IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

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

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

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

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

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

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

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

INTRODUCTION

SB 881-A is a quintessential example of a single-party-dominated legislature drawing district lines to favor its party's prospects.[1] Just since the Special Master issued his report, ideologically diverse newspapers of record—from the New York Times to the Wall Street Journal—have explained the obvious: Oregon "gained a seat in reapportionment, and the Democrats who control the State Legislature decided to grab it. They broke up heavily Democratic Portland—carved up into three districts since 2011—into four districts, forking outward into rural areas in the state,"[2] while Intervenors' strategy is to "justify the Oregon Legislature's implementation of a partisan map."[3] Thus, if SB 881-A survives judicial review, it will *rightly* become the lead example that Oregon (and the States that joined its amicus briefs before the U.S. Supreme Court) only opposes partisan gerrymandering when done by the other political party.

While the briefs submitted by Respondent and Intervenors involve numerous legal flaws to which Petitioners respond below, they contain two features that show how thoroughly these parties want this Court to gut Oregon's protections against partisan gerrymandering. First, and incredibly, Respondent argues that ORS § 188.010(2) *has no meaning* when the Legislative Assembly adopts a partisan-gerrymandered map like SB 881-A since, in Respondent's view, that map would impliedly repeal ORS § 188.010(2). That is directly contrary to Oregon's repeated assertions in amicus briefs before the U.S. Supreme Court, which briefs touted ORS § 188.010(2) as an effective tool against partisan gerrymandering. Second, Respondent and Intervenors claim that SB 881-A's compliance with traditional redistricting principles defeats any claim that the

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[1] The Oregon Supreme Court has regularly cited newspaper articles, including from the New York Times. *See, e.g., State v. Eastep*, 361 Or. 746, 752 (2017); *In re Custody of Ross*, 291 Or. 263, 278 (1981).

[2] Nick Corasaniti, et al., *How Maps Reshape American Politics: We Answer Your Most Pressing Questions About Redistricting And Gerrymandering*, N.Y. Times (Nov. 7, 2021) (formatting altered), *available at* https://www.nytimes.com/interactive/2021/11/07/us/politics/redistricting-maps-explained.html (all websites last accessed November 11, 2021).

[3] Editorial Board, *Legal Gerrymander Flip-Flop: Democratic Lawyers Go to Court to Defend Oregon's Partisan Map*, Wall Street Journal (Oct. 21, 2021), *available at* https:/www.wsj.com/articles/legal-gerrymander-flip-flop-oregon-redistricting-marc-elias-11634822303.

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

Legislative Assembly acted with partisan intent, but that again expressly contradicts what Oregon told the U.S. Supreme Court, repeatedly, when supporting partisan-gerrymandering challenges to other States' maps. Recognizing such a defense would render meaningless both ORS § 188.010(2) and the Oregon Constitution's protections against partisan gerrymandering, since both require a partisan-intent showing, and because the Legislative Assembly can *easily* craft a map that both complies with ORS § 188.010(1) and achieves fully any partisan aims at the same time.

Moving to considerations of partisan effect, which this Panel may decide are important for adjudicating Petitioners' constitutional claims, the parties have presented this Panel with two different approaches to measuring a map's partisan effect that are broadly accepted within academia: the efficiency gap (Petitioners) and partisan symmetry (Respondent and Intervenors). While Respondent and Intervenors argue that choosing between these approaches means deferring to the Special Master's factual findings, the question here is entirely legal. That is because the efficiency gap and partisan symmetry look at the notion of partisan fairness from different angles, and only this Panel's *legal* judgment can decide what approach is better for a judicial doctrine: the efficiency gap measures a map's fairness by how it will perform in the next decade if the political environment is similar to that in the prior decade, whereas partisan symmetry measures a map's fairness by how it will perform in the next decade if both parties are equal in terms of statewide vote-share. While the choice between these two methods may be academically interesting, Petitioners respectfully submit that focusing—as the efficiency gap does—on how the map will perform under the real-world electoral conditions that obtained in the prior decade is by far the more sensible and judicially administrable approach. And under every measure of the efficiency gap in this case, including the measures put forward by experts for Respondent and Intervenors, the efficiency gap of SB 881-A strongly favors Democrats.

In all, this Court should invalidate SB 881-A and adopt a remedial map, like the neutral map that Petitioners have submitted, with as close to a 0 efficiency gap as is practical.

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

ARGUMENT

I. The Legislative Assembly Violated ORS § 188.010(2) By Enacting SB 881-A With Partisan Intent

A. Respondent's Argument That ORS § 188.010(2) Is Meaningless Is Waived And Wrong

In Respondent's Memorandum, she makes the remarkable argument that ORS §188.010(2) is meaningless—contrary to the State's previous representations to the U.S. Supreme Court, Ex. 1024, States' Amici Brief, *Gill v. Whitford*, No. 16-1161 (U.S. Sept. 5, 2017), at 18–19; Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (Mar. 8, 2019), at 18—because any redistricting map that the Legislative Assembly has drawn "for the purpose of favoring any political party, incumbent legislator or other person," ORS §188.010(2) (and, by logical implication, "for the purpose of diluting the voting strength of any language or ethnic minority group," ORS §188.010(3)), impliedly repeals ORS §188.010, Resp. Mem. 33–36. This argument is waived and, in any event, meritless.

To begin, Respondent waived this implied-repeal argument against ORS § 188.010(2) by failing to raise it earlier in this litigation. *See Fox v. Collins*, 213 Or. App. 451, 460–61 (2007). Respondent had every opportunity to raise this implied-repeal argument against Petitioners' ORS § 188.010(2) claim—the lead claim that Petitioners have pressed here, Petition, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 11, 2021), at 10—in a motion to dismiss, at the outset of this case. Yet, despite that opportunity, Respondent declined to raise this argument, *see* Pet. Mem. 16; *see generally* Resp. Mem. 4–9, asserting it only now at the end of this litigation. Indeed, in her Order On Non-Parties' Motion To Quash, the Presiding Judge articulated the Special Panel's need to adjudicate Petitioners' ORS § 188.010(2) claim on the merits. *See* Order On Non-Parties' Motion To Quash; Protective Order at 3, *Clarno v. Fagan*, No.21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 21, 2021). So, given Respondent's inexcusable failure to "properly raise" this

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

implied-repeal argument earlier, this argument cannot now serve "as a basis to" dismiss Petitioners' ORS § 188.010(2) claim. *Fox*, 213 Or. App. at 460–61.

Waiver aside, Respondent's claim that SB 881-A repeals ORS § 188.010(2) is meritless.

The Legislative Assembly has the constitutional authority to enact statutes prohibiting discrimination by any governmental body, *see,* ORS § 659A.030(1)(a); ORS §§ 659A.001(4)(a), (9), 30.260(4)(a), 174.109, and this authority extends to prohibiting discrimination by the Legislative Assembly itself, *see generally Cascadia Wildlands v. Dep't of Fish & Wildlife*, 300 Or. App. 648, 663 (2019) (explaining the Legislature's "plenary power" to enact policy for the State). Examples of such laudatory antidiscrimination provisions include ORS § 188.010(2) and (3), which prohibit both the Legislative Assembly and the Secretary of State from discriminating on the basis of partisanship or language and minority-group status. Other States have likewise prohibited such discrimination, as Oregon itself touted before the U.S. Supreme Court in its amicus briefs in *Gill* and *Rucho*. Ex. 1024, States' Amici Brief, *Gill v. Whitford*, No. 16-1161 (U.S. Sept. 5, 2017), at 18–19; Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (Mar. 8, 2019), at 18. Further, Congress has also enacted statutes prohibiting discrimination by Congress itself, including in the exercise of its legislative function by the enactment of laws, just as it can prohibit the executive from discriminating even in the exercises of its executive function. 42 U.S.C. § 2000bb-3 (Religious Freedom Restoration Act, applying to "all Federal law, and the implementation of that law," no matter when enacted); 2 U.S.C. § 1302(a) (applying eleven separate statutory protections "to the legislative branch of the Federal Government," including "Title VII of the Civil Rights Act" and "The Americans with Disabilities Act").

When the Legislative Assembly chooses to enact an antidiscrimination statute like ORS § 188.010(2) or (3), the courts can—and, indeed, *must*—faithfully enforce that law according to its terms, including against the Legislative Assembly itself. *See State v. Gaines,* 346 Or. 160, 171–72 (2009). This is because the text of the statute demonstrates "the intent of the legislature," *id.* at 171, and this Court's role is "to discern and declare the intent of the legislature" so that it may

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

carry out the Legislative Assembly's "own policy judgments," *Whipple v. Howser*, 291 Or. 475, 480 (1981); *accord Cascadia*, 300 Or. App. at 663. Refusing to enforce ORS § 188.010(2) and (3) against the Legislative Assembly would violate the Legislative Assembly's own instructions, as articulated in binding law. *See Gaines*, 346 Or. at 171–72.

Any contrary conclusion would violate the doctrine that implied repeals are disfavored unless it is *clear* that the Legislative Assembly intended such an implicit repeal. *See State ex rel. Huddleston v. Sawyer*, 324 Or. 597, 604 (1997). Here, the Legislative Assembly specifically adopted ORS § 188.010(2) as applying to itself, unambiguously demonstrating that it wants to be subject to the statute unless it tells the courts and the public otherwise in express statutory language, such as through a "notwithstanding" clause. *Huddleston* at 604; *Arken*, 351 Or. at 137. Here, there is no serious claim that the Legislative Assembly wanted to repeal ORS § 188.010(2) when it enacted SB 881-A, rather than wanting this Panel to adjudicate the question of whether SB 881-A complies with ORS § 188.010(2) (and ORS § 188.010(3)). Indeed, the *same* Legislative Assembly that enacted SB 881-A reiterated its desire to subject this map to "all applicable [redistricting] statutes," through the enactment of SB 259, § 1(8)(a) earlier this year.

The conclusion that the Legislative Assembly can enact an anti-discrimination law that applies to its own actions does not raise any plausible separation-of-powers, entrenchment, or other constitutional concerns. *Contra* Resp. Mem.33. The Legislative Assembly *always* retains its full, constitutional authority to relieve any redistricting map that it enacts from the requirements of ORS § 188.010(2) and (3), or any other laws, by simply adding a clause stating that the map governs "notwithstanding ORS § 188.010(2) or (3)," *see O'Mara v. Douglas Cty.*, 318 Or. 72, 76 (1993) (explaining that a "'notwithstanding' clause" in a statute "exempt[s]" from that statute "other provisions of [ ] law that [are] referenced in that particular notwithstanding clause"). The Legislative Assembly regularly uses such "notwithstanding" clauses when enacting statutes, *see, e.g.*, ORS §§ 164.383(2), 418.642(1), 568.951(2)(a), including in SB 881-A itself, SB 881-A, § 5 ("Notwithstanding any other provision of law, ORS 188.016 does not apply to the reapportionment

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

of congressional districts set forth in ORS 188.140, as amended by section 1 of this 2021 special session Act."). Holding the Legislative Assembly to ORS § 188.010(2) and (3) in this way does not "entrench" the prior Legislative Assembly, Resp. Mem.33, since the current Legislative Assembly always retains its "plenary power" to exempt a particular map from ORS § 188.010(2) and (3)—or to repeal these provisions altogether, *Cascadia*, 300 Or. App. at 663. All that the Legislative Assembly must do is *inform the people* (and the courts) via express statutory text. *See Gaines*, 346 Or. at 171 ("nothing is law simply and solely because the legislators will that it shall be, unless they have expressed their determination to that effect" (citations omitted)). That does not "prevent future legislatures from changing [their policy] course," *Moro v. State*, 357 Or. 167, 195 (2015), any more than does the Legislative Assembly's enactment of default definitions and rules of construction governing all future legislation unless a future Legislative Assembly provides otherwise, *see* ORS § 174.010–590; *accord* 1 U.S.C. §§ 1–8.

Respondent claims that the Legisaltive Assembly may only apply antidiscrimination provisions like ORS § 188.010(2) and (3) to itself if they are tied to "an independent constitutional provision." Resp. Mem.34 (citing *Moro*, 357 Or. 167). Yet, *Moro* does not impose such a requirement, holding instead only that statutory contracts must be "clear[ ] and unmistakabl[e]" so as to not inadvertently bind the State. *See* 357 Or. at 195. But to the extent that a constitutional tie for ORS § 188.010(2) is required, it is plainly present here, since—as even Respondent admits—the Oregon Constitution prohibits partisan gerrymandering. Pet. Mem. 26–34; Resp. Mem. 35. And given the Legislative Assembly's broad, policymaking authority in this area, *see Cascadia*, 300 Or. App. at 663, the Legislative Assembly can impose more stringent anti-partisan-gerrymandering requirements upon itself than the Oregon Constitution alone requires, such as ORS § 188.010(2)'s prohibition on maps drawn with partisan intent, *see* Pet. Mem. 15.

None of the remaining authorities that Respondent cites support Respondent's position that ORS § 188.010(2) is meaningless. Resp. Mem. 34–35. Respondent relies heavily upon *McCall v. Legislative Assembly*, 291 Or. 663 (1981), but she misreads this case. In *McCall*, the Oregon

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

Supreme Court considered a challenge to a redistricting map under ORS § 188.010, brought pursuant to the Court's jurisdiction to review redistricting maps under the prior version of Article IV, Section 6. *Id.* at 673–74. Under that prior constitutional provision, the Oregon Supreme Court did *not* have the authority to consider whether a redistricting map complied with statutory requirements, *Ater v. Keisling*, 312 Or. 207, 211–12 (1991) (discussing *McCall*), thus, *McCall* dismissed the ORS § 188.010 challenge for lack of jurisdiction, which was consistent with the position of the Attorney General, *see McCall*, 291 Or. at 673. In the course of that dismissal, the Court also noted that the Attorney General had argued that the ORS § 188.010 challenge failed on the merits, since ORS § 188.010 "did not deprive the [ ] legislature of power to enact [a redistricting map] as a later statute," but did not endorse that argument. *Id.* at 673–74. Respondent also cites *LeRoux v. Secretary of State,* 640 N.W.2d 849, 860 (Mich. 2002) (per curiam), where the court held that the Michigan Legislature was not bound to adhere to certain "secondary [redistricting] guidelines" enacted by a prior legislature. *Id.* at 860–61; Resp. Mem. 35. But *LeRoux* is distinguishable, as the guidelines that the court considered comprised nine traditional redistricting criteria that had to be balanced, *see* 640 N.W.2d at 853, not a single antidiscrimination provision like ORS § 188.010(2) here. In any event, *LeRoux* rests only on propositions of Michigan law that Respondent does not claim that Oregon has adopted, and the decision misunderstands prior statutory enactments as purporting to "limit" a legislature's "power to amend or repeal statutes," 640 N.W.2d at 861; *but see supra* pp. 11–12.

B. Respondent and Intervenors Do Not Even Attempt To Argue That They Would Prevail Under The Well-Established *Arlington Heights* Approach to Determining Impermissible Intent

Courts employ the factors that the U.S. Supreme Court articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), to determine whether decision-makers acted with an impermissible intent, including partisan intent. *See, e.g.*, *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1094–96 (S.D. Ohio 2019), *vacated*

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

and remanded, 140 S. Ct. 102 (2019); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 862 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019); *Whitford v. Gill*, 218 F. Supp. 3d 837, 887–89 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018); *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 388–89 (Fla. 2015); Pet. Mem. 13–16. Under this well-established approach, Petitioners need only show by a preponderance of the evidence, ORS § 10.095(5), that "a motivating factor in the decision" to enact SB 881-A was to advance the partisan electoral interests of a party, *Arlington Heights*, 429 U.S. at 265–66; Pet. Mem. 13.

The record here establishes beyond serious dispute that the Legislative Assembly enacted SB 881-A "for the purpose of favoring any political party," ORS § 188.010(2), under the *Arlington Heights* factors; and, of course, "under a plan devised by a single major party, proving intent should not be hard," *Vieth v. Jubelirer*, 541 U.S. 267, 347–50 (2004) (Souter, J., dissenting). First, the "specific sequence of events" regarding SB 881-A's enactment, *Arlington Heights*, 429 U.S. at 267, is that Democrats drafted, composed, and supported SB 881-A with no input or support from Republicans, and then enacted this map on a party-line vote, in spite of Republicans frequently informing them that SB 881-A was an unfair gerrymander, Pet. Mem. 17, 20–21; Ex. 1043, Statement of Senate Republican Leader; Ex. 1044, Statement of Oregon House Republican Caucus; Ex. 1028, Video Clip 3; Ex. 1039, Video Clip 14; Ex. 1040, Video Clip 15; Ex. 1042, Video Clip 17. Next, the "legislative . . . history," *Arlington Heights*, 429 U.S. at 268, shows Legislative Assembly Democrats' intense focus on publicly available metrics—such as those on FiveThirtyEight and PlanScore—and every one of those "[p]ublic sources confirm that the efficiency gap of SB 881[-A] favors Democrats," SMFOF ¶ 242; *see* Pet. Mem. 18; Ex. 1045, Unger Dep. at 33, 61, 63–66, 68–69, 75, 80–81; Ex. 1022, FiveThirtyEight Congressional Map Assessment; Ex. 2703, PlanScore.Org – Oregon Congressional Plan SB 881 (2021). The "impact' and "historical background" of SB 881-A, *Arlington Heights*, 429 U.S. at 266–67, is that it uses classical gerrymandering techniques by stretching Democratic strongholds of Portland and the Greater Portland Area into four separate districts to ensure a Democratic seat in all and, contrary

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

to prior maps, Pet. Mem. 11; *see, e.g.*, 2011 SB 990 Oregon Congressional Map,[4] has a district cross the Cascade Mountain Range to include Bend with portions of far-away Portland to drag a Democratic region into District Five, Pet. Mem. 18–19; Ex. 100, SB 881-A Map; Ex. 1009, SB 881-A Portland Map; Ex. 1010, SB 881-A Greater Portland Area Map; Ex. 1002, Clarno Decl. ¶¶ 16–20; Ex. 1004, Clarno Dep., at 12:21–13:20, 14:16–15:17; Ex. 3017-B, Written Testimony by Alex Riedlinger at 1–2; Ex. 3017-B, Written Testimony by Kuko Mofor, at 56–57; Ex. 3017-E, Written Testimony by Brian Ettling, at 4; Ex. 3017-I, Written Testimony submitted by Nancy Boever, at 3; Exhibit 3017-B, Written Testimony by Joshua Berger, at 50–51; Ex. 1028, Video Clip 3; Ex. 1029, Video Clip 4; Ex. 1030, Video Clip 5; Ex. 1031, Video Clip 6; Ex. 1036, Video Clip 11; Ex. 1039, Video Clip 14; Ex. 3018-S, 9/8/21 Hearing at 74:2–4 ; Ex. 3018-K, 9/13/21 Hearing, at 31:11–18; Ex. 3018-K, 9/13/21 Hearing at 50:13–20.

Respondent and Intervenors do not grapple with the *Arlington Heights* test for determining impermissible partisan intent, while offhandedly referring to a "predominant purpose" requirement, Resp. Mem. 2; *see also* Int. Mem. 11, which is contrary to the *Arlington Heights* approach, 429 U.S. at 265 & n.11, and for which these parties offered no authority. The remaining arguments that Respondent and Intervenors offer in SB 881-A's defense are meritless. Indeed, if Respondent's and Intervenors' counterarguments were taken seriously, then no showing of partisan intent would be possible, spelling the end of any partisan gerrymandering claims under *both* ORS § 188.010(2) and the Oregon Constitution, as all parties agree that both of those sources of authority require a petition to show partisan intent.

First, Respondent and Intervenors rely primarily on their claims that SB 881-A complies with traditional redistricting criteria. Resp. Mem. 21–26; Int. Mem. 16–31. But as Petitioners explained, these considerations provide no defense to a claim of impermissible partisan purpose under ORS § 188.010(2), Pet. Mem. 22–24. Reading ORS § 188.010(1) into ORS § 188.010(2)

[4] Available at https://www.oregonlegislature.gov/la/2011_Redistricting/SB_990_Congressional.pdf.

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

would collapse these two independent mandates into one. Pet. Mem. 22–23 (citing *Dish Network Corp. v. Dep't of Revenue*, 364 Or. 254, 278 (2019); *Owens v. Maass*, 323 Or. 430, 437 (1996)). Further, compliance with traditional redistricting factors like those in ORS § 188.010(1) is no defense to claims of partisan intent, as numerous courts have concluded, *and as the State of Oregon argued to the U.S. Supreme Court*. Pet. Mem. 23–24 (citing Ex. 1024, States' Amici Brief, *Gill v. Whitford*, No. 16-1161 (U.S. Sept. 5, 2017), at 12–13). Given the advances in modern map-drawing technology, it is trivially easy for partisan actors to draw maps that "atten[d] to traditional districting criteria," while nevertheless imposing a strong partisan gerrymander in their party's favor. *Whitford*, 218 F. Supp. 3d at 849, 889; *see also Vieth*, 541 U.S. at 308 (Kennedy, J., concurring) (although compliance with traditional redistricting criteria "might seem [like a] promising" indicator of neutrality and fairness at the outset, such criteria are not "sound as independent judicial standards for measuring a burden on representational rights."); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 817 (Pa. 2018); *Common Cause*, 318 F. Supp. 3d at 891; *Whitford*, 218 F. Supp. 3d at 889; *see also Romo, League of Women Voters, et al. v. Detzner*, No. 2012-CA-490, 2014 WL 4797315, at *8 (Fla. Cir. Ct. Leon Cty. July 10, 2014). Respondent seemingly accepts as much in her own Memorandum, adopting the Special Master's interpretation of the "communities of common interest" criteria, ORS § 188.010(1)(d), as "nebulous" at best, Resp. Mem. at 24. Accordingly, Respondent would ask this Court to render ORS § 188.010(2) and (3), as well as the Oregon Constitution's prohibitions against partisan gerrymandering, functionally meaningless.

Unsurprisingly, Respondent and Intervenors are unable to cite any case that has adopted their approach to traditional redistricting factors and partisan intent. Although both Respondent and Intervenors cite *League of Women Voters*, 178 A.3d at 817–18, for the point that "neutral criteria provide a 'floor' of protection for an individual against the dilution of his or her vote in the creation of [ ] districts," Int. Mem. at 17; Resp. Mem. 26 (similar), that decision supports Petitioners. There, the Pennsylvania Supreme Court acknowledged that traditional criteria cannot

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

determine partisan intent, finding that traditional criteria *only* provide a "floor" of protection that modern technology can easily circumvent to draw partisan maps that comply with such criteria. *See League of Women Voters*, 178 A.3d at 817–18. No better is Respondent's reliance, Resp. Mem. 17, on Justice Breyer's dissent in *Vieth*, 541 U.S. at 366 (Breyer, J., dissenting). In *Vieth*, Justice Breyer accepts the limited at best value of traditional redistricting criteria, noting that even in cases where "no radical departure from traditional districting criteria is alleged," an unjustified partisan result occurring in two elections "would be sufficient to support a claim." *Id.* And, of course, Justice Breyer was talking about partisan *effect*, which is not the inquiry under ORS § 188.010(2). Respondent's and Intervenors' reliance on Justice Kagan's dissent in *Rucho* fares no better. *See* Resp. Mem. 26; Int. Mem. 17. Justice Kagan provided no quarter to legislatures who can point to compliance with traditional criteria, acknowledging that legislatures maintain "wide latitude in districting" even while conforming to such criteria, and the core question even in such cases is whether map drawers "manipulat[e] district lines for partisan gain." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2521 (2019) (Kagan, J., dissenting).

Second, Respondent's attempt to evade the clear import of SB 881-A's pure party-line vote misses the point. Resp. Mem. 31–32. Single-party control of the process that doles out *political power*, as in redistricting, is well-understood to provide strong evidence in support of "proving intent," *Vieth*, 541 U.S. at 350 (Souter, J., dissenting), because members of a legislature generally "intend[ ]" the "likely political consequences of [a] reapportionment," *Bandemer*, 478 U.S. at 129 (plurality op.); *see also* Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & Pol. 331, 336 (2007) ("Legislators want to win reelection handily and to have their party obtain as many seats as possible."). This important context in the redistricting realm distinguishes the relevance of a party-line vote here from other types of legislative acts, where members might be allowed to act with "political spite or for partisan, political or ideological reasons." Resp. Mem. 32 (quoting *Zilich v. Longo*, 34 F3d 359, 363 (6th Cir 1994)). In any event, ORS § 188.010(2) only applies to

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
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redistricting legislation. Intervenors seem to grasp this problem for their case, atextually claiming that Petitioners must prove "something more than mere garden-variety political considerations motivated the Legislative Assembly's congressional redistricting." Int. Mem. 12. The plain text of ORS § 188.010(2) refutes that suggestion, prohibiting districts "drawn for the purpose of favoring any political party," not some more elaborate showing. *Edwards v. Riverdale Sch. Dist.*, 220 Or. App. 509, 513 (2008) ("In examining the text of a statute, we ordinarily assume that the legislature intended terms be given their plain, ordinary meanings.").

Third, Respondent incorrectly claims that Petitioners offer the testimony of Executive Director of SEIU, Melissa Unger, to assert that "legislators colluded with unnamed 'Democrat aligned special-interest groups,' which . . . resulted in a gerrymandered map." Resp. Mem. 27. Petitioners offer her testimony to show that Democratic party leaders were focused on publicly available modeling data assessing the proposed maps, such as FiveThirtyEight, and all publicly available sources rated SB 881-A as clearly favoring Democrats. Pet. Mem. 18, 25–26, 42; Ex. 1045, Unger Dep. at 33, 61, 63–66, 68–69, 75, 80–81. Notably, if these Democratic leaders were similarly viewing and discussing metrics that showed that a proposed map would dilute the votes of racial minorities, which is a forbidden intent under ORS § 188.010(3), such testimony would certainly be powerful evidence of racial-dilution intent. Pet. Mem. 19–20. Intervenors' attempt to minimize this testimony as "garden-variety political questions that arise among legislators during every redistricting cycle," Int. Mem. 31–32, only undercuts their case. Of course, it is common for legislators to want to advance their own party's prospects in redistricting, and ORS § 188.010(2) prohibits them from doing so for just this reason.

Fourth, Intervenors' cherry-picked floor statements of Republican lawmakers do not support their position. Int. Mem. 5. Senator Lindley criticized SB 881-A for the exact reasons that he criticized Plan A, noting that "[SB] 881-A received no public scrutiny because it has received no public viewing," which made passage of SB 881-A simply "wrong," Ex. 1033, Video Clip 8, regardless of whether it had been updated from Plan A to incorporate some prior comments,

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
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Int. Mem. 5 (citing Ex. 3018-A). While Senator Knopp acknowledged that SB 881-A incorporated *some* public testimony regarding the substantial concerns with Plan A, he also noted that SB 881-A inexplicably looped Bend into District 5, among other factors he "didn't like." Ex. 1030, Video Clip 5. And Senator Knopp's out-of-context quote thanking the Legislative Assembly staff for their "time and effort on redistricting"—which allowed the Legislative Assembly to meet the voting deadline—and noting that their work allowed them to "accomplish what the statute lays out for [the Assembly]," followed the Senator's explanation that he was "going to be a no" vote. Ex. 3018-A, Floor Statements on Oregon Redistricting 2021, at 13–14; Ex. 1030, Video Clip 5. Other Republican legislators similarly condemned SB 881-A as a partisan gerrymander as they cast their "no" votes. Pet. Mem. 9–10; Ex. 1043, Statement of Senate Republican Leader; Ex. 1044, Statement of Oregon House Republican Caucus; Ex. 1028, Video Clip 3; Ex. 1039, Video Clip 14; Ex. 1040, Video Clip 15; Ex. 1042, Video Clip 17. And, of course, no Republican in the Legislative Assembly voted for SB 881-A.

Fifth, contrary to Respondent's claim, Resp. Mem. 28, Representative Bonham's testimony—while not necessary for Petitioners to show partisan intent—only further reinforces the same conclusion. Representative Bonham has personal knowledge of the "specific sequence of events" and "legislative . . . history" regarding SB 881-A's enactment, including "[d]epartures from the normal procedural sequence," which are strong evidence of the partisan intent leading to its enactment, *Arlington Heights*, 429 U.S. at 267–68. Specifically, Representative Bonham's testimony speaks to his personal knowledge, Ex. 1003, Bonham Decl. ¶ 3, of, *inter alia*: (a) the fact that Republicans' eagerness to negotiate with respect to Democrats' proposed map was completely rebuffed by Democrats, Ex. 1003, Bonham Decl. ¶¶ 13–16, 27–30–32, as the Democrats' "*maps were the maps*," without any Republican contributions or negotiations, Transcript of 10/27/21 Hearing at 162 (emphasis added); Pet. Mem. 12, and (b) Republicans' reasoning for providing a quorum for a vote on SB 881-A, Ex. 1003, Bonham Decl. ¶¶ 33–35; *see* Pet. Mem. 38–40. Respondent asserts that Representative Bonham's testimony "should be given

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
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little weight," because the post-enactment statement of one legislator is not part of the official legislative history and not relevant to evaluate the intent of the entire legislature. Resp. Mem. 28 (citing *Salem-Keizer Ass'n of Classified Emps. v. Salem-Kaizer Sch. Dist. 24J*, 186 Or. App. 19 (2003)). Whether Representative Bonham's testimony is part of the official legislative history is not a relevant criterion to assess partisan intent, *see Arlington Heights*, 429 U.S. at 266–68, especially given that Representative Bonham was the point person for House Republicans on redistricting issues, and so he was the *most* knowledgeable and qualified person to testify about what Republicans were thinking and planning during this time and whether Democrats had ever reached across the aisle to engage the Republican redistricting team in any negotiations. Ex. 1003, Bonham Decl. ¶ 3; Transcript of 10/27/21 Hearing, at 166–67. And unlike in *Salem-Keizer*, the testimony Petitioners seek to have admitted here is not merely explaining the meaning of a statute well after its enactment, but providing conversations Representative Bonham had with other legislators contemporaneous with the drafting and enactment of SB 881-A, *see infra* Part IV.E. And such conversations, involving "contemporary statements by members of the decision-making body," are "highly relevant" in cases involving discriminatory intent. *Arlington Heights*, 429 U.S. at 268.

Sixth, similarly helpful, but not at all necessary for Petitioners to prevail, is Speaker Kotek's decision to renege on her promise to provide equal representation to Republicans on the House Redistricting Committee, where she replaced the Committee with the House Committee on Congressional Redistricting which was composed of two Democrats and only one Republican, providing robust support that the Legislative Assembly enacted SB 881-A with partisan intent. Transcript of 10/27/21 Hearing, at 96–99; Ex. 1003, Bonham Decl. ¶¶ 5–6, 19–20; Ex. 1002, Clarno Decl. ¶ 14; Ex. 1027, Video Clip 2. This "specific sequence of events" is an important factor under *Arlington Heights* because it shows a "[d]eparture[ ] from the normal procedural sequence." 429 U.S. at 267–68. If, for example, the Legislative Assembly had changed the composition of a committee specifically to eliminate a minority member who voiced opposition to

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

a proposed map on the basis that it "dilut[ed] the voting strength of a[ ] language or ethnic minority group," ORS § 188.010(3), a court addressing such a "sequence of events" under *Arlington Heights* would surely find that event to be relevant to its inquiry, 429 U.S. at 267; Pet. Mem. 20–21.

Seventh, Intervenors claim that SB 881-A is consistent with previous Congressional maps, Int. Mem. 13–16, but that is incorrect as SB 881-A contains two features which no previous maps have ever had: (1) it splits Portland across four separate districts to spread Democratic Party voters into each of those districts, Pet. Mem. 18–19, and (2) it contains a district which cuts across the Cascade Mountain Range to include Bend, a city east of the Cascades, within District Five, a district otherwise entirely located on the western side of the Cascades, Pet. Mem. 11.

Finally, Intervenors, but not Respondent, claim that, in order to show partisan intent, Petitioners must establish partisan effect based upon the partisan symmetry metrics that their experts presented to the Special Master. Int. Mem. 10, 32–35. But an ORS § 188.010(2) claim requires only a showing of impermissible partisan *intent* alone, and does not deal with the exceedingly challenging issue as to how to identify, measure, and judicially administer the issue of how much partisan effect is too much. *Hartung v. Bradbury*, 332 Or. 570, 599 (2001). Intervenors cannot point to anything in the record to suggest that the Democrats who controlled the Legislative Assembly looked at anything like the partisan symmetry metrics that Intervenors' and Respondent's experts analyzed. Pet Mem. 25. So while Petitioners disagree that those metrics are a proper measure of partisan effect, that is an issue that is material only for the effect analysis, should this Panel conclude that such analysis is part of Petitioners' constitutional claims.

II. The Assembly Violated The Oregon Constitution By Enacting SB 881-A

The Legislative Assembly violated the Oregon Constitution in enacting SB 881-A. Petitioners have raised multiple constitutional claims, resting those claims on Sections 8, 20, and 26 of Article I, and Section 1 of Article II of the Oregon Constitution. Pet. Mem. 26–27. Respondent and Intervenor agree with Petitioners that the Oregon Constitution prohibits partisan gerrymandering—at least under Article II, Section 1—and both propose the intent-plus-effects test

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15350 SW Sequoia Parkway, Suite 250
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to govern such claims. Resp. Mem. 36; Int. Mem. 11. Petitioners are happy to rest their constitutional claims on Article II, Section 1's guarantee of "free and equal" elections, Or. Const. art. II, § 1, but also note that other courts have recognized partisan gerrymandering claims under the First Amendment or equal protection, *see, e.g.*, *Benisek v. Lamone*, 348 F. Supp. 3d 493, 517 (D. Md. 2018); *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 672, 883 (M.D.N.C. 2018); *Whitford*, 218 F. Supp. 3d at 883, and Petitioners also raised claims under Oregon's analogous provisions, *see* Petition, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 11, 2021), at 12–15.

Regardless of what constitutional provision this Panel concludes most directly prohibits partisan gerrymandering, it remains the prerogative of the Oregon courts to determine the appropriate standard for such claims under the Oregon Constitution, including determining whether the Constitution's prohibition on partisan gerrymandering mirrors ORS § 188.010(2)'s test, requiring only partisan intent. Pet. Mem. 28. Importantly, however, whatever standard this Panel selects, the test must be fair and administrable, providing the Legislative Assembly and courts clear rules for future redistricting efforts and giving judges administrable standards for determining impermissible partisan gerrymandering in future cases. Pet. Mem. 28–29.

In determining whether a map has too much partisan effect, the parties in their respective Memoranda have now presented this Court with three options—efficiency gap, partisan symmetry, and entrenchment—and Petitioners respectfully submit that their approach is the best one, while understanding, with necessary modesty, that there is no perfect approach for deciding the difficult issue of how to measure "too much" partisan effect.

Efficiency Gap of more than 7%. Petitioners' proposed test for partisan effect—efficiency gap with a 7% threshold—provides a clear, fair, and administrable test for lawmakers and courts. Pet. Mem. 29–30. This standard is keyed to actual, real-world elections, measuring the number of wasted votes each party would have under the new map, if the electoral conditions in the next decade are like those in the prior decade, using the method partisans actually use in order to

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

gerrymander districts. Pet. Mem. 29; *see also* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering And The Efficiency Gap*, 82 U. Chi. L. Rev. 831, 849–52 (2015); Transcript of 10/27/21 Hearing, at 308–09. In this way, the efficiency gap is more constructive at determining the likely effect of maps in future elections, given its use of recent electoral data and no need for counterfactual analysis or further assumptions. Stephanopoulos & McGhee, *supra*, at 855. Moreover, the efficiency gap is the most commonly used metric for measuring partisan advantage in recent years, Ex. 2300, Katz Report at 9; accord Ex. 3002, Gronke Decl. at 4; Ex. 3001, Caughey Decl. at 14–15, and adoption of the efficiency gap is particularly fair in Oregon, given that the State has endorsed this particular metric in the past, when supporting challenges to other States' maps. Pet. Mem. 29–30 (citing Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (Mar. 8, 2019), at 15). Because of its straightforward methodology, it is the easiest metric to calculate for judges and lawmakers. Pet. Mem. 30. The 7% efficiency-gap threshold comes from *Gill*, where the court concluded that an efficiency gap of 7% or higher "is likely to continue to favor that party for the life of the [redistricting] plan," *Whitford*, 218 F. Supp. 3d at 905–06, and the State of Oregon supported the plaintiffs in that case, Ex. 1024, States' Amici Brief, *Gill v. Whitford*, No. 16-1161 (U.S. Sept. 5, 2017). Because SB 881-A has an efficiency gap over 7% by every measure of that metric presented in this case, SMFOF ¶ 241; Ex. 2049 Brunell Supp. Report, at 21; Ex. 1006, Brunell Report, at 6–8; Ex. 3001, Caughey Decl., at 14–16; Ex. 3002, Gronke Decl., at 12–13; Ex. 2703, PlanScore Oregon Congressional Plan SB 881A Assessment, at 1, 3, SB 881-A has an impermissible partisan effect.

Respondent's attacks on the efficiency gap metric are unpersuasive. Respondent contends that the efficiency gap "is an even less reliable measure of partisan fairness for congressional elections in Oregon," because Oregon only has six seats. Resp. Mem. 18; *see id.* at 19. But this is the same problem facing all proposed metrics in Oregon, including partisan symmetry, as Dr. Katz acknowledged. Ex. 2300, Katz Report, at 13; *see also* Transcript of 10/27/21 Hearing, at 232. Because Oregon's map has only six districts, "it is exceedingly difficult to accurately estimate

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
Portland, OR 97224
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the seats-votes curve" that is so critical to a partisan symmetry analysis, Ex. 2300, Katz Report at 13. And Respondent's argument that efficiency gap analysis is only worthy of consideration "with other measures"—such as partisan bias, mean-median difference, and declination—in a holistic approach to partisan effect, Resp. Mem. 18, replicates the problems with the Special Master's suggested approach. As Petitioners explained, Pet. Mem. 33, such an all-things-considered approach would create the same practical problems that caused the U.S. Supreme Court to throw up its hands and exit the field, *see Rucho*, 139 S. Ct. at 2506–08, and would fail entirely to advise lawmakers of the rules for lawful redistricting or allow courts to police instances of partisan gerrymandering. Pet. Mem. 33–34.

Partisan symmetry. Respondent's and Intervenors' reliance on partisan symmetry tests is misplaced. Resp. Mem. 16–18, 40–41; Int. Mem. 33. As Petitioners have explained, such metrics are far more academically interesting than practically useful as a basis for judicial doctrine, because they measure partisan fairness only through the concept of mirroring, by analyzing "counter-factual election results," rather than historical elections and likely results. Pet. Mem. 31. Such analysis requires "sophisticated statistical model[s]," Ex. 3001, Caughey Decl. at 11, involving complex "regression analysis," Ex. 2300, Katz Report at 12, largely impenetrable to those outside of the expert and academic class. To complete such analyses, the experts must calculate recent election results and then also calculate purely hypothetical "counter-factual" scenarios to determine "the difference between the two parties' seat shares when each receives the same statewide vote share," Ex. 3001, Caughey Decl. at 4, or where a minority party, such as Oregon Republicans, attains a substantial statewide majority, Ex. 2300, Katz Report at 16–17; Ex. 3001, Caughey Decl. at 8. Partisan symmetry analyses, then, operate to measure fairness along a seats-votes curve, whereby a map is fair even if very biased in one party's favor under vote shares that have obtained in recent elections, so long as the map would be equally unfair in the other direction if the vote totals flipped, regardless of how unlikely that flip would be in the real world. Pet. Mem. 31–32. These analyses, therefore, are unanchored from the real-world effects of the

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

maps they are analyzing, and are a poor fit for determining partisan effect. Pet. Mem. 31–32; Transcript of 10/28/21 Hearing, at 99–101, 165–67.

Entrenchment. Respondent and Intervenors also propose an alternative "entrenchment" standard, Resp. Mem. 38–41; Int. Mem. 12, that is similarly unadministrable and largely unguided. Intervenors claim that only a showing that "redistricting plans . . . entrench politicians in power," suffices to "impinge[ ] on the representational rights of those associated with the party out of power." Int. Mem. 12. But Intervenors provide no further elucidation of what this entrenchment standard would mean, or how a court would analyze this standard. Would a map that causes one party to gain five out of six districts in most elections, and four out of six districts in others, constitute "entrenchment"? What about if the party gains five out of six seats in 75% of elections? 80%? 90%? Would this be calculated under an efficiency gap approach—such that the percent of elections is based upon the real-world outcomes over the prior decade—or under a partisan symmetry approach, which disregards political realities and looks at a hypothetical world where both parties are just as likely to win 58% of the statewide vote. Respondent and Intervenors do not answer these questions. Moreover, the cases Intervenors cite on this point, Int. Mem. 12, largely do not apply this "entrenchment" principle as a standard for partisan effect, instead treating it as an overarching concept and then applying other, more-administrable standards to determine partisan effect. *See Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *17, *112 (N.C. Sup. Ct. Sept. 3, 2019) (relying primarily on the analyses of Drs. Chen and Mattingly, who concluded that the redistricting plans were a partisan gerrymander after "employ[ing] computer simulations to generate alternative House and Senate plans to serve as a baseline for comparison to each enacted plan," which showed the enacted plans were "extreme outliers"); *Whitford*, 218 F. Supp. 3d at 905–06 (relying primarily on the efficiency gap to determine that the redistricting plan effected a partisan gerrymander).

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

III. Respondent's Attack on Petitioners' Remedial Map Are Misplaced

If this Panel finds that SB 881-A is unlawful or unconstitutional, SB 259-B § 1(8)(a) requires this Panel to adopt a neutral, remedial map. In an effort to assist this Court, Petitioners have proposed such a map, Ex. 1014, Proposed Neutral Map, which has a near-neutral efficiency gap of -1.03%, *see* Ex. 1049, Brunell Supp. Report, at 21, based on the real, ongoing voter demographic conditions in the State—statewide election data from 2012 to 2020—which is the most sensible method to cure the permeation of partisan intent that has so infected SB 881-A, *see* Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (U.S. Mar. 8, 2019), at 15 (showing the state of Oregon's previous endorsement of this approach). Petitioners would welcome Respondent, Intervenors, or any other interested parties to submit their own remedial maps offering similarly near-neutral efficiency gaps.

Respondent's and Intervenors' attacks on this neutral map fail. They first argue the map lacks a foundation and is unsupported in the record, Resp. Mem. 51–52; Int. Mem. 36, but such a foundation necessarily exists as to any map that this Panel chooses, whether proposed by Petitioners or anyone else, *see* SB 259-B § 1(8)(a). They contend that Petitioner's proposed map divides communities of common interest, Resp. Mem. 52–54; Int. Mem. 36–37, but compliance with the ORS § 188.010(1) criteria is satisfied by reasonably "consider[ing]" those criteria "as nearly as practicable," ORS § 188.010; *see* Pet. Mem. 22; Resp. Mem. 11; Int. Resp. Mem. 9, and Respondent admits that Petitioners did "consider" "[n]ot divid[ing] communities of common interest," ORS § 188.010(1)(d), when drawing their map, Resp. Mem. 52 (citing Ex. 1006, Brunell Report, at 9). Respondent next argues that Petitioners' map is biased in favor of Republican candidates, Resp. Mem. 54–55, but this just ignores the map's near-perfectly-neutral efficiency gap score in favor of partisan symmetry measures, *see* Pet. Mem. 31–32. Finally, Intervenors suggest that this Panel should not consider Petitioners' map because it was not subject to the legislative process. Int. Mem. 38. But this Panel has the duty of adopting a plan if it finds SB

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

881-A is unlawful or unconstitutional, SB 259-B § 1(8)(a), and any remedial map will not have gone through the legislative process by definition.

IV. This Court Should Reject Respondent's Procedural Motions

A. This Court Can And Should Consider What Oregon Told The U.S. Supreme Court Just Four Years Ago About The Very Issues In Dispute Here

Respondent's argument that this Special Judicial Panel should exclude as irrelevant Exhibits 1024 and 1025—amicus briefs that the State of Oregon filed in U.S. Supreme Court litigation challenging other States' alleged partisan gerrymandering—is entirely without merit. On this point, Respondent merely contends that these amicus briefs "do not have *any tendency* to make the existence of any fact more or less probable," and that Petitioners have misrepresented the State's arguments from those briefs. Resp. Evidentiary Mot. at 26–27 (emphasis added).

Under OEC 401, evidence is relevant if it has "*any* tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." OEC 401 (emphasis added). This standard imposes only "a very low threshold of relevance." *State v. Lyons*, 324 Or. 256, 270 (1996). Indeed, any "[e]vidence that increases, even slightly, the probability of the existence of a material fact is relevant evidence." *Id.* And evidence remains relevant "so long as the inference . . . is reasonable," even when "the evidence could also support a contradictory inference." *State v. Titus*, 328 Or. 475, 481 (1999). And once a party shows evidence to have any "logical[ ] relevance," a trial court no longer has any "discretion under OEC 401 to exclude" it. *State v. Faunce*, 251 Or. App. 58, 72 (2012).

Here, Exhibits 1024 and 1025 are clearly relevant to three legal issues in this case, and this Panel should either consider these briefs as evidence or, alternatively, as important legal authorities on: (1) whether ORS § 188.010(2) is legally meaningless whenever the Legislature enacts a partisan gerrymandered redistricting; (2) whether compliance with traditional redistricting criteria is relevant to a determination of partisan intent; and (3) the determination of partisan effect that this Panel might address in deciding Petitioners' constitutional claims.

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

On the first issue, Respondent has made relevant the State of Oregon's prior amicus briefs in *Gill* and *Rucho* by her newly raised argument that ORS § 188.010 is a nullity anytime that the Legislative Assembly passes a redistricting bill. Resp. Mem. 33–36. Given this novel and shocking position, Exhibits 1024 and 1025 are surely admissible to show "even slightly" the inaccuracy of that characterization, *Titus*, 328 Or. at 481, given that in these briefs the State of Oregon touted to the U.S. Supreme Court the directly contradictory statement that ORS § 188.010(2) operates to "expressly bar state officials from drawing district lines for the purpose of favoring or disfavoring a political party." Ex. 1024, States' Amici Brief, *Gill v. Whitford*, No. 16-1161 (U.S. Sept. 5, 2017), at 18–19; Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (Mar. 8, 2019), at 18.

On the second issue, Petitioners pointed out that Oregon supported a finding of partisan gerrymandering in *Gill*, even though that map complied with traditional redistricting criteria, and that Oregon had argued there that "[p]lanners developed Act 43 through a process in which they commissioned a number of redistricting plans—*all of which complied with traditional neutral redistricting criteria*—and then manipulated the political boundaries on those maps to assess the partisan advantage that the modified boundaries would provide." Pet. Mem. 23–24 (quoting Ex. 1024, States' Amici Brief, *Gill v. Whitford*, No. 16-1161 (U.S. Sept. 5, 2017), at 12–13). Just as above, Oregon's position, directly contrary to Respondent's arguments in this case, is plainly relevant to this issue, well above the low bar required. *Lyons*, 324 Or. at 270. And courts regularly consider the prior positions of a party—including government entities—from past cases to determine if their arguments are inconsistent or otherwise hypocritical. *See, e.g., Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 225 (2015); *New Hampshire v. Maine*, 532 U.S. 742, 750–52 (2001); *Zweibon v. Mitchell*, 516 F.2d 594, 605 n.10 (D.C. Cir. 1975).

On the third issue, it is the prerogative of the Oregon courts—and this Special Judicial Panel, in the first instance—to determine whether the claims arising under the various provisions of Oregon's Constitution that Petitioners assert, *see* Or. Const. art. I, §§ 8, 20, 26; *id.* art. II, § 1,

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

require Petitioners and future challengers of partisan gerrymandering to establish partisan effect. Pet. Mem. 27–28. Petitioners, for their part, have urged this Panel to select the efficiency gap as just that test, for multiple reasons. Pet. Mem. 29–30. Among those reasons, Petitioners have pointed out that the State of Oregon, as amicus, filed briefing in the U.S. Supreme Court praising the efficiency gap as a valid basis to "provide evidence" that a State's map has partisan effect. Pet. Memo. 29 (citing Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (U.S. Mar. 8, 2019), at 15). Petitioners have also noted that Oregon supported the plaintiffs in *Gill v. Whitford*, who argued in that litigation that an efficiency gap of 7% is sufficient to establish sustained partisan effect. Pet. Memo. 29 (citing Ex. 1024, States' Amici Brief, *Gill v. Whitford*, No. 16-1161 (U.S. Sept. 5, 2017); *Whitford*, 218 F. Supp. 3d at 860–61, 905–06). Thus, Oregon's prior briefs are plainly relevant, as they make it over the "very low threshold of relevance," *Lyons*, 324 Or. at 270, and "more probable" that this Panel should adopt the efficiency gap as the measure of partisan effect, OEC 401; *see also Young*, 575 U.S. at 225; *New Hampshire*, 532 U.S. at 750–52; *Zweibon*, 516 F.2d at 605 n.10.

Respondent is simply wrong to claim that these prior briefs do not support Petitioners' call for this Panel to adopt the efficiency gap as the measure of partisan effect in Oregon. Resp. Evidentiary Mot. 27. In its *Rucho* brief, the State of Oregon explicitly agreed that an "efficiency gap" score marking a map as an "extreme partisan outlier" would suffice to "'provide *evidence* that' it violates constitutional standards," which evidence a State might be able to rebut with proof that the score is attributable to "something other than intentional partisan entrenchment," like proof that members of one party tend to live in one part of the State, or a "large number of uncontested elections." Ex. 1025, States' Amici Brief, *Rucho v. Common Cause*, No. 18-422 (U.S. Mar. 8, 2019), at 15. So while Oregon did mention that "no single metric is likely to satisfy the effects prong by itself," it also claimed that a metric like the efficiency gap would be useful "prophylactically by States to ward off constitutional challenges," and recommending that the U.S. Supreme Court "endorse[ ] particular metrics" like the efficiency gap "as relevant to the effect

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

prong of the test," so that "States will be able to model those metrics and ensure that their maps stay within [constitutional] bounds." *Id.* Each of these points supports the efficiency gap as a valid model for partisan effect, and Oregon's praise for the measure is relevant to this Panel's determination. *Lyons*, 324 Or. at 270.

B. Representative Bonham's Testimony Is Admissible

1. Despite Respondent's original request to exclude only some of Representative Bonham's declaration and portions of his hearing testimony on Debate Clause grounds, *see* Respondent's Memorandum Of Law In Support Of Respondent's Objections To Petitioners' Evidentiary Submissions, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Nov. 2, 2021), Respondent now urges that the Special Master's decision—to exclude all of Representative Bonham's testimony on the grounds that a legislator can never offer any testimony whatsoever in a case, SMFOF, pp. 5–12—is correct and that Representative Bonham's declaration and hearing testimony should be excluded from the evidentiary record, Resp. Evidentiary Mot. 22–23. Neither the Debate Clause, nor any rule of evidence, prohibits consideration of Representative Bonham's declaration and testimony. Pet. Mem. 34–41.

Debate Clause. Article IV, Section 9 of the Oregon Constitution provides that no member shall, "for words uttered in debate in either house, *be questioned in any other place*." Or. Const. art. IV, § 9 (emphasis added). Oregon courts consider the privilege to be an individual one, held by each legislator, and they have never applied the Clause to prevent a legislator from testifying or submitting his own declaration in a case. Pet. Mem. 35. Representative Bonham's testimony here was freely offered of his own accord. Pet. Mem. 35–36. And permitting Representative Bonham to testify does not risk "interrupt[ing] or distract[ing]" any other legislator's "perform[ance] [of] their legislative functions," *State v. Babson*, 355 Or. 383, 419 (2014), which is the only evidence that Respondent actually sought to exclude, Pet. Mem. 34–35. The Presiding Judge's rulings on discovery motions also confirms that allowing this testimony is the proper result, as the Presiding Judge allowed Petitioners to depose and seek documents from various third

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

parties who spoke to members of the Legislative Assembly during the redistricting process, *see* Order on Non-Parties' Motion to Quash, at 2, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 21, 2021), which is no different than allowing the willing testimony of a sitting legislator who wishes to testify about just such statements that the legislator heard, Pet. Mem. 36–37. And Respondent adds nothing to support the Special Master's conclusion that an individual legislator may not waive that privilege, SMFOF pp. 8–11, which the Special Master based entirely on inapposite, out-of-state cases, *see* Pet. Mem. 37–38.

Relevancy. Likewise unavailing are Respondent's contentions that Representative Bonham's declaration and testimony are inadmissible on relevancy grounds. *See* Resp. Evidentiary Mot. 35. Because partisan intent is a core issue in partisan gerrymandering cases, courts routinely rely on "statements, particularly by delegates and state senators during the General Assembly's abbreviated consideration of the proposed map" in analyzing partisan intent. *Benisek*, 348 F. Supp. 3d at 518. Similarly, statements showing that one party has drawn a map to "gain partisan advantage," *Common Cause*, 279 F. Supp. 3d at 641, and "the actions and statements of legislators and staff" are consistently considered relevant evidence of a legislature's "motive in drawing the districts" in a redistricting map. *Detzner*, 172 So. 3d at 388.

Hearsay and Foundation. Respondent also briefly addresses alternative reasons to exclude portions of Representative Bonham's testimony on the basis of hearsay and foundation.

Respondent only briefly addresses its agreement with the Special Master's assessment, Resp. Evidentiary Mot. 29, that, contrary to Petitioners' argument, *see* Pet. Mem. 40–41, Representative Bonham's testimony does not satisfy the state-of-mind exception to the rule against hearsay, SMFOF pp. 3–4; *see* OEC 803(3). Respondent argues that Representative Bonham's testimony should be excluded because it requires "stacking inference upon inference," to provide any relevance to the Panel. Resp. Evidentiary Mot. 28–29. Not so. Whereas the declarant's "personal knowledge" would be a necessary requirement if Petitioners' sought to use Representative Bonham's testimony to prove the underlying facts regarding his conversations with

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

legislators, Petitioners only seek to use his testimony to show Democratic legislators' "intent, plan, [or] motive" under OEC 803(3), Pet. Mem. 40–41. This use does not rely on personal knowledge to establish its foundation, but instead bases its reliability on the contemporaneous nature of statements of a then-existing intent or plan of the declarant "at the time the statements were made." *State v. Blaylock*, 267 Or. App. 455, 461 (2014) (citation omitted). So Respondent's testimony regarding the statements pertaining to Democratic leadership's "intent, plan [or] motive," OEC 803(3), regarding the creation and adoption of redistricting maps are both admissible for that purpose, and plainly relevant to the issue of whether the legislative Democrats intended to enact maps for partisan purposes without any of Respondent's purported additional inferences, under the low bar applied to such relevancy determinations, *see Lyons*, 324 Or. at 270.

Respondent next asserts that the portion of Representative Bonham's testimony discussing his belief that Tom Powers, a member of Senate President Courtney's staff, drew the map that became SB 881-A, Transcript of 10/27/21 Hearing, at 115–17, 120, is inadmissible for lacking foundation of personal knowledge that, because Tom Powers authored the ESRI entry, he was the individual who drew the maps, Resp. Evidentiary Mot. 35. A witness has a sufficient foundation to testify to a matter so long as "the witness has personal knowledge of the matter," such that he "had an adequate opportunity to observe or otherwise personally perceive the facts to which the witness will testify, and did, in fact, observe or perceive them, thereby gaining personal knowledge of the facts." *State v. Lawson*, 352 Or. 724, 752–53 (2012) (citation omitted). Representative Bonham's testimony here easily satisfies those criteria. Representative Bonham has "personal knowledge" regarding the ESRI entry because he, himself, saw the ESRI entry with Tom Powers' name on it as author/creator of the map, *id.*; Transcript of 10/27/21 Hearing, at 116, and, because of his status as a leader in the Republican caucus and point person on redistricting issues, Ex. 1003, Bonham Decl. ¶ 3; Transcript of 10/27/21 Hearing, at 166–67, he of course has sufficient personal knowledge of the committee's actions and the ongoing procedures as to the map-drawing process,

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

Pet. Mem. 38–40, sufficient to satisfy the minimal showing necessary to "personally perceive the facts" regarding his opinion that Tom Powers drew the map, *Lawson,* 352 Or. at 752–53.

Finally, Respondent contends that Representative Bonham's testimony answering the question, "Given your role and given your knowledge of how the House caucus works, would you most likely have been informed of communications that other members of the caucus had with Democrats?," Transcript of 10/27/21 Hearing, at 169, should be excluded as lacking foundation because Representative Bonham did not testify to any procedures in which other caucus members may confer with him, Resp. Evidentiary Mot. 35–36. But Representative Bonham testified has personal knowledge of the ongoing communications of caucus members' conversations with Democrats as a leader in the Republican caucus and lead point person on redistricting for that caucus, Ex. 1003, Bonham Decl. ¶ 3; Transcript of 10/27/21 Hearing, at 166–67; *see Lawson*, 352 Or. at 752–53.

C. Dr. Brunell's Testimony Is Admissible

Dr. Brunell's analysis and testimony suffice for admission under Oregon evidentiary law. As an initial matter, Petitioners rely upon Dr. Brunell's expert analysis and testimony for only a limited purpose—explaining the efficiency gap methodology and calculating it for SB 881-A's drawn districts, Pet. Mem. 30–31—and Respondent does not directly challenge Dr. Brunell's analysis on those grounds, *see* Resp. Evidentiary Mot. 30–32. Nevertheless, Dr. Brunell's expert testimony has never been excluded by a court in 20 years of experience as an expert witness, so Petitioners feel dutybound to defend his broader positions and conclusions as well, in order to protect his professional reputation from Respondent's unfair attack.

Under OEC 702, "a witness qualified as an expert by knowledge, skill, experience, training or education may testify" regarding "scientific, technical or other specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue." In general, scientific evidence is admissible so long as it is relevant, OEC 401, helpful to the trier of fact, OEC 702, and its probative value is not substantially outweighed by the danger of unfair prejudice,

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

OEC 403; *State v. Perry*, 347 Or. 110, 121 (2009). When a party seeks to admit evidence that "is scientific in nature," the gatekeeping court "must determine that the evidence is scientifically valid before admitting it." *State v. Henley*, 310 Or. App. 813, 817 (2021). In making this determination, a court should consider the following nonexclusive factors: (1) "[t]he technique's general acceptance in the field"; (2) "[t]he expert's qualifications and stature"; (3) "[t]he use which has been made of the technique"; (4) "[t]he potential rate of error"; (5) "[t]he existence of specialized literature"; (6) "[t]he novelty of the invention"; and (7) "[t]he extent to which the technique relies on the subjective interpretation of the expert." *State v. O'Key*, 321 Or. 285, 299 (1995). But these factors are neither exclusive nor "to be used as a mechanical checklist requiring an affirmative finding with respect to each factor." *Perry*, 347 Or. at 122.

Here, Dr. Brunell and his efficiency gap analysis are sufficiently "scientifically valid," *Henley*, 310 Or. App. at 817, and this Panel should reject Respondent's request to exclude Dr. Brunell's testimony, thereby imposing unjustified harm on his professional reputation. As an initial matter, Dr. Brunell's "qualifications and stature" are unquestionably beyond dispute. *O'Key*, 321 Or. at 299. Dr. Brunell is a specialist in elections, representation, and redistricting, having published dozens of articles on those issues in peer-reviewed journals, as well as a book on redistricting in the United States, and he has testified as an expert witness in redistricting and election litigation throughout the country numerous times over the last 20 years. Ex. 1005, Declaration of Professor Thomas L. Brunell, ¶¶ 7–10. The efficiency gap analysis he performed has achieved "general acceptance in the field," *O'Key*, 321 Or. at 299, as even Respondent's and Intervenors' experts acknowledge that it has become the most common measure of partisan fairness, Ex. 2300, Katz Report at 9; Ex. 3002, Gronke Decl. at 5; Ex. 3001, Caughey Decl. at 15. Moreover, the efficiency gap is the subject of numerous peer-reviewed and law review articles—i.e., "specialized literature," *O'Key*, 321 Or. at 299—explaining its methodology and the merits of its use in redistricting litigation such as this. *See, e.g.*, Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015);

HARRIS BERNE CHRISTENSEN LLP
15350 SW Sequoia Parkway, Suite 250
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Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate Over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503 (2018); Eric M. McGhee, *Measuring Efficiency in Redistricting*, 16 Election L.J., No. 4, 2017, at 417. The efficiency gap is not "novel[ ]," *O'Key*, 321 Or. at 299, having been in use for years, and adopted by federal courts in partisan gerrymandering litigation challenging redistricting maps enacted in the wake of the prior decennial census, *Whitford*, 218 F. Supp. 3d at 834, 860–61, 905–06. Finally, one of the benefits of the efficiency gap is that it is straightforward and relies little, if at all, "on the subjective interpretation of the expert." *O'Key*, 321 Or. at 299. Thus, on all relevant factors, Dr. Brunell's analysis of, and testimony on, the efficiency gap passes muster under OEC 702.

Although Petitioners have not relied on Dr. Brunell's analysis of proportionality, *see* Pet. Mem. 30–31, 43, Respondent's challenge on that ground is similarly misplaced. As Dr. Brunell correctly testified, every type of partisan gerrymandering analysis involves some aspect of proportionality analysis. Transcript of 10/27/21 Hearing, at 194; *see also Whitford*, 218 F. Supp. 3d at 947–49 (Griesbach, J., dissenting). So, while "the Constitution does not require proportional representation," that "is not to say that highly *dis*proportional representation may not be evidence of a discriminatory effect." *Whitford*, 218 F. Supp. 3d at 906. Proportionality has long played a role in the partisan gerrymandering discourse, *see, e.g.*, Bernard Tamas, *American Disproportionality: A Historical Analysis of Partisan Bias in Elections to the U.S. House of Representatives*, 18 Election Law Journal, No. 1: 47–62 (2019);[5] John Loosemore and Victor J. Hanby, *The Theoretical Limits of Maximum Distortion: Some Analytic Expressions for Electoral Systems*, 1 British Journal of Political Science, Iss. 4, 467–77 (Oct. 1971); Michael Gallagher, *Proportionality, Disproportionality and Electoral Systems*, 10 Electoral Studies Iss. 1, 33–51 (1991), and two states (Michigan and Ohio) have even formally adopted proportionality as standards for partisan fairness, Mich. Const. art. IV, § 6(13)(d) ("Districts shall not provide a

[5] Available at https://www.liebertpub.com/doi/pdf/10.1089/elj.2017.0464.

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

disproportionate advantage to any political party."); Ohio Const. art. XI, § 6(B) ("The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio."). So, Respondent's attempted rejection of proportionality as a valid consideration in redistricting litigation is plainly incorrect.

Respondent's attempt to impugn Dr. Brunell's analysis and methods because of his supplemental report, Resp. Evidentiary Mot. 31, similarly fail. Although Respondent claims that Dr. Brunell's "estimates changed drastically after he incorporated data that he previously excluded," *id.*, that misstates the proceedings and greatly overstates the differences in his two reports. After opposing counsel criticized Dr. Brunell for using the three well-funded Presidential elections of 2012, 2016, and 2020 to conclude that SB 881-A resulted in a high efficiency gap in Democrats favor, *see* Ex. 1006, Brunell Report, at 2, 6–8, Dr. Brunell gamely agreed to re-run his analysis on an expanded set of data, so as to confirm his efficiency gap analysis, *see* Transcript of 10/27/21 Hearing, at 66–67. Upon analyzing "all statewide elections in Oregon between 2012 to 2020," he determined that SB 881-A maintained a noted Democratic advantage under the efficiency gap metric of 7.76%, meaning that Republicans would expect to waste 7.76% more votes than Democrats under this map. Ex. 1049, Brunell Supp. Report, at 1, 21.

Finally, Respondent is incorrect to claim that Dr. Brunell was "a 'mere conduit' for data that was given to him by counsel." Resp. Evidentiary Mot. 31. Dr. Brunell calculated the efficiency gap using data provided by data aggregators and maps created with up-to-date technology. So while he did not compile the data he analyzed himself, Transcript of 10/27/21 Hearing, at 181, that is standard. Indeed, both Dr. Gronke and Dr. Caughey used PlanScore data that they did not independently verify before analyzing the efficiency gap scores used in their reports. *See* Ex. 3001, Caughey Decl. at 2; Ex. 3002, Gronke Decl. at 2.

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

D. FiveThirtyEight.com And Princeton Gerrymander Project Are Admissible

Respondent also contends that this Panel should adopt the Special Master's recommendation to exclude Exhibits 1022 and 1023—nonpartisan analyses of SB 881-A by FiveThirtyEight.com and the Princeton Gerrymander Project, respectively—without any further argument. Resp. Evidentiary Mot. 29. Petitioners already explained fully in their Opening Memorandum why these documents are admissible, including because Petitioners did not seek to admit either exhibit "to prove the truth of the matter asserted," and so neither is subject to any hearsay objection. Pet. Mem. 41–43 (citing OEC 801(3)).

E. Statements Made By Republican Leader and Caucuses Are Admissible

No better is Respondent's challenge to Exhibits 1043 and 1044, statements by Senate Republican Leader Fred Girod and the Oregon House Republican Caucus, which are similarly admissible. Respondent is incorrect to claim that these statements are irrelevant, and she relies on inapposite precedent in doing so. Resp. Evidentiary Mot. 33–34 (citing *Salem-Keizer Ass's of Classified Emps. v. Salem-Kaizer Sch. Dist. 24J*, 186 Or. App. 19 (2003)). The Court in *Salem-Keizer* considered only "[s]ubsequent statements by legislators" well after the end of the enactment process and found them "not probative of the intent of statutes already in effect," because they could not be "considered" as "contemporaneous 'history' that is appropriate for courts to consult." 186 Or. App. at 26–27. Here, on the other hand, Senate Republican Leader Fred Girod and the Oregon House Republican Caucus issued statements on September 27, 2021, Ex. 1043, Statement of Senate Republican Leader; Ex. 1044, Statement of Oregon House Republican Caucus, the *very same day* that SB 881-A passed the Legislative Assembly and Governor Kate Brown signed it, SMFOF ¶¶ 14–16; SOF ¶ 25–27. Thus, these statements are generally like the legislative history that the Oregon Supreme Court has long considered a proper consideration when interpreting legislative enactments. *Gaines*, 346 Or. at 164. Furthermore, in cases involving discriminatory intent, as here, the U.S. Supreme Court has acknowledged that such "legislative or administrative history may be highly relevant, especially where there are contemporary statements by members

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

of the decision-making body," *Arlington Heights*, 429 U.S. at 268, and courts have admitted similar evidence in cases litigating partisan gerrymanders, *see Benisek,* 348 F. Supp. 3d at 518; *Common Cause*, 279 F. Supp. 3d at 641; *Detzner*, 172 So. 3d at 392.

F. This Court's Order Did Not Provide For Rebuttal Reports, Contrary to Petitioners' Preference, And It Would Be Deeply Prejudicial To Permit Respondent To Submit Rebuttal Testimony

This Panel should reject Respondent's objection to the Special Master's exclusion of Dr. Katz's and Dr. Caughey's rebuttal testimony as contrary to this Panel's Scheduling Order. This Panel issued a Scheduling Order that recognized that the deadlines in SB 259 were "incompatible with" various provisions of the Oregon Rules of Procedure and Uniform Trial Court Rules, and establishing specific guidelines to "control the proceedings and supersede any and all contrary provisions in the" Rules. Scheduling Order, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 14, 2021), at 3. Among those guidelines was the requirement that all parties submit all evidence in support of or objecting to the Petition by October 25, 2021, while acknowledging that the Special Master could hold evidentiary hearings thereafter and had discretion with regard to evidentiary matters. *Id.* at 2. So while Petitioners would have *strongly* preferred for the parties to be able to submit rebuttal reports, and proposed that just that to Respondent, *see* Declaration of Brian Simmonds Marshall In Support Of The Response To Petitioners' Motion To Amend Scheduling Order, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 18, 2021), Att.B at 3, they were duty-bound to follow the Scheduling Order.

Notwithstanding the Scheduling Order, Respondent attempted unfairly to submit a rebuttal report from her expert, Dr. Katz, on the eve of the first day of the evidentiary hearing, two days after the October 25, 2021 evidentiary deadline. Transcript of 10/27/21 Hearing, at 17. Petitioners objected and explained that such rebuttal evidence was impermissible under the Scheduling Order. Transcript of 10/27/21 Hearing, at 24–25. As a compromise, the Special Master and parties agreed to accept Dr. Katz's rebuttal report regarding Dr. Brunell's expert report and analysis and to allow

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

Dr. Brunell to prepare his own supplemental or rebuttal report addressing various alleged concerns the parties raised, in order to "address the fairness issue[s]" that would arise with permitting rebuttal testimony and the "awfully compressed" timeline of the case. Transcript of 10/27/21 Hearing, at 47–48. Nevertheless, the following day, Respondent and Intervenors *again* attempted to submit *additional* rebuttal testimony from their expert witnesses. *See, e.g.*, Transcript of 10/28/21 Hearing, at 133–35.

In all, either Petitioners were correct when they agreed with the Special Master that such rebuttal testimony was not permitted under the Scheduling Order, or Petitioners were entitled to rely upon the Special Master's evidentiary rulings. In either event it would be fundamentally unfair to allow Respondent to present this rebuttal testimony now, at this late stage. Under the Scheduling Order, this Panel granted the Special Master authority to "receive evidence" and "schedule evidentiary hearings," Scheduling Order, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 14, 2021), at 2, and with this authority, comes the "broad discretion to control the proceedings before it," *State v. Rogers*, 330 Or. 282, 300 (2000), which authority granted the Special Master the right to control the evidentiary hearing and exclude such testimony.

CONCLUSION

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

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

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TROUTMAN PEPPER HAMILTON SANDERS LLP

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

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

HARRIS BERNE CHRISTENSEN LLP

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

Trial Attorney:
Shawn M. Lindsay, OSB #020695

CERTIFICATE OF SERVICE

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

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

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

DATED this 12th day of November 2021.

HARRIS BERNE CHRISTENSEN LLP

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

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