IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT

TELISE TURNER, GARY WYGANT, and FRANCIE HUNT,

Plaintiffs,

v.

WILLIAM LEE, as Governor of Tennessee, in his official capacity; TRE HARGETT, as Tennessee Secretary of State, in his official capacity; and MARK GOINS, as Tennessee Coordinator of Elections, in his official capacity,

Defendants.

CASE NO. 22-0287-IV
Chancellor Perkins
Chancellor Maroney
Judge Sharp

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISQUALIFY JONATHAN CERVAS, OR IN THE ALTERNATIVE, TO STRIKE HIS UNTIMELY SUPPLEMENTAL REBUTTAL EXPERT REPORT

Pursuant to Tenn. R. Evid. 702 and 703, Defendants William Lee, Tre Hargett, and Mark Goins, in their official capacities only, move to disqualify Dr. Jonathan Cervas as an expert witness, or in the alternative, to strike his untimely supplemental rebuttal expert report.

I. Dr. Cervas should be disqualified as an expert witness.

The rules of evidence governing expert opinion are set forth by Tenn. R. Evid. 702 and 703. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known

> to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

To determine if expert opinion meet these standards, "a trial court must determine whether the evidence will substantially assist the trier of fact to determine a fact in issue and whether the facts underlying the evidence indicate a lack of trustworthiness." *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265 (Tenn. 1997).

First, the expert opinions of Dr. Cervas will not substantially assist the trier of fact. Plaintiffs' have submitted alternative maps created by their expert, Dr. Jonathan Cervas, to attempt to demonstrate that the General Assembly "has not given a good faith effort to balance the constitutional criteria in state and federal law." (*See* Expert Report of Dr. Cervas attached as Exhibit 1 at 19.) But Dr. Cervas expressly disavowed making any opinion that the General Assembly acted in bad faith (*see* Deposition of Dr. Cervas attached as Exhibit 2, at 137:18-138: 9.) Dr. Cervas also explained that he didn't "know anything about the Legislature or members of the Legislature or what their actions were." (Cervas Depo., 138:14-16.) Instead, his contention that the General Assembly did not make a good faith attempt to reduce the number of county splits was because "it was relatively easy to draw maps that actually reduced the number of county splits while still holding other criteria at similar levels." (Cervas Depo., 138: 17-20.)

But the standard is not whether General Assembly made a good faith effort to balance the constitutional issue, it is whether the General Assembly acted in bad faith or improper motive—which Dr. Cervas expressly declined to opine. *See Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985); *accord Moore v. State*, 436 S.W.3d 775 (Tenn. Ct. App. 2014) (both holding that "it would be improper to set aside individual district lines on the ground that they theoretically

might have been drawn more perfectly, in the absence of any proof whatever of bad faith or improper motives."). Thus, as a matter of law, Dr. Cervas's opinion cannot stand for the proposition that the General Assembly acted in bad faith or improper motive. And, unlike the plans presented to the General Assembly, it is impossible to intuit bad faith or improper motive from maps that were never presented for legislative debate, acceptance, or rejection. The post-hoc maps created by Dr. Cervas thus cannot serve as evidence that the General Assembly acted in bad faith or with improper motive. On its face, Dr. Cervas's expert opinion cannot substantially assist the trier of fact as required by the Tennessee Rules of Evidence.

Second, the expert opinions of Dr. Cervas are untrustworthy. Even if Dr. Cervas did opine that the General Assembly acted in bad faith based upon his maps, it would not matter because the maps submitted as part of his expert report are each constitutionally deficient due to his lack of familiarity with Tennessee.

During the temporary injunction phase of this case, Dr. Cervas submitted an affidavit in support of the motion for temporary injunction, which included ten maps: five plans that have thirteen districts in Shelby County (the "Apple plans") and five plans that have 14 districts in Shelby County (the "Orange plans"). (*see* Cervas TRO Aff. attached as Exhibit 3.) Each is facially unconstitutional:

TN_Apple_Test_1_9383: Double split of Warren County and non-contiguity in Washington County. (*see* Himes TRO 2nd Aff. Ex 1 attached as Exhibit 4.)

TN_Apple_Test_5_8716: Non-contiguity in Washington County and double split of Wilson County. (Himes TRO 2nd Aff. Ex. 2.)

TN_Apple_Test_3_0288: Double split and non-contiguity in both Loudon County and Monroe County. (Himes TRO 2nd Aff. Ex. 3.)

TN_Apple_Test_4_0032: Bizarre shapes in Hickman, Williamson, and Sumner Counties. (Himes TRO 2nd Aff. Ex. 4.)

TN_Apple_Test_2_0048: Triple split of Anderson County and a double split of Bradley County. (Himes TRO 2nd Aff. Ex. 5.)

TN_Orange_Test_1_9383: Non-contiguity in Loudon County and a double split of Jefferson County. (Himes TRO 2nd Aff. Ex. 6.)

TN_Orange_Test_0_9242: Double splits of Coffee County and Sevier County. (Himes TRO 2nd Aff. Ex. 7.)

TN_Orange_Test_2_9501: Non-contiguity in Washington County and a double split of Anderson County. (Himes TRO 2nd Aff. Ex. 8.)

TN_Orange_Test_4_8580: Double splits in Sevier County and McMinn County. (Himes TRO 2nd Aff. Ex. 9.)

TN_Orange_Test_3_9865: Double splits in Union County and Chester County. (Himes TRO 2nd Aff. Ex. 10.)

These maps uncontrovertibly violate Article I, Section 5 of the Tennessee Constitution and the Tennessee Supreme Court's guidance in *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982) ("*Lockert* I"), *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983) ("*Lockert* II"), *Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985), and *State ex rel. Lockert v. Crowell*, 729 S.W.2d 88 (Tenn. 1987) ("*Lockert III*"). They indicate a lack of familiarity with Tennessee geography and demographics and are simple mistakes that call into question Dr. Cervas's expertise.

One would expect that Dr. Cervas's next attempt would fare better. But it did not. In his initial expert report, similar mistakes persist:

Cervas Plan 13a: Non-contiguity in Rutherford County and Williamson County. (*See* Himes Expert Report attached as Exhibit 5 at 19-20.)

Cervas Plan 13b: Non-contiguity in Sevier County and variance-unjustified and unnecessary split of Madison County. (Himes Expert Report, 22-24.)

Cervas Plan 14a: Non-contiguity in Rutherford County and variance-unjustified and unnecessary split of Madison County. (Himes Expert Report, 25-27.)

Cervas Plan 13.5a: Severe reduction in majority-minority districts, non-contiguity in Shelby County, variance-unjustified and unnecessary splits of Madison County and Shelby County. (Himes Expert Report, 28-32.)

Cervas Plan 13.5b: Severe reduction in majority-minority districts, non-contiguity in Montgomery County, and variance-unjustified and unnecessary splits of Madison County, Montgomery County, and Shelby County (Himes Expert Report, 32-37.)

Along with brand-new violations of Section 2 of the Voting Rights Act, these maps violate the above referenced state constitutional provision and Tennessee Supreme Court guidance.

The same issues are present in Dr. Cervas's third bite at the apple. One of the two maps[1] offered in his rebuttal expert report are likewise facially unconstitutional:

Cervas Plan 13d: Double split of Sullivan County and non-contiguity in Dixson County. (*See* Himes Affidavit attached as Exhibit 6.)

[1] The second new map, Cervas Plan 13c does not have any obvious errors with contiguity or multiple splits of counties; however, it raises the overall variance compared to the enacted map, (Himes Affidavit), creating additional litigation risk for violations of the "one person, one vote" federal equal protection principle. *See Moore v. State*, 436 S.W.3d 775, 785 (Tenn. Ct. App. 2014). Thus, Dr. Cervas only created *one* map out of his *eighteen* submissions that was not overtly unconstitutional on its face.

And the same a fourth time in his untimely supplemental rebuttal expert report:

Cervas Plan 13d_e: Non-contiguity in Dixson County and Sullivan County. (Himes Affidavit.)

Perhaps these failed attempts should have been expected. Before his engagement in this matter, he "was not specifically aware of any particular provisions of the Tennessee Constitution." (Cervas Depo. 102: 21-23.) Nor had he ever "considered Tennessee at all with regards to redistricting." (Cervas Depo. 111: 8-11.) And even though his goal in drafting these maps was to "comply with state and federal requirements for redistricting," the maps discussed above expressly failed to do so. (Cervas Depo. 115: 18-23; 144:17-25.) Additionally, Dr. Cervas wrongly believes that the "one person, one vote" ten percent deviation is a bright line, even though such a proposition has been flatly rejected by Tennessee and federal courts. *Moore v. State*, 436 S.W.3d 775, 785 (Tenn. Ct. App. 2014) (no "'safe harbor' for plans achieving population variances of less than 10%."); *Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., concurring). He admits to not being "a law scholar, and [doesn't] know what the law says about that." (Cervas Depo. 117: 16-20.) He did not believe that there was a prohibition on splitting urban counties unless justified by a federal requirement, even though *Lockert II* says otherwise. (Cervas Depo. 119: 9-19.) He did not perform a Voting Rights Act analysis when creating his plans to ensure compliance with federal law. (Cervas Depo. 120: 24-25; 121: 1-3; 145: 5-10.)

Another reason these serial errors should have been expected is that an undergraduate student helped with the "drawing of the maps" offered by Dr. Cervas in this case. (Cervas Depo. 152:21-24.) Dr. Cervas admitted in his deposition he simply took instructions from Plaintiffs' counsel—"to draw maps with as few county splits as possible"—and passed them along to Zach Griggy to find "combinations of counties that would provide whole districts so as to minimize the

number of county splits." (Cervas Depo. 114:3-16.) Zach Griggy is an undergraduate student at the University of California, Irvine who provided "substantive, as well as technical, assistance." (Cervas Depo. 114:14-19.)

At bar, Dr. Cervas's unfamiliarity with Tennessee's geography and state constitutional requirements, as well as federal law requirements, led to the creation of unconstitutional alternative maps, despite multiple attempts to correct these issues. His testimony is not substantially helpful to the trier of fact because he cannot speak to the legal standard of bad faith or improper motive and his expert opinion—as illustrated by his flawed maps—is untrustworthy. Accordingly, the Court should disqualify him as an expert witness for failing to meet the requirements of Tenn. R. Evid. 702 and 703. *McDaniel v. CSX Transp., Inc.,* 955 S.W.2d 257, 265 (Tenn. 1997).

II. In the Alternative, Dr. Cervas's Untimely Supplemental Rebuttal Expert Report Should be Stricken.

Even if the Court permits Dr. Cervas to testify as an expert witness, the maps submitted in his supplemental rebuttal expert report should be stricken and excluded from consideration. After the completion of all expert discovery and less than two weeks before the dispositive motion deadline, on January 9, 2023, Plaintiffs submitted a Supplemental Report to their purported expert's Rebuttal report which had been filed on December 2, 2022. But expert discovery in this case was closed and Plaintiffs sought neither the agreement of the Defendants, nor leave of this Court to submit a Supplemental Rebuttal report after the discovery deadline as required by the Agreed Discovery Scheduling Order. Accordingly, Plaintiffs should not be permitted to rely upon this Supplemental Rebuttal Report in support of a summary judgment motion and such report should excluded.

The Tennessee Rules of Evidence provide that the court "shall exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by

counsel." Tenn. R. Evid. 611(a). Tennessee trial courts further possess broad inherent authority to control their dockets and the proceedings in their courts. *Hodges v. Attorney General*, 43 S.W.3d 918, 921 (Tenn. Ct. App. 2000). To relinquish control of proceedings to litigants and their attorneys would ultimately result in the limited access to the courts. *Rich v. Rich*, 2018 WL 1989619 at *7 (Tenn. Ct. App. April 27, 2018).

The Court's orders in this case were abundantly clear. The Agreed Discovery Scheduling Order, dated June 16, 2022, required Plaintiffs to file their expert(s)' rebuttal reports by November 11, 2022. (*See* Agreed Discovery Scheduling Order, ¶ 4.) That date was later changed to December 2, 2022. (*See* Agreed Order, dated November 2, 2022). By agreement of the parties, all expert witnesses were deposed by January 4, 2023, and thus discovery in this matter was complete as of that date. With no explanation whatsoever, on January 9, 2023, Plaintiffs disclosed the Supplemental Rebuttal Report of their expert, Jonathan Cervas, in contravention of the deadlines established by the Court's orders.

Defendant's expert, Doug Himes, specifically pointed out contiguity issues with respect to Cervas' House maps 13a, 13b, 14a, 13.5a, and 13.5b in his expert report. (Himes Expert Report, 18.) Pursuant to the scheduling order, Plaintiffs' expert had the opportunity to respond to Defendants' expert reports, and in particular, the deficiencies in his House Maps previously identified by Mr. Himes. And that is exactly what Plaintiffs' expert attempted to do when he submitted his Rebuttal Report on December 2, 2022, which included for the first time, Map 13d. Unfortunately, Plaintiff's expert was unsuccessful because when Defendants' experts were questioned about Cervas' Rebuttal Report, including Map 13d, they noted that the Map was still not constitutionally complaint. Now, after expert discovery has been completed, Plaintiffs seek to submit a Supplemental Rebuttal Report attempting to correct these deficiencies in Map 13d.

Defendants would be prejudiced, however, if Plaintiffs' expert were allowed to attempt to correct deficiencies in his maps by creating new maps each time Defendants' experts provided written or oral testimony. Indeed, Plaintiffs' expert's testimony would be a constantly moving target and amount to an ambush at trial for the defense. Plaintiffs' expert has had multiple opportunities to submit constitutionally-compliant plans and the deadline has passed.

Additionally, Plaintiffs failed to seek leave from the Court to disclose Cervas' Supplemental Rebuttal Report after the discovery deadline. The Agreed Discovery Scheduling Order provides that "[s]upplemental expert opinions or other expert disclosures not timely disclosed may be excluded at trial." (*See* Agreed Discovery Scheduling Order, ¶ 4.) The filing of a supplemental expert report was not "provided for in a separate pretrial order." *Id.* Plaintiffs did not seek agreement of the Defendants or leave of this Court to disclose Cervas' Supplemental Rebuttal Report. Accordingly, Plaintiffs should be prohibited from relying on Cervas' Supplemental Rebuttal Report either in support of a summary judgment motion or at trial.

CONCLUSION

For the foregoing reasons, Dr. Cervas should be disqualified as an expert witness or, in the alternative, his untimely supplemental rebuttal expert report should be stricken.

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General and Reporter

/s/ *Alexander S. Rieger*
ALEXANDER S. RIEGER (BPR 029362)
Senior Assistant Attorney General

JANET M. KLEINFELTER (BPR 013889)
Deputy Attorney General

PABLO A. VARELA (BPR 029436)
Assistant Attorney General
Public Interest Division
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202-0207
alex.rieger@ag.tn.gov
janet.kleinfelter@ag.tn.gov
pablo.varela@ag.tn.gov

JACOB. R. SWATLEY (BPR 037674)
HARRIS SHELTON HANOVER WALSH, PLLC
6060 Primacy Parkway, Suite 100
Memphis, TN 38119
Tel: (901) 525-1455
Fax: (901) 526-4084
jswatley@harrisshelton.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically upon the following on this 20th day of January, 2022:

David W. Garrison (BPR # 024968)
Scott P. Tift (BPR # 027592)
Barrett Johnston Martin & Garrison, LLC
414 Union Street, Suite 900
Nashville, TN 37219
(615) 244-2202
(615) 252-3798
dgarrison@barrettjohnston.com
stift@barrettjohnston.com

John Spragens (BPR # 31445)
Spragens Law PLC
311 22nd Ave. N.
Nashville, TN 37203
T: (615) 983-8900
F: (615) 682-8533
john@spragenslaw.com

/s/Alexander S. Rieger
ALEXANDER S. RIEGER
Sr. Asst. Atty. Gen.