STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
Case No. 18 CVS 014001

COMMON CAUSE; *et al.*

Plaintiffs,

v.

DAVID R. LEWIS, *et al.*

Defendants.

State Defendants' Statement of Position on Scheduling This Matter

This complicated case involves over 50 parties, including various elected and appointed officials, and the State of North Carolina itself, and it purports to assert "the constitutional rights of millions of North Carolinians." Amended Complaint at 2. One would think from all this that Plaintiffs would want the Court to have a satisfactory record, developed with ample time for counsel to hear from fact and expert witnesses, in order to adjudicate Plaintiffs' novel theory of law and fact. But Plaintiffs demand the opposite: they want this Court to adjudicate their novel claims after a trial, started and completed, five months after they served their amended complaint. To that end, Plaintiffs propose a schedule that robs preparation time from Defendants and deliberation time from this Court—threatening due process and creating a scenario where claims in the case will not rise or fall on merits, but on the speed of discovery and production of expert reports and Plaintiffs' litigation gamesmanship.

To be clear, the timing of the filing of this case and the purported need for an extrodinarily compressed schedule is entirely of the Plaintiffs' doing. Plaintiffs could have filed their complaint as early as September 2017 but, instead, they waited over a year until November 2018 to file an

initial complaint—later amended in December 2018—and now ask this Court to railroad the case to resolution by May 2019, all on the assumption that they have already proven their claims. That presumption is wrong. In fact, because of the deference that must be given to the legislatures' plan, the presumption is that Plaintiffs will *not* establish liability. So all of Plaintiffs' focus on a *remedial* phase is premature.

Plaintiffs' proposal[1] includes a form of shotgun discovery, with written discovery closing just 31 days from today. But the case has hardly even *commenced*, as no scheduling order yet exists. Indeed, it appears from Plaintiffs' proposal that Defendants will have *no* right to written discovery because by the time this Court enters a scheduling order the time to serve and respond will have *already expired.* What's more, Plaintiffs' schedule prohibits any follow-on discovery requests, and it is a mystery when motions to compel could be briefed, argued, and resolved; apparently, Plaintiffs expect the parties to give up the right to litigate those issues.

Next, their proposal provides Defendants just 14 days to respond to Plaintiffs' expert reports. Plaintiffs have had the benefit of preparing their case for many months, if not over a year. The novel nature of Plaintiffs' case renders opening reports by Defendants nearly worthless without an understanding of Plaintiffs' expert reports. Moreover, it is typical in redistricting and

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[1]Plaintiffs proposed the following:

- Completion of written discovery – March 1
- Expert reports – March 11
- Rebuttal expert reports – March 25
- Reply expert reports – April 1
- Joint proposal to establish deadlines for exchange of witness lists, exhibit lists, deposition designations, pretrial stipulations – April 5
- Discovery completion date – April 15
- Motions for summary judgment and accompanying memoranda – April 18
- Opposing memoranda regarding summary judgment motions – April 25
- Reply memoranda regarding summary judgment motions – April 30
- Motions in limine – April 24
- Oppositions to motions in limine – May 1
- Trial – Starting May 6

voting-rights cases that plaintiffs' expert reports rely on enormous data sets. Experts, for example, may program computers to produce 3 billion alternative redistricting plans, which, as a result, must be vetted by the defense experts. Depending on what Plaintiffs do it will be severely burdensome for the defense experts to prepare a response in 14 days. Indeed, it likely will be impossible even to run the data through a computer in that time. Further, Plaintiffs may resist producing the underlying data and source code, but even if those data and codes are timely produced, experts—many of whom are working professors in the middle of active and busy school semesters—will need more than 14 days to analyze and respond to Plaintiffs' experts in a manner sufficient to satisfy North Carolina Rule of Evidence 702(a) (requiring that expert testimony be based upon sufficient facts or data and the product of reliable principles and methods; and, that the witness has applied the principles and methods reliably to the facts of the case). Expert witnesses cannot prepare reliable testimony if they are not provided the necessary time to do so.

Finally, counsel to Defendants are in active litigation for other clients, including several weeks of trial in March 2019, which illustrates another problem with Plaintiffs' proposal: their counsel may have filed this case and sought expedition at a time most convenient for *them*, but that scheduling was without concern for the schedules of other counsel and for the Court.

During our meet and confer, Plaintiffs sought assurance that Defendants' proposed schedule would afford Plaintiffs an opportunity to fully appeal any adverse finding by this Court and obtain "complete relief." But that is something *Plaintiffs* should have considered when they decided not to file their complaint in September 2017 or any other month prior to November 2018. This scheduling crunch was created by Plaintiffs' decision to delay, and it is not this Court's duty to reward that strategic delay by cutting short the time necessary to prepare a case of this magnitude and complexity. Regardless, Plaintiffs are putting the cart before the horse: there is no need to

discuss a *remedy* before they establish *liability*, and they cannot do the latter without an adequate liability proceeding. If any proceeding is going to advance at breakneck speed, it should be the *remedial* proceeding, not the liability proceeding, since Plaintiffs could at least claim in a remedial proceeding that established rights are at issue—a wholly speculative claim at this time. As courts have recognized, the remedial phase of a redistricting matter can be fashioned within a trial court's sound discretion, even if it is less than perfect, to achieve very practical ends of balancing election integrity and the remedy of individual rights. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 586–87 (1964). Whether and how that might occur—or even what remedial needs may arise—in this case is wholly speculative now. But, in all events, there is no basis to gut the *liability* phase of its integrity based on Plaintiffs' hope of a remedial phase.

It bears emphasizing that Plaintiffs' claims are wholly novel—their theory of law appears nowhere in the North Carolina Constitution's text, which already imposes some of the most stringent redistricting restrictions of any constitution in the nation. It is clear that Defendants' proposed schedule is not satisfactory to Plaintiffs, and Plaintiffs' proposed schedule is not satisfactory to Defendants. But it is also clear that Plaintiffs seek hasty development of both the facts and law in this case.

Plaintiffs ask the Court to assume it will ultimately agree with Plaintiffs and choose to "provide effective relief" and work backwards from that assumption to identify an appropriate litigation timeline. Nothing could be more contrary to the strong presumption that the challenged redistricting plans are constitutional and the principle that, "[i]f there is any reasonable doubt" on that question, "it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473,

478 (1989) (quoting *Glenn v. Board of Education*, 210 N.C. 525, 529–30, 187 S.E. 781, 784 (1936)).

Plaintiffs also fail to appreciate that even in well-established litigation tracks, such as under Section 2 of the Voting Rights Act, redistricting litigation is complicated by its very nature, and cases normally run on for years. *See, e.g.*, *Solomon v. Liberty Cty., Fla.*, 865 F.2d 1566, 1568 (11th Cir. 1988), *reh'g granted and opinion vacated*, 873 F.2d 248 (11th Cir. 1989), *and on reh'g*, 899 F.2d 1012 (11th Cir. 1990), *cert denied* 111 S. Ct. 670 (1991), *on remand Solomon v. Liberty Cty., Fla.*, 957 F. Supp. 1522 (N.D. Fla. 1997), *rev'd sub nom. Solomon v. Liberty Cty. Comm'rs*, 166 F.3d 1135 (11th Cir. 1999), *reh'g en banc granted, opinion vacated*, 206 F.3d 1054 (11th Cir. 2000), and *on reh'g*, 221 F.3d 1218 (11th Cir. 2000), and *aff'd sub nom. Solomon v. Liberty Cty. Comm'rs*, 221 F.3d 1218 (11th Cir. 2000) (case history of a single Section 2 claim in a single county of approximately 8,000 residents). Plaintiffs' desire to have a remedial plan in place yesterday is at odds with the very nature of these complex cases. Indeed, if, as Plaintiffs' proposal intimates, this case should be three fourths of the way to its end, the only responsible course of action is simply to dismiss their claims as unproven and unprovable.

In light of all this, Defendants' proposal is reasonable. Attached as Exhibit A. Defendants propose a trial date—September 23, 2019—roughly nine months after Plaintiffs served their amended complaint. This date is significantly expedited for a case of this complexity and hardly dilatory. Moreover, Defendants remain amenable to shortening certain timeframes, lengthening others if necessary, or creating more overlap between different work items. Plaintiffs were not open to discussing any of these options. When asked which of the deadlines in Defendants' proposal Plaintiffs believed were unnecessary, they identified none. When pressed about exchanging initial disclosures to help frame the case for the Court and the Parties, Plaintiffs stated

that they would not schedule, let alone discuss, any deadlines other than those specifically identified by the Court in its order.[2] When asked for an alternative trial date, Plaintiffs returned only to the May 6th date in their proposal.

Defendants' counsel prepared the attached schedule based on their experience working on redistricting cases.[3] Where Plaintiffs proposed a date for an entry, that date is identified with an asterisk and italicized font. As indicated, Plaintiffs failed to identify dates for the vast majority of these events. Plaintiffs' position appears to be that the parties and the Court need not think about them (even though Plaintiffs ask this Court to fixate on an as-yet-unnecessary remedial proceeding). But these are all events that, like it or not, must *actually occur*. There must be exhibits, pre-trial motions, deposition designations, and so on; pretending they are not part of the case in setting a scheduling order risks leaving too little time to actually do them (or at least do them competently). Identifying due dates now for important pre-trial work is therefore not only helpful for planning purposes, but it also reveals why May 6, 2019 is such an unreasonable date for trial. This pre-trial work is important and takes more time than May 6 offers.

For example, staggered expert reports are appropriate because Plaintiffs' experts undoubtedly will present complex, social-science expert methodology and testimony, and Defendants must have ample time to not only rebut those reports but present their own complex social-science expert methodology and testimony. These reports will require developing methods

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[2] Even though the Court invited the parties to identify "[s]uch other deadlines, schedules and accommodations that the parties wish to propose." Order, Jan. 23, 2019, 18CVS14001.

[3] During our meet and confer, Plaintiffs identified *one* example of a partisan gerrymandering case—in Pennsylvania—in which discovery was expedited. *League of Women Voters v. Commonwealth,* 178 A.3d 737 (Pa. 2018). But Plaintiffs failed to acknowledge that they lost at the trial level in that case and only prevailed when the Pennsylvania Supreme Court decided to fast-track the appeal with a deciding vote cast by a Judge who had made campaign promises to rule in Plaintiffs' favor. They also fail to acknowledge that the Pennsylvania Supreme Court's decision was predicated on legal principles not addressed or supported in the factual record below because the parties had neither time nor notice of the standard ultimately applied. It is an understatement to say that the case is not one this Court should deem a model of sound litigation management.

to demonstrate both the flaws in Plaintiffs' approach and the merits of the challenged legislation. Initial disclosures and trial briefs will aid the Parties and the Court in framing the case and crystallizing the issues at play; this scheduled approach is particularly important in this case where Plaintiffs propose a novel legal theory. Setting out with specificity the deadlines for expert witness depositions, the various deadlines for deposition designations, witness and exhibit lists and objections thereto, pretrial stipulations, and the pre-trial hearing, illustrates the need for a later trial date.

Plaintiffs represent that this is an important case for every North Carolina voter. Although we believe their idea of what the case means and its impact on voters is severely misguided, we agree in a general sense on its overall importance to the State and its constitutional system. From that starting point, it should be common ground that the parties need time to develop the factual record, the expert methodologies, and legal arguments to get the law and the facts right. Plaintiffs' approach to this case is disappointing in how little regard they pay to that acute judicial necessity.

For the reasons stated herein, Defendants respectfully request that the Court enter a scheduling order consistent with the dates identified in Exhibit A. Counsel for Defendants will make themselves available for a hearing if the Court believes a hearing would be helpful in sorting out these complex issues.

Respectfully submitted this 29th day of January, 2019.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing in the above titled action upon all other parties to this cause by:

[ ] Hand delivering a copy hereof to each said party or to the attorney thereof;

[ ] Transmitting a copy hereof to each said party via facsimile transmittal;

[X] By email transmittal;

[X] Depositing a copy here of, first class postage pre-paid in the United States mail, properly addressed to:

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This the 29th day of January, 2019.

By: _____
Phillip J. Strach

Exhibit A

Proposed Schedule for *Common Cause v. Lewis*, 18cv014001

Item	Event	Proposed Date
1	Parties to voluntarily exchange initial disclosures consistent with categories of Fed. R. Civ. P. 26(a)(1)(A).	February 15, 2019
2	Completion of Written Discovery	April 15, 2019 **March 1, 2019*
3a	Plaintiffs' Expert Reports[1]	March 1, 2019 **March 11, 2019*
4	Completion of Fact Discovery	May 6, 2019 **April 15, 2019*
3b	Defendants' Expert Reports	May 15, 2019
3c	Rebuttal Expert Reports	June 3, 2019 **March 25, 2019*
3d	Reply Expert Reports	June 17, 2019 **April 1, 2019*
3d	Expert Witness Depositions	July 8, 2019
5a	Dispositive Motions	July 26, 2019 **April 18, 2019*
6a	Motions in Limine, including Motions to Exclude Expert Reports/Testimony Pursuant to N.C. R. 702(a).	July 31, 2019 **April 24, 2019*
5b	Opposition to Dispositive Motions	August 9, 2019 **April 25, 2019*
7a	Exchange deposition designations	August 14, 2019
6b	Opposition to Motions in Limine, including Motions to Exclude Expert Reports/Testimony Pursuant to N.C. R. 702(a).	August 14, 2019 **May 1, 2019*

[1] All experts will provide a report that conforms to N.C. R. Civ. P. 26(b)(4)(a.)(2.) in addition to the disclosures otherwise required under the N.C. Rules of Civil Procedure.

**Indicates dates proposed by Plaintiffs.*

Proposed Schedule for *Common Cause v. Lewis*, 18cv014001

Item	Event	Proposed Date
5c	Reply to Dispositive Motions	August 16, 2019 **April 30, 2019*
7b	Exchange rebuttal deposition designations	August 21, 2019
7c	File objections to deposition designations	August 28, 2019
7d	Confer regarding objections to deposition designations	August 30, 2019
8a	Plaintiffs Serve Witness and Exhibit Lists	September 6, 2019
7e	Submit to the Court a conformed set of agreed deposition designations	September 6, 2019
7f	Submit to the Court for resolution unresolved deposition designation objections.	September 6, 2019
8b	Defendants Serve Witness and Exhibit Lists	September 11, 2019
9	Pretrial stipulations	September 13, 2019
10	Pre-Trial Hearing on Outstanding Motions	September 13, 2019
11	Trial Brief	September 13, 2019
8c	File objections to exhibits	September 16, 2019
8d	Deliver to the Court hard copy pre-marked, indexed exhibits	September 20, 2019
12	Trial	September 23, 2019 **May 6, 2019*

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**Indicates dates proposed by Plaintiffs.*