

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 TO
COMPEL

The NCLCV Plaintiffs hereby oppose the Motion to Compel (the “Motion”) filed by the Legislative Defendants, both as premature and—more important—to the extent it seeks documents never in the possession of or considered by the NCLCV Plaintiffs’ expert, Professor Moon Duchin.

INTRODUCTION

The Motion appears to seek unprecedented expert discovery—namely, documents that were not provided to, were never in the possession of, and were not considered by Professor Duchin. The Motion also violates the Court’s December 13 Scheduling Order by demanding disclosures before the Order requires. As this Court knows, the Legislative Defendants proposed an order that would have limited Plaintiffs to their preliminary-injunction stage reports and would have required Plaintiffs to produce by December 13 “data supporting expert reports already submitted (including all source code, source data, input parameters, and all outputted data.” The Court instead required both sides to produce their opening reports by December 23 and specified

that these reports “*shall be accompanied* by all source code, source data, input parameters, and all outputted data.” The NCLCV Plaintiffs intend to comply with that Order and to produce appropriate expert discovery to “accompany” their report on December 23. Nonetheless, the Legislative Defendants seek to compel, even before expert reports are due, sweeping discovery that goes beyond anything the Legislative Defendants could legitimately obtain in expert discovery.

The NCLCV Plaintiffs wish to make their position clear: They intend to produce all facts and data that Professor Duchin considered in forming her opinions and creating her report, consistent with normal rules governing expert disclosures. These disclosures will provide the information necessary for the Legislative Defendants to replicate and test the conclusions in Professor Duchin’s report. That will include the block-assignment files for the Enacted Plans and Optimized Maps that Professor Duchin analyzed, election results by voting-tabulation district, address information for members of Congress and the General Assembly, and identification of the open-source software that Professor Duchin used.

Indeed, the Legislative Defendants have already received much of this information. To be sure, they have not yet received all of it. For example, Professor Duchin *did* consider the block-assignment files that embody the Optimized Maps. And the NCLCV Plaintiffs have *not yet* produced those block-assignment files. Instead, they filed with the Court “plan component reports” that were attached as Exhibits G, H, and AI to the affidavits of Stephen D. Feldman. These reports can be used to reproduce the Optimized Maps. But reproducing the maps is easier, and quicker, with the block-assignment files. The NCLCV Plaintiffs fully intend to disclose those block-assignment files by the Scheduling Order’s December 23 deadline (along with other facts or data Professor Duchin considers in producing her report). If the Court orders those files

produced sooner, the NCLCV Plaintiffs will of course do so.¹ The Legislative Defendants, however, will incur no prejudice from not receiving information that the NCLCV Plaintiffs' own expert *never* received or considered. Anyone who wants to replicate or test Professor Duchin's analysis can do so using the information that the NCLCV Plaintiffs have produced and will produce. And neither Professor Duchin nor the NCLCV Plaintiffs will rely on anything *besides* that information to prove their case.

To be clear, the NCLCV Plaintiffs agree that information like "source code" and "input parameters" is sometimes discoverable. Such information is properly discoverable when testifying experts *employ* that source code and when that source code is necessary to *replicate* the testifying expert's analyses. The *Harper* Plaintiffs' testifying experts, for example, analyze "ensembles" of thousands of maps, and it may not be possible to replicate those analyses without the code used to create the ensembles. Such code may sometimes be discoverable, and the NCLCV Plaintiffs take no position on whether a protective order is needed. Professor Duchin, however, did not perform any ensemble analysis. And her analysis of the Enacted Plans and the Optimized Maps can be replicated using information that the NCLCV Plaintiffs have produced and will produce.

The Legislative Defendants, remarkably, do not address the rules governing expert disclosures. Apparently recognizing that they seek discovery beyond what the North Carolina Rules permit, they stake their Motion on the claim that the "First Amendment right of access to civil trials" and related doctrines require production. Mot. 7. Those doctrines, however, concern the public's right to access information that is *filed* in courts. They do not entitle one party to obtain *discovery* from another party of information that was *never filed* in any court. Such

¹ The NCLCV Plaintiffs note that the Legislative Defendants did not request the block-assignment files before moving the Court for relief.

questions are governed by the principles of expert discovery. This Court should make clear that expert disclosures here will accord with those principles. Moreover, to the extent the Court orders the NCLCV Plaintiffs to produce early expert discovery in response to the Motion, the NCLCV Plaintiffs reserve the right to assert applicable privileges (including, *inter alia*, attorney-client privilege and work product, and Rule 26(b)(4)). That reservation is particularly appropriate given that the NCLCV Plaintiffs had only 5 business hours to respond to the Motion.

BACKGROUND

The Legislative Defendants' arguments turn, substantially, on what information Professor Duchin considered—and did not—consider. The NCLCV Plaintiffs thus begin there.

A. Professor Duchin's Analysis And Report.

The affidavit Professor Duchin submitted at the preliminary-injunction phase “evaluat[ed] the properties of the[] plans” that the NCLCV Plaintiffs have identified as the “Enacted Plans”—the Enacted Congressional Plan, the Enacted Senate Plan, and the Enacted House Plan, all passed by the General Assembly on November 4, 2021. Duchin Aff. 3 (attached hereto as Ex. A). In particular, she analyzed whether those plans yielded a “partisan imbalance” (and concluded that the imbalance was “egregious”). *Id.* She also assessed the argument that “the state’s political geography compel[ed]” the Enacted Plans’ “massive and entrenched partisan skew.” *Id.* To do so, she compared the Enacted Plans with the Optimized Plans that the NCLCV Plaintiffs attached to their Verified Complaint and that counsel provided to her.

Professor Duchin did so by analyzing the objective features of the Enacted Plans and Optimized Maps, without regard to how those maps were created—using open-source software that anyone can employ to analyze these maps. She proceeded as follows:²

1. Professor Duchin received, as inputs, “block-assignment files” for both the Enacted Plans and the Optimized Maps. Block-assignment files are simple two-column spreadsheets with the Census label for each block in the state in the left column and the number of the district to which the block is assigned (1 to 14 for Congress, 1 to 50 for Senate, 1 to 120 for House) in the right column.
2. The block-assignment files for the Enacted Congressional Plan, the Enacted Senate Plan, and the Enacted House Plan are available from the General Assembly’s website.³ The block-assignment files for the Optimized Congressional Map, the Optimized Senate Map, and the Optimized House Map were provided to Professor Duchin by counsel.
3. To analyze the Enacted Plans and the Optimized Maps, Professor Duchin and her assistants used publicly available software, namely Python, QGIS, and GeoPandas, along with a publicly maintained codebase that can be accessed in the following GitHub repositories: (1) MGGG Redistricting Lab, *GerryChain Python Package*, github.com/mggg/gerrychain; and (2) MGGG Redistricting Lab, *MAUP GeoSpatial Python Package*, github.com/mggg/maup. All of these tools are publicly available and readily accessible.
4. These tools allowed Professor Duchin to identify various characteristics of the maps and districts, such as population, compactness, contiguity, the extent to which they divided political subdivisions, and the extent to which they paired (or “double bunked”) two incumbents in the same district. (The double-bunking analysis requires an additional input—namely, incumbents’ address information. Professor Moon’s forthcoming report will use a spreadsheet provided by the Legislative Defendants.) The results of that analysis are reported in Tables 1–4 to Professor Duchin’s affidavit (Ex. A).
5. Professor Duchin and her research assistants also used the tools described in Paragraph 3 to see how the districting plans divide up the vote patterns of 52 recent statewide general elections that are available publicly for each “voting tabulation district” (or “VTD”) in the State. This analysis does not employ any statistical modeling. Instead, it is simply done by reporting whether the Democratic or the Republican candidate in the statewide election received more votes in each district. With this method, Professor Duchin obtained a seat

² Counsel for the NCLCV Plaintiffs have confirmed the substance of the statements in this section with Professor Duchin. Given the short response time, the NCLCV Plaintiffs have not been able to provide an affidavit to support these statements. But the NCLCV Plaintiffs stand ready to do so if the Court so directs.

³ See N.C. Gen. Assembly, Legislative & Congressional Redistricting, 2021 Redistricting, <https://www.ncleg.gov/Redistricting> (showing “Block Assignment File” for each of the “Congressional,” “State Senate,” and “State House” plans).

share for each majority party for every pairing of a statewide election and a districting plan (namely, the Enacted Plans and the Optimized Maps). The sole additional calculation this process required, beyond simple arithmetic, occurred when either the Enacted Plan or the Optimized Plan subdivided a VTD into its census blocks. In those circumstances, Professor Duchin employed the standard disaggregation technique of allocating the votes for each candidate pro rata to each census block, proportional to the block's voting age population. The results of that analysis are reported in Tables 5–6 and Figures 2–6 of Professor Duchin's affidavit.

Notably, the Legislative Defendants already have or will soon have all the information Professor Duchin considered in undertaking these analyses and already have everything needed to test and replicate those analyses. As detailed above, the "inputs" for her analyses consist of:

- The block-assignment files for the Enacted Plans and the Optimized Maps.
- Electoral data available from North Carolina official websites.
- Incumbent addresses.⁴

The only inputs that Legislative Defendants do not have are the block-assignment files for the Optimized Maps. Legislative Defendants can reconstruct the Optimized Maps using Exhibits G, H, and AI to the affidavits of Stephen Feldman, which have been publicly filed. The NCLCV Plaintiffs, however, had planned to provide more granular block-assignment files for all three Optimized Maps with the report of the expert who relied upon them, consistent with the Court's Scheduling Order.

⁴ Although the NCLCV Plaintiffs have not produced the documents containing the address information that Professor Duchin used to create her preliminary-injunction affidavit, the Legislative Defendants *already have* address information. Moreover, the NCLCV Plaintiffs anticipate that Professor Duchin will update her analysis with the spreadsheet that the Legislative Defendants produced.

The NCLCV Plaintiffs have also produced Professor Duchin's affidavit, which details the "output" of her analyses. When the NCLCV Plaintiffs submit Professor Duchin's new report on December 23, they will also provide the full backup data that her tables and figures reflect.⁵

B. The Legislative Defendants' Requests.

The NCLCV Plaintiffs fully intend to produce the facts and data that Professor Duchin considers in forming her opinions and creating her report that the NCLCV Plaintiffs intend to submit on December 23, 2021. The Legislative Defendants, however, have also sought a series of "source code, source data, [and] input parameters" never received or considered by Professor Duchin or any other testifying expert in this case. In particular, they have sought "the source code, source data, input parameters (as defined above), and output data (as defined above) used to generate the three 'Optimized' Maps/Plans that the NCLCV Plaintiffs asked Dr. Duchin to assess." Email from Katherine L. McKnight dated December 9, 2021 (attached hereto as Ex. B). Professor Duchin, however, never received or considered any source code, source data, or input parameters used to generate the Optimized Maps. Instead, she received the block-assignment files that the NCLCV Plaintiffs intend to disclose pursuant to the Scheduling Order. The NCLCV Plaintiffs have thus refused to comply with the Legislative Defendants' requests, as both premature and outside the scope of appropriate expert discovery.

⁵ Because Professor Duchin's December 23 report is expected to address the racial vote-dilution claims that the NCLCV Plaintiffs did not litigate at the preliminary-injunction stage, that report will differ from her preliminary-injunction affidavit. Again, per the Court's Scheduling Order, the NCLCV Plaintiffs intend to produce the facts or data considered by Professor Duchin in producing that report, including any "source code, source data, input parameters, and ... outputted data" that Professor Duchin herself employs. Scheduling Order at 6.

ARGUMENT

The Legislative Defendants' Motion is both premature and seeks documents beyond the scope of appropriate expert disclosures under Rule 26 and this Court's Scheduling Order. The Court should deny the Motion and instead permit the NCLCV Plaintiffs to produce the materials that the Scheduling Order requires on the timeline the Scheduling Order provides.

I. The Motion Violates The Court's Scheduling Order By Seeking Premature Disclosures.

The Motion violates the Court's Scheduling Order by demanding disclosures before the Order requires. As this Court knows, the Legislative Defendants proposed an order that would have limited Plaintiffs to their preliminary-injunction stage reports and would have required Plaintiffs to produce by December 13 "data supporting expert reports already submitted (including all source code, source data, input parameters, and all outputted data." The Court instead required the parties to produce their opening reports by December 23, 2021 and specified that these reports "*shall be accompanied* by all source code, source data, input parameters, and all outputted data." The NCLCV Plaintiffs intend to comply with that Order and to produce appropriate expert discovery to "accompany" their report on December 23.

The Legislative Defendants incorrectly claim that the Scheduling Order requires immediate production of materials related to the preliminary-injunction stage reports because the Scheduling Order, in Paragraph 4, refers generally to "[e]xpert reports produced to an opposing party." Mot. 4. That Paragraph, however, follows Paragraph 1, in which the Court set deadlines for "the parties' exchange of evidence," including "expert witness reports." The NCLCV Plaintiffs did not "produce[]" Professor Duchin's preliminary-injunction affidavit to the Legislative Defendants under the Scheduling Order; they *filed* that report with the Court (and indeed, did so before the Legislative Defendants had even been served).

Nor is there anything to the Legislative Defendants' claim that it would be "inequitable and untenable" for disclosures to proceed as scheduled on December 23. Mot. 7. Indeed, the Legislative Defendants are far *better off* than the NCLCV Plaintiffs (and the *Harper* Plaintiffs). The Legislative Defendants will likely produce, on December 23, expert reports that are far more detailed than the cursory affidavit submitted by Sean Trende at the preliminary-injunction stage. The Plaintiffs will then have only five days, until December 28, to submit rebuttal evidence. The Court should reject the Legislative Defendants' attempt to revise the process and timeline it established in the Scheduling Order.

II. The Motion Violates The Scheduling Order And Rule 26 To The Extent It Seeks Documents That Are Not Proper Expert Disclosures.

The Motion should also be denied to the extent it seeks documents that are not properly discoverable, including "source code, source data, [and] input parameters" that Professor Duchin never received or considered. Such disclosures are beyond the scope of the Scheduling Order, which contemplates disclosures of "source code, source data, input parameters, and ... outputted data" that the testifying expert *considered*, not documents that the testifying expert never received or considered. So, too, the Legislative Defendants' Motion violates Rule 26, which also does not provide for such disclosures. And the First Amendment and related doctrines that the Legislative Defendants invoke are simply irrelevant to the disclosures they seek here.

A. The Motion Should Be Denied To The Extent It Seeks Disclosure Of Documents Never In The Possession Of Or Considered By Testifying Experts.

The Motion should be denied to the extent it seeks documents that are not properly within the scope of expert discovery. Discovery relating to experts is governed by Rule 26(b)(4) of the North Carolina Rules of Civil Procedure. Under Rule 26, written reports provided by testifying experts must contain, among other things: (I) "[a] complete statement of all opinions the witness will express and the basis and reasons for them[;] and (II) "[t]he facts or data considered by the

witness in forming them.” Rule 26(b)(4)(a)(I-II). 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 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).⁶ As explained above, this Court’s Scheduling Order is properly read as consistent with those principles: It contemplates disclosure of the “source code, source data, input parameters, and ... outputted data” that testifying experts consider in creating their reports. Scheduling Order 6.

Federal courts applying the same language have held that parties may not obtain more information from testifying experts through general discovery mechanisms than is required by the specific provisions of Rule 26 applying to testifying expert reports. The court in *Morriss v. BNSF Ry. Co.*, 2014 WL 128393, *6 (D. Neb. Jan. 13, 2014), considered this question and held that the specific discovery provisions in Fed. R. Civ. Pro. 26(a)(2) and 26(b)(4) were the maximum that a party could obtain, not a minimum requirement: Hence, “the broad discovery provisions of Rule 34 and Rule 45 cannot be used to undermine the specific expert witness discovery rules in Rule 26(a)(2) and (b)(4).” Likewise here, the Legislative Defendants are not entitled to greater discovery than Rule 26 would permit. The NCLCV Plaintiffs will continue to provide appropriate disclosures with Professor Duchin’s forthcoming expert report. But the Court should reject the

⁶ 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.”).

Legislative Defendants' attempt to obtain—as expert disclosures—documents that Professor Duchin never received or considered.

B. The Legislative Defendants' First Amendment And Related Arguments Are Irrelevant.

Without engaging with North Carolina's law of *expert disclosure*, the Legislative Defendants instead stake their Motion on the claim that the “First Amendment right of access to civil trials,” and similar rights under North Carolina, compel the disclosure in discovery of documents that Professor Duchin never received or considered. Mot. 7. But those doctrines—including the First Amendment, North Carolina State Constitution, the common law, and the North Carolina Public Records Act—all apply exclusively to documents *filed* with the court. *In re Pol'y Mgmt. Sys. Corp.*, 67 F.3d 296 (4th Cir. 1995) (finding that the First Amendment right of access only extends to particular judicial records and documents filed in connection with dispositive motions and that are considered by the court when ruling on those motions); *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 476 (1999) (finding that Article I, Section 18 of the North Carolina Constitution provides a qualified right of access to civil court records); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989) (recognizing a common law qualified right to judicial records subject to the discretion of the court); *In re Investigation into Death of Cooper*, 683 S.E.2d 418, 425 (N.C. App. 2009) (same); *Virmani*, 350 N.C. at 476 (finding that documents filed with the court become public records for the purposes of North Carolina's public records act).

By contrast, none of those documents confer on one party to litigation a right to obtain from another party documents that were *never filed* in court. Tellingly, the Legislative Defendants' Motion cites no authority—none—applying any of these doctrines to require the production of documents never filed with any court. That is because no such authority exists.

Indeed, courts routinely reject attempts by parties and third parties to use these doctrines to obtain discovery materials and unproduced documents. *See, e.g., In re Subpoena Duces Tecum Served on Amerix Corp.*, No. CV WDQ-07-2737, 2008 WL 11518429, at *1 (D. Md. Jan. 31, 2008) (no public right of access to subpoenaed documents because the documents had not been produced and filed in any court proceeding); *Spears v. Wal-Mart Stores E., LP*, No. 2:18-CV-152, 2021 WL 472927, at *2 (S.D. Ga. Feb. 9, 2021) (“As a threshold matter, the common-law right of access to judicial proceedings does not apply to discovery material not filed with a substantive motion.”); *Dahl v. Bain Cap. Partners, LLC*, 891 F. Supp. 2d 221, 224 (D. Mass. 2012) (discovery material not filed with court was not entitled to presumption of public access); *United States v. Ring*, 47 F. Supp. 3d 38, 41 (D.D.C. 2014) (“If a document is not filed with the court, it is not part of the judicial record and is not subject to a common law right of access.”); *Johnson v. City of Chicago*, No. 05 C 6545, 2006 WL 3147715, at *2 (N.D. Ill. Nov. 1, 2006) (no common law public right of access to documents that were not filed in court, and no First Amendment right of access to the documents because pretrial discovery has not been traditionally open to the public); *accord Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-37 (1984) (explaining that discovery materials are not a traditionally public source of information); *Tavoulaareas v. Wash. Post Co.*, 724 F.2d 1010, 1016-29 (D.C. Cir. 1984) (no common-law right of access or First Amendment right of access to discovery materials not used at trial).

Appearing to recognize that these doctrines do not support the Motion, the Legislative Defendants briefly invoke the “rule of completeness,” codified in N.C.G.S. § 8C-1, Rule 106. Mot.

10. This argument is also without merit. Rule 106 provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

As the Court of Appeals has explained, Rule 106 “codifies the standard common law rule that when a writing or recorded statement or a part thereof is introduced by any party, an adverse party can obtain admission of the entire statement or anything so closely related that in fairness it too should be admitted.” *State v. Edwards*, 261 N.C. App. 459, 467, 820 S.E.2d 862, 868 (2018). This rule’s purpose “is merely to ensure that a misleading impression created by taking matters out of context is corrected on the spot, because of the inadequacy of repair work when delayed to a point later in the trial.” *Id.* (quoting *State v. Thompson*, 332 N.C. 204, 220 (1992)).

The rule of completeness is irrelevant here. The Legislative Defendants are not seeking to introduce in court an “other part” of a “writing or recorded statement” that the NCLCV Plaintiffs have introduced in court. They are seeking *discovery* of *entirely different documents*, on the theory that they have some relation to materials discussed in court. That request has nothing to do with the rule of completeness. And tellingly, the Legislative Defendants cite no authority applying the rule of completeness in a remotely similar situation. Their sole citation, *State v. Hensley*, 254 N.C. App. 173, 180, 802 S.E.2d 744, 750 (2017), concerned the admission at trial of the “full text of notes” when one side had referred to excerpts from those notes.

Indeed, even apart from these obvious legal defects, the Legislative Defendants’ arguments fundamentally mischaracterize the role that the Optimized Maps have played and will play in this litigation going forward. They say that the NCLCV Plaintiffs have asked that the Enacted Plans be “struck down” based on undisclosed information, Mot. 12-13, and they use that assertion to justify their broad disclosure demands. But at least as to the NCLCV Plaintiffs, the very opposite is true. The Enacted Plans will be judged according to their objective features. And the Optimized Plans that the NCLCV Plaintiffs have identified will be judged that same way. The Legislative Defendants already have the “plan components” files that allow them to analyze those objective

features and to replicate and test Professor Duchin's conclusions concerning them. And shortly, the NCLCV Plaintiffs intend to produce the block-assignment files that will make it even easier for the Legislative Defendants to do so. The Court should reject the Legislative Defendants' attempts to use their mischaracterizations to rewrite the law of expert disclosure in North Carolina.

CONCLUSION

The Motion should be denied. To the extent the Court considers granting the Motion in any respect, it should make clear that Plaintiffs need not produce documents that were never in the possession of or considered by the expert witnesses who have submitted or will submit expert reports.

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Dated: December 15, 2021

Respectfully submitted,

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This 15th day of December, 2021.

/s/Stephen Feldman
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