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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  
7 CAMPBELL,

8 Petitioners,

9 v.

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

12 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 Winsvey Campos, Khanh Pham, and  
22 Andrea Salinas (collectively, "Legislators").<sup>1</sup> Pursuant to ORCP 55 A(7)(b), the Legislative  
23 Assembly and the six Legislators (collectively, "Assembly") move the Court to quash these

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

1 subpoenas because they seek to obtain discovery that is subject to legislative privilege under the  
2 Debate Clause of Article IV, section 9, of the Oregon Constitution. *See State v. Babson*, 355 Or  
3 383, 418, 422–23 (2014) (the Debate Clause creates a legislative privilege that applies to the acts  
4 and communications of legislators in the course of carrying out their legislative functions).

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

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

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

## 15 MEMORANDUM OF POINTS AND AUTHORITIES

### 16 A. Introduction

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

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

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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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