STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 015426, 21 CVS 500085

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., et al.,

Plaintiffs,

REBECCA HARPER, et al.,

Plaintiffs,

v.

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

Defendants.

NCLCV PLAINTIFFS' OPPOSITION TO MOTION FOR PARTIAL RECONSIDERATION

The NCLCV Plaintiffs hereby oppose the Motion for Partial Reconsideration (the "Motion") filed by the Legislative Defendants. Appropriate circumstances for reconsideration "rarely arise"; instead, the "three permissible grounds" are "(1) the discovery of new evidence, (2) an intervening development or change in the controlling law, or (3) the need to correct a clear error or prevent manifest injustice." *Charlotte Student Hous. DST v. Choate Constr. Co.*, No. 18 CVS 5148, 2019 WL 1405851, at *3 (N.C. Super. Mar. 26, 2019). The Legislative Defendants invoke the third ground, *see* Mot. 6, but they fail to show any error, much less clear error or manifest injustice.

As this Court's December 15, 2021 Order correctly held, expert discovery encompasses only the facts and data considered by an expert in forming her opinions and "cannot compel production of materials never received or considered by an opposing party's expert." Dec. 15 Order 4. In resisting that straightforward conclusion, the Motion largely rehashes arguments "the

Court has already addressed and resolved," which "is not a sound basis for seeking reconsideration." *Charlotte Student Hous.*, 2019 WL 1405851, at *4; *see id.* ("it would be inappropriate to grant relief where the motion merely asks the Court to rethink what the Court had already thought through"). Indeed, the single supposedly new doctrine the Legislative Defendants invoke—that one expert cannot "parrot" another expert's conclusions—is also simply a repackaged version of arguments the Court already rejected. And even on its own terms, that rule is entirely irrelevant. First, that rule is not a basis for the type of compelled disclosures that the Legislative Defendants seek. Second, and more important, Professor Duchin does not parrot anyone else's conclusions. She relies on her own analysis of objective features of the Enacted Plans and the Optimized Maps. The Legislative Defendants' contrary arguments lack merit, and the Motion should be denied.

ARGUMENT

This Court's December 15 Order applied a straightforward rule to reach a straightforward result. In North Carolina, expert discovery encompasses "[t]he facts or data considered by the [expert] witness in forming" his or her opinions. Dec. 15 Order 4 (quoting Rule 26(b)(4)). Based on that rule, the Court ordered the NCLCV Plaintiffs to promptly produce "all source code, source data, input parameters, and all outputted data" that their expert witness, Professor Duchin, used and considered in producing her preliminary-injunction-stage report. *Id.* at 6. Pursuant to this Court's Order, the NCLCV Plaintiffs yesterday produced to the Legislative Defendants all the facts and data that Professor Duchin considered in forming her opinions and creating her report, including source code, source data, input parameters, and outputted data. That production included, among other things:

- Municipal Block Assignment File (NCLCVP_LD_00001)
- NC Seats & Votes Data (NCLCVP_LD_00002)

- Optimized Congressional Plan Block Assignment File (NCLCVP_LD_0003)
- Optimized Senate Plan Block Assignment File (NCLCVP_LD_00007)
- Optimized House Plan Block Assignment File (NCLCVP_LD_00005)
- NC Data File (NCLCVP_LD_00004)
- Email from S. Hirsch to M. Duchin re NC Data File (NCLCVP_LD_00018–NCLCVP_LD_00019)
- NC Incumbent Report (NCLCVP_LD_00006)
- North Carolina House Clusters 2021 (NCLCVP_LD_00008–NCLCVP_LD_000017)
- *Gerrymandering & Compactness* (NCLCVP_LD_00020–NCLCVP_LD_00029)
- *Locating the Representational Baseline: Republicans in Massachusetts* (NCLCVP_LD_00030–NCLCVP_LD_00045)
- *Computational Redistricting and the Voting Rights Act* (NCLCVP_LD_00046–NCLCVP_LD_00080)
- *NC General Assembly County Clusterings for the 2020 Census* (NCLCVP_LD_00081–NCLCVP_LD_00095)
- *Gerrymandering Jumble Map Projections Permute Districts Compactness Scores* (NCLCVP_LD_00096–NCLCVP_LD_00115)
- Scripts of M. Duchin (NCLCV_LD_00116), including:
    - Plan_metrics.py,
    - Score_non_recom_plans.py,
    - Summarize_proposed_plans.py,
    - Block_to_vtd_mapping.py,
    - Plan_stat_report.py,
    - Polsby_per_dist.py,
    - Vtd_splits.py,
    - Colors.py,
    - Dissolve.py,
    - Dualgraph.py,
    - Drawgraph.py,
    - Drawplan.py,

- Partisanship.py,
- Test_geography.py, and
- Test_mapping.py

The same rule the Court applied to require this production, however, has a flip side, which the Court also reaffirmed: "[P]arties are not entitled to more discovery than Rule 26 permits and cannot compel production of materials never received or considered by an opposing party's expert." Dec. 15 Order 4. The Court therefore specified that "NCLCV Plaintiffs are not required to produce any documents or information that Professor Moon Duchin did not consider or receive." *Id.*

Now, the Legislative Defendants ask this Court to reconsider its ruling and "br[ing] within the scope of the Court's order" concerning "production of expert materials" "documents or information that Professor Moon Duchin ***did not*** consider or receive." Mot. 1–2 (emphasis added) (quotation marks omitted).[1] But while the Legislative Defendants gesture briefly toward Rule 26 in support of that remarkable request, Mot. 3–4, they again do not engage with what either Rule 26 or this Court's Order ***says*** about expert disclosures: Parties must identify the "facts or data considered by the witness," no less and no more. *See* Rule 26(b)(4). Nor do the Legislative Defendants engage with the settled law, cited by the NCLCV Plaintiffs in their Opposition to the Motion to Compel, holding that expert discovery may not go beyond the information that the expert considered in forming his or her opinions. *E.g.*, *Peterson v. Seagate US LLC*, No. CIV. 07-2502

[1] To justify their request for reconsideration, the Legislative Defendants incorrectly aver that they did not previously "have the opportunity to rebut [the NCLCV Plaintiffs'] arguments," given the "short time between the *NCLCV* Plaintiffs' motion for a protective order and the Court's order granting that motion." Mot. 1. The NCLCV Plaintiffs, however, did not file any motion for a protective order. This is just one of many instances in which the Legislative Defendants are careless with the facts and the law.

MJD AJB, 2011 WL 861580, at *1 (D. Minn. Feb. 2, 2011) ("The court declines to reconsider its prior order and also declines to compel production of evaluation materials that were not considered by the defendant's own experts in arriving at opinions"); *United States v. Am. Exp. Co.*, No. 10-CV-4496 NGG RER, 2014 WL 2879811, at *7 (E.D.N.Y. June 24, 2014) ("Rule 26 does not require production of data that was neither received nor considered by" the expert); *In re Google Adwords Litig.*, No. 03-3369, 2010 WL 5185738, at *5 (N.D. Cal. Dec. 8, 2010) ("[S]ince Mothner did not specifically review, generate, or rely upon any underlying click data, Google need not disclose this data to Plaintiffs.").[2]

Instead, the Legislative Defendants largely rely on the same arguments that this Court already considered and rejected. To be sure, the Legislative Defendants tellingly ***no longer*** make a key argument from their prior Motion to Compel—that the lack of immediate expert disclosures is "highly prejudicial" because the Legislative Defendants were "unable to prepare opposing expert reports on [a] highly expedited time frame." Legislative Defendants' Motion to Compel ("MTC") 2. The Legislative Defendants dropped that argument because, after the NCLCV Plaintiffs' fulsome production described above, they now have everything they need to replicate and test Professor Duchin's analysis. As to the Optimized Maps specifically, however, the Legislative Defendants simply recycle the same claims they offered before—that these maps "were critical to the preliminary-injunction stage litigation," that the NCLCV Plaintiffs' Verified Complaint referenced the Optimized Maps, and that the methods underlying the creation of the Optimized Maps must be disclosed because they "cannot be separated from" materials that "were publicly filed." *Id.* at 3, 9–10; *see* Mot. 1–2, 5 (similar arguments). The answer to all those claims,

[2] *See Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, 250 N.C. App. 791, 797–98, 794 S.E.2d 535, 539 (2016) ("This Court has long held that federal decisions interpreting the federal rules are persuasive authority when interpreting similar state rules.").

however, is the one the Court already provided: What matters is that "parties are not entitled to more discovery than Rule 26 permits and cannot compel production of materials never received or considered by an opposing party's expert." Dec. 15 Order 4.

Straining to avoid the Court's straightforward conclusion, the Legislative Defendants invoke the rule—which has nothing to do with discovery—that an "expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements." Mot. 4 (quoting *State v. Ortiz-Zape*, 367 N.C. 1, 9, 743 S.E.2d 156, 162 (2013)). There is a good reason, however, that the Legislative Defendants' Motion to Compel did not invoke that rule: It is entirely irrelevant to the question at hand.

First, the Legislative Defendants' argument fails at the threshold: None of their cases relied on the anti-parroting rule to ***compel discovery***. Instead, those cases are about admissibility and proof. *See State v. Ortiz-Zape*, 367 N.C. 1, 14, 743 S.E.2d 156, 165 (2013) (no error in trial court's "admission of an independent expert opinion based on the expert's own scientific analysis"); *Dura Auto. Sys. of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 612 (7th Cir. 2002) (district judge was "reasonable" in "striking testimony" on the ground that it constituted "untimely expert witness reports"); *Matter of James Wilson Assocs.*, 965 F.2d 160, 172 (7th Cir. 1992) ("bankruptcy judge was entitled to exclude the [expert's] evidence as hearsay"); *TK-7 Corp. v. Est. of Barbouti*, 993 F.2d 722, 732–33 (10th Cir. 1993) (expert's testimony was inadmissible and "insufficient to establish plaintiff's entitlement to damages"); *State v. Craven*, 367 N.C. 51, 57, 744 S.E.2d 458, 462 (2013) ("admission of the out-of-court testimonial statements from … lab reports was error"); *see also* 29 Wright & Miller, Federal Practice & Procedure Evid. § 6274 (2d ed.) (discussing admissibility of expert testimony under Rule 703 of the Federal Rules of Evidence).

Second, and more fundamentally, the anti-parroting rule is irrelevant because Professor

Duchin has not parroted any other expert's opinions. The case the Legislative Defendants rely on illustrates when that rule applies: An "engineer" analyzed the "physical condition of a building," but then an architect "planned to testify about" the engineer's opinion. *James Wilson*, 965 F.2d at 172. That was improper, the Seventh Circuit held, because the architect could offer opinions only "within [his] domain of expertise" and could not serve as "the engineer's spokesman." *Id.* at 173.

Professor Duchin is no one's parrot, and no one's spokesperson. Tellingly, the Legislative Defendants do not cite a single sentence in Professor Duchin's affidavit that parroted any conclusion of any other expert. That is because Professor Duchin's conclusions are entirely her own. As the NCLCV Plaintiffs explained at length in their Opposition to the Motion to Compel, Professor Duchin received the "block-assignment files" providing the complete data for both the Enacted Plans and what the NCLCV Plaintiffs have identified as their "Optimized Maps." NCLCV Opp. to Mot. to Compel at 5 ("MTC Opp."). Then, she analyzed the features of both maps, such as whether they objectively created a partisan skew and whether North Carolina's political geography compelled any such skew. She concluded that the Enacted Plans yield an "egregious partisan imbalance." Duchin Aff. 3 (attached as Ex. A to MTC Opp.). And she concluded that the maps the NCLCV Plaintiffs had provided lacked this "massive and entrenched partisan skew" and thus "show[ed] that nothing about the state's political geography compel[led]" the skew in the Enacted Plans. *Id.*

In cases like this one, where an expert offers his or her own conclusions, the anti-parroting rule does not apply. *See, e.g.*, *State v. Sanchez*, 259 N.C. App. 939, 939, 814 S.E.2d 625, 625 (2018) (expert did not impermissibly serve as a "surrogate" because he "did not repeat any out-of-court statements by a non-testifying analyst" and instead "formed an independent opinion based on his analysis of data reasonably relied upon by experts in his field"); *Fletcher v. Doig*, 196 F.

Supp. 3d 817, 828–29 (N.D. Ill. 2016) (rejecting "mouthpiece" argument because the testifying expert "d[id] not *rely* on [another expert's] conclusion as part of his … methodology" (emphasis in the original)).[3] Indeed, that result accords with the well-settled North Carolina law distinguishing between testifying and nontestifying experts and holding that documents and communications concerning the latter are protected from disclosure by doctrines including attorney-client privilege and work product. *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 626 S.E.2d 716 (2006). In asking this Court to "reconsider" its Order, the Legislative Defendants are in fact trying to create a backdoor to procure discovery on privileged information, contrary to the North Carolina Rules. *See* N.C. R. Civ. P. 26(b(4) ("Discovery of facts known and opinions held by experts … may be obtained *only* as provided by this subdivision." (emphasis added)).[4]

Like their prior Motion to Compel, the Legislative Defendants' present Motion relies heavily on the NCLCV Plaintiffs' use of the word "Optimized." The NCLCV Plaintiffs, they observe, have termed their maps "Optimized Maps." Mot. 3, 5. Based on the word "Optimized," and the assertion that "expert discretion [is] necessarily" involved in drawing redistricting maps, Legislative Defendants appear to contend that Professor Duchin seeks to testify that the Optimized Maps are "optimal," and that doing so would necessarily render an opinion about the methodology

[3] Indeed, the Legislative Defendants' own preferred example illustrates why the anti-parroting rule does not apply here. They say that this case is just like *James Wilson*, where "the engineer [had to] be disclosed and certified as an expert to the extent the engineer's judgment calls [were] relevant to the architect's opinion." Mot. 5. But here, ***no other*** expert's "judgment calls" were relevant to Professor Duchin's "opinion"; she formed her own opinion based on the maps' objective characteristics.

[4] To be clear, the NCLCV Plaintiffs would assert relevant protections here, including (*inter alia*) attorney-client privilege, the work-product doctrine, and the protections afforded by Rule 26(b)(4). Because this Court's December 15 Order addressed only what information is potentially discoverable in the first instance, and because the Legislative Defendants' Motion for Reconsideration addressed that same subject, the NCLCV Plaintiffs reserve the right to invoke all applicable privileges in the event the Court grants the Motion in any respect.

underlying the maps. Mot. 5. But the Legislative Defendants made that same argument before, *see* Legislative Defendants' MTC 10, and the Court properly rejected it. Dec. 15 Order 4. The Legislative Defendants show no error in that conclusion. Indeed, Professor Duchin never even ***characterized*** the NCLCV Plaintiffs' maps as "Optimized." Instead, she identified them as "alternative … plans," "demonstrative plans," or the "NCLCV" Plans. Duchin Aff. 3.[5] And she certainly did not offer any ***opinion*** that they "achieve[] a 'Pareto' optimal standard" or were "optimized according to a sophisticated computer code." Mot. 5.

The Legislative Defendants also say that the NCLCV Plaintiffs' Optimized Maps cannot be used as a "point of comparison by which to strike down the enacted plans" without "[u]nderstanding th[e] process" that led to the maps' creation "and everything behind it." Mot. 5. But again, the Legislative Defendants made the same argument before (via the "rule of completeness," *see* Legislative Defendants' MTC 10). And again, the Legislative Defendants show no error in the Court's rejection of that argument. Dec. 15 Order 4. The NCLCV Plaintiffs have relied on their Optimized Maps to counter an "impossibility" argument the Legislative Defendants made: that "the political geography and the spread of voters in North Carolina" necessarily yields maps with a "partisan advantage." Dec. 3 Hr'g Tr. 74: 5–12. The NCLCV Plaintiffs thus relied on their maps to show that the General Assembly ***could have*** drawn fair maps, consistent with North Carolina's political geography and traditional districting principles, yet ***did not***. Proving that point requires nothing beyond the ***maps themselves*** and Professor Duchin's expert conclusion that the Optimized Maps show that it is possible to obtain far more balanced

[5] The only use of the word "optimized" in Professor Duchin's report appears in the following passage: "Reock is a different [compactness] measurement of how much a shape differs from a circle: it is computed as the ratio of a region's area to that of its circumcircle, defined as the smallest circle in which the region can be circumscribed. From this definition, it is clear that it too is optimized at a value of 1, which is achieved only by circles." Duchin Aff. 5.

outcomes than do the Enacted Plans while respecting traditional districting principles.

In all events, the Legislative Defendants' recycled arguments are targeted at issues of admissibility and proof that will arise at trial (which is why, again, they cite no case applying the rules they invoke to compel expert discovery). They say, for example, that whether particular redistricting maps "achieve a 'Pareto' optimal standard," or rely on "cutting-edge computational methods," constitutes "expert opinion" that "could only be reliable and admissible" if offered by qualified experts. Mot. 5. But if Legislative Defendants are indeed pre-litigating the trial in this case, the NCLCV Plaintiffs will save them the trouble. To be very clear: The NCLCV Plaintiffs do not intend to (and do not need to) prove their case at trial by showing that the Optimized Maps are Pareto-optimal, nor by presenting evidence about how the Optimized Maps were produced. Instead, at trial the NCLCV Plaintiffs will prove that the Enacted Plans are extreme partisan gerrymanders. And they will show that, contrary to the Legislative Defendants' arguments, nothing in North Carolina's political geography compelled those results—because, as the Optimized Maps illustrate, it is possible to avoid that partisan skew while "simultaneously maintain[ing] or improv[ing] metrics for all of the most important redistricting principles that are operative in North Carolina." Duchin Aff. 3.

In short: The Court's December 15 Order got it right, and the Court should reject the Legislative Defendants' attempts to rehash their meritless arguments.

CONCLUSION

The Legislative Defendants' Motion for Partial Reconsideration should be denied.

Dated: December 17, 2021

Respectfully submitted,

JENNER & BLOCK LLP

ROBINSON, BRADSHAW & HINSON, P.A.

/s/Stephen Feldman

Sam Hirsch*
Jessica Ring Amunson*
Kali Bracey*
Zachary C. Schauf*
Karthik P. Reddy*
Urja Mittal*
JENNER & BLOCK LLP
1099 New York Avenue NW, Suite 900
Washington, D.C. 20001
(202) 639-6000
shirsch@jenner.com
zschauf@jenner.com

* *Admitted pro hac vice*

Stephen D. Feldman
North Carolina Bar No. 34940
ROBINSON, BRADSHAW & HINSON, P.A.
434 Fayetteville Street, Suite 1600
Raleigh, NC 27601
(919) 239-2600
sfeldman@robinsonbradshaw.com

Adam K. Doerr
North Carolina Bar No. 37807
ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
(704) 377-2536
adoerr@robinsonbradshaw.com

Erik R. Zimmerman
North Carolina Bar No. 50247
ROBINSON, BRADSHAW & HINSON, P.A.
1450 Raleigh Road, Suite 100
Chapel Hill, NC 27517
(919) 328-8800
ezimmerman@robinsonbradshaw.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition was served upon each of the parties to this action by electronic mail to counsel at the e-mail addresses indicated below, in accordance with North Carolina Rule of Civil Procedure 5(b)(1)(a):

Burton Craige
Narendra K. Ghosh
Paul E. Smith
PATTERSON HARKAVY LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
bcraig@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com

Lalitha D. Madduri
Jacob D. Shelly
Graham W. White
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, DC 20002
lmadduri@elias.law
jshelly@elias.law
gwhite@elias.law

Abha Khanna
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
akhanna@elias.law

Elisabeth S. Theodore
R. Stanton Jones
Samuel F. Callahan
ARNOLD AND PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue NW
Washington, DC 20001-3743
elisabeth.theodore@arnoldporter.com
stanton.jones@arnoldporter.com
samuel.callahan@arnoldporter.com

Counsel for Plaintiffs Rebecca Harper, et al.

Phillip J. Strach
Thomas A. Farr
John E. Branch III
Alyssa M. Riggins
NELSON MULLINS RILEY & SCARBOROUGH LLP
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
phillip.strach@nelsonmullins.com
tom.farr@nelsonmullins.com
john.branch@nelsonmullins.com
alyssa.riggins@nelsonmullins.com

Mark E. Braden
Katherine McKnight
Richard Raile
BAKER HOSTETLER LLP
1050 Connecticut Avenue NW,
Suite 1100
Washington, DC 20036
mbraden@bakerlaw.com
kmcknight@bakerlaw.com
rraile@bakerlaw.com

Counsel for Defendants Representative Destin Hall, Senator Warren Daniel, Senator Ralph E. Hise, Jr., Senator Paul Newton, Representative Timothy K. Moore, and Senator Phillip E. Berger

Terence Steed
Stephanie Brennan
Amar Majmundar
N.C. DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, NC 27502-0629
tsteed@ncdoj.gov
sbrennan@ncdoj.gov
amajmundar@ncdoj.gov

Allison J. Riggs
Hilary H. Klein
Mitchell Brown
Katelin Kaiser
Jeffrey Loperfido
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 W. Highway 54, Suite 101
Durham, NC 27707
allison@southerncoalition.org
hilaryhklein@scsj.org
mitchellbrown@scsj.org
katelin@scsj.org
jeffloperfido@scsj.org

J. Tom Boer
Olivia T. Molodanof
HOGAN LOVELLS US LLP
3 Embarcadero Center, Suite 1500
San Francisco, CA 94111
tom.boer@hoganlovells.com
oliviamolodanof@hoganlovells.com

Counsel for Plaintiff Common Cause

Counsel for Defendants the North Carolina State Board of Elections, Damon Circosta, Stella Anderson, Jeff Carmon III, Stacy Eggers IV, Tommy Tucker, Karen Brinson Bell; and the State of North Carolina

This 17th day of December, 2021.

/s/Stephen Feldman_____
Stephen Feldman