

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

2019 JAN 29 P 4:05
WAKE CO. C.S.C.
BY _____

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.

**PLAINTIFFS' PROPOSED
CASE MANAGEMENT
ORDER

(OTHR)**

Pursuant to the Court's Order of January 23, 2019, the parties exchanged proposed schedules and conducted a telephonic meet and confer, but were unable to reach agreement. Plaintiffs thus respectfully submit their proposed schedule below. As explained below, Plaintiffs' proposed schedule allows adequate time to prepare for trial on the front end, while also allowing adequate time on the back end to adopt and implement remedial districting plans should the current plans be found unconstitutional. Plaintiffs' proposal is also consistent with the schedules adopted in prior redistricting lawsuits in North Carolina state court and elsewhere. By contrast, Legislative Defendants' proposed schedule is unreasonable—by design, the schedule would make it effectively impossible to afford a remedy under the current election schedule. The Court should reject Legislative Defendants' proposed schedule, which is designed to effectively moot this case, and adopt Plaintiffs' proposed schedule or a similar one that would allow sufficient time for relief in the event the current plans are found unconstitutional.

Plaintiffs' Proposed Schedule

Plaintiffs propose the following deadlines and procedures relating to pleadings, procedures, discovery, motions practice, and trial:¹

- All document and written discovery shall be completed no later than March 1, 2019.²
- All parties' opening expert reports shall be served no later than March 11, 2019. Rebuttal expert reports shall be served no later than March 25, 2019. Reply expert reports shall be served no later than April 1, 2019. The opening expert reports shall include the information listed in Rule 26(b)(4)(A)(2) of the North Carolina Rules of Civil Procedure.
- No later than April 5, 2019, the parties shall file a joint proposal to establish deadlines for the exchange of witness lists, exhibit lists, and deposition designations, and for submitting to the Court a joint pre-trial stipulation of facts. On any deadline where the parties cannot agree, they may each describe their respective positions.
- All discovery, including depositions of fact and expert witnesses, shall be completed no later than April 15, 2019. Any discovery-related disputes shall be heard on an expedited basis and, to the extent reasonable and appropriate, upon notice of less than five days.
- Any motion for summary judgment shall be filed no later than April 18, 2019. Any opposition shall be filed no later than April 25, 2019, and any reply shall be filed no later than April 30, 2019.
- Motions in limine and briefs in support shall be filed no later than April 24, 2019. Any oppositions shall be filed no later than May 1, 2019.
- Trial will begin May 6, 2019.
- Plaintiffs and Defendants shall each file their respective proposed findings of fact and conclusions of law seven days after the close of trial.

Plaintiffs also ask that the Court order the parties to serve all pleadings, motions, briefs, discovery requests, and discovery responses by e-mail, and clarify that service by mail is not necessary.

¹ All defendants have answered the Amended Complaint, and no party has proposed filing any Rule 12 motion.

² The parties by agreement may continue document or written discovery beyond this March 1, 2019 deadline, but the Court will not intervene in this voluntary process except in extraordinary circumstances, and the trial date will not be modified because of information obtained through this voluntary process.

The Trial Date

Plaintiffs' proposed schedule serves the twin goals of (1) providing sufficient time to conduct fair and orderly pre-trial proceedings and trial in this Court; and (2) ensuring that, if the current districting plans are found unconstitutional, there is sufficient time to develop and implement remedial plans for the the 2020 elections.

Plaintiffs' schedule is consistent with the schedule followed in other redistricting cases in North Carolina and elsewhere. Indeed, Plaintiffs' schedule is far less compressed than that adopted in *Stephenson v. Bartlett*, 562 S.E.2d 377, 382 (N.C. 2002), where the Superior Court and then the state Supreme Court struck down the state's legislative districts under the North Carolina Constitution. In *Stephenson*, a group of Republican voters and Republican representatives filed suit on November 13, 2001. As here, the defendants removed the case to federal court, and the federal court remanded the case a short time later, on December 20, 2001. *See Stephenson v. Bartlett*, 180 F. Supp. 2d 77 (E.D.N.C. 2001). The Superior Court then expedited the proceedings, presided over discovery, and entered summary judgment invalidating the plans on February 20, 2002, just over three months after the complaint was filed and exactly two months after the case was remanded from federal court. *Stephenson*, 562 S.E.2d at 382.

Under Plaintiffs' proposed schedule, this Court would enter judgment following trial more than six months after suit was filed—and more than four months after the federal court remanded the case. This is ample time to conduct fair and orderly trial court proceedings—indeed, it is more time than was allotted in *Stephenson*. Precedent from other jurisdictions confirms the point. For instance, in a partisan gerrymandering challenge to Pennsylvania's congressional districts last year, the trial began six months after the plaintiffs filed suit, precisely the same timeline that Plaintiffs seek here. *League of Women Voters v. Commonwealth*, 178

A.3d 737, 766-67 (Pa. 2018). As a practical matter, that case proceeded on a much more compressed schedule than Plaintiffs are requesting here. Because the case was initially stayed for a period of months, pre-trial proceedings and trial took place over approximately five weeks (they began November 9 and ended on December 15).

Critically, Plaintiffs' proposed schedule also ensures that, if the current plans are ultimately found unconstitutional, there will be sufficient time to develop and implement remedial plans before the next elections. Any trial date significantly later than May 6, 2019 will jeopardize the Court's ability to afford relief under the current election schedule—in large part due to changes that Legislative Defendants recently made to that schedule. Legislative Defendants recently moved up the candidate filing period for party primary nominations for the state House and the state Senate to begin on December 2, 2019, and Legislative Defendants moved the primary elections to March 3, 2020. *See* 2017 N.C. Sess. Laws S.L. 2018-21 (S.B. 655). Legislative Defendants moved up these dates by two months from what they have been in previous election cycles. *Id.*

To provide a remedy in this case, there are numerous steps that could be required between the end of trial and the beginning of the candidate filing period on December 2, 2019.³ Those steps could include:

- This Court issues its decision following trial.
- The losing party appeals to the Court of Appeals and/or files a petition to the North Carolina Supreme Court to bypass the Court of Appeals.
- The parties file briefs and have oral argument in the Court of Appeals and/or the North Carolina Supreme Court.

³ Plaintiffs do not concede that each of these steps would be necessary in this case, but Plaintiffs outline them as illustrative given that these steps have been taken in other redistricting cases in North Carolina and elsewhere.

- The Court of Appeals and/or the North Carolina Supreme Court issue opinions.
- If Plaintiffs prevail on the merits, the General Assembly may be afforded time to enact remedial plans that comply with the North Carolina Constitution. As Plaintiffs have noted previously, after this lawsuit was filed, Legislative Defendants amended N.C. Gen. Stat. § 120-2.4(a) to purport to significantly extend the time that the General Assembly must be given to develop remedial plans. The revised statute could purport to require that the General Assembly be given up to 59 days to enact remedial plans. *See* N.C. Sess. Law 2018-146, Part IV, § 4.7.⁴
- The relevant court(s) appoints a special master.
- The parties and/or the special master submit comments on the General Assembly's remedial maps.
- The relevant court(s) adopts in full or in part, or rejects in full or in part, the General Assembly's remedial maps.
- If the relevant court(s) does not adopt the remedial plans in full, the special master develops and submits proposed remedial districts.
- The parties comment on the special master's proposed districts.
- The relevant court(s) adopts final remedial maps.

Plaintiffs' proposed trial date of May 6, 2019 ensures that there will be sufficient time to complete these or similar steps sufficiently in advance of the start of the candidate filing period on December 2, 2019. Any trial date significantly later than May 6 would jeopardize the ability to implement a remedy under the current election schedule, creating the risk that North Carolinians will once again face the prospect of voting in districts that violate their constitutional rights. That has happened numerous times this decade, and it decidedly is not in the public interest for it to happen again. That is especially true for the 2020 state legislative elections,

⁴ Plaintiffs do not believe that this new provision could be lawfully applied to this pending lawsuit (or at all, if a shorter remedial timeline were necessary to cure a constitutional violation). Nevertheless, Legislative Defendants' revisions to N.C. Gen. Stat. § 120-2.4(a) substantially undermine their request for a September trial date. Legislative Defendants cannot enact legislation that purportedly entitles them to an extended period of time for a remedial process, and then request a trial date that makes it impossible to afford them that period of time and still grant relief to Plaintiffs.

since the state representatives elected in 2020 will be the ones who, in 2021, will redraw North Carolina's state legislative and congressional districts for the next decade.

In contrast to Plaintiffs' proposal, Legislative Defendants' proposed trial date of September 23, 2019 would render it nearly impossible to afford relief under the current election schedule should Plaintiffs prevail. That is no accident—having already moved up the election schedule, elongated the time they purportedly must be given to develop remedial plans, and removed this case to federal court without basis, Legislative Defendants' proposed trial date is a transparent effort to run out the clock.⁵

Indeed, at the parties' meet and confer on January 28, 2019, Plaintiffs' counsel asked Legislative Defendants' counsel whether Legislative Defendants took the position that their schedule would afford sufficient time to implement a remedy in this case. Legislative Defendants' counsel asserted that they took no position on that question one way or the other. In other words, Legislative Defendants do not dispute that their proposed schedule would effectively moot this case.

Competition of Written Discovery

Plaintiffs' proposed deadline of March 1, 2019 for the close of written discovery is reasonable and appropriate. There has already been substantial progress on written discovery. Plaintiffs served initial interrogatories and requests for production of documents the same day Plaintiffs filed their complaint, on November 13, 2018. Legislative Defendants provided initial responses to these discovery requests on January 4, 2019, and the parties have already conducted a meet and confer concerning these responses and agreed on a schedule for Legislative Defendants to supplement their responses over the next ten days. *See Ex. A.*

⁵ Plaintiffs rely on the proposed schedule that Legislative Defendants sent to Plaintiffs on January 28, 2019.

Plaintiffs' proposal also provides adequate time for Defendants to serve discovery requests and receive responses. Legislative Defendants' counsel stated at the parties' January 27 meet and confer that they did not intend to serve discovery requests by any particular date and would do so when "ready." This case was filed more than two and a half months ago, on November 13, 2018, and allocating approximately one more month for written discovery through Plaintiffs' proposed written discovery deadline of March 1 will provide ample and sufficient time for Legislative Defendants to serve discovery requests and for Plaintiffs to respond.

By contrast, Legislative Defendants' proposed April 15, 2019 deadline for the close of written discovery is unnecessarily long. There simply is no reason for another 2.5 months of written discovery. This is particularly true given that Legislative Defendants have already responded to multiple discovery requests and the parties have already set a schedule for Legislative Defendants to supplement those responses and to address other deficiencies over the next ten days. *See* Ex. A.

Expert Reports

Plaintiffs propose that both parties exchange opening expert reports on March 11, 2019—which is 10 days after the completion of written discovery. Plaintiffs propose that both parties file rebuttal reports two weeks later (March 25), and reply reports one week after that (April 1).

Legislative Defendants propose that Plaintiffs file opening expert reports on March 1, 2019—1.5 months before Legislative Defendants' proposed cutoff date for written discovery—and that Defendants file their opening expert reports 2.5 months after Plaintiffs' reports are due, on May 15, 2019. Legislative Defendants then propose that the parties file rebuttal reports on June 3, 2019, and reply reports on June 17, 2019.

Plaintiffs' proposal is evenhanded and reasonable, while Legislative Defendants' proposal treats the parties unfairly and is so prolonged that it would preclude the setting of a trial date that would allow for a remedy in time for the 2020 elections.

First, the parties' opening reports, rebuttal reports, and reply reports should be filed on the same days; there should be no disparity between the parties. At the meet and confer, Legislative Defendants explained that they propose a delay of 2.5 months between the filing of Plaintiffs' opening expert reports and Defendants' opening expert reports because they want to be able to prepare "defensive reports" specifically to respond to Plaintiffs' experts. But that should be done via *rebuttal* reports, which are accounted for under both parties' schedules. If Legislative Defendants wish to file opening expert reports setting forth affirmative opinions on any topic, Legislative Defendants should be required to do so in opening expert reports that are filed on the same day as Plaintiffs' opening reports. Moreover, on Legislative Defendants' schedule and given their announced intention to use their initial reports as "defensive reports," Legislative Defendants would effectively get 2.5 months to rebut Plaintiffs' expert reports (between March 1 and May 15), but Plaintiffs would get only 18 days (between May 15 and June 3) to rebut Defendants' expert reports. That disparity is unfair.

Second, the court should order both parties to file opening expert reports by March 11, 2019. Any later date would threaten this Court's ability to decide the case in time for the 2020 elections. This case has been pending since early November; Legislative Defendants have had nearly three months to secure experts, and Plaintiffs' proposed March 11 deadline would give Legislative Defendants an additional 1.5 months on top of that. It is no hardship to file initial reports in that time frame. It can come as no surprise to Legislative Defendants that they would

need to promptly secure experts, as they filed an answer rather than a motion to dismiss.

Moreover, Legislative Defendants have extensive experience defending their congressional and legislative plans against gerrymandering claims, including partisan gerrymandering claims, and they are familiar with the expert analyses presented in these cases and the experts themselves—both for plaintiffs and their own.

Third, 14 days—the period that Plaintiffs’ schedule allows for the parties to file rebuttal expert reports—is sufficient. Although Legislative Defendants objected at the meet and confer that 14 days was insufficient, Plaintiffs note that Legislative Defendants’ proposed schedule would give Plaintiffs only 18 days to file rebuttal reports.

Finally, the Court should set the deadline for initial expert reports to fall after the deadline for completion of written discovery, as Plaintiffs’ schedule does, so that the experts can incorporate written discovery into their analyses.

Pre-Trial Submissions

This Court’s Order directed the parties to propose a deadline for the submission of a “[j]oint proposal to establish deadlines for exchange of witness lists, exhibit lists, deposition designations, pretrial stipulations.” Plaintiffs propose that the parties submit such a joint proposal on April 5, 2019. That proposal is reasonable; it allows over a month before trial begins on May 6, 2019 for the exchange of witness lists, exhibit lists, deposition designations, and pretrial stipulations.

Rather than propose a single deadline, Legislative Defendants proposed specific dates for all of the individual exchanges of information. Legislative Defendants’ proposal thus includes multiple interim deadlines related to deposition designations as well as witness and exhibit lists,

plus pretrial stipulations. Plaintiffs do not believe that it is necessary for the Court to set all these interim deadlines at this time; a single deadline for the submission of a joint proposal is sufficient. After the Court sets a trial date and other major dates, the parties can confer on dates for witness lists, exhibit lists, deposition designations, and pretrial stipulations.

In any event, the parties' proposals are not markedly different on the total amount of time needed for pre-trial exchanges. Legislative Defendants' proposal allows of a total of 40 days from the first pre-trial exchange of information (on August 14) until Legislative Defendants' proposed trial date (on September 23), whereas Plaintiffs' proposal allows for a total of 31 days from the submission of a joint proposal on the exchange of pre-trial information (on April 5) until the start of trial (on May 6).

* * *

WHEREFORE, Plaintiffs request that the Court enter an order providing for expedited discovery, motions practice, and trial, consistent with the deadlines and procedures set out above.

Respectfully submitted this the 29th day of January, 2019.

POYNER SPRUILL LLP

By: _____

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*Counsel for Common Cause and the
Individual Plaintiffs*

* *Pro hac vice motions pending*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email and by U.S. mail*, addressed to the following persons at the following addresses which are the last addresses known to me:

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*Counsel for the State of North Carolina and State Board of
Elections and Ethics Enforcement and its members*

Phillip J. Strach
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Michael.mcknight@ogletree.com
Counsel for the Legislative Defendants

This the 29th day of January, 2019.

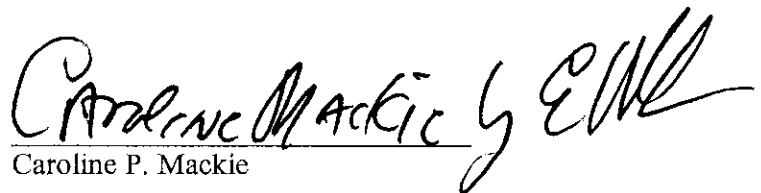

Caroline P. Mackie

EXHIBIT A

Jacobson, Daniel

From: Jones, Stanton
Sent: Friday, January 25, 2019 7:15 PM
To: Strach, Phillip J.; Riggins, Alyssa; McKnight, Michael D.
Cc: melias@perkinscoie.com; zzz.External.AKhanna@perkinscoie.com; Jacobson, Daniel; Theodore, Elisabeth; Mackie, Caroline P.; Speas, Edwin M.; Majmundar, Amar; Brennan, Stephanie
Subject: RE: Common Cause, et al. v. Lewis
Attachments: NC -- Plaintiffs Third Set of Rogs.pdf

Phil – Thanks for meeting and conferring with us earlier about Legislative Defendants’ discovery responses. As we agreed, attached are four new interrogatories addressing your concerns about the first four interrogatories in our first set. We look forward to receiving responses by February 1, as agreed.

In addition, below is a summary of points we discussed, and agreements we reached, with respect to other issues raised in our January 15 letter.

General Deficiencies:

You agreed to re-serve discovery responses under the state court rules by January 28.

You stated that you do not believe any materials were withheld on the basis of privilege, including you do not believe there are any communications with counsel relating to the 2017 Plans that are responsive to Plaintiffs’ discovery requests. You agreed to let us know by February 1 whether that remains your position or whether you will produce a privilege log.

Individual Interrogatories:

Interrogatories #1-4: Per above, we agreed to send new Interrogatories addressing Legislative Defendants’ objections, and you agreed to respond to those four new Interrogatories by February 1.

Interrogatory #5: We clarified that this Interrogatory seeks the names of, without limitation, legislative staff members, legal counsel, and anyone else Legislative Defendants remember communicating with about the 2017 redistricting before 8/10/17. You agreed to revisit the response to this Interrogatory and to supplement the response, if necessary, by February 1. Between now and February 1, you will, among other things, (1) investigate and identify additional individuals responsive to this Interrogatory; and (2) review the case law we identified holding that only the substance of the communications between attorneys and clients—not the identities of the attorneys and clients or the fact of the engagement—are privileged.

Interrogatory #7: We acknowledged that our January 15 letter had a typo and should have said 8/21/17 and not 8/17/17. We also explained that the same clarifications we provided for Interrogatory #5 applied for this Interrogatory. You agreed to revisit the response to this Interrogatory and to supplement the response, if necessary, by February 1.

Interrogatory #8: Legislative Defendants confirmed that Mark Coggins and Jim Blaine are the only two staff members that Legislative Defendants remember communicating with about the 2017 Plans between 8/10/17 and 8/21/17. You agreed to supplement the response to Interrogatory #8 by February 1 to list these two staff members as well as any legal counsel and other persons responsive to this request.

Interrogatory #9: You advised that Legislative Defendants will retain a local forensic consultant to receive the relevant hard drive and make two copies of its contents, one for you and the other for us. You also said that the hard drive has not been used since the creation of the 2017 Plans.

Interrogatory # 10: You stated that Legislative Defendants have no knowledge of the prioritization or weighting of the 2017 Plans Criteria other than the prioritization of equal population, contiguity, and the *Stephenson* county requirements. You stated that Legislative Defendant simply "gave him [i.e., Dr. Hofeller] the criteria and said draw the map."

Interrogatory # 12: We confirmed that "formulas" as used in the Interrogatory carries its ordinary meaning and noted that the "Hofeller formula" was used refer to Dr. Hofeller's weighting of election results in drawing the 2016 Congressional plans. You agreed to revisit the response to this Interrogatory and to supplement their response, if necessary, by February 1.

Interrogatory #13: We confirmed the meaning of "partisanship scores or estimates," including by referring you to our January 15 letter. You agreed to revisit the response to this Interrogatory and to supplement their response, if necessary, by February 1.

Interrogatories #14-18: We explained that Legislative Defendants must answer these Interrogatories relating to the 2011 Unchanged Districts. You agreed to revisit the response to this Interrogatory and to supplement their response, if necessary, by February 8.

RFPs: You agreed to investigate and tell us by February 1 the process of searching for documents, including which custodians were searched. Depending on the results of this investigation, the parties may then confer regarding a supplemental production schedule. You will also confirm that text messages and all other methods of communications were searched.

From: Strach, Phillip J. [mailto:phil.strach@ogletree.com]

Sent: Tuesday, January 22, 2019 10:00 PM

To: Jones, Stanton; Riggins, Alyssa; McKnight, Michael D.

Cc: melias@perkinscoie.com; zzz.External.AKhanna@perkinscoie.com; Jacobson, Daniel; Theodore, Elisabeth; Mackie, Caroline P.; Speas, Edwin M.; Majmundar, Amar; Brennan, Stephanie

Subject: RE: Common Cause, et al. v. Lewis

Stanton:

I would be glad to meet and confer on these issues Friday at 1:00pm. Please let me know if that works for you.

Thanks.

Phil

Phillip J. Strach | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

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phil.strach@ogletree.com | www.ogletree.com | [Bio](#)

From: Jones, Stanton <Stanton.Jones@arnoldporter.com>

Sent: Tuesday, January 22, 2019 6:41 PM

To: Strach, Phillip J. <Phil.Strach@ogletreedekins.com>; Riggins, Alyssa <Alyssa.Riggins@ogletreedekins.com>; McKnight, Michael D. <Michael.McKnight@ogletreedekins.com>

Cc: melias@perkinscoie.com; AKhanna@perkinscoie.com; Jacobson, Daniel <Daniel.Jacobson@arnoldporter.com>; Theodore, Elisabeth <Elisabeth.Theodore@arnoldporter.com>; Mackie, Caroline P. <CMackie@poynerspruill.com>;

Speas, Edwin M. <ESpeas@poynerspruill.com>; Majmundar, Amar <amajmundar@ncdoj.gov>; Brennan, Stephanie <Sbrennan@ncdoj.gov>

Subject: RE: Common Cause, et al. v. Lewis

Phil, thank you for your letter below. Please let us know times you are available this Thursday or Friday (1/24 or 1/25) to meet and confer on these issues. Also please let us know when you will provide the privilege log referenced on page one of your letter.

Regards,
Stanton

From: Strach, Phillip J. [<mailto:phil.strach@ogletree.com>]

Sent: Tuesday, January 22, 2019 5:06 PM

To: Jones, Stanton; Riggins, Alyssa; McKnight, Michael D.

Cc: melias@perkinscoie.com; zzz.External.AKhanna@perkinscoie.com; Jacobson, Daniel; Theodore, Elisabeth; Mackie, Caroline P.; Speas, Edwin M.; Majmundar, Amar; Brennan, Stephanie

Subject: RE: Common Cause, et al. v. Lewis

Counsel, please see attached letter. Thanks. Phil

Phillip J. Strach | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

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From: Jones, Stanton <Stanton.Jones@arnoldporter.com>

Sent: Tuesday, January 15, 2019 1:21 PM

To: Strach, Phillip J. <Phil.Strach@ogletreedeakins.com>; Riggins, Alyssa <Alyssa.Riggins@ogletreedeakins.com>; McKnight, Michael D. <Michael.McKnight@ogletreedeakins.com>

Cc: melias@perkinscoie.com; AKhanna@perkinscoie.com; Jacobson, Daniel <Daniel.Jacobson@arnoldporter.com>; Theodore, Elisabeth <Elisabeth.Theodore@arnoldporter.com>; Mackie, Caroline P. <CMackie@poynerspruill.com>; Speas, Edwin M. <ESpeas@poynerspruill.com>; Majmundar, Amar <amajmundar@ncdoj.gov>; Brennan, Stephanie <Sbrennan@ncdoj.gov>

Subject: RE: Common Cause, et al. v. Lewis

Counsel:

Please see the attached letter concerning Legislative Defendants' January 4 discovery responses.

Regards,
Stanton

From: Strach, Phillip J. [<mailto:phil.strach@ogletree.com>]

Sent: Friday, January 04, 2019 5:18 PM

To: Mackie, Caroline P.; Speas, Edwin M.

Cc: Jones, Stanton; melias@perkinscoie.com; zzz.External.AKhanna@perkinscoie.com; McKnight, Michael D.; Jacobson, Daniel; Theodore, Elisabeth; Majmundar, Amar; Brennan, Stephanie; Riggins, Alyssa

Subject: Common Cause, et al. v. Lewis

Counsel:

Please find attached discovery responses in this matter. Copies are being mailed out today as well.