

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
18 CVS 0141001

COMMON CAUSE, et al.,

Plaintiffs,

v.

Representative DAVID R. LEWIS, in his  
official capacity as Senior Chairman of the  
House Select Committee on Redistricting, et  
al.,

Defendants.

**BRIEF OF THE PROTECT  
DEMOCRACY PROJECT, INC. AS  
AMICUS CURIAE SUPPORTING  
PLAINTIFFS**

**INTRODUCTION**

*Amicus* The Protect Democracy Project, Inc. is a non-partisan non-profit organization dedicated to preventing a decline into a more authoritarian form of government by, among other things, defending democratic norms and institutions.<sup>1</sup> *Amicus* submits this brief to provide the Court with some information and a perspective that the Court may find helpful when considering Geographic Strategies, LLC's and Legislative Defendants' (collectively, "Movants") requests to designate as "Confidential" all of the "Hofeller files" and to destroy many of those records.<sup>2</sup>

**BACKGROUND**

As the Court knows, the "Hofeller files" are the life's work of Dr. Thomas Hofeller, a deceased Republican redistricting expert who is arguably the single-most important figure of the

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<sup>1</sup> Protect Democracy, *About*, <https://protectdemocracy.org/about/>.

<sup>2</sup> The Republican National Committee has also moved to intervene and assert claims of privilege over certain documents but has not yet articulated any specific claims or privilege.

last half-century in American redistricting.<sup>3</sup> They were discovered by Dr. Hofeller's daughter after Dr. Hofeller passed away in August 2018, and Dr. Hofeller's daughter turned the files over to plaintiffs in response to a third-party subpoena.<sup>4</sup> The Hofeller files consist of over 100,000 files located on 22 hard drives and thumb drives.<sup>5</sup>

Many of the files are undoubtedly of immense public significance, as evidenced by the importance and immediate impact of the disclosure of just a handful of those files on the litigation surrounding the addition of the citizenship question to the census, and by recent articles in *The New Yorker* and *The New York Times*.

In May, while *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), was pending in the Supreme Court, documents located amongst the Hofeller files revealed that Dr. Hofeller had been one of the first, if not the first, to suggest adding a citizenship question to the 2020 Census,<sup>6</sup> in order to facilitate states switching from total population districting to citizen-voting-age-population ("CVAP") districting.<sup>7</sup> Switching to CVAP districting, Hofeller concluded, would allow Republican map makers to empower white Republican voters at the

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<sup>3</sup> See Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, N.Y. Times (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/obituaries/thomas-Hofeller-republican-master-of-political-maps-dies-at-75.html> (noting that Dr. Hofeller has been called the "Michelangelo of the modern gerrymander").

<sup>4</sup> See Mem. in Supp. of Geographic Strategies' Response to Court Order of 7/12/2019 at 9, *Common Cause et al. v. Lewis et al.*, No. 1 No. 18-CVS-14001 (N.C. Super. Aug. 30, 2019); Gary D. Robertson, *Court: GOP Mapmaker's Files Allowed in Gerrymandering Trial*, Associated Press, July 12, 2019, <https://www.apnews.com/ea3e4cf0f23f4919b4c5945f8c933479>.

<sup>5</sup> See Mem. in Supp. of Geographic Strategies' Response to Court Order of 7/12/2019 at 9, *Common Cause et al. v. Lewis et al.*, No. 1 No. 18-CVS-14001 (N.C. Super. Aug. 30, 2019); Gary D. Robertson, *Court: GOP Mapmaker's Files Allowed in Gerrymandering Trial*, Associated Press, July 12, 2019, <https://www.apnews.com/ea3e4cf0f23f4919b4c5945f8c933479>.

<sup>6</sup> Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question* (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html>.

<sup>7</sup> Letter Mot. to Compel Defs. To Show Cause Ex. D at 8–9, *New York v. Dep't of Commerce.*, No. 18-cv-2921 (S.D.N.Y. May 31, 2019), ECF No. 595-1.

expense of communities of color and Democrats.<sup>8</sup> The disclosure generated substantial media attention and led the U.S. Court of Appeals for the Fourth Circuit to issue an extraordinary order permitting plaintiffs to re-open discovery into whether the Trump Administration’s addition of the citizenship question was an attempt to dilute the voting power of communities of color.<sup>9</sup>

Last week, *The New Yorker* published an article revealing that it has obtained copies of the Hofeller files and describing some of the most significant records identified thus far.<sup>10</sup> Records located amongst the Hofeller files reveal that Hofeller likely incorporated racial data into his decision-making in drawing North Carolina’s most recent legislative districting maps, even though Republican legislators have repeatedly denied he did so. Emails located amongst the files connect Hofeller to Republican operatives’ involvement in Florida’s 2011 redistricting, which a Florida judge held ran afoul of Florida’s 2010 state constitutional amendment barring partisan gerrymandering. Other files document Hofeller’s work in Massachusetts, Mississippi, Alabama, and Virginia.

This week, *The New York Times* published an article revealing that it too now has access to the Hofeller files and describing additional findings of significant public interest amongst the files.<sup>11</sup> Several emails from 2011 document Hofeller’s back-and-forth with his business partner Dale L. Oldham as the two worked to draw Texas maps that would “shuttl[e] 30,000 mostly Hispanic residents from a Republican district west of Austin into a Democratic one” in order to

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<sup>8</sup> *Id.*

<sup>9</sup> *La Union Del Pueblo Entero v. Ross*, 771 F. App’x 323 (4th Cir. 2019).

<sup>10</sup> David Daley, *The Secret Files of the Master of Modern Republican Gerrymandering*, *The New Yorker* (Sept. 6, 2019), <https://www.newyorker.com/news/news-desk/the-secret-files-of-the-master-of-modern-republican-gerrymandering>.

<sup>11</sup> Michael Wines, *Republican Gerrymander Whiz Had Wider Influence Than Was Known*, *N.Y. Times*, Sept. 10, 2019, <https://www.nytimes.com/2019/09/10/us/republican-gerrymander-thomas-hofeller.html>.

give the Republican party “a lock on all but one of the House seats in heavily Democratic Travis County.”<sup>12</sup> The files also reveal that, in addition to analyzing CVAP districting in Texas, Hofeller “collected CVAP data for other states, led by Arizona and North Carolina”;<sup>13</sup> those records may further link Hofeller to the Trump Administration’s ongoing drive to facilitate CVAP districting in order to disempower communities of color.

Notwithstanding the overwhelming public interest in the disclosure of additional documents from the Hofeller files—or the fact that many of the Hofeller files appear to catalogue work Hofeller did in his individual capacity and work that predates Geographic Strategies’ existence such that Geographic Strategies has no legal interest in the documents<sup>14</sup>—Geographic Strategies now asks this Court to seal the entirety of the Hofeller files. And the Legislative Defendants further request that the Court order plaintiffs to destroy many of those records. We respectfully urge the Court to reject both requests and designate as confidential *only* those files for which the public interest does not outweigh the interest in secrecy and which are legitimately privileged.

## POINT FOR CONSIDERATION

### **I. The Public Interest in Disclosure of the Hofeller Files Undercuts Any Suggestion That There Exists Good Cause Sufficient to Justify A Blanket Protective Order**

Under North Carolina Rule of Civil Procedure 26(c), a protective order “may be issued only ‘for good cause shown’ and . . . only ‘to protect a party or person from unreasonable annoyance, embarrassment, oppression or undue burden or expense.’” *Williams v. State Farm*

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See David Daley, *The Secret Files of the Master of Modern Republican Gerrymandering*, *The New Yorker* (Sept. 6, 2019), <https://www.newyorker.com/news/news-desk/the-secret-files-of-the-master-of-modern-republican-gerrymandering>.

*Mut. Auto. Ins. Co.*, 67 N.C. App. 271, 273, 312 S.E.2d 905, 907 (1984) (quoting G.S. 1A-1, Rule 26(c)); see *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 291 N.C. 618, 627, 231 S.E.2d 597, 602 (1977) (“The authority of the trial judge to issue such protective order is not unqualified.”).

“In considering whether good cause exists for a protective order, the federal courts have generally adopted a balancing process.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994). So, too, have most states. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 432–33 (1991) (collecting sources).

Among other factors, courts should consider “whether the case involves issues important to the public.” *Pansy*, 23 F.3d at 788; see *State ex rel. Brooks v. Zakaib*, 216 W. Va. 600, 608, 609 S.E.2d 861, 869 (2004) (same). Protective orders are justified only to prevent “unreasonable” and “undue” harm to a movant because they “are intended to offer litigants a measure of privacy, while balancing against this privacy interest the public’s right to obtain information concerning judicial proceedings.” *Ballard v. Herzke*, 924 S.W.2d 652, 658 (Tenn. 1996).

If [documents that would be subject to a protective order] involve[] issues or parties of a public nature, and involve[] matters of legitimate public concern, that should be a factor weighing against entering or maintaining an order of confidentiality. On the other hand, if a case involves private litigants, and concerns matters of little legitimate public interest, that should be a factor weighing in favor of granting or maintaining an order of confidentiality.

*Pansy*, 23 F.3d at 788.

Here, the public interest overwhelmingly weighs against finding that there exists good cause to keep all of the Hofeller files confidential. No individual played a more significant role in the rise of extreme partisan gerrymandering across the country over the last half-century than

Dr. Hofeller. Prior to his death in August 2018, Dr. Hofeller was a Republican political consultant who spent 48 years involved in the redistricting process in numerous states. He has been called the “pioneer of modern redistricting”<sup>15</sup> and the “Michelangelo of the modern gerrymander.”<sup>16</sup>

In the 1970s, Dr. Hofeller developed an early computerized mapping system for the California State Assembly.<sup>17</sup> In 1982, he was hired by the Republican National Committee (RNC) to run its redistricting activities and supervise its database and software development.<sup>18</sup> At the RNC, Dr. Hofeller helped lead Republican efforts to draw new maps and challenge maps drawn by Democratic legislatures in court.<sup>19</sup> Dr. Hofeller’s work paid off in 1994, when Republicans regained control of the U.S. House of Representatives for the first time since 1954 thanks, in part, to the districts he helped craft.

In 1997, Dr. Hofeller joined the House subcommittee on the census, where, from February 1998 to July 1999, he served as staff director.<sup>20</sup> He returned to the RNC in July 1999, where he served as its Redistricting Director until March 2003.<sup>21</sup> Although he left to serve in

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<sup>15</sup> Reid Wilson, *Pioneer of Modern Redistricting Dies at 75*, The Hill (Aug. 8, 2018), <https://thehill.com/homenews/state-watch/402489-pioneer-of-modern-redistricting-dies-at-75>.

<sup>16</sup> Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, N.Y. Times (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/obituaries/thomas-Hofeller-republican-master-of-political-maps-dies-at-75.html>.

<sup>17</sup> Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, N.Y. Times (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/obituaries/thomas-Hofeller-republican-master-of-political-maps-dies-at-75.html>.

<sup>18</sup> See Ex. B (Hofeller’s Resume) at 9, *N. Carolina State Conference of the NAACP v. McCrory*, No. 1:13-cv-00861-TDS-JEP (M.D.N.C. June 30, 2014), ECF No. 151-2.

<sup>19</sup> See Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, N.Y. Times (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/obituaries/thomas-Hofeller-republican-master-of-political-maps-dies-at-75.html>.

<sup>20</sup> Hofeller’s Resume at 8.

<sup>21</sup> *Id.* at 7.

senior roles in President George W. Bush's Agriculture Department until January 2009, Dr. Hofeller continued to serve as a redistricting consultant to the RNC throughout this period.

On June 8, 2009, Dr. Hofeller presented a powerpoint entitled *Redistricting 2010: Preparing for Success* at the Republican Legislative Campaign Committee's national meeting in Nashville. He laid out a grand strategy for using the 2010 census and subsequent redistricting processes around the country to benefit the GOP.<sup>22</sup>

After the 2010 census, Dr. Hofeller worked with the RNC to help develop and implement "Project REDMAP," a sweeping initiative to help GOP-controlled state houses build durable gerrymanders.<sup>23</sup> In 2010 and 2011, for example, Dr. Hofeller helped Republicans in North Carolina redistrict the state to "turn a 7-6 Democratic congressional majority into a 10-3 GOP stronghold."<sup>24</sup> Overall, Project REDMAP was wildly successful, helping Republicans hold the U.S. House in 2012, despite receiving 1.4 million fewer votes than Democratic congressional candidates.<sup>25</sup>

The Hofeller files, which reflect Dr. Hofeller's life's work of partisan gerrymandering, do not merely involve matters of legitimate public concern; they document the corrosion of our democracy. As the Supreme Court has repeatedly recognized, "[p]artisan gerrymanders . . . are incompatible with democratic principles." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004)) (alterations omitted); see *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019)

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<sup>22</sup> David Daley, *How the Republicans Rigged Congress – New Documents Reveal An Untold Story*, Salon (Feb. 6, 2018), <https://www.salon.com/2018/02/06/how-the-republicans-rigged-congress-and-poisoned-our-politics/>.

<sup>23</sup> *Id.*

<sup>24</sup> Robert Draper, *The League of Dangerous Mapmakers*, The Atlantic, Oct. 2012, available at <https://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/>.

<sup>25</sup> David Daley, *How the Republicans Rigged Congress – New Documents Reveal An Untold Story*, Salon (Feb. 6, 2018), <https://www.salon.com/2018/02/06/how-the-republicans-rigged-congress-and-poisoned-our-politics/>.

(same). Just last week, this Court echoed the Supreme Court in its merits decision, observing that “the core principle of republican government [is that] the voters should choose their representatives, not the other way around.” *Common Cause et al. v. Lewis et al.*, No. 18 CVS 014001, slip. op. at 301 (N.C. Super. Ct. Sept. 3, 2019) (quoting *Arizona State Legislature*, 135 S. Ct. at 2677). That is the basic, indispensable mechanism by which we govern ourselves. And it is vital to the protection of minority interests. “Allegations of unconstitutional bias in apportionment are most serious claims, for . . . ‘the right to vote’ is one of ‘those political processes ordinarily to be relied upon to protect minorities.’” *Vieth*, 541 U.S. at 311–12 (Kennedy, J., concurring) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938)).

Public access to information about Dr. Hofeller’s methods, and the extent and operation of his partisan gerrymanders, is even more important in the aftermath of the Supreme Court’s recent decision in another North Carolina redistricting case, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). There, the Court held that partisan gerrymandering claims are nonjusticiable in federal court for lack of judicially discoverable and manageable standards for resolving those claims. *Id.* But the Court explicitly did “not condone excessive partisan gerrymandering” or “condemn complaints about districting to echo into a void.” *Id.* at 2507. Instead, the Court observed that states, state legislatures, and Congress can combat extreme partisan gerrymanders by enacting legislation and adopting constitutional amendments. *Id.* at 2507–08.

Political reform, however, requires evidence and education. Legislators and voters must understand how partisan gerrymanders work, including those engineered by Dr. Hofeller, the country’s most prolific and effective gerrymanderer. They must also understand the extent of the problem in order to root it out.




The public interest in access to the vast majority of Hofeller files weighs heavily in favor of finding that there does not exist good cause sufficient to justify a blanket sealing order or an order directing plaintiffs to destroy many of the files.

### CONCLUSION

For the reason above, as well as those in Plaintiffs' initial opposition, we respectfully request that the Court deny Movants' motions to designate as confidential all of the Hofeller files and to destroy many of those records.

Dated: September 12, 2019

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