

**IN THE SUPREME COURT
OF THE STATE OF OREGON**

David Calderwood, <i>an individual</i>)	
<i>Oregon elector</i> , and Gordon)	
Culbertson, <i>an individual Oregon</i>)	
<i>elector</i> ,)	No. _____
Petitioners,)	
)	
vs.)	ORAL ARGUMENT
)	REQUESTED
Oregon Legislative Assembly,)	
)	
Respondent.)	

**PETITIONERS' BRIEF IN SUPPORT OF PETITION
TO REVIEW PLAN OF REAPPORTIONMENT
MADE
BY OREGON LEGISLATIVE ASSEMBLY**

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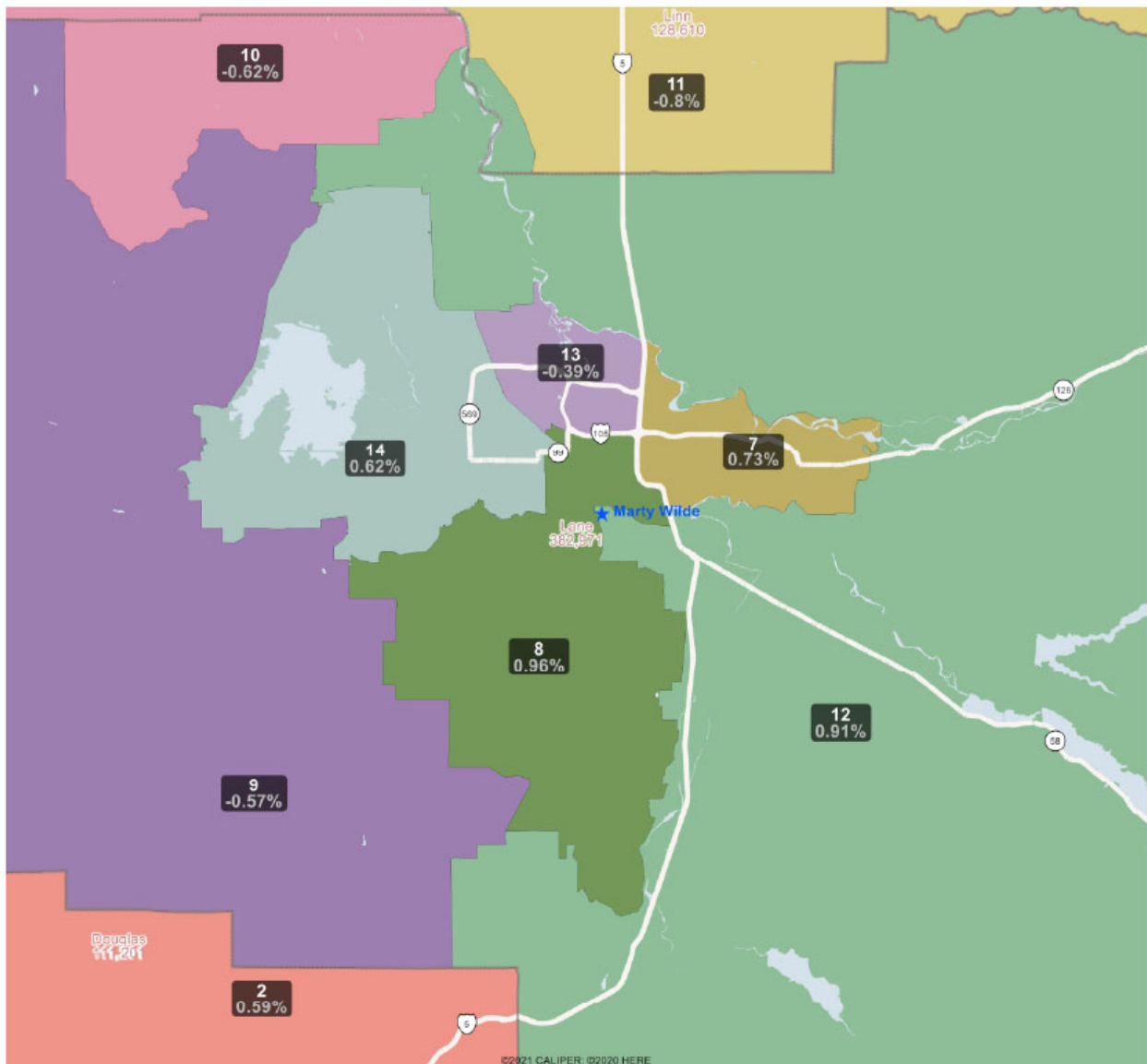
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I. INTRODUCTION



See Attachment A, Declaration of Shawn M. Lindsay ¶ 2 & Ex. 1 (“Decl. Lindsay”).

While many aspects of Senate Bill 882—the Legislative Assembly’s reapportionment of Assembly redistricting lines—are subject to reasonable disagreement, one district line is indefensible. That line was not based upon consideration of any permissible

districting criteria, but was the result of an effort by Legislative Assembly leadership to protect one incumbent from a primary challenge, by surgically jutting a district line around a different, disfavored legislator's home.

Unfortunately, the two Petitioners here were caught up in this intraparty powerplay, and ended up drawn into two districts whose boundaries make no statutory sense. So while this case does not involve the momentous issues of a wholly partisan-gerrymandered map—as does the case pending in Marion County challenging the Legislative Assembly's congressional districts, *see Clarno, et al. v. Fagan*, No. 21CV40180 (Marion Cty. filed Oct. 11, 2021)—it involves violations of law important to people in one part of Oregon that, respectfully, this Court should require the Secretary of State to correct.

II. STATEMENT OF THE CASE

A. Nature of the Action

Petitioners—David Calderwood, an Oregon elector and resident of Lane County, Attachment B, Declaration of David Calderwood ¶¶ 2–3 (hereinafter “Decl. Calderwood”), and Gordon Culbertson, an Oregon elector and resident of Walterville, Lane County, Oregon,

Attachment C, Declaration of Gordon Culbertson ¶¶ 2, 5 (hereinafter “Decl. Culbertson”)—bring this original proceeding pursuant to Article IV, Section 6, of the Oregon Constitution, and all applicable law thereto, to petition the Supreme Court to void Districts 8 and 12 of the reapportionment plan made by the Legislative Assembly for failure to comply with Oregon Revised Statute § 188.010. As a result of the coronavirus pandemic, this Court directed that “[o]bjections by electors [to the Legislative Assembly’s enacted reapportionment plan] are due by Monday, October 25, 2021.” *State ex rel. Kotek v. Fagan*, 367 Or. 803, 821 app.2, 484 P.3d 1058 (2021); *see also* ORAP 11.35(1). Petitioners timely object to Districts 8 and 12 of the Legislative Assembly’s enacted reapportionment.

B. Nature of the Matter Sought to be Reviewed

The Legislative Assembly enacted a reapportionment plan on September 27, 2021. On the same day, the Governor signed the reapportionment plan into law. *See* OR SB 882 (2021).

C. Nature of the Relief Sought

Petitioners seek an order declaring that Districts 8 and 12 of the Legislative Assembly’s enacted reapportionment plan are void and directing the Secretary of State to correct the reapportionment,

consistent with the requirement in ORS § 188.010(1) that the Legislative Assembly adequately consider certain objective criteria and the prohibition of ORS § 188.010(2) against realignments intending to favor a political party, incumbent, or person.

D. Jurisdiction

This Court has original jurisdiction to review the Legislative Assembly's enacted reapportionment plan upon the Petition of any elector of the state filed on or before October 25, 2021. Or. Const., art. IV, § 6(2); ORAP 11.35(1); *Fagan*, 367 Or. at 821 app.2. Petitioners filed their Petition with this Court within that deadline.

E. Questions Presented on Appeal

1) Whether Districts 8 and 12 of the Legislative Assembly's enacted reapportionment plan are void because they are apportioned in violation of ORS § 188.010(1)?

2) Whether Districts 8 and 12 of the Legislative Assembly's enacted reapportionment plan are void because they are apportioned in violation of ORS § 188.010(2)?

F. Summary of the Arguments

The Oregon Constitution and ORS § 188.010 require the Legislative Assembly to reapportion Districts for State Senators and

Representatives following each decennial census, while considering several objective criteria and without the purpose of favoring any political party or protecting any incumbent. Among the criteria that the Legislative Assembly must consider are the political and geographic boundaries within the State, ensuring that Districts will not divide communities of common interest, and that Districts are connected by transportation links. The Legislative Assembly's apportionment of House Districts 8 and 12 within SB 882 violates these principles.

First, the Legislative Assembly failed to consider, or consider reasonably, in SB 882 any of political and geographic boundaries, communities of common interest, and transportation links in gerrymandering a portion of southeastern Eugene into House District 12 with majority rural and dissimilar communities. The Legislative Assembly claimed solely that this portion of Eugene was joined with these other communities in order "to reach the population target," thereby acknowledging that it did not consider these other neutral criteria. The Legislative Assembly's rationale especially makes no sense in the context of the ORS § 188.010(1) criteria. As currently drawn in SB 882, House Districts 8 and 12 ignore natural and logical

boundaries by meandering away from Interstate 5 to capture portions of Eugene in House District 12, combine unrelated communities in Eugene and the rural out-county, and join areas that have no transportation links. Thus, SB 882 violates ORS § 188.010(1) as to House Districts 8 and 12, and this Court should void the reapportionment.

Second, the Legislative Assembly violated ORS § 188.010(2)'s prohibition on "district[s] . . . drawn for the purpose of favoring any . . . incumbent legislator." Here, the Legislative Assembly gerrymandered House Districts 8 and 12 to place incumbent Representative Marty Wilde in House District 12 in order to remove him to Senate District 6, so that he could not raise a primary challenge against incumbent Senator Floyd Prozanski. Legislative Assembly leadership stated as much to Representative Wilde, and this is the only plausible explanation for the adopted line between Districts 8 and 12.

This Court can order the Secretary of State to remedy these violations simply, without disrupting *any* other Districts. As an illustration, Petitioners have provided an example map that complies with the neutral criteria of ORS § 188.010, as well as that provision's prohibition against incumbent-protection gerrymandering.

G. Summary of Material Facts

On April 9, 2021, this Court issued an order revising the deadlines to be used for the 2021 Oregon reapportionment process. *See Fagan*, 367 Or. at 821 app.2. This Court ordered that the Legislative Assembly must enact a plan, if it chooses to do so, “on or before Monday, September 27, 2021.” *Id.* The Legislative Assembly did enact its state legislative reapportionment plan on September 27, 2021, which the Governor signed into law on the same day. *See* OR SB 882 (2021).

During the Legislative Assembly’s reapportionment efforts throughout September and October, Representative Marty Wilde of the Oregon House of Representatives raised certain serious objections to the proposed maps, including some objections that are not at issue here. Attachment D, Declaration of Representative Wilde ¶ 5 (hereinafter “Decl. Rep. Wilde”). Specifically, Representative Wilde questioned why the proposed Map A—which the Redistricting Committee released on September 3, 2021—divided the University of Oregon area into three different House and Senate districts, dividing a community of interest located within his district with no countervailing interests fulfilled under the factors provided in ORS §

188.010(1). Decl. Rep. Wilde ¶ 6. Consistent with those objections, Representative Wilde organized constituents in his District to object to the maps, resulting in over 100 pieces of written testimony to the House Redistricting Committee and at least two dozen people testifying against the Legislative Assembly’s plan to divide the University community into separate districts. Decl. Rep. Wilde ¶ 11; *see also* Legislative Plan – House and Senate Districts at 3 (September 20, 2021).¹ Representative Wilde disclosed his efforts on this constituent drive to the Chair of the House Redistricting Committee, Representative Andrea Salinas. Decl. Rep. Wilde ¶ 11. Following the outpouring of testimony against the proposed maps, all subsequent maps—including SB 882, adopted by the Legislative Assembly on September 27, 2021, and signed by the Governor that same day—the leaders in charge of the Redistricting Committee revised the proposed maps to contain the entire University campus within one House District. *See* Legislative Plan – House and Senate Districts at 3.

¹ Located at <https://olis.oregonlegislature.gov/liz/2021S1/Downloads/CommitteeMeetingDocument/249775> (all websites last visited October 22, 2021).

But these later maps also included a change that is core to this lawsuit: picking off Lane County Precinct 1233 (where Representative Wilde resides) from House District 8 (“House District 8-SB 882”) and removing it into adopted House District 12 (“House District 12-SB 882”), by running the northernmost border between those two Districts (“District 8/12 Dividing Line”) inexplicably westward in order to incorporate Representative Wilde’s home Precinct into House District 12-SB 882. Decl. Rep. Wilde ¶¶ 13, 15.

Notably, because the Oregon Constitution requires all “senatorial district[s] [to] consist of two representative districts,” Or. Const., art. IV, § 6(1), placing the District 8/12 Dividing Line where it is and moving Representative Wilde into House District 12-SB 882 *also* moved Representative Wilde from Senate District 4-SB 882, into Senate District 6-SB 882, while keeping incumbent Democrat Senator Floyd Prozanski, who is up for reelection in 2022, in Senate District 4-SB 882. Decl. Rep. Wilde ¶¶ 8, 17–19, 22. Representative Wilde had already indicated his interest in running for Oregon Senate office, so moving him into Senate District 6-SB 882 protected Senator Prozanski from a primary challenge by Representative Wilde. Decl. Rep. Wilde ¶¶ 3, 19. When Representative Wilde raised his objections about this

particular gerrymander, *see, e.g.*, Decl. Lindsay Ex. 3, House leadership told him that the request to place his Precinct in House District 12-SB 882 came specifically from Senate leadership, and that Senate leadership was not flexible on this point. Decl. Rep. Wilde ¶ 21.

While incumbent protection was the actual reason for the boundary between Districts 8 and 12, the *only* official reason that the Legislative Assembly gave in the Legislative Record for the District 8/12 Dividing Line was “to reach the population target” for House District 12-SB 882. Legislative Plan – House and Senate Districts at 4–5. The “population target” cannot explain the sharp and jutting line that conveniently ensnares Representative Wilde’s home Precinct into House District 12-SB 882 because, as shown below, *infra* pp. 21–23, population targets for both District 8 and 12 can easily be met while complying with all of ORS § 188.010’s various requirements.

The inclusion of Precinct 1233 within House District 12-SB 882 makes no statutory sense under the factors articulated in ORS § 188.010, as Representative Wilde explained to Legislative Assembly leadership as it was considering Senate Bill 882. Decl. Rep. Wilde ¶¶ 23–24; *see also* Decl. Lindsay Ex. 3. First, the District 8/12 Dividing Line fails to utilize an existing boundary in Interstate 5 in

contravention of ORS § 188.010(1)(c), instead running the boundary between House District 8-SB 882 and House District 12-SB 882 near, but not along, Interstate 5 from the south before jutting westward and then returning back along Interstate 5 at the intersection of the boundaries of those Districts with House District 7. Decl. Rep. Wilde ¶ 31. Second, the District 8/12 Dividing Line splits Precinct 1233 from the other south Eugene Precincts, dividing communities of common interest in contravention of ORS § 188.010(1)(d). Decl. Rep. Wilde ¶ 24–25. Finally, the District 8/12 Dividing Line disconnects intra-district transportation links in contravention of ORS § 188.010(1)(e), by moving southeast Eugene, which is connected to urban House District 8-SB 882 via a number of roads and bus routes (through the Lane Transit District), into rural House District 12-SB 882, with which it shares no transportation links. Decl. Rep. Wilde ¶ 29.

More generally, joining southeastern Eugene with the rural communities to the east and south/southwest is not rational, given that those communities are very different from Eugene. Decl. Calderwood ¶ 6–9; Decl. Culbertson ¶ 8–12. These rural communities are largely agricultural and forest communities, with many residents making a substantial part of living from the area's natural resources.

Decl. Calderwood ¶ 8; Decl. Culbertson ¶ 9–11. The rural communities also tend to be more blue collar, unlike the metropolitan/government/ University communities in Eugene. Decl. Calderwood ¶¶ 7–9; Decl. Culbertson ¶¶ 8–9. There are no real public transportation options or transportation links from these rural communities into Eugene, and the southwestern rural areas have no major expressways connecting to Eugene at all. Decl. Calderwood ¶ 10; Decl. Culbertson ¶ 14. Finally, these out-county rural communities all receive completely separate public services—police and fire protection—from the city, further showing their separation from Eugene. Decl. Culbertson ¶ 15.

Legislators and members of the public voiced similar concerns at the various hearings on redistricting before the Legislative Assembly. People in the University of Oregon community wanted the University area to be in a single house district. *See, e.g., Hearing On S.B. 881 & S.B. 882 Before H. Interim Comm. On Redistricting, 2021 Leg. Special Session (Or. Sept. 9, 2021, 8:00 a.m.).*² Residents of the rural areas

² Located at <https://olis.oregonlegislature.gov/liz/mediaplayer?clientID=4879615486&eventID=2021091009>.

expressed the desire to stay associated with other rural communities in a single house district. *See id.* In abbreviated comments about Districts 8 and 12, Representative Andrea Salinas merely nodded at communities of interest in these Districts, but only insofar as the rural communities are concerned and nowhere discusses the portion of Eugene shoehorned into this new region. *Hearing on S.B. 882 Before H. Special Comm. On State Legs. Redistricting*, 2021 Leg. Special Session, at 1:00:00–1:06:00 (Or. Sept. 20, 2021) (statement of Rep. Salinas, Member, H. Special Comm. On State Legs. Redistricting).³ Committee Democrats dismissed without explanation the revised house map put forward by Representative Daniel Bonham. *Hearing on S.B. 882 Before H. Special Comm. On State Legs. Redistricting*, 2021 Leg. Special Session, at 24:40–32:56 (Or. Sept. 20, 2021) (statement of Rep. Bonham, Member, H. Special Comm. On State Legs. Redistricting).⁴ As Representative Bonham explained, his revised map would have consolidated the University and South

³ Located at <https://olis.oregonlegislature.gov/liz/mediaplayer?clientID=4879615486&eventID=2021091072>.

⁴ Located at <https://olis.oregonlegislature.gov/liz/mediaplayer?clientID=4879615486&eventID=2021091072>.

Eugene in a single district, while responding to the desires expressed by the rural communities south of Eugene by placing them in a separate district. *Id.*

Nevertheless, the Legislative Assembly did not take these concerns into consideration and the enacted map contains all of these errors. Decl. Rep. Wilde ¶¶ 10–11, 13–14; *see* OR SB 882 (2021).

III. GOVERNING LEGAL STANDARDS

The Oregon Constitution requires the Legislative Assembly to reapportion Districts for Oregon State Senators and Representatives following each decennial census. Or. Const., art. IV, § 6(1); *see Ater v. Keisling*, 312 Or. 207, 210, 819 P.2d 296 (1991). Any reapportionment must comply with the requirements of Article IV, § 6(1) and “all law applicable” to apportionment. Or. Const., art. IV, § 6(2)(c). Article IV, § 6(1) imposes three requirements upon the Legislative Assembly when reapportioning districts: (1) Senators and Representatives must be “apportioned among legislative districts according to population”; (2) each Senate district must consist of two House districts; and (3) any Senators serving uncompleted terms must be assigned to specific Senate districts. Or. Const., art. IV, § 6(1).

Beyond the constitutional requirements found in Article IV, § 6, Oregon law also imposes affirmative requirements on any reapportionment effort. To that end, ORS § 188.010 requires the Legislative Assembly to “consider” various objective “criteria when apportioning the state into . . . legislative districts.” ORS § 188.010. The Legislative Assembly must ensure that “[e]ach district, as nearly as practicable,” is “contiguous” and “of equal population,” “[u]tilize[s] existing geographic or political boundaries,” does “[n]ot divide communities of common interest,” and is “connected by transportation links.” ORS § 188.010(1).

Oregon law also bans the Legislative Assembly from drawing any electoral district “for the purpose of favoring any party, *incumbent legislator* or other person.” ORS § 188.010(2) (emphasis added). Under this provision, it is sufficient that the responsible party “had an improper purpose,” such as “favoring one political party over another,” *Hartung v. Bradbury*, 332 Or. 570, 599, 33 P.3d 972 (2001), or—as most relevant here—favoring an incumbent legislator, ORS § 188.010(2).

If the Court holds that any reapportionment violates the Oregon Constitution or applicable laws, it “shall” declare the reapportionment

“void.” Or. Const., art. IV, § 6(2)(c). Thereafter, the Court must “direct the Secretary of State to draft a reapportionment” to remedy the way in which “the reapportionment fails to comply” with the Constitution or laws. *Id.*; *accord Ater*, 312 Or. at 211–13; *Hartung*, 332 Or. at 587.

IV. First Assignment of Error: SB 882 Violates Oregon Revised Statute Section 188.010(1) Because The Legislative Assembly Failed to Consider The Various Objective Criteria For Reapportionment Set Out In That Subsection

A. Preservation of Error

The error was preserved by challenging the enacted maps on or before the October 25, 2021 deadline. Or. Const., art. IV, § 6(2); ORAP 11.35(1); *Fagan*, 367 Or. at 821 app.2.

B. Standard of Review

This Court’s original jurisdiction is to determine whether a plan of reapportionment “complies with” the Oregon Constitution and “all law applicable thereto.” Or. Const., art. IV, § 6(2). This Court’s “review is confined to whether the [reapportionment] before [the Court] meets the constitutional criteria,” *McCall v. Legislative Assembly*, 291 Or. 663, 685, 634 P.2d 223 (1981), including “applicable” laws, Or. Const., art. IV, § 6(2). Applicable law requires that the Legislative Assembly “consider” several objective “criteria.” ORS

§ 188.010(1). And a determination that the reapportionment plan or any part of it is in violation of Section 188.010 requires the Court to void the reapportionment insofar as necessary to comply with the Constitution and laws. Or. Const., art. IV, § 6(2)(c); *see Hartung*, 332 Or. at 587.

C. Argument

1. Section 188.010 of the Oregon Revised Statutes establishes objective “criteria” that the Legislative Assembly must “consider” when “apportioning the state into . . . legislative districts,” ORS § 188.010, including that “[e]ach district, as nearly as practicable, shall:” (1) “[u]tilize existing geographic or political boundaries,” (2) “[n]ot divide communities of common interest,” and (3) “[b]e connected by transportation links.” ORS § 188.010(1)(c)–(e). The Legislative Assembly must “adequately consider the[se] appropriate criteria” and must make “reasonable” “conclusions” on each. *Hartung*, 332 Or. at 589.

2. The Legislative Assembly’s only explanation for why it included the portion of southeastern Eugene in House District 12 is illogical, inadequate, and unreasonable. *Hartung*, 332 Or. at 589. The Assembly claims that it included “southeast Eugene” in House District

12 to “reach the population target.” Legislative Plan – House and Senate Districts at 3. But pointing to the population targets in no way explains the District 8/12 Dividing Line, as that line could have been drawn between House Districts 8 and 12 in a way that hits population targets in the same way, but does not violate numerous other criteria in ORS § 188.010(1), as discussed immediately below. That means both that the Legislative Assembly did not consider these other factors in making this particular redistricting choice, as discussed below, *and* that its approach to the line between Districts 8/12 is one that no “reasonable” Legislative Assembly would have made. *Hartung*, 332 Or. at 589.

First, the District 8/12 Dividing Line fails to utilize existing boundaries, as required under ORS § 188.010(c). The boundary dividing House District 8-SB 882 and House District 12-SB 882, which could easily follow Interstate 5, instead moves from the south to the north hovering next to it, and then juts inward to include portions of southeast Eugene in House District 12-SB 882, finally returning to Interstate 5 at the intersection of the boundaries between those Districts and District 7. *See supra* p. 1. Interstate 5 provides a readily available boundary, but contrary to ORS § 188.010(c), the District 8/12

Dividing Line fails to utilize or attempt to explain why it did not use this line. The Legislative Assembly never explained why it rejected this readily available boundary for line drawing, and its contrary choices for the District 8/12 Dividing Line simply have no “reasonable” explanation, *Hartung*, 332 Or. at 589, (except, of course, for the obvious and impermissible incumbency-protection reasons discussed below, *see infra* pp. 25–28).

Second and relatedly, the District 8/12 Dividing Line creates disconnected intra-district transportation links in violation of ORS § 188.010(e). Precinct 1233, the southeast Eugene community, is connected with the University of Oregon and downtown Eugene, within House District 8-SB 882, via a number of roads, primarily 30th Avenue and Amazon Parkway, numerous bus routes through the Lane Transit District, including Routes 28, 81, and 82, and biking and walking trails. Decl. Rep. Wilde ¶ 29. Conversely, House District 12-SB 882 is made up of primarily rural area, which is not connected to Precinct 1233 by any bus routes or biking and walking trails. Decl. Rep. Wilde ¶ 30; Decl. Culbertson ¶ 14. Similarly, the rural areas south and southwest of Eugene that were included in House District 8-SB 882 have no reliable public transportation into the city and no

major expressways even for ease of private transportation to travel to Eugene. Decl. Calderwood ¶ 10. The Legislative Assembly's final explanation contends that Interstate 5, OR-99, OR-58, OR-222, OR-126, and E 30th Avenue connect the various portions of House District 12-SB822, Legislative Plan – House and Senate Districts at 4–5, but none adequately connect the gerrymandered portion of southeast Eugene with the more-rural precincts. Rather, the primary transportation link between House District 8-SB 882's rural precincts and Eugene/Springfield is Interstate 5, which does not even pass through Precinct 1233. Decl. Rep. Wilde ¶ 30.

Third, the District 8/12 Dividing Line divides communities of common interest, contrary to ORS § 188.010(d), and the Legislative Assembly did not reasonably consider this factor, *Hartung*, 332 Or. at 589. Precinct 1233 is a community of common interest with the other south Eugene Precincts, entirely within the political boundaries of the City of Eugene and the 4J School Districts and primarily in the Amazon Creek drainage basin, as is the case with the other primarily urban precincts in House District 8-SB 882. Decl. Rep. Wilde ¶ 25. But the enacted maps remove Precinct 1233 from the urban communities with which it shares common interests and place it in

District 12-SB 882, consisting of almost entirely rural communities (none of the proposed House District 12-SB 882, other than Precinct 1233, is within the south Eugene valley and Amazon Creek basin). Decl. Rep. Wilde ¶¶ 26–27; Decl. Calderwood ¶ 5; Decl. Culbertson ¶ 6. Conversely, the enacted maps include the rural precincts to the north and west of Cottage Grove and Creswell in the adopted House District 8-SB 882, dividing them from their rural communities of common interest located in House District 12-SB 882 while the majority of their associated school districts remain in House District 12-SB 882. Decl. Rep. Wilde ¶¶ 24, 26. There is no “reasonable” basis for these odd couplings, *Hartung*, 332 Or. at 589, when the alternate combinations—joining similar rural communities together in District 12 and unifying the Eugene/University of Oregon community in District 8—properly reflects communities of interest.

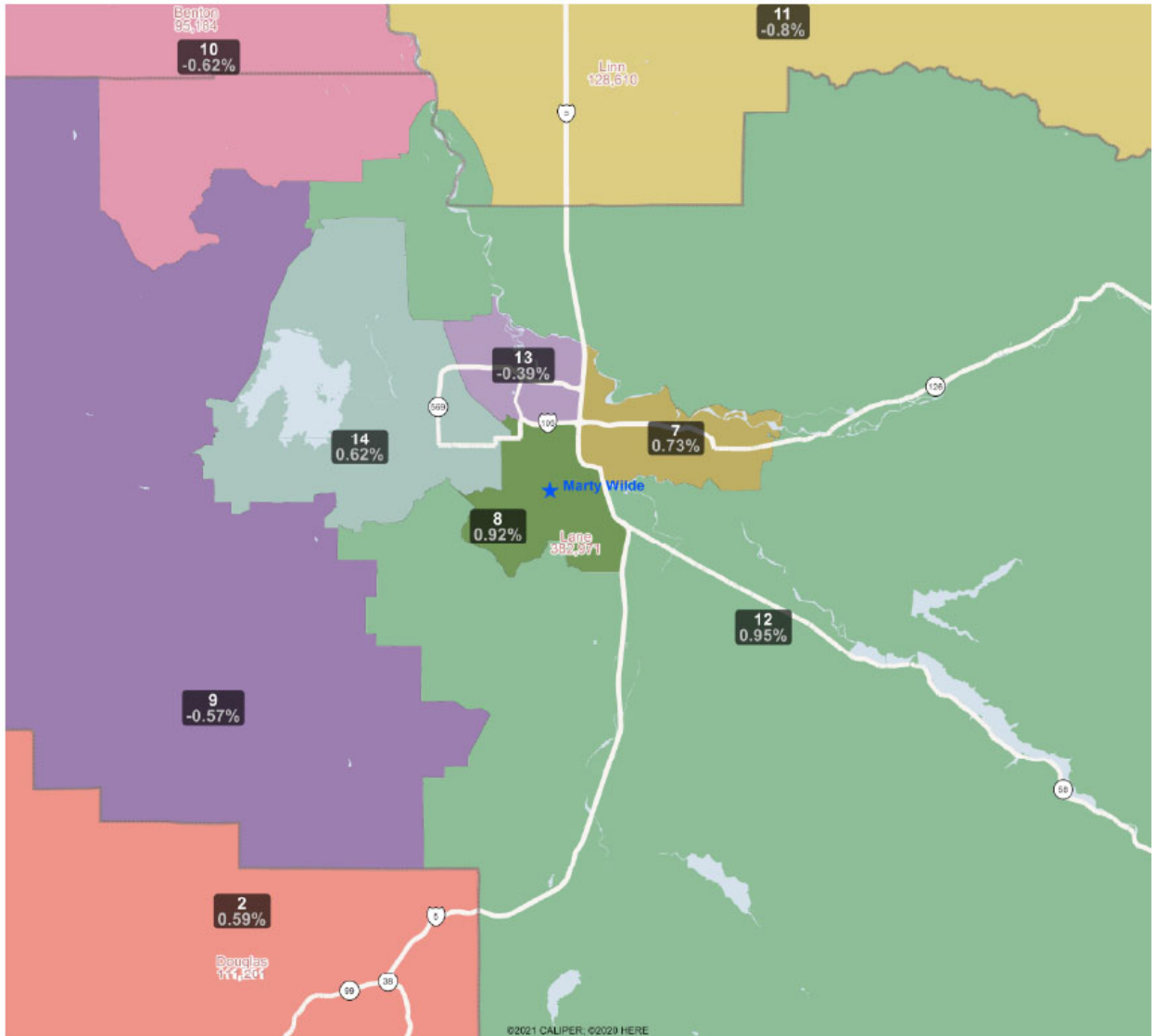
3. It would be easy for the Secretary of State to correct the Legislative Assembly’s unlawful reapportionment, while satisfying all of ORS § 188.010’s criteria, including population equality, *without impacting any other Districts*. Just as one example, consistent with proposed map below, the Secretary of State can redraw House Districts 8 and 12 while meeting all requirements for contiguity,

population, geographic and political boundaries, communities of common interest, and transportation links. *See* ORS § 188.010(1). The Secretary of State can do so by removing the line between House Districts 8 and 12 that follows generally along Interstate 5, and incorporating southeastern Eugene into House District 8, extending that district line along Eugene’s southern border. That would result in House District 8 incorporating the remaining portions of southeastern Eugene to the west of Interstate 5 that were unlawfully gerrymandered into new House District 12. And House District 12 then would encompass not only its existing rural communities, but also the similar rural communities south and southwest of Eugene.

These new House Districts would not differ in terms of population deviations as between the two Districts at issue, would reflect actual communities of interest, and would otherwise comply with ORS § 188.010’s varied and important redistricting concerns.

Notably, this would not require the Secretary of State of modify *any other Districts* in order to retain population equality. *Hartung*, 332 Or. at 589–90 (noting that petitioners should explain how their proposed changes would affect “other[]” districts); *also compare* Decl. Lindsay ¶¶ 2–3 & Exs.1–2 (showing that House District 8-SB 882

would go from 0.96% population deviation to 0.92%, and that House District 12-SB 882 would go from 0.91% population deviation to 0.95%, all within the Legislative Assembly's requirements).



See Decl. Lindsay ¶ 3 & Ex. 2; see also Decl. Lindsay ¶ 5 & Ex. 4 (providing a Block Equivalency File of all block assignments in proposed House Districts 8 and 12).

V. Second Assignment of Error: SB 882 Violates Oregon Revised Statute Section 188.010(2) Because The Legislative Assembly Drew House Districts 8 And 12 With Unlawful Partisan Intent

A. Preservation of Error

The error was preserved by challenging the enacted maps on or before the October 25, 2021 deadline. Or. Const., art. IV, § 6(2); ORAP 11.35(1); *Fagan*, 367 Or. at 821 app.2.

B. Standard of Review

This Court’s original jurisdiction is to determine whether a plan of reapportionment “complies with subsection (1) of [Article IV, section 6 of the Oregon Constitution⁵] and all law applicable thereto.” Or. Const., art. IV, § 6(2). Such “review is confined to whether the [reapportionment] before [the Court] meets the constitutional criteria,” *McCall*, 291 Or. at 685, including “applicable” laws, Or. Const., art. IV, § 6(2). The Legislative Assembly has enacted applicable laws governing the criteria for reapportioning the state into legislative districts, most notably ORS § 188.010. Therefore, if this

⁵ Article IV, Section 6(1), provides that “[a]t the odd-numbered year regular session of the Legislative Assembly next following an enumeration of the inhabitants by the United States Government, the number of Senators and Representatives shall be fixed by law and apportioned among legislative districts according to population.” Or. Const., art. IV, § 6(1).

Court determines that the Legislative Assembly's enacted plan or a portion of it is in violation of Section 188.010, the Court shall void the reapportionment of those districts insofar as necessary to comply with the law. Or. Const., art. IV, § 6(2)(c); *see Hartung*, 332 Or. at 587.

C. Argument

1. As previously noted, Section 188.010(2) prohibits the Legislative Assembly from drawing any electoral district “for the purpose of favoring any party, *incumbent legislator* or other person.” ORS § 188.010(2) (emphasis added). Under this provision, it is sufficient that the responsible party “had an improper purpose,” such as “favoring one political party over another,” *Hartung*, 332 Or. at 599, or, as here, favoring an incumbent legislator, ORS § 188.010(2).

2. SB 882 violates ORS § 188.010(2)'s prohibition against drawing a district line with the purpose of favoring an incumbent legislator.

In particular, the Legislative Assembly violated ORS § 188.010(2) by placing the District 8/12 Dividing Line with a specific “purpose of favoring” Senator Prozanski, an “incumbent legislator.” After Representative Wilde both articulated his desire to run for Senate office to Senate leaders and spearheaded a successful challenge and constituent drive against the Democratic leaderships' prior

proposed reapportionment plan, the Redistricting Committee began creating maps with a District 8/12 Dividing Line that placed Representative Wilde's home Precinct in House District 12. Decl. Rep. Wilde ¶¶ 3, 5–6, 11–13. By doing so, the Legislative Assembly placed Representative Wilde in Senate District 6-SB 882, guaranteeing that he could not mount a primary challenge against Senator Prozanski, who is in Senate District 4-SB 882. Decl. Rep. Wilde ¶ 19.

Democratic leadership underscored this incumbent protection intent after Representative Wilde questioned them about the clear gerrymander. Decl. Rep. Wilde ¶¶ 21–22. The leadership stated that the request to place his Precinct in House District 12-SB 882 came directly from Senate leadership, and that Senate leadership was determined not to budge on the particular District 8/12 Dividing Line at issue here. Decl. Rep. Wilde ¶¶ 21–22. In light of the fact that Representative Wilde had already conveyed to Senate leadership his interest in running for Oregon Senate, protecting Senator Prozanski from a primary challenge that would occur if he and Representative Wilde remained in the same Senate District can be the *only* logical reason for *the Senate* to drive this abrupt, illogical change to the

Eugene area maps to pluck Representative Wilde out of House District 8. Decl. Rep. Wilde ¶ 22.

Further proof of the Legislative Assembly's incumbent protection intent is evident in the near-surgical precision with which SB 882 pushed Representative Wilde's Precinct into a new House District and corresponding Senate District. The District 8/12 Dividing Line snakes northwestward from Interstate 5, going only so far enough to capture Representative Wilde's Precinct 1233. Decl. Rep. Wilde ¶ 31; *see supra* p. 1. This removes Representative Wilde out of Senate District 4-SB 882 and into Senate District 6-SB 882 with a telling level of exactness, thereby protecting Senator Prozanski from having to face Representative Wilde in a primary. Decl. Rep. Wilde ¶ 22. Moreover, as further explained in the First Assignment of Error, *supra* pp. 17–21, no other valid basis can explain this clear gerrymander. The resulting Districts 8 and 12 in SB 882 combine inapposite regions of Eugene and the rural out-county communities, which share no communities of interest or transportation links, and does so by ignoring and traversing various natural and political boundaries, all in violation of ORS § 188.010(1), so only incumbent protection intent remain to explain this Line.

3. As noted above, this Court can order the Secretary of State to remedy the unlawful District 8/12 Dividing Line without requiring any changes to *any* other Districts. *See supra* pp. 21–23; *Hartung*, 332 Or. at 589–90. By reincorporating southeastern Eugene into House District 8-SB 882, and replacing that area in House District 12-SB 882 with the rural communities south and southwest of Eugene, the Secretary of State can easily cure the incumbent protection interests that resulted in the District 8/12 Dividing Line.

VI. CONCLUSION

This Court should hold that the Legislative Assembly’s enacted reapportionment is void as to House Districts 8 and 12, and order the Secretary of State to revise the reapportionment plan to correct these errors.

Dated: October 25, 2021.

Respectfully submitted,

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**Pro Hac Vice forthcoming*

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Attorneys for Petitioners

**CERTIFICATE OF COMPLIANCE WITH BRIEF
LENGTH AND TYPE SIZE REQUIREMENTS**

I hereby certify that this Brief complies with the word-count limitation in ORAP 5.05(1)(b)(i)(A), and that the word-count of this Brief (as described in ORAP 5.05(1)(a)) is 5,036 words.

I further certify that the size of the type in this Opening Brief is not smaller than 14 point for both the text of the Brief and the footnotes as required by ORAP 5.05(3)(a)(ii).

Dated this 25th day of October 2021.

HARRIS BERNE CHRISTENSEN LLP

/s/ Shawn M. Lindsay _____

Shawn M. Lindsay OSB #020695

Attorney for Petitioners

Attachment A

IN THE SUPREME COURT
OF THE STATE OF OREGON

David Calderwood, <i>an individual</i>)	
<i>Oregon elector</i> , and Gordon)	
Culbertson, <i>an individual Oregon</i>)	
<i>elector</i> ,)	No. _____
Petitioners,)	
)	
vs.)	
)	
Oregon Legislative Assembly,)	
)	
Respondent.)	

DECLARATION OF ATTORNEY SHAWN M. LINDSAY

I, Shawn M. Lindsay, declare under penalty of perjury as follows:

1. I am an attorney licensed to practice law in the State of Oregon, OSB #020695.

2. Attached as **Exhibit 1** to this Declaration is a true and accurate depiction of the SB 882 House Districts in the Eugene area, as prepared on a Geographic Information System (“GIS”) platform, using

publicly available United States Census data, and showing that as-apportioned House District 8 has a population deviation of 0.96% and that as-apportioned House District 12 has a population deviation of 0.91%.

3. Attached as **Exhibit 2** to this Declaration is a true and accurate depiction of proposed House Districts in the Eugene area, curing SB 882's deficiencies, as prepared on a Geographic Information System ("GIS") platform, using publicly available United States Census data, and showing that new House District 8 would have a population deviation of 0.92% and that new House District 12 would have a population deviation of 0.95%.

4. Attached as **Exhibit 3** to this Declaration is a true and accurate copy of a September 20, 2021 letter sent by Representative Marty Wilde to Representative Boshart Davis, Representative Andrea Salinas, and members of the House Special Committee on Redistricting.

5. Attached as **Exhibit 4** to this Declaration is a true and accurate Block Equivalency File for proposed House Districts 8 and 12, as redrafted to cure SB 882's deficiencies. A Block Equivalency File is an exported file showing the assignment of the Census blocks in the two

modified state House districts and is commonly used to exchange drafted maps between Geographic Information System (“GIS”) platforms.

I hereby declare that the above statements are true to the best of my knowledge and belief, and that I understand they are made for use as evidence in court and subject to penalty for perjury.

Dated: October 25, 2021

/s/ Shawn M. Lindsay

Shawn M. Lindsay

Exhibit 1

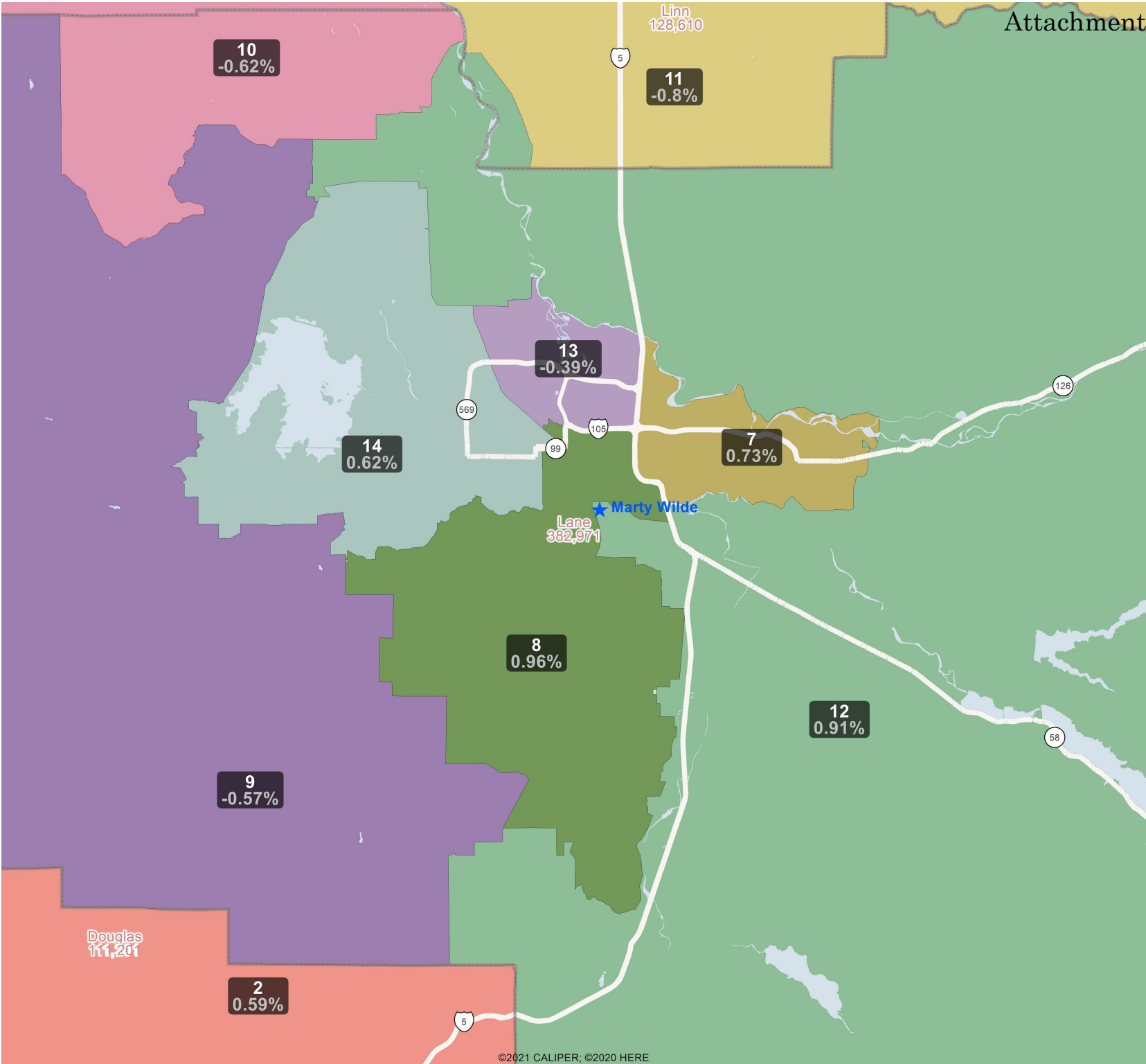


Exhibit 2

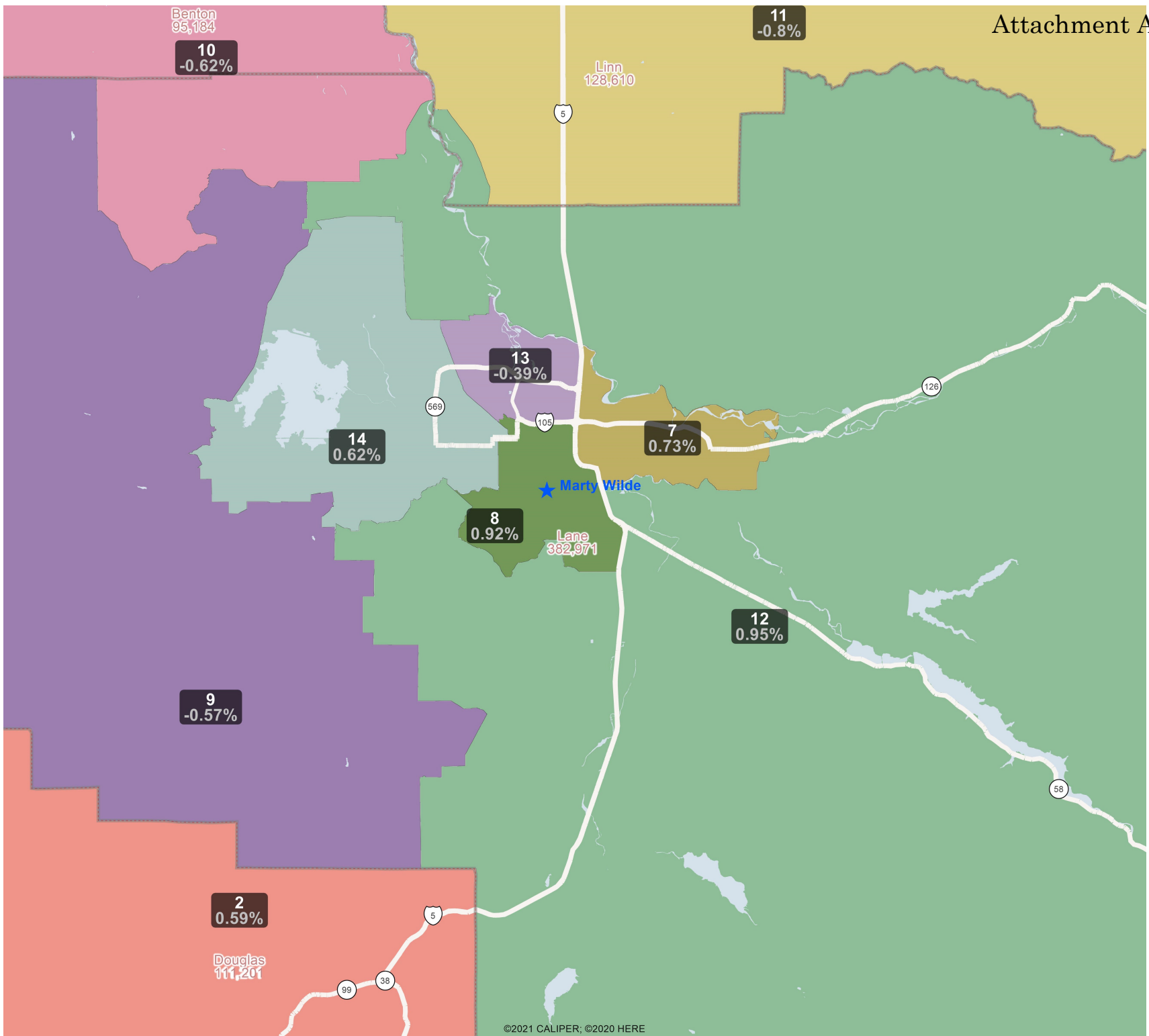


Exhibit 3



HOUSE OF REPRESENTATIVES

September 20, 2021

Hon. Shelly Boshart Davis and Hon. Andrea Salinas, Co-Chairs
Members of the House Special Committee on Redistricting
900 Court St. NE, H-389
Salem, OR 97301

Dear Rep. Boshart Davis, Rep. Salinas, and Members of House Special Committee on Redistricting,

Thank you for your work on the House Special Committee on the once-a-decade redrawing of Legislative district boundaries. While the Committee wisely recognized the University of Oregon as a community of common interest, **the Oregon House Map proposed by the Senate Redistricting Committee fails to accommodate existing geographic or political boundaries in Southeast Eugene.** Specifically, separating precinct 1233 from its immediate, contiguous neighbors in Eugene precincts 1343, 1345, 1231, and 1235 divides a clear community of common interest and dilutes the voting strength of rural Oregonians. I urge you to correct this error and include 1233 with its neighbors.

The Southeast Eugene community in precinct 1233 (just 2-3 miles south of the University of Oregon) is at the heart of the Southeast Neighborhood Association. This community is connected far more socially, politically, economically, and educationally, and linked more closely in transportation to its geographic and political neighbors in South Eugene's contiguous precincts 1231, 1235, 1343, and 1345 than it is with extremely rural Lane County precincts 744, 722, 724, and 718.

Further, if the Committee is to consider transportation links seriously as an essential "Criteria for Redistricting," note that Lane Transit District (LTD) efficiently connects the Southeast Eugene community (precinct 1233) to the University of Oregon and Downtown Eugene via quick bus rides on three different routes, a 5-10 minute drive, and many safe and accessible bike and walking trails

In contrast, the rural precincts of 718, 722, 724, 744 have vastly different political and geographic boundaries – they are **seemingly inaccessible and disconnected through state transportation links**; and they have no common interest with 1233 in relation to municipal services, education access, utility hookups, and local representation. These rural precincts serving students and parents of the Crow-Applegate-Lorane and Creswell School Districts would be far better represented by a rural voice, as they are currently apportioned on the Lane County Board of Commissioners (East Lane – District 5).

Please consider a critical revision of the proposed Oregon House Map by keeping Southeast Eugene (precinct 1233) in a district with its contiguous neighbors in precincts 1343, 1345, 1231, and 1235, with whom they share representation on the Eugene City Council, Eugene Water Electric Board Commission, LCC Board of Education, 4J School Board, and the Lane County Board of Commissioners (South Eugene – District 3).

Sincerely,

Rep. Marty Wilde

Exhibit 4

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Attachment B

IN THE SUPREME COURT
OF THE STATE OF OREGON

David Calderwood, <i>an individual</i>)	
<i>Oregon elector</i> , and Gordon)	
Culbertson, <i>an individual Oregon</i>)	
<i>elector</i> ,)	No. _____
Petitioners,)	
)	
vs.)	
)	
Oregon Legislative Assembly,)	
)	
Respondent.)	

DECLARATION OF DAVID CALDERWOOD

I, David Calderwood, declare under penalty of perjury as follows:

1. I make this declaration based on my personal knowledge and if called upon to testify, I could and would testify to the following facts.

2. I am a qualified elector of the State of Oregon.

3. Since 1987, I have lived seven miles outside of Eugene, Oregon, in unincorporated Lane County, in an area that was included in House District 8 in the most recent legislative reapportionment.

4. Given my long residency here, I am very familiar with both Eugene and the surrounding area, and spend considerable time in both.

5. I am very disappointed to see that large portions of Eugene and the rural communities to the south and southwest of the city have been joined together in a single House District.

6. Eugene and the surrounding area, while separated only by mere miles, are completely different and disinterested communities.

7. Eugene is a large urban area with communities built around the city lifestyle, the University of Oregon main campus, government, and similar concerns.

8. Southwest of Eugene, however, is extremely rural with massive amounts of farmland and forests.

9. Moreover, the more-rural areas to the south and southwest of the city are different culturally, with more traditional values than typically held by those living in Eugene.

10. Finally, there are no real public transportation options to travel into Eugene from the rural community I live in or those around me. Indeed, there are very few transportation links at all between these surrounding rural areas and the city, with no major expressways connecting Eugene with the out-county region to the southwest.

I hereby declare that the above statements are true to the best of my knowledge and belief, and that I understand they are made for use as evidence in court and subject to penalty for perjury.

Dated: October 22, 2021


David Calderwood

Attachment C

**IN THE SUPREME COURT
OF THE STATE OF OREGON**

David Calderwood, <i>an individual</i>)	
<i>Oregon elector</i> , and Gordon)	
Culbertson, <i>an individual Oregon</i>)	
<i>elector</i> ,)	No. _____
Petitioners,)	
)	
vs.)	
)	
Oregon Legislative Assembly,)	
)	
Respondent.)	

DECLARATION OF GORDON CULBERTSON

I, Gordon Culbertson, declare under penalty of perjury as follows:

1. I make this declaration based on my personal knowledge and if called upon to testify, I could and would testify to the following facts.

2. I am a qualified elector of the State of Oregon.

3. I was raised in Eugene, Oregon, and brought up my own children in the city. Thereafter, we moved to rural Lane County in 1996, where we lived when our children attended high school.

4. In the mid-1990s, my wife and I decided to move out of Eugene, because we felt that the town had shifted politically and no longer reflected many of our values and beliefs.

5. For more than 25 years we have resided in Walterville, Oregon, an unincorporated community in Lane County, Oregon, east of Springfield and Eugene, along OR-126.

6. I was very disappointed to see that SB 882 gerrymandered new House District 12 to combine the rural communities to the east of Eugene, with an unrelated portion of southeastern Eugene.

7. I-5 divides Eugene from Springfield, Walterville, and these other rural areas to the east, and serves as a natural barrier and logical distinguishing line between Eugene and these communities.

8. In recent decades, Eugene has become a much larger city, with communities and interests largely centered on metropolitan culture, public transportation, technology, government, and the University of Oregon main campus.

9. On the other hand, Walterville and the nearby rural communities, and to a slightly lesser extent, Springfield, are more blue-collar, agricultural and forest communities, with a variety of small to large farms producing grapes to grass seed to, livestock, as well as forested, timber-producing lands.

10. The citizens of these rural communities are a mix of people who moved out there for the rural lifestyle away from Eugene and the traditional resident farmers and forest workers who make a substantial part of their living from natural resources of the area.

11. South of the Eugene city limits, the communities east and west of I-5 are all very similar rural and agricultural areas, with the majority of local economies centered on farming and timber. Indeed, all of these rural communities are similar, and all are uniquely different from Eugene.

12. Beyond the geographic, economic, and cultural differences, Eugene and the rural communities to the east and south are worlds apart.

13. Like many of the citizens of these rural communities, I do my daily and weekly shopping outside of Eugene, in Springfield and my local area.

14. There are few, if any reliable public transportation options from the rural communities east of Springfield into Eugene, which would make such shopping in Eugene exceptionally difficult for anyone without their own private transportation.

15. Furthermore, the rural communities east and south of Eugene all are in jurisdictions of their own law enforcement and fire agencies. Eugene has a city police department, whereas Springfield has its own police department and the remaining incorporated communities to the south and east use their own departments or depend on the State Police and Lane County Sheriff's Department. Similarly, while Eugene and Springfield have a combined fire department, all other rural communities east and south of Eugene have their own rural fire districts unconnected to Eugene.

I hereby declare that the above statements are true to the best of my knowledge and belief, and that I understand they are made for use as evidence in court and subject to penalty for perjury.

Dated: October 22, 2021

A handwritten signature in cursive script that reads "Gordon Culbertson". The signature is written in black ink and is positioned above a horizontal line.

Gordon Culbertson

Attachment D

**IN THE SUPREME COURT
OF THE STATE OF OREGON**

David Calderwood, <i>an individual</i>)	
<i>Oregon elector</i> , and Gordon)	
Culbertson, <i>an individual Oregon</i>)	
<i>elector</i> ,)	No. _____
Petitioners,)	
)	
vs.)	
)	
Oregon Legislative Assembly,)	
)	
Respondent.)	

DECLARATION OF REPRESENTATIVE MARTY WILDE

I, Marshall (“Marty”) Wilde, declare under penalty of perjury as follows:

1. I make this declaration based on my personal knowledge and if called upon to testify, I could and would testify to the following facts.

2. I currently represent House District 11 in the Oregon House of Representatives and I reside in Lane County Precinct 1233, in Eugene, Oregon.

3. I am, however, interested in running for office in the Oregon Senate, and I have previously stated my interest in doing so to Senators Lee Beyer and Floyd Prozanski, noting that.

4. During the 2021 session, I testified before the House Committee on Redistricting to object to the gerrymandering of my current district on various grounds.

5. I also raised serious objections to the proposed maps created in the most-recent reapportionment efforts by the Redistricting Committee, following the 2020 Decennial Census.

6. For example, when the proposed Map A for the House was released by the Redistricting Committee, on September 3, 2021, I noticed that it divided the University of Oregon area into three different House Districts and three different Senate Districts, thereby dividing a significant community of interest in my district without any apparent countervailing interests as provided in ORS § 180.010.

7. Under the Oregon Constitution, all “senatorial district[s] shall consist of two representative districts,” Or. Const., art. IV § 6(1), meaning that each House District is paired with another to make up a Senate District.

8. Consistent with that requirement, House District 7-A was paired with Map A’s proposed House District 12 (“House District 12-A”) in the proposed Senate District 4 (“Senate District 4-A”), where Democrats would have enjoyed a 6-point (53%–47%) predicted advantage over Republicans.¹ Senator Floyd Prozanski, a Democrat, resides in Senate District 4-A, and is up for reelection in 2022, as does Senator Lee Beyer, who indicated he would retire in 2022 and not run for reelection.

9. Consistent with Map A, then, I would have been in Senate District 4-A, and therefore would potentially challenge Senator Prozanski in the Senate Democratic Primary, consistent with my prior indications to Senators Beyer and Prozanski.

10. During a meeting and correspondence with the other Lane County Democratic legislative members, I indicated my objections to

¹ See Oregon House Plan A, Plan Score: A Project of the Campaign Legal Center (Sept. 27, 2021), <https://planscore.campaignlegal.org/plan.html?20210927T162440.975310674Z>.

proposed House District 7-A because it divided the University community, as I felt it violated the redistricting statute with no countervailing considerations.

11. Consistent with my objections, I organized constituents and supporters to object to the maps, resulting in over 100 pieces of written testimony to the House Redistricting Committee and at least two dozen people testifying against the division of the University community. I disclosed my efforts on this constituent drive to the Chair of the House Redistricting Committee, Representative Andrea Salinas, prior to beginning it.

12. These efforts were ultimately successful, as the Redistricting Committee eventually decided to keep the University in a single District.

13. All subsequent redistricting maps, however, including the one adopted in Senate Bill 882, passed by the Senate on September 20, 2021, placed Lane County Precinct 1233 (and my home) in adopted House District 12 (“House District 12-SB 882”).

14. The Legislative Assembly passed Senate Bill 882 on September 27, 2021, and the Governor signed it that same day.

15. This map also placed the boundary between House District 8 (“House District 8-SB 882”) and House District 12-SB 882 directly between my home Precinct and Representative Paul Holvey’s home Precinct, thereby placing Representative Holvey in House District 8-SB 882.

16. My home Precinct 1233 and surrounding Precincts are heavily Democratic, much like most of Eugene.

17. Under Senate Bill 882’s reapportionment plan, House District 12-SB 882 is paired with House District 11-SB 882 in Senate District 6 (“Senate District 6-SB 882”).

18. In Senate Bill 882, Senator Prozanski, remained in Senate District 4 (“Senate Bill 4-SB 882”).

19. By moving me into House District 12-SB 882, the Redistricting Committee guaranteed that I would not be within Senate District 4-SB 882, and therefore could not mount a primary challenge against Senator Prozanski.

20. The only reason provided in the legislative record for including Precinct 1233 in House District 12-SB 882 is population balancing.

21. When I objected to the gerrymander of including Precinct 1233 in House District 12-SB 882, I was told by Democratic leadership that the request to place Precinct 1233 in House District 12-SB 882 came from Senate leadership, and that they were inflexible on this matter.

22. The only logical inference from the facts that (1) SB 882 removed my home Precinct from House District 8-SB 882 (and therefore Senate District 4-SB 882) with near-surgical precision, (2) that decision came from the Senate leadership in particular, and (3) Senate leadership knew I intended to run in the upcoming Senate primary election, is that the Senate leadership wanted to protect Senator Prozanski from my primary challenge.

23. I continue to object to proposed House District 12-SB 882's inclusion of Lane County Precinct 1233 to the members of the House Redistricting Committee, both because it was an unlawful partisan and incumbency gerrymander, and for the reasons detailed below.

24. The inclusion of Precinct 1233 in House District 12-SB 882 is not consistent the redistricting statute, especially when compared with the inclusions of the rural precincts to the north and west of Cottage

Grove and Creswell in the adopted House District 8 (“House District 8-SB 882”).

25. Precinct 1233 is a community of interest with the other South Eugene Precincts. Precinct 1233 is entirely within the political boundaries of the City of Eugene and the 4J School Districts and primarily in the Amazon Creek drainage basin, as is the case with the neighboring urban precincts in House District 8-SB 882.

26. Conversely, House District 8-SB 882’s rural precincts are primarily within unincorporated Lane County, the Creswell School District and the South Lane School District. The majority of these school districts are in House District 12-SB 882.

27. None of the proposed House District 12-SB 882, other than Precinct 1233, is within the South Eugene valley and Amazon Creek basin.

28. When it comes to shopping and commercial activities, the residents of Precinct 1233 primarily do their local shopping and related commercial activities such as dining in Eugene, while the residents of House District 8-SB 882’s rural precincts generally shop and dine elsewhere, primarily in Creswell and Cottage Grove.

29. Regarding transportation links, Precinct 1233 is connected with the urban parts of House District 8-SB 882 by a number of roads, primarily 30th Avenue and Amazon Parkway, and a number of bus routes through Lane Transit District, including Routes 28, 81, and 82. Indeed, the Lane Transit District and City of Eugene provide accessible transportation via bus and biking and walking trails between the University of Oregon and downtown Eugene and the Southeast Eugene community.

30. Conversely, the rural districts are not connected to Precinct 1233 by bus routes or biking and walking trails at all. The primary transportation link between House District 8-SB 882's rural precincts and Eugene/Springfield is I-5, which does not pass through Precinct 1233.

31. Furthermore, SB 882 fails to consider and accommodate existing geographic boundaries and natural barriers in its line-drawing. SB 882 divides House District 8-SB 882 and House District 12-SB 882 in a meandering path that departs from Highway 58 and I-5, moving westward to remove a section of Southeast Eugene from the remainder

of the metropolitan community, combining it with the rural communities lying east of I-5.

I hereby declare that the above statements are true to the best of my knowledge and belief, and that I understand they are made for use as evidence in court and subject to penalty for perjury.

Dated: October 22, 2021

A handwritten signature in cursive script that reads "Marshall Z. Wilde". The signature is written in black ink and is positioned above a horizontal line.

Representative Marty Wilde
Oregon House District 11

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 25, 2021, I filed the foregoing **BRIEF IN SUPPORT OF PETITION TO REVIEW PLAN OF REAPPORTIONMENT MADE BY OREGON LEGISLATIVE ASSEMBLY** with the Appellate Court Administrator by using the appellate courts' electronic filing (eFiling) system.

I further certify that service of a true and correct copy of the foregoing will be accomplished on the Secretary of the Senate, the Chief Clerk of the House of Representatives, the Secretary of State, and the Attorney General, as required by ORAP 11.35(4)–(5) & n.2, delivered to:

- (1) Secretary of the Oregon Senate,
Lori.l.brocker@oregonlegislature.gov;
 - (2) Chief Clerk of the Oregon House of Representatives,
Tim.sekerak@oregonlegislature.gov;
 - (3) Oregon Secretary of State,
LegalService.sos@oregon.gov;
- and
- (4) Oregon Attorney General,
AppellateService@doj.state.or.us.

Dated this 25th day of October 2021.

HARRIS BERNE CHRISTENSEN LLP

/s/ Shawn M. Lindsay _____

Shawn M. Lindsay OSB #020695

Attorney for Petitioners