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 TRIAL MEMORANDUM

ORS 20.140 - State fees deferred at filing

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I. INTRODUCTION

Drawing congressional districts requires balancing a host of competing considerations: equalizing the population in each district, utilizing existing political and geographic boundaries, and not unnecessarily dividing communities of common interest, among other criteria. "When the Legislative Assembly is able to achieve agreement in this difficult decennial assignment, that achievement is entitled to be respected if possible." *McCall v. Legislative Assembly*, 291 Or 663, 685 (1981).

The legislature successfully achieved that task this year in Senate Bill 881 (2021). Petitioners challenge SB 881 as a partisan gerrymander on the ground that Democratic candidates are likely to win as many of 5 of the 6 seats even if they collectively receive only 55–60 percent of the statewide vote. The Special Master found the allegation that SB 881 creates a "5–1 map" is false. Even if it were true, lack of strict proportionality is expected in single-member-district systems; it does not suggest that the map is biased. On the contrary, the evidence shows that the map has partisan symmetry: In elections where Republicans receive a majority of the votes, they likely will win half or more of the seats, just as Democrats will when their candidates receive a majority of the votes. The Special Master's extensive recommended findings of fact, which this Court should adopt, demonstrate that the map is fundamentally fair.

For that basic reason, Petitioners' claims fail as a matter of fact. The Oregon Constitution forbids partisan gerrymandering, but SB 881 does not constitute a partisan gerrymander. As explained below, many of them also fail as a matter of law. This Court should affirm the legislatively adopted reapportionment plan for four reasons.

1. SB 881 does not violate ORS 188.010(2), which requires the legislature to "consider" the principle that districts not be drawn for the purpose of favoring a political party. Petitioners' allegation to the contrary is both factually and legally unsupported.

Factually, the record does not show that the legislature's purpose in enacting SB 881 was to favor Democrats. *See* Section IV.A.1, below. The extensive legislative record, as the Special

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Master recounted, shows that the legislature drew the congressional districts as it did based on ordinary districting principles: contiguity, equal population, utilizing existing political and geographic boundaries to the extent feasible, and not dividing communities of common interest. The legislature considered public feedback on its original plan and adjusted the districts to take that feedback into account. None of that record suggests that the legislature's purpose, let alone its predominant purpose, was partisan favoritism.

The Special Master correctly refused to consider the primary evidence that Petitioners offered to contest those findings, testimony from Representative Daniel Bonham, on the ground that it would violate legislative privilege to admit Rep. Bonham's assertions about what other legislators told him. But even if the Court were to consider that testimony, all it shows is that the map was drawn without significant input from Republican legislators. That does not mean that it was drawn for the purpose of benefiting Democrats. In any event, with that testimony excluded, there is no factual basis for Petitioners' allegation of partisan favoritism.

And, under the law, Petitioners would not be entitled to relief even if SB 881 conflicted with ORS 188.010(2)—which it does not. Legally, a statute cannot be overturned on the basis that it violates a previously enacted statute. This Court is obligated to harmonize the statutes where possible, which is easily done here—and, even in a situation in which the statutes could not be harmonized, the Court would be obligated to view SB 881 as superseding the earlier-enacted ORS 188.010. There is no basis in law for this Court to invalidate one statute on the ground that it conflicts with an earlier-enacted statute. *See* Section IV.A.2, below.

2. SB 881 does not violate Article II, section 1, of the Oregon Constitution, which provides that "[a]ll elections shall be free and equal." To establish a violation of Article II, section 1, Petitioners would have to show *both* that SB 881 was adopted for the purpose of partisan favoritism *and* that it has a partisan-favoring effect. As explained above, Petitioners have not shown a partisan-favoring purpose. They also have not shown a partisan-favoring effect. *See* Section IV.B, below.

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The Special Master correctly credited the expert testimony of Dr. Jonathan Katz, a Cal Tech political scientist. Dr. Katz explained that in evaluating the partisan bias of a map, the most reliable metric is partisan symmetry: Is each party likely to win a similar number of seats if it receives a similar percentage of the overall vote and, in particular, is the party that receives the most votes overall likely to win a majority of the seats? On that metric, SB 881 produces a fair map—one that has no statistically significant bias and that is fairer than most maps historically. Oregon's electorate has tended to favor Democratic candidates in recent years, so it is no surprise that the Democratic candidates would be expected to win a majority of the congressional seats—even 4 or 5 of the 6. But if the electorate's preferences were to shift far enough towards Republicans to give them a majority of the votes, the Republican candidates would be expected to win a majority of the seats. That conclusion is based not only on reasonable predictions about future races but also on historical data from statewide elections that Republican candidates won, like the 2016 race for Secretary of State.

The Special Master also correctly concluded that the expert testimony offered by Petitioners' expert, Dr. Thomas Brunell, was not based on reliable methodologies and did not support Petitioners' allegations in any event. Dr. Brunell used metrics that do not reliably determine whether a redistricting plan unfairly advantages one party, particularly for congressional delegations as small as Oregon's, and employed methods that (unlike Dr. Katz's) had not been subject to peer review. The Court should not credit Dr. Brunell's opinions, without which Petitioners' claim of partisan-favoring effect has no factual support.

3. SB 881 does not violate any of the other constitutional provisions cited in the petition. None of the Article I provisions that Petitioners invoke add meaningfully to the analysis under Article II, section 1. And, factually, Petitioners have not shown that SB 881 grants unequal privileges and immunities (*see* Section IV.C, below) or infringes on their right to free speech or assembly (*see* Section IV.D, below).

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4. Even if the Court were to conclude that SB 881 does not comply with all applicable laws, the Court still should not adopt Petitioners' proposed map. Petitioners have not shown that their map complies with legal requirements, and—as Dr. Katz's analysis shows—it constitutes an extreme gerrymander favoring Republican candidates. *See* Section IV.E below.

II. FACTS

A. Procedural Posture

Petitioners challenge the validity of SB 881 (2021). Under Oregon Laws 2021, chapter 419, section 1 (Senate Bill 259) (hereinafter "SB 259") § 1(6), the Chief Justice of the Oregon Supreme Court appointed a Special Judicial Panel to hear the petition. CJO 21-045.[1] The Special Judicial Panel, in turn, requested a special master be appointed under SB 259 § 1(7)(c), and the Chief Justice appointed the Honorable Henry Breithaupt as Special Master to receive evidence and to prepare recommended findings of fact. CJO 21-047.[2]

1. The Petition

Petitioners filed a Petition on October 12, 2021, challenging the legislatively adopted reapportionment plan and asking the Court to adopt their alternative plan. *See* Pet. ¶¶ 58–105. The Petition asserted four claims: two claims alleged violations of the statutory redistricting standards under ORS 188.010, and two claims alleged violations of four provisions of the Oregon Constitution. Pet. ¶¶ 58–104.

The first claim alleged that SB 881 violates ORS 188.010(2), which provides that "[n]o district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person." Pet. ¶¶ 59–60. Specifically, Petitioners alleged that SB 881 was enacted for the purpose of favoring the Democratic Party, Democratic incumbent legislators, and "other person[s]" affiliated with the Democratic Party. Pet. ¶ 60.

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[1] Special Master's Recommended Findings of Fact and Report (hereinafter "SMRFOF") at p. 2.
[2] SMRFOF at p. 2.

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The second claim alleged that SB 881 violates Article 1, sections 8 and 26 of the Oregon Constitution, which guarantee freedom of expression and assembly, respectively. Pet. ¶¶ 78–87. Petitioners alleged that those provisions together prohibit partisan gerrymandering. Pet. ¶¶ 78–87.

The third claim alleged that SB 881 violates Article I, section 20, and Article II, section 1—the Privileges and Immunities Clause and the Free and Equal Elections Clause—of the Oregon Constitution. Pet. ¶ 89–94. Petitioners alleged that both of those provisions "prohibit the Oregon State Legislature from drawing and adopting a partisan gerrymandered redistricting map," and that SB 881 violates those provisions because it was enacted with impermissible partisan intent and will have an impermissible partisan effect. Pet. ¶¶ 91–93.

The fourth claim alleged that SB 881 violates ORS 188.010(1), which requires consideration of five traditional redistricting criteria, which include utilizing existing geographic or political boundaries, not dividing communities of common interest, and drawing districts connected by transportation links. Pet. ¶¶ 96–97.Petitioners have now voluntarily dismissed this claim, but the underlying allegations remain relevant as described below in Sections II.B.2 and IV.A.1.

On October 18, six Intervenors filed an Intervention Petition in support of SB 881. *See* Int. Pet. ¶¶ 4, 59.

2. Discovery

On October 15, Petitioners served deposition subpoenas and requests for production of documents directed to six members of the Legislative Assembly, two SEIU locals,[3] and four of those unions' employees.[4] The Presiding Judge granted the Legislative Assembly's motion to

[3] Service Employees International Union (SEIU), Locals 49 and 503.

[4] *See* Decl. of Brian Simmonds Marshall in Support of Legislative Assembly's Combined Motion to Quash Subpoenas and Motion for Protective Order (Oct 18, 2021), Attachments A–F (subpoenas directed at legislators); Decl. of Steven C. Berman in Support of the Non-Parties' Motion for Protective Order and to Quash Subpoena (Oct 20, 2021), Exs. 1–6 (subpoenas directed at SEIU).

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quash the subpoenas to legislators under the Debate Clause of the Oregon Constitution.[5] The Presiding Judge also granted SEIU's motion for a protective order in part, limiting the scope of depositions and document requests to communications between the non-parties and the Legislative Assembly, or specific members thereof, on or after April 26, 2021, and barring inquiries into the "change in composition of the House Redistricting Committee."[6]

3. Submission of Evidence and Hearing

The Amended Scheduling Order and the Order of Special Master on Schedule as to Evidence and Findings directed the parties to submit their evidence on October 25, which the parties did. The Special Master directed that the parties would submit declarations from their witnesses in place of live direct testimony, but parties could cross-examine adverse witnesses at a two-day evidentiary hearing.[7]

Petitioners' submissions included declarations of Petitioner Beverly Clarno, Representative Daniel Bonham, and expert witness Dr. Thomas L. Brunell, as well as the deposition transcript of Melissa Unger, Executive Director of SEIU 503.[8] Petitioners also submitted a proposed district plan, which they titled the "Neutral Map."[9] Respondent's submissions included a declaration and report of expert witness Dr. Jonathan N. Katz as well as extensive submissions from the legislative record and other public records, including map excerpts showing the details of the enacted map.[10] Intervenors' submissions included

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[5] Order on Legislative Assembly's Motion to Quash at 1, 5 (Oct 20, 2021).

[6] Order on Non-Parties' Motion to Quash at 2 (Oct 21, 2021).

[7] *See* Order of Special Master on Schedule as to Evidence and Findings ¶¶ 2–3 (Oct 20, 2021).

[8] *See* Exs. 1002, 1003, 1005–1006, 1045.

[9] *See* Ex. 1014–1016 (images of Petitioners' proposed map); Ex. 1019–20 (block file and shape file of the map).

[10] *See* Ex. 2300 (declaration and report of Dr. Katz); Exs. 2013–2012 (public hearing testimony and meeting materials); Ex. 2001 (overview of enacted map); Exs. 2506–2508, 2512–13, 2541–2560 (close-up views of enacted map).

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declarations of expert witnesses Dr. Devin Caughey and Dr. Paul Gronke, thirteen fact witnesses, and transcripts of the legislature's proceedings, including its hearings.[11]

After the initial submissions of evidence, Respondent moved to strike Petitioners' Declaration of Representative Daniel Bonham on legislative privilege grounds, focusing on portions of the declaration that purported to describe communications of other legislators.[12] The motion to strike was pending when the hearing began on October 27.[13] The Special Master allowed Representative Bonham to testify and took Respondent's motion to strike and related objections under advisement.[14]

The hearing took place on October 27 and 28. The Special Master heard cross-examination and redirect examination testimony of Representative Bonham, Dr. Brunell, Dr. Katz, Dr. Caughey, and Dr. Gronke.[15] Overruling an objection from Respondent, the Special Master ruled that the expert witnesses could not comment on the approach of another expert witness.[16] However, the Special Master allowed Respondent and Intervenors to question Dr. Katz and Dr. Caughey about the methodology of Dr. Brunell's expert report, in the form of an offer of proof to preserve a record for appeal.[17] Petitioners were offered, and waived, the same opportunity for Dr. Brunell.[18]

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[11] *See* Exs. 3001–3002 (expert witness declarations); Exs. 3003–3006, 3007–3016 (fact witness declarations); Exs. 3018A–3018V (transcripts of legislative proceedings).

[12] *See* Respondent's and Legislative Assembly's Motion to Strike (Oct 26, 2021).

[13] 10/27/2021 Hrg. Trans. (vol. 1) at 75:24–79:11, 84:14–88:9.

[14] 10/27/2021 Hrg. Trans. (vol. 1) at 90:7–91:14.

[15] *See* 10/27/2021 Hrg. Trans. (vol. 1); 10/28/2021 Hrg. Trans. (vol. 2).

[16] *See* 10/27/2021 Hrg. Trans. (vol. 1) at 71:19–72:11, 75:9–15, 325:5–9.

[17] 10/28/2021 Hrg. Trans. (vol. 2) at 133:10–136:8, 153:5–157:10, 204:2–215:16.

[18] SMRFOF at p. 14.

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4. Dismissal of Petitioners' Fourth Claim for Relief

On October 29, Petitioners moved to dismiss their fourth claim for relief, which alleged that the Legislative Assembly failed to sufficiently consider the redistricting criteria listed under ORS 188.010(1).[19] The Court granted that motion on November 1.[20]

5. The Special Master's Recommended Findings of Fact and Report

Each party submitted proposed findings of fact to the Special Master on October 29.[21] The Special Master informed the parties of his tentative findings of fact on November 1, and the parties responded with their objections to those findings on November 2.[22] After considering those objections, the Special Master filed his Recommended Findings of Fact and Report on November 5.[23]

The Report contained the Special Master's recommended rulings on evidentiary objections, subject to final ruling by the Presiding Judge.[24] The Special Master recommended that the declaration and the hearing testimony of Representative Bonham be stricken on grounds of legislative privilege, and that portions of the declaration were inadmissible on the alternative grounds of hearsay, relevance, and foundation.[25] Although Petitioners had dismissed their Fourth Claim, under ORS 188.010(1), the Special Master found that findings related to SB 881's compliance with the neutral redistricting criteria of ORS 188.010(1) remained relevant to

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[19] Pets.' Motion to Dismiss Pets.' Fourth Claim for Relief with Prejudice (Oct 29, 2021).

[20] Order Approving Motion to Dismiss Pets.' Fourth Claim for Relief with Prejudice (Nov 1, 2021).

[21] *See* Order of Special Master on Schedule ¶ 5.

[22] *See* Order of Special Master on Schedule ¶ 6–7.

[23] *See* Order of Special Master on Schedule ¶ 8.

[24] SMRFOF at pp. 3–16.

[25] SMRFOF at pp. 3–4; *see also* SMRFOF at pp. 5–12 (explaining the Special Master's ruling on legislative privilege grounds).

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Petitioners' remaining ORS 188.010(2) claim, which relies on allegations that SB 881 was enacted with partisan intent.[26]

B. The Factual Record

The Panel should adopt the Special Master's Recommended Findings of Fact, which this brief incorporates by reference. The discussion below is largely drawn from those findings.

1. Legislative history

Last year, the United States Census Bureau conducted a nationwide decennial census (the "2020 Census") as required under Article I, section 2, of the U.S. Constitution.[27] On April 26, 2021, the Census Bureau certified Oregon's population and determined that the increase in its population since the 2010 Census entitled Oregon to six seats in the U.S. House of Representatives.[28] Accordingly, under 2 U.S.C. section 2c, Oregon was required to establish six equally populous congressional districts from which its representatives would be elected.[29]

The legislative process that led to the adoption of the new six-district map began during the 2021 Regular Session and was completed in a special session in September.[30] The redistricting committees solicited public input in ten public hearings during the regular session.[31] On September 3, the House Interim Committee on Redistricting released two draft redistricting plans, called "Plan A" and "Plan B."[32] The Committee then held 12 more public hearings at which it received testimony from hundreds of Oregonians.[33] In total, lawmakers collected more than 1,400 pieces of testimony.[34]

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[26] SMRFOF at p. 5; *see* Pet. ¶¶ 59–76.

[27] SMRFOF ¶ 1.

[28] SMRFOF ¶ 1–2; *see also* US Const, Art. I, § 2; 2 USC § 2a.

[29] SMRFOF ¶ 2; *Reynolds v. Sims*, 377 US 533 (1964).

[30] SMRFOF ¶¶ 14–16, 19.

[31] SMRFOF ¶ 19.

[32] SMRFOF ¶¶ 7–8; *see* Ex. 2010 (the Plan A map); Ex. 2011 (the Plan B map).

[33] SMRFOF ¶ 9.

[34] SMRFOF ¶ 21.

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One topic of significant public feedback on Plan A was its treatment of Central Oregon and the Columbia River Gorge.[35] Plan A would have extended District 3 eastward through the Gorge and southward through Central Oregon, so that the district would include East Portland, Gresham, Hood River, The Dalles, Warm Springs, Madras, and Bend.[36] In support of Plan A, many residents noted connections and similarities between Portland, Hood River, and Bend, as well as characteristics that distinguish Hood River and Bend from Eastern Oregon.[37] However, some residents of The Dalles and Wasco County objected to being grouped with those cities, stressing cultural and economic differences, as well as ties between The Dalles and Eastern Oregon.[38]

Senate President Peter Courtney introduced Plan A as Senate Bill 881 (Introduced) on September 20; the Senate Redistricting Committee recommended passage and the Senate did so on the same day.[39] When the House convened on September 25, it lacked the quorum necessary to conduct business because Republican representatives did not attend.[40] The House Special Committee on Redistricting then held an informational hearing to discuss a proposed amendment to the congressional redistricting bill, which adjusted the map in response to the extensive feedback received at the public hearings.[41] On September 27, the Committee adopted the amendment.[42] That same day, both the Senate and the House agreed by unanimous consent to suspend the rules so that the amended bill, known as SB 881-A, could proceed immediately to a

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[35] *See, e.g.*, SMRFOF ¶¶ 71, 73, 85–86, 102, 105–106, 123–126, 128–132 (quoting testimony about which district should include Bend).

[36] Ex. 2010.

[37] SMRFOF ¶ 105–106, 124–126, 128–133.

[38] SMRFOF ¶ 72–73, 78, 80, 83, 85.

[39] SMRFOF ¶ 11–12.

[40] SMRFOF ¶ 12–13; Ex. 2109.

[41] Ex. 3018-D, House Special Committee on Congressional Redistricting, SB 881, Sept 25, 2021, 11:00 a.m., 3:1–11 (statement of Chair Salinas).

[42] Ex. 3018-B, House Special Committee on Congressional Redistricting, SB 881, Sept 27, 2021, 10:00 a.m., 14:11–15:14; SMRFOF ¶¶ 14–15.

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vote.[43] The vote in the House was 33 ayes to 16 nays, with 11 members excused.[44] The vote in the Senate was 18 ayes to 6 nays, with six members excused.[45] Governor Kate Brown then signed the bill—now referred to post-passage as SB 881 (enrolled) (hereinafter "SB 881")—into law.[46]

Under the enacted map, Bend and surrounding communities in Deschutes County are in District 5, along with areas of the Cascade Range, the eastern Willamette Valley, most of Clackamas County, and parts of Multnomah County.[47] Hood River is in District 3, along with Sandy, Gresham, and most of Portland's eastside.[48] The Dalles, the Warm Springs Reservation, and Madras are in District 2, along with much of Central and Southern Oregon and all of Eastern Oregon.[49]

2. The Legislative Assembly's consideration of ORS 188.010(1) redistricting criteria

ORS 188.010(1) enumerates redistricting criteria for the apportioning body to consider, including that each district, as nearly as practicable, (a) be contiguous; (b) be of equal population; (c) utilize existing geographic or political boundaries; (d) not divide communities of common interest; and (e) be connected by transportation links. Though Petitioners voluntarily dismissed their fourth claim, alleging a violation of ORS 188.010(1), the Special Master found that findings about the ORS 188.010(1) criteria remain relevant to the first claim, which alleges a

[43] Ex. 3018-C, House Chamber, 9:00 a.m., 2:24–5:17; Ex. 3018-A, Senate Chamber, 2:00 p.m., 2:18–5:19.

[44] SMRFOF ¶ 14.

[45] SMRFOF ¶ 15.

[46] SMRFOF ¶¶ 14–16.

[47] *See* Ex. 2001.

[48] *See* Ex. 2001.

[49] *See* Ex. 2001.

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violation of ORS 188.0210(2), and recommended the Court find that SB 881 complied with those criteria.[50]

a. ORS 188.010(1)(a): Contiguity

ORS 188.010(1)(a) provides that each district, as nearly as practicable, shall be contiguous. The parties stipulated, and the Special Master found, that each of Oregon's six congressional districts is contiguous and thus complies with ORS 188.010(1)(a).[51]

b. ORS 188.010(1)(b): Equal population

ORS 188.010(1)(b) provides that each district, as nearly as practicable, shall be of equal population. Under SB 881, the populations of Oregon's six congressional districts vary in population by only four people.[52] SB 881 satisfies ORS 188.010(1)(b).[53]

c. ORS 188.010(1)(c): Existing geographic or political boundaries

ORS 188.010(1)(c) provides that each district, as nearly as practicable, shall utilize existing geographic or political boundaries. The Special Master found that under SB 881, each district utilizes existing geographic or political boundaries, including county lines, city lines, state borders, highways, rivers, shorelines, and the boundaries of the Warm Springs Reservation.[54]

SB 881 "splits" 11 counties into two or more districts.[55] However, some of the county splits are so small as to be invisible on a large-scale map, and three of them affect only

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[50] SMRFOF at pp. 4–5 (finding that the traditional criteria listed under ORS 188.010(1) remain relevant); SMRFOF ¶¶ 211–214 (finding that SB 881 complies with the criteria); *see* SMRFOF ¶¶ 33–210 (detailed findings on each of the criteria); Order Approving Motion to Dismiss Petitioners' Fourth Claim for Relief with Prejudice, *Clarno v. Fagan* (CV40180); *see also* Pet. ¶¶ 95–104.

[51] SMRFOF ¶ 33; Stip. ¶ 34.

[52] SMRFOF ¶ 34.

[53] SMRFOF ¶ 34.

[54] SMRFOF ¶ 35.

[55] SMRFOF ¶ 48.

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uninhabited areas.[56] Of Oregon's 36 counties, the populations of only eight counties are divided at all.[57] One of those eight counties is Jefferson County, which has 24,482 residents in District 2 and 20 residents in District 5.[58]

Some district lines depart from county lines to follow other existing geographic or political boundaries, such as the boundaries of the Warm Springs Reservation.[59] ORS 188.010(1)(c) does not specify the types of boundaries that qualify as "geographic or political," nor does the statute prioritize county lines over other types of boundaries.[60]

The Special Master also noted that "the criterion that districts utilize existing geographic or political boundaries 'as nearly as practicable' contemplates the likely necessity of departing from such boundaries when necessary to satisfy [the] other criteria" listed under ORS 188.010(1).[61] He found that, "[i]n any event, the vast majority of the lines that SB 881 (2021) draws across Oregon follow existing geographic or political boundaries."[62]

d. ORS 188.010(1)(d): Communities of common interest

ORS 188.010(1)(d) provides that each district, as nearly as practicable, shall not divide communities of common interest. The Special Master found that SB 881 satisfies that criterion.[63]

As part of the redistricting process, the legislature held extensive public hearings where residents of all parts of the state gave oral and written testimony about the impact of the proposed congressional and state redistricting plans on their communities. *See* Sections II.B.1

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[56] SMRFOF ¶¶ 48–49.

[57] SMRFOF ¶ 49.

[58] SMRFOF ¶ 49.

[59] SMRFOF ¶ 50.

[60] SMRFOF ¶ 50.

[61] SMRFOF ¶ 51.

[62] SMRFOF ¶ 51.

[63] SMRFOF ¶ 55, 214.

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and II.B.2, above at pp. 9–12.[64] The Special Master found that the content of those residents' statements about their communities and how they should be represented is relevant to determining whether SB 881 unnecessarily divides those communities.[65]

The Recommended Findings of Fact include numerous excerpts from the public hearing testimony, along with citations to images of the SB 881 map showing how the enacted district lines reflect various residents' statements about their communities.[66] The testimony includes statements by Bend residents, as well as residents of other regions of Central and Eastern Oregon, stating that Bend has more in common with Portland than it does with Eastern Oregon and that the Legislative Assembly should draw district lines accordingly.[67] Residents of the Mount Hood area testified about ties between Sandy and its neighbors along Highway 26, as well as the increasing interconnectedness of Sandy and Portland.[68] Salem and Woodburn residents testified about the interconnected Hispanic community that spans those two cities.[69]

The Special Master found that, although it is difficult to objectively determine the extent to which communities have been divided, and although it was impossible for the redistricting plan to satisfy every resident's wishes, SB 881 reflected many of the wishes expressed at the public hearings, indicating that the legislature considered and responded to the needs of the communities within each district.[70]

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[64] SMRFOF ¶¶ 52, 212.

[65] SMRFOF ¶ 55.

[66] SMRFOF ¶¶ 56–160.

[67] SMRFOF ¶¶ 124, 126, 129–133 (quoting Bend residents who testified about cultural and economic connections and similarities between Bend and Portland, as well as differences between Bend and Eastern Oregon); SMRFOF ¶¶ 71, 73, 85–86 (quoting Central and Eastern Oregon residents who requested that their communities not share a district with Bend).

[68] SMRFOF ¶¶ 97–102.

[69] SMRFOF ¶¶ 143, 145–146, 149, 151.

[70] SMRFOF ¶¶ 212–213.

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e. ORS 188.010(1)(e): Transportation links

ORS 188.010(1)(e) provides that each district, as nearly as practicable, shall be connected by transportation links. The Special Master found that SB 881 satisfies that criterion.[71]

The Recommended Findings of Fact list various transportation links that connect each district, along with testimony from residents about the importance of many of those transportation links.[72] For example, District 5, which includes areas of Clackamas, Multnomah, Marion, Linn, Jefferson, and Deschutes Counties,[73] is connected by transportation links that include I-5, I-205, US-26, OR-22, OR-226, US-20, OR-99E, OR-213, OR-224, OR-43, OR-212, OR-126, and US-97.[74] Those links include the major highway routes between Bend and Portland, which are maintained at a high level of service in the winter, keeping transportation links within District 5 intact year-round.[75]

f. The Legislative Assembly considered each criterion of ORS 188.010(1).

After reviewing each of the criteria, the Special Master found that "SB 881 strikes a balance between the expressed wishes of various Oregonians and the objective criteria of contiguousness, equal population, geographic and political boundaries, and transportation links."[76] He found that "SB 881 thus comports with Oregon's traditional redistricting criteria under ORS 188.010(1)."[77]

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[71] SMRFOF ¶ 162.

[72] SMRFOF ¶¶ 163–210.

[73] As well as an uninhabited area of Benton County that is not visible on a large-scale map, which appears to be the result of census block misalignment. SMRFOF ¶ 48; Ex. 3017-O.

[74] SMRFOF ¶ 190. *See* SMRFOF ¶¶ 196–201 for public testimony about District 5 transportation links.

[75] SMRFOF ¶ 193; *see also* SMRFOF ¶ 199 (quoting Bend resident who testified that "[o]ur transportation links to Portland through [Highway] 97 and over Mount Hood and to Santiam make us part of the Portland commercial area").

[76] SMRFOF ¶ 214.

[77] SMRFOF ¶ 214.

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g. Compactness

Compactness is not a statutory criterion for redistricting under Oregon law.[78] The Special Master found that compactness is not a useful redistricting criterion and that there is no basis in the record to draw any conclusions about the compactness of the enacted map.[79]

3. Expert testimony on partisan effect

Altogether, the parties called four professors of political science as expert witnesses to testify about Petitioners' allegations that the enacted map had the effect of favoring Democratic candidates for the U.S. House.

The Special Master found the testimony of experts called by the Respondent[80] and the Intervenors[81] reliable, but he came to a different conclusion about Petitioners' expert: "While the Special Master finds Dr. Brunell generally to be a credible witness, the methodology he employs, and therefore the conclusions he reached, lack credibility and are therefore unreliable."[82]

a. The relevant standard for partisan fairness is partisan symmetry.

"The most commonly accepted standard in political science to judge the partisan fairness of voting districts for a legislature is partisan symmetry."[83] As Dr. Katz explained that standard 15 years ago, partisan symmetry requires only that if one party is likely to win a particular number of districts (say, 5 of 6) with a particular share of the aggregate vote (say, 60%), the same will be true if the shoe is on the other foot:

> The symmetry standard requires that the electoral system treat similarly-situated political parties equally, so that each receives the same fraction of legislative seats for a particular vote percentage as

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[78] SMRFOF ¶ 215.

[79] SMRFOF ¶ 215–216.

[80] SMRFOF ¶¶ 224–230, 244–245 (Katz).

[81] SMRFOF ¶ 258 (Gronke); *id.* ¶ 273 (Caughey).

[82] SMRFOF ¶ 289.

[83] SMRFOF ¶ 231 (citing Drs. Katz, Brunell, and Caughey); *see also* SMRFOF at p. 15 ("most experts consider the symmetry metric to be the most established standard ….").

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> the other party would receive if it had received the same percentage. * * * For example, suppose the Democratic Party receives an average of 55% of the vote total across a state's district elections and, because of the way the district lines were drawn, it wins 70% of the legislative seats in that state. Is that fair? It depends on a comparison with the opposite hypothetical outcome: it would be fair only if the Republican Party would have received 70% of the seats in an election where it had received an average of 55% of the vote totals in district elections. * * * In other words, the symmetry standard is that "each political group in a State [has] the same chance to elect representatives of its choice as any other political group." *Davis v. Bandemer*, 478 U.S. 109, 124 (1986).[84]

b. The enacted map achieves partisan symmetry.

The Special Master found that "[t]he most reliable measure of partisan symmetry is the full seats-vote curve," which is a statistical measure that shows how each party's vote share relates to the number of seats they will typically win under a given redistricting plan.[85] Partisan symmetry requires that each party contesting an election has similar seats-votes curves.[86] "Dr. Katz's estimate of the seats-votes curve demonstrates there is no statistically significant bias toward either party under the enacted map. His point-estimates of the bias ranges from 0.03 seats in favor of the Democrats (when one party wins 55%-60% of the two-party vote) to 0.12 seats in favor of Republicans (when each party wins 49%-51% of the two-party vote)."[87] For that reason, "the Special Master agree[d] with Dr. Katz's conclusion that the Enacted Map 'shows no statistically significant partisan bias.'"[88]

The Special Master also specifically rejected the Petition's allegation that SB 881 created a "5–1 map."[89] Instead, he credited Dr. Katz's conclusion that the average of expected outcomes

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[84] Ex. 2303 at 10–11 (Amicus brief of Dr. Katz, et al., in *League of United Latin American Citizens v. Perry*, 548 US 399 (2006), adopted by reference Ex. 2300 at 3 (¶ 8) (Katz Decl.)).

[85] SMRFOF ¶ 235.

[86] Ex. 2300 at 7; *see* SMRFOF ¶ 235 (citing Ex. 2300 at 7–8).

[87] SMRFOF ¶ 249.

[88] SMRFOF ¶ 255.

[89] SMRFOF ¶¶ 254–55; *see also* Pet. ¶¶ 10, 41, 43, 57, 62, 86.

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under the enacted map were 3.86 seats for Democratic candidates and 2.14 seats for Republican candidates.[90]

c. The efficiency gap and other incomplete measures of partisan fairness

Petitioners' expert, Dr. Brunell, reported only two measures of partisan fairness: efficiency gap (addressed in this section) and proportionality (addressed in the next section).

The Special Master found that the efficiency gap is not a reliable measure of partisan fairness for congressional elections in Oregon.[91] As a general matter, "[t]he efficiency gap does not measure partisan symmetry…."[92] In addition, because Oregon has only six U.S. House seats, the "[e]fficiency gap is an even less reliable measure of partisan fairness for congressional elections in Oregon …."[93] As the Special Master found, even political scientists who believe the efficiency gap is a relevant measure of partisan fairness, including Petitioners' expert,[94] believe that the efficiency gap should be considered along with other measures.[95] As applied to SB 881, those other measures—partisan bias, mean-median difference, and declination—reveal that the efficiency gap's suggestion that the enacted map favors Democrats is an outlier.[96]

And even the efficiency gap—the least favorable of these measures considered by the experts in this case—does not support Petitioners' claims.[97] "Comparison with other districting plans indicates that efficiency gaps of th[e] magnitude [reported by Caughey and Brunell] are

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[90] SMRFOF ¶¶ 254 (Katz); *see also id.* ¶¶ 296, 302 (rejecting Brunell).

[91] SMRFOF ¶¶ 237–39.

[92] SMRFOF at ¶ 237.

[93] SMRFOF at ¶ 239.

[94] SMRFOF at pp. 15–16; 10/27/2021 Hrg. Trans. (vol. 1) at 276:18–277:8 (Brunell) (testifying "[p]artisan bias, mean median, declination" are valid metrics that he did not calculate due to lack of time).

[95] SMRFOF ¶¶ 281, 286–87 (Caughey); *see also id.* ¶ 238 ("The efficiency gap alone may not 'measure the partisan fairness of a proposed electoral map.'" (quoting Katz)).

[96] SMRFOF ¶¶ 275–86 (adopting Caughey's conclusions).

[97] SMRFOF ¶¶ 265, 281, 284–85, 301.

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hardly unusual ….”[98] Moreover, the “[e]fficiency gap is an even less reliable measure of partisan fairness for congressional elections in Oregon, because Oregon has only six seats.”[99]

d. Proportionality is not a relevant measure of partisan fairness.

Based on the testimony of Drs. Katz, Gronke, and Brunell, the Special Master found that “proportionality”—the idea that a party’s share of the seats should be roughly equal to their share of the vote in the election—is not required for partisan symmetry, and that lack of proportionality does not suggest unfairness because of the effects of the single-member, winner-take-all electoral system in the United States.[100] Three expert witnesses—one called by each party—testified to the well-known finding in political science that in single-member district elections (like those for the U.S. House[101]) the party whose candidates win the most votes usually wins an even greater proportion of the seats, a phenomenon known as the “winner’s bonus.”[102] (In fact, if each party’s voters were evenly distributed across every district, one party or the other would often sweep every seat.) “In the United States, a one percent increase in votes for a party normally leads to a two to three percent increase in seats.”[103] This effect “is even larger in states with fewer than seven congressional seats.”[104]

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[98] SMRFOF ¶ 284.

[99] SMRFOF ¶ 239 (citing Drs. Brunell and Katz).

[100] SMRFOF ¶¶ 250, 260.

[101] 2 USC § 2c (with exceptions no longer relevant in any state, “no district [shall] elect more than one Representative”).

[102] SMRFOF ¶ 297 (Dr. Brunell); SMRFOF ¶¶ 232–234, 250 (Dr. Katz); SMRFOF ¶¶ 260 (Dr. Gronke).

[103] SMRFOF ¶ 233.

[104] SMRFOF ¶ 234.

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III. LEGAL STANDARDS

A. SB 259 review parameters

Senate Bill 259[105] establishes the Special Judicial Panel's authority over this proceeding:

> The special judicial panel shall employ the following standards in deciding upon a reapportionment plan…. For a legislatively adopted reapportionment plan, the panel must affirm the plan if the plan complies with all applicable statutes and the United States and Oregon Constitutions. If the panel finds that the legislatively adopted reapportionment plan does not comply with applicable statutes or the United States or Oregon Constitution, the panel may create its own reapportionment plan. A reapportionment plan adopted by the panel under this paragraph must comply with all applicable statutes and the United States and Oregon Constitutions.

Or Laws 2021, c 419, Section 1(8).

B. Standard of review applicable to Special Master's recommended findings of fact

Under Oregon Laws 2021, c 419, section 1(7)(c), the Oregon Supreme Court appointed Senior Judge Henry Breithaupt as a special master to "receive evidence and prepare recommended findings of fact." That statute does not specify the standard of review for this Court to apply in reviewing the recommended findings of fact. In an analogous case involving the appointment of a special master, the Supreme Court reviewed *de novo*. *See Strunk v. PERB*, 338 Or 145, 155 (2005) (conducting "a *de novo* review of the evidentiary record" assembled by a special master appointed by the court to "conduct the trial of all factual issues").

In conducting *de novo* review, a reviewing court makes its own "independent evaluation" of the evidence. *In re Day*, 362 Or 547, 552 (2018). However, "considerable weight" should be given to the demeanor-based findings made by a trial judge "who had the opportunity to observe the witnesses and their demeanor in evaluating the credibility of their testimony." *State ex rel Juv. Dep't v. Geist*, 310 Or 176, 194 (1990).

Generally, a reviewing court is as "well equipped as the trial court" to make a credibility determination based on "objective factors, such as the inherent probability or improbability of

[105] Oregon Laws 2021, chapter 419, section 1.

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testimony, whether testimony is internally consistent or inconsistent, [and] whether the testimony is corroborated or contradicted[.]" *State ex rel. Dep't of Hum. Servs. v. R.T.*, 228 Or App 645, 655 (2009); *In re Fitzhenry*, 343 Or 86, 104 (2007). But even when a credibility determination is based on objective factors, rather than a witness's demeanor, a fact-finder's discussion of the evidence may have "persuasive force." *Fitzhenry*, 343 Or at 103 n 13. That is particularly true here, where the Special Master actively questioned the witnesses and the Court has limited time to independently review the voluminous record.

C. Burden of proof

Petitioners bear the burden of producing evidence to support their claims (the burden of production) as well as proving their claims by a preponderance of the evidence (the burden of persuasion). ORS 40.105 (ORE 305) ("A party has the burden of persuasion as to each fact the existence or nonexistence of which the law declares essential to the claim for relief or defense the party is asserting."); ORS 10.095 ("[I]n civil cases the affirmative of the issue shall be proved, and when the evidence is contradictory, the finding shall be according to the preponderance of evidence[.]"); *see also Riley Hill Gen. Contractor, Inc. v. Tandy Corp.*, 303 Or 390, 394 (1987).

IV. ARGUMENT

A. The first claim for relief, alleging that SB 881 violates ORS 188.010(2), fails both on the facts and on the law.

Petitioners' first claim for relief alleges that SB 881 violates the statutory criteria set out in ORS 188.010(2). *See* Pet. ¶¶ 58–76. In that statute, the legislature directed itself to "consider" certain criteria in redistricting, including the principle that districts not be drawn for the purpose of favoring any political party, incumbent legislator, or other person.

ORS 188.010(2). Because SB 881 is a statute, this is a claim that one statute violates another. It fails legally and factually, both because the legislature complied with ORS 188.010(2) in

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enacting SB 881 and because legally a statute cannot be invalidated on the ground that it violates an earlier-enacted statute, rather than a constitutional provision.

Petitioners proffer no concrete support for their allegation that SB 881 was enacted for the purpose of partisan favoritism, and this allegation is rebutted both by the evidence of the legislature's intent in enacting SB 881 and by an examination of the districts that SB 881 establishes, which are delineated according to legitimate redistricting criteria. Petitioners' allegations about political motivations for certain aspects of the boundary are pure speculation, unsupported by either any relevant evidence in the record or by the Special Master's factual findings. SB 881 represents the legislature's legitimate effort to balance and fulfill its own criteria for dividing the State into six congressional districts.

1. Factually, Petitioners did not prove that the legislature drew the congressional districts for the purpose of favoring a political party.

As the first claim asserts that one statute conflicts with another, the Court's analysis of the first claim is largely, if not exclusively, an exercise of statutory interpretation. Thus, this Court should evaluate it under the traditional framework established by *State v. Gaines*, 346 Or 160, 171 (2009)—examining the statutory text, context, and, if helpful, legislative history to ascertain legislative intent. Assuming that extrinsic evidence is also relevant, a preponderance of the evidence, including the expert testimony as appropriately weighed by the Special Master, further compels a conclusion that SB 881 complies with ORS 188.010(2). The record as a whole reflects that the legislature considered traditional districting criteria like contiguity and preserving communities of common interest when drawing the congressional districts.

a. SB 881 itself and the legislative history demonstrate that it was enacted for legitimate purposes.

The Special Master's findings describe how SB 881's district boundaries and legislative history show that it was enacted for neutral purposes. Public testimony from committee hearings held before the enactment of SB 881 is legislative history relevant to the issue of legislative

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intent. *See Zidell Marine Corp. v. W. Painting, Inc.*, 322 Or 347, 357 (1995) (considering non-legislator testimony). Such testimony is particularly useful given the extraordinary legislative process that occurred here, in which the Redistricting Committees went to great lengths to hear public testimony on redistricting.[106]

i. Contiguity and equal population.

It is undisputed that the six districts created by SB 881 are contiguous and are, as nearly as practicable, of equal population.[107]

ii. Existing geographic or political boundaries.

Each district utilizes existing geographic or political boundaries, including county lines, city lines, state borders, highways, rivers, shorelines, and reservation boundaries, as well as utilizing the historic boundaries of Oregon's congressional districts.[108] The statutory criterion that districts utilize existing geographic or political boundaries "as nearly as practicable" leaves to the Legislature the discretion to determine what is "practicable" and contemplates the likely necessity of departing from such boundaries when necessary to satisfy other criteria, such as that the districts be of equal population, not divide communities of common interest, and be connected by transportation links. *See* ORS 188.010(b), (c)–(e); *see also Hartung v. Bradbury*, 332 Or 570, 592 (2001) (rejecting the argument that the Secretary of State "was required to, or at least should, have emphasized county boundaries at the expense of all the criteria except population").[109]

Furthermore, by its plain text, ORS 188.010 does not elevate particular types of boundaries over others, leaving which boundaries to prioritize to the discretion of the enacting body. Therefore, the places where counties are split across two or more districts do not evince

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[106] SMRFOF ¶¶ 7, 9, 19, 21.

[107] SMRFOF ¶¶ 33–34.

[108] SMRFOF ¶¶ 35–50.

[109] SMRFOF ¶ 51.

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partisan favoritism by the legislature. This is particularly so because the legislative record indicates that various county splits occurred for logical and valid reasons such as maintaining transportation links in areas where a road briefly passes from one county into another and avoiding a split of the Warm Springs Reservation. Several of the county splits are *de minimis* and do not divide communities of interest unless necessary to effectuate other legitimate goals.[110]

iii. Communities of common interest

ORS 188.010(1)(d) provides the criterion that districts, as nearly as practicable, not divide communities of common interest. SB 881 satisfies that criterion.[111] The primary evidence of what the legislature considered on this issue is public testimony.

Section II.B.2.d, at p. 13–14, above, describes and references the Special Master's extensive findings of fact on this issue, describing numerous communities of common interest that the enacted map does not divide.[112] The Special Master explained that, although the nebulous, overlapping, and interconnected nature of "communities" makes it difficult to objectively determine the extent to which communities have been divided, the Redistricting Committees held extensive public hearings at which they received oral and written testimony from dozens of Oregonians concerning how their communities should be organized into districts to give each community a voice and that the enacted map reflected much of the public testimony, showing that the legislature considered and responded to the needs of the communities within each district.[113] Moreover, the Special Master found that, given the nature of redistricting, it

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[110] SMRFOF ¶¶ 39–40, 46–51; *see* Exs. 2554–2555, 2557 (showing the eastern boundary of District 4 following a road as it briefly crosses from Lincoln County into Polk County); Exs. 2001, 2543 (showing the District 5 boundary following U.S. Route 20 as it crosses the southwestern corner of Jefferson County); Ex. 2507 (showing the western boundary of District 2 splits eastern Clackamas and Marion Counties in order to follow the Warm Springs Reservation boundary); Ex. 2572 (showing that the District 5 split of Jefferson County affects 20 residents and that the District 2 splits of eastern Clackamas and Marion Counties, as well as the District 4 split of Polk County, affect 0 residents).

[111] SMRFOF ¶¶ 55, 214.

[112] SMRFOF ¶¶ 52–150.

[113] SMRFOF ¶¶ 212.

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would be impossible to satisfy the views of every member of the public who testified. Therefore, he found, the dissatisfaction of some Oregonians with the district plan is not strong evidence that the plan fails to follow the statutory criteria.[114]

The Special Master's approach makes sense under the circumstances of this case. Given the unique and substantial amount of legislative history evidence that the legislators had before them and could have considered in enacting SB 881—along with the lack of other evidence on this topic—the public testimony provides a solid footing for the Special Master's findings on this issue.

iv. Transportation links

The Special Master found that each district of the enacted map is connected by transportation links and therefore satisfies the ORS 188.010(1)(e) criteria that each district be connected by transportation links, as nearly as practicable. The Recommended Findings of Fact list some of the transportation links that connect residents and communities within each district, along with testimony about the importance of those transportation links. *See* Section II.B.2.e, above at p. 15.

v. Conclusion

These basic features of the map and the legislative history evidence, which supports the choices that were ultimately made by the legislature in adopting SB 881, evince the legislature's intent in enacting SB 881 as a neutral map that follows the legislature's own criteria.

b. The legitimate, non-partisan considerations for SB 881 affirmatively rebut Petitioners' speculation about partisan purpose.

Although Petitioners have withdrawn their claim under ORS 188.010(1), factual findings about the criteria that the legislature considered in enacting SB 881 remain relevant to Petitioners' other claims, each of which alleges that the legislature enacted SB 881 with the purpose or intent of favoring one political party. *See* Pet. ¶¶ 60, 83, 93.

[114] SMRFOF ¶ 213.

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To rebut that unfounded allegation, Respondent relies, in part, on evidence about the legitimate, nondiscriminatory considerations that went into the districts drawn in SB 881. Evidence that the map complies with "traditional" districting criteria undermines Petitioners' allegation that the map was enacted for other, improper purposes. *See, e.g.*, *League of Women Voters v. Pennsylvania*, 645 Pa 1, 122 (2018); *see also Vieth v. Jubelirer*, 541 U.S. 267, 360–61 (2004) (Breyer, J., dissenting) (arguing that reliance on "traditional districting criteria" should defeat a claim of partisan gerrymandering); *Rucho v. Common Cause*, 139 S Ct 2484, 2521 (2019) (Kagan, J., dissenting) ("Everyone agrees that state officials using non-partisan criteria * * * have wide latitude in districting. The problem arises only when legislators or mapmakers substantially deviate from the baseline distribution * * *."). More generally, evidence of legitimate, nondiscriminatory reasons for an action undercuts claims of intentional discrimination. *See, e.g.*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."); *see also Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (arguing that a showing of partisan gerrymandering can be rebutted by "a legitimate, non-partisan justification" for the map).

In this case, the Special Master found that "proposed findings related to the ORS 188.010(1) remain relevant in light of Petitioners' first claim for relief pursuant to ORS 188.010(2)."[115] Accordingly, the Court should consider the Special Master's findings on the criteria considered by the legislature and are reflected in the final map in evaluating Petitioners' allegations of partisan favoritism.

[115] SMRFOF at p. 5.

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c. Petitioners have not met their burden to prove their partisan intent and partisan purpose allegations.

Petitioners' first claim rests on a series of unproven or irrelevant allegations. As explained below, none of the evidence that Petitioners rely on establishes that SB 881 was enacted with a partisan intent or purpose in violation of ORS 188.010(1) or any constitutional provision.[116]

i. Melissa Unger

Petitioners' theory of the case appears to have been that legislators colluded with unnamed "Democrat aligned special-interest groups," which they contend resulted in a gerrymandered map.[117] Yet they have produced no evidence—admissible or otherwise—to support that theory. The only evidence they rely on, the deposition testimony of Melissa Unger, SEIU's Executive Director, proves no such conspiracy.[118] At most it establishes that SEIU participated in the legislative process on behalf of its members (as it is entitled to do). As part of that engagement, Ms. Unger talked to two legislators about redistricting, with a particular focus on completing the legislative process—that is, SEIU supported legislation that it hoped Republicans would show up to vote on (as opposed to denying a quorum).[119] Indeed, Ms. Unger testified that neither she nor SEIU was involved in the details of the line-drawing.[120] Petitioners have not met their burden of proof to show that SEIU's participation evinces that SB 881 had a partisan intent or purpose.

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[116] Because Petitioners' allegations of partisan intent are identical across all three of their claims, this section applies with equal force to the allegations of partisan intent Petitioners make in their second and third claims. *See* Pet. ¶¶ 7–12, 29, 39, 41, 44–52 (general allegations relating to partisan intent or partisan purpose theory); ¶¶ 77, 82–84, 87, 92–95 (alleging partisan intent in second and third claims and incorporating all prior allegations).

[117] *See, e.g.*, Pet. ¶¶ 5, 23, 34, 38, 75; Pets.' Opp. to Legislative Assembly's Motion to Quash at 2, 5.

[118] *See* SMRFOF ¶¶ 217–222 (findings regarding Melissa Unger).

[119] SMRFOF ¶¶ 217–219.

[120] SMRFOF ¶¶ 218.

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ii. Representative Bonham

Petitioners also rely on testimony from Representative Bonham to establish partisan intent.[121] This evidence is inadmissible for multiple reasons. The Court should adhere to the Special Master's recommended finding that Representative Bonham's testimony is inadmissible under the Debate Clause of the Oregon Constitution. In the alternative, as the Special Master concluded, most of that testimony should also be excluded on the grounds of hearsay, relevance, and lack of foundation.[122] And even if the Court does not exclude all of Representative Bonham's testimony, his assertions should be given little weight for the same reasons that the Special Master recommended excluding it, including that it is post-enactment lay opinion which is of little relevance to the overall question of legislative intent. *See Salem-Keizer Ass'n of Classified Employees v. Salem-Keizer Sch. Dist. 24J*, 186 Or App 19, 26–27 (2003) (post-enactment statements by legislators are not part of the official legislative history and at most they represent the recollections of a single participant, which is not relevant to the intentions of the body as a whole); Respondent's Evidentiary Mot. & Memo. at pp. 33-34 (Nov. 10, 2021). Representative Bonham's testimony does not establish a violation of ORS 188.010(2) because it is not probative of legislative intent.

iii. Representative Salinas

Petitioners also alleged, but failed to prove, that the SB 881 map was gerrymandered "to permit Representative Andrea Salinas, a member of the House Redistricting Committee and a Democrat leader in the Legislative Assembly, to run for election in District 6." Pet. ¶ 69. Representative Salinas does not even live in District 6.[123] Petitioners have offered no evidence

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[121] *See* Ex. 1003 ¶ 30 (so alleging).

[122] SMRFOF at pp. 2–12 (recommending excluding Exhibit 1003 and cross examination hearing testimony); *see also* Respondent's Evidentiary Mot. and Memo. at pp. 4–10.

[123] *See* Ex. 2511 (Candidate information on Rep. Salinas); Exs. 2512 and 2513 (maps showing Rep. Salinas' address in District 5, almost one mile from the District 6 boundary).

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whatsoever to support their allegation and appear to have abandoned it. *See* Pets.' Prop. FOF (omitting any proposed finding that map was gerrymandered for Salinas' benefit).

iv. Committee assignments

Petitioners also rely heavily on irrelevant allegations about legislative committee assignments in attempting to prove the first claim. *See* Pet. ¶ 74; Pets.' Prop. FOF ¶¶ 2, 3, 4. Such evidence is inadmissible under the Court's Order on the Non-Parties' Motion to Quash, which holds that evidence regarding legislative committee assignments and internal legislative business is irrelevant.[124]

v. Cascade Mountain Range

Petitioners also contend that the fact that Bend is part of District 5, rather than District 2, evinces "partisan purposes." Pet. ¶ 68. They particularly focus on the fact that SB 881 does not utilize the Cascade Range as a border line. Pet. ¶ 68. But no law required the legislature to utilize the Cascades as a border line. ORS 188.010(1) makes the use of geographic and political boundaries a redistricting criteria, but it does not suggest that mountain ranges (or county lines, for that matter) should take precedence over other types of boundaries or the other redistricting criteria.

To the extent that they still maintain it, Petitioners' related contention that District 5's boundaries constitute a partisan gerrymander based on an allegation that highways between Bend and Portland are "impassible," *see* Pet. ¶¶ 52, 101, also fails. Petitioners have not submitted any evidence to support that allegation and a preponderance of the evidence rebuts it; three major highway routes between those cities remain open through winter weather and are all maintained at high levels of service year-round.[125]

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[124] October 21, 2021 Order on Non-Parties' Motion to Quash, Protective Order, at 3; *see* SMRFOF at 3–4 (upholding Respondent's objections to Ex. 1003 on relevance grounds in the alternative); Respondent's Memo in Support of Objections to Pets.' Evidentiary Submissions (11/2/2021) Table and pages 20–21.

[125] SMRFOF ¶¶ 190–195.

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Moreover, the Oregon Supreme Court has previously rejected an argument that a district was improper where it crossed the Cascades. In *Hartung v. Bradbury*, 332 Or 570, 588 (2001), several petitioners challenged a state house district on the grounds that it crossed the Cascades. *Id.* at 588–89. The Court rejected that argument, explaining:

> Petitioners' allegations that that part of Jackson County has, for example, more of a community of common interest with other communities west of the Cascades, or better transportation links with that area, do not demonstrate that the Secretary of State inadequately considered the appropriate criteria, or that his conclusions were those that no reasonable Secretary of State would have made. *See McCall*, 291 Or. at 685, 634 P.2d 223 ("This court does not inquire if a more nearly ideal apportionment could be designed, even assuming agreement on what is ideal.").

Hartung, 332 Or at 589.

vi. Contentions that urban voters should have been diluted

Petitioners also appear to contend that it would have been less partisan to dilute the Bend vote by including it in District 2. *See* Pet. ¶¶ 50, 68. This allegation is unfounded. There is no basis for either Petitioners or the Court to substitute their subjective judgment for that of the legislature about a particular city "belonging" more to a different district. *See Hartung*, 332 Or at 591 (rejecting the argument that Wilsonville and Tualatin should have been placed in different districts). The legislative record contains ample public commentary in favor of separating Bend from Eastern Oregon due to the significant cultural differences between those communities and the rapid population growth in the Bend area.[126]

The same is true for Petitioners' suggestion that voters in the Portland metropolitan area should have been packed together to decrease their voting strength. *See* Pet. ¶¶ 65, 66, 67. This contention, which is unsupported by any evidence to support their view of the consequences of these lines, simply seeks to replace the legislature's discretion and judgment for Petitioners'

[126] SMRFOF ¶¶ 71, 73, 85–86, 124, 126, 129–133 (quoting Bend residents who testified about cultural and economic connections and similarities between Bend and Portland, as well as differences between Bend and Eastern Oregon); SMRFOF ¶¶ 71, 73, 85–86 (quoting Central and Eastern Oregon residents who requested that their communities not share a district with Bend).

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subjective preferences. Petitioners, who advocate for packing the most populated area of the state into a single district as part of the alleged basis for first claim, *see* Pet. ¶ 67, would also see this state depart from how districts have been drawn for at least the last 48 years.[127] ORS 188.010 provides only that the Legislature or Secretary of State, "whichever is applicable," must "consider" the statutory criteria precisely because tradeoffs and difficult decisions are inherent in the redistricting process. The statute does not dictate how such tradeoffs must be resolved, let alone mandate Petitioners' preferred resolution. *See Hartung*, 332 Or at 590–91 (rejecting the argument that it was improper to divide Beaverton into multiple districts).

Petitioners also claim that their incorrect allegation that the enacted map is "5–1" favoring Democrats is relevant to the issue of partisan intent. *See* Pet. ¶¶ 41, 62, 86. This allegation is rebutted above and below. *See* Section II.B.3.b at pages 17–18 and Section IV.B.2 at pages 42–44. Ms. Unger also testified that, to her knowledge, no one she spoke to about redistricting expected the enacted map to result in a delegation of 5 Democrats and 1 Republican.[128]

vii. Expert testimony

For the reasons explained elsewhere, *see* Section II.B.3 at pages 16–19 and Section IV.B.2 at pages 42–44, the testimony of Dr. Brunell, Petitioners' expert, contending that the SB 881 map shows evidence of partisan intent, has been thoroughly rebutted by the testimony of Drs. Katz, Gronke, and Caughey, and the Special Master correctly did not credit Dr. Brunell's opinions.[129]

viii. Party-line vote

Finally, Petitioners ask the court to infer that SB 881 was enacted for the purpose of favoring Democrats from the fact that it was enacted by a party-line vote. *See* Pet. ¶¶ 8, 41, 72,

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[127] Ex. 3017-Q (showing that every congressional district map since 1973 has had multiple districts that include portions of Portland metropolitan area).

[128] Ex. 1045, Unger Depo. Trans. (Rough), at 63.

[129] SMRFOF ¶¶ 223–302.

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73. The party-line vote shows that it was politically contentious, but it does not show that the purpose of the statute was improper partisan favoritism. Many statutes are enacted by party-line votes. All that shows is that the parties disagree about the policies behind them, not that they stem from improper purposes. *Cf. Blair v. Bethel Sch. Dist.*, 608 F3d 540, 546 (9th Cir 2010) ("Disagreement is endemic to politics, and naturally plays out in how votes are cast."); *Zilich v. Longo*, 34 F3d 359, 363 (6th Cir 1994) ("A body does not violate the First Amendment when some members cast their votes in opposition to other members out of political spite or for partisan, political or ideological reasons. Legislators across the country cast their votes every day for or against the position of another legislator because of what other members say on or off the floor or because of what newspapers, television commentators, polls, letter writers and members of the general public say. We may not invalidate such legislative action based on the allegedly improper motives of legislators.").

It is no more reasonable to infer from the vote that the majority intended to favor Democrats improperly than it would be to infer that the minority voted against the bill because it was holding out for amendments that would favor Republicans improperly. Moreover, Republican members of the Legislative Assembly at least allowed the passage of SB 881 to proceed by voting to suspend the rules to allow final passage before the statutory deadline lapsed. *See above* Section II.B.1, at pp. 10–11. That supports the inference that the party-line vote reflected ordinary policy disagreements between the parties rather than improper partisan favoritism.

ix. Conclusion

In sum, for all of the reasons set out above, as well as those set forth in the Special Master's Recommended Findings of Fact and Report, Petitioners failed to meet their burden of production as well as their burden of proof and persuasion on their first claim for relief and, more generally, on their allegations of partisan intent on all three claims. A preponderance of the

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evidence demonstrates that SB 881 was adopted for legitimate and neutral reasons, was not adopted with partisan intent, and is entirely consistent with ORS 188.010(2).

2. SB 881 would necessarily supersede incompatible provisions of ORS 188.010(2) if the two statutes conflict.

Petitioners' first claim is factually defeated by the record showing that the Legislature complied with the law in enacting SB 881; the first claim also fails as a matter of law. The Court need not reach this issue if it agrees with the Special Master's findings that SB 881 fully complies with the ORS 188.010 criteria and that Petitioners have failed to prove otherwise. However, if the Court were to disagree, the first claim would still fail because a court cannot invalidate a duly enacted statute based on a legislature's failure to comply with another, older statute enacted by the same body. This is because when two statutes conflict irreconcilably, the more recently enacted statute implicitly supersedes the earlier one.

Petitioners' statutory argument reduces to a claim that a newly enacted statute, SB 881, violates a prior statute enacted by the same body, ORS 188.010(2). Unlike a claim alleging that a statute violates a constitutional provision, their statutory theory is incompatible with the bedrock principle that one legislature cannot bind future legislatures. For that reason, the rules of statutory construction require this court to harmonize SB 881 with ORS 188.010, viewing SB 881 as implicitly superseding any conflicting provisions of ORS 188.010. Under that analysis, even if this Court were to find—contrary to the record—some conflict between SB 881 and ORS 188.010, SB 881 would control as the more recently enacted statute.[130]

The later-in-time rule applies when a later-enacted statute is incompatible with an earlier-enacted one. In instances where the two cannot be harmonized, the later-enacted statute controls, and impliedly repeals or amends the earlier statute. *State v. Shumway,* 291 Or 153, 160 (1981).

[130] ORS 188.010 was enacted in 1979 and amended in 1981. Or Laws 1979 c 667 §1; Or Laws 1981 c 864 §2. SB 881 was enacted September 27, 2021.

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That rule would apply if the court were to conclude that SB 881 violates the ORS 188.010(2) criteria, because that would constitute an irreconcilable conflict between the two.

The later-in-time rule is a special application of the broader anti-entrenchment principle, which states that no legislature can bind future legislatures. *See Moro v. State*, 357 Or 167, 195 (2015) ("When the legislature pursues a particular policy by passing legislation, it does not usually intend to prevent future legislatures from changing course. For that reason, the intention to surrender or suspend legislative control over matters vitally affecting the public welfare cannot be established by mere implication." (quoting *Strunk v. PERB*, 338 Or 145, 171 (2005), and *Campbell v. Aldrich*, 159 Or 208, 213–14 (1938) (internal punctuation and citations omitted))); *see also James v. State of Oregon*, 366 Or 732, 745 (2020) ("[L]egislatures generally do not intend to bind future legislatures." (quoting *Moro*, 357 Or at 226)). Although the courts have recognized exceptions to that rule, most notably for statutory contracts of the sort asserted in *Moro*, those exceptions themselves are tied to constitutional provisions like the Contract Clause. *See Moro*, 357 Or at 192. Petitioners here assert no exception grounded in an independent constitutional provision.

The analysis in *McCall v. Legislative Assembly*, 291 Or 663, 673 (1981), applied this principle in the context of legislative reapportionment. There, the court summarily rejected a claim challenging a legislatively adopted apportionment measure's compliance with ORS 188.010. The Attorney General, who was defending the Legislative Assembly, had argued that "the reapportionment measure cannot be reviewed for compliance with ORS 188.010 in this proceeding" and that "it did not deprive the 1981 legislature of power to enact chapter 261 as a later statute." *Id.* The Oregon Supreme Court agreed with the Attorney General's conclusion, noting that its role was to review a reapportionment measure for compliance with the constitution and that "ORS 188.010 does not purport to be an authoritative interpretation of constitutionally mandated standards." *Id.*; *see also Cargo v. Paulus*, 291 Or 772, 777 (1981) (similar, citing *McCall*).

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That conclusion is consistent with decisions from other courts. In *LeRoux v. Secretary of State*, for example, the Michigan Supreme Court considered a state statute enacted in 1999 that established a set of statutory redistricting guidelines similar to, but more detailed than, the ones contained in ORS 188.010. 465 Mich 594, 599 (2002) (discussing a statute the opinion refers to as 1999 PA 221, codified at Mich Comp Law 3.63). In a challenge to a 2001 reapportionment map, *LeRoux* relied on the anti-entrenchment principle to hold that those guidelines, enacted by a 1999 legislature, could not bind a 2001 legislature in its enactment of a reapportionment map. 465 Mich at 615–17 ("[T]he 2001 Legislature was not bound to follow the guidelines in M.C.L. § 3.63(c) adopted by the 1999 Legislature."). *LeRoux* rejected an argument that, when the 2001 legislature enacted a statute expressly stating that it intended to comply with the earlier-enacted guideline statute when enacting the reapportionment law, it incorporated those earlier guidelines and thereby made them binding on that reapportionment. *Id*. at 616–17. Thus, to the extent that SB 881 conflicts in any way with ORS 188.010, SB 881 likewise must control as the later-enacted law, for the same reasons as the Michigan Supreme Court explained in *LeRoux*, and under the basic principles of legislative authority and statutory construction discussed above.

The legislature may well have considered itself bound by the guidelines it set for itself in ORS 188.010, just like it considers itself bound by other internal legislative rules. That does not mean, however, that a court can invalidate one duly enacted statute on the ground that it conflicts with an earlier-enacted statute. Therefore, if this court were to conclude that SB 881 irreconcilably conflicted with ORS 188.010, the more recent law must prevail. However, the Court need not reach this issue at all if it concludes that SB 881 is consistent with ORS 188.010(2).

Partisan gerrymandering is, of course, restricted by the Oregon Constitution, as discussed below. Petitioners' claims must, therefore, be considered under the constitutional framework, and not under an earlier-enacted statute.

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In sum, Respondent is entitled to prevail both as a matter of law and because a preponderance of the evidence demonstrates that SB 881 was not enacted with partisan intent or purpose, but rather was enacted with valid and lawful intent, in keeping with the ORS 188.010 criteria.

B. The enacted map complies with the Free and Equal Elections Clause (Article II, Section 1).

Petitioner's third claim for relief alleges that the enacted map violates Article II, Section 1, of the Oregon Constitution. *See* Pet. ¶ 90. For the reasons set forth below, that claim is without merit.

1. Article II, section 1, prohibits only redistricting maps that are intended to, and have the effect of, benefiting a party asymmetrically.

When interpreting a provision of the Oregon Constitution, this court looks at the provision's "specific wording, the case law surrounding it, and the historical circumstances that led to its creation." *Priest v. Pearce*, 314 Or 411, 415–16 (1992). Those considerations show that, to the extent that it constrains the Legislative Assembly's authority to draw redistricting maps, the Oregon Constitution is implicated only by maps that have the purpose and effect of entrenching a single party in power for the duration of the redistricting cycle even if that party loses majority support.

Article II, section 1 of the Oregon Constitution provides that "[a]ll elections shall be free and equal." The key words in that provision are "free" and "equal." The Oregon Supreme Court first explained the meaning—and limits—of the distinct but complementary requirements of being both "free" and "equal" in *Ladd v. Holmes*, 40 Or 167, 178 (1901).

The Oregon Supreme Court has held that to be "free," an election must not impose any "impediment or restraint of any character," either "directly or indirectly," on qualified voters. *Id.* at 178. That is, all voters "shall be left in the untrammeled exercise, whether by civil or military

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authority," of their right to vote, without being "hindered or prevented from participation at the polls." *Id.*

By contrast, the Oregon Supreme Court has explained, the "word 'equal' has a different signification." *Id.* That requirement demands that each elector's vote should "count for all it is worth, in proportion to the whole number of qualified electors desiring to exercise their privilege." *Id.* The Court has explained that that requirement is violated when "persons not legitimately entitled to vote are permitted to do so," which causes qualified voters to be denied their "adequate, proportionate share of influence," rendering the election unequal as to those qualified voters. *Id.*

Thus, textually, the terms "free" and "equal" are used "correlatively," or as symmetrical complements to each other, signifying "that the elections shall not only be open and untrammeled to all persons endowed with the elective franchise, but shall be closed to all not in the enjoyment of such privilege under the constitution." *Id.*

The Oregon Supreme Court took a similar view of that provision's requirements in *State ex rel. Gibson v. Richardson*, 48 Or 309, 317 (1906). *Gibson* involved a challenge to a statute allowing counties, or subdivisions no smaller than precincts, to prohibit the sale of liquor within their boundaries. 48 Or at 317–18, 320. In rejecting an argument that such a procedure violated Article II, section 1, the court observed that "[n]o qualified elector was prevented by any means whatever, so far as disclosed by the transcript, from freely voting to adopt or reject the local option law, or deprived of having his vote counted as cast," meaning that for any elector who "exercised the right of suffrage on this particular occasion, his opportunity was equal to that of all other persons voting, and hence the act does not contravene the clause of the Constitution invoked to defeat it." *Id.* at 317. The core right guaranteed by Article II, section 1, then, is the right to an equal opportunity to vote, not a right to a particular electoral outcome.

In the century since those cases were decided, the Oregon Supreme Court has suggested only one additional requirement arising from that provision: that it "prohibits the government

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from attempting to influence the outcome of elections through intervention on behalf of favored candidates or against disfavored candidates," as such "favoritism would be inconsistent with an 'equal' election." *Libertarian Party of Oregon v. Roberts*, 305 Or 238, 248 (1988). But neutral election laws that incidentally benefit one particular candidate or party do not run afoul of this principle. *Libertarian Party* itself rejected an argument that Article II, section 1, prevented the enactment of statutory requirements for political parties to be recognized for purposes of having the party name appear in connection with affiliated candidates on ballots. *Id*. at 247–51. In disposing of that challenge, *Libertarian Party* considered and rejected an argument that "voters cannot vote as effectively for candidates whose political affiliations are not labeled or who do not appear on the ballot at all," and it explained that a lack of effective voting is "not an issue of unequal voting strength." *Id*. at 248 n 9.

In other words, to the extent that Article II, section 1, addresses electoral results at all, it does so only when the law being challenged is one that subverts rather than serves majority rule. The provision is concerned with unequal voting strength, not electoral outcomes.

Extreme partisan gerrymandering is a serious problem for our democracy. This Court should not foreclose a reading of Article II, section 1, that would ban such action. For purposes of this case, this Court can assume without deciding that Article II, section 1, prohibits partisan gerrymandering. But to establish a violation, courts require challengers to show that a map is likely to entrench a single party in power for the duration of the redistricting cycle regardless of shifts in votes toward the other party and that the Legislative Assembly acted with that partisan-entrenching intent. *See generally Vieth v. Jubelirer*, 541 U.S. 267, 360–61 (2004) (Breyer, J., dissenting).

Evidence that a map may be favorable to one or the other party under certain circumstances is not enough. Article II, section 1, is implicated only when the *purpose* of the law is to entrench some advantage even if it is contrary to who voters prefer to represent them. In *Hartung*, 332 Or at 599, for example, the Supreme Court rejected the argument that a map was

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improper merely because it might be thought to favor one party: "[T]he mere fact that a particular reapportionment may result in a shift in political control of some legislative districts (assuming that every registered voter votes along party lines)—and that is all that petitioners point to on this record—falls short of demonstrating such a purpose." *See also Libertarian Party*, 305 Or at 251 ("Without a more substantial showing * * * that the purpose of [the challenged statutes] is to discourage the development of political rivals of the major parties, we cannot conclude that these statutes violate * * * Article II, section 1, of the Oregon Constitution.").

In addition to proving an improper purpose, courts have required challengers to show a redistricting plan insulates the party in power from changes in the voters' preferences. Indeed, courts in other states with similar free-and-equal constitutional provisions have held as much when concluding that those provisions prohibit partisan gerrymandering. *See, e.g.*, *League of Women Voters*, 645 Pa at 116 (concluding that a similar constitutional provision prohibited partisan gerrymandering that "dilutes the votes of those who in prior elections voted for the party not in power to give the party in power a *lasting electoral advantage*" (emphasis added));[131] *Common Cause v. Lewis*, 2019 WL 4569584, at *110 (NC Super 2019) (concluding that "extreme partisan gerrymandering—namely redistricting plans that *entrench politicians in power*, that evince a fundamental distrust of voters by serving the self-interest of political parties over the public good, and that dilute and devalue votes of some citizens compared to others—is contrary to the fundamental right of North Carolina citizens to have elections conducted freely and honestly" (emphasis added)); *see also id*. at *112 ("Elections are not free when partisan actors have *tainted future elections* by specifically and systematically designing the contours of the election districts for partisan purposes and a desire to preserve power." (emphasis added)).

[131] As for objective measures of gerrymandering, the Pennsylvania Supreme Court cited that state's traditional redistricting factors, which are similar to Oregon's ORS 188.010 criteria. *League of Women Voters*, 645 Pa at 119–21 ("compactness, contiguity, and the maintenance of the integrity of the boundaries of political subdivisions").

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To show partisan entrenchment, a plaintiff must prove more than that the majority party is expected to win a larger percentage of seats than its share of votes. The party that wins the most votes almost always wins an even greater share of the seats; that is a straightforward consequence of the American system of single-member district elections. "If all or most of the districts are competitive ... even a narrow statewide preference for either party would produce an overwhelming majority for the winning party …. This consequence, however, is inherent in winner-take-all, district-based elections …." *Bandemer*, 478 U.S. at 130 (plurality opinion); *accord Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1042 (D Md 1994) (unanimous opinion of three-judge district court) ("With plurality (winner-take-all) district-based elections, one can expect a party with even a narrow majority statewide to win a much larger proportion of seats than its proportion of the statewide vote."); SMRFOF ¶ 232–34 (citing an expert witness for each party for this finding); *see also* Ex. 2303 (Amicus Brief of Jonathan Katz, et al. in *LULAC v. Perry*, 2006 WL 53994 (U.S.), at *8) ("Because most electoral systems in the United States are single-member districts that are winner-take-all, in practice they normally give a 'bonus' of varying sizes (above proportionality) in seats to the party that wins a majority of the votes across a state.").

Oregon's own history of congressional elections illustrates this feature of district-based elections. Over the past three decades, Democratic candidates have won 59 of 75 (78.7%) U.S. House elections.[132] These elections were held in districts drawn on a bipartisan or nonpartisan basis: the 1991–2000 map was adopted by consent decree supported by both parties; the 2001–2010 map was created by a circuit court order that was not appealed; and the 2011–2020 map was enacted by large bipartisan majorities in both houses of the legislature.[133]

That is why courts, as a threshold matter, generally require proof of asymmetry in a redistricting plan alleged to favor one party over another. "The symmetry standard 'requires that

[132] Ex. 2500 at 25–26; *see also* Ex. 3002 ¶ 31(Gronke).

[133] Ex. 3002 ¶ 22, 31(Gonke).

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the electoral system treat similarly-situated parties equally, so that each receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage.' This standard is widely accepted by scholars as providing a measure of partisan fairness in electoral systems." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 466 (2006) (Stevens, J., concurring in part and dissenting in part) (citations omitted); *accord* SMRFOF ¶ 231 ("The most commonly accepted standard in political science to judge the partisan fairness of voting districts for a legislature is partisan symmetry.").

Most importantly, to establish a risk of partisan entrenchment, courts require a plaintiff to prove a substantial risk that a party could win a majority of the seats with a minority of the votes. Indeed, this is a critical distinguishing feature of redistricting plans condemned as gerrymanders by other courts. *See, e.g.*, *Whitford v. Gill*, 218 F Supp 3d 837, 853 (WD Wis 2016), *vac'd*, 138 S Ct 1916 (2018) ("In 2012, the Republican Party received 48.6% of the two-party statewide vote share for Assembly candidates and won 60 of the 99 seats in the Wisconsin Assembly."); *League of Women Voters v. Commonwealth*, 645 Pa 1, 37–38 (2018) (noting Democrats won only 5 of 18 congressional seats with 50.8% of the two-party vote); *Common Cause v. Lewis*, 2019 WL 4569584, at *74 (N.C. Super. Sept. 3, 2019) ("Republican candidates won a minority of the two-party statewide vote" in state house and senate races but "still won 65 of 120 [House] seats (54%) [and] 29 of 50 [senate] seats (58%).").

In sum, courts have required redistricting challengers who assert an impermissible gerrymander to show (1) that the map is likely to entrench a particular party in power durably, regardless of changes in the partisan preference; and (2) that entrenchment was the purpose, not merely an incidental effect, of drawing the districts that way. Petitioners here have not—and cannot—come anywhere close to either showing.

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2. Petitioners failed to prove a purposeful, partisan-entrenching effect.

a. Petitioners failed to prove the enacted map has a partisan-entrenching effect.

For the reasons explained above in Section II.B.3, at pages 16–19, the Special Master concluded "that the Enacted Map 'shows no statistically significant partisan bias.'"[134] The Special Master credited the findings of two political scientists who applied distinct methods to come to a common conclusion: the enacted map is not biased in favor of Democratic candidates.[135] The Special Master also found that even the testimony of Petitioners' own expert did not ultimately support their claim: once Dr. Brunell analyzed a "more comprehensive" set of elections than the three he selected for his initial report, "the Enacted Map's estimated efficiency gap shrunk significantly—by over 60%—to 7.76%."[136] As the Special Master found, "efficiency gaps of this magnitude are hardly unusual . . . ."[137] Under every measure, "comparisons with other districting plans indicate that the absolute magnitude of bias under the Enacted Map is unusually small."[138]

There is no evidence that under the enacted plan Democrats would win a majority of the seats with less than a majority of the votes. Dr. Katz's analysis shows that the enacted map

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[134] SMRFOF ¶ 255 (quoting Ex. 2300 at 6 (Katz)).

[135] SMRFOF ¶ 255 ("[T]he Special Master agrees with Dr. Katz's conclusion that the Enacted Map "shows no statistically significant partisan bias." Ex. 2300 at 6 (Declaration of Dr. Katz)."); *id.* ¶ 287 ("[T]he Special Master agrees with Dr. Caughey's conclusion that '[t]here is, in short, little compelling evidence that the Oregon districting plan substantially favors the Democratic Party.' Ex 3001 ¶15 (declaration of Dr. Caughey).")

[136] SMRFOF ¶ 301.

[137] SMRFOF ¶ 284 (referring to a higher 8.5% estimate of a pro-Democratic efficiency gap as "hardly unusual").

[138] SMRFOF ¶ 286.

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favors Republicans, not Democrats, in close elections.[139] So did Dr. Caughey's analysis.[140] And even Dr. Brunell, whom the Special Master did not credit, found that were Republicans to win a majority of the vote, they would win a majority of the seats.[141] In close elections where the Democrats earned more votes (i.e., between 50.1% and 53.8% of the two-party votes), under Dr. Brunell's assessment, each party would often still win three seats under the enacted map.[142]

Petitioners' primary response to this conclusion is to contend that Republicans are a permanent minority in Oregon; thus, the Court should disregard what would happen were Republicans to win a majority of the vote.[143] But that is not how the partisan-entrenchment inquiry works: the relevant question is whether a party can retain a majority of seats *if* it loses majority support. Moreover, the Special Master flatly rejected this argument as unsupported by the record.[144] Given that single-member district elections like those for the U.S. House naturally result in the majority party winning a disproportionate share of the seats, *see* Section IV.B.1 above, at 39–41, the only principled way to determine whether a redistricting plan is gerrymandered is to put the shoe on the other foot by determining whether the other party would win a similar share of the seats *if* it won a majority of the votes.[145]

Regardless, the record contradicts the factual premise that Oregon Republicans are destined to minority status. Petitioners' own expert's supplemental report showed that the

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[139] Ex. 2300 at 17 (Katz, Figure 2 & accompanying text) (showing a 2.19% pro-Republican bias for elections ranging from 51%-49% to 49%-51%); [TRANSCRIPT OF KATZ REDIRECT] 10/28/2021 Hrg. Trans. (vol. 2) at 105:16–107:2 (Katz); *see also* SMRFOF ¶¶ 224–30, 244–45 (finding Dr. Katz and his methods are reliable).

[140] SMRFOF ¶ 282 (crediting Dr. Caughey estimate of the mean-median difference as showing a Republican skew); *see also* SMRFOF ¶ 285 (noting efficiency gap is zero in close elections).

[141] Ex. 1048 ¶ 4 (2016 Secretary of State).

[142] Ex. 1048 ¶ 4 (Brunell supplemental) (2014 and 2016 Gubernatorial and 2016 Treasurer).

[143] *See, e.g.*, Petitioners' Objections to Special Master's Tentative Findings of Fact ¶ 276 (Nov 2, 2021); *contra* SMRFOF at pp. 12–13 (rejecting these arguments).

[144] SMRFOF at pp. 13–14.

[145] SMRFOF ¶ 231; Ex. 2304 at 3 (adopted by reference Ex. 2300 at 3 (¶ 10)).

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Republican candidate won a majority of the two-party vote in the 2016 election for Secretary of State (and applying those results to the SB 881 map, Republicans would win four of the six districts).[146] Of the remaining 17 statewide elections that the supplemental report considered,[147] the Democratic candidate won less than 54% of the two-party vote 5 times.[148] Based on Petitioners' counsel's question about the results of federal elections over the past two decades, Dr. Gronke described Republican Gordon Smith's statewide victory for U.S. Senate in 2002.[149] Senator Smith lost in 2008 when the Democrats enjoyed their best Presidential election result in Oregon since 1964.[150] And Dr. Caughey made the only prediction of any witness about the expected trend in future congressional elections; he predicted that the Republican congressional candidates would do better in the coming decade than in the last given that the President's party typically loses seats in midterm elections.[151] For all of these reasons, the Court should join the Special Master in rejecting Petitioners' argument that the Court should disregard evidence of the map's consequences in elections where Republican candidates win a majority of the two-party vote.

Petitioners have not proved partisan effect.

b. Petitioners failed to prove the SB 881 was enacted with a partisan intent.

Petitioners' three claims all assert that the legislature, acted with "partisan intent" or "partisan purpose"—terms which appear to be interchangeable—in enacting SB 881. *See* above

[146] Ex. 1048 ¶ 4 (Brunell).

[147] In 6 of those 17 elections, the Republican candidate ran no meaningful campaign and the Democrat won more than 56.9% to 62.9% of the vote. *See* Respondent's Objections to the Special Master's Tentative Findings of Fact ¶ 291 & nn 1–6 (Nov. 2, 2021); Ex. 1048 ¶ 4 (Brunell Supplemental).

[148] Ex. 1048 ¶ 4 (Brunell).

[149] 10/28/2021 Hrg. Trans. (vol. 2) at 58 (Gronke).

[150] 10/28/2021 Hrg. Trans. (vol. 2) at 62–65.

[151] SMRFOF ¶ 279.

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at 27, n 108. Given that, Petitioners have not proven their allegations of partisan intent within the second and third claims for relief for the same reasons they cannot prove their statutory claim. *See* Section IV.A.1, at pages 22–32. As explained above, both the traditional statutory construction evidence as well as the other evidence in the record rebuts Petitioners' partisan intent allegations. Plaintiffs submitted no persuasive evidence that those criteria were merely a pretext for partisan advantage. Nor can partisan intent be inferred from the predicted effects of the enacted map. *See* above Section IV.B.2.a, at 42–45.[152]

C. The enacted map does not grant unequal privileges and immunities (Article I, Section 20)

Petitioners' third claim for relief also alleges that the congressional redistricting map drawn by the Oregon Legislative Assembly violates Article I, Section 20 of the Oregon Constitution. Specifically, they claim that:

> Under Article I, Section 20 and Article II, Section 1, an unconstitutional partisan gerrymandered map is one that the Oregon Legislative Assembly drew with the intent to favor one political party over another and that actually has the effect of so favoring that political party.[153]

That claim does not withstand scrutiny.

Article I, Section 20, provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." The clause "forbids inequality of privileges or immunities not available 'upon the same terms,' first, to any citizen, and second, to any class of citizens. In other words, it may be invoked by an individual who demands equality of treatment with other individuals as well as by one who demands equal privileges or immunities for a class to which he or she belongs." *State v. Clark*, 291 Or 231, 237 (1981); *see also Kramer v. City of Lake Oswego*, 365 Or 422,

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[152] *See* page 43, notes 140–143, above, and accompanying text.

[153] Pet. ¶ 92.

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452 (2019) ("Article I, section 20, addresses governmental grants of a privilege or immunity in an unequal manner.").

In the context of elections, however, Article I, section 20, adds nothing to the analysis under Article II, section 1. The Supreme Court recognized as much in *Libertarian Party of Oregon v. Roberts*, 305 Or 238 (1988), when it held that Article II, section 1, which states that "[a]ll elections shall be free and equal," prohibits "favoritism" in elections. *Id.* at 248. The court explained that "In this respect, Article II, section 1, can be viewed as a special application of Article I, section 20, which prohibits disparate treatment of 'any citizen or class of citizens' based upon impermissible or nonexistent criteria." *Id.*

Because Article II, section 1, is effectively an application of Article I, section 20, in the context of elections, there is no need to address the latter separately. As explained above, SB 881 does not violate the equality requirement of Article II, section 1. For the same reasons, it does not violate the equality requirement of Article I, section 20.

In any event, the same result follows from conventional analysis under well-established Article I, section 20, doctrine. Here, Petitioners advance a claim based on class rather than individual treatment. Only laws that disparately treat a "true class"—as opposed to a class created by the challenged law itself—may violate Article I, Section 20. *See State ex rel Huddleston v. Sawyer*, 324 Or 597, 610, *cert den*, 522 US 994 (1997); *Clark*, 291 Or at 240. SB 881 does not, on its face, treat a true class disparately. It draws congressional districts that place voters into particular districts, but the class of voters in a particular district is not a true class—it is the result of the enactment of SB 881, not a class that existed independent of the law itself.

Petitioners argue instead that the law, although facially neutral, was enacted for the purpose of favoring one political party over another. Assuming a political party can be considered a "true" class, SB 881 does not grant a "privilege or immunity in an unequal manner" to any political party. *Kramer*, 365 Or at 452.

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The Supreme Court has suggested that a law that was enacted for the *purpose* of protecting one political party from a rival could violate Article I, section 20, but it has made it clear that a challenger bears a considerable burden in showing such an improper purpose. In *Libertarian Party of Oregon*, the challenged statute required a political party to show support from at least five percent of the electorate to qualify as a minor political party recognized on the ballot. 305 Or at 240. That five-percent threshold was among the most restrictive in the nation and made it all but impossible for most political parties to mount a challenge to the major political parties. *Id.* at 249. The court nonetheless held that that was insufficient to show an improper purpose, noting that nothing in the statute itself or its legislative history suggested that the purpose was to favor the major parties. *Id.* at 249–51. The court noted that the law could have been much less favorable to minor parties. *Id.* at 251.

Here too, as explained above, *see* Section IV.A.1 at pages 22–33 and Section IV.B.2 at pages 42–45, neither SB 881 nor its legislative history establishes that it was motivated by an improper purpose. Indeed, had the purpose been to disfavor the Republican Party, the bill could have drawn districts that were much less favorable to the party—for example, districts that made it likely that all six congressional seats would lean Democratic, or districts that made the Democratic-leaning districts much less competitive than they are. Most importantly, on measures of partisan symmetry the districts rate as fair to both parties. And the Special Master specifically found that SB 881 did not deny anyone's voting rights.[154] Petitioners' arguments to the contrary do not make the "substantial showing" required by *Libertarian Party of Oregon*, 305 Or at 251, of an improper legislative purpose.

[154] "No person testified to the legislature or has asserted in this proceeding that they are denied the privilege of voting for a Representative in Congress based on an immutable characteristic." SMRFOF ¶ 303.

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D. The enacted map respects the freedoms of speech and assembly (Article I, Sections 8 and 26)

Petitioners' second claim for relief alleges that SB 881 violates Article I, sections 8, and 26, of the Oregon Constitution. Those claims have no legal or factual merit.

Article I, section 8 of the Oregon Constitution provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

Article I, section 26 of the Oregon Constitution provides that "[n]o law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of grievances."

The "freedoms that sections 8 and 26 of Article I guarantee, speech and assembly, are closely associated," as "the right of assembly guaranteed by the latter provision protects an important aspect of the freedom of expression protected by Article I, section 8—it assures that those who speak may have an audience." *State v. Illig-Renn*, 341 Or 228, 236 (2006). For that reason, "the two constitutional provisions are subject to the same analytical framework, including that part of the framework that limits facial overbreadth challenges to statutes that . . . by their terms proscribe the exercise of the constitutionally protected rights of assembly or expression." *Id.* at 236–37. The analytical framework governing those protected rights was first announced in *State v. Robertson*, 293 Or 402 (1982), and it was most recently applied to election statutes in *Multnomah County v. Mehrwein*, 366 Or 295 (2020).

Under *Robertson*, a law restricting speech (or, under the same framework, assembly) "falls into one of three categories." *Mehrwein*, 366 Or at 301. The first category includes any statute "written in terms directed to the substance" of any opinion, communication, or assembly. *See id.* (internal quotation marks omitted). Such laws are unconstitutional, unless the scope of the restraint is wholly confined within some well-established historical exception. *Id.* Laws in

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the second category are also those that "expressly regulate speech [or assembly] but do so only insofar as that speech [or assembly] is linked to a particular harm—that is, where the actual focus of the enactment is on an effect or harm that may be proscribed, rather than on the substance" of the speech or assembly itself. *See id*. (internal quotation marks and emphasis omitted). Such laws "are analyzed for overbreadth and are held facially invalid if they are overbroad." *Id*. at 302. Finally, the third category is where most laws will fall, insofar as they "do not expressly restrict speech" or assembly but "may have the effect of prohibiting or limiting it." *Id*. Such laws "are not facially invalid, but they are subject to as-applied challenges." *Id*.

A challenge to a legislatively drawn redistricting map does not purport to challenge a statute as applied to any particular voter; instead, it seeks to challenge the map—and the law enacting it—on its face. *See City of Eugene v. Lincoln*, 183 Or App 36, 41 (2002) ("A facial challenge asserts that lawmakers violated the constitution when they enacted the ordinance; an as-applied challenge asserts that executive officials, including police and prosecutors, violated the constitution when they enforced the ordinance.").[155]

Because such a challenge must be facial in nature, it can prevail under *Robertson* only against a law that *by its terms* regulates speech or assembly. That is precisely the analysis that the Oregon Supreme Court applied in *Mehrwein*, where it held that, although political contributions "may enable speech," the conduct of making such contributions is not "necessarily expressive," and laws limiting those contributions "are not subject to facial challenge" under *Robertson*'s first two categories. *Mehrwein*, 366 Or at 313, 322–26.

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[155] Indeed, such challenges must be conceived as facial, as no remedy would be possible for an as-applied challenge. Even assuming that Petitioners could identify some executive action to challenge as the "application" to them of a legislatively drawn map, that type of challenge implicitly admits that the map could permissibly be applied to *other* individuals. *Cf. Jensen v. Whitlow*, 334 Or 412, 421 (2002) ("A statute is not facially unconstitutional unless the statute is incapable of constitutional application in any circumstance."). If such a claim were to prevail, it would require modifying the map (or at least the relevant district) as to the Petitioners and *only* as to the Petitioners, which is of course impossible. For that reason, a challenge to legislatively drawn maps must proceed, if at all, as a facial challenge seeking to invalidate the map, or at least a district, in its entirety.

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But just like a statute setting limits on campaign contributions, a statute redrawing legislative districts does not expressly regulate speech or assembly. At worst, the drawing of legislative maps may have an *effect* on speech or assembly, as contemplated in *Robertson*'s third category. That is the most that Justice Kagan identified when dissenting in *Rucho v. Common Cause*, __ US __, 139 S Ct 2484, 2514 (2019), where she worried that "[b]y diluting the votes of certain citizens, [partisan gerrymandering] frustrates their efforts to translate those affiliations into political effectiveness." *See also Gill v. Whitford*, __ US __, 138 S Ct 1916, 1938 (2018) (Kagan, J., concurring) ("Members of the 'disfavored party' in the State, deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." (internal citations omitted)).

But, under *Robertson*, such effects are insufficient to support a challenge under Article I, sections 8 and 26. Indeed, the Oregon Supreme Court has already rejected the proposition that election statutes governing the voting process itself restrict expression or assembly at all. *See Libertarian Party of Oregon v. Roberts*, 305 Or 238, 248 n 9 (1988) (rejecting a claim that "voters cannot vote as effectively for candidates whose political affiliations are not labeled or who do not appear on the ballot at all"); *see also id*. at 247 (concluding that a "cursory examination of" provisions including Article I, sections 8 and 26, "is sufficient to show that none of them, of themselves, requires the state to recognize political parties or list the nominees of political organizations on election ballots," and that failing to so recognize a political party does "would not restrain the free expression of opinion" and "would not restrain the inhabitants of the state from assembling together").

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In any case, the Special Master found that Petitioners did not prove any effect on their rights to free speech[156] or assembly.[157] Thus, even if showing such an effect were sufficient to succeed on a facial challenge under Article I, sections 8 and 26, Petitioners still would have failed to prove their claim.

E. Petitioners' proposed map violates ORS 188.010.

Petitioners have proposed a remedial redistricting plan in the form of a block file, a shape file, and a map representation, which they have entitled the "Neutral Map."[158] This plan, which is anything but neutral, is problematic for three main reasons. First, Petitioners have presented no evidence of how the map meets the statutory criteria under ORS 188.010. Second, Petitioners' proposed plan would unnecessarily divide communities of common interest in violation of ORS 188.010(1). And third, the proposed plan is biased in favor of Republican candidates in violation of ORS 188.010(2).

1. Petitioners' proposed map lacks a foundation.

Petitioners failed to present any evidence of who drew the map or the criteria that were used in its creation. Petitioners sought admission of their map through their expert, Dr. Brunell, who testified that counsel gave him the map and he did not know who created it.[159] Although Dr. Brunell's declaration states that Petitioners' map images, block file, and shape file were "true and correct cop[ies]" of the "Neutral Map," on cross examination Dr. Brunell was not able to testify as to who drew the map, the criteria that were used to create the map, or the significance of white lines drawn across the map, nor could he say whether the map complied with statutory

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[156] "No person testified to the legislature or has asserted in this proceeding that SB 881 (2021) prevents them from uttering and publishing their views on candidates for office in any of the Congressional districts created under SB 881 (2021)." SMRFOF ¶ 304.

[157] "No person testified to the legislature or has asserted in this proceeding that SB 881 (2021) prevents them from assembling with others, petitioning their representatives for redress of grievances, or instructing their representatives." SMRFOF ¶ 304.

[158] *See* Ex. 1014 (Petitioners' image representation of the map); Ex. 1019 (block file); Ex. 1020 (shape file).

[159] *See* 10/27/2021 Hrg. Trans. (vol. 1) at 284:8–17.

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redistricting criteria.[160] Petitioners therefore have failed to lay a foundation for their proposed remedy. The map also lacks a foundation for, and fails to comply with, basic statutory redistricting criteria, as described below.

2. Petitioners' proposed map unnecessarily divides communities of common interest.

Petitioners have presented almost no evidence that their proposed plan complies with any of the traditional redistricting criteria listed under ORS 188.010(1).[161] They presented no evidence that the districts are connected by transportation links.[162] Nor have they presented any evidence that their plan does not unnecessarily divide communities of common interest beyond a raw count of how many counties and cities are "split" between multiple districts.[163]

The only evidence Petitioners present about their map's keeping "communities of common interest" whole is a table in Dr. Brunell's report that appears to compare the numbers of cities and counties that are split by the SB 881 map, the "Plan A" map proposed in the Legislative Assembly, and Petitioners' remedial map.[164] There is no evidence of how the numbers of county and city splits were determined. Dr. Brunell testified that he merely copied and pasted those figures from counsel; he did not verify or otherwise have any knowledge of where the figures came from.[165] Further, even assuming that the figures are accurate, they indicate only the raw number of cities and counties that were split.[166] The report does not indicate the number of residents, if any, affected by each of those splits. Nor does the report

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[160] Ex. 1005 ¶ 26–28, 31–32; 10/27/2021 Hrg. Trans. (vol. 1) at 284:8–288:8; SMRFOF ¶ 292.

[161] *See* Ex. 1014 (overview of the map); Ex. 2574 (detailed map, including city boundaries in red).

[162] SMRFOF ¶ 307.

[163] SMRFOF ¶ 308.

[164] *See* Ex. 1006 at 9.

[165] SMRFOF ¶ 291.

[166] Ex. 1006 at 9.

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consider any other factors to determine how well the map preserves communities of common interest.

On closer examination, Petitioners' map unnecessarily divides communities of interest. Dr. Ethan Sharygin, Director of Portland State University's Population Research Center, used Petitioners' "Neutral Map" shape file to prepare an image showing a detailed view of the map.[167] The detailed map shows district lines cutting through the cities of Salem, Eugene, and Medford.[168] By splitting Salem, Petitioners' map would separate the majority of Salem from nearby Woodburn.[169] Additionally, Petitioners' proposed district line running along the Marion/Linn county line would divide a community in the Santiam Canyon.[170] Petitioners have presented no evidence that their remedial plan, "as nearly as practicable," avoids such divisions. The enacted map itself demonstrates that it is possible and even practical to avoid these stark splits.

Because Petitioners' proposed map flouts these statutory requirements, it also undermines the merits of their claims. The enacted map is the only redistricting plan in the record that comports with ORS 188.010(1). Thus, even if Petitioners could show that the enacted map favored one party, the Court would have no basis to infer whether that effect was the natural

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[167] *See* Ex. 2574 (detailed view of Petitioners' map, prepared using Petitioners' shape file); Ex. 2573 (Second Declaration of Dr. Ethan Sharygin, explaining the process used to generate the detailed map); Ex. 2570 (Declaration of Dr. Ethan Sharygin, explaining his credentials); Ex. 2571 (Dr. Sharygin's curriculum vitae).

[168] *See* Ex. 2574.

[169] *See* Ex. 2574; *see, e.g.*, 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").

[170] *See* Ex. 2574; Ex. 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 into 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.").

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consequence of the political geography of Oregon[171] or the result of intentional gerrymandering. *See Rucho*, 139 S. Ct. at 2521 (Kagan, J., dissenting) (proposing as the relevant inquiry "[w]hat would have happened, given the State's natural political geography and chosen districting criteria, had officials not indulged in partisan manipulation?"). To prove a partisan gerrymandering claim, a plaintiff must propose a lawful alternative map to demonstrate that the enacted map's purported shortcomings can be addressed and still comport with the state's neutral redistricting criteria. *Cf. Easley v. Cromartie*, 532 US 234, 258 (2001) (holding that in Voting Rights Act cases, "the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles"). Here, Petitioners have not done so and their claims thus fail for that reason as well.

3. Petitioners' proposed map is biased in favor of Republican candidates.

Petitioners' proposed "Neutral Map" also improperly favors Republicans. Dr. Katz's point estimates of the bias of Petitioners' map show a 4% to 10.54% bias toward Republican candidates.[172] Dr. Katz's analysis of the map shows that it is more likely than not that Democrats would need to receive more than half the votes in congressional races to be expected to win half of the seats, while it is more likely than not that Republicans would *not* need to receive more than half the votes in congressional races to be expected to win half of the seats.[173]

Unlike the map enacted by SB 881, there is no legislative history or public testimony supporting Petitioners' plan. Rather, it was drawn by an anonymous mapmaker retained by Petitioners' counsel. Given those facts, in combination with the stark advantage the remedy map

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[171] Indeed, the history of Democrats' success in U.S. House elections under bipartisan and nonpartisan maps suggests causes other than partisan gerrymandering. *See* notes 133–134 and accompanying text.

[172] SMTFOF ¶ 299; Ex. 2306 at 6 (Figure 2).

[173] SMTFOF ¶ 300–301; Ex. 2306 at 4–6; *see also* Ex. 1048 ¶ 4 (Brunell supplemental) (showing under the conditions of the 2016 Gubernatorial and Treasurer elections, Democratic candidates would win only 2 of 6 districts despite winning a majority of the votes).

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gives Republican candidates, the only plausible inference is that it was drawn with the purpose of partisan advantage in violation of ORS 188.010(2) and the Free and Equal Elections Clause under the standards described above. Petitioners have not proposed a legally permissible remedy.

V. CONCLUSION

This Court should affirm SB 881 and enter judgment for Respondent on all remaining claims.

DATED November 10, 2021.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on November 10, 2021, I served the foregoing Respondent's Trial Memorandum upon the parties hereto by the method indicated below, and addressed to the following:

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