



September 13, 2019

Via E-mail

The Honorable Paul Ridgeway
Senior Resident Judge
Wake County Justice Center
300 S. Salisbury Street
Raleigh, NC 27602

The Honorable Alma L. Hinton
Senior Resident Judge
Halifax County Courthouse
357 Ferrell Lane
Halifax, NC 27839

The Honorable Joseph N. Crosswhite
Senior Resident Judge
Hall of Justice
226 Stockton Street
Statesville, NC 28677

Re: *Common Cause et al. v. Lewis et al.*, No. 18-CVS-14001 (N.C. Super.)

Dear Hon. Judge Ridgeway, Hon. Judge Hinton, and Hon. Judge Crosswhite:

The American Civil Liberties Union (“ACLU”) Voting Rights Project submits this letter regarding the files of the late Dr. Thomas Hofeller, which are now under this Court’s review. Given our work in *New York v. U.S. Department of Commerce*, No. 18-cv-2921 (S.D.N.Y.) (“*Department of Commerce*”), *aff’d* 139 S. Ct. 2551 (2019), and *Ohio A. Philip Randolph Institute v. Householder*, No. 18-cv-357 (S.D. Ohio) (“*Householder*”), we are well acquainted with Dr. Hofeller’s work in the redistricting arena and the concerted effort to keep Dr. Hofeller’s files from public scrutiny. Given Dr. Hofeller’s extensive engagement in redistricting throughout the country, we anticipate that these files will continue to be a source of vital information regarding legislative maps all over the country. Access to Dr. Hofeller’s documents is in the public interest and furthers public transparency in the operation of government, especially the drawing of the legislative maps. This is particularly so as, in most states, documents that “serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of” government action are public records, *see, e.g., State ex rel. Glasgow v. Jones*, 894 N.E.2d 686, 690 (Ohio 2008). As Dr. Hofeller’s materials document functions of the state itself, *i.e.*, drawing district maps, they “are the people’s records,” and those

“in whose custody they happen to be are merely trustees for the people.” *Patterson v. Ayers*, 171 N.E.2d 508, 509 (Ohio 1960).

The ACLU has worked in voting rights for decades. In 1964, the ACLU secured the principle of one person, one vote in the U.S. Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 538 (1964). A year later, the ACLU Voting Rights Project was established to work exclusively on defending and securing the right to vote. Since its inception, the Voting Rights Project has litigated over 300 voting rights cases, including cases that successfully challenged efforts to dilute minority voting strength or obstruct the ability of minority communities to elect candidates of their choice. This past year, the ACLU was also involved in two cases where Dr. Hofeller’s role was critical: *Department of Commerce*, concerning Dr. Hofeller’s involvement in the attempt to add the citizenship question to the Census, and in *Householder*, concerning the drawing of the United States congressional map in Ohio.

Ohio A. Philip Randolph Institute v. Householder

In *Householder*, the ACLU represented Plaintiffs who alleged that the redistricting plan enacted by the Ohio General Assembly and signed into law by the Governor in 2011 constituted an unconstitutional partisan gerrymander. On May 3, 2019, the three-judge panel issued its opinion, which constituted its findings of fact and conclusions of law holding that Ohio’s congressional map was an unconstitutional gerrymander.¹ Critical to this finding was the role Dr. Hofeller in Ohio’s redistricting process. *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 998, 1002, 1003, 1147 (S.D. Ohio 2019) (discussing the role of Dr. Hofeller in Ohio’s redistricting process).² The panel found that Dr. Hofeller was one of the Republican operatives brought in from outside of the state to help draw the Ohio congressional map. *Id.*

That Dr. Hofeller’s role was cited in the Panel’s decision is of no surprise, given Dr. Hofeller’s extensive involvement in the Ohio redistricting process. He first became acquainted with Ohio’s map drawers in May 2010 at a Republican National Committee (“RNC”) conference, where he admonished state legislative officials to keep the redistricting process secret and out of the public eye and warned that redistricting could lead to litigation. *Householder*, No. 18-cv-357, ECF No. 251-1, ¶¶ 28–29 (S.D. Ohio Mar. 23, 2019). He then flew out to Ohio to give several presentations to Republican officials on how to redistrict in the state; he again encouraged secrecy and warned of the possibility of litigation. *Id.* ¶¶ 30–32. Following the 2010 elections, the Republican State Leadership Committee (“RSLC”) encouraged Republican state legislators around the country to take advantage of a redistricting team led by Dr. Hofeller and stated that his services would be offered free of charge in coordination with the RNC. *Id.* ¶¶ 33–34. The offer was taken up by officials in Ohio. *See id.* ¶ 35. Dr. Hofeller’s advice included how to draw

¹ The Supreme Court has since found that partisan gerrymandering cases are non-justiciable in federal court. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019). However, the Supreme Court explicitly left state court as an avenue to pursue similar claims. *Id.* at 2507–08 (stating that “[t]he States,” including state courts may address partisan gerrymandering).

² This makes sense as the partisan intent of those actually drawing the maps is attributable to those government officials charged with enacting the maps. *See also Common Cause v. Lewis*, No. 18 CVS 14001, slip op. ¶ 54 (N.C. Super. Ct. Sept. 3, 2019).

maps in accordance with the Voting Rights Act, what past political data to include when studying the partisan impact of draft maps, what locations should be included and excluded from districts in draft maps, and how to push the proposed map through the Ohio legislature. *Id.* ¶¶ 32, 139–45, 225, 246, 267, 274, 1015–16.

Notably, as in the present case, there has been an attempt to keep Dr. Hofeller’s files from judicial scrutiny. However, unlike the current case, the claim of privilege emanates not from Geographic Strategies, LLC, but from the RNC, along with the National Republican Congressional Committee (“NRCC”), and Adam Kincaid (former head of redistricting at the NRCC, and presently a Republican consultant and strategist). The RNC has claimed that it has a First Amendment privilege over Dr. Hofeller’s work and is seeking to claw back its production. *Ohio A. Philip Randolph Institute v. Obhof*, No. 19-3551, ECF No. 19 at 23 (6th Cir. Aug. 14, 2019) (claiming First Amendment privilege over all communications between the Republican party, its state affiliates, “and other aligned entities,” including Dr. Hofeller); *see also Ohio A. Philip Randolph Institute v. LaRose*, 761 F. App’x 506, 514 (6th Cir. 2019) (declining to exercise jurisdiction because the district court “explicitly applied” the correct framework in rejecting the RNC, NRCC, and Kincaid’s assertion of First Amendment privilege).

New York v. U.S. Department of Commerce

In *Department of Commerce*, the ACLU, along with Arnold and Porter, filed a federal lawsuit on behalf of immigrants’ rights groups challenging the Trump Administration’s plan to include a citizenship question on the 2020 Decennial Census. One of the central questions in the case was whether the Administration’s publicly-stated reason for adding a citizenship question to the Census (*i.e.*, to obtain better data to enforce the Voting Rights Act), was in fact its real reason. The Supreme Court ultimately ruled that the government’s proffered rationale for adding the question was pretextual, and ruled that the question could not be added to the 2020 Census questionnaire.³ *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019).

Dr. Hofeller’s files were significant because they shed light on the reason why there was a push to add the citizenship question to the Census. Prior to the discovery of Dr. Hofeller’s records, his role in the push for the addition of a citizenship question to the Census was unknown. Dr. Hofeller’s records illustrated that his work was, in fact, likely the genesis of the entire plan. In 2015, Dr. Hofeller concluded in a study that adding a citizenship question to the 2020 Decennial Census was necessary to enable the use of citizenship population, rather than total population, in redistricting, and that switching to the use of citizenship population would, in his words, disadvantage Latino communities and be “advantageous to Republicans and Non-Hispanic Whites.” *Dep’t of Commerce*, No. 18-cv-2921, ECF No. 595 (S.D.N.Y. May 31, 2019). Dr. Hofeller also wrote a portion of an early Justice Department (“DOJ”) draft letter articulating the pretextual Voting Rights Act rationale for adding the question to the Census, despite having no official position or relationship with the DOJ at the time. *Id.* Dr. Hofeller’s draft was then handed by Commerce Secretary Wilbur Ross’s “trusted . . . adviser” on census issues, Mark

³ Because Dr. Hofeller’s files had been kept from review until after the case had been fully submitted and argued at the Supreme Court, the true motive of the citizenship question were not included in the Court’s decision.

Neuman, to a DOJ official, at a meeting arranged by the Commerce Department's General Counsel. *Id.*

In sum, Dr. Hofeller appears to have been intimately involved with the plan to include the citizenship question on the census, and his files provided explicit evidence that the Administration's purpose in adding the question was the opposite of what was publicly stated: not to protect voting rights, but to dilute the political influence of communities of color. Dr. Hofeller's files have also revealed that key Administration witnesses may have given false or at least highly misleading testimony about the origin, process, and purpose of adding a citizenship question to the census, which has led to ongoing sanctions proceedings. *See Dep't of Commerce*, No. 18-cv-2921, ECF No. 635 (S.D.N.Y. July 16, 2019).

Conclusion

Dr. Hofeller was a leader of the effort to create a systematic approach to redistricting across the country—one in which redistricting was done behind closed doors to benefit the drawers of map to the detriment of the larger body politic. “A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office.” *Stanson v. Mott*, 17 Cal. 3d 206, 217 (1976) (citing *The Federalist Papers*, Nos. 52, 53 (Madison), 10 Richardson, *Messages and Papers of the Presidents 98-99* (1899) (President Jefferson)). His efforts were antithetical to what the map drawing process is supposed to be and, if left unexamined, strip our democracy of its key safeguards: transparency and accountability. In order to ensure that maps are reflective of the will of the people, it is critical that the populace understands how and why legislative lines have been drawn. Dr. Hofeller's files are critical piece in understanding redistricting decisions throughout the country.

Sincerely,
/s/ T. Alora Thomas-Lundborg

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