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 COMBINED RESPONSE TO PETITIONERS' MEMORANDUM IN SUPPORT OF PETITION AND EVIDENTIARY ARGUMENTS **ORS 20.140 - State fees deferred at filing**

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

TABLE OF CONTENTS

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

RESPONSE TO PETITIONERS' MEMORANDUM IN SUPPORT OF PETITION

A. Introduction

Petitioners—who have dismissed their claim under ORS 188.010(1)—no longer dispute that the legislature properly considered the neutral criteria listed in that statute when it drew the map enacted in SB 881. The extensive expert evidence developed in this case confirms that, as the Special Master found, the map "shows no statistically significant partisan bias."[1]

Petitioners' argument that this Court should nevertheless invalidate that map boils down to this: Because SB 881 was enacted by a party-line vote and it would have been possible to draw a congressional map that is more favorable to Republican candidates, SB 881 must have been enacted for the purpose of favoring Democratic candidates. That conclusion does not follow as a matter of law or logic. No doubt the enactment of SB 881 was politically contentious, as legislation on significant issues often is. But the map is politically fair, and this Court should uphold it.

Because by objective metrics SB 881 creates no partisan bias, Petitioners are forced to resort to the unprecedented claim that the Court should adopt a single mechanical test: that any plan with an efficiency gap of 7% or more, calculated based on past elections, is *per se* unconstitutional. Not even proponents of using the efficiency gap in redistricting litigation endorse that approach, and no court has ever suggested anything like it. Mathematically, the efficiency gap is unreliable for maps with fewer than seven districts. Proponents of the efficiency gap set the threshold much higher than Petitioners do—33% for maps with six districts—and recognize that the metric is only one piece of a court's fairness inquiry, not its entirety.

Even more fundamentally, Petitioners' arguments are inconsistent with basic principles of Oregon statutory construction and constitutional interpretation. Courts interpret statutes to

[1] Special Master's Recommended Findings of Fact and Report (hereinafter "SMRFOF") ¶ 255.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

determine the intent of the legislature that enacted them, looking primarily to text, context, and legislative history to discern that intent. *State v. Gaines*, 346 Or 160, 171-72 (2009). Courts interpret constitutional provisions by examining their text in historical context and in light of relevant case law, to "determine the meaning of the provision at issue most likely understood by those who adopted it," with the objective of identifying underlying principles to inform application of the constitutional text to modern circumstances. *Couey v. Atkins*, 357 Or 460, 490–91 (2015). Petitioners make no effort to show that the text, context, or history of any of the statutory or constitutional provisions on which they rely support using the efficiency-gap as the dispositive test for whether a redistricting plan is lawful. Nor, for that matter, do they show that text, context, or history supports many of the other rules of law they propose. At bottom they make a naked policy argument for their approach, but that is not how Oregon law works. *See, e.g.*, ORS 174.010 ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted * * *.").

For the reasons explained in more detail below, none of Petitioners' arguments have merit. This Court should affirm the legislatively enacted redistricting plan.

B. The record does not support Petitioners' allegations of partisan intent and partisan purpose.

Petitioners fail to meet their burden to produce admissible evidence to support most of their allegations. Their thin evidentiary record does not meet their burden to prove their allegations that SB 881 was enacted with partisan intent or partisan purpose, which is an element of all three of their claims.

The "factual statement" section of Petitioners' brief is based largely on speculation and conjecture, and lacks citations to admissible evidence that support the inferences that they invite the Court to draw. Much of it is contrary to, and rebutted by, the Special Master's recommended

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

findings of fact, which found that SB 881 was enacted for legitimate purposes rather than for the purpose of partisan favoritism. Indeed, the record demonstrates that SB 881 was enacted in accordance with the traditional redistricting criteria that the legislature has directed itself to consider, as reflected both in the districts of the enacted map and by the public testimony received by the legislature.

Lacking any other evidence of improper partisan purpose, Petitioners resort to inferences that, in addition to being speculative, disrespect the legislative process. Petitioners invite the Court to assume, without direct evidence, that simply because SB 881 was enacted by elected officials with party affiliations (as all laws are), that must mean that the motive behind legislature's policy decision is suspect. The Court should decline this invitation to question the underpinnings of the legislative process and find that Petitioners have failed to prove the element of partisan intent.

1. Allegations of legislators' reliance on public reporting

Petitioners argue that the FiveThirtyEight and PlanScore ratings of the enacted map support a finding of partisan intent, based on the contention that some legislators "frequently considered" and "focused obsessively on" those ratings.[2] The evidence Petitioners rely on for their claim that legislators reviewed those sites is inadmissible for that purpose and is irrelevant. Even if the Court were to consider those sources, they would prove nothing about legislators' intent, because Petitioners have not shown that those ratings even existed before the map was enacted, let alone that legislators were aware of them and relied upon them.

The FiveThirtyEight and PlanScore ratings of the enacted map could not have influenced the *drafting* of that map, because those websites could not have rated a map when it did not yet exist. The only way those sites could have even conceivably influenced legislators' decision to

[2] Petitioners' Memo in Support of Petition and in Support of Request for Evidentiary and Procedural Rulings (hereinafter "Pets.' Trial Memo") at 8, 18.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

vote in favor of the map is if the ratings were posted sometime between when the map was released and when it was enacted.

Petitioners' own FiveThirtyEight exhibit indicates that the enacted map was first released on September 25, 2021, and enacted on September 27.[3] The only exhibit of any FiveThirtyEight webpage in the record was updated as of October 22.[4] The exhibit does not indicate what the page looked like earlier—so there is nothing in the record that shows what was on that page during the two-day window between the release of the map and the enactment of it. Thus, there is no evidence that it would even have been possible for anyone to look at the FiveThirtyEight material before SB 881 was enacted.

A tweet from a FiveThirtyEight elections analyst on September 25 (the day the map was released) said that FiveThirtyEight planned to analyze the map on September 27 (the day that the map was eventually enacted), but it is unclear whether the eventual analysis was posted before or after the vote on the map.[5] There is no evidence of what the analysis page looked like on September 27. Nor have any archived documents been introduced that might shed light on that question.

Similarly, the exhibit showing the PlanScore ratings of the enacted map is dated October 20, well after SB 881 was enacted.[6] The PlanScore website currently indicates that its ratings of the map were first "[a]dded to PlanScore" on September 28—the day after the map was enacted.[7] Petitioners have failed to establish the basic timeline upon which their argument

---

[3] *See* Ex. 1022 at 4.

[4] *See* Ex. 1022 at 1 ("Updated Oct. 22, 2021, at 10:54 AM").

[5] *See* @baseballot, Twitter (Sept 25, 2021, 8:47 a.m.), https://twitter.com/baseballot/status/1441791363276705795?s=27 ("The latest Oregon, Maine, and Nebraska congressional maps will be up and analyzed on FiveThirtyEight on Monday!").

[6] *See* Ex. 2703 at 1.

[7] *Oregon Plan Library*, PlanScore, https://planscore.campaignlegal.org/library/oregon/ (last visited Nov 11, 2021).

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

depends, and in particular they have failed to explain how legislators could have "frequently considered" a webpage that did not yet exist.

Further, Petitioners' allegations related to FiveThirtyEight and similar sites depend entirely on an unjustifiable inferences from vague statements by Melissa Unger in her deposition. Ms. Unger testified that publicly available map ratings such as those posted on FiveThirtyEight had come up in conversation with legislators, but she could not recall who participated in any such conversation or when the conversation occurred.[8] Nothing in her testimony supports the inference that any legislators "focused obsessively" on those websites or even that they were aware of those site's ratings of SB 881 at any time before the vote on the SB 881 map.

2. Party line vote

Lacking any concrete evidence to support their allegations, 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. This argument fails for the reasons set out at pages 31-33 of Respondent's Trial Memorandum, which Respondent does not repeat here.

The arguments that Petitioners advance in their brief on this point are meritless. First, their contention that a party-line vote evinces legislative malintent rather than an honest policy disagreement is contrary to the basic principle that "in passing upon the validity of legislative action the courts must presume that such action is constitutional unless the contrary is clearly shown." *State ex rel. Overhulse v. Appling*, 226 Or 575, 585–86 (1961).

They claim that they are "unaware of any case anywhere in the country, that has ever held that a redistricting map adopted by a party-line vote by a legislature was not drawn with partisan intent, and there is no record basis for this Panel to become the first here." Pets.' Trial Memo at 7, 15–17. Notably, Petitioners do not provide any *direct* citations to case law as

[8] Ex. 1045, at 61, 67, 69, Unger Depo. Trans.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

support for this proposition. Instead, they cite to out-of-jurisdiction cases as examples of this reasoning.[9] These cases are inapposite.

One of the cases that Petitioners cite in support of their proposed rule of law that a party-line vote is evidence of legislative malintent—*League of Women Voters v. Pennsylvania*, 178 A3d 737, 817 (Pa 2018)—did not involve a finding of partisan intent at all, because the court adopted a standard that relied solely on effects. And in the other cases, there was no serious factual question about whether the map was a partisan gerrymander; the only question was whether gerrymandering was illegal under the law at issue:

- In Ohio, a national Republican involved in the map-drawing explained that certain decisions were made to "try[] to *lock down* 12 Republican seats." *Ohio A. Philip Randolph Inst. v. Householder*, 373 F Supp 3d 978, 1103 (SD Ohio), *vac'd and rem'd*, 140 S Ct 102 (2019) (emphasis in original).
- In Florida, "the trial court found that there was 'just too much circumstantial evidence' and 'too many coincidences' to reach any conclusion other than that the political operatives had 'infiltrate[d] and influence[d] the Legislature' in order to 'obtain the necessary cooperation and collaboration' to 'taint the redistricting process and the resulting map with improper partisan intent.'" *League of Women Voters of Florida v. Detzner*, 172 So 3d 363, 385 (Fla 2015).

Based on the record here—ample evidence that SB 881 was based on legitimate policies, overwhelming expert testimony that the enacted map does not have a partisan effect, and no

[9] *See* Pets.' Trial Memo at 15 (citing case law as examples).

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

direct evidence of partisan intent—this case is not remotely comparable to those cited by Petitioners.

Finally, Petitioners cannot reconcile their party-line-vote argument with Republican legislators' decision to suspend the rules immediately prior to the passage of SB 881, which is what allowed the vote to go forward.[10] Had Republican representatives required the bill to comply with the rule that the bill be read on three separate days,[11] the statutory deadline to enact a redistricting plan would have lapsed.[12]

3. Committee assignments

Petitioners continue to rely on irrelevant allegations about committee assignments and internal legislative business in attempting to prove partisan intent. In so doing, they improperly ask the Special Judicial Panel to exceed its authority—they ask that the Special Judicial Panel reverse the Presiding Judge's ruling that legislative committee assignments are irrelevant to their claims.[13] That request is improper; SB 259 vests sole authority over procedural and evidentiary rulings in the Presiding Judge and contains no provision authorizing the panel to review the Presiding Judge's procedural and evidentiary rulings. Or Laws 2021, ch. 419, § 1(6) (SB 259) (providing that the Presiding Judge will "preside over the special judicial panel" and "make all rulings on procedural and evidentiary matters before the panel").[14] This Court should summarily reject Petitioners' request.

---

[10] *See* Respondent's Trial Memorandum (hereinafter Respondent's Trial Memo") at 10–11, 32; SMRFOF ¶¶ 13–15 (describing lack of quorum on September 25, and vote counts on September 27).

[11] Ex. 2103 at 5 (House Rule 3.50(1)); Ex. 2006 (Measure History of SB 881 showing suspension of the rules and vote counts); Ex. 3018-C at 5 (Sept 27 House transcript).

[12] SB 259 (2021), § 1(2)(b)(A) (establishing a September 27 deadline).

[13] Pets.' Trial Memo at 20–21.

[14] *See id.* §§ (7)–(9) (providing that the Special Judicial Panel has authority to consolidate petitions, allow *amicus* participation, request appointment of a special master, receive memoranda and evidence, hear oral argument, and decide petitions); ORS 174.010 ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Furthermore, as the Presiding Judge held, under separation of powers principles, "discretionary acts governing the internal procedures of the legislative branch are not subject to scrutiny or control by the judicial branch where those procedures do not conflict with constitutional provisions"—and the determination of committee composition is one such act.[15] Even if such evidence were admissible, it would not be relevant to the issue of partisan intent under that same rationale.[16]

4. Floor and committee statements of legislators opposed to SB 881

In support of their argument that SB 881 was designed to favor Democratic candidates, Petitioners cite floor and committee statements of Republican legislators expressing their opposition to the map.[17] Those statements prove nothing about the intent of the map's proponents. "In general, an examination of legislative history is most useful when it is able to uncover the manifest general legislative intent behind an enactment." *State v. Gaines*, 346 Or 160, 172 n 9 (2009) (quoting *Errand v. Cascade Steel Rolling Mills, Inc.*, 320 Or 509, 539 n 4 (1995)). The statements of legislators who *opposed* an enactment contribute nothing to that analysis.

---

terms or in substance, contained therein, *not to insert what has been omitted . . . .*" (Emphasis added.)).

[15] Order on Non-Parties' Mot. to Quash; Protective Order at 3-4 (October 21, 2021) (citing S*tate ex rel. Overhulse v. Appling*, 226 Or 575, 586 (1961)).

[16] Beyond all of that, these allegations suffer from evidentiary problems, among other things, that Petitioners attempt to establish what legislators said and subjectively believed through hearsay testimony that also lacks a foundation. 5 *See* Respondent's Evidentiary Mot. & Memo at 3, 4, 6, 7, 15 (Nov. 10, 2021) (hearsay and foundation objections to the testimony of Petitioner Clarno and Representative Bonham).

[17] *See* Pets.' Trial Memo at 11 (citing 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)

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

5. Representative Bonham

Even if it were admissible, Representative Bonham's testimony does not show that the legislature enacted SB 881 with partisan intent.[18] This testimony lacks probative value for the same reasons that the Special Master recommended that it be excluded, including that the post-enactment views of a single legislator are not probative of the intent of the body as a whole, and that the testimony consists of lay opinion, conjecture, and hearsay. The post-enactment testimony of a single legislator, made for purposes of litigation, would be a thin reed upon which to judicially circumvent legislation enacted by the body as a whole.

Furthermore, Representative Bonham's testimony shows that he was a bystander during the period that SB 881 was under consideration, as he served on the House Redistricting Committee only until September 20, 2021.[19] He was not part of the reconstituted committee during the critical period leading up to the enactment of SB 881 on September 27, 2021, and was therefore not in a position to gain personal knowledge about proceedings during that time.[20] Though Petitioners characterize Representative Bonham as having a "first-hand view of the process," the testimony shows otherwise; it relies almost exclusively on his opinions about redistricting decisions and what others purportedly told him about what was happening.[21]

Representative Bonham testified that he believed that he would have likely been informed of any communications by his caucus's members regarding redistricting,[22] yet admitted that he had no basis to testify that no members of the Republican caucus had private

---

[18] *See* Pets.' Memo in Support of Pet. at 11–13, 20–21 (relying on Representative Bonham's testimony).

[19] *See* Ex. 1003, at ¶ 1, Declaration of Daniel Bonham; 10/27/2021 Hrg. Trans. (vol. 1) at 102:3-12.

[20] SB 881 was not before the House until Representative Bonham was no longer a member of the congressional-redistricting committee. Ex. 1003, ¶¶ 17-21, Bonham Dec; *see* Ex. 2006, at p. 4, 2021 1st Special Session (showing vote of House committee).

[21] Pets.' Trial Memo at 11.

[22] 10/27/2021 Hrg. Trans. (vol. 1) at 168:2–19.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

conversations with Democratic legislators without his participation. That concession undermines his assertions that no political negotiations took place, and it shows that his testimony was not, in fact, based on upon direct personal knowledge.[23] Without personal knowledge of his colleagues' subjective intent, Representative Bonham's belief of partisan purpose is pure speculation based on the form of the final map. He implicitly admits as much by asserting that the "partisan design" is apparent, because, in his view, the redistricting maps broke up the greater Portland area into four districts.[24] Petitioners do not offer the representative's testimony as expert testimony (nor would it be appropriate to do so).[25] Although Representative Bonham is certainly entitled to his personal opinion, it is of no probative value.

In sum, Petitioners' reliance on Representative Bonham's testimony as the linchpin for their partisan-intent claim demonstrates the absence of evidence necessary to justify judicial intervention. Personal opinion, conjecture, and hearsay offered through the post-enactment statements of an individual legislator is not probative of partisan intent.

6. The varied, conflicting public hearing testimony does not show that the map was enacted with partisan intent.

In support of their argument that the enacted map was intended to favor Democratic candidates, Petitioners cite public hearing testimony in which residents expressed differing views

---

[23] 10/27/2021 Hrg. Trans. (vol. 1) at 125:9–126:16; *see also* Ex. 1003, ¶ 20, Bonham Dec. (Representative Bonham no longer on congressional redistricting committee); *id.* at ¶ 22 (Representative Boshart Davis—not Representative Bonham—attended House Committee on State Legislative Redistricting); 10/27/2021 Hrg. Trans. (vol. 1) at 105:7–11 (Representative Bonham did not converse with Speaker Kotek about the reconstitution of the redistricting committee), 115:19–116:9 (Representative Bonham not involved in congressional redistricting; instead limited to being "together in our caucus room"), 122:17–123:3 (Representative Bonham's belief that Minority Leader Drazan and Representative Boshart Davis received the enacted map at the same time as him based solely on fact that "they were sitting with me when I received it"), 126:13–16 (admitting inability to know about all conversations between Minority Leader Drazan and Democratic leadership).

[24] Ex. 1003, at ¶ 11, Bonham Dec.

[25] 10/27/2021 Hrg. Trans. (vol. 1) at 134:22–23.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

on how Portland and Bend should be apportioned.[26] The fact that the enacted map reflects some of that testimony and does not reflect other, conflicting testimony does nothing to show that the map was enacted with partisan intent. As the Special Master found, there is no way that the map could have fulfilled the wishes of every person who testified.[27]

7. Petitioners' geographic policy preferences

Petitioners assert the enacted map was "designed to favor Democratic Party candidates for Congress" because (1) the map does not pack the Portland metropolitan area into one or two districts; and (2) District 5 crosses the Cascade Range, therefore encompassing areas to the east and to the west of that mountain range, including Bend. These arguments fail for all of the reasons set out at pages 29-30 of Respondent's Trial Memorandum.

In addition, Petitioners fail to support this allegation with persuasive evidence, given that they rely on unhelpful and likely inadmissible lay opinion from Petitioner Clarno and Representative Bonham.[28] They also rely on public testimony that advocates for the policies that Petitioners favor (such as packing Portland and diluting the urban vote), but that were not ultimately adopted by the legislature. As explained by the Special Master, the existence of conflicting testimony in such a large legislative record is inevitable, and the fact the legislature declined to adopt the policies favored by Petitioners and some of the witnesses who testified does not support an inference that the legislature acted with partisan intent.

8. Relevance of 188.010(1) compliance to rebut allegations of partisan intent and noncompliance with ORS 188.010(2)

Respondent requested extensive findings relating to SB 881's compliance with the ORS 188.010(1) traditional redistricting criteria, which the Special Master, determining that they

---

[26] Pets. Trial Memo at 11, 18–19.

[27] *See* SMRFOF ¶ 213 ("The Redistricting Committees heard testimony expressing a variety of views, and it was not possible to satisfy them all.").

[28] *See* Pets.' Trial Memo at 11-12.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

remain relevant, provided. Evidence of what the legislature *did* intend is clearly relevant to rebut assertions that the legislature intended something different. This is so for all of the reasons set forth in Respondent's Trial Memorandum at pages 25-26, not repeated here.

Petitioners suggest that because ORS 188.010(1) and ORS 188.010(2) are separate provisions of the same statute, they are unconnected and must be considered in isolation. This argument is untethered from Oregon law. In determining legislative intent, courts must consider a statute's text, context, and legislative history. Here, ORS 188.010—in its entirety—is important context to SB 881 because it is a related statute on the same subject, and ORS 188.010's closely related provisions should be read together, not in isolation. *See Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 508 (2004) ("Ordinarily, however, 'text should not be read in isolation but must be considered in context.' Context includes other provisions of the same statute.") (quoting *Stevens v. Czerniak*, 336 Or 392, 401 (2004)). And the legislative history of SB 881 is clearly relevant and helpful to the Court under the circumstances here, for reasons that have already been explained.

Petitioners also suggest that because there are cases in which courts from other jurisdictions found that it was *possible* for a map to both comply with those states' traditional redistricting criteria and nonetheless constitute an unlawful partisan gerrymander, the Court should *refuse to consider* evidence of compliance with traditional redistricting criteria here.[29] But there is no justification for this Court to refuse to consider relevant legislative history evidence in interpreting what the legislature intended in enacting SB 881. And Petitioners, unlike the challengers in the cases they cite, have failed to prove both partisan intent and partisan effect. In the absence of such a showing, evidence of what the legislature did intend is particularly relevant.

[29] *See* Pets.' Trial Memo at 23–24.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

C. Petitioners' legal arguments regarding the first claim and partisan intent generally fail.

Petitioners' legal arguments regarding the first claim are meritless and ignore basic tenets of Oregon law.

1. Petitioners offer no basis for reading "the purpose" in ORS 188.010(2) to mean "motivating factor.

ORS 188.010(2) is implicated only if the legislature draws a district for the purpose of partisan favoritism. Petitioners offer no persuasive reason for this Court to apply the "motivating factor" standard from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), when assessing what the legislature's "purpose" was under ORS 188.010(2).[30] Statutory construction of an Oregon statute is governed by a well-established framework that considers text, context, and legislative history to determine the intent of the legislature that enacted the statute. *State v. Gaines*, 346 Or 160, 171-72 (2009). Petitioner offers no argument based on text, context, or history for importing the *Village of Arlington Heights* standard.

Textually, the criterion that the legislature must consider under ORS 188.010(2) is that districts not be drawn for "*the* purpose" of favoring a political party. (Emphasis added). By using the definite article "the" instead of the indefinite article "a" for the word "purpose," the text suggests that partisan favoritism must be the sole or at least dominant purpose. *See State v. Lykins*, 357 Or 145, 159 (2015) ("As a grammatical matter, the definite article, 'the,' indicates something specific, either known to the reader or listener or uniquely specified."). The text does not support interpreting "the purpose" to mean "a motivating factor."

Nothing in the statute's context or legislative history supports a different conclusion than the text suggests. ORS 188.010(2) was enacted in its present form in 1979. Or Laws 1979, ch 667, § 1. The language was originally drafted by the House to guide the work of a proposed

[30] *See* Pets.' Trial Memo at 13.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

bipartisan redistricting commission. *See* House Amendments to Printed A-Engrossed Senate Bill 305, § 11 (June 28, 1979). A conference committee rejected the proposed commission but kept the language as a guide to the redistricting work of the legislature and the Secretary of State. *See* Conference Committee Amendments to Printed A-Engrossed Senate Bill 305 (July 3, 1979). Nothing in the legislative history suggests that the legislature had in mind the then-recent ruling in *Village of Arlington Heights*, which addressed how to determine if a municipality's zoning decision was racially discriminatory. 429 U.S. at 254. *Village of Arlington Heights* itself emphasized that race discrimination was a uniquely pernicious problem that required a separate legal standard. *Id.* at 265-66 ("But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified."). Petitioners offer no reason to think that the 1979 Oregon legislature intended to codify that standard from a different area of the law into ORS 188.010(2).

Thus, courts—including most of the courts cited by Petitioners[31]—generally *reject* the motivating-factor standard as appropriate for claims of partisan gerrymandering and apply a predominant-purpose standard instead. *See, e.g.*, *Ohio A. Philip Randolph Inst. v. Householder*, 373 F Supp 3d 978, 1095 (SD Ohio), *vac'd and rem'd*, 140 S. Ct. 102 (2019); *Common Cause v. Rucho*, 318 F Supp 3d 777, 864 (MDNC 2018), *vac'd and rem'd*, 139 S. Ct. 2484 (2019).

2. Petitioners do not explain how their ORS 188.010(2) claim states a legally cognizable claim.

Petitioners do not take issue with the bedrock principle that a court cannot invalidate one statute on the ground that it violates an earlier-enacted statute. They offer several undeveloped assertions in response, but none has merit.

[31] *See* Pets.' Trial Memo at 14.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

The principle that one statute cannot violate another draws on and relates to the well-established case law disfavoring implied repeal. Although the court "will not *presume* an intent to repeal" when a statute does not do so explicitly, "when a subsequent statute is repugnant to or in conflict with a prior statute the prior statute is impliedly repealed." *Buehler v. Rosenblum,* 354 Or 318, 325 (2013) (emphasis added; quotation marks and ellipsis omitted). Implied repeal exists "when there is plain, unavoidable, and irreconcilable conflict between the new and the old statute"; that is, "where the carrying out of the later act prevents the enforcement of any part of the former." *Id.* (quotation marks omitted).

Respondent is *not* arguing that SB 881 impliedly repealed ORS 188.010(2). SB 881 is not a partisan gerrymander, there is no evidence that the legislature intended it as such, and the Secretary of State[32] strongly opposes partisan gerrymandering. The legislature fully complied with ORS 188.010(2) when it enacted SB 881, and there is no conflict between those two statutes. But *if* the Court were to disagree and conclude that the two statutes irreconcilably conflicted, such that SB 881 could not be implemented if ORS 188.010(2) were enforced, it is black letter law that the more recently enacted SB 881 would prevail.

Although Petitioners cite Article IV, section 6, of the Oregon Constitution, that provision has nothing to do with congressional redistricting.[33] It governs Supreme Court review of the *state* legislative maps.

Petitioners also argue that the argument that one statute cannot violate another statute was waived.[34] This argument fails for three reasons.

First, an argument about the proper interpretation of a statute is not waivable; the Court has an obligation to construe the statute correctly regardless of the parties' arguments. *See*

---

[32] As the Court knows, the Secretary is the technical defendant here (*see* SB 259 (2021), § 1(3)), though she had no role in the congressional redistricting process.

[33] *See* Pets.' Trial Memo at 16.

[34] *See* Pets.' Trial Memo at 16.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Stull v. Hoke, 326 Or 72, 77 (1997) ("In construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties."); *see also Strasser v. State*, 368 Or 238, 260 (2021) ("While this court generally will confine itself to the arguments that the parties have actually asserted in a case, we have an independent duty to correctly interpret any statute that comes before us, regardless of the arguments and interpretations offered by the parties."); *State v. Vallin*, 364 Or 295, 300 (2019), *opinion adh'd to as modified on recons*, 437 P3d 231 (Or 2019) ("At bottom, the issue here is one of constitutional interpretation, and this court is duty-bound to interpret the law correctly, without regard to the parties' arguments or lack thereof.").

Second, the trial brief is not too late to make an argument that Petitioners' statutory claim under ORS 188.010(2) fails to state a claim upon which relief could be granted. Under ORCP 21 G(3), such a defense "may be made in any pleading * * * *or* at the trial on the merits." (Emphasis added); *see also Vance v. Ford*, 187 Or App 412, 420 (2003) ("[E]ven if defendants had failed to assert the defense in a pleading, they could have raised it for the first time at trial."). Because this Court has not yet held the "trial" of this special proceeding, the defense is timely even if it were waivable. The only case Petitioners cite—*Fox v. Collins*, 213 Or App 451 (2007)—involved a statute-of-limitations defense. That defense, unlike failure to state a claim, is waived if not included in the answer or an ORCP 21 motion. ORCP 21 G(2).

Finally, the Answer *did* expressly preserve the defense. The Answer's First Affirmative Defense was that the statutory claims under ORS 188.010 failed to state a claim upon which relief could be granted, and the Fourth Affirmative Defense was that the claims are nonjusticiable. Nothing more was required to preserve the argument that the ORS 188.010 claims fail as a matter of law.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Petitioners also accuse the State of "repudiat[ing]" what it said about ORS 188.010(2) in two U.S. Supreme Court amicus briefs.[35] Not so. Those briefs cited ORS 188.010(2) as part of a list of state laws that bar officials from drawing district lines for the purpose of favoring or disfavoring a political party.[36] And so it does. That law is binding on the Secretary of State when she is called upon to draw state legislative maps, and it guides the courts when they draw or redraw maps.

As a duly enacted law, ORS 188.010(2) also binds the legislature when it draws districts—unless and until the legislature repeals it, either expressly or impliedly. The legislature properly treated ORS 188.010(2) as binding and complied with it when enacting SB 881. The two statutes are consistent. If, but only if, SB 881 conflicted irreconcilably with ORS 188.010(2), the more recent statute would control.

D. Petitioners' Free and Equal Election Clause Claim is Meritless.

The parties agree that the Free and Equal Elections Clause prohibits partisan gerrymandering, but they disagree about the standard. Respondent's opening brief surveys the text and Oregon Supreme Court case law to demonstrate that a partisan gerrymandering plaintiff must "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."[37] Petitioners, on the other hand, simply assert that Article II, section 2, requires the Court to adopt as a constitutional mandate their proposed test under the efficiency gap, which they apparently gleaned from a 2015 law review article.[38] They also cite an out-of-state case holding, correctly, that free-and-equal-elections

---

[35] *See* Pets.' Trial Memo at 16.

[36] Ex. 1024, at 19; Ex. 1025, at 18.

[37] Respondent's Trial Memo at 41.

[38] Pets.' Trial Memo at 28–34.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

clauses prohibit partisan gerrymandering.[39] But that case does not support their argument that the Oregon Constitution prohibits a redistricting plan simply because it was adopted by a party-line vote and fails to comport with their single preferred metric for partisan fairness.[40]

1. Petitioners failed to prove partisan intent

As explained in Respondent's opening brief (Section IV.A.1 (at 22–33) and above (Section B), Petitioners have failed to prove partisan intent. A failure to establish partisan intent is fatal to their constitutional claim.

2. Petitioners failed to prove partisan effect

a. The efficiency gap alone cannot prove partisan effect.

Petitioners' argument about the effects prong centers entirely on a single metric—the efficiency gap—and the proposition that the Court should automatically condemn any map that exceeds a threshold Petitioners have chosen: 7%. The evidentiary record does not support that approach. Even if the efficiency gap has value, it has well-known limitations, especially when, as here, the map being analyzed has fewer than 7 districts. Moreover, not even the efficiency gap's academic proponents propose a 7% threshold. The efficiency gap was never meant to be a stand-alone metric; at most an abnormally large efficiency gap (far in excess of the efficiency

[39] Pets.' Trial Memo at 27 (citing *League of Women Voters v. Commonwealth*, 178 A.3d 737, 97–123 (Pa. 2018)).

[40] *League of Women Voters*, 178 A.3d at 816–17 (2018) ("an essential part of such an inquiry is an examination of whether the congressional districts created under a redistricting plan are: composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population."); *id.* at 817 ("When, however, it is demonstrated that, in the creation of congressional districts, these neutral criteria have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage, a congressional redistricting plan violates Article I, Section 5 of the Pennsylvania Constitution."). In dicta, the Court notes other methods may be used to prove a redistricting plan violates the Pennsylvania Constitution, but *LWV* does not propose the standards that would apply to such an inquiry. *Id.* at 817.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

gap estimates here[41]) suggests the need for further inquiry to see whether the figure is sensitive to small shifts in voter preference and whether it can be explained by political geography.

First, the efficiency gap's value here is questionable because of inherent shortcomings of the metric. It "does not measure partisan symmetry …."[42] And, as recent peer-reviewed research has conclusively established, the mathematical premises of the metric are simply incorrect.[43] Moreover, the value of the efficiency gap for any purpose is limited because it swings wildly depending on the parties' statewide vote share; here, all that "suggest[s is] that the Enacted Map does not offer a durable advantage to either party."[44]

Petitioners argue that the Court should nevertheless prefer the efficiency gap over any other measure because it is "easy to calculate."[45] It's true that the efficiency gap is trivially simple in one respect: *given a known election result,* the efficiency gap can be calculated using fifth-grade math.[46] That simplicity also makes it of limited utility in answering the real question here: how to predict the results of elections in the coming decade. Provided one knows how many hits and at bats a baseball player has, it's easy to calculate a batting average,[47] but knowing that formula does not make it possible to predict a player's batting average over the next 10 years.

---

[41] SMRFOF ¶¶ 265–266, 281, 284–285.

[42] SMRFOF ¶ 237.

[43] Ex. 2304 at 13–14 (adopted by reference Ex. 2300 at 3 (¶ 10)).

[44] SMRFOF ¶ 285; *see also* Ex. 1048 at 3 (Brunell) (showing efficiency gap values ranging from 21.24% (2016 President) to -23.8% (2016 Secretary of State), a range of 45%.

[45] Pets.' Trial Memo at 30.

[46] "A wasted vote is either (a) a vote cast for a losing candidate or (b) a vote cast for a winning candidate beyond the 50% + 1 required for victory. Stephanopoulos and McGhee define the efficiency gap as "the difference between the parties' respective wasted votes, divided by the total number of votes cast in the election." Ex. 3001 at 13 n 34 (Caughey); *accord* Ex. 1006 at 7 (Brunell).

[47] Hits divided by at-bats.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

The wide-ranging estimates of the efficiency gap flowing from different methods used in this case illustrate this fact vividly:[48]

- Brunell (Oct. 25)[49]: 19.85%
- FiveThirtyEight[50]: 17.2%
- PlanScore[51] / Caughey (average results, relying on PlanScore)[52]: 8.5%
- Brunell (Oct. 28)[53]: 7.7%
- Caughey (assuming statewide vote is tied)[54]: "almost exactly 0"
- Princeton Gerrymandering Project[55]: decline to calculate – too few seats

This wide variance in estimates of the efficiency gap in future elections shows that the metric depends heavily on the method used. Dr. Brunell's own estimate of the efficiency gap changed from 19.85% in his original report to 7.7% in the supplemental report he filed after cross-examinations were complete.[56]

Second, not even the proponents of the efficiency gap as a measure of partisan bias support using the 7% threshold that Petitioners suggest here. The original law review article proposing the efficiency gap suggested that courts condemn a plan for congressional districts as a partisan gerrymander only if the efficiency gap is equal to two seats.[57] For a 6-seat map, that is a

---

[48] See Appendix 1, a summary of the experts' methods.

[49] Ex. 1005 at 3 (¶ 15). See also Ex. 1006 at 8 (calculating this number as the average of 21.07%, 21.24%, and 17.23%).

[50] Ex. 1022 at 2.

[51] Ex. 2703 at 1.

[52] Ex. 3001 at 15 (¶ 28)

[53] Ex. 1048 at 3. This is calculated as the average of 18 values ranging from 21.24% (2016 President) to -23.8% (2016 Secretary of State), a range of 45%.

[54] Ex. 3001 at 15 (¶ 29).

[55] Ex. 1023.

[56] *Compare* Ex. 1005 at 3 (¶ 15) *with* Ex. 1048 at 3 (¶ 7).

[57] Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 837 (2015) ("To take into account both the severity and the

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

33.33% efficiency gap.[58] None of the efficiency gap estimates in this case come anywhere close to that mark. And the testimony in this case shows "that efficiency gaps of this magnitude are hardly unusual …."[59]

Finally, the efficiency gap was never designed to be a stand-alone metric based on a single figure. Judges who have found the efficiency gap relevant have recognized that even a large gap might not be probative in a given instance.[60] Thus, even if the Court were to adopt a 7% threshold, it would have to consider other evidence of partisan bias or fairness to complete the picture. No court has ever suggested that the efficiency gap alone is dispositive; no judge has even proposed such a rule. The Special Master in this case found "[t]he efficiency gap alone may not 'measure the partisan fairness of a proposed electoral map.'"[61] In short, no one believes that the efficiency gap (or other partial metrics for that matter) offers a complete analytical picture.

The discussion above of the efficiency gap's shortcomings is entirely consistent with the State's amicus briefs in prior federal cases on which Petitioners rely.[62] Those briefs did not suggest that courts should use the efficiency gap and only the efficiency gap—however

---

durability of gerrymanders, we recommend setting the bar at *two seats* for congressional plans….").

[58] 10/28/2021 Hrg. Trans. (vol. 2) at 109:21–111:3 (Katz); Ex. 2300 at 13 (noting that "since the enacted Congressional map only has six districts," "the seat share can only move by 1/6 or 16.67%").

[59] SMRFOF ¶ 284; *see also* SMRFOF ¶¶ 265–66.

[60] *See, e.g.*, *Rucho*, 139 S Ct at 2516 ("the State must come up with a legitimate, non-partisan justification to save its map"); *Whitford v. Nichol*, 151 F Supp 3d 918, 931 (WD Wis 2015) *rev'd on other grounds* 138 S. Ct. 1916 ("The defendants also might be able to show that a large efficiency gap is justified by a legitimate state interest, which may include traditional districting criteria such as equal population, compliance with the Voting Rights Act, compactness, respect for political subdivisions or respect for communities of interest (step three).").

[61] SMRFOF ¶ 238.

[62] As a formal matter, these briefs are not relevant evidence. *See* Respondent's Evid. Mot. & Memo at 26-27. Even if they were, they would not establish that Respondent here—much less the courts—are legally bound by the arguments advanced in those briefs.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

inappropriate for the particular case—to determine whether there was an illegal partisan gerrymander. Quite to the contrary, the briefs emphasized that the inquiry had to "look at a full range of metrics," and that even a large efficiency gap would not be ground for invalidating a map if the gap could be explained by neutral considerations:

> **Texas amici also err in focusing on a single metric - the efficiency gap** - and assuming that if a State's election results in a single year yield a high efficiency gap, the effects prong is satisfied and the map is unconstitutional. …. **A purpose-and-effects test in this context would have to look at a full range of metrics** …. And Texas amici ignore that even a large efficiency gap is not a problem if it can be explained by something other than intentional partisan entrenchment for the long-term ….
> Properly applied, a purpose-and-effects standard will invalidate only the most extreme maps**….**[63]

The States' brief in *Rucho* also expressly disclaimed reliance on a single metric.[64]

That is as it should be. As the Special Master found, "the evidence shows that experts also agree that no one metric should be used without consideration of other tests, because while any one test may be acceptable, the reliability of the metric must be tested by consideration of other metrics."[65] The Special Master found that four common indicators were each within the margin of error, with two leaning in favor of Democrats and two leaning toward Republicans.[66] For that reason, he concluded "'[t]here is, in short, little compelling evidence that the Oregon

---

[63] Ex. 1024 at 17 (States Amicus Brief, *Gill v. Whitford*, 2017 WL 3948435, at *16-*17 (U.S. 2017)). *See also* Ex. 1025 at 15 (States Amicus Brief, *Rucho v. Common Cause*, 2019 WL 1167911, at *15 (U.S. 2019) ("[M]etrics such as the efficiency gap showing that a map is an extreme partisan outlier merely 'provide *evidence* that' it violates constitutional standards. Pet. App. 122. Thus, if a State's election results in a single year yielded a high efficiency gap, that alone would not likely satisfy the effects prong. And even if it did, the map still would be upheld if the effect could be explained by something other than intentional partisan entrenchment….")

[64] Ex. 1025 at 15 (States Amicus Brief, *Rucho v. Common Cause*, 2019 WL 1167911, at *15 (U.S. 2019) ("no single metric is likely to satisfy the effects prong by itself").

[65] SMRFOF at p. 15.

[66] SMRFOF ¶ 286.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

districting plan substantially favors the Democratic Party.'"[67] That finding is well supported by the record.[68]

The context in which these amicus briefs were filed also matters. None of the cases had a serious factual question at issue. All were obvious and extreme partisan gerrymanders that none of the defendant states seriously contested; the only question was whether the Supreme Court would determine there was a cognizable constitutional claim prohibiting partisan gerrymandering:

- In North Carolina, the Republican chair of the redistricting committee said, in the legislative record, that the legislature was "'draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [I] d[o] not believe it['s] possible to draw a map with 11 Republicans and 2 Democrats.'"[69]
- In Maryland, Democratic leaders—admittedly—drew the lines intentionally "'to create a map that was more favorable for Democrats over the next ten years.' … [The mapdrawer] received only two instructions: to ensure that the new map

[67] SMRFOF ¶ 287 (adopting Dr. Caughey's conclusion).

[68] *See* Ex. 3001 at 6 (¶ 12) (Caughey) ("no one indicator provides a dispositive test of partisan gerrymandering"); 10/27/2021 Hrg. Trans. (vol. 1) at 276:18–277:8 (Brunell) (Q: "would find [partisan bias, mean median, declination] to be valid metrics of – " A. "Yeah, there's a lot of decent metrics out there to measure partisan gerrymandering and they all have -- you know, there's pluses and minuses to them.").

[69] *Rucho v. Common Cause*, 139 S. Ct. 2484, 2510 (2019) (Kagan, J., dissenting).

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

produced 7 reliable Democratic seats, and to protect all Democratic incumbents.'"[70]

- In Wisconsin, Republicans won the lower house of the state legislature by a 19-seat margin (60 seats to 39 seats) in an election in which Republican candidates received fewer votes than Democratic candidates.[71]

Other metrics confirmed that these were extreme partisan gerrymanders.[72]

Also not at issue in either amicus brief were the efficiency gap's particular shortcomings for evaluating a six-district plans, because those cases concerned a 13-member North Carolina U.S. House delegation and a 99-seat Wisconsin Assembly.[73] As the Special Master found, "Efficiency gap is an even less reliable measure of partisan fairness for congressional elections in Oregon, because Oregon has only six seats."[74] That finding is well supported by the record:

- Dr. Brunell's own testimony admitted as much.[75]
- PlanScore warns its readers: "This plan has 6 seats. Fairness metrics for plans with fewer than seven seats should be interpreted with great caution."[76]
- Princeton Gerrymandering Project refuses to publish an efficiency gap metric for Oregon at all: "Additional metrics: Not calculated because this map has either

---

[70] *Rucho v. Common Cause*, 139 S. Ct. 2484, 2510—11 (2019) (Kagan, J., dissenting).

[71] *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018) ("In 2012, Republicans won 60 [of 99] Assembly seats with 48.6% of the two-party statewide vote for Assembly candidates.").

[72] *See also* Ex. 1025 at 2 (States Amicus Brief, *Rucho v. Common Cause*, 2019 WL 1167911, at *2 (U.S. 2019)) ("North Carolina's map maximized partisan advantage to a greater extent than 99 percent of all possible districting maps based on neutral criteria.").

[73] The Maryland claim in *Bensek* (which was consolidated with *Rucho*) was not based on a statewide theory of partisan gerrymandering and metrics like efficiency gap were not at issue. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2518 (2019) ("the Maryland gerrymander involved just one district").

[74] SMRFOF ¶ 239.

[75] 10/27/2021 Hrg. Trans. (Rough) at 230:8-232:14 (Brunell).

[76] Ex. 2703 at 1.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

fewer than 7 districts or the voteshare is outside 45-55% causing the metrics to be unreliable."[77]

Petitioners' sole reliance on the efficiency gap, on which Petitioners' entire proof of partisan effects rests, should be rejected.

b. The Special Master was correct to find Dr. Brunell unreliable.

Contrary to Petitioners' argument, the Special Master's finding that "the methodology [Dr. Brunell] employs, and therefore the conclusions he reached, lack credibility and are therefore unreliable" is well grounded in the record.[78] If anything, the Special Master's conclusion that Dr. Brunell's missteps were honest methodological errors was generous.[79] No one disputes the Special Master's conclusion that Dr. Brunell is a well-credentialed political scientist, but his report in this case is not based on any methods recognized in that field. It is therefore inadmissible under *State v. O'Key*.[80] Even if Dr. Brunell's testimony is admissible, the Court should give it no weight.

i. Brunell's methods to calculate efficiency gap and proportionality are unreliable.

Petitioners misunderstand the basis of the Special Master's finding on of the "lack of methodological rigor" in Dr. Brunell's work:[81] while it is true that there are problems with relying on proportionality and efficiency gap as metrics of partisan effect in general,[82] Dr.

---

[77] Ex. 1023 at 2.

[78] SMRFOF ¶ 289.

[79] *See* Respondent's Proposed Findings of Fact ¶¶ 262–91 (detailing four sets of material inaccuracies in Dr. Brunell's testimony). Dr. Brunell also decided not to disclose the results of his analyses of the 2014, 2016, and 2018 Governor's race when he knew those results severely undermined the conclusions he presented to the Court. *Id.* at ¶¶ 263–73.

[80] Respondent's Evidentiary Mot. & Memo. at 29-32.

[81] SMRFOF ¶¶ 296–302.

[82] *See* § D.2.a, above.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Brunell's method of estimating these metrics is not reliable.[83] Dr. Brunell reaggregates the raw results of past statewide elections for other offices rather than make any effort to determine how elections for the U.S. House are correlated to election results for other offices. He also provides no probability or other estimate of uncertainty.[84] As Dr. Katz testified, this is not a recognized method in political science.[85] And on the stand, Dr. Brunell could identify no peer-reviewed publication in the history of political science that supports the methods used in his report. This alone makes his testimony inadmissible.[86]

ii. Brunell's testimony on county splits, compactness, and maps is unreliable.

As the Special Master found, Dr. Brunell's report passed along the work of an unnamed mapmaker received from counsel, despite no independent verification and without disclosing that fact.[87] That is quite different from relying on the raw data of election results from sources ordinarily relied on by political scientists.

Dr. Brunell's published views about the insignificance of county splits and compactness as redistricting criteria are directly at odds with his testimony in this case. Nothing in Dr. Brunell's article was taken out of context: Petitioners point to no other part of Dr. Brunell's article that shows the parts he was asked about are not representative of his views. And, on cross-examination, Dr. Brunell had no plausible explanation for the difference between his

[83] SMRFOF ¶¶ 300–02.

[84] SMRFOF ¶¶ 296, 300; 10/27/2021 Hrg. Trans. (vol. 1) at 212:24–213:6 (Brunell).

[85] 10/28/2021 Hrg. Trans. (vol. 2) at 156:16–20 (Katz) (offer of proof) (Q. "What … do you think the likelihood is that the methods presented here [by Dr. Brunell] would survive peer review and be published in a refereed journal? A. None ….").

[86] Respondent's Evidentiary Mot. & Memo. at 29–32.

[87] SMRFOF ¶ 291.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

longstanding published views and his testimony in this case.[88] If there is any doubt, the Panel's own review of the article in comparison to his report will easily resolve the issue.[89]

The Special Master's finding that Dr. Brunell's testimony is not reliable is well founded.

E. Petitioners' Article I claims fail as a matter of law

Petitioners make no attempt to square their claims with Oregon jurisprudence or the text, context, or history of any of the provisions of Article I they assert in this case.[90] These claims fail as a matter of law for the reasons articulated in Respondent's opening brief.[91] Even if these constitutional provisions were reinterpreted to address partisan gerrymandering, Petitioners' claims fail factually for the same reasons as their Free and Equal Elections claim fails: Petitioners have not proven partisan intent or partisan effect.

F. Petitioners have failed to propose a legally permissible map

As explained in Respondent's Trial Memorandum, Petitioners have not proposed a legally permissible map, because it would unnecessarily divide communities of common interest in violation of ORS 188.010(1), and it is biased in favor of Republican candidates in violation of ORS 188.010(2).[92] Petitioners now suggest that the Court should squeeze a remedy phase into this trial to address these deficiencies, stating that they "would thus welcome Respondent, Intervenors or any other interested parties submitting their own competing remedial maps, with as close to an efficiency gap of 0 as possible."[93]

This Court has until November 24, 2021, to decide this case and, if the Court finds it necessary, to "create its own reapportionment plan." SB 259 § 1 (8)(a), (10)(a). Petitioners have

---

[88] SMRFOF ¶¶ 294–95 (citing Brunell cross-examination at 10/27/2021 Hrg. Trans. (vol. 1) at 175–76, 187).

[89] Ex. 2701A.

[90] Pets.' Trial Memo at 26:19–27:14.

[91] Respondent's Trial Memo at 45–51.

[92] *See* Resp's Trial Memo at 51–55; *see also* SMRFOF ¶¶ 307–311.

[93] Pets.' Trial Memo at 34.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

failed to justify their proposed plan, and the Court should reject this eleventh hour request to effectively amend the scheduling order.

RESPONSE TO PETITIONERS' EVIDENTIARY ARGUMENTS

This section of the response addresses evidentiary arguments introduced by Petitioners in their merits brief.[94]

A. Legal standard

The issues of admissibility discussed below are all questions of law. *See State v. Babson*, 355 Or 383, 417–28 (2014) (construing scope of Debate Clause); *State v. Henderson-Laird*, 280 Or App 107, 115 (2016) ("The admissibility of hearsay is a question of law that we review for legal error."); *State v. Hickman*, 355 Or 715, 731 (2014) (requiring proponent of testimony to produce evidence "from which a rational juror could find" that witness has personal knowledge); *State v. Davis*, 336 Or 19, 25 (2003) (rulings on relevance reviewed for legal error); *State v. Etzel*, 310 Or App 761, 774 (2021) ("It is a question of law whether evidence is 'scientific' in nature.").

Under SB 259, the Presiding Judge has the exclusive authority to make procedural and evidentiary rulings in this proceeding.[95] If Petitioners wish to appeal the Presiding Judge's evidentiary rulings, the court with jurisdiction to review those rulings is the Oregon Supreme Court, not the Special Judicial Panel. *See id.* §§ (9)(c), (10)(b) (providing for direct appeal to Supreme Court); *see also id.* § (11)–(13) (providing procedure and standards for appeal).

[94] Respondent does not waive any of the objections previously set out in Respondent's Evidentiary Motion and Memorandum of October 10, 2021.

[95] SB 259 provides that "The Chief Justice shall also select one of the appointed judges to preside over the special judicial panel and to make all rulings on procedural and evidentiary matters before the panel." Or Laws 2021, ch. 419, § 1(6).

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

B. The Special Master correctly concluded that the declaration and testimony of Representative Bonham were inadmissible on legislative privilege grounds.

The Special Master concluded that the declaration and hearing testimony of Representative Daniel Bonham, purporting to describe communications of other legislators, were inadmissible on the grounds of legislative privilege under the Debate Clause of the Oregon Constitution.[96] The Special Master explained that "in the present instance, the legislative privilege is a privilege of the Legislative Assembly as a whole, and allowing one member to waive privilege on behalf of the body would both undermine and dilute the purposes of the privilege identified in [*State v.*] *Babson*[, 355 Or 383 (2014)]."[97]

Petitioners argue that the Special Master's conclusion conflicts with how "Oregon courts have long characterized the Debate Clause privilege."[98] But *Babson*—the *only* case interpreting Oregon's Debate Clause, less than a decade ago[99]—did not address the issue of whether one legislator may waive the Clause's protection of another legislator's communications.[100] Accordingly, the Special Master's analysis "relie[d] on the underpinnings and fundamental teaching of *Babson*, while looking to guidance from other state courts that have more squarely considered this question within the context of their own constitutional debate clauses."[101] The Special Master's approach thus reflected the approach of the Supreme Court in *Babson* itself, where the court expressly endorsed the instructive value of other courts' interpretations of

---

[96] SMRFOF at pp. 3, 11–12.

[97] SMRFOF at p. 11.

[98] Pets.' Trial Memo at 37.

[99] *See Babson*, 355 Or at 417 ("This court has never interpreted [the Debate Clause] . . . ."); *State v. Babson*, 249 Or App 278, 294 (2012) ("That provision has never been construed by an Oregon court."). The other case that Petitioners cite, *Adamson v. Bonesteele*, 295 Or 815 (1983), did not address the Debate Clause. *Bonesteele* involved an assertion of a common law privilege by a city council member, not a Legislative Assembly member, so the Debate Clause did not apply. *See* 295 Or at 817; Or Const, Art IV, § 9 (referring to "Senators and Representatives").

[100] *See* SMRFOF at p. 8 (noting that this case presents "a different question" from the question considered in *Babson*).

[101] SMRFOF at p. 8.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

similar federal and state constitutional provisions. *See Babson*, 355 Or at 419 n 10 (noting the "useful perspective" of federal Speech or Debate Clause cases); *id.* at 421–23 (discussing *Coffin v. Coffin*, 4 Mass 1 (1808) and concluding that it is "in line with the text and context of" the Debate Clause).

For the reasons stated by the Special Master, the Court should strike the declaration and testimony of Representative Bonham.[102]

C. Petitioners cannot show that the Special Master erred in recommending exclusion of Representative Bonham's testimony on the alternative grounds of hearsay, foundation, and relevance.

Petitioners make no meritorious arguments for rejecting the Special Master's recommendation to exclude most of Representative Bonham's testimony on the alternative grounds of hearsay, foundation, and relevance.

1. Hearsay statements offered through Representative Bonham are not admissible under the state-of-mind exception.

Petitioners rely on the state-of-mind exception to the rule against hearsay, but that exception is unavailing here. They assert, without further explanation, that the hearsay statements should come in under the exception because "Representative Bonham's testimony was about the state of mind, intent, and plans of legislators."[103] That argument does not withstand scrutiny.

Under OEC 803(3), a hearsay statement is admissible if it is a "statement of the declarant's then-existing intent or plan." *State v. Clegg*, 332 Or 432, 441 (2001). There, prosecutors sought to prove that the defendant had hired people to kill the victim and had caused the victim to change her plan to go to lunch with a friend so that she would be present when the killers arrived. *Id.* at 436. For that purpose, the prosecutors' witness testified,

[102] *See* SMRFOF at pp. 5–12.

[103] Pets.' Trial Memo at 41.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

> And [the victim] said, "I just talked to [the defendant] and told him Gladys was going to take me to the bank and he said, 'No, no, no,' and insisted I not let Gladys take me, that he was going to take me when he took me to lunch."

Id. That hearsay statement was admissible because it was offered for the purpose of proving that the victim intended to go with Gladys to the bank before lunch, illustrating a straightforward application of the state-of-mind exception. *Id.* at 441.

This situation is different. As the Special Master correctly noted, hearsay statements do not come within the exception when they are "offered to prove the facts underlying the declarant's state of mind." *State v. Bement*, 363 Or 760, 765 (2018).[104]

Here, the hearsay statements offered through Representative Bonham are not offered for any permissible purpose. For example:

As to Speaker Kotek's purported agreement to have equal membership on the congressional redistricting committee, Petitioners do not offer that testimony about that agreement for the purpose of proving that Speaker Kotek created an equal-membership committee.[105] Rather, they offer it to argue that it "was done to ensure that the Committee recommended a neutral, non-gerrymandered map."[106] And they seek to use those hearsay statements to further argue that, when Speaker Kotek reconstituted the congressional redistricting committee into a three-person committee, the House Speaker did so with a partisan purpose, an underlying and heavily disputed assertion.[107]

As to Representative Bonham's references to ratings by "non-partisan third parties—such as FiveThirtyEight," Petitioners offer it to prove Representative Bonham's state of mind, namely that he found it "entirely unsurprising."[108] Petitioners offer no explanation for how the

---

[104] *See* SMRFOF at p. 4 (citing *Bement*).

[105] Ex. 1003 ¶ 5, Declaration of Daniel Bonham.

[106] Ex. 1003 ¶ 5, Bonham Dec.

[107] Ex. 1003 ¶ 6, Bonham Dec.; Pets.' Trial Memo at 20:19–23.

[108] Ex. 1003 ¶ 12, Bonham Dec.; Pets.' Trial Memo at 39:12–13.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

representative's lack of surprise is relevant. *See Clegg*, 332 Or at 440–41 (asking whether state-of-mind evidence was relevant).

For Democratic redistricting committee members' purported statement that "negotiating a compromise map between Plan A and the Republicans' proposed map was out of the question," Petitioners do not offer the hearsay statement to prove that, at the time of the statement, Democratic committee members were not interested in negotiating.[109] *See* OEC 803(3) (providing exception for "statement of the declarant's *then existing* state of mind . . . ."). Indeed, Representative Bonham never indicates when the statement was made, meaning it could have happened in the thick of public hearings. And the statement is entirely irrelevant as to the crucial time period between September 20 and September 27 during which SB 881 was discussed and passed, during which Representative Bonham was essentially uninvolved in the substantive discussions among legislative leaders. *See Clegg*, 332 Or at 440–41.

As a final example, for Senate President Courtney's purported statement that "the maps were the maps" when discussing the eventually enacted maps, Petitioners do not offer it to argue that the maps were enacted without further input from Representative Bonham, who was no longer on the congressional redistricting committee at that time.[110] Instead, they seek to argue that it proves that *no* Republican had *any* role in the form of those maps.[111] On this record, that is pure speculation. *See Clegg*, 332 Or at 440–41.

In sum, the Special Master correctly recommend excluding Representative Bonham's testimony on the alternative grounds of hearsay.

[109] Ex. 1003 ¶ 15, Bonham Dec.

[110] 10/27/2021 Hrg. Trans. (vol. 1) at 160:18–162:24.

[111] Pets.' Trial Memo at 21:24–26.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

2. Petitioners did not lay sufficient foundation for how Representative Bonham would personally know the facts he testified to.

Petitioners also insist that they have laid sufficient foundation for how Representative Bonham would personally know the facts excluded by the Special Master. But that insistence does not stand up to scrutiny. *See* OEC 602 (requiring proponent of testimony to introduce evidence "sufficient to support finding that the witness has personal knowledge of the matter"); *cf. State v. Lawson*, 352 Or 724, 753 (2012) (providing, for eyewitness testimony, that proponent "must offer evidence showing both that the witness 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*" (emphasis added)). In particular:

There was no foundation laid for how Representative Bonham would personally know that the Democratic committee members' initial proposal, Plan A, was a "partisan gerrymandered map, designed to create a disproportionately Democratic advantage."[112] Petitioners contend that the statements are "consistent with his knowledge and perception as an Oregon legislator and member of the redistricting committee and caucus."[113] But Representative Bonham is not an expert in detecting partisan intent in redistricting plans.[114] And he has given no admissible testimony on the subjective intent of Democratic legislators.

There was also no foundation laid for how the representative would personally know that "Democrats never once attempted to negotiate with Republicans on the congressional map."[115] On that point, Petitioners argue that the representative's testimony came from "his personal knowledge and experiences on the redistricting committee and in Republican leadership as point

---

[112] Ex. 1003 ¶ 10, Bonham Dec.

[113] Pets.' Trial Memo at 39:6–17 (discussing Ex. 1003 ¶¶ 10–12).

[114] *See* 10/27/2021 Hrg. Trans. (vol. 1) at 134:22–23 ("[W]e're not putting up Representative Bonham as an expert . . . .").

[115] Ex. 1003 ¶ 15, Bonham Dec.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

man on redistricting issues."[116] But the representative was not part of the reconstituted committee during the critical period leading up to the enactment of SB 881 on September 27, 2021, and was thus not in a position to gain personal knowledge about the Legislative Assembly's intent during congressional-redistricting proceedings. And he admitted that he had no basis to testify that no members of the Republican caucus had private conversations with Democratic legislators without his participation, which renders meaningless his assertions that no political negotiations took place.[117]

Representative Bonham certainly has personal knowledge of what did and did not happen to him personally. His testimony should therefore be limited accordingly. For example, when he says that no Democratic legislators "attempted to negotiate with Republicans on the congressional map," it should be read to assert that no Democratic legislators attempted to negotiate with *Representative Bonham*. Otherwise, this Court should adopt the Special Master's recommendation to exclude the testimony on the alternative grounds of foundation.

Lastly, even if the Special Master were to have erred in excluding the testimony on those alternative grounds, this Court should defer to the Special Master's implicit factual finding that Representative Bonham did not, in fact, have personal knowledge of the facts he testified to. *See* Laird C. Kirkpatrick, *Oregon Evidence* § 602.03 (7th ed 2020) ("The determination of the personal knowledge of a witness is ultimately a question for the trier of fact under Rule 104(2).").

D. This Court has already correctly ruled that Speaker Kotek's committee assignments are irrelevant.

As discussed above in Section A.3 of merits response, Petitioners improperly seek to revisit this Court's ruling that legislative committee assignments are irrelevant to their claims.[118]

---

[116] Pets.' Trial Memo at 39:18–40:6 (discussing Ex. 1003 ¶¶ 13–15, 27–30, 32).

[117] 10/27/2021 Hrg. Trans. (vol. 1) at 125:9–126:16.

[118] *See* above at 7-8; *see also* Pets.' Trial Memo at 20–21.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

This Court's authority over procedural and evidentiary rulings is vested solely with the Presiding Judge, who has already ruled that committee assignments are irrelevant to Petitioners' partisan-intent claim.[119] Nor do Petitioners offer any valid bases to reconsider the ruling.

E. Petitioners' other relevance arguments fail, and this Court should adopt the Special Master's recommendation.

Petitioners' other arguments for relevance fail as well. Although "the threshold for admissibility under [OEC 401] is 'very low,'" it still requires that "the evidence, based on logic and experience, can support a reasonable inference that is material to the case." *State v. Turnidge*, 359 Or 507, 512–13 (2016). Inferences are not reasonable if they amount to "mere speculation." *Hedgpeth*, 365 Or at 732. The testimony excluded by the Special Master does not meet that minimum standard.

First, Representative Bonham's opinion about whether the Plan A redistricting map was a "plainly partisan gerrymandered map" is irrelevant to whether the Legislative Assembly enacted SB 881 with partisan intent.[120] Even assuming that the creation of Plan A is relevant to the legislature's intent when enacting a different map under SB 881, it is not reasonable to infer that Plan A was a "plainly partisan gerrymandered map" simply because an individual legislator opposing the plan believes it to be so.

Second, as discussed, Representative Bonham only had personal knowledge of what did or did not happen to him, and his assertions based on that knowledge are irrelevant. Representative Bonham thus has personal knowledge to assert that Democratic legislators did not attempt to negotiate the congressional maps *with him*.[121] But it is not reasonable to infer that,

---

[119] Or Laws 2021, ch. 419, § 1(6) (SB 259); Order on Non-Parties' Motion to Quash (Oct. 21, 2021), at 3–4.

[120] Ex. 1003 ¶ 10, Bonham Dec.; *see* Pets.' Trial Memo at 39:6–17 (arguing that Ex. 1003 ¶¶ 10–12 are relevant).

[121] *See* Ex. 1003 ¶¶ 15 ("Democrats never once attempted to negotiate with Republicans on the congressional map."), 32 ("All three maps . . . were drawn without any Legislative Assembly

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

because Democratic legislators did not attempt to negotiate with Representative Bonham (who was not a member of the congressional redistricting committee during the crucial time period between September 20–27), Democratic legislators did not attempt to negotiate with *any* Republican legislators, such as Minority Leader Christine Drazan.

Third, the hearsay statement of Representative Marty Wilde is facially irrelevant. The purported fact that Democratic leadership acknowledged a risk that that Petitioners' counsel had publicly threatened litigation[122] is entirely irrelevant to whether the legislature had partisan intent when it enacted SB 881.[123]

Finally, Representative Bonham's belief that Republican legislators "provided quorum for a vote on SB 881-A because of fears of possible worse maps" has no tendency to prove or disprove the Assembly's partisan intent.[124] Even if the representative could have personal knowledge of that fact, it would only tend to prove that the intent of Republican legislators was based on their own subjective, speculative fear.

In sum, the Special Master correctly excluded Representative Bonham's testimony on the alternative grounds of relevance.

Republicans' input whatsoever . . . ."); Pets.' Trial Memo at 39:18–40:6 (arguing that Ex. 1003 ¶¶ 13–15, 27–30, and 32 are relevant).

[122] *See* Hillary Borrud, "Oregon House Republicans say they're at impasse over Democrats' redistricting plan," *Oregonian/Oregon Live* (Sept 16 2021, updated Sept 19, 2021), https://www.oregonlive.com/politics/2021/09/oregon-house-republicans-say-theyre-at-impasse-over-democrats-redistricting-plan.html (quoting Mr. Tsyetlin as saying in a statement "'If the Oregon Democrats adopt anything like the maps that they proposed on September 3, those maps will be in violation of Oregon law and will not survive a legal challenge.'").

[123] Ex. 1003 ¶ 31, Bonham Dec.; Pets.' Trial Memo at 40:4–6 (arguing relevance of Ex. 1003 ¶ 31).

[124] Pets.' Trial Memo at 40:16–23 (arguing relevance of Ex. 1003 ¶¶ 33–35).

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

F. The FiveThirtyEight and Princeton Gerrymandering Project webpages submitted by Petitioners are inadmissible

The FiveThirtyEight webpage submitted by Petitioners is irrelevant.[125] Petitioners rely on the FiveThirtyEight page to show that legislators were aware of FiveThirtyEight's ratings of the map when they were drafting and voting on it.[126] As explained above in Section B.1, Petitioners have failed to show that the FiveThirtyEight ratings even existed before the map was enacted, rendering the webpage irrelevant. [127]

The Princeton Gerrymandering Project webpage submitted by Petitioners is inadmissible hearsay.[128] Petitioners argue that they rely on the Project's rating of the enacted map not for the truth of its conclusions but rather to illustrate that using multiple metrics to measure partisan effect can lead to differing outcomes.[129] But that argument depends on the assumption that the Project properly applied the metrics on which its rating relies. Petitioners thus rely on the Princeton Gerrymandering Project for the truth of its assertions, and therefore the Project's analysis is inadmissible hearsay.

[125] *See* Ex. 1022.

[126] Pets.' Trial Memo at 42.

[128] *See* Ex. 1023.

[129] Pets.' Trial Memo at 42–43.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

CONCLUSION

This Court should affirm the legislatively adopted redistricting plan.

DATED November 12, 2021.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

s/ Brian Simmonds Marshall

BRIAN SIMMONDS MARSHALL #196129
Senior Assistant Attorney General
SADIE FORZLEY #151025
ALEXANDER C. JONES #213898
Assistant Attorneys General
Trial Attorneys
Tel (971) 673-1880
Fax (971) 673-5000
Brian.S.Marshall@doj.state.or.us
Sadie.Forzley@doj.state.or.us
Alex.Jones@doj.state.or.us
Of Attorneys for Respondent

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

CERTIFICATE OF SERVICE

I certify that on November 12, 2021, I served the foregoing Respondent's Combined Response to Petitioners' Memorandum in Support of Petition and Evidentiary Arguments upon the parties hereto by the method indicated below, and addressed to the following:

Shawn M. Lindsay Harris Berne Christensen LLP 15350 SW Sequoia Parkway, Suite 250 Portland, OR 97224 *Of Attorneys for Petitioners*	___ HAND DELIVERY ___ MAIL DELIVERY ___ OVERNIGHT MAIL X E-MAIL X SERVED BY E-FILING
Misha Tseytlin Troutman Pepper Hamilton Sanders LLP 227 W. Monroe Street, Ste. 3900 Chicago, IL 60606 *Of Attorneys for Petitioners*	___ HAND DELIVERY ___ MAIL DELIVERY ___ OVERNIGHT MAIL X E-MAIL X SERVED BY E-FILING
Thomas R. Johnson Misha Isaak Jeremy A. Carp Garmai Gorlorwulu Perkins Coie LLP 1120 N.W. Couch Street, Tenth Floor Portland, Oregon 97209-4128 *Of Attorneys for Proposed Intervenor-Respondents*	___ HAND DELIVERY ___ MAIL DELIVERY ___ OVERNIGHT MAIL X E-MAIL X SERVED BY E-FILING
Abha Khanna Jonathan P. Hawley Elias Law Group LLP 1700 Seventh Avenue, Suite 2100 Seattle, Washington 98101 *Of Attorneys for Proposed Intervenor-Respondents*	___ HAND DELIVERY ___ MAIL DELIVERY ___ OVERNIGHT MAIL X E-MAIL X SERVED BY E-FILING

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Aria C. Branch Jacob D. Shelly Elias Law Group LLP 10 G Street NE, Suite 600 Washington, D.C. 20002 *Of Attorneys for Proposed Intervenor-Respondents*	___ HAND DELIVERY ___ MAIL DELIVERY ___ OVERNIGHT MAIL _X_ E-MAIL _X_ SERVED BY E-FILING

s/ Brian Simmonds Marshall
BRIAN SIMMONDS MARSHALL #196129
Senior Assistant Attorney General
SADIE FORZLEY #151025
ALEXANDER C. JONES #213898
Assistant Attorneys General
Trial Attorneys
Tel (971) 673-1880
Fax (971) 673-5000
Brian.S.Marshall@doj.state.or.us
Sadie.Forzley@doj.state.or.us
Alex.Jones@doj.state.or.us
Of Attorneys for Respondent

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000