

STATE OF NORTH CAROLINA

FILED

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

COUNTY OF WAKE

2021 DEC 29 P 1:35

21 CVS 015426

NORTH CAROLINA LEAGUE OF  
CONSERVATION VOTERS, et al.,

WAKE CO. C.S.C.  
BY \_\_\_\_\_

REBECCA HARPER, et al.,

Plaintiffs,

*Consolidated with*  
21 CVS 500085

vs.

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

Defendants.

**LEGISLATIVE DEFENDANTS' MOTION TO SEAL THEIR  
MOTION FOR CLARIFICATION, AND IN THE ALTERNATIVE, MOTION TO  
COMPEL**

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 Paragraph 17 of this Court's December 15, 2021 Protective Order and Rule 27 of the General Rules of Practice for the Superior and District Courts, and move to seal Legislative Defendant's Motion for Clarification and, in the Alternative, Motion to Compel ("Motion for Clarification"), filed contemporaneously herewith. Legislative Defendants show the Court as follows:

**BACKGROUND**

1. On 15 December 2021, this Court entered a Protective Order (“Protective Order”) governing information, documents, and testimony exchanged in this litigation that the producing party believes should be protected from disclosure to third parties.

2. On 20 December 2021, this Court entered an Order granting Legislative Defendants’ Motion to Compel and requiring NCLCV Plaintiffs to produce information and documents relating to “the method and means by which the Optimized Maps were formulated and produced, including, but not limited to all source code, source data, input parameters, and all outputted data associated with the Optimized Maps,” and to “further identify any and all persons who took part in drawing or participated in the computerized production of the Optimized Maps.”

3. On 23 December 2021, NCLCV Plaintiffs produced a cover letter, information, and documents pursuant to this Court’s Order but designated the entirety of its response as “Confidential Pursuant to December 15, 2021 Protective Order,” even information such as the identity of persons involved in the drawing of their maps.

4. On 27 December 2021, Legislative Defendants issued a “Notice of Deposition” to the person identified within their December 23<sup>rd</sup> letter as having “directed the drawing and computerized production” of NCLCV Plaintiffs’ maps.

5. On 28 December 2021, NCLCV Plaintiffs’ counsel indicated their belief that the Notice of Deposition is improper.

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6. Accordingly, Legislative Defendants now seek relief from this Court allowing them to depose the individual who directed the drawing of NCLCV Plaintiffs’ maps.

## ARGUMENT

### NCLCV Plaintiffs' Improper "Confidential" Designations Prompt this Motion to Seal

7. Contemporaneous with this Motion, Legislative Defendants have filed a Motion for Clarification seeking clarification from the Court that a Notice of Deposition is a sufficient means of obtaining the deposition of the individual who directed the drawing of the NCLCV Plaintiffs' "Optimized Maps." That Motion asks, in the alternative, that the Court compel the deposition.

8. In order to identify and explain the relief sought in their Motion for Clarification, Legislative Defendants have no choice but to describe information and documents that NCLCV Plaintiffs have designated as "CONFIDENTIAL," such as the name of the individual whose deposition has been noticed and the contents disclosed in the 23 December 2021 cover letter that NCLCV Plaintiffs included with their document production. *See* General Rules of Practice for the Superior and District Courts ("G.R.P."), Rule 27(b)(2)(a), (b).

9. Paragraph 17 of this Court's December 15 Protective Order states:

Should any party seek to file with the Court or introduce into evidence or information they believe should not be made public and therefore should be placed under seal they must follow the procedures set for in Rule 27 of the General Rules of Practice.

10. Therefore, filing their Motion for Clarification requires Legislative Defendants to file this contemporaneous Motion to Seal because NCLCV Plaintiffs have designated documents and information described in that Motion as "Confidential," and the terms of the Protective Order require Legislative Defendants to file documents disclosing information designed "Confidential" provisionally under seal. *See* G.R.P., Rule 27(b)(2)(a), (b).

11. Indeed, absent NCLCV Plaintiffs' consent, the lack of which is evidenced by the Motion for Protective Order they filed this morning, the Protective Order provides no reasonable

alternative to filing this Motion to Seal if Legislative Defendants are to be able to file their Motion for Clarification. *See* G.R.P., Rule 27(b)(2)(c), (f)(ii).

12. With respect to whether the information should be accessible only to counsel of record, the terms of the Protective Order already permit the parties access due to NCLCV Plaintiffs' designation of this information and these documents as "Confidential" rather than "Highly Confidential." Therefore, this Court need not further restrict access to the Motion for Clarification or its exhibits pursuant to this Motion to Seal. *See* G.R.P., Rule 27(b)(2)(d).

13. Legislative Defendants do not believe that these documents should be sealed for any length of time because the "Confidentiality" designation necessitating this Motion is improper, as discussed further below. *See* G.R.P., Rule 27(b)(2)(e).

14. Because these documents and information have been produced pursuant to written discovery requests to a Party to this case, the provisions of Rule 27(b)(2)(g) of the General Rules of Practice are inapplicable to this Motion.

15. Legislative Defendants do not believe a hearing on this Motion is necessary, as provided for by Rule 27(b)(4) of the General Rules of Practice.

**NCLCV Plaintiffs' Confidentiality Designations are Inappropriate**

16. As explained above, Legislative Defendants move to seal their Motion for Clarification solely because the terms of the Protective Order require them to do so. Legislative Defendants, however, do not believe that the "Confidentiality" designations triggering this Motion are appropriate and, accordingly, do not think an order sealing their Motion for Clarification is appropriate either.

17. Legislative Defendants do not oppose "Confidentiality" designations on truly proprietary materials such as NCLCV's source codes or scripts.

18. Information such as the identity of NCLCV's map drawers and the process they undertook to draw those maps, however, is quantifiably different. Such information cannot reasonably be described as "competitively sensitive or proprietary" so as to warrant a "Confidentiality" designation consistent with the letter or spirit of the Protective Order. NCLCV Plaintiffs have failed to identify the "good faith claim of need of protection from disclosure" required by the Protective Order, see Protective Order at ¶ 2, and allowing NCLCV Plaintiffs to remain secretive about this basic information contradicts well-established norms in North Carolina with respect to open courts and public access to court documents, see, e.g., *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999) (noting court's inherent authority to shield court records should "only" be exercised when "[i]ts use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial."). NCLCV Plaintiffs have made no such showing here, nor can they. Indeed, robust discovery has been had with respect to Legislative Defendants' map drawers and map drawing processes.

19. Indeed, NCLCV Plaintiffs not only use the "Optimized Maps" in their verified complaint as the basis for alleging deficiencies in the plans enacted by the General Assembly and as the basis for their expert report, they expressly ask this Court to impose the "Optimized Maps" on North Carolina in the event the Court decides that remedial maps adopted by the General Assembly are constitutionally deficient. As such, information about the formation of these maps, including knowledge possessed by the person who directed their creation, go to the core of NCLCV Plaintiffs' claims in this matter. Improper restrictions on the use of non-proprietary information as basic as the identity of persons who directed the map drawing fundamentally and unfairly prejudices Legislative Defendants' ability to defend against the claims made by NCLCV Plaintiffs.

20. Accordingly, should the Court determine, in reviewing Legislative Defendants' contemporaneously-filed Motion for Clarification, that information included in that Motion is not properly designated as "Confidential," Legislative Defendants would concede that this Motion to Seal is moot and the relief sought thereby unnecessary.

### CONCLUSION

WHEREFORE, for the reason set forth above, the Movants respectfully pray that the Court seal their contemporaneously-filed Motion for Clarification, unless the Court should determine these documents are not appropriately designated as "Confidential," in which this Motion would be moot.

Respectfully submitted, this the 29th day of December, 2021.

/s/ Phillip J. Strach

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**CERTIFICATE OF SERVICE**

It is hereby certified that on this the 29th day of December, 2021, the foregoing was served on the individuals below by email:

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