their legislative functions. Statements by Democratic legislators, if any, are subject to legislative privilege. <i>See</i> Memorandum § A, below.</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Rep. Bonham’s opinion about whether Speaker Kotek “broke unwritten rules” is irrelevant to whether the Legislative Assembly had partisan intent when it passed SB 881. Post-enactment statements by legislators are irrelevant to legislative intent.</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Other objections here implicitly overruled. SMRFOF at p. 3; <i>but see id.</i> at pp. 3–4 (sustaining objections to Rep. Bonham’s declaration on grounds alternative to privilege).</p>
<p>10/27/2021 Hrg. Trans. (vol. 1) at 114:16–116:20</p> <p>(Pets.’ Prop. FOF ¶¶ 21, 101)</p>	<p>Representative Daniel Bonham</p>	<p>Lacks foundation for personal knowledge (OEC 602). No non-hearsay basis to provide foundation as to how Rep. Bonham would personally know who drew the enacted map. Further, no foundation for how Rep. Bonham would personally know that no Republican caucus member provided input for the enacted map.</p> <p>Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. Rep. Bonham testified that the basis for his testimony was a notation in the ESRI system. <i>See</i> Memorandum § G.2, below.</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Objections here implicitly overruled. SMRFOF at p. 3; <i>but see id.</i> at pp. 3–4 (sustaining objections to Rep. Bonham’s declaration on grounds alternative to privilege).</p>

TRANSCRIPT CITE	WITNESS	OBJECTION
<p>10/27/2021 Hrg. Trans. (vol. 1) at 127:21–130:6</p> <p>(Pets.’ Prop. FOF ¶¶ 24–25, 104–105)</p>	<p>Representative Daniel Bonham</p>	<p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham would personally know each Republican legislator’s reasons for showing up to vote.</p> <p>Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. Foundation cannot be based on inadmissible hearsay statements of other legislators. <i>See</i> Memorandum § G, below.</p> <p>Legislative privilege: evidence purports to refer to communications of legislators in carrying out their legislative functions. Other legislators’ statements, if any, would be subject to legislative privilege. <i>See</i> Memorandum § G, below.</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Purported fact that legislators feared the speculative hypothetical that Secretary of State Fagan would draw unfair maps is irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881.</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Other objections here implicitly overruled. SMRFOF at p. 3; <i>but see id.</i> at pp. 3–4 (sustaining objections to Rep. Bonham’s declaration on grounds alternative to privilege).</p>

TRANSCRIPT CITE	WITNESS	OBJECTION
<p>10/27/2021 Hrg. Trans. (vol. 1) at 130:12–131:11, 162:8–12, 173:14–174:2</p> <p>(Pets.’ Prop. FOF ¶ 141)</p>	<p>Representative Daniel Bonham</p>	<p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham personally knows the voting tendencies of particular areas. Generally held beliefs are not valid as foundation. Also, no foundation for how Rep. Bonham would personally know the views of all individual Legislative Assembly Republicans.</p> <p>Inadmissible lay opinion (OEC 701). Rep. Bonham’s opinion about whether certain redistricting decisions resulted in a partisan effect is inadmissible lay opinion.</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Even if it were admissible, an individual legislator’s opinion about the partisan effect of redistricting is irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881 or whether the enacted map has a partisan effect. Post-enactment statements by legislators are irrelevant to legislative intent. <i>See</i> Memorandum § G, below.</p> <p>Best-evidence rule (OEC 1002). The redistricting maps are the best evidence of the redistricting choices made by the Legislative Assembly and of geographical facts related to those choices.</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Objections here implicitly overruled. SMRFOF at p. 3; <i>but see id.</i> at pp. 3–4 (sustaining objections to Rep. Bonham’s declaration on grounds alternative to privilege).</p>
<p>10/27/2021 Hrg. Trans. (vol. 1) at 117:24–118:18</p>	<p>Representative Daniel Bonham</p>	<p>Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. Assertion relies on purported hearsay statements and possible hearsay statements. <i>See</i> Memorandum § G, below.</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Whether Democratic leadership recognized that someone could hypothetically successfully challenge the enacted congressional redistricting map is irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881 or whether the enacted map has a partisan effect.</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Objections here implicitly overruled. SMRFOF at p. 3; <i>but see id.</i> at pp. 3–4 (sustaining objections to Rep. Bonham’s declaration on grounds alternative to privilege).</p>

TRANSCRIPT CITE	WITNESS	OBJECTION
10/27/2021 Hrg. Trans. (vol. 1) at 120:19–123:9	Representative Daniel Bonham	<p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham would personally know that Minority Leader Drazan and Representative Boshart Davis had never seen the enacted map before Rep. Bonham saw it for the first time.</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Objection here implicitly overruled. SMRFOF at p. 3; <i>but see id.</i> at pp. 3–4 (sustaining objections to Rep. Bonham’s declaration on grounds alternative to privilege).</p>
10/27/2021 Hrg. Trans. (vol. 1) at 123:10–126:12	Representative Daniel Bonham	<p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham would personally know that “not a single Republican had a voice” in the congressional-redistricting process.</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Objections here implicitly overruled. SMRFOF at p. 3; <i>but see id.</i> at pp. 3–4 (sustaining objections to Rep. Bonham’s declaration on grounds alternative to privilege).</p>
10/27/2021 Hrg. Trans. (vol. 1) at 131:13–150:11, 171:1–174:14	Representative Daniel Bonham	<p>Inadmissible lay opinion (OEC 701). For the same reasons as for his opinions regarding the 2021 map, Rep. Bonham’s opinions about whether certain redistricting maps evidence an “extreme partisan gerrymander” are inadmissible lay opinion.</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Rep. Bonham’s lay opinion about whether certain redistricting maps evidence an “extreme partisan gerrymander” are not relevant to whether the Legislative Assembly had partisan intent when it enacted SB 881 or whether the enacted maps in 2021 have a partisan effect. Post-enactment statements by legislators are irrelevant to legislative intent. <i>See</i> Memorandum § G, below.</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Objections here implicitly overruled. SMRFOF at p. 3; <i>but see id.</i> at pp. 3–4 (sustaining objections to Rep. Bonham’s declaration on grounds alternative to privilege).</p>

TRANSCRIPT CITE	WITNESS	OBJECTION
10/27/2021 Hrg. Trans. (vol. 1) at 165:14–166:14	Representative Daniel Bonham	<p>Relevance (OEC 402): evidence not relevant to any claim or defense. Irrelevant that Representative Salinas did not call a public hearing specifically for SB 881 as amended (SB 881-A). The amendments followed substantial public input on both Plan A and Plan B, and the amendments were presented sometime between September 25 and September 27, 2021, with September 27 as the deadline for enacting state-legislative maps.</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Objections here implicitly overruled. SMRFOF at p. 3; <i>but see id.</i> at pp. 3–4 (sustaining objections to Rep. Bonham’s declaration on grounds alternative to privilege).</p>
10/27/2021 Hrg. Trans. (vol. 1) at 170:13–25	Representative Daniel Bonham	<p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham would personally know that “there was no communication on the congressional maps.”</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Objections here implicitly overruled. SMRFOF at p. 3; <i>but see id.</i> at pp. 3–4 (sustaining objections to Rep. Bonham’s declaration on grounds alternative to privilege).</p>
10/27/2021 Hrg. Trans. (vol. 1) at 167:4–168:8	Representative Daniel Bonham	<p>Relevance (OEC 402): evidence not relevant to any claim or defense. Rep. Bonham’s testimony explaining basis for belief that he would “likely have been informed of communications” between caucus members and Democratic legislators demonstrates that his belief is speculative and therefore has no tendency to prove or disprove the asserted fact.</p> <p>Special Master’s Recommendation: Hearing testimony excluded as privileged under the Debate Clause. SMRFOF at p. 4. Objection here overruled as limited by Special Master’s wording of question. 10/27/2021 Hrg. Trans. (vol. 1) at 169:1–19.</p>

1 **MEMORANDUM IN SUPPORT OF MOTION¹**

2 Respondent seeks an order adopting in part and rejecting in part the Special Master’s
3 recommended evidentiary rulings, as described on the record and in the Recommended Findings
4 of Fact and Report. Respondent maintains all objections as noted in the above Evidentiary
5 Objections Chart. This memorandum addresses objections that warrant further briefing,
6 including an objection by Petitioners that resulted in a recommendation adverse to Respondent.
7 The Special Master’s recommended rulings for those objections are addressed in their respective
8 sections. For the reasons discussed, this Court should rule in Respondent’s favor on the
9 respective objections.

10 **A. The Special Master correctly excluded the testimony of Representative Daniel**
11 **Bonham, as required by the Oregon Constitution’s Debate Clause.**

12 The Special Master correctly excluded declaration and hearing testimony from
13 Representative Daniel Bonham, which purported to describe communications of other legislators
14 in order to prove those legislators’ intent in enacting SB 881. *See Ex. 1003; 10/27/2021*
15 *Hrg. Trans. (vol. 1) at 98:24–175:17.* As the Special Master recognized, those submissions are
16 barred by the Debate Clause of the Oregon Constitution, Art. IV, § 9, which guarantees a
17 legislative privilege that “applies when legislators are communicating in carrying out their
18 legislative functions.” *See State v. Babson, 355 Or 383, 419 (2014); SMRFOF at pp. 5–12.*

19 Representative Bonham’s declaration and hearing testimony purports to describe
20 communications of other legislators during their course of their legislative duties. *See Ex. 1003,*
21 *Declaration of Daniel Bonham; 10/27/2021 Hrg. Trans. (vol. 1) at 98:24–175:17.* Citing the
22 Debate Clause of the Oregon Constitution, Respondent and the Legislative Assembly filed a
23 motion to strike the contents of the declaration. Respondent’s and Legislative Assembly’s

24 _____
25 ¹ For readability of quoted material, this memorandum omits internal markups (such as quotation
26 marks and emphasis) and internal citations, except where context or parentheticals indicate
otherwise.

1 Motion to Strike (filed Oct. 26, 2021). Respondent objected to Representative Bonham’s hearing
2 testimony on the same grounds. 10/27/2021 Hrg. Trans. (vol. 1) at 76:9–94:4.

3 The Special Master deferred ruling on Respondent’s motion to strike and allowed
4 Representative Bonham to testify. 10/27/2021 Hrg. Trans. (vol. 1) at 90:7–91:14. Following the
5 hearing and additional briefing, however, the Special Master recommended that the Court
6 exclude both the declaration and the hearing testimony, because they were barred by legislative
7 privilege under the Oregon Constitution’s Debate Clause, Art. IV, § 9. SMRFOF at pp. 5–12.
8 This Court should adopt the Special Master’s recommendation.

9 For this motion, Respondent incorporates by reference the arguments in Respondent’s
10 and Legislative Assembly’s Motion to Strike, filed on October 26, as well as the Special
11 Master’s recommendation on this issue. SMRFOF at pp. 5–12. In support of that
12 recommendation, the Special Master relied on *State v. Babson*, 355 Or 383 (2014), but noted that
13 *Babson* did not consider the question of “whether an individual legislator may voluntarily waive
14 legislative privilege when the communications at issue are otherwise clearly within the scope of
15 the Debate Clause privilege.” SMRFOF at pp. 7–8. The Special Master concluded that allowing
16 the challenged testimony would violate the Debate Clause:

17 [I]n the present instance, the legislative privilege is a privilege of
18 the Legislative Assembly as a whole, and allowing one member to
19 waive privilege on behalf of the body would both undermine and
20 dilute the purposes of the privilege identified in *Babson*.
21 Additionally, allowing Representative Bonham’s testimony would
22 have a chilling effect on other legislators in the Legislative
23 Assembly, would limit debate and conversation among legislators,
24 especially among those who may be in disagreement with
25 each other, and would impair legislators’ ability to carry out their
26 legislative functions and duties.

23 SMRFOF at p. 11.

24 For those reasons, the declaration and hearing testimony of Representative Daniel
25 Bonham should be excluded from the evidentiary record.

1 **B. The Special Master incorrectly excluded Dr. Katz’s and Dr. Caughey’s rebuttal**
2 **testimony.**

3 On Petitioners’ objection, the Special Master incorrectly disallowed rebuttal testimony
4 from Dr. Katz and Dr. Caughey. Petitioners’ objection was predicated on a mistaken reading of
5 this Court’s scheduling order, and the Special Master’s ruling resulted in procedural unfairness
6 by giving Respondent no opportunity to present evidence in rebuttal to Petitioners’ case-in-chief.
7 Although the Special Master undoubtedly had broad discretion to direct the order of evidentiary
8 proceedings, the decision to disallow the rebuttal testimony of Dr. Katz and Dr. Caughey was in
9 error. *Cf. State ex rel. Johnson v. Dale*, 277 Or 359, 366–67 (1977) (recognizing that “trial
10 judge[s] [have] broad discretion . . . to control the conduct of the trial and to direct the order of
11 the proceedings,” but reversing decision to bifurcate trial).

12 Petitioners raised their objection on the first day of hearing, when they learned that
13 Respondent would try to elicit rebuttal testimony from Dr. Katz on the following day.
14 10/27/2021 Hrg. Trans. (vol. 1) at 75:9–13. The Special Master sustained Petitioners’ objection,
15 directing that the parties would not be allowed to elicit criticisms of other experts’ methodology
16 during the hearing examinations. *Id.* at 75:11–15.²

17 On the following day, Respondent made an offer of proof for Dr. Katz’s rebuttal
18 testimony. *Id.* at 131:16–132:4. Intervenors-respondents likewise made an offer of proof with
19 their expert, Dr. Caughey, *id.* at 200:25–201:2, 203:25–216:14, which Respondent joined, *id.* at
20
21

22 _____
23 ² To ensure that there was no question regarding Respondent’s opposition to the exclusion of
24 rebuttal testimony in the hearing, Respondent reiterated her opposition at the end of the first
25 hearing day. 10/27/2021 Hrg. Trans. (vol. 1) at 327:9–21.

26 Additionally, although Petitioners had initially objected to the submission of Dr. Katz’s
rebuttal report, that objection was withdrawn after the parties’ compromise allowing Dr. Brunell
to submit a surrebuttal report. *See* 10/28/2021 Hrg. Trans. (vol. 2) at 145:11–15 (describing
compromise).

1 198:11–12. Petitioners, on the other hand, waived their opportunity to make an offer of proof for
2 any rebuttal testimony by Dr. Brunell. *Id.* at 220:21–221:1; SMRFOF at p. 14 (so noting).³

3 This Court should reject the Special Master’s recommendation, because Petitioners’
4 objection was based on their mistaken belief that this Court’s scheduling order precluded the
5 submission of rebuttal evidence and testimony after 4 P.M. on October 25. 10/27/2021 Hrg.
6 Trans. (vol. 1) at 24:24–25:2, 72:12–18. But Petitioners’ belief is belied by the scheduling order
7 itself, which required only that “[s]upporting evidence in support of petition or in objection to
8 petition must be filed on or before October 25, 2021, at 4 P.M.” Amended Scheduling Order at 2
9 (emphasis added). *Rebuttal* evidence is not necessarily *supporting* evidence. *See, e.g., State v.*
10 *Fischer*, 232 Or 558, 563 (1962) (“Rebuttal testimony should be limited to evidence *made*
11 *necessary by the opponent’s evidence.*” (Emphasis added.)). If Respondent were required to
12 preemptively file rebuttal evidence along with the supporting evidence, that would put
13 Respondent “in the impossible situation of attempting to rebut something that [Respondent] had
14 not yet seen.” *103 Invs. I, L.P. v. Square D Co.*, 372 F3d 1213, 1216–17 (10th Cir. 2004)
15 (reversing federal district court’s exclusion of rebuttal expert report based on scheduling order
16 that required rebuttal reports filed before expert reports).

17 Further, Oregon values rebuttal evidence as integral to factfinding. ORCP 58—which
18 prescribes the procedure for trials—is instructive, because this proceeding is essentially an
19 expedited bench trial. For bench trials, it provides that, after each party’s case-in-chief, “[t]he
20 parties respectively may introduce rebutting evidence only.” ORCP 58 B(5); *see* ORCP 58 A
21 (referring to subrules B(3)–(6)).

22 ³ If Petitioners argue that the offer-of-proof testimony should be excluded even if the Special
23 Master erred in disallowing rebuttal testimony, the Presiding Judge should reject that argument
24 because it is without merit. An offer of proof was the only way for Respondent to preserve the
25 objection. *See* OEC 103(1) (“Evidential error is not presumed to be prejudicial.”); *State v.*
26 *Affeld*, 307 Or 125, 129 (1988) (“Without an offer of proof, the issue raised by defendant should
not be addressed on appeal.”). And Petitioners cannot claim any prejudice resulting from the
offers of proof, because they voluntarily waived their opportunity to make an offer of proof with
their own expert.

1 Because this Court’s scheduling order was silent on the submission of rebuttal evidence,
2 the Special Master had the authority to direct how he would receive that evidence, within the
3 constraints of the other deadlines in that order. *See* Amended Scheduling Order at 2 (authorizing
4 Special Master to receive evidence and ordering that “[t]he schedule to receive evidence must
5 not interfere with the deadlines stated herein”). The Special Master correctly acknowledged that
6 authority, 10/27/2021 Hrg. Trans. (vol. 1) at 26:8–11, but nevertheless granted Petitioners’
7 objection, which was based on the mistaken reading of this Court’s scheduling order. The
8 Special Master’s exclusion of rebuttal testimony based on that objection was therefore in error.
9 This Court should accordingly reject that recommendation and allow the Special Judicial Panel
10 to consider that rebuttal testimony.

11 **C. Petitioners do not offer the State of Oregon’s *amicus* briefs for any proper**
12 **evidentiary purpose.**

13 Petitioners offered two *amicus* briefs submitted in U.S. Supreme Court cases by a
14 coalition of states, including the State of Oregon. Ex. 1024, State *Amici*’s Brief in *Gill v.*
15 *Whitford*, 138 S Ct 1916 (2018); Ex. 1025, State *amici*’s brief in *Rucho v. Common Cause*, 139 S
16 Ct 2484 (2019). Respondent objected to Petitioners’ submission of those briefs, and the Special
17 Master implicitly overruled that objection. *See* Respondent’s Memo in Support of Objections to
18 Pets.’ Evidentiary Submissions, at 21–22 (so objecting); SMRFOF at p. 3 (stating, “All exhibits
19 and testimony are admitted unless a particular objection has been made and sustained” and “Any
20 objection the Special Master does not specifically address in this document is considered
21 overruled”). This Court should exclude the *amicus* briefs from the evidentiary record.

22 The *amicus* briefs are irrelevant, not only because they do not have any tendency to make
23 the existence of any fact in this case either more or less probable (OEC 401), but also because
24 Petitioners misrepresent the state *amici*’s arguments in those briefs. Most notably, Petitioners
25 assert—incorrectly—that, with the state *amici*’s brief in *Rucho*, the State of Oregon “endorsed
26 the efficiency gap as sufficient to provide evidence that a map favors a particular party” and has

1 further “supported” the position that “an efficiency gap of 7% or higher shows partisan
2 gerrymandering.” Pets.’ Prop. FOF, ¶¶ 39, 44, 119, 124 (citing Ex. 1025, State *amici*’s brief in
3 *Rucho*). But the brief does not say or endorse those things.⁴

4 To the contrary, the argument in the *amicus* brief was only that a high efficiency gap
5 would “merely provide evidence” of partisan effect, that it would not be dispositive and would
6 be *unlikely* to be sufficient on its own, and that it should be considered with other metrics:

7 Of course, no single metric is likely to satisfy the effects prong by
8 itself. As the district court explained, no one is asking the judiciary
9 to enshrine any particular statistical measure of partisanship into
10 the Constitution. Instead, metrics such as the efficiency gap
11 showing that a map is an extreme partisan outlier merely “provide
12 evidence that” it violates constitutional standards. *Thus, if a State’s*
13 *election results in a single year yielded a high efficiency gap, that*
alone would not likely satisfy the effects prong. And even if it did,
the map still would be upheld if the effect could be explained by
something other than intentional partisan entrenchment, such as
that members of one party tend to cluster more in particular parts
of the State than do members of the other party, or that the State
has large numbers of uncontested elections. . . .

14 Ex. 1025, at 15, State *amici*’s brief in *Rucho* (emphasis added); *see also* Ex. 1024, at 16, State
15 *amici*’s brief in *Gill* (“Texas amici also err in focusing on a single metric—the efficiency gap—
16 and assuming that if a State’s election results in a single year yield a high efficiency gap, the
17 effects prong is satisfied and the map is unconstitutional.”). In other words, Petitioners are citing
18 the state *amici*’s brief in *Rucho* as support for a proposition that it expressly *does not* support.
19 The *amicus* briefs are not relevant and should be excluded from the evidentiary record.

20 **D. Representative Bonham’s testimony about the hearsay statements of other**
21 **legislators is not admissible under the state-of-mind exception, OEC 803(3).**

22 The Special Master correctly excluded Representative Bonham’s declaration and hearing
23 testimony on the grounds of legislative privilege and on several alternative grounds, including
24 hearsay. SMRFOF at pp. 3–4 (sustaining Respondent’s objections on “the alternative grounds of

25 ⁴ Although Petitioners have also offered the state *amici*’s brief in *Gill v. Whitford* as an exhibit,
26 they made no reference to that brief in their proposed findings of facts.

1 hearsay, relevance, and foundation”); *see also* Evidentiary Objections Chart, *supra*. In doing so,
2 the Special Master also correctly rejected Petitioners’ argument that Representative Bonham’s
3 testimony about the hearsay statements of other legislators was admissible under the state-of-
4 mind exception, OEC 803(3). SMRFOF at p. 4; *see also* Pets.’ Objections to SMTFOF at 6:10–
5 7:5; 10/27/2021 Hrg. Trans. (vol. 1) at 162:20–164:2. This Court should adopt the Special
6 Master’s recommendation.

7 In opposition to the objection at the hearing, and in their objections to the Special
8 Master’s Tentative Findings of Fact, Petitioners argued that Representative Bonham’s testimony
9 should not be stricken as hearsay, because the hearsay statements showed the declarants’ “state
10 of mind as to their ‘intent, plan, motive, or design.’” Pets.’ Objs to SMTFOF at 6:17–19;
11 10/27/2021 Hrg. Trans. (vol. 1) at 163:3–17. As the Special Master has explained, Petitioners’
12 OEC 803(3) argument fails for two reasons.

13 First, Petitioners offered the hearsay statements of individual legislators for the improper
14 purpose of proving the partisan intent of Democratic Assembly members. Petitioners explained
15 at the hearing that they offered the hearsay statements “to prove the intent of the Democratic
16 Leadership.” 10/27/2021 Hrg. Trans. (vol. 1) at 163:15–17. But, here, Petitioners must prove
17 that the Legislative Assembly—not just a few individual legislators—enacted the map with
18 partisan intent. Petitioners would thus have this court receive the hearsay statements for the
19 purpose of stacking inference upon inference to the point of speculation. *See Wood v. Baldwin*,
20 158 Or App 98, 103 (1999) (“Even under the “tendency” standard, the stacking of inferences that
21 petitioner urges is too speculative to permit its admission under OEC 804(3)(c).”); *cf. Davis v.*
22 *O’Brien*, 320 Or 729, 745 (1995) (noting that, even for statements “made in committee,”
23 statements of individual legislators “are not necessarily indicative of the intent of the entire
24 legislature”). Specifically, Petitioners’ evidence would require the finder of fact to (1) infer from
25 the circumstances that the declarant had personal knowledge, (2) infer that the statements
26 demonstrate the partisan intent of the declarant, (3) infer that members of Democratic leadership

1 shared that individual declarant’s inferred partisan intent, (4) infer that a significant majority of
2 Democratic legislators shared the Democratic leadership’s inferred partisan intent, and (5) infer
3 that the Legislative Assembly therefore enacted SB 881 with partisan intent. That is improper,
4 and the Special Master therefore correctly excluded the testimony.

5 Second, neither are the hearsay statements admissible for any narrower purpose. As the
6 Special Master noted, if the hearsay statements are not offered for the purpose of attempting to
7 prove the partisan intent of the legislature, then they are instead offered for the improper purpose
8 of “prov[ing] facts ‘underlying the declarant’s state of mind.’” SMRFOF at p. 4 (quoting *State v.*
9 *Bement*, 363 Or 760, 765 (2018)).

10 In sum, the Special Master correctly excluded, on the alternative grounds of hearsay,
11 Representative Bonham’s testimony about the statements of other legislators. This Court should
12 adopt that recommendation.

13 **E. This Court should adopt the Special Master’s recommendation to sustain**
14 **Respondent’s other objections to Representative Bonham’s testimony and to**
exhibits 1022 and 1023.

15 This Court should adopt the Special Master’s recommendation to sustain Respondent’s
16 objections to Representative Bonham’s testimony and to exhibits 1022 and 1023. SMRFOF at
17 pp. 3–4. The Special Master correctly sustained those objections for the reasons argued in
18 Respondent’s Memorandum of Law in support of the evidentiary objections, filed on November
19 2, 2021. *See* Respondent’s Memo in Support of Objections to Pets.’ Evidentiary Submissions, at
20 18–22, 24–25.

21 **F. Dr. Brunell’s expert testimony should be excluded as unreliable.**

22 “If scientific, technical or other specialized knowledge will assist the trier of fact to
23 understand the evidence or to determine a fact in issue, a witness qualified as an expert by
24 knowledge, skill, experience, training or education may testify thereto in the form of an opinion
25 or otherwise.” OEC 702. “[A] trial court should exclude ‘bad science’ in order to control the
26

1 flow of confusing, misleading, erroneous, prejudicial, or useless information to the trier of fact.”
2 *State v. O’Key*, 321 Or 285, 306 (1995).

3 The methods used to produce Dr. Brunell’s report fail to meet muster under OEC 702.
4 Dr. Brunell is a political scientist, but his work in this case was not political science. His
5 testimony should be excluded from the evidentiary record.

6 **1. It is Petitioners’ burden to establish the reliability of Dr. Brunell’s expert**
7 **testimony.**

8 As an initial matter, Petitioners, as the proponents of Dr. Brunell’s expert testimony, have
9 the burden of satisfying this Court that the “unusually high degree of persuasive power”
10 possessed by scientific evidence is “legitimate.” *O’Key*, 321 Or at 291, 303, 306. In
11 determining whether Petitioners have met their burden, this Court has “an obligation to ensure
12 that proffered expert scientific testimony . . . is scientifically valid. *State v. Henley*, 363 Or 284,
13 306–07 (2018). To meet that obligation, courts “may be required to consider a number of
14 factors, including: (1) The technique's general acceptance in the field; (2) The expert's
15 qualifications and stature; (3) The use which has been made of the technique; (4) The potential
16 rate of error; (5) The existence of specialized literature; (6) The novelty of the invention; and
17 (7) The extent to which the technique relies on the subjective interpretation of the expert.”
18 *State v. Perry*, 347 Or 110, 121 (2009).

19 “Whether the facts or data relied on by the expert are of the quality required
20 by OEC 703 also is a preliminary question of fact to be decided by the trial court under OEC
21 104(1).” *Dyer v. R.E. Christiansen Trucking, Inc.*, 318 Or 391, 399 (1994).

22 **2. Dr. Brunell’s proportionality and efficiency gap opinions are unreliable.**

23 First, proportionality is not a relevant criterion of partisan fairness. In single-member
24 district elections—such as those for the U.S. House—the party who wins the largest percentage
25 of votes generally earns an even greater percentage of seats. This is a point of agreement among
26 the experts. See SMRFOF ¶¶ 250 (Dr. Katz), 260 (Dr. Gronke), 297 (Dr. Brunell). Thus,

1 proportionality is not a reliable measure of partisan fairness. The efficiency gap is also not a
2 reliable measure of partisan fairness for congressional elections in Oregon. SMRFOF ¶¶ 238–
3 39. Even those political scientists who believe that efficiency-gap analysis can be relevant
4 believe also that it is only reliable when considered along with other measures of partisan
5 fairness. SMRFOF ¶¶ 281, 285–87.

6 Even if proportionality and efficiency gap were valid measures of partisan fairness,
7 Dr. Brunell’s methods of estimating those measures are unreliable. The method he used to
8 estimate these measures is not documented in any peer-reviewed publication. SMRFOF ¶ 299
9 (citing Hearing Tr (rough), Oct 27, 2021, at 212, 242, corresponding with 10/27/2021
10 Hrg. Trans. (vol. 1) at 226–27, 257–58). His estimates changed drastically after he incorporated
11 data that he had previously discarded. *See* SMRFOF ¶¶ 301–02; 10/27/2021 Hrg. Trans. (vol. 1)
12 at 213:17–220:22 (Dr. Brunell).

13 **3. Dr. Brunell’s testimony was a “mere conduit” for data that was given to him**
14 **by counsel.**

15 Three categories of information in Dr. Brunell’s testimony—compactness, splits, and
16 maps—were based only on counsel’s representation to Dr. Brunell that the data were provided
17 by a mapmaker. Dr. Brunell does not know the identity, let alone the reliability, of this
18 mapmaker, and the mapmaker did not submit to cross-examination. *See* Resp’s Prop. FOF
19 ¶¶ 274–291; *see also* SMRFOF ¶ 291 (“Dr. Brunell testified that he merely copied and pasted
20 these [compactness scores and county and municipal splits] figures from counsel—he did not
21 otherwise know where the figures came from—and he never examined or verified the
22 calculations that he reported.”); *id.* ¶ 292 (similar with respect to maps).

23 A witness cannot simply repeat what others told him in the guise of expert testimony.
24 *See State v. Thomas*, 279 Or App 98, 108 (2016), *rev den*, 360 Or 423 (2016) (citing *Travis v.*
25 *Unruh*, 66 Or App 562, 565 (1984), for the proposition that “OEC 703 does not permit experts to
26 serve as a mere conduit for out-of-court authorities”). That is precisely what Dr. Brunell did

1 with respect to Tables 11 (regarding compactness) and Table 12 (regarding county and municipal
2 splits). *See* SMRFOF ¶ 291; *see also* Respondent’s Prop. FOF ¶¶ 274, 283, 286. Similarly, he
3 could not provide the foundation for the depiction of the maps he sponsored as exhibits. *See*
4 SMRFOF ¶ 292.

5 **G. This Court should reject the Special Master’s recommendation to overrule**
6 **Respondent’s other objections.**

7 Respondent made numerous other objections to Petitioners’ evidentiary submissions that
8 the Special Master overruled. *See* Evidentiary Objections Chart, *supra*; SMRFOF at p. 3
9 (stating, “All exhibits and testimony are admitted unless a particular objection has been made
10 and sustained” and “Any objection the Special Master does not specifically address in this
11 document is considered overruled”). Respondent maintains all objections for the reasons argued
12 in Respondent’s Memorandum of Law in support of the evidentiary objections, filed on
13 November 2, 2021. In particular, this Court should reject the Special Master’s recommendation
14 to overrule Respondent’s objections as to exhibits 1043 and 1044, and to overrule certain
15 objections—on grounds alternative to legislative privilege—as to Representative Bonham’s
16 testimony.

17 **1. Exhibits 1043 and 1044, which contain post-enactment press-release**
18 **statements of individual legislators, should be excluded.**

19 The Special Master incorrectly recommended overruling Respondent’s objection to
20 exhibits 1043 and 1044, which are press releases containing post-enactment statements of
21 individual legislators that are inadmissible on both hearsay and relevance grounds. It appears
22 that the Special Master may have overruled those objections as moot, as the exhibits are not
23 addressed in the Recommended Findings of Fact. Petitioners, however, rely on those exhibits as
24 substantive evidence, Pets.’ Prop. FOF at ¶¶ 29, 53–55, 109, 132–134; Pets.’ Objections to
25 SMTFOF 148:5–13, and Respondent thus moves for an order excluding those exhibits from the
26 evidentiary record.

1 First, there can be no reasonable dispute that Petitioners offer the exhibits for a hearsay
2 purpose. Petitioners seek to prove that the Legislative Assembly enacted SB 881 with partisan
3 intent and that the enacted map has a partisan effect. Pets.’ Prop. FOF at ¶¶ 29, 53–55, 109,
4 132–134; Pets.’ Objections to SMTFOF 148:5–13. In turn, exhibits 1043 and 1044 contain post-
5 enactment statements of individual legislators characterizing the maps as “the very definition of
6 gerrymandering” and “rigged political maps.” Ex. 1043, Oregon Senate Republicans, Senate
7 Republican Leader’s Statement on the Passage of Gerrymandered Congressional Redistricting
8 Plan (first quote); Ex. 1044, Oregon House Republican Caucus, Rigged Redistricting Process
9 Fails Oregon (second quote, quoting House Republican Leader Christine Drazan). That is
10 hornbook hearsay, and no exception applies. OEC 801(3).

11 Second, the post-enactment statements are further inadmissible because they are
12 irrelevant to proving the legislature’s intent. It is well-settled that post-enactment statements by
13 a legislator cannot be considered as part of the legislative-intent analysis. *See Salem-Keizer*
14 *Ass’n v. Salem-Keizer Sch. Dist. 24J*, 186 Or App 19, 26 (2003); *see also* Jack L. Landau,
15 *Oregon Statutory Construction*, 97 Or L Rev 583, 696 (2019) (the rule that post-enactment
16 events are not relevant “is especially true with respect to post-enactment statements of
17 legislators, such as affidavits prepared for litigation or statements made in subsequent legislative
18 sessions”). That rule is based on two considerations. *Salem-Keizer Ass’n*, 186 Or App at 27.
19 One, they are not part of the official legislative history that members of the Legislative Assembly
20 could have relied upon. *Id.* Two, at most they represent “the views—or, perhaps more
21 accurately, the recollections—of a single participant in the legislative process.” *Id.* Courts are
22 hesitant to impute a statement of one legislator to the body as a whole, even when the statement
23 is *in* the legislative record. *See, e.g., Patton v. Target Corp.*, 349 Or 230, 242 (2010) (“[T]he
24 comment of a single legislator at one committee hearing generally is of dubious utility in
25 determining the intent of the legislature in enacting a statute.”).

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1 As observed by the U.S. Court of Appeals for the Seventh Circuit, “Subsequent writings
2 may be nothing but wishful thinking,” and particularly when “generated in the course of
3 litigation . . . it may be designed to mislead, to put an advocate’s slant on things.” *Covalt v.*
4 *Carey Canada Inc.*, 860 F2d 1434, 1438–39 (7th Cir 1988). A firm rule against considering such
5 evidence induces members of the legislature “to put their thoughts on record when they should—
6 before the bill becomes law, when there is still time for other Members to deny the claims.” *Id.*
7 at 1439.

8 It makes no difference here (1) that Petitioners seek to establish the purpose of a statute
9 rather than its interpretation, or (2) that the underlying hearsay statement they seek to admit was
10 allegedly made contemporaneously with the enactment of the legislation. All the same reasons
11 apply for refusing to consider, or for at least giving minimal weight to, post-enactment
12 statements. Even if credited, the hearsay statements would, at most, reflect the private views of
13 two individual legislators, not the views of the Legislative Assembly as a whole. And because
14 the purported statement at issue was not made part of the official legislative record, there was no
15 opportunity for other legislators to consider it and disavow it if appropriate. Nor can they do so
16 here without waiving legislative privilege—a privilege that protects the integrity of the
17 legislative record rather than inviting competing post hoc spin by legislators on both sides of the
18 debate.

19 In short, exhibits 1043 and 1044 are inadmissible, and this Court should therefore
20 exclude those exhibits.

21 **2. This Court should also exclude Representative Bonham’s testimony on**
22 **grounds alternative to legislative privilege.**

23 Respondent maintains all remaining objections to Representative Bonham’s testimony for
24 the reasons argued in Respondent’s Memorandum of Law in support of the evidentiary
25 objections, filed on November 2, 2021. *See* Evidentiary Objections Chart, *supra*. The Special
26 Master did not reach those objections, because he struck all of Representative Bonham’s hearing

1 testimony on legislative-privilege grounds. SMRFOF at p. 4. Two of those objections warrant
2 further discussion here.

3 First, the Special Master should have granted Intervenors-respondents' motion to strike
4 Representative Bonham's testimony about his belief that Tom Powers, a member of Senate
5 President Courtney's staff, drew the enacted maps. 10/27/2021 Hrg. Trans. (vol. 1) at 115:1-3,
6 116:10-117:14; *see id.* at 120:10-13 (Representative Bonham identifying map associated with
7 Powers as "the 881A map"). The Special Master deferred ruling on the motion based on
8 Petitioners' representation that they would "elicit [the information] on redirect." *Id.* at 117:11-
9 14. But Petitioners did not, at least not as to the question of who drew the enacted maps. The
10 Special Master's tentative ruling remained deferred until the Special Master's Recommended
11 Findings of Fact and Report implicitly denied the motion.

12 This Court should reject the recommendation to deny, because the testimony is
13 inadmissible as hearsay, lacking foundation for personal knowledge, and irrelevant. As to
14 hearsay, Representative Bonham testified that the basis for his belief was that the "ESRI system"
15 had Tom Powers's name as the author. 10/27/2021 Hrg. Trans. (vol. 1) at 116:13-20. Assuming
16 that to be true, and if that notation was entered by a person, then the notation is hearsay that is
17 not subject to an exception. OEC 801(3). But more fundamentally, Representative Bonham's
18 belief lacks foundation under OEC 602 for how he would personally know that, because Tom
19 Powers authored the ESRI entry (assuming that to be true, and which was not established),
20 Powers also drew the maps in that ESRI-system entry, as opposed to simply being the one to
21 upload the collective work of various legislators and staff. As a result, the testimony is also
22 inadmissible as irrelevant, because it is speculation that has no tendency to prove or disprove
23 Representative Bonham's assertion that Powers drew the maps. OEC 401.

24 Second, the Special Master should have sustained Respondent's objection to Petitioners'
25 question, "As the deputy leader, would you be privy to communications that other Republicans
26 have with Democrats?" 10/27/2021 Hrg. Trans. (vol. 1) at 167:4-7. The Special Master

1 overruled the objection after limiting the question to the following: “Given your role and given
2 your knowledge of how the House caucus works, would you most likely have been informed of
3 communications that other members of the caucus had with Democrats?” *Id.* at 169:1–19.

4 This Court should exclude that testimony, because the question remains speculative and
5 lacking foundation for personal knowledge. Representative Bonham’s explanation as to the
6 basis for answering “Yes” makes that clear. Namely, he explained his view that the Republican
7 caucus had “a team approach,” that they had established “goals and intent,” that other legislators
8 had “engaged in conversations” with the redistricting committee, and that caucus members
9 “stayed engaged in that caucus room together throughout the redistricting special session.” *Id.* at
10 170:1–12. Notably, he did not testify as to any established procedures in which other caucus
11 members would confer with Representative Bonham before or after engaging in discussions with
12 Democratic legislators, nor did he testify as to anything beyond an assumption that other caucus
13 members were on the exact same page as him regarding redistricting. This Court should
14 accordingly reject the Special Master’s recommendation on that objection.

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1 **CONCLUSION**

2 For the foregoing reasons, Respondent moves for an order adopting in part and rejecting
3 in part the Special Master’s recommended rulings.

4
5 DATED November 10, 2021.

6 Respectfully submitted,

7 ELLEN F. ROSENBLUM
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9
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1 **CERTIFICATE OF SERVICE**

2 I certify that on November 10, 2021, I served the foregoing Respondent’s Evidentiary
3 Motion and Memorandum upon the parties hereto by the method indicated below, and addressed
4 to the following:

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