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 **Senior Judge Mary M. James, Presiding Judge of Special Judicial Panel** **Senior Judge Henry C. Breithaupt, Special Master to Special Judicial Panel** REPLY IN SUPPORT OF 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**

INTRODUCTION

Petitioners served six state legislators papers invoking the power of this Court to "HEREBY COMMAND[]" members of a co-equal branch of government to appear for deposition and produce documents from their files. *See* Marshall Decl., Ex. A–F, at 1 (subpoenas and document requests to Senate President Courtney, Senator Wagner, House Speaker Kotek, and Representatives Campos, Pham, and Salinas). Petitioners seek to question the Legislators about their legislative duties and obtain their communications, in an attempt to prove their theory about the Legislators' intentions and motivations in drafting and enacting legislation. The Debate Clause bars an Oregon state court from allowing Petitioners to do so, because it would intrude upon the legislative privilege.

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ARGUMENT

A. Petitioners rely on irrelevant federal cases ordering discovery of state legislators' communications under a five-factor balancing test inapplicable to the Debate Clause.

The Legislative Assembly moves to quash "under the Debate Clause of Article IV, section 9, of the Oregon Constitution. *See State v. Babson*, 355 Or 383, 418, 422–23 (2014)." Mot. at 1–2. Petitioners' response erroneously conflates that *absolute* privilege—established under the Debate Clause of the Oregon Constitution, which is similar to the Speech or Debate Clause of the U.S. Constitution and similar clauses of other state constitutions—with a different type of privilege that is not at issue, the *qualified* common-law legislative privilege.

Petitioners principally cite cases in which federal courts ordered state legislators to produce discovery. Those cases have no bearing on a state court's interpretation of its own state's constitution: "Under the Supremacy Clause, a federal court clearly is not bound by the Speech or Debate Clause of [a state constitution]." *Rodriguez v. Pataki*, 280 F Supp 2d 89, 95 (SDNY 2003), *aff'd*, 293 F Supp 2d 302 (SDNY 2003) (citing *United States v. Gillock*, 445 US 360, 370, 100 S Ct 1185, 63 L Ed 2d 454 (1980)) (cited in Pets' Resp. at 2); *see* US Const, Art VI, Cl 2. The federal Speech or Debate Clause "by its terms is confined to federal legislators." *Gillock*, 445 US at 374. Thus, "by its terms, [the Clause] does not apply at all to state and local legislators." *Comm. for a Fair & Balanced Map v. Ill. State Bd. Of Elections*, No. 11-C-5065, 2011 WL 4837508, at *5 (ND Ill Oct 12, 2011) (cited in Resp. at 4).

For that reason, assertions of legislative privilege by state legislators in *federal* court are governed by federal common law. Petitioners' own cases distinguish between the federal Speech or Debate Clause, which "by its terms protects only federal officials," and "the federal common law doctrine of legislative privilege." *Benisek v. Lamone*, 241 F Supp 3d 566, 572–73 (D Md 2017) (cited in Pets' Resp. at 4); *see also Rodriguez*, 280 F Supp 2d at 95 (explaining that state legislators enjoy "common law" legislative immunity and privilege in federal court because no

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constitutional provision applies); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *5–7 (distinguishing between the federal Speech or Debate Clause and "federal common law" legislative immunity and privilege). The *qualified*, common-law legislative privilege for state legislators in federal court differs from the Speech or Debate Clause privilege because it is not founded on a constitutional provision but "on an interpretation of the federal common law that is necessarily abrogated when the . . . privilege is incompatible with federal statutory law." *Bethune-Hill v. Virginia State Bd. of Elections*, 114 F Supp 3d 323, 334 (E.D. Va. 2015).

Contrary to Petitioners' contention, courts do not apply a balancing test to determine whether to ignore a constitutional speech or debate clause invoked by a legislator to whom it is directly applicable. Every balancing test case that Petitioners cite is a federal case considering the common law legislative privilege of a state official. *See Benisek*, 241 F Supp 3d at 568, 571–72 (involving state legislators and members of the Governor's Redistricting Advisory Committee); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *2 (involving state legislators and legislative staff); *Rodriguez*, 280 F Supp 2d at 93 (involving state legislators). Thus, Petitioners' observation that "federal courts have regularly allowed plaintiffs in partisan gerrymandering cases to obtain discovery from legislators who controlled the redistricting

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process" is irrelevant. *See* Pets' Resp. at 1–2.[1] Their assertions that federal courts apply a "five-factor balancing test" in these cases is just as irrelevant: none of those cases involved any applicable constitutional protection of a state legislature. *See* Pets' Resp. at 2, 5, 7-9.[2]

Petitioners also incorrectly contend that *Babson* incorporates the qualified federal common law privilege (as opposed to the absolute federal constitutional privilege) into the Oregon Constitution. *See* Pets' Resp. at 1 (contending that "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." (emphasis added)). Petitioners are wrong: *Babson* says that the Oregon courts give weight to federal cases interpreting the federal *constitutional* privilege: "Although federal cases decided after the Oregon Constitution was adopted are not controlling authority in our interpretation of Article IV, section 9, because of the

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[1] Petitioners also rely on a discovery order of the Ohio Supreme Court in an ongoing redistricting case, but legislative privilege was not at issue in that order at all. *See Ohio Org. Collaborative v. Ohio Redistricting Comm'n*, No 2021-1210, 2021 WL 4695759 (Ohio, Oct 7, 2021). The Ohio court ordered depositions of commissioners of the Ohio Redistricting Commission, which includes members of the state's executive branch and legislative branch appointees. Those witnesses did not assert *any privilege*. *See* Opposition of Respondents Huffman and Cupp to Relators' Motion to Compel Expedited Discovery at 9-10, *Ohio Org. Collaborative v. Ohio Redistricting Comm'n*, No 2021-1210 (Ohio Oct. 6, 2021), *available at* https://www.democracydocket.com/wp-content/uploads/2021/09/2021-10-05-B-GOP-Respondents-opposition-to-motion-to-compel-expedited-discovery.pdf (arguing that "[t]he mental impressions and private communications of commission members are irrelevant"). Nor could the Commissioners have asserted legislative privilege: the Ohio Redistricting Commission is a separate constitutional entity from the Ohio legislature. *Compare* Ohio Const. art. XI, § 1, art. XIX, § 1(B) (Ohio Redistricting Commission) *with id.* art. II, § 1 ("The legislative power of the state shall be vested in a general assembly ….") & *id.* art. II, § 12 ("any speech, or debate, in either house, [legislators] they shall not be questioned elsewhere").

[2] *See Benisek v. Lamone*, 241 F Supp 3d 566, 572 (D Md 2017) (applying the "federal common law doctrine of legislative privilege"); *Comm. for a Fair & Balanced Map v. Ill. State Bd. Of Elections*, No 11-C-5065, 2011 WL 4837508, at *7 (ND Ill Oct 12, 2011) (applying "federal common law" legislative privilege); *Rodriguez v. Pataki*, 280 F Supp 2d 89, 95–96, 100–03 (SDNY 2003), *aff'd*, 293 F Supp 2d 302 (SDNY 2003) (discussing and applying the "common law" legislative immunity and privilege of state officials).

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similar wording and similar origins *of the federal Speech or Debate Clause*, federal cases provide a useful perspective." *Babson*, 355 Or at 419 (emphasis added).[3] And that makes sense: a state court is "as duty bound to honor [a state] constitutional provision in a lawsuit involving the actions of state legislators as is a federal court bound to honor the identical absolute legislative privilege and immunity sourced in the United States Constitution in a lawsuit involving the actions of federal legislators." *League of Women Voters of Pa. v. Commonwealth*, 177 A3d 1000, 1004–05 (Pa Commw Ct 2017). The federal courts and Congress are parts of co-equal branches of the same sovereign, just as this Court and the Legislative Assembly are.[4]

When applying a constitutional speech or debate clause, the courts hold that "once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Eastland v. U.S. Servicemen's Fund*, 421 US 491, 503, 95 S Ct 1813, 44 L Ed 2d 342 (1975) (citing *Doe v. McMillan*, 412 US 306, 314, 93 S Ct 2018, 36 L Ed 2d 912 (1973)). *See also Holmes v. Farmer*, 475 A2d 976, 983 (RI 1984) ("The [state constitutional] speech in debate clause … confers a privilege on legislators from inquiry into their legislative acts or into the motivation for actual performance of legislative acts that are clearly part of the legislative process. Legislators should not be questioned by any other branch of government for their acts in carrying out their legislative duties relating to the legislative process.").

This is not a federal court. Petitioners do not assert federal claims. The five-factor common-law privilege test does not apply.

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[3] The only federal common law privilege case cited in *Babson* is *Tenney v. Brandhove*, 341 US 367 (1951). But *Babson* cites the parts of *Tenney* that discuss the federal *constitutional* privilege.

[4] For that reason, application of "the common law [and] any statutory law of this state" rejecting the common law privilege for a city council member is also irrelevant. *See Adamson v. Bonesteele*, 295 Or 815, 828 (1983) (cited in Pets' Resp. at 3-5, 6). The Debate Clause of Article IV, section 9 protects the Legislative Assembly, not local legislators.

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B. Accusations of "partisan intent" or other unlawful intent do not alter or negate the privilege.

Petitioners incorrectly presume that, because they claim SB 881 was enacted with an allegedly unlawful intent, they are therefore entitled to take discovery from legislators. Just the opposite is true. "[T]he prohibitions of the Speech or Debate Clause are absolute." *Eastland*, 421 US at 501. "In determining whether an act falls within the legitimate legislative sphere, courts do "not look to the motives alleged to have prompted it." *Id.* at 503, 508. "[O]nce it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Id.* at 503.

The Speech or Debate Clause protects against inquiry into the motivations underlying legislative acts, whether or not the alleged motivations were improper. "It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States v. Brewster*, 408 US 501, 525-29, 92 S Ct 2531, 33 L Ed 2d 507 (1972) (holding that the Speech and Debate Clause does not prohibit prosecution of a senator for violating federal bribery laws but that "inquiry into a legislative act or the motivation for a legislative act" is unnecessary to the prosecution); *Gravel v. United States*, 408 US 606, 628–29, 92 S Ct 2614, 33 L Ed 2d 583 (1972) (forbidding questioning about a senator's conduct at a subcommittee hearing or his motivations and communications in connection with it).[5]

[5] Courts have recognized that legislative privilege does not provide immunity from charges of bribery, but the legislative privilege still limits the type of inquiry that may be made in such cases. *See Brewster*, 408 US at 525-29 (allowing bribery prosecution that did not require "inquiry into a legislative act or the motivation for a legislative act"); *United States v. McDade*, 28 F3d 283, 289, 291, 302 (3d Cir 1994), *cert den*, 514 US 1003 (1995) (allowing bribery prosecution when the indictment referred to the defendant's status as a member of congressional committees but did not refer to legislative acts); *see also United States v. Johnson*, 383 US 169, 184–85, 86 S Ct 749, 15 L Ed 2d 681 (1966) ("a prosecution under a general criminal statute dependent on [inquiries into legislative acts] necessarily contravenes the Speech or Debate Clause").

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The following passage in *Eastland* explains why a "mere allegation" of improper motive never negates the privilege:

> If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it. 'In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed.' The wisdom of congressional approach or methodology is not open to judicial veto. Nor is the legitimacy of a congressional inquiry to be defined by what it produces. The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result."

Eastland, 421 US at 508-09 (quoting *Tenney v. Brandhove*, 341 US 367, 377, 71 S Ct 783, 95 L Ed 1019 (1951)).

Legislative privilege undisputedly shields from inquiry legislative intentions, motivations, communications, and actions in enacting legislation, regardless of a party's allegations that a law was enacted with an improper intent. The Debate Clause legislative privilege blocks the discovery that Petitioners seek into the allegedly improper intentions and motivations of legislators *in enacting* SB 881.

C. Under *Babson*, the Debate Clause legislative privilege applies when legislators are communicating in carrying out their legislative functions, without limitation.

1. The privilege is not limited to the legislative meeting place.

Petitioners argue that the legislative privilege is limited and only applies within the legislative meeting place. This argument is wrong for two reasons. First, *Babson* clearly holds that a Legislative Assembly member's privilege under the Clause is not confined "to communications that occur in a particular place." *Babson*, 355 Or at 418. This is because the word "house," as used in the Debate Clause, "refer[s] to the legislature as an institution," not as a place, and thus "the privilege applies when legislators are communicating in carrying out their legislative functions." *Id.*

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Second, for similar reasons to those set forth above in Section A, the case that Petitioners cite in support of their argument, *Adamson v. Bonesteele*, 295 Or 815 (1983), is irrelevant. *See* Pets' Resp. at 3. *Bonesteele*—which involved an assertion of common law "absolute privilege" by a *city council member*, not a Legislative Assembly member—did not address the Debate Clause legislative privilege. *See Bonesteele*, 295 Or at 817; Or Const, Art IV, § 9 (referring to "Senators and Representatives"). There, the court held that "neither the common law nor any statutory law of this state justifies extending a local legislator's immunity to his remarks concerning legislative business made to the press outside the legislative meeting place and outside the legislative process itself." *Bonesteele*, 295 Or at 828. *Bonesteele*, which does not concern a state legislator's Debate Clause privilege, has no bearing on the issue before the Court.

2. The privilege extends to communications with third parties.

The Debate Clause privilege extends to legislator communications with third parties, so long as such communications are made as part of the legislative process. Petitioners' argument to the contrary conflicts with *Babson*.

In *Babson*, the Oregon Supreme Court made clear that the Debate Clause did not protect only communications between legislators and their staff. The court noted that "legislators enacting or amending a law often will consider the practical implications involved in enforcing a law." *Babson*, 355 Or at 426. Thus, "[t]o the extent that legislators seek information about how a law would be or is being enforced, for purposes of enacting or amending legislation, those communications likely would be protected by the Debate Clause." *Id.* Legislators' communications with third parties about legislation are a vital part of the legislative process. Those communications are privileged. They reflect the intentions and motivations of legislators with respect to the consideration and passage of legislation.

The courts are not "entitled to compel congressional testimony—or production of documents . . . ." *Brown & Williamson Tobacco Corp. v. Williams*, 62 F3d 408, 421 (DC Cir

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1995) (quashing subpoenas seeking depositions of Members and third-party documents in their possession under the federal Speech or Debate Clause). "[T]he touchstone is interference with legislative activities." *Id.* "A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. *Discovery procedures* can prove just as intrusive." *Id.* at 418 (emphasis in original). As with the federal Constitution, the judicially compelled disclosure of documents itself that violates the Oregon Constitution's command not to "question[]" legislators "in any other place."

In *League of Women Voters of Pa. v. Commonwealth*, after the petitioners served subpoenas on various third-party entities and individuals (including the Republican National Committee and the National Republican Congressional Committee), the Pennsylvania Commonwealth Court blocked discovery of all of those third parties' "communications with any committees, legislators, or legislative staffers referring or relating to" a redistricting plan. 177 A3d at 1006–08. A paragraph in the subpoenas directed at third-party entities sought those entities' "communications . . . referring or relating to" the plan, but the court struck that paragraph "to the extent that it [sought] communications with" state legislators. *Id.* at 1007–08. The court also held that "the remaining categories of documents sought in the Third-Party Subpoenas," which included "[a]ll proposals, analyses, notes, and calendar entries" referring or relating to the plan, "[a]ll documents referring or relating to all considerations or criteria that were used to develop" the plan, "[a]ll documents referring or relating to how each consideration or criterion was measured," "[a]ll documents referring or relating to how each consideration or criterion affected" the plan, and "[a]ll communications with any consultants, advisors, attorneys, or political scientists referring or relating to" the plan, "SHALL BE INTERPRETED as *excluding* those documents that reflect the intentions, motivations, and activities of state legislators and their staff with respect to the consideration and passage" of the redistricting act. *Id.* at 1006–08 (emphasis in original). *See also Securities & Exch. Comm'n v. Comm. on Ways*

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and Means of the U.S. House of Representatives, 161 F Supp 3d 199, 237 (SDNY 2015) ("The Clause's protections also extend to a legislator's gathering of information from federal agencies and from lobbyists . . . ."); *Jewish War Veterans of the U.S. of Am., Inc.*, 506 F Supp 2d 30, 57 (DC Cir 2007) ("To the extent that [legislator's] communications, discussions, or other contacts with [third-party lobbyist groups] constitute information gathering in connection with or in aid of . . . legislative acts, they are protected by the Speech or Debate Clause and need not be disclosed.").

Here, Petitioners seek, in their own words, "documents and communications directly related to the redistricting decisions and motivations that are at the core of this dispute." Pets' Resp. at 9. Therefore, they outright seek legislators' communications to inquire into their motivations for legislation, which is prohibited. "Inquiry by the court into the actions or motivations of the legislators in proposing, passing, or voting upon a particular piece of legislation . . . falls clearly within the most basic elements of legislative privilege." *Holmes v. Farmer*, 475 A2d 976, 984 (RI 1984). Forcing legislators to disclose communications in this proceeding in an effort to prove their legislative intent contravenes the Debate Clause's command that legislators shall not "be questioned in any other place."

D. Petitioners' document requests are unreasonable and unduly burdensome.

As the Combined Motion to Quash and Motion for Protective Order points out, Petitioners' subpoenas and document requests were issued in violation of ORCP 55, both for failing to provide 7 days' advance notice before service and for demanding production of documents within 6-7 days without obtaining a court order *first*. *See* ORCP 55 C(3)(a)-(b). Although Petitioners do not dispute that they acted in violation of ORCP 55, they suggest that they are entitled to ignore it. The Court should not countenance this disregard for the rules.

Despite the Court's scheduling order, Petitioners served broad requests that would require the State to collect, review, and produce tens of thousands of documents. Petitioners' plea for

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the Court to focus their document requests for them at this late date does not solve the problem. Evidentiary submissions are due Monday, October 25—in five days. The Court should quash the subpoenas and issue a protective order barring Petitioners from seeking discovery of privileged information.

CONCLUSION

The Debate Clause mandates that no member of the Legislative Assembly shall "be questioned in any other place." That prohibits Petitioners from invoking the power of the Court to question legislators or to force them to disclose the correspondence inherent to their legislative duties.

The Court should quash all of the subpoenas and document requests issued to the Legislators, and it should issue a protective order directing that Petitioners may not depose, seek testimony, or request documents from the Legislative Assembly or its members on matters subject to legislative privilege.

DATED October 20, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 20, 2021, I served the foregoing REPLY IN SUPPORT OF LEGISLATIVE ASSEMBLY'S COMBINED MOTION TO QUASH SUBPOENAS AND MOTION FOR PROTECTIVE ORDER AND MEMORANDUM IN SUPPORT upon the parties hereto by the method indicated below, and addressed to the following:

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