

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
NO. 1:15-CV-00399

SANDRA LITTLE COVINGTON, *et al.*, )  
)  
Plaintiffs, )  
)  
v. )  
)  
STATE OF NORTH CAROLINA, *et al.* )  
)  
Defendants. )  
\_\_\_\_\_ )

**LEGISLATIVE DEFENDANTS’  
MOTION TO QUASH OR MODIFY  
SUBPOENA**

Pursuant to Rule 45, Fed. R. Civ. P., legislative defendants respectfully move the Court to quash the subpoena issued to Representative David Lewis (“Rep. Lewis”) on July 20, 2017 directing Rep. Lewis to appear as a witness at the hearing scheduled for July 27, 2017 (the “Subpoena”). A copy of the Subpoena is attached as Exhibit 1. The Subpoena imposes an undue burden on Rep. Lewis and requires disclosure of information protected by legislative privilege, namely, information regarding the remedial redistricting plans the General Assembly will work to enact in 2017 in response to this Court’s order but have not been enacted as of this date (“2017 redistricting plans”). Alternatively, legislative defendants respectfully request the Court to modify the Subpoena to limit any testimony by Rep. Lewis to redistricting plans on which Rep. Lewis has already waived his legislative privilege, namely, the 2011 legislative and congressional plans, and the 2016 congressional plan, or to information about the 2017 redistricting plans that is publicly known, unless any such testimony or information is based on statements from legislators who have not waived legislative privilege.

In the event the Court denies this motion, legislative defendants request that the Court stay its order so that legislative defendants may take an immediate appeal of any such order.

Wherefore, legislative defendants request the Court to quash or modify the Subpoena as requested above, award their reasonable costs and attorney's fees, and other and further relief as the Court deems just and proper.

This the 25<sup>th</sup> day of July, 2017.

OGLETREE, DEAKINS, NASH  
SMOAK & STEWART, P.C.

/s/ Phillip J. Strach

Thomas A. Farr  
N.C. State Bar No. 10871  
Phillip J. Strach  
N.C. State Bar No. 29456  
thomas.farr@ogletreedeakins.com  
phil.strach@ogletreedeakins.com  
4208 Six Forks Road, Suite 1100  
Raleigh, North Carolina 27609  
Telephone: (919) 787-9700  
Facsimile: (919) 783-9412  
*Counsel for Legislative Defendants*

## **CERTIFICATE OF CONFERENCE**

Pursuant to Local Rule 37.1, the undersigned certifies that after personal consultation and diligent attempts to resolve differences, the parties are unable to reach an accord. On July 19, 2017, the undersigned consulted with Eddie Speas, counsel for plaintiffs who issued the subpoena. The email exchange between the undersigned and Mr. Speas is attached as Exhibit 2. Mr. Speas indicated that he would not limit his questions based on legislative privilege and that the undersigned should file the instant motion.

This the 25<sup>th</sup> day of July, 2017

/s/ Phillip J. Strach

Phillip J. Strach

## **CERTIFICATE OF SERVICE**

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing **LEGISLATIVE DEFENDANTS' MOTION TO QUASH OR MODIFY SUBPOENA** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

Edwin M. Speas, Jr.  
Carolina P. Mackie  
Poyner Spruill LLP  
P.O. Box 1801 (27602-1801)  
301 Fayetteville St., Suite 1900  
Raleigh, NC 27601  
espeas@poynerspruill.com  
cmackie@poymerspruill.com  
*Attorneys for Plaintiffs*

Anita S. Earls  
Allison J. Riggs  
Southern Coalition for Social Justice  
1415 Highway 54, Suite 101  
Durham, NC 27707  
anita@southerncoalition.org  
allisonriggs@southerncoalition.org  
*Attorneys for Plaintiffs*

Alexander McC. Peters  
Senior Deputy Attorney General  
N.C. Department of Justice  
apeters@ncdoj.gov  
P.O. Box 629  
Raleigh, NC 27602

This the 25<sup>th</sup> day of July 2017.

OGLETREE, DEAKINS, NASH  
SMOAK & STEWART, P.C.

/s/ Phillip J. Strach  
Phillip J. Strach  
N.C. State Bar No. 29456  
4208 Six Forks Road, Suite 1100  
Raleigh, NC 27609  
Telephone: 919.787.9700  
Facsimile: 919.783.9412

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# EXHIBIT 1

# UNITED STATES DISTRICT COURT

for the

Middle District of North Carolina

SANDRA LITTLE COVINGTON, et al.,

*Plaintiff*

v.

THE STATE OF NORTH CAROLINA, et al.,

*Defendant*

Civil Action No. 1:15-cv-00399-TDS-JEP

## SUBPOENA TO APPEAR AND TESTIFY AT A HEARING OR TRIAL IN A CIVIL ACTION

To: David R. Lewis, c/o Phillip J. Strach  
Ogletree, Deakins, Nash, Smoak & Stewart, P.C., 4208 Six Forks Rd, Ste 1100, Raleigh, NC 27609

*(Name of person to whom this subpoena is directed)*

**YOU ARE COMMANDED** to appear in the United States district court at the time, date, and place set forth below to testify at a hearing or trial in this civil action. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place: US District Court 324 W. Market Street Greensboro, NC 27401	Courtroom No.: 3 Date and Time: 07/27/2017 10:00 am
--	--

You must also bring with you the following documents, electronically stored information, or objects *(leave blank if not applicable)*:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 07/20/2017

CLERK OF COURT

OR

s/ Edwin M. Speas, Jr.

*Signature of Clerk or Deputy Clerk*

*Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs

, who issues or requests this subpoena, are:

Edwin M. Speas, Jr., Poyner Spruill LLP, P.O. Box 1801, Raleigh, NC 27602-1801.  
espeas@poynerspruill.com / (919) 783-6400

### Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 1:15-cv-00399-TDS-JEP

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for *(name of individual and title, if any)* \_\_\_\_\_  
on *(date)* \_\_\_\_\_.

☐ I served the subpoena by delivering a copy to the named person as follows: \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the subpoena unexecuted because: \_\_\_\_\_  
\_\_\_\_\_.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of  
\$ \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_  
\_\_\_\_\_ *Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:

**Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**

**(c) Place of Compliance.**

**(1) For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
  - (i) is a party or a party's officer; or
  - (ii) is commanded to attend a trial and would not incur substantial expense.

**(2) For Other Discovery.** A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

**(A) Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

**(A) When Required.** On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
  - (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
  - (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
  - (iv) subjects a person to undue burden.
- (B) When Permitted.** To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:
- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

**(C) Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

**(A) Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

**(B) Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

**(C) Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

**(D) Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

**(A) Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

**(B) Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(g) Contempt.**

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.



### CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing via email to the following persons at the following addresses, which are the last addresses known to me:

Alexander McClure Peters  
James Bernier, Jr.  
N.C. Dept. of Justice  
P.O. Box 629  
Raleigh, NC 27602  
apeters@ncdoj.gov  
jbernier@ncdoj.gov  
*Counsel for Defendants*

Thomas A. Farr  
Phillip J. Strach  
Michael D. McKnight  
Ogletree Deakins Nash Smoak &  
Stewart, P.C.  
4208 Six Forks Road, Suite 1100  
Raleigh, NC 27609  
thomas.farr@ogletreedeakins.com  
phil.strach@ogletreedeakins.com  
michael.mcknight@odnss.com  
*Counsel for Defendants*

Penda Denise Hair  
Leah J. Kang  
Forward Justice  
P.O. Box 42521  
Washington, DC 20015  
phair@forwardjustice.org  
lkang@forwardjustice.org  
*Counsel for Amicus North Carolina  
State Conference of the NAACP*

Irving L. Joyner  
Irving Joyner, Attorney at Law  
P.O. Box 374  
Cary, NC 27512  
ijoyner@nccu.edu  
*Counsel for Amicus North Carolina  
State Conference of the NAACP*

This the 20th day of July, 2017.

s/ Edwin M. Speas, Jr.

Edwin M. Speas, Jr.

# EXHIBIT 2

## Strach, Phillip J.

---

**From:** Speas, Edwin M. <ESpeas@poynerspruill.com>  
**Sent:** Wednesday, July 19, 2017 10:18 PM  
**To:** Strach, Phillip J.  
**Cc:** Farr, Thomas A.; Peters, Alec (apeters@ncdoj.gov); Anita Earls; King, Joanna  
**Subject:** Re: David Lewis subpoena for Covington hearing

Phil, I will not divulge my questions in advance. My only agreement is not to inquire about attorney client privilege matters. I would suggest that you accept service and file a motion to preclude any questions about the remedy for the unconstitutional 2011 plan. Thanks, Eddie

Sent from my iPhone

On Jul 19, 2017, at 10:09 PM, Strach, Phillip J. <[Phil.Strach@ogletree.com](mailto:Phil.Strach@ogletree.com)> wrote:

Eddie, that's what I'm trying to explore. His waiver in this case applied to the 2011 districts which are no longer at issue. He has not waived any privilege as to any other redistricting plan. Do you intend to ask questions related to anything other than the 2011 plans? Phil

**Phillip J. Strach | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**  
4208 Six Forks Road, Suite 1100 | Raleigh, NC 27609 | Telephone: 919-789-3179 | Fax: 919-783-9412  
[phil.strach@ogletree.com](mailto:phil.strach@ogletree.com) | [www.ogletree.com](http://www.ogletree.com) | [Bio](#)

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**From:** Speas, Edwin M. [<mailto:ESpeas@poynerspruill.com>]  
**Sent:** Wednesday, July 19, 2017 10:03 PM  
**To:** Strach, Phillip J.  
**Cc:** Farr, Thomas A.; Peters, Alec ([apeters@ncdoj.gov](mailto:apeters@ncdoj.gov)); Anita Earls; King, Joanna  
**Subject:** Re: David Lewis subpoena for Covington hearing

Phil, Rep. Lewis has waived his legislative privilege with regard o this litigation. I have no intention of asking about conversations with his counsel. Will serve him tomorrow unless you want to accept for him. Thanks, Eddie

Sent from my iPhone

On Jul 19, 2017, at 9:33 PM, Strach, Phillip J. <[Phil.Strach@ogletree.com](mailto:Phil.Strach@ogletree.com)> wrote:

Eddie:

Obviously we have concerns about privilege issues. What are the questions/topics you intend to cover?

Phil

**Phillip J. Strach | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**  
4208 Six Forks Road, Suite 1100 | Raleigh, NC 27609 | Telephone: 919-789-3179 | Fax: 919-783-9412  
[phil.strach@ogletree.com](mailto:phil.strach@ogletree.com) | [www.ogletree.com](http://www.ogletree.com) | [Bio](#)

**From:** Speas, Edwin M. [mailto:ESpeas@poynerspruill.com]  
**Sent:** Wednesday, July 19, 2017 4:23 PM  
**To:** Farr, Thomas A.; Strach, Phillip J.; Peters, Alec (apeters@ncdoj.gov)  
**Cc:** Anita Earls; King, Joanna  
**Subject:** David Lewis subpoena for Covington hearing

Gentlemen, plaintiffs will subpoena Rep. David Lewis to testify at the remedy hearing in Covington next Thursday. Will you accept service of that subpoena for him? Thanks,  
Eddie

Edwin Marion Speas, Jr. | Partner  
<image001.jpg>  
301 Fayetteville Street, Suite 1900, Raleigh, NC 27601  
PO Box 1801, Raleigh NC 27602-1801  
D: 919 783 2881 | F: 919 783 1075

[espeas@poynerspruill.com](mailto:espeas@poynerspruill.com) | [www.poynerspruill.com](http://www.poynerspruill.com)  
<image002.png> <image003.png> <image004.png>

\*\*\*\*\*

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