

**IN THE CHANCERY COURT OF TENNESSEE  
FOR THE TWENTIETH JUDICIAL DISTRICT**

FRANCIE HUNT, TELISE TURNER, and GARY  
WYGANT,

Plaintiffs,

v.

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

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.

---

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE  
UNTIMELY AFFIDAVIT AND REBUTTAL EXPERT REPORT FILED AS EXHIBIT O  
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND FOR EVIDENTIARY  
SANCTIONS**

---

Defendants William Lee, Tre Hargett, and Mark Goins, in their official capacities only, submit this memorandum in support of their Motion to Strike Untimely Affidavit and Rebuttal Expert Report Filed as Exhibit O to Plaintiffs' Motion for Summary Judgment and for Evidentiary Sanctions.

**FACTUAL AND PROCEDURAL BACKGROUND**

On January 9, 2023, Plaintiffs submitted a supplemental expert report titled Response to Defendants' Expert Depositions Regarding Tennessee State House Reapportionment and offered to reopen Dr. Cervas's deposition. (Attachment A-January 9, 2023 Resp. to Defs' Expert. Depos.) The report introduced map Cervas 13d\_e and was expressly created to address the constitutional flaws pointed out by Defendants' experts during their depositions. (*Id* at \*1.) That same day, Defendants submitted that report to their expert, Doug Himes, to evaluate Cervas 13d\_e.

(Attachment B-Aff. of Doug Himes.)

After realizing that Cervas 13d\_e was unconstitutional based on non-contiguity, Defendants declined to reopen the deposition and instead filed a Motion to Disqualify Jonathan Cervas or in the Alternative Strike His Untimely Supplemental Expert Report. Defendants also addressed the unconstitutionality of Cervas 13d\_e in their Motion for Summary Judgment. *See* Defs' Memo. Mot. for Sum. J., at \*46. Plaintiffs submitted no further expert reports to Defendants after January 9, 2023.

On January 20, 2023, Plaintiffs filed their motion for summary judgment. As Exhibit O to their motion, Plaintiffs attached an affidavit from Dr. Cervas and a supplemental expert report titled Response to Defendants' Expert Depositions Regarding Tennessee State House Reapportionment. *See* Exhibit O, Plaintiffs' Mot. for Sum. J. Superficially, the report in Exhibit O appeared identical to the report disclosed to Defendants on January 9, 2023, which is the subject of Defendants' Motion to Disqualify Jonathan Cervas or in the Alternative Strike His Untimely Supplemental Expert Report.

But it was discovered during summary judgment briefing that there was a change. The report in Exhibit O purports to reference map Cervas 13d\_e via URL: <https://davesredistricting.org/join/ab9f8923-5638-45d1-98f6-e01318aa81ca>. *See* Exhibit O, Plaintiffs' Mtn. for Sum. J. That link now reflects a brand new map, Cervas 13d\_e2, which Plaintiffs gave Defendants no notice of. (Attachment C-Screenshot of Dave's Redistricting.)

There is no indication of when Cervas 13d\_e became Cervas 13d\_e2, only that it likely occurred after January 9, 2023 and perhaps after the apparent constitutional flaws in Cervas 13d\_e were pointed out in Defendants' motion to disqualify. The report is identical, with the same date, and same text, and same URL text—but now Cervas 13d\_e does not exist at the URL link and

Cervas 13d\_e2 has replaced it. Shielded from the discovery process, Cervas 13d\_e2 is now part of the record in this case as part of Plaintiffs' Motion for Summary Judgment.

**I. EXHIBIT O SHOULD BE STRICKEN FROM THE RECORD.**

At a minimum, Exhibit O should be stricken from the record due to its inclusion of Cervas 13d\_e2. After the completion of all expert discovery, after the submission of the already-untimely supplemental expert report on January 9, 2023, and possibly in response to Defendants' identification of the constitutional flaws of Cervas 13d\_e, a brand-new map is now part of the record. Expert discovery in this case was closed and Plaintiffs sought neither the agreement of the Defendants, nor leave of this Court to submit a new map after the discovery deadline as required by the Agreed Discovery Scheduling Order. Accordingly, Plaintiffs should not be permitted to rely upon Exhibit O in support of a summary judgment motion and it should be excluded from the record.

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. Defendants did not receive the Supplemental Report containing Cervas 13d\_e until January 9, 2023 and Exhibit O (with the Supplemental Report attached) was filed with Plaintiffs' Motion for Summary Judgment on January 20, 2023.

Defendants specifically pointed out the unconstitutional contiguity issues with respect to Cervas 13d\_e in their motions to disqualify and for summary judgment. *See* Defs' Memo. Mot. for Sum. J., at \*46; Defs' Memo. Mot. to Disqualify, at \*5. Just as Plaintiffs submitted an untimely expert report (creating Cervas 13d\_e) unsuccessfully trying to remedy Cervas 13d after Dr. Cervas's mapmaking mistakes became evident, now Cervas 13d\_e2 appears apparently in response to Defendants' motion to disqualify, only this time without notice to Defendants. With no explanation whatsoever, Cervas 13d\_e became Cervas 13d\_e2.

The prejudice is paramount. Plaintiffs' expert's testimony is a constantly moving target. Plaintiffs' expert has had multiple opportunities to submit constitutionally-compliant plans and the deadline has passed. The parties are in the midst of summary judgment briefing, and Dr. Cervas should not be allowed to continue to play multiple guess with alternative maps in the hopes that he gets lucky and finally creates a constitutional one—*especially* where his next guess appears after discovery, in the midst of summary judgment, without notice to the Defendants, and insulated from the discovery process. Imagine if Defendants hadn't double-checked the URL while preparing their reply in support of their motion for summary judgment. Then imagine if the parties reached trial, or worse, appeal to the Tennessee Supreme Court without discovery of Cervas 13d\_e2's new place in the record.

The Agreed Discovery Scheduling Order is clear: it 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 Cervas 13d\_e2 was not “provided for in a separate pretrial order.” *Id.* Plaintiffs did not seek agreement of the Defendants or leave of this Court to submit a new map in the middle of summary judgment briefing. Accordingly, at a minimum, Exhibit O to Plaintiffs’ Motion for Summary Judgment should be stricken from the record and not considered by this Court when rendering judgment on the merits of this case.

## **II. THE COURT SHOULD ORDER EVIDENTIARY SANCTIONS TO AMELIORATE THE PREJUDICE TO DEFENDANTS.**

Now that Dr. Cervas has moved beyond his expert reports, it is impossible to ensure that it would not taint his testimony in this matter, forcing Defendants to defend against whatever else Plaintiffs’ expert witness has done without disclosure. It also appears that the original version of Cervas 13d\_e may be spoliated, as the URL text has not changed, strongly implying that it has been overwritten. Accordingly, Defendants must move for evidentiary sanctions including disqualification of Dr. Cervas and rejection of any testimony or evidence he may offer in this matter.

It is well-settled that “trial courts possess the inherent authority to take actions to prevent abuse of the discovery process.” *Alexander v. Jackson Radiology Associates, P.A.*, 156 S.W.3d 11, 15 (Tenn. Ct. App. 2004) (citing *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 133 (Tenn. 2004)). Likewise, Tenn. R. Civ. P. 34 and 37 permit evidentiary sanctions for spoliation of evidence. *See Tatham v. Bridgestone Americas Holding, Inc.*, 473 S.W.3d 734, 739 (Tenn. 2015). In both circumstances, the decision to impose sanctions falls within the wide discretion of the trial court. *Id.* at 746; *Alexander*, 156 S.W.3d at 15 (citations omitted).

First, as the text of the URL has not changed, but the map it links to has, it is possible, if not probable, that Cervas 13d\_e was overwritten by Cervas 13d\_e2. If so, Cervas 13d\_e will have been spoliated if it cannot be recovered in its original format without recreating it anew. In such

circumstances, allowing Plaintiffs to rely upon Cervas 13d\_e in any way prejudices Defendants by forcing them to trust that the accuracy of a *recreated* 13d\_e is the same as the original—and Defendants have already submitted their evaluations of that map and a motion to strike it as untimely. To remedy this prejudice, the Court should either exclude Cervas 13d\_e from evidence and prevent Plaintiffs from relying upon it in any way or accept as uncontroverted Defendants' assertion of its unconstitutionality as referenced in the various summary judgment and disqualification pleadings.

Second, even if the Court strikes Cervas 13d\_e2 from the record as discussed above, the map would still remain in the record alongside the order striking it. It would necessarily have to work that way in case Plaintiffs sought to raise that decision as an issue on appeal. And that is a difficult bell to unring. A map, undisclosed to Defendants, isolated from the crucible of discovery, that appears to be yet another untimely attempt by Dr. Cervas to try to draw a constitutional map, that remains in the record (even if ordered stricken) is simply too prejudicial to Defendants. Moreover, the existence of the map confirms that Dr. Cervas is continuing to work on this matter—which will necessarily affect his testimony and opinion on the ultimate subject without disclosure in a timely expert report. Given the presence of a tantalizing alternative map (although untimely, undisclosed, and untested for constitutional compliance), the only remedy to cure the prejudice to Defendants is to disqualify Dr. Cervas and exclude his testimony from being entered into evidence at summary judgment and trial.

Accordingly, Defendants submit that Exhibit O to Plaintiffs' Motion for Summary Judgment Should be Stricken from the Record and that the Court should issue evidentiary sanctions as necessary to ameliorate the prejudice to Defendants.

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@harrishelton.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 22nd day of February, 2023:

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.