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.	Case No. 21CV40180 **OPPOSITION TO MOTION TO QUASH**

OPPOSITION TO MOTION TO QUASH

Petitioners oppose Respondent's Motion To Quash, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cnty. Oct. 18, 2021) (hereinafter "Motion" or "Mot.").

Because "[p]artisan gerrymanders . . . are incompatible with democratic principles," *Ariz. State Legislature v. Ariz. Ind. Redistricting Comm'n*, 576 U.S. 787, 791 (2015) (citations omitted), Oregon has chosen to outlaw this practice. Notwithstanding that clear state-law prohibition, Respondent now seeks to hide from this Court, and from the people of Oregon, the most direct evidence that the Legislature "dr[ew]" congressional lines "for the purpose of favoring any political party, incumbent legislator or other person." ORS § 188.010(2). Respondent does not cite any Oregon cases that support her position, and she does not mention the federal partisan gerrymandering line of cases in her Motion. This is telling. Oregon courts follow interpretations of the federal Speech or Debate Clause, U.S. Const. art. I, § 6, or its common law analogues, in interpreting the Oregon Constitution's Debate Clause. *See State v. Babson*, 355 Or. 383, 417, 419 n.10, 420–21 (2014). And federal courts have regularly allowed plaintiffs in partisan

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gerrymandering cases to obtain discovery from legislators who controlled the redistricting process, in the face of analogous claims for legislative privilege to those Respondent raises here.

Indeed, it appears that the Respondent and Proposed Intervenors intend to rely upon Democratic Party legislative leaders' whitewashed statements about their intent in enacting SB 881-A made for public consumption, while asking this Court to shut the courthouse door to the most direct evidence of the Legislature's *actual* partisan intent under both ORS § 188.010(2) and the Oregon Constitution. Oregon law does not permit this result.

This Court should deny the Motion to Quash. First, as a threshold matter, a significant portion of the discovery that Petitioners seek does not implicate the Debate Clause at all, as it involves communications between legislators and third parties who are not the legislators' alter egos, such as special interest groups. And as to communications among legislators that do *implicate* the Debate Clause privilege, as federal courts have explained in discussing the analogous federal law debate privilege, *Babson*, 355 Or. at 419 n.10, "[w]hether the privilege that legislator[s] seek to assert is characterized as a legislative or a deliberative process privilege, it is, at best, one which is qualified," *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100 (S.D.N.Y. 2003), *aff'd*, 293 F.Supp.2d 302 (S.D.N.Y. 2003). That privilege is subject to the well-established five-factor balancing test that federal courts apply in redistricting cases, especially partisan gerrymandering cases, which balances the debate privilege with the urgent need for the most direct evidence of partisan intent. Under that test, Petitioners are entitled to the discovery that they seek, which discovery is the standard sort that plaintiffs obtain in partisan gerrymandering cases. *See, e.g.*, Order, *Bennett v. Ohio Redistricting Comm'n*, No. 2021-1198 (Ohio Oct. 7, 2021), *available at* https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=227960.pdf (counsel for Proposed Intervenors recently securing analogous expedited discovery, including requests for production of documents and depositions of the Ohio Governor, Senate President, and House Speaker, among other officials, in a partisan gerrymandering before the Ohio Supreme Court).

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I. Legal Standard

The burden of persuasion falls first on the party asserting a privilege to show he or she is entitled to assert it in the case at hand "and that the communications that he or she seeks to exclude fall within the scope of the privilege." *State v. Serrano*, 346 Or 311, 325 (2009). Only once the party asserting privilege establishes that it applies does the burden shift to "the proponent of the evidence"—here, Petitioners—"to rebut the claim of privilege". *Id.* at 326.

II. Argument

Article IV, Section 9 of the Oregon Constitution grants legislators certain limited immunity or privilege related to their official functions. Or. Const. art. IV, § 9. The Debate Clause, as relevant here, provides that state legislators cannot be questioned about "words uttered in debate in either house." *Id.* The Oregon Supreme Court has interpreted this Clause consistent with federal law protections on legislative privilege, *Babson*, 355 Or. at 417, 419 n.10, 420–21, "appl[ying] to communications that occur when 'a collection of persons,' that is, legislators, are 'united in their legislative capacity,'" *id.* at 418. Cases interpreting the Debate Clause make clear that the scope of this legislative privilege is limited, *Adamson v. Bonesteele*, 295 Or. 815, 824 (1983), and covers only the speech and writings of legislators "in the exercise of the functions of th[eir] office, so long as those words are uttered 'in session,'" *State v. Babson*, 249 Or. App. 278, 302 (2012), *aff'd*, 355 Or. 383 (Ct. App. 2014) (citation omitted).

The Debate Clause privilege does not apply to a legislator's communications with non-alter-ego third parties, such as special interest groups seeking the enactment of legislation, including unlawful partisan gerrymandering legislation. Such communications are, at most, "casually or incidentally related to legislative affairs but not a part of the legislative process itself." *United States v. Brewster*, 408 U.S. 501, 528 (1972). In addressing the scope of the privilege arising from the Debate Clause, the Oregon Supreme Court has favorably cited precedent holding such privilege is "limited to 'an act which was clearly part of the legislative process—the *due*

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functioning of the process,'" *Babson*, 355 Or. at 423 (quoting *Brewster*, 408 U.S. at 515–16), which does not extend to legislator discussions with such third parties.

And even where the privilege is implicated—such as to communications among legislators and their staff about specific, contemplated legislation—that privilege is qualified, and courts can and must set that privilege aside under a well-established, five-factor balancing test. The Oregon Supreme Court has found instructive federal analogues in interpreting the Debate Clause, directing courts to look at such analogues when determining the scope and application of the legislative privilege found there. *Babson*, 355 Or. at 417, 419 n.10, 420–21. In turn, federal courts adjudicating redistricting cases, especially partisan gerrymandering cases, have looked to "a five-factor standard that facilitates case-by-case evaluation of the competing interests at stake" when addressing claims of state legislator privilege in similar contexts. *Benisek v. Lamone*, 241 F. Supp. 3d 566, 575 (D. Md. 2017); *see also Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011) (same); *Rodriguez*, 280 F. Supp. 2d at 101 (same). This standard requires the court to weigh: (1) "the relevance of the evidence sought," (2) "the availability of other evidence," (3) "the seriousness of the litigation," (4) "the role of the State, as opposed to individual legislators, in the litigation," and (5) "the extent to which the discovery would impede legislative action." *Benisek*, 241 F. Supp. 3d at 575. At bottom, a court considering these factors seeks to "determine whether the need for disclosure and accurate fact finding outweighs the legislature's need to act free of worry about inquiry into [its] deliberations." *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *7 (citation omitted).

A. As A Threshold Matter, To The Extent That Petitioners' Discovery Requests Seek Information And Testimony Regarding Communications Between Legislators And Third Parties, And The Debate Clause Privilege Plainly Does Not Apply

A significant portion of the discovery that Petitioners seek here falls outside "the scope of legislative functions protected by the privilege"—and thus does not even implicate the five-factor test for setting that privilege aside—because it deals with communications between the Legislature

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and third parties, including special interest groups. *Babson*, 355 Or. at 423 (citation omitted). The Deposition Subpoenas directed at legislators seek "[a]ll Communications related to the 2021 redistricting, including but not limited to the Criteria considered, relied on, and/or used; analyses, memoranda, reports, and/or data; expected effects on congressional races in 2022 to 2030; and the composition of the House Redistricting Committee," which "Communications" include "all forms of written or recorded communication," such as "emails, texts, mobile device messages, chats." Declaration of Brian Simmonds Marshall in Support of Motion to Quash, Attachments A–F at 3, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cnty. Oct. 18, 2021) (hereinafter "Marshal Dec."). These requests include communications with third parties. *Id.* Similarly, Petitioners' depositions of these legislators would encompass these third-party communications, endeavoring to determine the communications the Democratic Party leaders who control the Legislature had with outside partisan groups regarding redistricting decisions. These types of communications with partisan groups and other third parties are not covered by the Debate Clause because they take place "outside the legislative meeting place and outside the legislative process itself." *Bonesteele*, 295 Or. at 828. Notably, such third-party communications regularly provide essential evidence of partisan intent in partisan gerrymandering cases. *See Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018), *vacated and remanded sub nom*. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018), *vacated and remanded*, 138 S. Ct. 2679 (2018); *League of Women Voters v. Commonwealth of Pa.*, 178 A.3d 737, 766–67 & n.38 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 392 (Fla. 2015).

Respondent asserts that that legislative privilege applies here because the Debate Clause "creates an absolute legislative privilege that applies to all legislative functions." Mot. at 3. But this both misstates the law—because, as explained below, the Debate Clause privilege is not absolute, and is subject to a five-factor balancing test—and ignores entirely that the communications that Petitioners seek involve third-party communications outside the legislative process. Because the communications and activities that Petitioners seek to discover fall outside

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the official legislative role and occurred with third parties, legislative privilege simply does not apply. *Babson*, 355 Or. at 418; *Bonesteele*, 295 Or. at 824.

None of the federal or out-of-state cases that Respondent cites suggests that communications with third parties are protected by the Debate Clause. *United States v. Johnson*, 383 U.S. 169 (1966), dealt with "an improperly motivated speech" given "on the floor of the House of Representatives." *Id.* at 171–72. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Court held that legislative hearings fell within the scope of the privilege. *Id.* at 369, 376–78. *Gravel v. United States*, 408 U.S. 606 (1972), extended the privilege to a legislator's aides, as "alter egos." *Id.* at 616–17, 628. *United States v. Gillock*, 445 U.S. 360 (1980), and *United States v. Brewster*, 408 U.S. 501 (1972), held that there was no constitutional limitation on federally prosecuting a state legislator, because such privileges yield to important, "legitimate interest[s]." *Gillock*, 445 U.S. at 373; *see also Brewster*, 408 U.S. at 502–03, 516. *Arizona Independent Redistricting Commission v. Fields*, 206 Ariz. 130 (Ariz. Ct. App. 2003), concluded that some consultants are analogous to legislative aides. *Id.* at 139–40. *Edwards v. Vesilind*, 292 Va. 510 (Va. 2016), held that communications with third-party non-staff are not protected unless they can be considered an "alter ego" of legislators. *Id.* at 532–33. *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, 177 A.3d 1000 (Pa. Commw. Ct. 2017), allowed discovery on third party communications between legislators and party organizations, with only limited immunity applied to *certain types* of requests. *Id.* at 1007–08. And so on.

For these reasons, the Court should hold that all discovery—including depositions—implicating legislator communications with third parties who are not alter egos falls outside of the Debate Clause entirely, and deny the Motion to Quash.

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B. As To The Portions Of Petitioners' Request That Cover Communications Among Legislators And/Or Their Alter Egos, The Debate Clause Does Not Bar That Discovery Under The Five-Part Balancing Test

Of course, Petitioners' discovery requests *also* cover communications between legislators or their staff that do implicate at least to some extent the legislative privilege under the Debate Clause, as is standard in partisan gerrymandering cases. But such privilege is not absolute—rather, it is a "qualified" privilege "at best." *Rodriguez*, 280 F. Supp. 2d at 100. Petitioners' discovery requests are permitted under a proper application of the "five-factor standard" federal courts apply to such privilege claims, *Benisek v. Lamone*, 241 F. Supp. 3d 566, 575 (D. Md. 2017), which five-part-test Respondent entirely ignores. Once again, this standard requires the court to weigh: (1) "the relevance of the evidence sought," (2) "the availability of other evidence," (3) "the seriousness of the litigation," (4) "the role of the State, as opposed to individual legislators, in the litigation," and (5) "the extent to which the discovery would impede legislative action." *Id.* Each of these five factors weighs against applying legislative privilege to shield state legislators from the discovery sought by Petitioners. Here, "the need for disclosure and accurate fact finding outweighs the legislature's need to act free of worry about inquiry into [its] deliberations." *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *7 (citation omitted; alteration in original). This test is readily satisfied here because, *inter alia*, both Oregon law and the Oregon Constitution prohibit partisan gerrymandering, and the evidence that Petitioners seek here is the most direct proof of such unlawful legislative intent.

These factors lead to the conclusion that Petitioners' requested discovery is permissible.

First, the requested discovery is highly relevant to this litigation because it has the potential to support Petitioners' allegations of partisan intent. Partisan intent is the sole element that Petitioners must establish for their claim under ORS § 188.010(2), *Hartung v. Bradbury*, 332 Or. 570, 599 (2001), and is one of two necessary elements of their claims under Article I, Sections 8, 20, and 26, and Article II, Section 1 of the Oregon Constitution, Or. Const. art. I, §§ 8, 20, 26; *id.*

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art. II, § 1. Documents and testimony that Petitioners seek will provide the most direct evidence of partisan intent surrounding the map drawing process. *See, e.g.*, *Benisek*, 348 F. Supp. 3d at 497, 518 (noting that, due to "extensive discovery," "the record is replete with direct evidence of . . . precise [partisan] purpose," including documentary and testimonial evidence from elected officials); *see also Rucho*, 279 F. Supp. 3d at 640; *League of Women Voters*, 178 A.3d at 766–67 & n.38; *League of Women Voters of Fla.*, 172 So. 3d at 392.

Second, the requested discovery cannot be provided by other witnesses or accessed from other sources. *See Benisek*, 241 F. Supp. 3d at 575. This most direct evidence of impermissible partisan intent is uniquely within the possession of Democratic Party legislative leaders who controlled the entire process. The ability to depose the legislators responsible for the redistricting choices and to review their related communications would present the most direct evidence of impermissible partisan intent that is imaginable.

Third, the interests at stake in this litigation are deeply serious. *Id.*; Petition ¶¶ 59–63, 78–86, 89–94, 96–101, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cnty. Oct. 11, 2021). "Partisan gerrymanders . . . are incompatible with democratic principles," *Ariz. State Legislature*, 576 U.S. at 791 (brackets omitted; citation omitted), and so the people of Oregon have chosen to outlaw this practice in our State, *see* ORS § 188.010(2); Or. Const. art. I, § 20; *id.* art. II, § 1.

Fourth, the role of the State is distinct from the role of the legislative leaders from whom discovery is sought. *State v. Stoneman*, 323 Or. 536, 542 (1996) ("[A]mong the various interests that the government of this state seeks to protect and promote, the interests represented by the state constitution are paramount to legislative ones."). The leaders' decision to engage in unlawful partisan gerrymandering shows how their individual interests deviated from the State's interest in a lawful and constitutional map. *See* Petition ¶¶ 23–26, 34–36, *Clarno v. Fagan*, No. 21CV40180.

Finally, if Petitioners' requested discovery is granted, there is little risk that legislative deliberations will be improperly chilled or impeded. *Benisek*, 241 F. Supp. 3d at 575. The Legislature has already decided that partisan gerrymandering is unlawful, ORS § 180.010(2), and

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the Oregon Constitution also prohibits this practice, Or. Const. art. I, §§ 8, 20, 26; *id.* art. II, § 1. Petitioners' discovery would, at most, dissuade future legislators from engaging in such unlawful partisan gerrymandering, which would not impede any permissible legislative deliberations.

This Court should thus deny Respondent's Motion to Quash in whole.

C. Petitioners' Discovery Requests Are Reasonable And Not Unduly Burdensome

Petitioners' Discovery Requests are focused on communications and documents that may reveal unlawful partisanship in the drafting and adopting of SB 881-A. While Respondent asserts that the requests require production of "a large volume of documents," *see* Mot. at 9, the requests are tailored to unearth evidence of partisan intent. Petitioners' discovery requests are explicitly directed at documents "considered, reviewed, relied on, and/or used" in relation to "the 2021 congressional redistricting," and communications "related to the 2021 redistricting, including but not limited to the Criteria considered, relied on, and/or used; analyses, memoranda, reports, and/or data; expected effects on congressional races in 2022 to 2030; and the composition of the House Redistricting Committee." *See, e.g.*, Marshall Dec., Attachment A at 2–3. These requests are plainly limited to documents and communications directly related to the redistricting decisions and motivations that are at the core of this dispute.

Also unavailing is Respondent's assertion that Petitioners' requests violate ORCP 55C(3)(b). *See* Mot. at 9. Petitioners previously addressed the narrow window for discovery in their Motion to Amend Scheduling Order, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cnty. Oct. 15, 2021), seeking more time for discovery and noting that this Court's Scheduling Order already acknowledges that certain provisions of the Oregon Rules of Civil Procedure and the Uniform Trial Court Rules are incompatible with the deadlines set out in 2021 Oregon Law Ch. 419, SB 259 (2021). Petitioners respectfully submit that it is well within this Court's discretion to address these concerns, and to permit Petitioners to obtain the discovery to which they are entitled.

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III. Conclusion

The Court should deny Respondent's Motion to Quash in whole.

DATED: October 19, 2021.

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CERTIFICATE OF SERVICE

I certify that I served a true and complete copy of the foregoing **OPPOSITION TO MOTION TO QUASH** on the date below as follows:

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