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, **JEANNA ATKINS**, **SUSAN CHURCH**, **NADIA DAHAB**, **JANE SQUIRES**, **JENNIFER LYNCH**, and **DAVID GUTTERMAN**, Intervenors.	Case No. 21CV40180 **Senior Judge Mary M. James, Presiding Judge of the Special Judicial Panel** **Senior Judge Henry C. Breithaupt, Special Master to Special Judicial Panel** **RESPONSE TO RESPONDENT'S AND LEGISLATIVE ASSEMBLY'S MOTION TO STRIKE**

RESPONSE TO RESPONDENT'S AND LEGISLATIVE ASSEMBLY'S MOTION TO STRIKE

Petitioners oppose the Motion to Strike filed by the Department of Justice on behalf of both Respondent and Legislative Assembly (hereinafter, collectively, "Department"). Motion to Strike, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 26, 2021) (hereinafter "Motion" or "Mot."). For the reasons that follow, the Special Master should reject the Department's Motion on both procedural and substantive grounds.

As a matter of procedure, any decision to exclude evidence must come from the Presiding Judge of the Special Judicial Panel (hereinafter "Presiding Judge"). And even if the Special Master can make any such evidentiary rulings, Petitioners respectfully submit that the better course of action is for the Special Master to consider the disputed evidence as admitted, and then permit

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cross-examination on that evidence, in order to present full optionality on the evidentiary record to the Special Judicial Panel.

If this Court reaches the substance of the Department's motion, it should reject the Department's remarkable position that in attempting to prove that the Legislative Assembly acted with impermissible partisan intent, the Debate Clause bars ordinary citizens from presenting any evidence of legislators' words and intentions, *even if the party is not seeking to compel any unwilling legislator to present any evidence*. Adopting the Department's position would erect a near-insuperable barrier to an ordinary citizen litigating a claim that a "district [has been] drawn for the purpose of favoring any political party, incumbent legislator or other person," ORS § 188.010(2), or that a plan is a partisan gerrymander, in violation of the Oregon Constitution, *see* Or. Const., art. I, §§ 8, 20, 26; *id.*, art. II, § 1. As if to underscore that the Department seeks to gut any protections that Oregonians have against partisan gerrymandering, the Department analogizes its position to a line of out-of-date cases in one federal court of appeals, which "bar[ ] causes of action against governmental entities and officials when either the plaintiff's case or the defense would require a legislator's testimony regarding the motives behind legislative conduct." Mot. 4.

The Debate Clause does not make Oregon's partisan gerrymandering prohibition a dead letter. While the Presiding Judge held that the Debate Clause prohibits citizens from taking discovery of partisan intent from unwilling legislators, the Presiding Judge unambiguously held that petitioners *could* take discovery from, and present evidence about, legislators' statements and intentions from parties not protected by the Debate Clause. That is why the Presiding Judge permitted Petitioners to take discovery from non-parties about what members of the Legislative Assembly told them about redistricting. It follows that Petitioners can also present such evidence from a knowledgeable legislator—like Representative Bonham—who is willing to testify about what he knows of the Legislative Assembly's unlawful intent.

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I. Only The Presiding Judge Can Exclude Evidence And, In Any Event, Leaving Any Such A Decision To The Presiding Judge Is The Better Approach Here

Consistent with the Special Judicial Panel's October 14, 2021 Scheduling Order, the Special Master "is authorized to receive evidence and to prepare recommended findings of fact," and shall "submit recommended findings of fact to the Special Judicial Panel on or before November 5, 2021 at 4 P.M." Scheduling Order, at 2, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 14, 2021). The Presiding Judge is authorized "to make evidentiary or procedural rulings" and must do so on or before November 12, 2021 at 5 P.M." *Id.* at 3. Thus, only the Presiding Judge has the authority to exclude any portion of Representative Bonham's testimony and evidence.

Even if the Special Master takes a different view of the above-described authority issue, Petitioners respectfully submit that it would not advance the interests of justice for the Special Master to rule on the Department's motion. If this Court were to exclude Representative Bonham's testimony as to the paragraphs on which the Department seeks exclusion now, the Special Judicial Panel would not have the benefit of either this Court's finding about that testimony *or* cross-examination on these aspects of Representative Bonham's testimony, including if the Special Judicial Panel ultimately decides that Representative Bonham's testimony is admissible. Petitioners respectfully submit that the better practice is for this Court to accept Representative Bonham's testimony on all of the issues in his declaration, permit the adverse parties to cross-examine him, and then allow the Presiding Judge to decide whether to exclude any aspect of the evidence.

Nor is it advisable for the Special Master to make a decision that could fundamentally—and, perhaps, irrevocably—alter this case at the outset, based upon emergency, rushed briefing, where Petitioners had so little time to respond to the Department's argument (which argument is based primarily on inapposite, possibly overruled, out-of-state authority, *see infra* Part II.C.).

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II. The Debate Clause Does Not Prohibit Representative Bonham from Voluntarily Testifying

A. The Debate Clause—Article IV, Section 9 of the Oregon Constitution—provides, as relevant here, that no member shall, "for words uttered in debate in either house, *be questioned in any other place*." Or. Const., art. IV, § 9 (emphasis added). From the language of this constitutional provision, "when viewed as a whole," the Oregon Supreme Court has concluded that there are "two related purposes" for this privilege: (1) "allow[ing] legislators to perform their legislative functions *without being interrupted or distracted* by arrest, civil process, or other questioning," and (2) "allow[ing] legislators to perform their legislative functions without fear of retribution in the form of '*be[ing] questioned* in any other place' by either another branch of government or the public." *State v. Babson*, 355 Or. 383, 419, 326 P.3d 559 (2014) (emphases added; citation omitted). Notably, Oregon courts have never applied that Clause to stop a legislator who wishes to waive this privilege and testify or submit his own declaration. *See id.*; *Adamson v. Bonesteele*, 295 Or. 815, 824, 671 P.2d 693 (1983); *accord* Or. Op. of Attorney Gen., 49 Or. Op. Atty. Gen. 167, 1999 WL 98010, at *5 (Feb. 24, 1999) (discussing throughout as a privilege/immunity that "members enjoy"); *id.* at *4 n.6 (noting that the Debate Clause "insulate[s] legislators" in certain contexts). Indeed, in *Babson* itself, the Oregon Supreme Court noted without any concern that "Senator Courtney and Representative Hunt each filed affidavits." 355 Or. at 427.

B. Here, Representative Bonham has freely offered his own testimony, and nothing in the Debate Clause even arguably prohibits him from doing so. Since the Debate Clause is meant to protect legislators like Representative Bonham from "'be[ing] questioned in any other place' by either another branch of government or the public," and from being "unnecessarily burden[ed]" by the "judicial process," *Babson*, 355 Or. at 419, 427 (quoting Or. Const., art. IV, § 9), he is free to provide his declaration or testimony at his own option. That is what the Debate Clause provides—

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protection of *unwilling* "member[s]" from "be[ing] questioned in any other place" about their "words uttered" in furtherance of official legislative acts. Or. Const., art. IV, § 9.

The Presiding Judge's rulings on discovery motions confirm this conclusion. The Presiding Judge allowed Petitioners to depose and seek documents from *third parties regarding their communications with legislators of the Legislative Assembly*. *See* Order on Non-Parties' Motion to Quash, at 2, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 21, 2021). At the same time, the Presiding Judge did *not* permit Petitioners to seek *this same exact information*—communications between legislators with third parties—from unwilling legislators themselves. Order on Legislative Assembly's Motion to Quash, at 2, 5–7, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 20, 2021). It follows, then, that the Debate Clause—as read by the Presiding Judge—serves to protect unwilling "member[s]" from "be[ing] questioned" against their will, Or. Const., art. IV, § 9, but does nothing to prohibit Petitioners from obtaining the evidence in some other manner, such as from third parties or willing legislators.

C. The Department's contrary arguments are legally wrong.

The Department's policy argument against Representative Bonham's testimony appears to be that legislators should never have to defend against partisan gerrymandering because any accusations about the "propriety of their privileged acts" would require them to choose between "waiving the privilege themselves" or "allowing the accusation to stand." Mot. 2, 5. But this is true whether the "statement impugning the motives of" legislators come from evidence of statements made by one legislator or statements made by a legislator to a non-legislative third-party. Mot. 5. And, as noted above, the Presiding Judge has already ruled that statements made by legislators to third parties are properly subject to discovery so long as Petitioners can obtain those statements without requiring unwilling legislators to answer discovery. *See supra* pp. 4–5. Indeed, taking the Department's arguments to their logical conclusion, any partisan gerrymandering claim would be a dead letter under Oregon law, contrary to what the Department told the U.S. Supreme Court. *See* Petitioners' Exhibit 1024, States' Amici Brief in *Gill v. Whitford*,

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No. 16-1161 (U.S. Sept. 5, 2017), at 18–19; Petitioners' Exhibit 1025, States' Amici Brief in *Rucho v. Common Cause*, No. 18-422 (U.S. Mar. 8, 2019), at 18. After all, in order to prove such a claim, a plaintiff must show the Legislative Assembly "had an improper purpose," such as "favoring one particular political party over another," *Hartung v. Bradbury*, 332 Or. 570, 599, 33 P.3d 972 (2001). But under the Department's view of the Debate Clause, a plaintiff would apparently never be permitted to enter such evidence of the motivations and purpose of the Legislative Assembly in enacting any redistricting legislation, lest some legislators accused of partisan gerrymandering feel the need to defend themselves against such an accusation.

Tellingly, beyond such inapposite policy concerns that would end the very concept of challenging an illegal partisan gerrymandering in Oregon, the Department does not cite any Oregon precedent supporting its interpretation of the Debate Clause, relying instead on out-of-state caselaw. The Presiding Judge already rejected reliance on out-of-state precedent in interpreting Oregon's Debate Clause, "declin[ing] Petitioners' invitation" to apply out-of-state precedent when it "has never been applied in Oregon." Order on Legislative Assembly's Motion to Quash, at 4, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Marion Cty. Oct. 20, 2021). While Petitioners continue to disagree with the Presiding Judge's ruling on that front, it cannot possibly be that Petitioners are precluded from relying on any out-of-state partisan gerrymandering cases that allow broad discovery into legislators' partisan intent, but the Department can rely upon far-flung, possibly overruled out-of-state precedent to support their positions on the Debate Clause.

In any event, the out-of-state cases that the Department cites do not help its position. The Department points to "a series of Fourth Circuit decisions barring causes of action against governmental entities when either the plaintiff's case or the defense would require a legislator's testimony regarding the motives behind legislative conduct," Mot. 4, but these cases all involved generally applicable causes of action (such as for anti-discrimination claims) that the plaintiff attempted to apply against a legislative body, not a prohibition against a legislative body acting with illegal intent, as in a partisan gerrymandering claim. *See Schlitz v. Commonwealth of Va.*,

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854 F.2d 43, 43–44 (4th Cir. 1988), *overruled by Berkley v. Common Council of City of Charleston*, 63 F.3d 295 (4th Cir. 1995) (legislative body was immune because claim under Age Discrimination in Employment Act ("ADEA") necessarily required testimony about the legislative body's motivations); *Baker v. Mayor & City Council of Baltimore*, 894 F.2d 679, 682 (4th Cir. 1990), *overruled by Berkley*, 63 F.3d 295 (same) ; *Hollyday v. Rainey*, 964 F.2d 1441, 1443 (4th Cir. 1992) (Hall, J., writing for herself) (relying on *Schlitz* to preclude Section 1983 claim for same reason); *id.* at 1444 (Luttig, J., concurring in the judgment and concurring in the opinion in part). Further, while the Department claims that this line of Fourth Circuit decisions was "overruled on other grounds," Mot. 4–5 (italics omitted), that is a doubtful claim. Indeed, in *Berkley*, the Fourth Circuit explicitly "overruled" *Baker* and *Schlitz* to the extent they "can be read to confer legislative immunity on municipalities from suits brought under section 1983," which calls into directly doubt the logic of those decisions that the Department relies upon. *Berkley*, 63 F.3d at 303.

Similarly ineffective is the Department's reliance on *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984), and *Montgomery Cty. v. Schooley*, 97 Md. App. 107, 627 A.2d 69 (Ct. Spec. App. 1993). *See* Mot. 3–4. In *Holmes*, the court held that the Rhode Island "privilege is institutional in its protection of the Legislature, ensuring the separation of powers," so no individual waiver was permissible. *Id.* But Oregon courts have long understood the legislative privilege to be personal, protecting individual legislators from certain compelled testimony. *See supra* pp. 3–4. And in *Schooley*, there was no voluntary waiver by an individual councilman, who explicitly took no position on the privilege. *Schooley*, 97 Md. App. at 119–20. Moreover, the *Schooley* decision relied, in part, on the Fourth Circuit's decisions in *Schlitz*, *Baker*, and *Hollyday*—which may no longer be good law even in the Fourth Circuit, as noted immediately above. *Id.* at 122.

III. Conclusion

The Court should deny the Department's Motion to Strike in whole.

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