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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.

v.

JEANNE ATKINS, SUSAN CHURCH,  
NADIA DAHAB, JANE SQUIRES,  
JENNIFER LYNCH, and DAVID  
GUTTERMAN,

Intervenors.

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**

RESPONDENT'S AND LEGISLATIVE  
ASSEMBLY'S MOTION TO STRIKE  
(Legislative Privilege)

**ORS 20.140 - State fees deferred at filing**

**UTCR 5.010 CERTIFICATION**

Pursuant to UTCR 5.010, counsel made a good faith effort to resolve the subject of this motion through conferral by telephone with counsel for Petitioners.

**MOTION**

Respondent and the Legislative Assembly move to strike from the record the contents of the Declaration of Daniel Bonham which purport to describe and/or characterize communications of other legislators during the course of their legislative duties.

Respondent anticipates this motion will remain pending tomorrow, October 27, and therefore intends to cross-examine Representative Bonham without prejudice to this motion.

1 Respondent also reserves all non-privilege evidentiary objections to Representative Bonham’s  
2 testimony, which will be raised at the appropriate times under the Court’s scheduling orders.  
3 This motion is based on the pleadings and orders on file herein and the points and authorities set  
4 forth below.

## 5 MEMORANDUM OF POINTS AND AUTHORITIES

### 6 I. INTRODUCTION

7 Petitioners submitted a declaration of Representative Daniel Bonham (Bonham  
8 Declaration) in support of their petition challenging the legislatively adopted redistricting plan.  
9 This declaration purports to describe and characterize communications of other legislators made  
10 during the course of carrying out their legislative duties. *See, e.g.*, Bonham Declaration ¶¶ 16 &  
11 31. As explained below, any and all such references should be excluded from the factual record  
12 in this matter because allowing them would violate the Debate Clause of Article IV, section 9 of  
13 the Oregon Constitution. Admitting testimony from a legislator concerning the legislative  
14 communications of other legislators would violate the Debate Clause by allowing the judicial  
15 process to invade the legislative process. It would also destroy the protection that the Debate  
16 Clause affords to individual legislators by leaving them unable to defend the propriety of their  
17 privileged acts without waiving the privilege themselves.

### 18 II. ARGUMENT

#### 19 A. **The Debate Clause provides for a legislative privilege for communications in** 20 **carrying out legislative duties.**

21 The Debate Clause provides: “Nor shall a [Legislative Assembly] member for words  
22 uttered in debate in either house, be questioned in any other place.” The Oregon Supreme Court  
23 has held that the Debate Clause guarantees a legislative privilege that “applies when legislators  
24 are communicating in carrying out their legislative functions.” *State v. Babson*, 355 Or 383, 418  
25 (2014). The court emphasized that the privilege “is essential to the legislative function and that  
26 the judicial process must not be allowed to improperly intrude on the legislative process or

1 unnecessarily burden the time and actions of individual legislators.” *Id.* at 427. By shielding  
2 legislative communications, “the Debate Clause preserves legislative integrity and  
3 independence.” *Id.* at 419. As Special Judicial Panel Presiding Judge Mary James explained in  
4 her Order on Legislative Assembly’s Motion to Quash, the “legislative privilege applies to all  
5 communications that are a part of a legislative function, including functions that necessarily  
6 involve third parties.” Accordingly, Petitioners were not allowed in this matter to conduct any  
7 discovery *from legislators* to obtain “information that is related to the enactment of SB 881  
8 (2021).” Order on Legislative Assembly’s Motion to Quash, Entered Oct. 20, 2021, *Clarno v*  
9 *Fagan* (CV40180). For the same reasons such evidence was not discoverable it is likewise not  
10 admissible.

11 **B. An individual legislator may not waive the legislative privilege held by other**  
12 **legislators or the legislature as a whole because allowing such unilateral waiver**  
13 **would unlawfully intrude on legislative privilege and violate the Debate Clause.**

14 An individual legislator may not unilaterally waive the privilege, which serves to protect  
15 the Legislative Assembly as an institution. *Babson*, 355 Or at 418 (holding that the Debate  
16 Clause applies to communications that occur when legislators are “united in their legislative  
17 capacity”). Even if the privilege is personal and may be waived under some circumstances, a  
18 legislator may not waive the privilege when to do so would effectively dictate a waiver of the  
19 privilege on behalf of the legislature or other legislators.

20 Courts in other states have recognized that admitting statements from one legislator  
21 regarding the legislative motives of other legislators invades those legislators’ personal  
22 privileges as well as the legislature’s institutional privilege. The Rhode Island Supreme Court  
23 has held that a state senator’s voluntary testimony concerning other legislators’ conduct related  
24 to the formation of a reapportionment plan was inadmissible. *Holmes v. Farmer*, 475 A2d 976,  
25 985 (RI 1984). The court reasoned that allowing one legislator to testify regarding the actions or  
26 statements of other legislators would be inconsistent with the purposes underlying legislative  
privilege, which protects the legislature as a whole. *Id.* “To allow an individual legislator to

1 waive the institution's privilege would be to allow one to act on behalf of the whole in waiving  
2 the protection of a significant bulwark of our constitutionally mandated system of government.”  
3 *Id.*

4 Similarly, when plaintiffs sought to depose a county council member regarding factors  
5 that influenced the council’s enactment of a county redistricting plan, the Maryland Court of  
6 Special Appeals held that the county government had standing to invoke legislative privilege on  
7 behalf of that council member “and, in effect, on behalf of the other members of the Council.”  
8 *Montgomery Cty. v. Schooley*, 97 Md App 107, 110–11, 122, 627 A2d 69, 77 (Md Ct Spec App  
9 1993). The court explained that when a lawsuit attacks the legislative process itself, the waiver  
10 of one legislator can effectively dictate the waiver of other legislators, destroying the  
11 “cumulative effect of [the] individual privileges” that protects “the independence and integrity of  
12 the Legislature as an institution”:

13 If the attack is on the legislative process itself or on the end  
14 product of that process, rather than on the conduct of an individual  
15 legislator, the motivation and legislative conduct of each member  
16 associated with the challenged process or product necessarily  
17 comes into question. If even one member is permitted to waive his  
18 individual privilege and testify in support of the attack, the other  
19 members will, perforce, be required either to respond or risk the  
20 consequence of an adverse judgment based, at least in part, on the  
unfavorable testimony of their colleague. When viewed in that  
context, the waiver by one legislator of his privilege may, in effect,  
dictate the waiver by other legislators of their privilege. One  
willing member could thus cripple the privilege of other members  
and be the instrument for dismantling the separation of powers  
pillar upon which the privilege is, in part, based.

21 *Id.* at 120–21, 627 A2d at 76–77.

22 The same concerns underlie a series of Fourth Circuit decisions barring causes of action  
23 against governmental entities and officials when either the plaintiff’s case or the defense would  
24 require a legislator’s testimony regarding the motives behind legislative conduct. In *Schlitz v.*  
25 *Commonwealth of Virginia*, the plaintiff alleged that the state legislature’s decision not to reelect  
26 him to a judgeship was motivated by age discrimination. 854 F2d 43, 43, 45 (4th Cir 1988),

1 *overruled on other grounds by Berkley v. Common Council of City of Charleston*, 63 F3d 295  
2 (4th Cir 1995). Although no legislator was named as a defendant, the court held that the suit was  
3 barred by legislative immunity because the state “would be unable to defend [the] action unless  
4 the legislators testify as to their motives.” *Id.* at 46; *see also Baker v. Mayor and City Council of*  
5 *Baltimore*, 894 F2d 679, 681–82 (4th Cir 1990), *overruled on other grounds by Berkley*, 63 F3d  
6 295 (barring suit when there could be no “viable defense” that would not include legislators’  
7 testimony regarding their motives; later overruled on the grounds that legislative immunity did  
8 not extend to municipalities); *Hollyday v. Rainey*, 964 F2d 1441, 1443 (4th Cir), *cert den*,  
9 506 US 1014 (1992) (barring suit when either the plaintiff’s case or the defense “would perforce  
10 require testimony of the legislators involved regarding their motives”). In applying the same  
11 principles, the court explained, “[l]egislators must be permitted to discharge their legislative  
12 duties without fear of being subjected to the cost and inconvenience of a trial at which their  
13 motives come under scrutiny.” *Hollyday*, 964 F2d at 1443.

14 For that same reason, the Debate Clause “allows legislators to perform their legislative  
15 functions without fear of retribution in the form of ‘be[ing] questioned in any other place’ by  
16 either another branch of government or the public.” *Babson*, 355 Or at 419. If this Court were to  
17 admit one legislator’s statement impugning the motives of others, it would force the legislators  
18 who are the subject of the statement to either allow the accusation to stand or waive the privilege  
19 in order to defend and explain their privileged conduct. Either way, the Debate Clause’s  
20 protection of “legislative integrity and independence,” *id.*, would be lost.

21 **C. The portions of the Bonham Declaration which purports to disclose communications**  
22 **of other legislators should be excluded from the factual record in this case.**

23 Paragraphs 16 and 31 of the Bonham Declaration purport to describe communications of  
24 other legislators—including Senate President Peter Courtney, Senate Democratic Chair Kathleen  
25 Taylor, and Representative Marty Wilde—made during the course of carrying out their  
26 legislative duties. Because allowing this testimony would violate the Debate Clause by

1 infringing on legislative privilege, paragraphs 16 and 31 should be stricken from the record in  
2 this case.

3  
4 **III. CONCLUSION**

5 This Court should strike the Bonham Declaration, including in particular paragraphs 16  
6 and 31, because introducing them in this proceeding violates the Debate Clause.

7 DATED October 26, 2021.

8 Respectfully submitted,

9 ELLEN F. ROSENBLUM  
10 Attorney General

11 *s/ Brian Simmonds Marshall*

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1 **CERTIFICATE OF SERVICE**

2 I certify that on October 26, 2021, I served the foregoing RESPONDENT’S AND  
3 LEGISLATIVE ASSEMBLY’S MOTION TO STRIKE (Legislative Privilege) upon the parties  
4 hereto by the method indicated below, and addressed to the following:

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