

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
18 CVS 014001

COMMON CAUSE, et al.,

Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS  
SENIOR CHAIRMAN OF THE HOUSE SELECT  
COMMITTEE ON REDISTRICTING, et al.,

Defendants.

**MOTION OF PROPOSED  
AMICI CURIAE CLEAN  
ELECTIONS TEXAS, ET AL.,  
FOR LEAVE TO FILE BRIEF  
OBJECTING TO THE  
CONFIDENTIAL  
DESIGNATION OF THE  
HOFELLER FILES**

Clean Elections Texas, Common Ground for Texans, the League of Women Voters of Texas, March to the Polls, MOVE Texas, the Texas Civil Rights Project, and the Texas Progressive Action Network (collectively “Movants”) respectfully move the Court for an Order granting leave to file an amici curiae brief, attached hereto as “Exhibit A,” objecting to the continued treatment as confidential of the Hofeller files, with the exception of those previously designated as “HIGHLY CONFIDENTIAL/OUTSIDE ATTORNEYS’ EYES ONLY.”

INTEREST OF AMICI CURIAE

Movants are Texas-based non-profit organizations. These organizations work to ensure that underserved Texans have a voice in the political process. Based on publicly available information, it is highly likely that the files in question contain information that has a significant impact on the public interest, Movants’ work, and the communities and individuals that Movants serve. Indeed, the files that have been made available to the public document Mr. Hofeller’s work specifically with respect to how using voter eligible population as opposed to total population to draw legislative districts would affect the Texas House of Representatives. Mr. Hofeller concluded that using voter eligible population would advantage non-Hispanic Whites to the detriment of other demographic groups.

This would be in direct conflict with Movants' goals of protecting the voting rights of historically disenfranchised communities of color. The use of voter eligible population to draw districts would also undermine Movants' commitment to protecting the representational needs of communities with large immigrant populations and large youth populations.

Additionally, Movants are dedicated to ensuring that the State of Texas follows a fair and transparent redistricting process that provides representation for all Texans. Given Mr. Hofeller's known work on Texas districts, it is likely that the files in question contain substantially more information relevant to Texas organizations and Texas interests, including: (a) any and all files related to the distribution of citizenship data from the federal government to the states for the purposes of facilitating redistricting; (b) any and all files related to the redistricting of federal and state legislative districts in Texas; (c) any and all files related to the redistricting of any political subdivisions within Texas; and (d) any and all files related to use of voting age population in Texas.

#### REASONS WHY AN AMICI CURIAE BRIEF IS DESIRABLE

In determining whether to continue treating the Hofeller files as confidential, it is relevant for this Court to consider what best serves the public interest. Weighing the public interest requires a holistic appreciation of how the availability of the Hofeller files will affect parties in other states. These files contain unique information that has significant national implications. Already the public availability of a limited subsection of the files proved a highly relevant consideration in reopening a closely-watched national case. *See Kravitz v. United States Dep't of Commerce*, 382 F. Supp. 3d 393, 400 (D. Md. 2019) (finding that the content of the files "potentially connects the dots between a discriminatory purpose—diluting Hispanics' political power—and [the decision to attempt to add a citizenship question to the Census]"). Given that the Hofeller files are known to contain ample materials that specifically pertain to Texas public policy and redistricting, knowing their impact on

Texas-based entities will assist this Court in assessing how to best serve the public interest as it determines the files' fate.

CONCLUSION

For the foregoing reasons, Movants' Motion should be granted and the brief attached as Exhibit A should be considered by the Court.

Respectfully submitted this 13th day of September, 2019

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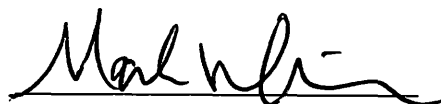
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This the 13th day of September, 2019.



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# **EXHIBIT A**

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## STATEMENT OF INTEREST

The entities filing this brief are community and civil rights organizations working on redistricting and voting rights issues in Texas. Entities named are Clean Elections Texas, a 501(c)(3) non-profit organization that seeks to promote open and accountable government in Texas; Common Ground for Texans, a 501(c)(3) non-profit organization that advocates for election reforms that empower the people and amplify their voice in the political process; League of Women Voters of Texas, a 501(c)(3) non-profit organization that empowers voters and builds participation in the democratic process; March to the Polls, a non-partisan voter empowerment coalition with 501(c)(3) status working to significantly increase voter participation and turnout, especially among historically low-propensity voters; MOVE Texas, a 501(c)(3) working to build power in underrepresented youth communities through civic engagement, leadership development, and issue advocacy; Texas Civil Rights Project, a 501(c)(3) that works on tackling the systemic issues that suppress voting rights in Texas; and Texas Progressive Action Network, a 501(c)(3) non-profit organization that promotes voter rights education and strong civic engagement.

Filers bring this brief as Amici Curiae to object to the continued confidentiality designation of the “Hofeller Files.” The filing organizations all work to ensure that underserved Texans have a voice in the political process. Based on publicly available information, it is highly likely that the files in question contain information that has a significant impact on the public interest, our organizations, and our work in Texas. Indeed, the files that have been made available to the public document Mr. Hofeller’s work specifically with respect to how using voter eligible population as opposed to total population to draw legislative districts would affect the Texas House of

Representatives.<sup>1</sup> Mr. Hofeller concluded that using voter eligible population would advantage non-Hispanic Whites. This would be in direct conflict with our organizations' goals of protecting the voting rights of historically disenfranchised communities of color. The use of voter eligible population to draw districts would also undermine our organizations' commitment to protecting the representational needs of communities with large immigrant populations and large youth populations.

Additionally, the filing organizations are dedicated to ensuring that the State of Texas follows a fair and transparent redistricting process that provides representation for all Texans.<sup>2</sup> Given Mr. Hofeller's known work on Texas districts, it is likely that the files in question contain substantially more information relevant to Texas organizations and Texas interests, including: (a) any and all files related to the distribution of citizenship data from the federal government to the states for the purposes of facilitating redistricting; (b) any and all files related to the redistricting of federal and state legislative districts in Texas; (c) any and all files related to the redistricting of any political subdivisions within Texas; and (d) any and all files related to use of voting age population to draw districts in Texas.

#### SUMMARY OF ARGUMENT

The Hofeller files represent a unique source of information that impacts the filing organizations and countless other Texas organizations and individuals. Mr. Hofeller played a significant role in drawing political districts across the country and shaping public policy related

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<sup>1</sup> See Alexa Ura, *Texas at center of new evidence suggesting census citizenship question was pushed to help Republicans*, Texas Tribune (May 30, 2019), <https://www.texastribune.org/2019/05/30/texas-center-new-evidence-census-citizenship-question-case>.

<sup>2</sup> See, e.g., *Fair Maps Texas*, FairmapsTexas.org (last accessed Sep. 04, 2019).

to redistricting and political representation. There is a presumption of openness for court records—including documents produced in discovery—which can only be overcome by showing a countervailing interest to outweigh the public interest in openness. No party has established such a significant countervailing interest. Based on what is publicly known about the files, and the likelihood that these files will not be obtainable through any other means, it is incumbent on this Court to allow the Hofeller files’ temporary “CONFIDENTIAL” designation to expire.

### ARGUMENT

#### I. THE PUBLIC INTEREST IN THE HOFELLER FILES AND THE PRESUMPTION OF OPEN COURT PROCEEDINGS REQUIRE LETTING THE “CONFIDENTIAL” STATUS OF THE HOFELLER FILES EXPIRE.

In order to close off court records from the public, it is necessary for the party seeking confidentiality to establish that the public interest in allowing such secrecy outweighs the public interest in free and open courts. In this case the general public interest in free and open courts and legal processes is supplemented by the unique significance of the files in question which directly impact countless organizations and affect the fundamental right to vote of individuals across the country, particularly those in Texas.

#### A. THE PUBLIC INTEREST WEIGHS HEAVILY IN FAVOR OF NOT MAINTAINING THE CONFIDENTIAL DESIGNATION OF THE HOFELLER FILES.

Mr. Hofeller played a significant role in drawing political districts across the country and shaping public policy related to redistricting and political representation. He played a particularly critical role in redistricting efforts in Texas through the end of his career. The filing organizations’ interests in the Hofeller files highlight their immense public importance to organizations and individuals in a variety of contexts, including the consideration of future public policy and potential litigation. The filing organizations seek to protect the rights of underserved and

historically disenfranchised communities. This includes helping to amplify and facilitate efforts to obtain a complete census count, including in hard- to-count communities most of which in Texas have large immigrant populations.<sup>3</sup> State legislators in Texas have openly discussed the possibility of drawing legislative districts in 2021 based on some criteria other than total population—for example, on citizen-only population.<sup>4</sup> Any attempts to exclude non-citizens from district drawing will negatively impact the communities we serve by diluting the voice of residents in those communities. Any materials related to the origin of the push for citizen data for redistricting purposes are relevant to determining the intentions and motivations underlying possible efforts by federal officials to provide the data to states, and possible efforts by state officials to draw districts based on some metric other than total population. Already, a limited set of the files has proven highly relevant to a closely-watched case of national import. *See Kravitz v. United States Dep't of Commerce*, 382 F.Supp.3d 393, 400 (D. Md. 2019) (finding that the content of the files “potentially connects the dots between a discriminatory purpose—diluting Hispanics’ political power—and [the decision to attempt to add a citizenship question to the Census]”).

Not only do these documents carry potential legal consequences, but their availability is vital to our work in promoting a fair and open redistricting process in Texas. Our organizations have been actively promoting public participation in the upcoming redistricting process by holding

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<sup>3</sup> *See, e.g.*, League of Women Voters of Texas, *Texas Census*, LWV.org (last accessed Sep. 04, 2019), <https://my.lwv.org/texas/redistrictingcensus/texas-census> (providing training materials, census toolkit, and resources related to identifying and counting communities with low response rates).

<sup>4</sup> Nick Brown, *Republicans Want Census Data on Citizenship for Redistricting*, Reuters.com (Apr. 08, 2019), <https://af.reuters.com/article/worldNews/idAFKCN1RK18H> (stating that Texas State Senator Kel Seliger “told Reuters that lawmakers there would explore citizen-only maps.”).

community forums and grassroots organizing events.<sup>5</sup> We help prepare residents with knowledge to understand past failures of the State when it comes to redistricting and facilitate residents to demand fairness and transparency from their State Legislature.<sup>6</sup> Any information concerning Texas' past efforts at redistricting and future plans for redistricting are relevant to the upcoming drawing of legislative districts in 2021. The public deserves to be fully informed as to how and why state officials are making choices about how to draw legislative districts, and the Hofeller files will undoubtedly shed light on this process. Our work also extends to promoting fair and open redistricting within political subdivisions of the state, including municipalities and county governing bodies. To the extent that any files relate to past or future redistricting efforts within Texas political subdivisions, it is crucial for the affected communities to understand the factors at play in drawing the districts which determine their representation.

Additionally, as has been made public, Mr. Hofeller strategized about the use of drivers license databases to attempt to identify non-citizen registered voters.<sup>7</sup> On February 04, 2019, the Texas Civil Rights Project, and others, filed suit on behalf of MOVE Texas and the League of Women Voters of Texas, amongst others, to enjoin a newly implemented state procedure that had improperly identified approximately 98,000 individuals as allegedly being non-citizens who were illegally registered to vote. Complaint (Doc. #1), *Move v. Whitley*, 3:19-cv-00041 (S.D. Tex. Feb. 02, 2019). This procedure was based on a poorly designed scheme to use drivers license data in attempt to identify non-citizens. As became immediately apparent, however, the vast majority of

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<sup>5</sup> *Events*, FairmapsTexas.org (last accessed Sep. 04, 2019), <https://www.fairmapstexas.org/events>.

<sup>6</sup> *See id.*

<sup>7</sup> *See* David Daley, *The Secret Files of the Master of Modern Republican Gerrymandering*, NewYorker.com (Sep. 06, 2019), <https://www.newyorker.com/news/news-desk/the-secret-files-of-the-master-of-modern-republican-gerrymandering>.

these individuals were in fact naturalized citizens who had properly registered to vote. Unsurprisingly the communities most impacted by this process were those, such as Harris County, Texas, that have the largest immigrant populations. The Plaintiffs in that case successfully obtained an injunction to halt this flawed program and ultimately settled the case with the Texas Secretary of State. The possible discriminatory intent of this attempted voter “purge” in Texas might be informed by the specific revelations in the Hofeller files. Moreover, the origins of this program are of continued interest to our organizations and the communities they serve. Texas has a long history of intentional discrimination in voting rights context. *See, e.g., Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc) (“[i]n every redistricting cycle since 1970, Texas has been found to have violated the VRA with racially gerrymandered districts.”). Any further evidence of past or future discriminatory intent on the part of state officials and the consultants they have worked with will be relevant to future litigation based on either the Voting Rights Act or the Fourteenth Amendment to the United States Constitution. *See Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (holding “the history of voting-related discrimination in the State or political subdivision” to be one of the factors relevant to determining whether a Voting Rights Act violation exists); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (“The historical background of [a governmental] decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.”).

**B. NO PARTY HAS OVERCOME THE STRONG PRESUMPTION IN FAVOR OF OPEN COURT RECORDS.**

North Carolina's Constitution and statutory authority dictate that in civil litigation the public has a presumptive right to access court proceedings and records. *France v. France*, 209 N.C. 406, 705 S.E.2d 399 (2011). A party seeking to limit or prevent altogether the public’s right to access must plead and demonstrate a “compelling countervailing public interest and [that]

closure of the court proceedings or sealing of documents is required to protect such countervailing public interest.” *Virmani v. Presbyterian Health Services Corp.*, 515 S.E.2d 675, 693 (1999). “The public’s right of access to court records is provided by N.C.G.S. § 7A–109(a), which specifically grants the public the right to inspect court records in criminal and civil proceedings.” *Id.* at 686-87; N.C.G.S. § 7A–109(a). The Court must construe this right liberally, as public access to records of the court is a foundational principle of Constitutionally mandated “open courts,” and is deemed to be in the public interest. *See News & Observer Publ’g Co. v. Poole*, 412 S.E.2d 7, 13 (1992).

Further, because the Hofeller files relate to current and likely future litigation, the public interest lies in permitting their public disclosure, and the fact that they may include documents only produced in discovery, but not presented to the Court is irrelevant to this public interest balancing. “The sharing of information . . . promotes speedy, efficient and inexpensive litigation by facilitating the dissemination of discovery material necessary to analyze ones case and prepare for trial. It reduces repetitious requests and depositions, thereby conserving even defendant’s time and expense . . . .” *Burlington City Bd. of Educ. v. U.S. Mineral Prod. Co.*, 115 F.R.D. 188, 190 (M.D.N.C. 1987). “[I]t is the party seeking the protective order who bears the burden of establishing with a specific factual showing both the need for a protective order and the harm ensuing without one, should he wish to prevent the sharing of discovery material. Any protective order entered should be narrowly tailored to fit the situation and even confidential material should be shared when possible.” *Id.* (internal citations omitted).

No party seeking to keep the Hofeller files designated as “CONFIDENTIAL” has asserted any public interest that would countervail the general presumption of openness, much less the unique national and Texas-specific public and litigation-related interest in these particular files.



General allegations of contract-based confidentiality are insufficient to outweigh the overriding public interest in the Hofeller files, and the judicial economy is permitted their public disclosure. *France v. France*, 209 N.C. App. 406, 415–16, 705 S.E.2d 399, 407 (2011) (“Evidence otherwise appropriate for open court may not be sealed merely because an agreement is involved that purports to render the contents of that agreement confidential.”).

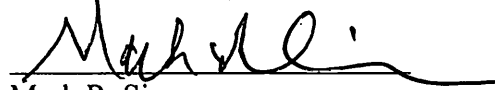
### CONCLUSION

The Parties filing this brief will be severely prejudiced by the continued confidentiality of the Hofeller files. The limited material that has been made public indicates the potential magnitude of the files on legal proceedings and public policy, particularly related to redistricting work in Texas. If the Hofeller files continue to be treated as confidential, the filing organizations will be harmed in their ability to fulfill their missions related fair and open redistricting and protecting the right of all Texans to participate in the political process, will be denied the right to public access of legal materials promised by the North Carolina Constitution, and will ultimately be required to drain the well of judicial resources in seeking these same documents in future litigation.

For the foregoing reasons, we respectfully ask that this Court allow the “CONFIDENTIAL” designation of the Hofeller files to expire at 11:59 PM on September 17, 2019.

Respectfully submitted this 13th day of September, 2019.

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# EXHIBIT B

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COUNTY OF WAKE

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v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS  
SENIOR CHAIRMAN OF THE HOUSE SELECT  
COMMITTEE ON REDISTRICTING, et al.,

Defendants.

**[PROPOSED] ORDER**

The Court, having considered the Motion of Proposed Amici Curiae Clean Elections Texas, et al., For Leave To File Brief Objecting To The Confidential Designation Of The Hofeller Files, hereby GRANTS the motion, and the brief attached to the Motion as Exhibit A is hereby submitted to the Court for consideration.

So ORDERED this \_\_\_\_ day of September, 2019.

\_\_\_\_\_  
Paul C. Ridgeway, Superior Court Judge

\_\_\_\_\_  
Joseph N. Crosswhite, Superior Court Judge

\_\_\_\_\_  
Alma L. Hinton, Superior Court Judge