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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.

v.

JEANNE ATKINS, SUSAN CHURCH,
NADIA DAHAB, JANE SQUIRES,
JENNIFER LYNCH, and DAVID
GUTTERMAN,

Intervenors.

Case No. 21CV40180

**Senior Judge Mary M. James, Presiding Judge
of Special Judicial Panel
Senior Judge Henry C. Breithaupt, Special
Master to Special Judicial Panel**

RESPONDENT'S OBJECTIONS TO THE
SPECIAL MASTER'S TENTATIVE FINDINGS
OF FACT

ORS 20.140 - State fees deferred at filing

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PARAGRAPH NUMBER	TEXT	RESPONSE
SECTION I		
5	Due to a delay in the Census Bureau’s dissemination of population data resulting from the ongoing pandemic, the Legislative Assembly postponed the process for congressional redistricting with the enactment of Senate Bill 259 (2021). If not for enactment of SB 259 (2021), the deadline for the Legislative Assembly to enact a Congressional redistricting plan would have been August 1, 2021. SB 259 (2021) moved that deadline to September 27, 2021. Other existing deadlines for judicial review of a Congressional Redistricting plan in ORS 188.125 were also modified by SB 259 (2021).	“If not for enactment of SB 259 (2021), the deadline for the Legislative Assembly to enact a Congressional redistricting plan would have been August 1, 2021 July 1, 2021.” See ORS 188.125(2)(b)(A).

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PARAGRAPH NUMBER	TEXT	RESPONSE
SECTION III		
48	<p>Some of these county splits affect only uninhabited areas, so that no residents of either county are affected...</p> <p>* * *</p> <p><i>See Ex. 2572 (showing Multnomah County residents in Districts 1, 3, and 5; showing total Multnomah County population of 815,428; showing district populations from 706,209 to 706,212). In contrast, the split of Jefferson County between Districts 2 and 5 affects 20 people.</i></p> <p><i>See Ex. 2572 (showing 24,482 Jefferson County residents in District 2 and 20 residents in District 5).</i></p>	<p>A typographical error in Respondent’s proposed findings resulted in this paragraph’s parenthetical explanation for Ex. 2572 misstating the range of populations between the six districts.</p> <p>The number “706,209” should be replaced with “706,208.”</p>

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PARAGRAPH NUMBER	TEXT	RESPONSE
SECTION IV.A		
210-212	<p>210. Members of Democratic Leadership were also aware of and discussing the ratings of the various proposed maps by FiveThirtyEight.com and other publicly available models and discussing the overall meaning of those proposed maps and their grading under the modeling tools. Ex. 1045, Unger Dep. at 61, 63–66, 68–69.</p> <p>211. Melissa Unger discussed with members of the Oregon Legislature how Oregon Public Broadcasting and The Oregonian were reporting on the proposed maps. Ex. 1045, Unger Dep. at 64.</p> <p>212. Melissa Unger had conversations with Democratic legislators regarding the various proposed maps and the potential impact of those maps. Ex. 1045, Unger Dep. at 76, 80–81.</p>	<p>Objection: these findings are incomplete without a companion finding that, though Ms. Unger’s testimony establishes that there may have been a general awareness of the analysis publicly available on sites such as FiveThirtyEight.com after map proposals were published, there is no evidence in the record that any legislator <i>relied</i> upon FiveThirtyEight.com or other similar websites in voting on SB 881. Temporally, the drafters of 881-A could not have relied upon FiveThirtyEight.com analysis of the map, which that website could only produce after the map was publicly released.</p>

PARAGRAPH NUMBER	TEXT	RESPONSE
233	233. There is at least an 8.5% efficiency gap in favor of Democrats. Ex. 3001, Caughey Decl. ¶ 28; Ex. 3002, Gronke Decl. ¶ 25; Ex. 1049; Ex. 2703, PlanScore.Org.	Objection: “at least” is not an accurate summary of the record. However, Respondent has no objection to the following finding of fact: Dr. Caughey’s testimony and other sources provided a range of estimates of the efficiency gap under various electoral conditions. One of Dr. Caughey’s estimates had a point estimate of an 8.5% efficiency gap in favor of Democrats (assuming an election in which Democrats won 54% of the statewide vote). See Ex. 3001; Caughey Decl. ¶ 28.
237	Assuming Democratic incumbents run in Districts 1, 3, 4, and 5, the expected seat share is 4.16 Democratic seats to 1.84 seats. 10/28/2021 Hrg. Trans. (Rough vol. 2) at 117:15-118:12 (Katz); Ex. 2300 at 14 (Table 3).	Objection: Professor Katz’s specification of the model assumes Democratic incumbents run in Districts 1, 3, 4, and 5, <u>and a Republican incumbent runs in District 2</u> . Ex. 2300 at 19 (Katz Report, p. 14). No objection to the finding if that additional detail is included.
267	Dr. Caughey reported that if Democrats win 58% of Oregon’s statewide vote, they are likely to win five of six congressional seats under the Enacted Map. Conversely, Dr. Caughey illustrated that when Republicans win 58% of Oregon’s statewide vote, they are likely to win four of six congressional seats. This one-seat difference in the two party’s expected fortunes with 58% of the statewide vote reveals a partisan bias of 8%, the smallest possible pro-Democratic bias. Ex 3001 ¶¶ 14-16 (declaration of Dr. Caughey). I credit this finding and accept it as my own.	Objection: Paragraphs 14-16 of Ex. 3001 are an “illustration of how partisan bias is calculated.” Dr. Caughey opines that the partisan bias ranges from 8% pro-Democratic to 17% pro-Republican, depending on the assumptions of the analysis. Ex. 3001 ¶ 20. In addition, this finding should be considered in tandem with Dr. Katz’s finding that the pro-Democratic bias for 55% to 60% is only 0.03 seats (or 0.54%). SMTFOF ¶ 239.

PARAGRAPH NUMBER	TEXT	RESPONSE
291	<p>Dr. Brunell filed a Supplemental Report on October 28 that further undermines his original conclusions. Dr. Brunell originally estimated an efficiency gap under the Enacted Map of 19.85%, which he calculated by analyzing what the efficiency gap would be under only three scenarios: the vote distribution reflected by the 2012, 2016, and 2020 presidential elections in Oregon. Ex 1006 at 8 (report of Dr. Brunell). Because data from these three elections are insufficient to model elections that will occur under the Enacted Map, Dr. Brunell reconducted his analysis using data from all Oregon statewide elections from 2012-2020. Ex 1049 at 2 (supplemental report of Dr. Brunell). Under this more comprehensive approach, the Enacted Map’s estimated efficiency gap shrunk significantly—by over 60%—to 7.76%. Id. at 21.</p>	<p>Additional finding requested:</p> <p>Dr. Brunell selected the 2012, 2016, and 2020 presidential election results, because “[p]residential elections are well funded, hard fought, and feature the same two candidates across the state,” and therefore are “typically good to gauge the underlying partisanship of the state.” Ex. 1006 at 2.</p> <p>The efficiency gap remains inflated under Dr. Brunell’s larger data set analysis because it includes several elections in which the Republican candidate ran no meaningful campaign (each of which Dr. Brunell concluded would suggest that Democrats would win 5 of 6 congressional districts under the enacted map):</p> <ul style="list-style-type: none"> a. 2012 Treasurer (16-to-1 expenditures). ¹ b. 2012 Attorney General (29-to-1) ² c. 2016 Attorney General (6-to-1) ³ d. 2016 U.S. Senate (290-to-1) ⁴ e. 2020 Attorney General (49-to-1) ⁵ f. 2020 U.S. Senate (67-to-1) ⁶ <p>These data are subject to judicial notice.</p>
SECTION VII		
297	<p>Petitioners have proposed a redistricting plan. See Ex. 1014 (overview of the map); Ex. 2574 (detailed map, including city boundaries in red). Petitioners have presented almost no evidence that the proposed plan complies with the ORS 188.010(1) criteria.</p>	<p>Object to admission of Ex. 1014 for lack of foundation. <i>See</i> Respondent’s Evidentiary Objections at Ex. 1014.</p> <p>No objection to remaining findings.</p>

PARAGRAPH NUMBER	TEXT	RESPONSE
298	<p>Each of the districts in Petitioners’ plan appears to be contiguous and of almost exactly equal population, satisfying ORS 188.010(1)(a) and (b). See Ex. 2574; Exs. 1019–1020 (files containing the exact map data). The districts appear to utilize existing geographic and political boundaries, relying mostly on county lines. See Ex. 2574. But Petitioners have not presented any evidence that the districts are connected by transportation links. Nor have they presented any evidence that their plan does not unnecessarily divide communities of common interest beyond a simple counting of how many counties and cities are “split” between multiple districts.</p>	<p>No objection to existing findings.</p> <p>Requested additional findings:</p> <ol style="list-style-type: none"> a. Petitioners’ plan divides communities of common interest by splitting the major cities of Salem, Medford, and Eugene. <i>See</i> Ex. 2574. b. Petitioners’ plan divides a community of common interest along the Marion/Linn county line. <i>See</i> Ex. 2574 (showing the boundary between Districts 4 and 5 following the Marion/Linn county line southeast of Salem); Exhibit 3018-K, Testimony, Senate Interim Committee on Redistricting, SB 881, Sept 13, 2021, 8:00 a.m., 25:22–26:23 (statement of Tricia Hafner) (“Splitting it up straight down Highway 22 would put many of these small towns in two districts. This map just does not feel like my rural community that has gone through so much was taken into consideration, and all they went with was an easy transportation route to draw, rather than caring about the people that it would affect.”); <i>see also</i> Ex. 2549 (showing Mill City, Gates, and Idanha straddling the Marion/Linn county line along Highway 22, contained within one district on the enacted map). c. Petitioners’ plan divides a significant Latino community of common interest in Salem and nearby Woodburn. <i>See</i> Ex. 2574 (showing the boundary between Districts 5 and 6 running through Salem, separating the majority of Salem from Woodburn); <i>see, e.g.</i>, Ex. 2040, Testimony, Senate Interim Committee on Redistricting, SB 881 Sept 9, 2021, 1:00 p.m. (statement of Debbie Cabrales) (opposing an Oregon House district plan that would “split[] up Salem and Woodburn, two areas that are so connected that folks travel in between them every single day”).

1 DATED November 2, 2021.

2 Respectfully submitted,

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4 Attorney General

5 *s/ Brian Simmonds Marshall*

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17 Of Attorneys for Respondent

1 **ENDNOTES**

2
3 ¹ See Friends of Ted Wheeler: Account Summary Information for the Year 2012, Or. Election
4 Sys. for Tracking &
5 Reporting, https://secure.sos.state.or.us/orestar/publicAccountSummary.do?filerId=5591&OWASP_CSRFTOKEN=PQ3N-AHQF-7LXT-PGI0-BVAK-IQDK-D7DP-WCBB (last visited Nov 1,
6 2021) (showing total 2012 expenditures of \$268,432.11); Friends of Tom Cox:
7 Account Summary Information for the Year 2012, Or. Election Sys. for Tracking &
8 Reporting, https://secure.sos.state.or.us/orestar/publicAccountSummary.do?filerId=15793&OWASP_CSRFTOKEN=PQ3N-AHQF-7LXT-PGI0-BVAK-IQDK-D7DP-WCBB (last visited Nov
9 2, 2021) (showing total 2012 expenditures of \$15,820.34)

10 ² See Elect Ellen Rosenblum for Attorney General: Account Summary Information for the
11 Year 2012, Or. Election Sys. for Tracking &
12 Reporting, https://secure.sos.state.or.us/orestar/publicAccountSummary.do?filerId=15406&OWASP_CSRFTOKEN=C54L-IHX3-BWVP-RD5O-F9IP-M4N7-B3IN-VFUL (last visited Nov 1,
13 2021) (showing total 2012 expenditures of \$1,094,255.69); Buchal for Attorney General:
14 Account Summary Information for the Year 2012, Or. Election Sys. for Tracking &
15 Reporting, https://secure.sos.state.or.us/orestar/publicAccountSummary.do?filerId=15806&OWASP_CSRFTOKEN=C54L-IHX3-BWVP-RD5O-F9IP-M4N7-B3IN-VFUL (last visited Nov 1,
16 2021) (showing total 2012 expenditures of \$33,745.33).

17 ³ See Elect Ellen Rosenblum for Attorney General: Account Summary Information for the
18 Year 2016, Or. Election Sys. for Tracking &
19 Reporting, https://secure.sos.state.or.us/orestar/publicAccountSummary.do?filerId=15406&OWASP_CSRFTOKEN=C54L-IHX3-BWVP-RD5O-F9IP-M4N7-B3IN-VFUL (last visited Nov 1,
20 2021) (showing total 2016 expenditures of \$492,643.04); Friends of Daniel Crowe: Account
21 Summary Information for the Year 2016, Or. Election Sys. for Tracking &
22 Reporting, https://secure.sos.state.or.us/orestar/publicAccountSummary.do?filerId=17943&OWASP_CSRFTOKEN=PQ3N-AHQF-7LXT-PGI0-BVAK-IQDK-D7DP-WCBB (last visited Nov
23 1, 2021) (showing total 2016 expenditures of \$74,320.23).

24 ⁴ See *2016 Election United States Senate – Oregon*, Fed. Election
25 Comm’n, <https://www.fec.gov/data/elections/senate/OR/2016/> (showing the Wyden campaign
26 spent \$9,782,114 and the Callahan campaign spent \$33,572).

⁵ See Elect Ellen Rosenblum for Attorney General: Account Summary Information for the Year
2020, Or. Election Sys. for Tracking &
21 Reporting, https://secure.sos.state.or.us/orestar/publicAccountSummary.do?filerId=15406&OWASP_CSRFTOKEN=PQ3N-AHQF-7LXT-PGI0-BVAK-IQDK-D7DP-WCBB (last visited Nov
22 1, 2021) (showing total 2020 expenditures of \$559,908.02); Michael Cross for Oregon: Account
23 Summary Information for the Year 2020, Or. Election Sys. for Tracking &
24 Reporting, https://secure.sos.state.or.us/orestar/publicAccountSummary.do?filerId=20647&OWASP_CSRFTOKEN=PQ3N-AHQF-7LXT-PGI0-BVAK-IQDK-D7DP-WCBB (last visited Nov
25 1, 2021) (showing total 2020 expenditures of \$11,333.22).

⁶ See *2020 Election United States Senate – Oregon*, Fed. Election
Comm’n, <https://www.fec.gov/data/elections/senate/OR/2020/> (showing the Merkley campaign
spent \$8,277,385.37 and the Perkins campaign spent \$123,508.19).

1 **CERTIFICATE OF SERVICE**

2 I certify that on November 2, 2021, I served the foregoing RESPONDENT’S
3 OBJECTIONS TO THE SPECIAL MASTER’S TENTATIVE FINDINGS OF FACT upon the
4 parties hereto by the method indicated below, and addressed to the following:

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