

STATE OF NORTH CAROLINA

COUNTY OF WAKE

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

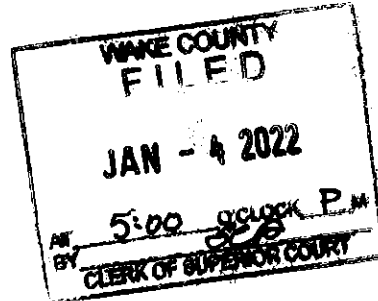
and

COMMON CAUSE,  
*Plaintiff-Intervenor,*

v.

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

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 21 CVS 015426



STATE OF NORTH CAROLINA

COUNTY OF WAKE

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.*

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 21 CVS 500085

**ORDER ON HARPER PLAINTIFFS' AND PLAINTIFF COMMON CAUSE'S JOINT  
MOTION FOR DISCOVERY SANCTIONS**

THIS MATTER came before the undersigned three-judge panel upon Harper  
Plaintiffs' and Plaintiff Common Cause's Motion for Discovery Sanctions submitted to the

Court<sup>1</sup> on December 31, 2021, pursuant to Rules 26 and 37 of the North Carolina Rules of Civil Procedure.

### Procedural and Factual Background

In this litigation, Plaintiffs seek a declaration that the North Carolina Congressional, North Carolina Senate, and North Carolina House of Representatives districts established by an act of the General Assembly in 2021, N.C. Sess. Laws 2021-174 (Senate Bill 750), 2021-173 (Senate Bill 739), and 2021-175 (House Bill 976) (collectively the “Enacted Plans”), violate the rights of Plaintiffs under the North Carolina Constitution. Plaintiffs seek to enjoin the future use of the 2021 congressional and state legislative districts.

On December 13, 2021, after receiving an order from the Supreme Court of North Carolina directing this Court to resolve all Plaintiffs’ claims on the merits by January 11, 2022, this Court entered a Case Scheduling Order giving the parties until December 31, 2021, to complete discovery in advance of trial, which is set to commence on January 3, 2022.

On December 20, 2021, this Court entered an order clarifying that NCLCV Plaintiffs would be required to identify any and all persons who took part in drawing or participated in the computerized production of NCLCV Plaintiffs’ Optimized Maps, that NCLCV Plaintiffs were to produce to Legislative Defendants 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 that NCLCV Plaintiffs were to identify any and all persons who took part in drawing or participated in the computerized production of the Optimized Maps. On December 21, 2021, Harper Plaintiffs requested this same information from Legislative Defendants through interrogatories and requests for production of documents issued, respectively, pursuant to

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<sup>1</sup> The Hon. A. Graham Shirley has accepted Plaintiffs Motion for filing on the 31<sup>st</sup> day of December, 2021, pursuant to Rule 5(e) of the North Carolina Rules of Civil Procedure.

Rules 33 and 34 of the North Carolina Rules of Civil Procedure. Harper Plaintiffs specifically requested this information and documentation as it pertains to the Enacted Plans, including the identification of all persons who took part in the drawing of the Enacted Plans in any way as well as all documents or data relied upon by those involved in the map drawing process.

On December 24, 2021, this Court entered a Protective Order acknowledging assertions of legislative privilege by four of the named Legislative Defendants—President *Pro Tempore* Philip E. Berger, Senator Warren Daniel, Senator Paul Newton, and Speaker Timothy K. Moore—and ordering that those four legislators not be called to testify at depositions noticed by Harper Plaintiffs. In that same Order, this Court noted that nothing in the Order should be construed as a limitation on the ability of Representative Hall or Senator Hise to waive their personal legislative privilege and testify at deposition or at trial. Representative Hall’s deposition occurred on December 27, 2021, and Senator Hise’s deposition occurred on December 28, 2021.

On December 27, 2021, Harper Plaintiffs filed their First Motion to Compel, and on that same date the Court entered an Order granting the Motion to Compel, ordering Legislative Defendants to respond to Harper Plaintiffs’ second set of interrogatories and first set of requests for production by 9:00 AM EST on December 28, 2021.

On December 28, 2021, Harper Plaintiffs filed their second Motion to Compel, contending that, in light of testimony given by Representative Hall, Legislative Defendants’ responses served in response to this Court’s December 27, 2021, Order, were facially deficient and were impeding access to key information that goes “to the heart of the dispute in this redistricting litigation.” On December 29, 2021, this Court entered an Order granting the second Motion to Compel, ordering Legislative Defendants to fully respond to the discovery requests and identify any materials that were lost or destroyed with specificity by 9 AM EST on December 30, 2021.

On December 31, 2021, Harper Plaintiffs' and Plaintiff Common Cause filed the present Joint Motion, contending that Legislative Defendants' December 30 responses again failed to fully respond to their discovery requests, simply producing documents already in the public record and refusing to provide any specific information about lost or destroyed materials. They have asked this Court to make an adverse inference that the evidence would show that Legislative Defendants considered partisan and racial data in drawing the Enacted Plans and to enter an order prohibiting Legislative Defendants from presenting any evidence that they did not consider this data.

Legislative Defendants informed the Court of their position on the Motion through a written response submitted to the Court on December 31, 2021. This Court rendered its ruling upon the Joint Motion in open court at the start of trial of these consolidated cases on January 3, 2022, and the Court's reasoning is more fully set forth below.

#### Joint Motion for Sanctions


After considering the Motion and the responses to that motion, as well as the matters contained therein, the Court, in its discretion, rules upon the Joint Motion as follows:

This Court is not persuaded that Legislative Defendants' actions failed to comply with this Court's December 29, 2021, Order on the Motion to Compel in the short time allotted. While Mr. Reel was a legislative employee at the time the House Plans were drawn, he is not at this time a legislative employee subject to the demands or requests of a legislator employer (*i.e.*, Representative Hall) any different than any other non-legislative witness. Furthermore, although Harper Plaintiffs and Plaintiff Common Cause contend that Legislative Defendants should have asked additional questions of Mr. Reel, these Plaintiffs also had the opportunity to seek this same information from Mr. Reel by way of subpoena for his testimony, a subpoena *duces tecum*, or both.

Moreover, the record before the Court at this time does not demonstrate that Legislative Defendants' actions definitively amount to spoliation necessitating an adverse inference. While this Court will not order an adverse inference, Plaintiffs remain able to ask the Court to make any reasonable inference from the evidence presented.

WHEREFORE, the Court, for the reasons stated herein and in the exercise of its discretion, hereby **ORDERS** that Harper Plaintiffs' and Plaintiff Common Cause's Joint Motion for Discovery Sanctions is **DENIED**.

SO ORDERED, this the 4 day of January, 2022.

  
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A. Graham Shirley, Superior Court Judge

*/s/ Nathaniel J. Poovey*

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Nathaniel J. Poovey, Superior Court Judge

*/s/ Dawn M. Layton*

\_\_\_\_\_  
Dawn M. Layton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via e-mail transmission addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 5<sup>th</sup> day of January, 2022.

/s/ Kellie Z. Myers  
Kellie Z. Myers  
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