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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.

Case No. 21CV40180

RESPONDENT'S MEMORANDUM OF LAW IN  
SUPPORT OF RESPONDENT'S OBJECTIONS  
TO PETITIONERS' EVIDENTIARY  
SUBMISSIONS

**ORS 20.140 - State fees deferred at filing**

**I. SUMMARY OF OBJECTIONS**

Petitioners offer numerous pieces of evidence in the form of exhibits and testimony that are inadmissible under the Oregon Evidence Code (OEC). As explained in more detail below, the evidence identified in the following charts (the first chart pertains to exhibits and the second chart pertains to testimony given in this case on October 26 and 27, 2021) should be stricken from the record in this case on evidentiary grounds.<sup>1</sup>

<sup>1</sup> Respondent does not repeat here objections made on the record during live testimony before this Court and continues to preserve them.

| EXHIBIT                        | DESCRIPTION                                 | OBJECTION   |
|--------------------------------|---|---|
| 1002 ¶¶ 12-21                  | Declaration of Beverly Clarno               | <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 § II.B.2, 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): lacks 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>   |
| 1003 ¶ 5 (Pets’ PFOF ¶¶ 2, 82) | Declaration of Representative Daniel Bonham | <p>Lacks foundation for personal knowledge (OEC 602). Lacks foundation for how Rep. Bonham would know Speaker Kotek’s intent with respect to the makeup of the House Redistricting Committee.</p> <p>Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. If reliant on statements of Speaker Kotek, assertion improperly relies on inadmissible hearsay. <i>See</i> Memorandum § II.E, below.</p> <p>Legislative privilege: evidence purports to refer to communications of legislators in carrying out their legislative functions. If reliant on alleged hearsay statements of Speaker Kotek, legislative privilege applies. <i>See</i> Memorandum § II.A, below.</p> <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Speaker Kotek’s reason for the even-split committee is irrelevant to whether the Legislative Assembly had partisan intent when it enacted SB 881. Further, committee assignments and other internal legislative matters are categorically irrelevant to this proceeding. <i>See</i> Memorandum § II.B.2, below.</p> |

| EXHIBIT                            | DESCRIPTION                                 | OBJECTION  |
|------------------------------------|---|--|
| 1003 ¶ 6<br>(Pets' PFOF ¶¶ 3, 83)  | Declaration of Representative Daniel Bonham | <p>Relevance (OEC 402): evidence not relevant to any claim or defense. Whether Republican 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 § II.B.1, 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>   |
| 1003 ¶ 10<br>(Pets' PFOF ¶¶ 7, 87) | Declaration of Representative Daniel Bonham | <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 § II.B.1, below.</p> |

| EXHIBIT                                    | DESCRIPTION                                 | OBJECTION  |
|--|---|--|
| 1003 ¶ 11<br>(Pets' PFOF ¶¶ 8, 88, 140-41) | Declaration of Representative Daniel Bonham | <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 § II.B.1, below.</p> <p>Best-evidence rule (OEC 1002). Enacted map is best evidence of how the congressional districts were drawn.</p> |
| 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 § II.E, below.</p>   |

| EXHIBIT   | DESCRIPTION  | OBJECTION   |
|---|--|---|
| <p>1 1003<br/>2 ¶¶ 13-16<br/>3 (Pets'<br/>4 PFOF<br/>5 ¶¶ 10, 13,<br/>6 90, 93)</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 “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 § II.E, 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 § II.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>10 1003<br/>11 ¶¶ 19-20<br/>12 (Pets'<br/>13 PFOF<br/>14 ¶¶ 17, 97)</p>          | <p>Declaration of Representative Daniel Bonham</p> | <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 § II.B.2, below. That Speaker Kotek took actions that Rep. Bonham “feared” is similarly irrelevant to those merits.</p>   |
| <p>13 1003 ¶ 21</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 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 § II.E, 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 § II.A, below.</p>   |

| EXHIBIT                           | DESCRIPTION                                 | OBJECTION  |
|-----------------------------------|---|--|
| 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 § II.E, 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 § II.A, below.</p>   |
| 1003 ¶¶ 28-30 (Pet’rs’ PFOF ¶ 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> |

| EXHIBIT                              | DESCRIPTION                                 | OBJECTION  |
|--------------------------------------|---|--|
| 1003 ¶ 29<br>(Pets' PFOF ¶¶ 22, 102) | Declaration of Representative Daniel Bonham | <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>                     |
| 1003 ¶ 31                            | Declaration of Representative Daniel Bonham | <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 § II.E, 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 § II.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> |
| 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>  |

| EXHIBIT  | DESCRIPTION   | OBJECTION  |
|--|---|--|
| <p>1 1003</p> <p>2 ¶¶ 33-35,</p> <p>3 37</p> <p>4 (Pets’</p> <p>5 PFOF</p> <p>6 ¶¶ 25,</p> <p>7 105)</p> | <p>Declaration of Representative Daniel Bonham</p>            | <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.</p> <p>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 § II.E, 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 § II.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>10 1005</p>   | <p>Declaration of Professor Thomas L. Brunell</p>             | <p>Objections to 1006 incorporated by reference.</p>   |
| <p>12 1006</p>   | <p>Expert Report of Professor Thomas L. Brunell - Data</p>    | <p>Inadmissible expert testimony (OEC 702; <i>State v. O’Key</i>, 321 Or 285 (1995)). Use of only presidential elections is unreliable. SMTFOF ¶ 291; 10/27/2021 Hrg. Trans. (vol. 1) at 213:17-220:22 (Brunell); <i>see</i> Memorandum § II.D.1, below.</p>   |
| <p>15 1006</p>   | <p>Expert Report of Professor Thomas L. Brunell – Methods</p> | <p>Inadmissible expert testimony (OEC 702; <i>State v. O’Key</i>, 321 Or 285 (1995)). Dr. Brunell’s methods are unreliable. SMTFOF ¶ 292; <i>see</i> Memorandum § II.D.1, below.</p>   |



| EXHIBIT | DESCRIPTION   | OBJECTION   |
|---------|---|---|
| 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> SMTFOF ¶¶ 240 (Katz), 250 (Gronke), 287 (Brunell); Memorandum § II.D.1, below.<br><br>Inadmissible expert testimony (OEC 702; <i>State v. O'Key</i> , 321 Or 285 (1995)). Dr. Brunell's methods of testing proportionality are unreliable. SMTFOF ¶ 292; <i>see</i> Memorandum § II.D.1, below. |
| 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. SMTFOF ¶¶ 228-29. In addition, Dr. Brunell's methods of testing proportionality are unreliable. SMTFOF ¶ 292; <i>see</i> Memorandum § II.D.1, below; <i>see also</i> OEC 403.  |
| 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 § II.D.2, below.   |
| 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 § II.D.2, below.  |
| 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.   |
| 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</i> SMTFOF ¶ 282.  |

| EXHIBIT | DESCRIPTION   | OBJECTION                                 |   |
|---------|---|---|---|
| 1009    | SB 881-A<br>Portland Map  | <i>See objections to Ex. 1008, above.</i> |   |
| 1010    | SB 881-A<br>Greater<br>Portland Area<br>Map                       |   |   |
| 1011    | Plan A (SB<br>881) Map  |   |   |
| 1012    | Plan A (SB<br>881) Portland<br>Map                                |   |   |
| 1013    | Plan A (SB<br>881) Greater<br>Portland Area<br>Map                |   |   |
| 1014    | Neutral Map   |   |   |
| 1015    | Neutral Map<br>Portland Area                                      |   |   |
| 1016    | Neutral Map<br>Greater<br>Portland Area                           |   |   |
| 1022    | FiveThirtyEight<br>Congressional<br>Map<br>Assessment             |   | Hearsay (OEC 802): relies on purported statement of non-testifying witness and no hearsay exception applies. <i>See Memorandum § II.E, below.</i> |
| 1023    | Princeton<br>Gerrymander<br>Project<br>Congressional<br>Map Grade |   | <i>See objection to Ex. 1022, above.</i>  |

| EXHIBIT                              | DESCRIPTION  | OBJECTION   |
|--------------------------------------|--|---|
| 1024                                 | <i>Gill v. Whitford</i><br>States Amici<br>Brief   | Relevance (OEC 402): evidence not relevant to any claim or defense. <i>See</i> Memorandum § II.B.3, below.  |
| 1025                                 | <i>Rucho v. Common Cause</i><br>States Amici<br>Brief  | <i>See</i> objection to Ex. 1024, above.  |
| 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.  |
| 1043                                 | Senate<br>Republican<br>Leader's<br>9.27.2021<br>Statement on<br>the Passage of<br>Gerrymandered<br>Congressional<br>Redistricting<br>Plan | 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 § II.B.1, below.<br><br>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 § II.E, below. |
| 1044                                 | Oregon House<br>Republican<br>Caucus<br>9.27.2021<br>Statement on<br>Redistricting   | <i>See</i> objections to Ex. 1043, above.   |
| 1045<br>at 29-30,<br>32-34,<br>37-40 | Rough<br>Deposition<br>Transcript of<br>SEIU<br>503.Melissa<br>Unger   | 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 § II.E, below.  |

| TRANSCRIPT CITE   | WITNESS   | OBJECTION  |
|---|---|--|
| 10/27 Rough Tr, at 105:3–107:5, 109:18–110:1, 115:13–116:19<br>(Pets’ PFOF ¶¶ 10, 90) | Hearing testimony of Representative Daniel Bonham | 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.   |
| 10/27 Rough Tr, at 148:5-23<br>(Pets’ PFOF ¶¶ 10, 90)                                 | Hearing testimony of Representative Daniel Bonham | 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.   |
| 10/27 Rough Tr, at 149:10–150:20<br>(Pets’ PFOF ¶¶ 12, 92)                            | Hearing testimony of Representative Daniel Bonham | 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 § II.E, below.<br><br>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 § II.A, below. |

| TRANSCRIPT CITE  | WITNESS  | OBJECTION   |
|--|--|---|
| <p>10/27 Rough Tr, at 117:22–119:18 (Pets’ PFOF ¶¶ 13, 93)</p> | <p>Hearing testimony of 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 § II.E, 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 § II.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 § II.B.1, below.</p> |

| TRANSCRIPT CITE   | WITNESS  | OBJECTION   |
|---|--|---|
| <p>10/27 Rough Tr, at 96:5–99:3, 100:23–101:12<br/>(Pets’ PFOF ¶¶ 17, 97)</p> | <p>Hearing testimony 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, namely “agreements” with and the “word” of Democratic legislators as well as other statements by Democratic legislators and congressional representatives. <i>See</i> Memorandum § II.E, 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 § II.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>10/27 Rough Tr, at 105:16–107:17<br/>(Pets’ PFOF ¶¶ 21, 101)</p>           | <p>Hearing testimony of 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. (Hearsay objection made on the record. <i>See</i> Memorandum § II.E, below.)</p>   |

| TRANSCRIPT CITE  | WITNESS  | OBJECTION  |
|--|--|--|
| <p>10/27 Rough Tr, at 117:22–120:4 (Pets’ PFOF ¶¶ 24-25, 104-05)</p>         | <p>Hearing testimony of Representative Daniel Bonham</p> | <p>Lacks foundation for personal knowledge (OEC 602). No foundation for how Rep. Bonham would personally know each Republican legislators’ 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 § II.E, 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 § II.A, 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>10/27 Rough Tr, at 120:11–121:9, 150:4-8, 161:5-17 (Pets’ PFOF ¶ 141)</p> | <p>Hearing testimony of 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 § II.B.1, 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> |

| TRANSCRIPT CITE                               | WITNESS   | OBJECTION  |
|---|---|--|
| 10/27 Rough Tr, at 108:20–109:13              | Hearing testimony of Representative Daniel Bonham | 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 § II.E, below.<br><br>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.  |
| 10/27 Rough Tr, at 111:11–113:18              | Hearing testimony of Representative Daniel Bonham | 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.   |
| 10/27 Rough Tr, at 113:19–116:15              | Hearing testimony of Representative Daniel Bonham | 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.  |
| 10/27 Rough Tr, at 121:11–139:1, 158:19–162:4 | Hearing testimony of Representative Daniel Bonham | 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.<br><br>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 § II.B.1, below. |
| 10/27 Rough Tr, at 153:9–154:9                | Hearing testimony of Representative Daniel Bonham | 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.   |



| TRANSCRIPT<br>CITE                 | WITNESS   | OBJECTION   |
|------------------------------------|---|---|
| 10/27 Rough<br>Tr, at 158:7-<br>18 | Hearing testimony<br>of Representative<br>Daniel Bonham | 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.” |

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1 **II. MEMORANDUM**

2 **A. Evidence that violates legislative privilege should be stricken.**

3 Respondent incorporates by reference the arguments made in Respondent’s and  
4 Legislative Assembly’s motion to strike filed on October 26, 2021.

5 **B. Irrelevant evidence should be stricken.**

6 It is axiomatic that only relevant evidence is admissible. *See* OEC 402 (providing that  
7 relevant evidence is generally admissible). OEC 401 defines “relevant evidence” as: “[E]vidence  
8 having any tendency to make the existence of any fact that is of consequence to the  
9 determination of the action more probable or less probable than it would be without the  
10 evidence.” As noted in the above charts, Petitioners offer a host of evidence that has no  
11 tendency to make the existence of any fact that is of consequence more or less probable than it  
12 would be without the evidence. Specific categories of irrelevant evidence that warrant further  
13 analysis are addressed, in turn, below.

14 **1. Post-enactment statements of legislators are not relevant to prove legislative**  
15 **intent.**

16 Petitioners’ evidentiary submissions include a declaration and testimony from Rep.  
17 Daniel Bonham. *See* Ex. 1003; 10/27 Rough Tr (testimony of Rep. Bonham). And as detailed  
18 above, both the declaration and Rep. Bonham’s testimony are replete with post-enactment  
19 statements that are irrelevant to the legislature’s intent in enacting SB 881.

20 Statements from a legislator in the form of declarations or testimony about what they or  
21 other legislators intended when enacting a law are not relevant to determining the legislature’s  
22 intent or purpose. Oregon has a well-settled framework for determining legislative intent by  
23 examining a statute’s text, context, and legislative history. *See State v. Gaines*, 346 Or 160, 171-  
24 72 (2009). It is equally well settled that post-enactment statements by a legislator, including  
25 testimony proffered from a legislator in litigation, cannot be considered as part of that  
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1 analysis. *See Salem-Keizer Ass’n v. Salem-Keizer Sch. Dist. 24J*, 186 Or App 19, 26 (2003); *see*  
2 *also* Jack L. Landau, *Oregon Statutory Construction*, 97 Or L Rev 583, 696 (2019) (the rule that  
3 post-enactment events are not relevant “is especially true with respect to post-enactment  
4 statements of legislators, such as affidavits prepared for litigation or statements made in  
5 subsequent legislative sessions”).

6 The rule against considering post-enactment statements of legislators is based on two  
7 considerations. *Salem-Keizer Ass’n*, 186 Or App at 27. First, they are not part of the official  
8 legislative history that members of the Legislative Assembly could have relied on. *Id.* Second,  
9 at most they represent “the views—or, perhaps more accurately, the recollections—of a single  
10 participant in the legislative process.” *Id.* Courts are hesitant to impute a statement of one  
11 legislator to the body as a whole, even when the statement is *in* the legislative record. *See, e.g.,*  
12 *Patton v. Target Corp.*, 349 Or 230, 242 (2010) (“[T]he comment of a single legislator at one  
13 committee hearing generally is of dubious utility in determining the intent of the legislature in  
14 enacting a statute.”). Thus, “[c]ourts are all the more loath to determine the intentions of the  
15 institution as a whole on the basis of isolated statements that are generated after enactment,  
16 without any evidence that the other members of the legislative body even were aware of them,  
17 much less that they agreed with them.” *Id.*

18 Oregon is hardly unique in rejecting post-enactment statements of legislators as probative  
19 of legislative intent or purpose. “It is a rule that appears to have been adopted by nearly every  
20 other court that has addressed the issue.” *Salem-Keizer Ass’n*, 186 Or App at 26; *see also Bread*  
21 *Political Action Comm. v. FEC*, 455 US 577, 582 n 3, 102 S Ct 1235, 71 L Ed 2d 432 (1982)  
22 (refusing to give “probative weight” to an affidavit of a senator); *Covalt v. Carey Canada Inc.*,  
23 860 F2d 1434, 1438 (7th Cir 1988) (noting that it is “far from clear that [affidavits from a  
24 legislator] are admissible in evidence,” but “[a]t all events, we pay these no heed”). “Subsequent  
25 writings may be nothing but wishful thinking,” and particularly when “generated in the course of  
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1 litigation \* \* \* it may be designed to mislead, to put an advocate’s slant on things.” *Id.* at 1438-  
2 39. A firm rule against considering such evidence induces members of the legislature “to put  
3 their thoughts on record when they should—before the bill becomes law, when there is still time  
4 for other Members to deny the claims.” *Id.* at 1439.

5 Even courts that consider post-enactment declarations or testimony generally note that  
6 they should be viewed with distrust and have little probative weight. *See, e.g., California Tow*  
7 *Truck Ass’n v. City & Cty. of San Francisco*, 693 F3d 847, 864 n 15 (9th Cir 2012) (“A court  
8 should be wary, however, about crediting post hoc safety rationalizations that conflict with the  
9 contemporaneous legislative record.”). Here, Rep. Bonham’s statements are post hoc  
10 “legislative history” purporting to describe conversations and events that are not reflected  
11 anywhere in the contemporaneous legislative record. As such, even if they meet the low  
12 threshold for evidentiary relevance, they should be afforded little weight.

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

23 **2. Legislative committee assignments are not relevant to prove legislative intent.**

24 Paragraphs 5, 6, 19, 20, 21 of the Bonham Declaration (Ex. 1003) all contain testimony  
25 about redistricting committee assignments and the inner workings of the legislature with respect  
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1 to internal legislative business. Such evidence is inadmissible to prove legislative intent here.  
2 Respondent objects based on Judge James’ Order of October 21, which ruled that that discovery  
3 into the “change in composition of the House Redistricting Committee” is not relevant to the  
4 issue of legislative intent and that discretionary acts concerning internal legislative procedures  
5 are not subject to judicial scrutiny or control. See 10/21/2021 Order on Non-Parties’ Motion to  
6 Quash; Protective Order at 3. The testimony at issue is about the change in composition and the  
7 discretionary internal legislative decisions. Therefore, those portions of Exhibit 1003 should be  
8 excluded.

9 **3. The Attorney General’s amicus briefs in other cases are not relevant.**

10 To support their proposition that the “efficiency gap” is “sufficient to provide evidence  
11 that a map favors a particular party,” Petitioners submitted two amicus briefs filed by the Oregon  
12 Attorney General in other cases. See Pets.’ Proposed Findings of Fact at ¶ 39; Ex. 1025, States’  
13 Amici Brief, *Rucho v. Common Cause*, No.18-422, 2019 WL 1167911 (U.S. Mar. 8, 2019)  
14 (*Rucho* Amici Br.); See also Ex. 1024, (States’ Amici Brief, *Gill v. Whitford* (*Gill* Amici Brief)).  
15 But litigants’ views of legal questions are not facts, and those amicus briefs would not be  
16 relevant here in any case, for three reasons.<sup>2</sup>

17 First, the amicus briefs did not argue that an efficiency gap *alone* tends to show partisan  
18 gerrymandering. Rather, those briefs argued (as a matter of federal law) that the efficiency gap  
19 was relevant *when considered along with other measures*. See Ex. 1024 at 15 (“Of course, no  
20 single metric is likely to satisfy the effects prong by itself. ...[N]o one is asking the judiciary to  
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22 <sup>2</sup> The value of the efficiency gap has been much debated in the federal cases. See, e.g., Brief for  
23 Appellants, *Gill v. Whitford*, No. 16-1161, 2017 WL 4325878, at 49–53 (US July 28, 2017), in  
24 which Mr. Tsyetlin argued that the efficiency gap is not a reliable indicator of partisan  
25 gerrymandering because it (1) it erroneously assumes that “proportionate representation is the  
26 baseline,”; (2) the premise that some votes are “wasted” if they are not for the winning  
candidate is a “reductionist view of voting”; (3) efficiency gap is “systematically biased against  
Republicans”; (4) the measure has “numerous technical defects”; and (5) “the efficiency gap is  
overbroad, putting so many plans in jeopardy that it ‘would risk [federal courts] assuming  
political, not legal, responsibility for a process that often produces ill will and distrust.’”

1 enshrine any particular statistical measure of partisanship into the Constitution.”). That is  
2 because it is well known that using an efficiency gap alone results in false-positives; thus, if an  
3 efficiency gap were to be considered at all, it would have to be considered in conjunction with  
4 the other simplified statistical measures of partisan symmetry. *See* Ex. 3001 ¶¶ 22-30  
5 (Caughey).

6 Second, the special difficulties associated with using the efficiency gap as a measure of  
7 partisan fairness with on a map that has only six seats were not present in *Rucho*. *See* SMTFOF  
8 ¶ 229. *Rucho* concerned the congressional redistricting plans of North Carolina, which has  
9 eleven congressional districts.

10 Third, the scholarship has changed regarding the reliability of the efficiency gap in  
11 general since the amicus briefs were filed. Dr. Katz (along with Drs. Gary King and Elizabeth  
12 Rosenblatt of Harvard University) has since published a refereed article conclusively debunking  
13 the notion that the efficiency gap was a reliable measure of partisan symmetry. *See* Ex. 2304.  
14 That finding is not merely the opinion of three preeminent political scientists; it is a published  
15 scholarly article that survived the peer review process.<sup>3</sup>

16 **C. Evidence that lacks foundation should be stricken.**

17 A lay “witness may not testify to a matter unless evidence is introduced sufficient to  
18 support a finding that the witness has personal knowledge of the matter.” OEC 703. The charts  
19 above identify the evidence which lacks the requisite personal knowledge to meet this basic  
20 evidentiary standard.

21 **D. Dr. Brunell’s testimony is not admissible under OEC 702.**

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

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24 <sup>3</sup> Dr. Brunell cited no sources to justify the reliability of the efficiency gap. SMTFOF ¶ 289.  
25 The article proposing the efficiency gap was published in a student-edited law review, not a peer-  
26 reviewed political science journal. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, Partisan  
Gerrymandering and the Efficiency Gap, 82 *U. Chi. L. Rev.* 831 (2015).

1 knowledge, skill, experience, training or education may testify thereto in the form of an opinion  
2 or otherwise.” OEC 702. “[A] trial court should exclude ‘bad science’ in order to control the  
3 flow of confusing, misleading, erroneous, prejudicial, or useless information to the trier of fact.”  
4 *State v. O’Key*, 321 Or 285, 306 (1995). Among the factors a court is to consider in determining  
5 “‘the scientific validity’” of the “‘principles and methodology’” underlying expert testimony is  
6 whether the method has been tested, subject to peer review, has a known error rate, and is  
7 accepted in the scientific community. *Id.* at 304-05 (quoting *Daubert v. Merrell Dow*  
8 *Pharmaceuticals*, 509 US 579, 594-95 (1993)).

9 The methods used to produce Dr. Brunell’s report meet none of these criteria.  
10 Dr. Brunell is a political scientist, but his work in this case was not political science. It is  
11 therefore inadmissible.

12 **1. Dr. Brunell’s proportionality and efficiency gap opinions are unreliable.**

13 First, proportionality is not a relevant criterion of partisan fairness. In single-member  
14 district elections—such as those for the U.S. House—the party who wins the largest percentage  
15 of votes generally earns an even greater percentage of seats. This is a point of agreement among  
16 the experts. *See* SMTFOF ¶¶ 240 (Katz), 250 (Gronke), 287 (Brunell). Thus, proportionality is  
17 not a reliable measure of partisan fairness. The efficiency gap is also not a reliable measure of  
18 partisan fairness for congressional elections in Oregon. SMTFOF ¶¶ 228-29. Even political  
19 scientists who believe efficiency gap is a relevant measure believe that it is only reliable when  
20 considered along with other measures of partisan fairness. SMTFOF ¶¶ 271, 276-77.

21 Even if proportionality and efficiency gap were valid measures of partisan fairness,  
22 Dr. Brunell’s methods of estimating those measures are unreliable. The method he used to  
23 estimate these measures is not documented in any peer-reviewed publication. SMTFOF ¶ 289  
24 (citing Hearing Tr (rough), Oct 27, 2021, at 212, 242). His estimates changed drastically after he  
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1 discarded relevant data. *See* SMTFOF ¶¶ 291-92; 10/27/2021 Hrg. Trans. (vol. 1) at 213:17-  
2 220:22 (Brunell).

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4 **2. Dr. Brunell’s testimony was a “mere conduit” for splits data, compactness  
5 data, and maps.**

6 Three categories of information in Dr. Brunell’s testimony—compactness, splits, and  
7 maps—were based only on counsel’s representation to Dr. Brunell that the data were provided  
8 by a mapmaker. Dr. Brunell does not even know the identity, let alone the reliability, of this  
9 mapmaker, and the mapmaker did not submit to cross-examination. *See* RPFof paras. 274-291;  
10 *see also* SMTFOF ¶ 281 (“Dr. Brunell testified that he merely copied and pasted these  
11 [compactness scores and county and municipal splits] figures from counsel—he did not  
12 otherwise know where the figures came from—and he never examined or verified the  
13 calculations that he reported.”); *id.* ¶ 282 (similar with respect to maps).

14 A witness cannot simply repeat what others told him in the guise of expert testimony.  
15 *See State v. Thomas*, 279 Or App 98, 108 (2016), *rev den*, 360 Or 423 (2016) (citing *Travis v.*  
16 *Unruh*, 66 Or App 562, 565 (1984), for the proposition that “OEC 703 does not permit experts to  
17 serve as a mere conduit for out-of-court authorities”). That is precisely what Dr. Brunell did  
18 with respect to Tables 11 (regarding compactness) and Table 12 (regarding county and municipal  
19 splits). *See* SMTFOF ¶ 281; *see also* RPFof ¶¶. 274, 283, 286. Similarly, he could not provide  
20 the foundation for the depiction of the maps he sponsored as exhibits. *See* SMTFOF ¶ 282.

21 **E. Hearsay not subject to any exceptions should be stricken.**

22 As identified in the above charts, Petitioners offer a variety of evidence in the form of  
23 exhibits and testimony that rely on hearsay and in some cases double or triple hearsay that should  
24 be stricken. Hearsay is a “statement, other than one made by the declarant while testifying at the  
25 trial or hearing, offered in evidence to prove the truth of the matter asserted.” OEC 801(3). A  
26 “statement is an assertion, whether oral, written, or nonverbal conduct intended as an assertion.”



1 *State v. Bement*, 363 Or 760, 765 (2018); OEC 801(1). “The hearsay rule bars the admission of  
2 hearsay unless the statement falls within a hearsay exception.” *Bement*, 363 Or at 765.; *see also*  
3 *State v. Iseli*, 366 Or 151, 158 (2020) (“As a general rule, hearsay statements are not admissible  
4 as evidence unless an exception applies.”); OEC 802 (“Hearsay is not admissible except as  
5 provided in ORS 40.450 to 40.475 or as otherwise provided by law.”). Respondent has not  
6 identified any applicable exception to permit admission of the hearsay evidence identified in the  
7 above chart.

### 8 III. CONCLUSION

9 For the foregoing reasons, the evidence identified above should be stricken from the  
10 record in this case.

11 DATED November 2, 2021.

12 Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2 I certify that on November 2, 2021, I served the foregoing RESPONDENT'S  
3 MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S OBJECTIONS TO  
4 PETITIONERS' EVIDENTIARY SUBMISSIONS upon the parties hereto by the method  
5 indicated below, and addressed to the following:

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