

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION**

TRACEY E. GEORGE, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 3:14-cv-02182
	)	Chief Judge Sharp
WILLIAM EDWARD "BILL" HASLAM,	)	Magistrate Judge Bryant
as Governor of the State of Tennessee,	)	
in his official capacity, <i>et al.</i> ,	)	
	)	
Defendants.	)	

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**JOINT PROPOSED PRETRIAL ORDER**

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Pursuant to the Court's January 28, 2016 Order and the Local Rules, Plaintiffs and Defendants respectfully submit this joint proposed pretrial order.

**I. Pleadings Amended to Conform to the Pretrial Order.**

Plaintiffs' statement: The pleadings are otherwise amended to conform to this pretrial order, and this order supplants the pleadings.

Defendants' statement: To the extent that Plaintiffs seek to amend their pleadings to raise new constitutional claims through their "Statement of the Issues" and/or request new relief through their "Succinct Statement of Relief Sought," the Defendants object to any such amendment. Subjection to these exceptions, the pleadings are otherwise amended to conform to this pretrial order, and this order supplants the pleadings.

**II. Statement of Basis for Jurisdiction.**

This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343. This action arises under the Constitution of the United States and under 42 U.S.C. §§ 1981 and 1983. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2).

### III. Short Summary of Plaintiffs' Theory.

Regardless of whether it was consistent with or contrary to the plain language of Article XI, Section 3 of the Tennessee Constitution, Defendants' determination of the threshold for the ratification of proposed Constitutional Amendment No. 1 on the November 4, 2014 general election ballot violated Plaintiffs' and other voters' federal constitutional rights, including equal protection and due process (which also incorporates the First Amendment), by (i) diluting Plaintiffs' votes by basing ratification on the number of "yes" votes on the amendment as compared to total votes cast in the governor's race, (ii) disenfranchising Plaintiffs and other Tennessee voters by rewarding proponents of Amendment 1 who refrained from voting in the governor's race, (iii) forcing proponents of Amendment 1 to choose between increasing the likelihood of the passage of Amendment 1 and exercising their constitutional right to vote in the governor's race, and (iv) compelling Plaintiffs and other voters against Amendment 1 to vote in the governor's race in order for their vote to count at all for purposes of ratification.

As a result of Defendants' conduct, Amendment 1 supporters publicly encouraged "yes" voters not to vote in the governor's race while opponents of Amendment 1 were incentivized to vote for a candidate for governor listed on the ballot (write-in candidates were not counted by Defendants). For the first time in Tennessee history, the number of votes on a proposed constitutional amendment substantially exceeded the number of votes in the gubernatorial race.

Defendants could have avoided vote dilution and disenfranchisement by basing ratification of Amendment 1 on whether a majority of the citizens who voted for governor also voted in favor

of the proposed constitutional amendment, which is consistent with the plain text of Article XI, Section 3. However, Defendants take the position that such a method would still run afoul of the U.S. Constitution. While Plaintiffs do not agree, Defendants' position makes it unnecessary to determine the proper reading of Article XI, Section 3 because the provision both facially and as applied in the November 4, 2014 election on Amendment 1 fails constitutional review.

#### **IV. Short Summary of Defendants' Theory.**

Plaintiffs contend that Defendants' method of tabulating votes on Amendment 1 during the November 2014 election violated the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, but those claims are without merit.

A state's election practices implicate the Due Process Clause only in the extraordinary case when they render the state's voting system "fundamentally unfair." Defendants' method of tabulating votes on Amendment 1, however, was not unfair in the least. Defendants' method complied with article XI, section 3, of the Tennessee Constitution and was entirely consistent with previous state election practice. Properly interpreted, article XI, section 3, requires that, to be ratified, a proposed amendment must receive "yes" votes constituting a majority of the total votes cast in the gubernatorial election. Plaintiffs' contrary interpretation—that voting for governor is a precondition to voting on a constitutional amendment—not only lacks any textual or historical basis, but it would also violate the Tennessee Constitution (by imposing an additional qualification on voting) and the U.S. Constitution (by substantially burdening the right of Tennessee voters to vote on constitutional amendments).

To prevail under the Equal Protection Clause, Plaintiffs must establish that Defendants' method of tabulating votes on Amendment 1 (i) resulted in vote dilution; (ii) intentionally discriminated against an identifiable political group; and (iii) lacked a rational basis. Plaintiffs

cannot meet this standard. At best for Plaintiffs, requiring a proposed amendment to receive “yes” votes constituting a majority of the total votes cast for governor (in addition to receiving more “yes” votes than “no” votes) is akin to a supermajority requirement, and the U.S. Supreme Court has long upheld such requirements when, as here, they do not discriminate against any identifiable class. Moreover, Defendants’ method of tabulating votes is rationally related to the State’s legitimate, if not compelling, interest in making it difficult for a small interest group to amend the Tennessee Constitution. To the extent Plaintiffs are contending that tabulating votes in a manner that permits strategic voting somehow violates the Equal Protection Clause, that theory also lacks merit because, taken to its logical conclusion, it would require the invalidation of election practices long recognized to protect minority voting rights.

Finally, even if Plaintiffs could prevail on their Due Process or Equal Protection claims, they are not entitled to the drastic and intrusive remedy of voiding the election on Amendment 1 because (i) Plaintiffs could have, but did not, challenge the Defendants’ method of tabulating votes prior to the election; and (ii) the less drastic remedy of requiring the Defendants to recount the votes on Amendment 1 would be more appropriate.

#### **V. Statement of the Issues.**

Plaintiffs’ statement: Does the legislative method set forth in the first paragraph of Article XI, Section 3 of the Tennessee Constitution for amending the state constitution and/or the method by which Defendants’ tabulated the votes and certified ratification of Amendment 1 on the November 4, 2014 general election ballot survive constitutional scrutiny?

Defendants’ statement: Does the legislative method set forth in the first paragraph of Article XI, Section 3 of the Tennessee Constitution for amending the state constitution and/or the method by which Defendants’ tabulated the votes on and certified passage of Amendment 1 on the

November 4, 2014 general election ballot violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution?

**VI. Succinct Statement of Relief Sought.**

Plaintiffs' statement: Plaintiffs seek a judgment voiding the November 4, 2014 election results on Amendment 1 as certified by Defendants, declaring unconstitutional the first paragraph of Article XI, Section 3 on its face and/or the method by which votes were tabulated and certified on Amendment 1, enjoining Defendants from certifying the ratification of any proposed constitutional amendment under the legislative method set forth in the first paragraph of Article XI, Section 3 of the Tennessee Constitution as currently written and/or applied, awarding Plaintiffs attorneys' fees, expenses and costs, and providing Plaintiffs with such other relief that may be available to them.

Defendants' statement: Plaintiffs' current statement of relief sought departs substantially from the relief sought in their First Amended Complaint. Most notably, the First Amended Complaint sought "an injunction mandating that Defendants recount the vote on Amendment 1 to correlate votes in the governor's race with votes on Amendment 1," or, "[i]f Defendants are unable to properly tabulate the vote or if such tabulation method itself as required to Article XI, Section 3 is found unconstitutional, then declaring that the November 4, 2014 vote on Amendment 1 is void." (DE 51, Prayer for Relief at ¶¶ 4-5). Plaintiffs' current statement, by contrast, asks the Court to declare the results of the election on Amendment 1 void, but without first requiring a re-count of the votes on Amendment 1 to determine whether it would have passed in any event under Plaintiffs' alternative interpretation of article XI, section 3. As explained in Defendants' theory of the case, Plaintiffs are not entitled to the drastic remedy of voiding the election on Amendment 1, and particularly not without first allowing for a re-count.

**VII. Summary of Anticipated Evidentiary Disputes.**

1. Plaintiffs filed motions in limine to (i) bar Defendants from introducing at trial evidence to which Defendants objected based on relevance during written discovery, (ii) exclude Defendants from introducing at trial any documents or materials that they failed to disclose or produce during written discovery, (iii) prohibit Defendants from contesting certain allegations in Plaintiffs' complaint and to strike from Defendants' Answer any statements to the contrary, (iv) exclude from evidence various newspaper articles, and (v) exclude from evidence various nineteenth-century Tennessee General Assembly resolutions acts.

2. Defendants filed a motion in limine to exclude evidence reflecting efforts by individuals or groups to encourage proponents of Amendment 1 to refrain from voting in the governor's race.

**VIII. Estimate of Anticipated Length of Trial.**

One to three days.

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KEVIN H. SHARP  
UNITED STATES DISTRICT JUDGE

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