

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
No. 21 CVS 015426  
No. 21 CVS 500085

NORTH CAROLINA LEAGUE OF CONSERVATION  
VOTERS, INC., *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL  
CAPACITY AS SENIOR CHAIR OF THE HOUSE  
STANDING COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL  
CAPACITY AS SENIOR CHAIR OF THE HOUSE  
STANDING COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

**HARPER PLAINTIFFS'  
OPPOSITION TO  
LEGISLATIVE  
DEFENDANTS' MOTION  
TO COMPEL**

Legislative Defendants are not entitled, under either this Court's scheduling order or any rule, to source code and backup materials associated with preliminary-injunction-stage expert reports that Plaintiffs are not planning to introduce as evidence at the merits stage of this case. Indeed, in their proposed schedule, Legislative Defendants proposed requiring plaintiffs to disclose source code associated with their experts' preliminary-injunction-stage reports, but this Court's scheduling order does not require such a disclosure. Nonetheless, Legislative

Defendants would already have the requested preliminary-injunction-stage code if they would simply agree to entry of a routine protective order that is identical to the one that all parties agreed to, and that was used without incident, in the 2019 *Common Cause* case, and that allows Legislative Defendants and their experts to use source code and any other confidential data for any case-related purpose.<sup>1</sup> It is inexplicable that Legislative Defendants, after initially advising that they had no problems with a protective order, and while insisting that they need “immediate access” to the preliminary-injunction-stage source code, Mot. to Compel at 14, have chosen to delay their own access to this material for purposes of this case on the theory that they must be allowed to publicly disseminate the experts’ proprietary and confidential source code without restriction, including for non-case-related purposes.

*Harper* Plaintiffs provide a fuller background regarding this dispute in their motion for a protective order, also filed today. See Pls.’ Mot. for Protective Order ¶¶ 9-12. As explained in that motion, if the Court enters the proposed Protective Order, Plaintiffs will promptly turn over their experts’ preliminary injunction-stage materials and Legislative Defendants’ motion to compel will be moot. *Id.* ¶¶ 12, 18. And as Plaintiffs explained in their motion, there is ample cause to enter the proposed Protective Order, which is a routine measure in litigation like this involving confidential material. Pls.’ Mot. for Protective Order ¶ 4; see *Longman v. Food Lion, Inc.*, 186 F.R.D. 331, 333 (M.D.N.C. 1999) (protective orders are “essential to the efficient functioning of the discovery process” in cases involving confidential information). Academics frequently treat their source code underlying their expert analysis as confidential, as disclosure of that code could enable other academics to publish work using the code before the experts can do

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<sup>1</sup> Legislative Defendants seem to assume throughout their motion that all expert-related data will be necessarily marked confidential. That is incorrect. Entry of a protective order simply allows Plaintiffs to mark data as confidential if it is in fact confidential (such as source code).

so themselves. Pls.’ Mot. for Protective Order ¶ 5. That is why all parties consented to an identical protective order in *Common Cause*, and why under that protective order expert code and certain other data was produced as confidential with no objection, and with no restriction on public access to court filings or proceedings. *Id.* ¶¶ 7-8. Although Legislative Defendants puzzlingly argue that the mere entry of a protective order and designation of experts’ source code as confidential will necessitate “sealing portions of deposition transcripts, closing parts of the trial, [and] sealing exhibits,” Mot. 15, literally none of those things happened in the 2019 *Common Cause* case even though source code was designated confidential. That is because source code is discovery material that experts analyze and can testify about at trial, just as occurred in *Common Cause*. It is not going to be an exhibit presented to the Court.

Plaintiffs’ motion for a protective order also explains why the central premise of Legislative Defendants’ motion to compel—that a routine protective order would somehow inhibit “public access” to judicial proceedings—is irreconcilable with black-letter law. Pls.’ Mot. for Protective Order ¶¶ 13-14. Expert backup materials are discovery materials under Rule 26, and discovery material is not a “judicial record.” *See, e.g., United States v. Johnson*, No. 12-CV-1349, 2014 WL 12787211, at \*2 (M.D.N.C. Feb. 10, 2014). Courts enter protective orders to restrict dissemination of discovery material all the time; they do not violate the First Amendment or related rights of public access. *See, e.g., United States v. Aguilar*, 515 U.S. 593, 606 (1995) (“protective orders may be imposed in connection with information acquired through civil discovery without violating the First Amendment”) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984)). What’s more, under the Protective Order itself, Legislative Defendants would remain able to challenge particular confidentiality designations if they believe them to be improper. *See* Protective Order, Ex. A to Pls.’ Mot. to Compel, ¶ 7(e). And Defendants’ experts

and counsel would remain free to examine any code and data designated as confidential, and to use that information in attempting to critique the analysis of Plaintiffs' experts—just like in the 2019 *Common Cause* case. And any rebuttal reports or witness testimony relying on the code and data would remain public. Pls.' Mot. for Protective Order ¶ 15.

If the Court denies Plaintiffs' motion for a protective order, it should still deny the motion to compel. The Court's scheduling order did not incorporate language proposed by Legislative Defendants that would have required all plaintiffs, by December 13, to "submit data supporting expert reports already submitted." Legislative Defendants' Submission on Scheduling at 2 (Dec. 10, 2021). Instead, this Court's scheduling order requires the production of expert source code and data *with* expert reports. Case Scheduling Order ¶ 4. Those reports are not due until December 23 and 28. *Id.* ¶ 1. As Plaintiffs have told Legislative Defendants, they will be producing all required source code and data on those dates. Plaintiffs believe that the source code produced with on those dates should be treated as confidential, but if the Court denies Plaintiffs' motion for entry of a protective order, Plaintiffs will of course comply with the scheduling order. And Legislative Defendants have identified no rule or precedent requiring the disclosure of proprietary code and underlying data for early-stage expert reports that are not going to be used as evidence during the merits phase. It would extremely prejudicial to require plaintiffs to turn over confidential material that does not even form the basis for any expert report that this Court will be considering as evidence in this case. Legislative Defendants note that they will have a short time to prepare rebuttal reports, but Plaintiffs will have exactly the same short period to prepare rebuttal reports—without the benefit of a preview of what Legislative Defendants' experts will say.

Respectfully submitted, this the 15th day of December, 2021.

By: /s/ Narendra K. Ghosh

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*\*Pro hac vice motion pending*

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to counsel for all other parties.

This the 15th day of December, 2021.

/s/ Narendra K. Ghosh  
Narendra K. Ghosh, NC Bar No. 37649