

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, et al.,

Plaintiffs,

vs.

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

Defendants.

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.

**RESPONSE TO *HARPER*  
PLAINTIFFS' MOTION TO  
COMPEL RESPONSES TO SECOND  
SET OF INTERROGATORIES AND  
FIRST SET OF  
REQUESTS FOR PRODUCTION**

NOW COME President *Pro Tempore* Philip E. Berger, Senator Warren Daniel, Senator Ralph E. Hise, Senator Paul Newton, Speaker Timothy K. Moore, and Representative Destin Hall (collectively, "Legislative Defendants"), by and through undersigned counsel and pursuant to this Court's December 13, 2021 Scheduling Order and Rules 7(b), 33(a), and 34(b) of the North Carolina Rules of Civil Procedure, and hereby respond to *Harper* Plaintiffs' Motion to Compel Responses to Written Discovery. Legislative Defendants show the Court as follows:

## PROCEDURAL HISTORY

A brief recitation of pertinent aspects of the procedural history is appropriate to place *Harper* Plaintiffs' Motion within context:

*NCLCV* Plaintiffs filed their complaint with the court on November 16, 2021. The *Harper* Plaintiffs filed their complaint on November 18, 2021. On December 8, 2021, the Supreme Court of North Carolina ordered this Court to issue a written order on the merits of this dispute by January 11, 2021, thirty-four days later.

This Court ordered the parties to submit proposed scheduling orders by December 10, 2021. The *Harper* Plaintiffs' December 10 submission did not request specialized or expedited treatment of written discovery in the Court's Scheduling Order. On December 13, 2021, this Court issued its Scheduling Order. The Scheduling Order did not provide expedited deadlines for responding to written discovery requests despite universal knowledge of the incredibly expedited scheduling demands on this Court and the parties. The Scheduling Order did, however, state in Paragraph 9 that "The North Carolina Rules of Civil Procedure, General Rules of Practice for the Superior and District Courts, and Local Rules of Civil Superior Court for Wake County shall govern all matters not expressly covered or superseded by this Order."

*Harper* Plaintiffs served their first set of Interrogatories on Legislative Defendants on December 13, 2021, but did not seek leave of the Court for an expedited deadline for a response. *Harper* Plaintiffs served their second set of Interrogatories and first set of Requests for Production of Documents on Legislative Defendants on December 21, 2021, but again, did not seek leave of the Court for an expedited deadline for a response. On December 24, 2021, counsel for *Harper* Plaintiffs emailed requesting an update on responses to the discovery responses. Counsel for Legislative Defendants responded two hours later stating that the North Carolina Rules of Civil

Procedure under which the discovery requests were made, Rules 33 and 34, provided for 30-day response periods unless the Court ordered otherwise. This email also informed *Harper* Plaintiffs' counsel that the information sought by the discovery requests "is publicly available" at the General Assembly's website and YouTube channel.

*Harper* Plaintiffs responded on December 26, 2021 at 5:42 p.m. stating that Legislative Defendants' counsel's response was "not [ ] proper" and that it was unreasonable to "rely on the ordinary 30-day window to respond to discovery requests." *Harper* Plaintiffs then filed a Motion to Compel on December 27, 2021 and the Court has ordered Legislative Defendants to respond by 3:00 p.m.

### **STANDARDS**

Paragraph 9 of the Scheduling Order states: "The North Carolina Rules of Civil Procedure, General Rules of Practice for the Superior and District Courts, and Local Rules of Civil Superior Court for Wake County shall govern all matters not expressly covered or superseded by this Order."

The pertinent parts of Rule 33(a) of the North Carolina Rules of Civil Procedure state as follows: "Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.... The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon the defendant. The court may allow a shorter or longer time...."

The pertinent parts of Rule 34(b) of the North Carolina Rules of Civil Procedure state as follows: "The request may, without leave of court, be served upon the plaintiff after

commencement of the action and upon any other party with or after service of the summons and complaint upon that party. ...The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time.”

### **ARGUMENT**

*Harper* Plaintiffs’ Motion to Compel is improper and should be denied. The Motion comes despite *Harper* Plaintiffs having failed to take advantage of numerous opportunities to seek expedited discovery, despite *Harper* Plaintiffs having numerous other avenues to obtain the information sought by the discovery they now seek to compel, and despite substantial prejudice that granting the Motion would cause Legislative Defendants.

**A. *Harper* Plaintiffs’ Failure to Avail Themselves of Opportunities for Expedited Written Discovery Precludes Their Last-Minute Motion to Compel.**

*Harper* Plaintiffs’ Motion to Compel should be denied because they have failed to avail themselves of numerous other opportunities to obtain the discovery they now seek to have this Court compel. N.C. Rules of Civil Procedure 33(a) and 34(b), each provide 30 days from the date of service to respond to discovery requests made under those rules. A party may seek leave of Court for a shorter deadline. Additionally, a party may serve each type of discovery as early as the time of service of the summons and complaint. *Harper* Plaintiffs’ Motion should be denied for their failure to take advantage of at least three opportunities to seek expedited written discovery in this matter.

First, *Harper* Plaintiffs could have obtained the written discovery they now ask this Court to compel, without any Court intervention, if they had served these discovery requests at the time they served the summons and complaint. They did not.

Second, *Harper* Plaintiffs could have asked the Court for an expedited schedule for written discovery requests at the time they submitted their proposed Scheduling Order to the Court. They did not. Indeed, *Harper* Plaintiffs' proposed scheduling order does not even mention written discovery. And the Court's Scheduling Order does not provide for expedited deadlines for written discovery.

Third, *Harper* Plaintiffs could have sought leave of Court for expedited response deadlines at either time they serve the written discovery at issue in this Motion to Compel. Again, they did not.

Accordingly, the black letter of North Carolina's Rules of Civil Procedure and this Court's Scheduling Order provided multiple avenues for *Harper* Plaintiffs to seek expedited responses to the written discovery at issue in this Motion. They failed to take advantage of any of them. The Court should not now award their lack of compliance with governing rules by granting their Motion to Compel.

**B. *Harper* Plaintiffs Can Obtain the Information Sought Through Other Means.**

Second, *Harper* Plaintiffs' Motion to Compel is wholly unnecessary because the information sought by the written discovery subject to the Motion is available through other means. A basic premise of discovery under the North Carolina Rules of Civil Procedure is the notion that discovery should be proportionate to the needs of the case and not be unnecessarily duplicative or redundant. *See* N.C. Gen. Stat § 1A-1, Rule 26(b).

The email from Legislative Defendants' counsel on December 24, 2021 to *Harper* Plaintiffs' counsel expressly stated: "the information requested in the discovery requests is publicly available at [www.ncleg.gov](http://www.ncleg.gov) and YouTube (NCGA Redistricting – YouTube)." That email provided Plaintiffs' counsel with hyperlinks to those resources. The Parties share the same

relative access to the information. Additionally, *Harper* Plaintiffs’ counsel has the opportunity to depose two of the legislative defendants, who have waived legislative privilege and thus are willing to testify about information sought in the written discovery subject to *Harper* Plaintiffs’ Motion. Just today, Plaintiffs deposed Representative Hall who answered questions about “each person who, to your knowledge, took part in the drawing of the 2021 Plans,” Mot. Ex. A at 4, and “data relied upon or otherwise considered by” him in the map drawing process, *Id.*

As such, *Harper* Plaintiffs (and all Plaintiffs) have multiple avenues of accessing the information sought through their untimely written discovery requests. Plaintiffs’ written discovery requests are unnecessary, duplicative, and harassing, *especially* given the extraordinarily expediting process in this case—which they requested.

**C. Legislative Defendants Would be Prejudiced if *Harper* Plaintiffs’ Motion is Granted.**

Finally, Legislative Defendants will be prejudiced if *Harper* Plaintiffs’ Motion to Compel is granted. This Court’s Scheduling Order acknowledges the unprecedented speed at which this matter is proceeding, which only is compounded further by the scope of information at issue here as Legislative Defendants prepare to defend against three separate sets of allegations. This week alone, sandwiched between two federal holidays, may consist of approximately a dozen depositions on top of the myriad issues and processes attendant to preparing for a trial that starts in six days. *Harper* Plaintiffs’ seek a court order directing Legislative Defendants to, among other things, produce “all documents or data relied upon or otherwise considered [. . .] by any person [. . .] in connection with the creation of the 2021 Plans.” Mot. Ex. A at p.4. And *Harper* Plaintiffs define the word “document” “in its broadest sense” to include items like “receipts,” the word “tables” appears at least twice in the bloated definition, and “includes originals and each and every

non-identical copy of all writings of every kind.” Mot. Ex. B at p. 3.<sup>1</sup> After failing to secure, let alone seek, expedited discovery deadlines, *Harper* Plaintiffs would have Legislative Defendants sent on a fishing expedition these last days before trial, diverting resources away from preparation, when this information is readily available—and being offered—through other means.

*Harper* Plaintiffs’ Motion to Compel violates the dictates of N.C. R. Civ. P. 26(g), which requires that discovery be handled “consistent with the rules and warranted by existing law [and] not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation, [and] not unreasonable or unduly burdensome [ ] given the needs of the case [and] the discovery already had in the case....”

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<sup>1</sup> *Harper* Plaintiffs define the term “document” in the following way: “‘Document’ is used in its broadest sense and is intended to be comprehensive and to include, without limitation, a record, in whatever medium (e.g., paper, computerized format, e-mail, photograph, audiotape) it is maintained, and includes originals and each and every non-identical copy of all writings of every kind, including drafts, legal pleadings, brochures, circulars, advertisements, letters, internal memoranda, minutes, notes or records of meetings, reports, comments, affidavits, statements, summaries, messages, worksheets, notes, correspondence, diaries, calendars, appointment books, registers, travel records, tables, calculations, books of account, budgets, bookkeeping or accounting records, telephone records, tables, stenographic notes, financial data, checks, receipts, financial statements, annual reports, accountants’ work papers, analyses, forecasts, statistical or other projections, newspaper articles, press releases, publications, tabulations, graphs, charts, maps, public records, telegrams, books, facsimiles, agreements, opinions or reports of experts, records or transcripts of conversations, discussions, conferences, meetings or interviews, whether in person or by telephone or by any other means and all other forms or types of written or printed matter or tangible things on which any words, phrases, or numbers are affixed, however produced or reproduced and wherever located, which are in Your possession, custody or control. The term “Document” includes electronical mail and attachments, data processing or computer printouts, tapes, documents contained on floppy disks, hard disks, computer hard drives, CDs, and DVDs, or retrieval listings, together with programs and program documentation necessary to utilize or retrieve such information, and all other mechanical or electronic means of storing or recording information, as well as tape, film or cassette sound or visual recordings and reproduction for film impressions of any of the aforementioned writings.” Mot. Ex. B at p. 3.

**D. The *Harper* Plaintiffs' Arguments in Support of Their Motion Fail.**

*Harper* Plaintiffs' Motion makes two arguments in support of their motion, but both fail. First, *Harper* Plaintiffs position that their discovery simply seeks the same type of information that Legislative Defendants sought from the *NCLCV* Plaintiffs is not true. The Enacted Plans were drawn in public, on public computers, and the drawing process was recorded and uploaded to YouTube. There is no allegation that the Enacted Plans were created by a computer code, so that and related materials do not exist. The computer materials that do exist is the block-assignment file, which the *Harper* Plaintiffs (presumably) have, and the recordings from the drawing sessions, which are already available. In contrast, the *NCLCV* Plaintiffs alleged in their complaint that their so-called "Optimized Maps" were created by a sophisticated computer algorithm to achieve Pareto optimization by some undisclosed criteria. This implied the existence of computer code, experts qualified to create and run it, and criteria engrafted into the code. All of that was kept secret and it was capable of being disclosed given that the *NCLCV* Plaintiffs asked this Court to require North Carolina elections to be conducted under their maps as opposed to the Enacted Plans.

Moreover, Legislative Defendants' efforts to obtain this information from the *NCLCV* Plaintiffs occurred far earlier in the discovery process, having been the subject of a Motion to Compel nearly two weeks ago on December 14, 2021, which the Court resolved in favor of Legislative Defendants on December 15, 2021, and then further clarified on December 20, 2021. As such, Legislative Defendant's efforts to obtain discovery from *NCLCV* Plaintiffs had already been through two rounds of briefing before this Court before *Harper* Plaintiffs even served the written discovery requests subject to this Motion to Compel.

Second, *Harper* Plaintiffs' Motion argues that an email from Legislative Defendants' counsel fails to constitute a proper response under the Rules of Civil Procedure. That argument



assumes that said email constitutes Legislative Defendants' response. Legislative Defendants have not responded to *Harper* Plaintiffs' discovery requests because no response is yet due under this Court's Scheduling Order and the N.C. Rules of Civil Procedure, as explained above.

### **CONCLUSION**

*Harper* Plaintiffs' Motion to Compel is a paradigmatic example of "poor planning on your part does not necessitate an emergency on mine." The Motion is inappropriate, improper, and constitutes harassment. The Court should deny it outright.

WHEREFORE, for the reason set forth above, the Movants respectfully pray that the Court deny *Harper* Plaintiffs' Motion to Compel, and grant all any and all other relief that the Court deems appropriate.

Respectfully submitted, this the 27th day of December, 2021.

/s/ Phillip J. Strach

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**CERTIFICATE OF SERVICE**

It is hereby certified that on this the 27th day of December, 2021, the foregoing was served on the individuals below by email:

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