

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.

COMMON CAUSE,

Plaintiff,

v.

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

Defendants.

**HARPER PLAINTIFFS'
MOTION FOR
CLARIFICATION AS TO
THE ADMISSIBILITY OF
FACT WITNESS
AFFIDAVITS**

Harper Plaintiffs respectfully move for this Court to clarify that fact witness affidavits will be admissible as evidence at trial, without regard to hearsay. This Court’s December 13, 2021 scheduling order states that, on December 23, each party must “exchange ... evidence (in the form of expert witness reports, fact witness affidavits, and exhibit lists).” Case Scheduling Order at 5. On December 19, plaintiffs asked Defendants whether they would agree that “fact witness affidavits disclosed on Dec. 23 will be admissible as evidence at trial without regard to hearsay objections, so long as the parties have an opportunity to depose the fact witness, even if the witness doesn’t testify at trial.” *See* Exhibit A at 3. Plaintiffs stated that parties would reserve the right to offer non-hearsay objections to such evidence. *Id.* On December 20, Legislative Defendants indicated that they did not object to the admission of fact witness affidavits going solely to standing, even if those witnesses did not testify at trial (these are likely to include affidavits from individual plaintiffs attesting, *e.g.*, to their voting history, residence, and district). *Id.* at 1-2. But Legislative Defendants stated that they did object to the admission of fact witness affidavits “about facts of the map drawing process or other fact testimony that goes to the substance of the claims at issue as opposed to just standing.” *Id.* at 2.

Given the significant time constraints that the parties—and particularly the plaintiffs, who have a collective 9 hours to divide among three separate groups—will face at trial, *Harper* Plaintiffs request that this Court clarify that fact witness affidavits served on December 23 will be admissible as evidence without regard to hearsay objections, so long as all parties have an opportunity to depose the proponents of the affidavits (and to offer the deposition testimony as evidence). Plaintiffs have a collective 9 hours to present testimony from all of their collective expert witnesses and to cross-examine Legislative Defendants’ 3 or 4 anticipated expert witnesses. As the Court is well aware, in the 2019 *Common Cause* trial, which had a similar

total number of expert witnesses, trial lasted for two weeks. While Plaintiffs appreciate Legislative Defendants' desire to cross-examine witnesses at trial, given the unique circumstances and timing considerations in this case, requiring Plaintiffs to offer all substantive fact witnesses at trial will inevitably prevent Plaintiffs from presenting significant evidence in support of their claims. Under these circumstances, allowing depositions to challenge the testimony included in fact witness affidavits is a fair compromise that allows Plaintiffs to present their evidence in this case of surpassing importance.

Harper Plaintiffs respectfully request that this Court rule on this motion by December 22, because the Court's decision will affect the content of fact witness affidavits exchanged on December 23 at 5 pm. If the Court decides that fact witness affidavits going to issues other than standing will not be admissible, *Harper* Plaintiffs or other Plaintiffs are likely not to exchange certain fact witness affidavits they would otherwise exchange.

Respectfully submitted, this the 21st day of December, 2021.

By: /s/ Paul E. Smith

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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 21st day of December, 2021.

/s/ Paul E. Smith
Paul E. Smith, NC Bar No. 45014