

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
FILED SUPERIOR COURT DIVISION
21 CVS 015426

NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, et al.,

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.

2021 DEC 16 P 3:51

WAKE CO. C.S.C.
BY 

Consolidated with
21 CVS 500085

**MOTION FOR PARTIAL RECONSIDERATION OF
DECEMBER 15 ORDER**

Legislative Defendants respectfully move the Court to reconsider the portion of its order of December 15, 2021, providing that the “NCLCV Plaintiffs are not required to produce any documents or information that Professor Moon Duchin did not consider or receive.” 12/15/21 Order 6, ¶ 2. The Court entered this portion of the order based on arguments Legislative Defendants did not have the opportunity to rebut, given the short time between the *NCLCV* Plaintiffs’ motion for a protective order and the Court’s order granting that motion. Legislative Defendants respectfully submit that the Court would benefit from a closer look at this issue with appropriate adversarial briefing.

The Court’s order, if left unamended, would shield most or all discovery concerning the *NCLCV* Plaintiffs’ supposedly “optimized” alternative plans for the North Carolina legislative and congressional districts (the “Optimized Plans”), which the *NCLCV* Plaintiffs claim they developed

using “high-performance computers” and “cutting-edge computational methods and resources.” The Optimized Plans are a central plank of the *NCLCV* Plaintiffs’ complaint, featured prominently in the *NCLCV* Plaintiffs’ preliminary-injunction motion, and are clearly within the scope of discovery. In fact, the *NCLCV* Plaintiffs have asked that the Optimized Plans be *imposed on North Carolina* at the remedial phase of this case. But, in opposing Legislative Defendants’ motion to compel and advancing their own motion for a protective order, the *NCLCV* Plaintiffs made the troubling and baseless argument that, because their expert Prof. Duchin did not personally create the Optimized Plans or access, review, and consider the source code and other materials germane to their creation, those materials are beyond the scope of discovery. The Court’s order provides that the *NCLCV* Plaintiffs need not produce any documents or information that Prof. Duchin did not “consider or receive.”

But even if Prof. Duchin did not create the plans or review the source code, *some* expert did. It is contrary to law for the *NCLCV* Plaintiffs to use Prof. Duchin as a conduit to present undisclosed expert work to the Court and as intermediary to conceal that work from scrutiny. If the *NCLCV* Plaintiffs intend to utilize the Optimized Plans in this case, it is incumbent upon them to disclose the expert; produce a report disclosing the basis of the expert’s opinions (e.g., the basis for the opinion that the plans are “optimized”); provide all supporting materials, including source code; and make that expert available for a deposition and cross examination. And, because the *NCLCV* Plaintiffs relied on this information in their preliminary-injunction papers—and because Prof. Duchin relied on the Optimized Maps for her own work—this information should be brought within the scope of the Court’s order commanding immediate production of expert materials relied

on at the preliminary injunction phase. To that extent, Legislative Defendants respectfully urge the Court to reconsider and amend its December 15 order.¹

1. The *NCLCV* Plaintiffs' complaint alleges that

Plaintiffs have harnessed the power of high-performance computers, and employed cutting-edge computational methods and resources, to draw alternative maps that comply with state-law requirements and policies, advance traditional and neutral districting principles, and yield more competitive districts. Indeed, using these cutting-edge tools, Plaintiffs have created maps that approach being 'Pareto optimal,' which means that the maps are so strong on each redistricting criterion that improving the map on any one criterion necessarily worsens it on another. The Complaint refers to these maps as the 'Optimized Maps.'

NCLCV Compl. ¶ 154.² Thus, according to the complaint, the Optimized Plans are the result of sophisticated "computational methods" and "resources" utilized by "high-performance computers" that achieve a "Pareto" optimal result. However, the *NCLCV* Plaintiffs have also hinted that one or more human persons were involved in drawing lines within the Optimized Plans. Their attorney represented to this Court at the preliminary-injunction hearing that "I'm not here to tell you that our maps were drawn without human intervention." Dec. 3, 2021 Hr'g Tr. at 98:4–14. Yet both the "computational methods" and "human intervention" remain to this day a total mystery to everyone but the *NCLCV* Plaintiffs. Among other things, their basis for calling the plans "Pareto" optimal is unknown and remains unvetted.

2. Legislative Defendants are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." 12/15/21 Order

¹ To be clear, this motion does not challenge most of the Court's ruling, including its protective order. To the extent the Court grants relief pursuant to this motion, resulting disclosures may be made under the protective order, as appropriate.

² Although the *NCLCV* Plaintiffs were afforded until December 15 to file an amended complaint, they have not done so and instead elected to stand on their original complaint.

4 (quoting N.C. Ru. Civ. P. 26(b)(1)). Any expert materials a litigant offers must come supported with “[t]he facts or data considered by the [expert] witness.” *Id.* (quoting N.C. R. Civ. P. 26(b)(4)).

3. The law governing this issue is clear. An “expert must present an independent opinion obtained through his or her own analysis and not merely ‘surrogate testimony’ parroting otherwise inadmissible statements.” *State v. Ortiz-Zape*, 367 N.C. 1, 9, 743 S.E.2d 156, 162 (2013). “A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty.” *Dura Auto. Sys. of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002). If one expert relies on the work of another, then *both* experts must be disclosed, certified and accepted as experts, and subjected to expert discovery. *See id.* at 613–15 (excluding evidence where second expert, on whose work a disclosed expert relied, was not disclosed and accepted as an expert). As the Seventh Circuit explained:

If for example the expert witness (call him A) bases his opinion in part on a fact (call it X) that the party’s lawyer told him, the lawyer cannot in closing argument tell the jury, “See, we proved X through our expert witness, A.”

Matter of James Wilson Assocs., 965 F.2d 160, 173 (7th Cir. 1992). In that case, “[t]he issue was the state of [a] building,” and an architect was proffered to testify on that topic but had relied on the work of a consulting engineer; the Seventh Circuit rejected this “screen against cross-examination” and held that “the consulting engineer . . . was the one who should have testified.” *Id.* at 173; *see also TK-7 Corp. v. Est. of Barbouti*, 993 F.2d 722, 732 (10th Cir. 1993); *Dura Auto.*, 285 F.3d at 613–14; *State v. Craven*, 367 N.C. 51, 55, 744 S.E.2d 458, 460 (2013) (finding it impermissible for testifying expert to parrot results of lab report conducted by others); 29 Wright & Miller, *Federal Practice & Procedure Evid.* § 6274 (2d ed.) (“A court also may reject expert testimony under Rule 703 where the witness relies on the findings of an expert in a different field

and, because the witness is not an expert in that field, can only parrot and not critically evaluate those findings.”).

4. The *NCLCV* Plaintiffs are improperly attempting to shield a critical component of their case from discovery by clever expert disclosures and omissions. Plaintiffs tout the Optimized Plans created by “high-performance computers” and the “cutting-edge computational methods and resources,” *NCLCV* Compl. ¶ 154, but they failed to disclose (at least at the preliminary-injunction phase) the expert who ran that process or the methods used. The creators of the Optimized Plans were not “merely gofers or data gatherers but exercise[d] professional judgment.” *Dura Auto.*, 285 F.3d at 613. There are infinite ways to redistrict North Carolina, and expert discretion was necessarily required in crafting computer code to utilize or prioritize some criteria and not others. As their name indicates, the *Optimized* Plans were *optimized* according to a sophisticated computer code to achieve goals chosen by the expert or experts who performed the optimization. It is expert opinion that the Optimized Plans achieve a “Pareto” optimal standard, and the sophisticated process of creating the plans could only be reliable and admissible if someone with appropriate expertise performed the work. In turn, additional expert judgment was involved in any “human intervention” into the optimization and map-drawing processes. Understanding that process, and everything behind it, is essential to understanding the Optimized Plans.

5. The *NCLCV* Plaintiffs, however, are attempting to shield *all* of that critical information from discovery by disclosing a *different* expert, Prof. Duchin, who was not included in the creation process but merely analyzed the plans on the back end. But, just as the engineer must be disclosed and certified as an expert to the extent the engineer’s judgment calls are relevant to the architect’s opinion, the creator(s) of the Optimized Plans must be certified as experts, their opinions (e.g., their basis for calling the plans *optimized*) must be provided in a written report, their

underlying code and materials must be produced, and they must be made available for depositions and other appropriate discovery. The Optimized Plans are obviously not amenable to judicial notice or to admission as fact testimony. This is paradigmatic expert work that must be brought into the case—if at all—through an expert report.

6. The Court should apply these principles and require disclosure of the source code and other expert materials that produced the Optimized Plans. The December 15 order is not a final judgment and “is subject to revision at any time.” N.C. R. Civ. P. 54(b). Reconsideration is appropriate “to correct a clear error or prevent manifest injustice.” *Rossabi L. PLLC v. Greater Greensboro Ent. Grp., LLC*, No. 18 CVS 9568, 2021 WL 3073875, at *4 (N.C. Super. July 20, 2021) (citation omitted). Manifest injustice would result if Legislative Defendants were denied all inquiry into the Optimized Maps, which have been proposed as a point of comparison by which to strike down the enacted plans and as potential replacements. And the positions the *NCLCV* Plaintiffs tendered are clearly erroneous. Reconsideration is particularly appropriate where, as here, the aggrieved party was unable to advance the arguments supporting the reconsideration motion “at the time the relevant motion was pending.” *Morris Int’l, Inc. v. Packer*, No. 20 CVS 2156, 2021 WL 5115529, at *5 (N.C. Super. Nov. 2, 2021). The speed with which the Court (appropriately) sought to issue a ruling provides an adequate basis to open this limited portion of its ruling to reconsideration.

7. For these reasons, Legislative Defendants respectfully ask the Court to reconsider the portion of its December 15 order providing that the “*NCLCV* Plaintiffs are not required to produce any documents or information that Professor Moon Duchin did not consider or receive.” 12/15/21 Order 6, ¶ 2. The Court should order the *NCLCV* Plaintiffs to produce immediately all source code, source data, input parameters, and all outputted data pertaining to the Optimized Plans

and identify the persons involved in their creation. The Court should also make clear that expert disclosures required on December 23 must fully support the Optimized Plans, including the methods behind their creation, or else the Optimized Plans will be excluded from this case.

Respectfully submitted this the 16th day of December, 2021.

/s/ Phillip J. Strach

NELSON MULLINS RILEY &
SCARBOROUGH LLP
Phillip J. Strach (NC Bar No. 29456)
phillip.strach@nelsonmullins.com
Thomas A. Farr (NC Bar No. 10871)
tom.farr@nelsonmullins.com
Alyssa M. Riggins (NC Bar No. 52366)
alyssa.riggins@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
Telephone: (919) 329-3800

BAKER HOSTETLER LLP
Mark E. Braden* (DC Bar No. 419915)
MBraden@bakerlaw.com
Katherine McKnight* (VA Bar No. 81482)
kmcknight@bakerlaw.com
1050 Connecticut Ave NW, Suite 1100 Washington DC
20036
* Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

It is hereby certified that on this the 16th day of December, 2021, the foregoing was served on the individuals below by email:

Burton Craige
Narendra K. Ghosh
Paul E. Smith
Patterson Harkavy LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
bcraige@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com
Counsel for Plaintiffs Rebecca Harper, et al.

Abha Khanna
Elias Law Group LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
AKhanna@elias.law
Counsel for Plaintiffs Rebecca Harper, et al.

Elisabeth S. Theodore
R. Stanton Jones
Samuel F. Callahan
Arnold and Porter
Kaye Scholer LLP
601 Massachusetts Avenue NW
Washington, DC 20001-3743
elisabeth.theodore@arnoldporter.com
Counsel for Plaintiffs Rebecca Harper, et al.

David J. Bradford
Jenner & Block LLP
353 North Clark Street
Chicago, IL 60654
dbradford@jenner.com
*Counsel for Plaintiffs North Carolina League of
Conservation Voters, et al.*

Aria C. Branch
Lalitha D. Madduri
Jacob D. Shelly
Graham W. White
Elias Law Group LLP
10 G Street NE, Suite 600
Washington, DC 20002
ABranch@elias.law
LMadduri@elias.law
JShelly@elias.law
GWhite@elias.law
*Counsel for Plaintiffs Rebecca Harper, et
al.*

Terence Steed
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
tsteed@ncdoj.gov
*Counsel for the North Carolina State Board
of Elections; Damon Circosta, Stella
Anderson, Jeff Carmon III, Stacy Eggers IV,
and Tommy Tucker, in their official
capacities with the State Board of Elections*

Stephen D. Feldman
Robinson, Bradshaw & Hinson, P.A.
434 Fayetteville Street, Suite 1600
Raleigh, NC 27601
sfeldman@robinsonbradshaw.com
*Counsel for Plaintiffs North Carolina
League of Conservation Voters, et al.*

Sam Hirsch
Jessica Ring Amunson
Kali Bracey
Zachary C. Schauf
Karthik P. Reddy
Urja Mittal
Jenner & Block LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
shirsch@jenner.com
zschauf@jenner.com

Adam K. Doerr
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
adoerr@robinsonbradshaw.com

Erik R. Zimmerman
Robinson, Bradshaw & Hinson, P.A.
1450 Raleigh Road, Suite 100
Chapel Hill, NC 27517
ezimmerman@robinsonbradshaw.com

*Counsel for Plaintiffs North Carolina League of
Conservation Voters, et al.*

*Counsel for Plaintiffs North Carolina
League of Conservation Voters, et al.*

Allison J. Riggs
Hilary H. Klein
Mitchell Brown
Katelin Kaiser
Southern Coalition For Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
allison@southerncoalition.org
hilaryhklein@scsj.org
mitchellbrown@scsj.org
katelin@scsj.org

J. Tom Boer
Olivia T. Molodanof
Hogan Lovells US LLP
3 Embarcadero Center, Suite 1500
San Francisco, CA 94111
tom.boer@hoganlovells.com
olivia.molodanof@hoganlovells.com
Counsel for Intervenor Common Cause

/s/ Phillip J. Strach

NELSON MULLINS RILEY &
SCARBOROUGH LLP
Phillip J. Strach (NC Bar No. 29456)
phillip.strach@nelsonmullins.com