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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5
6 FOR THE COUNTY OF MARION

7 BEVERLY CLARNO, GARY)
8 WILHELMS, JAMES L. WILCOX, AND)
9 LARRY CAMPBELL,)

10 Petitioners,)

11 vs.)

12 SHEMIA FAGAN, in her official)
13 capacity as Secretary of State of)
14 Oregon)

15 Respondent,)

16 vs.)

17 JEANNE ATKINS, SUSAN CHURCH,)
18 NADIA DAHAB, JANE SQUIRES,)
19 JENNIFER LYNCH, AND DAVID)
20 GUTTERMAN.)

21 Intervenors.)

Case No. 21CV40180

ORDER ON LEGISLATIVE
ASSEMBLY'S MOTION TO QUASH;
PROTECTIVE ORDER

22 After consideration of the Legislative Assembly's Combined Motion to Quash
23 Subpoenas and Motion for Protective Order and Memorandum in Support dated
24 October 18, 2021, the Declaration of Brian Simmonds Marshall in Support of Legislative
25 Assembly's Combined Motion to Quash Subpoenas and Motion for Protective Order
26 and Memorandum of Support dated October 18, 2021, Petitioners' Opposition to Motion
27 to Quash dated October 19, 2021, and Legislative Assembly's Reply in Support of
28 Legislative Assembly's Combined Motion to Quash Subpoenas and Motion for

1 Protective Order and Memorandum in Support dated October 20, 2021, Special Judicial
2 Panel Presiding Judge Mary James grants the Legislative Assembly’s Motion to Quash
3 the Deposition Subpoenas and Requests for Production of Documents identified by the
4 Legislative Assembly in its combined motion, to the extent that those subpoenas and
5 requests for documents seek information that falls within the scope of the legislative
6 privilege pursuant to the Oregon Constitution, Article IV, §9. Petitioners may not
7 depose, seek testimony, or request documents from the Legislative Assembly or its
8 members on matters subject to legislative privilege, as further described below.
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11 **Opinion**
12

13 **Babson Defines the Scope of Oregon’s Debate Clause, Article IV, §9.**

14 *State v. Babson*, 355 Or 383 (2014), is the controlling case on the Debate Clause
15 of Article IV, section 9, of the Oregon Constitution. Article IV, §9 provides in full:

16 Senators and Representatives in all cases, except for treason, felony, or
17 breaches of the peace, shall be privileged from arrest during the session of
18 the Legislative Assembly, and in going to and returning from the same; and
19 shall not be subject to any civil process during the session of the Legislative
20 Assembly, nor during the fifteen days next before the commencement
21 thereof: **Nor shall a member for words uttered in debate in either house,
be questioned in any other place.** (emphasis added).

22 In *Babson*, the Oregon Supreme Court identified two purposes of Article IV, §9:
23 First, the provision allows legislators to perform their legislative functions without being
24 interrupted or distracted by arrest, civil process, or other questioning. Second, it allows
25 legislators to perform their legislative functions without fear of retribution in the form of
26 ‘be[ing] questioned in any other place’ by either another branch of government or the
27 public.” *Babson*, at 419 (2014).
28

1 When it applies, the legislative privilege is absolute; however, the scope of the
2 privilege is broad but not unlimited. In *Babson*, the Court discussed a Massachusetts
3 case, *Coffin v. Coffin*, 4 Mass. 1 (1808), which was decided before the Oregon
4 Constitution was adopted. *Coffin* interpreted a similar clause in the Massachusetts
5 Constitution and is therefore authoritative in interpreting Oregon’s Debate Clause.
6
7 *Babson* at 421.

8 In *Coffin v. Coffin*, “the court stated that it would not confine the scope of the
9 clause to “delivering an opinion, uttering a speech, or haranguing in debate” and it
10 instead “extend[ed] it to the giving of a vote, to the making of a written report, *and to*
11 *every other act resulting from the nature, and in the execution, of the office.*” (emphasis
12 added). The privilege would not apply “[w]hen a representative is not acting as a
13 member of the house.” *Babson* at 422. The question for trial courts determining
14 application of the debate clause is “whether questions seek to obtain information about
15 legislative functions.” *State v. Babson*, 355 Or 383, 427 (2014). The Court further
16 recognized that “the line between enactment and enforcement may be difficult to draw .
17 . . . As the state notes, legislators enacting or amending a law often will consider the
18 practical implications involved in enforcing a law. . . To the extent that legislators seek
19 information about how a law would be or is being enforced, for purposes of enacting or
20 amending legislation, those communications likely would be protected by the Debate
21 Clause.” *Babson* at 426. To the extent that the Petitioners in this case seek information
22 about the effects of proposed legislation considered during enactment of SB 881 (2021)
23 or other legislation, those communications are also protected by the privilege.
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1 **The Five-Factor Balancing Test Identified by Petitioners is Inapplicable Here.**

2 The Presiding Judge of the Special Judicial Panel declines Petitioners' invitation
3 to apply the federal five-factor balancing test from *In re Franklin Nat'l Bank Secs. Litig.*,
4 478 F.Supp. 577, 583 (1979). Although this test has been applied in federal cases
5 when determining the application of the legislative privilege and other privileges under
6 federal law, this five-factor test has never been applied in Oregon.
7

8 In a footnote, the Court in *Babson* noted that federal cases decided after the
9 Oregon Constitution was adopted are not controlling authority in interpretation of Article
10 IV, section 9; however, they may provide a useful perspective." *Babson* at fn. 10. It is
11 notable that the Court chose not to apply the five-factor test in *Babson*, even though that
12 test has been applied in federal cases since at least 1979 and before *Babson* was
13 decided in 2014. Ostensibly the Court in *Babson* was aware of the five-factor test and
14 chose not to apply it. Petitioners' invitation to apply the five-factor test to application of
15 the Article IV § 9 Debate Clause for the first time in this case is declined.
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18 **Applicability of the Legislative Privilege to Third-Party Communications.**

19 In *Babson*, the Court was never squarely presented with the question of whether
20 third-party communications involving legislative functions are privileged. The Court's
21 inquiry focused on whether the information sought related to a legislative function,
22 regardless of whether that information came from communications between legislators
23 and third parties:
24

25 Here, however, the information that defendants seek clearly relates to the
26 enforcement, rather than the enactment, of the guideline, and evidence in
27 the record indicates that the legislators who were subpoenaed had
28 conversations with the Legislative Administrator regarding the guideline.
For those reasons, we remand to allow defendants to question the LAC co-
chairs about their involvement, if any, in enforcing the guideline against

1 defendants.

2 *Babson* at 428.

3 The legislative privilege applies to all communications that are part of a
4 legislative function, including functions that necessarily involve third parties. For this
5 reason, Petitioners' argument that legislators may be questioned as to communications
6 with third parties is unavailing.

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8 **Information Sought by Petitioners' Subpoenas and Requests for Documents Falls
9 Within the Scope of the Debate Clause.**

10 Petitioners' Deposition Subpoenas and Requests for Production of Documents
11 seek to obtain information that is squarely related to a legislative function, generally,
12 enacting laws, and specifically, enacting reapportionment plans. The Oregon
13 Constitution vests the legislative power of the state in the Legislative Assembly. Or.
14 Const. Article IV § 1. The federal constitution assigns state legislatures the task of
15 reapportionment. U.S. Const. Article I, §4.
16

17 To the extent that Petitioners' Deposition Subpoenas and Requests for
18 Production of Documents seek information that is related to the enactment of SB 881
19 (2021), such information therefore falls within the scope of the legislative privilege.
20 Examples of Requests for Documents that seek information protected by the privilege
21 include, but are not limited to the following:
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- 23
24 • "All Documents pertaining to the Criteria You considered, reviewed, relied on,
25 and/or used related to the 2021 congressional redistricting..." See e.g.
26 Declaration of Brian Marshall dated October 18, 2021, Attachment A ¶ 1.
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- 1 • “All Documents related to the 2021 congressional redistricting You provided to
2 the House Redistricting Committee, Senate Redistricting Committee, and/or
3 Oregon Democrat Leaders...” See e.g. Declaration of Brian Marshall dated
4 October 18, 2021, Attachment A ¶ 2.
- 5
6 • “All Communications related to the 2021 redistricting, including but not limited to
7 the Criteria considered, relied on, and/or used; analyses, memoranda, reports,
8 and/or data; expected effects on congressional races in 2022 to 2030...” See e.g.
9 Declaration of Brian Marshall dated October 18, 2021, Attachment A ¶ 3.
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11 • “All 2021 Oregon congressional redistricting maps and partial maps, including all
12 related analyses and data, You proposed, suggested, drafted, drew, considered,
13 and/or sent to House Democrats, Senate Democrats, Oregon Congressional
14 Democrats, the Governor, the Secretary of State, and/or SEIU.” See e.g.
15 Declaration of Brian Marshall dated October 18, 2021, Attachment A ¶ 4.
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18 • “All contracts relating to the redistricting of Oregon's congressional districts in
19 2021, including but not limited to (i) draft or proposed Oregon congressional
20 redistricting maps; (ii) analyses of any proposed or draft Oregon congressional
21 redistricting map or partial map, and (iii) analyses of the expected, anticipated,
22 and/or hoped-for effect of any proposed or draft Oregon congressional
23 redistricting map or partial map.” See e.g. Declaration of Brian Marshall dated
24 October 18, 2021, Attachment A ¶ 6.
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27 • “All Documents, including all data, analyses, memoranda and reports, including
28 all drafts, pertaining to the expected effects of Oregon Senate Bill 881-A on the

1 2022, 2024, 2026, 2028, and 2030 Oregon congressional races.” See e.g.
2 Declaration of Brian Marshall dated October 18, 2021, Attachment A ¶ 7.

- 3 • All Communications relating to the change in composition of the House
4 Redistricting Committee, including but not limited to House Speaker Tina Kotek,
5 on April 14, 2021, changing the composition of the House Redistricting
6 Committee from three Democrats and two Republicans to three Republicans and
7 three Democrats; and Speaker Kotek, on September 24, 2021, changing the
8 composition of the House Redistricting Committee from three Democrats and
9 Three Republicans to two Democrats and one Republican. See e.g. Declaration
10 of Brian Marshall dated October 18, 2021, Attachment A ¶ 8.
- 11 • All Communications from January 1, 2021 to the present that contain any of the
12 following terms: "reapportionment," "redistricting," "congressional district,"
13 "congressional districts," "gerrymander," "188.010", "Hartung," "SB 881," "Senate
14 Bill 881," "SB 259," "Senate Bill 259," "Census," "Suzanne Bonamici," "Earl
15 Blumenauer," "Peter Defazio," and/or "Kurt Schrader. . ." See e.g. Declaration of
16 Brian Marshall dated October 18, 2021, Attachment A ¶ 9.

17 To the extent that the information sought in Petitioners’ Deposition Subpoenas and
18 Requests for Documents does not appear to be covered by the Debate Clause, this
19 information can more appropriately be obtained from the Custodian of the Records, the

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1 published and publicly available information relating to SB 881 (2021) or other
2 legislation, or other sources.

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4 IT IS SO ORDERED.

5 
6 Senior Judge Mary M. James