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3 IN THE CIRCUIT COURT OF THE STATE OF OREGON
4 FOR THE COUNTY OF MARION

5 BEVERLY CLARNO, GARY WILHELMS,
6 JAMES L. WILCOX, and LARRY
CAMPBELL,

7 Petitioners,

8 v.

9 SHEMIA FAGAN, in her official capacity as
10 Secretary of State of Oregon,

11 Respondent.

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**

LEGISLATIVE ASSEMBLY'S COMBINED
MOTION TO QUASH SUBPOENAS AND
MOTION FOR PROTECTIVE ORDER AND
MEMORANDUM IN SUPPORT

ORS 20.140 - State fees deferred at filing

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14 **UTCR 5.010 CERTIFICATION**

15 Pursuant to UTCR 5.010, counsel for the movants certifies that prior to filing this motion
16 they conferred with counsel for Petitioners regarding the issues raised in this motion. The parties
17 were unable to resolve the issues raised in this motion without the assistance of the Court.

18 **MOTION**

19 On Friday, October 15, Petitioners served deposition subpoenas and requests for
20 production of documents directed to House Speaker Tina Kotek, Senate President Peter
21 Courtney, Senator Rob Wagner, and Representatives Wlnsvey Campos, Khanh Pham, and
22 Andrea Salinas (collectively, "Legislators").¹ Pursuant to ORCP 55 A(7)(b), the Legislative
23 Assembly and the six Legislators (collectively, "Assembly") move the Court to quash these

24 ¹ The six documents at issue are Attachments A-F to the Marshall Declaration. Each is entitled
25 "Deposition Subpoena and Request for Production of Documents," and is functionally a
26 Subpoena Duces Tecum. The Attorney General is representing the Legislative Assembly and
these Legislators for purposes of discovery.

subpoenas because they seek to obtain discovery that is subject to legislative privilege under the Debate Clause of Article IV, section 9, of the Oregon Constitution. *See State v. Babson*, 355 Or 383, 418, 422–23 (2014) (the Debate Clause creates a legislative privilege that applies to the acts and communications of legislators in the course of carrying out their legislative functions).

The Assembly moves for a protective order pursuant to ORCP 36 C(1) on the same grounds. The Court should issue a protective order barring Petitioners from seeking depositions or testimony from legislators on matters subject to legislative privilege and it should prohibit Petitioners from seeking the production of documents subject to legislative privilege from the Legislative Assembly and its members.

The Court should also disallow Petitioners' document requests, which demand that the Legislators produce a huge array of documents in a week or less, for the additional reasons that they are unreasonable and unduly burdensome.

These motions are supported by the Memorandum of Points and Authorities below and the Declaration of Brian Simmonds Marshall and its attachments.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Introduction

Petitioners' deposition subpoenas and document requests to members of the Legislative Assembly seek discovery about their intentions and deliberative process during redistricting. This type of discovery is categorically barred by the Debate Clause of the Oregon Constitution, which provides: "Nor shall a member [of the Legislative Assembly] for words uttered in debate in either house, be questioned in any other place." Or Const, Art IV, § 9. The Debate Clause guarantees a legislative privilege that "applies when legislators are communicating in carrying out their legislative functions." *Babson*, 355 Or at 418.

As explained in further detail below, under *Babson* and analogous case law in the federal courts and other states, constitutional legislative privilege is absolute and shields against inquiry

1 into all legislative acts, communications, and motives of legislators, regardless of any alleged
2 improper motive or purpose. Legislators cannot be forced to testify or provide document
3 discovery in connection with their thoughts, intent, actions, and communications taken in
4 carrying out their core legislative function—which is exactly what Petitioners are seeking to
5 obtain in this action. *See* Pets’ Mot. to Amend Scheduling Order at 2–3. The documents
6 requested by these subpoenas make it clear that Petitioners are seeking discovery into individual
7 legislators’ intentions during the redistricting process, which is the core of their legislative
8 function and is unequivocally prohibited. Any non-privileged materials that their requests
9 incidentally include are part of the legislative record and are already publicly available. This
10 Court should quash the subpoenas and document requests and issue a protective order barring
11 Petitioners from seeking any discovery into matters subject to legislative privilege.

12 **B. Article IV, section 9, of the Oregon Constitution creates an absolute legislative**
13 **privilege that applies to all legislative functions.**

14 *Babson* is the only Oregon Supreme Court case addressing the Debate Clause. In that
15 case, the Court held that the Clause guarantees a legislative privilege that “applies when
16 legislators are communicating in carrying out their legislative functions,” regardless of where the
17 communications occur. 355 Or at 418. Citing an early Massachusetts case that predates the
18 Oregon Constitution and which interpreted a “similar clause” in the Massachusetts Constitution,
19 *Babson* suggests that the clause should be construed liberally, and that it applies to virtually
20 every act resulting from the nature and the execution of the legislative office, including speeches
21 and debates, written reports, and delivering an opinion. *Id.* at 422–23 (citing *Coffin v. Coffin*, 4
22 Mass 1, 27 (1808)). The Debate Clause and the other provisions of Article IV, section 9 protect
23 the separation of powers by “allow[ing] legislators to perform their legislative functions without
24 being interrupted or distracted by arrest, civil process, or other questioning,” and “to perform
25 their legislative functions without fear of retribution in the form of ‘be[ing] questioned in any
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1 other place' by either another branch of government or the public.” *Id.* at 419.² “In providing
2 those protections,” the Oregon Supreme Court explained, “the Debate Clause preserves
3 legislative integrity and independence.” *Id.*

4 Likewise, under federal case law interpreting the Speech or Debate Clause of the U.S.
5 Constitution³—which *Babson* states “provide a useful perspective” on the meaning of Oregon’s
6 Debate Clause given their similar wording and origins, 355 Or at 419 n. 10—constitutional
7 legislative privilege is absolute and shields against inquiry into all legislative acts,
8 communications, and motives of legislators, regardless of any alleged improper motive or
9 purpose. The purposes of the Speech and Debate Clause are essentially the same as those under
10 the Oregon Constitution: “first, the need to avoid intrusion by the Executive or Judiciary into the
11 affairs of a coequal branch, and second, the desire to protect legislative independence.” *United*
12 *States v. Gillock*, 445 US 360, 369, 100 S Ct 1185, 63 L Ed 2d 454 (1980). Its protections
13 “include not only ‘words spoken in debate,’ but anything ‘generally done in a session of the
14 House by one of its members in relation to the business before it.”” *United States v. Johnson*,
15 383 US 169, 179, 86 S Ct 749, 755, 15 L Ed 2d 681 (1966) (quoting *Kilbourn v. Thompson*, 103
16 US 168, 204 (1880)). “[O]nce it is determined that Members are acting within the ‘legitimate
17 legislative sphere’ the Speech or Debate Clause is an absolute bar to interference.” *Eastland v.*
18 *U.S. Servicemen’s Fund*, 421 US 491, 503, 95 S Ct 1813, 44 L Ed 2d 324 (1975) (citing *Doe v.*
19 *McMillan*, 412 US 306, 314, 93 S Ct 2018, 36 L Ed 2d 912 (1973)).

21 _____
22 ² Article IV, section 9, provides in full: “Senators and Representatives in all cases, except for
23 treason, felony, or breaches of the peace, shall be privileged from arrest during the session of the
24 Legislative Assembly, and in going to and returning from the same; and shall not be subject to
any civil process during the session of the Legislative Assembly, nor during the fifteen days next
before the commencement thereof: Nor shall a member for words uttered in debate in either
house, be questioned in any other place.”

25 ³ The Speech or Debate Clause of the United States Constitution provides that “for any Speech or
26 Debate in either House, [Senators and Representatives] shall not be questioned in any other
Place.” US Const, Art I, § 6.

1 In determining whether an act falls within the legitimate legislative sphere, courts do “not
2 look to the motives alleged to have prompted it.” *Id.* at 508. Indeed, the Speech or Debate
3 Clause protects against inquiry into the motivations underlying legislative acts, regardless of
4 whether the alleged motivations were improper. “It is beyond doubt that the Speech or Debate
5 Clause protects against inquiry into acts that occur in the regular course of the legislative process
6 and into the motivation for those acts.” *United States v. Brewster*, 408 US 501, 525-29, 92 S Ct
7 2531, 33 L Ed 2d 507 (1972) (holding that the Speech and Debate Clause does not prohibit
8 prosecution of a senator for violating federal bribery laws but that “inquiry into a legislative act
9 or the motivation for a legislative act” is not necessary to the prosecution); *Gravel v. United*
10 *States*, 408 US 606, 628–29, 92 S Ct 2614, 33 L Ed 2d 583 (1972) (forbidding questioning
11 concerning a senator’s conduct at a subcommittee hearing or his motivations and
12 communications in connection therewith); *Tenney v. Brandhove*, 341 US 367, 377, 71 S Ct 783,
13 95 L Ed 1019 (1951) (“The claim of an unworthy purpose does not destroy the privilege.”). “If
14 the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift
15 the protection of the Clause, then the Clause simply would not provide the protection historically
16 undergirding it.” *Eastland*, 421 US at 508–09. In sum, legislative privilege undisputedly shields
17 legislative motivations, communications, and actions from inquiry.

18 **C. The drafting and enactment of a redistricting plan are legislative functions shielded**
19 **by legislative privilege.**

20 The United States Constitution and the Oregon Constitution grant the Legislative
21 Assembly authority to enact a congressional redistricting plan. US Const, Art I, § 4; *Ariz. State*
22 *Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 US 787, 808, 135 S Ct 2652, 192 L Ed 2d 704
23 (2015) (“[R]edistricting is a legislative function, to be performed in accordance with the State’s
24 prescriptions for lawmaking”); Or Const, Art IV, § 1(1). Therefore, enacting a redistricting
25 plan like SB 881 is a core legislative function under the Debate Clause. *See Gravel*, 408 US at
26

1 625 (holding federal Speech or Debate Clause applies to integral parts of “proceedings with
2 respect to the consideration and passage or rejection of proposed legislation or with respect to
3 other matters which the Constitution places within the jurisdiction of either House”).

4 Although the Oregon Supreme Court has never addressed legislative privilege in the
5 context of redistricting litigation, courts in other states applying similar constitutional provisions
6 have consistently upheld the privilege in redistricting cases alleging gerrymandering. The Rhode
7 Island Supreme Court has held that testimony concerning the “actions or motivations” of Rhode
8 Island legislators in “proposing, passing, or voting upon” a redistricting plan is privileged under
9 the state speech and debate clause. *Holmes v. Farmer*, 475 A2d 976, 984 (RI 1984) (holding that
10 “[t]he business conducted at meetings of the [legislature’s] Reapportionment Commission, the
11 discussions that took place among groups of individual legislators, and the actions of individuals
12 in carrying out the reapportionment process [were] areas of legitimate legislative undertakings,”
13 and therefore holding that legislative privilege applied).

14 Similarly, the Virginia Supreme Court held that documents and communications relating
15 to “Senators’ partisan considerations affecting the shape or composition of the districts or
16 adjacent districts, including impact on incumbents,” the “development and prioritization of the
17 criteria used to draft and modify the districts,” and “map files and plans proposed, considered, or
18 adopted,” were privileged and held that the privilege applies to “communications or acts integral
19 to the sphere of legitimate legislative activity, whether in an official legislative proceeding or
20 not.” *Edwards v. Vesilind*, 292 Va 510, 516–17, 528–29, 536, 790 SE2d 469, 473, 479, 483–84
21 (2016). Likewise, the Pennsylvania courts barred plaintiffs from subjecting legislators to
22 discovery in redistricting litigation under that state’s speech and debate clause, which confers
23 “absolute” legislative privilege covering activities within the “sphere of legitimate legislative
24 activity” and that “the consideration and passage of [a redistricting act is] unquestionably a
25 legitimate legislative activity.” *League of Women Voters of Pa. v. Commonwealth*, 177 A3d

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1 1000, 1005, 1009 (Pa Commw Ct 2017). *See also In re Perry*, 60 SW3d 857, 859, 862 (Tex
2 2001) (holding plaintiffs could not discover documents relating to “the consideration of and/or
3 formulation of redistricting plans”); *Ariz. Indep. Redistricting Comm’n v. Fields*, 206 Ariz 130,
4 139, 75 P3d 1088, 1097 (Ariz Ct App 2003) (holding Independent Redistricting Commission
5 members were “cloaked with legislative privilege for actions that are ‘an integral part of the
6 deliberative and communicative processes’ utilized in developing and finalizing a redistricting
7 plan, and ‘when necessary to prevent indirect impairment of such deliberations’”) (quoting
8 *Gravel*, 408 US at 625)).⁴

9 In sum, it is well established both in Oregon and nationwide that legislative privilege
10 categorically shields the legislative process—including in the context of redistricting, which is a
11 core legislative function—from discovery.

12 **D. All of the information that Petitioners seek from the Legislators is privileged.**

13 In accordance with the above principles, legislators may not be compelled to submit to
14 questioning in a deposition, trial, or interrogatory about legislative acts or communications,
15 including the legislators’ motives and purposes with respect to the consideration, development,
16 and passage of legislation. Nor may they be compelled to disclose documents or any other
17 evidence containing or reflecting legislative acts or communications or the motives and purposes
18 underlying those acts or communications.

19 Yet Petitioners’ subpoenas and extensive document requests, which are virtually
20 identical, directly seek privileged materials and testimony. For example, they seek:

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22 ⁴ Among the states, only Florida, which lacks a state constitutional speech or debate clause, has
23 limited the legislative privilege in the redistricting context. *See League of Women Voters of Fla.*
24 *v. Fla. House of Representatives*, 132 So 3d 135, 151-52, 154 (Fla 2013). A Texas court has also
25 suggested that there may exist an “extraordinary circumstance” that would justify an “almost
26 unprecedented incursion into legislative immunity” but nonetheless held that the plaintiffs in that
case were barred from discovery into document relating to “the consideration of and/or
formulation of redistricting plans.” *Perry*, 60 SW3d at 859, 861–62 (citing *Vill. of Arlington*
Heights v. Metro. Hous. Dev. Corp., 429 US 252, 268, 97 S Ct 555, 50 L Ed 2d 450 (1977)).

- 1 • All documents, including communications, data, notes, drafts, memoranda, or reports,
2 pertaining to the criteria each legislator “*considered, reviewed, relied on, and/or used*
3 related to the 2021 congressional redistricting.” Marshall Decl., Attachments 1-6, RFP
4 # 1 (emphasis added).
- 5 • “All Communications related to the 2021 redistricting, including but not limited to the
6 Criteria *considered, relied on, and/or used*; analyses, memoranda, reports, and/or data;
7 expected effects on congressional races in 2022 to 2030; and the composition of the
8 House Redistricting Committee.” *Id.*, RFP # 3 (emphasis added)
- 9 • “All 2021 Oregon congressional redistricting maps and partial maps, including all related
10 analyses and data, You *proposed, suggested, drafted, drew, considered, and/or sent to*
11 House Democrats, Senate Democrats, Oregon Congressional Democrats, the Governor,
12 the Secretary of State, and/or SEIU.” *Id.*, RFP #4 (emphasis added).
- 13 • All Documents, including all data, analyses, memoranda and reports, including all drafts,
14 *pertaining to the expected effects of Oregon Senate Bill 881-A* on the 2022, 2024, 2026,
15 2028, and 2030 Oregon congressional races. *Id.*, RFP # 7 (emphasis added).

16 These and all of the other document requests clearly seek privileged information
17 regarding members’ motives, purposes, and communications with respect to the consideration,
18 development, and passage of SB 881. The Petition confirms that the only purpose of this
19 discovery to attempt to prove that members of the Legislative Assembly drafted and enacted a
20 congressional redistricting plan for partisan purposes and with partisan intent. *See* Petition
21 ¶¶ 60-61, 70-71, 76, 82-84, 92-93, 97. The case, as framed by Petitioners, centers around the
22 “actions and motivations of the legislators in proposing, passing, or voting upon a particular
23 piece of legislation,” which “falls clearly within the most basic elements of legislative privilege.”
24 *See Holmes*, 475 A2d at 984.

25 Any non-privileged documents or communications that Petitioners incidentally request
26 are already in the public record and readily available to Petitioners. For example, Petitioners’
27 requests for “All Documents related to the 2021 congressional redistricting You provided to the
28 House Redistricting Committee, Senate Redistricting Committee, and/or Oregon Democrat
29 Leaders,” and for “All Communications related to the 2021 redistricting,” Marshall Decl.,
30 Attachments 1-6, RFPs # 2 & 3, are so broad that they encompass both legislatively privileged
31 materials and materials that are part of the legislative record, which is available online. *See*

1 <https://olis.oregonlegislature.gov/liz/2021S1/Measures/Overview/SB881> (providing bill drafts,
2 measure history, committee recordings, committee and floor voting records, staff measure
3 summary and other analysis, adopted amendments, and testimony submitted on SB 881). There
4 is no purpose to these requests other than to obtain privileged materials.

5 To be clear, the State's position is not that legislators and the Legislative Assembly are
6 immune from discovery under all circumstances, but rather that, in the context of this case, all
7 information that Petitioners are seeking that is not already available to them is shielded from
8 disclosure by legislative privilege.

9 **E. Petitioners' document requests are unreasonable and unduly burdensome.**

10 Petitioners' document requests demand that each Legislator, including the House Speaker
11 and Senate President, appear for deposition with a large volume of documents within a week of
12 the date that the requests were provided to counsel. *See* Marshall Dec., Attachments A-F. This
13 timeline violates ORCP 55 C(3)(b) both because the recipients of such a request are entitled to at
14 least 14 days' notice unless there is a court order and because Petitioners did not provide
15 Respondent with seven days' notice before issuing the subpoenas. While the State recognizes
16 that the statutory timeline for this case requires expedited deadlines, it is wholly unreasonable to
17 expect production of so many documents from so many custodians on such a short timeline.

18 The wide range and large volume of documents that Petitioners seek demonstrates that
19 these requests are unduly burdensome; their requests are not at all targeted or specific. In
20 addition to the examples already provided above, Petitioners request:

1 All Communications from January 1, 2021 to the present that contain any of the
2 following terms: "reapportionment," "redistricting," "congressional district,"
3 "congressional districts," "gerrymander," "188.010", "Hartung," "SB 881," "Senate Bill
4 881," "SB 259," "Senate Bill 259," "Census," "Suzanne Bonamici," "Earl Blumenauer,"
5 "Peter DeFazio," and/or "Kurt Schrader." (For purposes of this Request,
6 "reapportionment," "redistricting," "congressional district," "congressional districts,"
"gerrymander," "188.010", "Hartung," "SB 881," "Senate Bill 881," "SB 259," "Senate
Bill 259," "Census," must be searched in the subject line, the body, and any attachments.
"Suzanne Bonamici," "Earl Blumenauer," "Peter DeFazio," and/or "Kurt Schrader" must
be searched in "to," "from," "cc," and "bcc," fields, the subject line, the body, and any
attachments.)

7 Marshall Dec., Attachments 1-6, RFP # 9. This request (and the others) would require
8 substantial e-discovery and email searches with multiple custodians, and would likely yield tens
9 of thousands of documents, which would then need to undergo review for responsiveness and
10 privilege, which would be absolutely necessary to avoid disclosure of privileged materials. This
11 would occupy a significant portion, if not all, of counsel's time during the extremely limited
12 period before evidentiary submissions are due October 25 under the Scheduling Order.
13 Requiring production of any of Petitioners' unwieldy document requests under these
14 circumstances is unduly burdensome and unreasonable.

1 **F. Conclusion**

2 For the above reasons, this Court should quash the subpoenas and document requests
3 issued to President Courtney, Senator Wagner, Speaker Kotek, and Representatives Campos,
4 Pham, and Salinas. The Court should also issue a protective order directing that Petitioners may
5 not depose, seek testimony, or request documents from the Legislative Assembly or its members
6 on matters subject to legislative privilege.

7
8 DATED October 18, 2021.

9 Respectfully submitted,

10 ELLEN F. ROSENBLUM
11 Attorney General

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26 Assembly

1 **CERTIFICATE OF SERVICE**

2 I certify that on October 18, 2021, I served the foregoing LEGISLATIVE
3 ASSEMBLY'S COMBINED MOTION TO QUASH SUBPOENAS AND MOTION FOR
4 PROTECTIVE ORDER AND MEMORANDUM IN SUPPORT upon the parties hereto by the
5 method indicated below, and addressed to the following:

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