STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 015426

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, et al.,

REBECCA HARPER, et al.,

Plaintiffs,

vs.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.,

Defendants.

Consolidated with
21 CVS 500085

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BY

LEGISLATIVE DEFENDANTS' MOTION TO COMPEL

Legislative Defendants respectfully move the Court to compel both sets of Plaintiffs (respectively, the *Harper* Plaintiffs and *NCLCV* Plaintiffs) to produce all source code, source data, input parameters, and all outputted data pertaining to the expert reports produced to Legislative Defendants during the preliminary-injunction phase of this case. Plaintiffs used their expert reports to obtain an injunction and order changing election dates for every voter in every election across North Carolina. But Plaintiffs have yet to disclose any information supporting those reports, and they remain a black box of secrecy. Further, the *Harper* Plaintiffs have wrongly attempted to condition disclosure of this vital information on an onerous protective order that would inhibit Legislative Defendants' ability to analyze, on this highly expedited time-table, the source code that implements the mathematical models employed by Plaintiffs' experts and that would leave the public without any access to this information.

Plaintiffs' continued demand for secrecy stands in stark and dissonant contrast to the public scrutiny to which the General Assembly subjected its redistricting work. And it violates this Court's scheduling order, which requires "[e]xpert reports produced to any opposing party [to] be accompanied by all source code, source data, input parameters, and all outputted data." 12/13/21 Order ¶ 4. Plaintiffs' failure to disclose this information also infringes—with no justification at all—the public's First Amendment right of access to information supporting court rulings and analogous provisions of North Carolina constitutional, statutory, and common law.

Plaintiffs' continued obstinacy is highly prejudicial to Legislative Defendants, who have yet to see any of the material used as evidence against the 2021 Plans and who are unable to prepare opposing expert reports on this highly expedited time frame. Legislative Defendants have made every effort to negotiate with Plaintiffs' counsel to obtain this information, and Legislative Defendants also have produced information to Plaintiffs to assist them in preparing their expert reports. Plaintiffs' continued obstinacy in the face of their clear legal obligations will, if ratified, prejudice Legislative Defendants' ability to put on a fair and effective case. Plaintiffs' intransigence and delay is clearly improper and Legislative Defendants respectfully ask the Court to order immediate production and disclosure of all materials Plaintiffs used to change the voting opportunities of all North Carolina citizens.

BACKGROUND

1. Plaintiffs contend that "[t]his suit is about harnessing the power of mathematics and computer science to identify and remedy the severe constitutional flaws in the redistricting maps recently enacted by the North Carolina General Assembly." *NCLCV* Compl. ¶ 1; *see also Harper* Compl. ¶ 105. Both sets of Plaintiffs filed verified complaints reciting the alleged output of those mathematical and computer-science processes and preliminary-injunction motions accompanied

by expert reports purporting to establish that the 2021 Plans are unconstitutionally partisan. The *Harper* Plaintiffs relied on expert reports purporting to identify the results of simulated mapping exercises, by which thousands—even millions—of alternative plans were produced by a computer algorithm and compared with the 2021 Plans. The *NCLCV* Plaintiffs relied only on three maps (one for each legislative body and the congressional delegation) and alleged that the maps had been "optimized" based on undisclosed criteria using a high-performance computing platform and a mysterious, alleged advanced algorithm. Neither set of Plaintiffs produced any supporting data or source code with their reports; they asked the courts to accept their assertions on faith.

2. These expert materials serve a unique significance in the context of this unique case. Both sets of Plaintiffs allege that the 2021 Plans are unconstitutionally partisan. But this type of claim has vexed the courts for generations as jurists have sought "some limited and precise rationale . . . to correct an established violation of the Constitution in some redistricting cases." *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring). In 2019, the U.S. Supreme Court called off that hunt, concluding that there are no judicially manageable standards for distinguishing an unconstitutionally political plan from a constitutional plan. *See Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). But the dissent argued that standards could be identified that "do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process." *Id.* at 2509 (Kagan, J., dissenting). In purporting to "harness[] the power of mathematics and computer science to identify and remedy the severe constitutional flaws in the redistricting maps recently enacted by the North Carolina General Assembly," *NCLCV* Compl. ¶ 1, Plaintiffs here are attempting to provide a judicially manageable standard of constitutional law by which

redistricting laws are to be judged and by which the voting rights of every North Carolina resident will be administered.

3. Because Plaintiffs have purported to make such a significant discovery, one would have thought they would be eager to share the details of their "mathematics and computer science" with the world. *Id.* Instead, Plaintiffs have treated all their source code, source data, input parameters, and outputted data as akin to the recipe for Coca-Cola and made every effort to hide it under lock and key. As noted, they did not disclose any supporting material with their preliminary-injunction papers. Nevertheless, the State Supreme Court issued an injunction based on Plaintiffs' presentation, concluding that "the great public interest in the subject matter of these cases" and their "importance . . . to the constitutional jurisprudence of this State" justified the "preliminary injunction" Plaintiffs requested, as well as a temporary stay of the candidate-filing period and primaries. 12/8/21 Supreme Court Order 3.

4. On expedited remand, as part of discussions concerning a proposed scheduling order, Counsel for Legislative Defendants made a formal request for "copies of the source code, source data, input parameters . . . , and all data outputted from those simulations . . . for the analyses that formed the basis" of Plaintiffs' expert reports at the preliminary-injunction stage. Exhibit 1. Counsel for the *Harper* Plaintiffs responded by agreeing to produce that information "on two conditions": (1) that the parties agree to a protective order keeping the information sealed, and (2) that Legislative Defendants produce incumbent addresses. Exhibit 2. Counsel for Legislative Defendants responded by arranging for the collection of incumbent addresses, but Legislative Defendants asserted that a protective order would be improper and proposed an interim production of material under a conditional protective order pending the Court's resolution of the issue. Exhibit 3. Counsel for the *Harper* Plaintiffs responded in protest to any disclosure in the

absence of a protective order maintaining the basis of their case under seal, observing that Legislative Defendants had agreed to a protective order in the *Common Cause* litigation. Exhibit 4. The *Harper* Plaintiffs also reiterated their demand for incumbent addresses. *Id.* Meanwhile, the *NCLCV* Plaintiffs responded that they "do not agree to produce the materials . . . described" in Legislative Defendants' request "and reserve all rights." Exhibit 5.

5. On the morning of Tuesday, December 14, Legislative Defendants produced the incumbent addresses, which had taken several days to collect,[1] and reiterated their request for the materials supporting the preliminary-injunction stage expert reports. Exhibit 6. The *Harper* Plaintiffs, however, reiterated their refusal to produce the material requested by Legislative Defendants without a protective order. Exhibit 7. The *NCLCV* Plaintiffs reiterated their opposition to any production of preliminary-injunction stage materials at all. Exhibit 8.

6. Legislative Defendants now move to compel production of all source code, source data, input parameters, and all outputted data pertaining to the expert reports produced on Legislative Defendants during the preliminary-injunction phase of this case.

ARGUMENT

The Court should require Plaintiffs to fulfill their obligations to the Court and to the public and produce the materials by which they obtained an injunction impacting the voting rights and opportunities of every North Carolina voter. The materials Legislative Defendants request are covered by the plain text of this Court's scheduling order and must independently be disclosed under various rights of access the public has to materials forming the basis of judicial decisions, including under the First Amendment. Legislative Defendants are suffering prejudice every

[1] Some members list a PO Box in public and official address lists, which does not serve redistricting purposes. It therefore took several days for the General Assembly's non-partisan staff to compile the requested list, which Legislative Defendants accomplished as quickly as possible.

moment Plaintiffs fail to fulfill their obligations, as their experts need these materials to prepare an appropriate defense in this case of exceptional magnitude on short time.

A. Production Is Required Under the Scheduling Order

Plaintiffs' production obligations flow from the plain text of the Court's December 13 scheduling order, which provides that "[e]xpert reports produced to an opposing party shall be accompanied by all source code, source data, input parameters, and all outputted data." 12/13/21 Order ¶ 4. The materials supporting Plaintiffs' preliminary-injunction motions are clearly "[e]xpert reports," and they were clearly "produced to an opposing party," as they were served on Legislative Defendants in conjunction with Plaintiffs' preliminary-injunction motions. As a result, the clear text of the order requires that the "be accompanied by all source code, source data, input parameters, and all outputted data." Thus, Plaintiffs' obligations are clear: they must produce all materials forming the basis of their expert reports immediately.

Both sets of Plaintiffs have suggested that the disclosure obligation of paragraph 4 applies only to expert reports produced on December 23, which is the scheduling order's deadline "for parties' exchange of evidence (in the form of expert witness reports [etc.])." 12/13/21 Order ¶ 1. But that is not what the scheduling order provides. It plainly applies to "[e]xpert reports produced to an opposing party," *id.* ¶ 4, and, as shown, the preliminary-injunction stage reports qualify under that definition. There is no limitation under paragraph 4 restricting the disclosure requirement to expert reports produced under paragraph 1. Court orders are interpreted according to "the plain meaning of the language used." *See, e.g.*, *Butler v. Butler*, 239 N.C. App. 1, 9, 768 S.E.2d 332, 337 (2015); *Saunders v. Crystal Springs Park, Inc*, 269 N.C. App. 678, 837 S.E.2d 480 (2020) (unreported table decision); *Bradshaw v. Maiden*, No. 14 CVS 14445, 2018 WL 2140354, at *6 (N.C. Super. May 9, 2018). The plain language here refutes Plaintiffs' assertion that subparagraph 4 does not reach the preliminary-injunction stage reports.

It would also be inequitable and untenable to allow Plaintiffs to refuse to produce the materials forming the basis of reports filed with this Court and which formed the basis of relief in the North Carolina Supreme Court. Legislative Defendants negotiated with Plaintiffs and offered to produce materials (the incumbent addresses), and, in return, both sets of Plaintiffs have frustrated Legislative Defendants in their reasonable request of production of information vital to the defense of this case. Even if Plaintiffs chose to rely on totally new expert materials, the preliminary-injunction materials would be relevant to probe the reasons for such an abrupt change and call into question Plaintiffs' experts' methods and credibility. The material must be disclosed.

B. Disclosure of Expert Materials Is Required as Matter of Public Access

Disclosure is independently required—and a protective order forbidden—under several doctrines mandating that materials forming the basis of court decisions be made public, particularly in cases of exceptional public importance. If this case is sufficiently important, and Plaintiffs' claims sufficiently compelling, to justify an incredibly expedited proceeding and an injunction modifying North Carolina's entire election apparatus, then it is sufficiently important to required disclosure of the materials at the heart of this case—and which are proffered as the constitutional law of North Carolina.

Several related doctrines of state and federal law prohibit Plaintiffs from maintaining their expert's source code as a secret sauce in the context of this case of overriding public importance. First, "the public and the press have a First Amendment right of access to civil trials," *In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, 924 F.3d 662, 673 (3d Cir. 2019), as well as "to documents filed in" in a civil case, *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 253 (4th Cir.

1988).[2] Second, Article I, Section 18 of the North Carolina Constitution "guarantees a qualified constitutional right on the part of the public to attend civil court proceedings" and to obtain "records or documents" associated with those proceedings. *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 476–77, 515 S.E.2d 675, 693 (1999) (emphasis omitted). Third, the North Carolina Public Records Act requires that "court records . . . 'shall be open to the inspection of the public . . . .'" *LexisNexis Risk Data Mgmt. Inc. v. N. Carolina Admin. Off. of Cts.*, 368 N.C. 180, 185, 775 S.E.2d 651, 654–55 (2015) (quoting N.C.G.S. § 7A–109(a)). Fourth, North Carolina common law also recognizes a right of public access. *Virmani*, 350 N.C. at 473, 515 S.E.2d at 691.

Although there are differences among these doctrines on the margins, they all involve a similar framework. The first question, generally, is whether the right of access or disclosure applies. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (First Amendment); *Virmani*, 350 N.C. at 476, 515 S.E.2d at 693 (Article I, Section 18 of N.C. Constitution); *LexisNexis Risk Data Mgmt.*, 368 N.C. at 186, 775 S.E.2d at 655 (N.C. Public Records Act); *In re Investigation into Death of Cooper*, 200 N.C. App. 180, 188, 683 S.E.2d 418, 425 (common law); N.C.G.S. § 1A-1, Rule 26. If so, the question becomes whether the party seeking to maintain secrecy can establish an appropriate interest in secrecy and narrow tailoring. *See, e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606–07 (1982) (First Amendment); *Virmani*, 350 N.C. at 476, 515 S.E.2d at 693 (Article I, Section 18 of N.C. Constitution). Under the First Amendment, that standard is strict scrutiny and demands a compelling state interest and narrow tailoring. *Globe*

[2] Although "the Supreme Court has not addressed whether the First Amendment's right of access extends to civil trials or other aspects of civil cases," "most circuit courts, including the Fourth Circuit, have recognized that the First Amendment right of access extends to civil trials and some civil filings." *Am. C.L. Union v. Holder*, 673 F.3d 245, 252 (4th Cir. 2011). The North Carolina Supreme Court has "assume[d]" this to be correct. *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 471, 515 S.E.2d 675, 690 (1999).

Newspaper, 457 U.S. at 606; *Baltimore Sun Co. v.* Goetz, 886 F.2d 60, 64 (4th Cir. 1989). Under this framework, disclosure without a protective order is required.

1. There can be no serious question that the right of access triggering heightened scrutiny applies to the requested materials. The First Amendment right of access reaches "those materials which properly come before the court in the course of an adjudicatory proceeding and which are relevant to that adjudication." *In re Providence Journal Co.*, 293 F.3d 1, 9 (1st Cir. 2002). It therefore applies to materials that "are made part of a dispositive motion" or other request "by a party seeking action by a court," *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 252 (4th Cir. 1988), because such materials "play a role in the adjudicative process," *In re U.S. for an Ord. Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 291 (4th Cir. 2013) (citation omitted). The rule under North Carolina constitutional, statutory, and common law is similar. *See Virmani*, 350 N.C. at 469, 515 S.E.2d at 689 (construing North Carolina's disclosure regimes to reach "judicial records and documents"). Here, the source code, source data, input parameters, and all outputted data pertaining to the expert reports produced at the preliminary-injunction stage meet this standard in two different respects.[3]

First, Plaintiffs' expert materials were critical to the preliminary-injunction stage litigation, which qualifies as part of the adjudicative process to which the First Amendment and other rights of access apply. *See Bayer Cropscience Inc v. Syngenta Crop Protection LLC*, 979 F. Supp. 2d 653, 656 (M.D.N.C. 2013) ("The Court concludes that the briefing and exhibits filed in connection with motions seeking injunctive relief are subject to the public's First Amendment right of access."); *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1103 (9th Cir. 2016) ("Due

[3] The North Carolina statutory and common law rights of access apply to a broader swath of "public records," *Virmani*, 350 N.C. at 462-63, 473, 515 S.E.2d at 685, 691. For that reason, if the First Amendment right of access attaches, so does the common law right.

to the strong presumption for public access and the nature of the instant motion for a preliminary injunction, Chrysler must demonstrate compelling reasons to keep the documents under seal."); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3rd Cir. 1984) (finding a First Amendment right of access to preliminary injunction proceedings). Although the source code, source data, input parameters, and all outputted data were not filed with the Court, the materials that *were* filed with the Court were derived from these "mathematics and computer science" tools and materials, *NCLCV* Compl. ¶ 1, and cannot be separated from them. The materials that were disclosed were created from the undisclosed materials. Under the rule of completeness, where Plaintiffs relied on portions of these materials that they chose to make part of the public record, Legislative Defendants have the right to compel admission and disclosure of the portions Plaintiffs relied upon and yet kept hidden. *See State v. Hensley*, 254 N.C. App. 173, 177–78, 802 S.E.2d 744, 748 (2017) (discussing the rule of completeness). Any other rule would permit litigants to avoid First Amendment scrutiny by selective disclosure of materials. Because the materials that *were* publicly filed are inextricably intertwined with the materials Plaintiffs seek to maintain in secrecy, the right of access applies.

Second, Plaintiffs' expert materials are certain to be used at the forthcoming trial on the merits in this matter. Even if Plaintiffs were to utilize different expert reports and materials—which seems unlikely—Legislative Defendants would seek admission of the prior reports and underlying materials, including to probe the reason for any abrupt abandonment of the preliminary-injunction stage materials. Plainly, trial exhibits filed with the Court are subject to all applicable rights of access, including under the First Amendment. *Syngenta Crop Prot., LLC v. Willowood, LLC*, No. 1:15-cv-274, 2017 WL 6001818, at *2 (M.D.N.C. Dec. 4, 2017) ("Because the public has a right to attend trials and oversee the courts, the First Amendment protects the public's right

to access the trial testimony and exhibits." (citing *In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d at 290–91)). This is an independently sufficient basis to compel disclosure, without a protective order.

2. The continued secrecy of the source code, source data, input parameters, and all outputted data pertaining to the expert reports produced at the preliminary-injunction stage cannot satisfy strict scrutiny applicable under the First Amendment or any lower standard of scrutiny. No interest can outweigh the interest in production and public disclosure under the facts here. Strict scrutiny involves a weighing of interest under the unique facts of each case. *See United States v. Doe*, 962 F.3d 139, 146–47 (4th Cir. 2020). Thus, Plaintiffs must propound an interest "sufficiently compelling to justify closure under the First Amendment" when compared against the public's interest in the context of the case at bar. *See Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014); *see also Nixon v. Warner Comms, Inc.*, 435 U.S. 589, 599 (under common law court must exercise its discretion in light of relevant facts and circumstances of case.). "Once a discovery document becomes part of a judicial record, there is a strong presumptive right of public access; to overcome that strong presumption requires a much higher showing than to obtain a protective order." *Midwest Athletics and Sports Alliance LLC v. Ricoh USA, Inc.*, 332 F.R.D. 159, 104 Fed. R. Serv. 3d 1179 (E.D. Pa. 2019).

Here, Legislative Defendants understand that Plaintiffs intend to proffer their experts' proprietary interest in the source code, source data, input parameters, and at least some outputted data as justifying continued secrecy. This interest would, if proffered, be insufficient in this case. The State Supreme Court has already concluded that "the great public interest in the subject matter of these cases" and their "importance . . . to the constitutional jurisprudence of this State" justified a "preliminary injunction" and upheaval of all election deadlines and processes in the state. 12/8/21

Supreme Court Order 3. In issuing an injunction the Supreme Court had to find a likelihood of success, which in turn must have been predicated on Plaintiffs' expert reports. The public's interest in learning why their elections have been thrown into chaos unquestionably outweighs Plaintiffs' experts' interests in maintaining the basis of that injunction—and any further claims Plaintiffs will assert or relief they will seek—under lock and key. *See, e.g.*, *Doe v. Pub. Citizen*, 749 F.3d 246, 274 (4th Cir. 2014) ("[T]he public interest in the underlying litigation is especially compelling given that Company Doe sued a federal agency."); *Doe v. Megless*, 654 F.3d 404, 411 (3d Cir.2011) (explaining that public's interest in disclosure of plaintiff's identity was "heightened" because defendants were "public officials and government bodies" (citation omitted) (internal quotation marks omitted)); *Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir.2000) (noting that "the public has an important interest in access to legal proceedings, particularly those attacking . . . properly enacted legislation").

In the ordinary case where proprietary or trade secret information is deemed a sufficient justification for secrecy, the issues involve the private rights of the litigants to compensation from those trade secrets or else intellectual property alleged to be similar to those trade secrets.[4] The posture of this case is fundamentally different. Plaintiffs' experts came to court to use their data as a sword and to obtain a complete modification of the voting rights and opportunities of all North Carolina residents. Legislative Defendants did not ask them to do this; they chose to participate. It is one thing for the makers of Coca-Cola to maintain the secret recipe under seal in an intellectual property dispute; it is another thing for them to come into court and ask duly enacted election laws

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[4] As an initial matter, Plaintiffs would have to substantiate and prove up any such assertion, and they have yet to do so. *See Doe*, 749 F.3d at 274 ("[C]ourts consistently have rejected anonymity requests to prevent speculative and unsubstantiated claims of harm to a company's reputational or economic interests.").

to be struck down based on that very recipe. Plaintiffs' experts have every right to maintain their proprietary information in secret for purposes of their private work, and that right is not in question here. Legislative Defendants, however, submit that Plaintiffs' experts have no right to place that information at issue as, in effect, a constitutional standard in seeking the exceptional relief on a matter of this level of public importance and yet maintain secrecy. Their remedy, if they value secrecy, is not to seek to use their information as a sword, as they have done here.

Indeed, the public nature of the source code and related materials is difficult to overstate. As explained, Plaintiffs admitted, *in the first sentence of their complaint*, that this case seeks to harness math and computer science to crack the longstanding puzzle of identifying "some limited and precise rationale" to identify and adjudicate claims of partisan gerrymandering. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). Their expert materials provide their effort at such a rationale. And that, in turn, is a proposed component of the constitutional law of North Carolina. If Plaintiffs succeed, the General Assembly's plans will be judged according to their experts' source code and methodologies. So, too, will any remedial plans in this case, as well as future plans subject to future challenge. Plaintiffs cannot assert that, if a plan falls on one side of their expert's code, it is unconstitutional and, if it falls on the other, it is constitutional and, in the next breath, contend that the code is proprietary. This Court has no more right to maintain the code in secret than it has the right to maintain its principles of black-letter constitutional law in secret.

In this respect, it is critical to emphasize that the rights at issue are not solely those of Legislative Defendants. The First Amendment protects the *public's* right of access. Thus, the *Harper* Plaintiffs' assertion that they have reached agreements over protective orders with Legislative Defendants and other litigants in other cases rings hollow. A party cannot "waive[] the public's First Amendment and common law right of access to court filings. The court's obligation

to keep its records open for public inspection is not condition on an objection from anybody. Rather, the court has an independent obligation to consider the rights of the public." *Rudd Equipment Co. v. Jonn Deere Construction & Forrestry Co.*, 834 F.3d 589, 595 (6th Cir. 2016) (cleaned up). Even if Legislative Defendants were not making this motion, the Court would have an obligation to command public disclosure of the materials at issue.

Legislative Defendants are in all events prejudiced by Plaintiffs' failure to adhere to their obligations, and they would be prejudiced by anything short of full disclosure. This case is set on an extraordinary schedule, and Legislative Defendants' experts will not have time to evaluate Plaintiffs' experts' work between December 23 and December 28. And, if Plaintiffs continue in their obstinance, Legislative Defendants will need to seek this Court's relief during that time period, which would be impossible to attain (short of an order excluding Plaintiffs' experts' testimony in its entirety, which Legislative Defendants are prepared to seek). By contrast, in *Common Cause v. Lewis*, a case Plaintiffs often cite, the discovery period lasted five-and-a-half months. 12/13/21 Order 3–4 (observing this critical difference). Legislative Defendants were permitted six weeks to prepare rebuttal reports—a period subsequently compressed to about 22 days, but still vastly longer than the *five days* the Legislative Defendants have been afforded under the present circumstances. *See* Exhibits 9-10, Lewis 2/15/19 order and 3/21/19 amended order. Legislative Defendants require as much latitude as possible to try to mitigate the prejudice caused by this highly truncated period for preparation of rebuttal reports, and that requires immediate access to the preliminary-injunction phase reports, data, and source code.

Further, production under a protective order requiring secrecy would prejudice Legislative Defendants in multiple respects. For one thing, most, if not all, of the experts who testify in these cases are academic political scientists, statisticians, and mathematicians, and such experts—as well

as those experts Legislative Defendants may call upon in this case—publish and teach as well as serve as experts. In the experience of Legislative Defendants' counsel—who have extensive experience in this field—experts can and will refuse to examine source code produced under a non-disclosure agreement out of fear that doing so will inhibit their ability to engage in scholarship that draws upon or criticizes the work of others whose code or algorithms were provided under such an NDA, without risk of being accused (rightly or wrongly) of infringing such an NDA. This chilling effect may result in Plaintiffs' experts' work being partially or fully free from any vetting in this case of paramount public interest. For another thing, the deadlines in this case are too stringent for secrecy. A protective order would by necessity entail sealing portions of deposition transcripts, closing parts of the trial, sealing exhibits and litigating over the metes and bounds of such sealing and closure. That process is cumbersome, and there simply is not time for the parties and the Court—with everything else that must be done—to litigate those issues and achieve a result that is legally correct and fair to the parties and the public interest.

In sum, the Court should not oblige any request for continued secrecy. The redistricting plans Plaintiffs challenge were drawn in public in video-recorded sessions. Any plaintiffs who wants those plans thrown out should be required to subject that plaintiff's methods to the same public scrutiny that is being applied to the General Assembly's work. The Court should order immediate production of all source code, source data, input parameters, and all outputted data pertaining to the expert reports served on Legislative Defendants at the preliminary injunction stage—and it should do so promptly.

CONCLUSION

The motion should be granted.

Respectfully submitted this the 14th day of December, 2021.

/s/ Phillip J. Strach

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CERTIFICATE OF SERVICE

It is hereby certified that on this the 14th day of December, 2021, the foregoing was served on the individuals below by email:

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