

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF  
JUSTICE  
SUPERIOR COURT DIVISION  
18 CVS 15292

JABARI HOLMES, FRED CULP,  
DANIEL E. SMITH, BRENDON  
JADEN PEAY, and PAUL KEARNEY,  
SR.,

*Plaintiffs,*

v.

TIMOTHY K. MOORE, *in his official  
capacity as Speaker of the North  
Carolina House of Representatives;*  
PHILLIP E. BERGER, *in his official  
capacity as President Pro Tempore of  
the North Carolina Senate;* DAVID R.  
LEWIS, *in his official capacity as  
Chairman of the House Select  
Committee on Elections for the 2018  
Third Extra Session;* RALPH E. HISE,  
*in his official capacity as Chairman of  
the Senate Select Committee on Election  
for the 2018 Third Extra Session;* THE  
STATE OF NORTH CAROLINA; and  
THE NORTH CAROLINA STATE  
BOARD OF ELECTIONS,

*Defendants.*

PLAINTIFFS' MOTION TO  
COMPEL JOEL FORD TO COMPLY  
WITH PLAINTIFFS' TRIAL  
SUBPOENA

Plaintiffs respectfully request that this Court order non-party witness Joel Ford to comply with Plaintiffs' trial subpoena and appear to provide testimony during Plaintiffs' case-in-chief pursuant to North Carolina Rule of Civil Procedure 45(c)(4).

### **BACKGROUND**

As the Court is aware, former Senator Joel Ford's testimony has featured prominently in this case. Ford submitted an affidavit on behalf of Legislative Defendants and sat for a deposition during the preliminary injunction proceedings. His testimony, as well as his role in the legislative process that led to the enactment of S.B. 824, have been cornerstones of Legislative Defendants' defense of the law. There is no dispute Ford will testify at trial; both Plaintiffs and Defendants have indicated that they intend to call him to the stand. *See* Ex. A (2021.04.02 Email from Paul Brachman to Nicole Moss); Ex. B (2021.04.09 Email from Nicole Moss to Paul Brachman). The only question presented by this motion is *when* the Court will hear Ford's testimony.

Put simply, Plaintiffs, who have the burden of proof in this case, have the right to put on their case in the order that they see fit, including calling witnesses in the order they view as appropriate—provided they comply with the procedural rules, which is not subject to any dispute. Legislative Defendants should not be permitted to dictate to Plaintiffs the order of proof to be presented at trial, and have presented no reason why Plaintiffs should be required to relinquish their right, in the ordinary course, to call Ford in their case-in-chief. Ford should be therefore compelled to testify when called by Plaintiffs.

Plaintiffs have notified Defendants repeatedly that they reserved the right to call in their case-in-chief witnesses identified and disclosed by Defendants, including Ford: five months to the day before this trial began, Plaintiffs reserved the right to rely at trial on “individuals . . . appearing on defendants’ trial witness list,” *see* Ex. C, at 12 (2020.11.12 Pls.’ Responses and Objections to Leg. Defs.’ Third Set of Discovery Requests); nearly two months ago, Plaintiffs again reserved the right to supplement their preliminary witness list to “add . . . any witness Defendants identif[ied] on their witness lists,” *see* Ex. D (2021.02.05 Email from Paul Brachman to Nicole Moss attaching Pls.’ Preliminary Trial Witness List); and, consistent with those reservations of rights, Plaintiffs advised Defendants eleven days ago of their intent to call Ford as a witness in Plaintiffs’ case-in-chief before listing him on Plaintiffs’ final witness list the following day, *see* Ex. E (2021.04.01 Email from Jeffrey Loperfido to Nicole Moss); Ex. A (2021.04.02 Email from Paul Brachman to Nicole Moss).

Plaintiffs thereafter asked Legislative Defendants to accept service of a trial subpoena on Ford’s behalf, but Legislative Defendants refused unless Plaintiffs agreed to relinquish their right to call Ford in their case-in-chief. Legislative Defendants also refused even to confirm whether they would forward a convenience copy of Plaintiffs’ subpoena to Ford. And Ford could not be served at the P.O. Box address Legislative Defendants finally did provide in response to Plaintiffs’ requests. *See* Ex. F (2021.04.09 Email from Jeffrey Loperfido to Nicole Moss). Plaintiffs nevertheless succeeded in personally serving Ford with a subpoena commanding his appearance on April 15 or 16. *See* Ex. G (Joel Ford Trial Subpoena).

Legislative Defendants have advised that they intend to move to quash the subpoena, but they have no basis to do so. Defendants have not been sandbagged, Ford has been properly served, and Plaintiffs are entitled to present Ford's testimony in their case.

### **LEGAL STANDARD**

Rule 45(c)(5) of the North Carolina Rules of Civil Procedure provides that "[a] person commanded to appear at a trial . . . within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena." N.C.G.S. § 1A-1, Rule 45(c)(5). The person seeking to quash or modify the subpoena must, in writing, "demonstrate the existence" of one of the following grounds for objecting to the subpoena: (a) the subpoena fails to allow reasonable time for compliance, (b) the subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection, (c) the subpoena subjects the person to an undue burden or expense, (d) the subpoena is otherwise unreasonable or oppressive, or (e) the subpoena is procedurally defective. N.C.G.S. § 1A-1, Rule 45(c)(3), (5). The party serving the subpoena may then move for an order to compel the subpoenaed person's appearance. N.C.G.S. § 1A-1, Rule 45(c)(4).

### **ARGUMENT**

The Court should grant Plaintiffs' motion to compel Joel Ford to comply with Plaintiffs' trial subpoena for several reasons.

*First*, Plaintiffs’ subpoena allows reasonable time for Ford’s compliance. Ford has been on notice for at least five months that Plaintiffs reserved the right to call him as a witness. *See* Ex. C, at 12. Legislative Defendants most certainly told Ford that he would be testifying at trial and the dates of the trial. *See* Ex. H, at 2 (2021.02.05 Leg. Defs.’ Witness List). And Plaintiffs expressly conveyed their intent to call Ford as a witness to Ford’s counsel on April 1, 2021—two full weeks before they planned to call Ford at trial. *See* Ex. E (2021.04.01 Email from Jeffrey Loperfido to Nicole Moss). To leave no room for doubt, and in accordance with the parties’ Joint Pre-Trial Order, Plaintiffs timely disclosed Ford in their intended order of witnesses, which was shared with Legislative Defendants (Ford’s counsel) on April 2, 2021. *See* Ex. A (2021.04.02 Email from Paul Brachman to Nicole Moss). Against this backdrop, Plaintiffs’ subpoena—served several days in advance of Ford’s anticipated testimony—allows reasonable time for Ford’s compliance. This is simply not a case where Plaintiffs have waited until the eve of trial to surprise a witness with a trial subpoena. *Contra North Carolina Dept. of Transp. v. Albermarle Properties, LLC*, No. 12CVS000315, 2014 WL 11392992, at \*2 (N.C. Super. Apr. 15, 2014) (trial court order) (subpoena did not allow reasonable time for compliance where plaintiff had waited two years to seek information in subpoena duces tecum served less than one week before trial).

*Second*, Plaintiffs’ subpoena does not require disclosure of privileged or other protected matter. Ford has already waived legislative privilege with respect to S.B.

824, *see* Legislators’ Opp’n to Pls.’ Mot. to Compel, at 13, and Plaintiffs do not intend to question Ford about matters that would be covered by the attorney-client privilege.

*Third*, Plaintiffs’ subpoena does not subject Ford to an undue burden or expense. Ford does not face the prospect of an onerous document production—Plaintiffs’ subpoena requires only his testimony at trial. *Contra Smith v. Sentry Fire Protection Co., Inc.*, No. 13 CVS 2913, 2014 WL 5018719, at \*2 (N.C. Super. Aug. 12, 2014) (trial court order) (subpoena was unduly burdensome and expensive where it demanded that non-party produce all text messages from a six-year period between the non-party and the parties to the litigation). And, because the trial will proceed remotely, Ford will not have to travel to appear at trial. There is no question that Ford will testify at trial since Legislative Defendants have also signaled their intent to question him. *See* Ex. F (2021.04.02 Email from Nicole Moss to Jeffrey Loperfido). Any remaining burden on Ford can thus be minimized, if not eliminated altogether, by allowing Defendants to conduct their direct examination of Ford during Plaintiffs’ case-in-chief, as Plaintiffs have already offered to do. *See* Ex. E (2021.04.06 Email from Jeffrey Loperfido to Nicole Moss).

*Fourth*, Plaintiffs’ subpoena is not otherwise unreasonable or oppressive. Courts have quashed or modified subpoenas on this basis for a variety of reasons, none of which applies to Plaintiffs’ subpoena of Ford. *See, e.g., Matter of A.H.*, 250 N.C. App. 546, 559, 794 S.E.2d 866, 876 (2016) (mother’s subpoena to compel child to testify during proceeding terminating her parental rights was unreasonable and oppressive where there was “evidence regarding [the child’s] mental health condition

and his extreme distress during and following contacts with [m]other regarding her desire that he testify.”); *Ward v. Taylor*, 68 N.C. App. 74, 83, 314 S.E.2d 814, 821 (1984) (“extremely broad subpoena” was unreasonable and oppressive when plaintiffs had been on notice of the importance of the information sought yet waited to serve the subpoena until after cross-examination of the non-party witness). Ford can make no showing that testifying during Plaintiffs’ case-in-chief, as opposed to during Defendants’ case-in-chief, would be similarly “unreasonable or oppressive.”

*Fifth*, Plaintiffs’ subpoena is not procedurally defective. It was issued and properly served on April 10, 2021 in accordance with the procedures outlined in Rule 45 of the North Carolina Rules of Civil Procedure. N.C.G.S. § 1A-1, Rule 45(a)–(b); *see also Greene v. Hoekstra*, 189 N.C. App. 179, 181, 657 S.E.2d 415, 417 (2008) (“Subject to the protections of Rule 45(c), the obligation to appear as a witness is perfected when the subpoena is served on the witness.”). Plaintiffs attempted to serve Ford prior to April 10, but were repeatedly rejected by his counsel. *See* Ex. F (2021.04.09 Email from Jeffrey Loperfido to Nicole Moss). In any case, the properly served subpoena provides Ford with sufficient time to comply, especially because he has already agreed to appear at trial if called by Defendants.

*Sixth*, Plaintiffs undisputedly have the right to call Ford as a hostile witness during Plaintiffs’ case-in-chief. *See* N.C.G.S. § 1A-1, Rule 43(b) (“A party may interrogate any unwilling or hostile witness by leading questions and may contradict and impeach him in all respects as if he had been called by the adverse party.”); *Bost v. Riley*, 44 N.C. App. 638, 642, 262 S.E.2d 391, 393 (1980) (noting that witness,

“though called by plaintiff, was an adverse and hostile witness, and was therefore subject to impeachment by plaintiff.”). This Court should not allow Ford or Legislative Defendants to curtail Plaintiffs’ ability to fairly and fully present their case-in-chief.

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs’ motion to compel Joel Ford to comply with Plaintiffs’ trial subpoena.

Respectfully submitted this the 12th day of April, 2021.

By: /s/ Jeffrey Loperfido  
Jeffrey Loperfido  
State Bar No. 52939  
jeffloperfido@scsj.org

Allison J. Riggs  
State Bar No. 40028  
allison@southerncoalition.org

SOUTHERN COALITION FOR SOCIAL JUSTICE  
1415 W. Highway 54, Suite 101  
Durham, NC 27707  
Telephone: 919-323-3909  
Facsimile: 919-323-3942

Andrew J. Ehrlich\*  
David Giller\*  
Amitav Chakraborty\*

PAUL, WEISS, RIFKIND, WHARTON  
& GARRISON LLP  
1285 Avenue of the Americas  
New York, NY 10019-6064  
Telephone: 212-373-3000  
Facsimile: 212-492-0166

Jane O’Brien\*  
Paul D. Brachman\*

PAUL, WEISS, RIFKIND, WHARTON  
& GARRISON LLP  
2001 K Street, NW  
Washington, DC 20006-1047  
Telephone: 202-223-7300  
Facsimile: 202-223-7420

(\* admitted *pro hac vice*)

*Counsel for Plaintiffs*



**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing was served upon all parties by electronic mail and United States Mail, postage prepaid, if requested, addressed to the following:

Nicole Moss  
David Thompson  
Cooper & Kirk, PLLC  
1523 New Hampshire Ave., N.W.  
Washington, DC 20036  
nmoss@cooperkirk.com  
dthompson@cooperkirk.com

Nathan A. Huff  
Phelps Dunbar LLP  
GlenLake One  
4140 ParkLake Avenue, Suite 100  
Raleigh, NC 27612  
nathan.huff@phelps.com

*Counsel for Legislative Defendants*

Olga E. Vysotskaya de Brito  
Amar Majmundar  
Paul M. Cox  
N.C. Department of Justice  
114 W. Edenton St.  
Raleigh, NC 27603  
ovysotskaya@ncdoj.gov  
amajmundar@ncdoj.gov  
pcox@ncdoj.gov

*Counsel for State Defendants*

Respectfully submitted this the 12th day of April, 2021.

/s/ Jeffrey Loperfido  
Jeffrey Loperfido