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

TENNESSEE STATE CONFERENCE OF THE NAACP et al.,	)	
Plaintiffs,	)	No. 3:23-cv-00832
v.	)	JUDGE ELI RICHARDSON JUDGE ERIC E. MURPHY
WILLIAM B. LEE et al.,	)	JUDGE BENITA Y. PEARSON
Defendants.	)	

MEMORANDUM IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

The Complaint contains detailed allegations that the 112th Tennessee Legislature engaged in unconstitutional racial gerrymandering and intentional vote dilution in the drawing of Congressional Districts ("CD") 5, 6, and 7 and State Senate District 31. Those facts illustrate that race predominated in the drawing of the maps and leave no doubt that the maps were drawn with the intent to discriminate against Black and other voters of color, diluting their votes and minimizing their electoral voices. Plaintiffs have thus met their pleading burden under Federal Rule of Civil Procedure 12(b)(6), as construed by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

Unable to craft an argument based on the insufficiency of those allegations as a matter of law, Defendants instead raise a host of unsupported factual assertions that have no place in a motion to dismiss. Defendants rely on material found nowhere within the four corners of the Complaint—including newspaper articles, YouTube videos, and PowerPoint presentations—in support of their contention that the Legislature was motivated by partisan considerations rather than racial ones in redrawing the challenged districts as it did. As an initial matter, of course, the Tennessee Legislature itself has stated that it was aiming to equalize the population of each district and not to effect a partisan gerrymander. Compl. ¶¶ 132, 155. But even if it hadn't, this Motion is not the occasion for the Court to assess factual disputes, let alone to grant Defendants the multitude of inferences they seek in their favor from their presentation of these extra-pleading factual assertions. Defendants may not escape the import of the allegations in the Complaint by offering their own counterfactual.

The Complaint pleads in detail that the Tennessee Legislature intentionally split Davidson County into three Congressional districts, destroying a functioning crossover district in which Black voters had a real voice by placing pieces of Davidson County and Nashville into far-flung

white, rural districts that have very little in common with the urban center that is Nashville. *Id.* ¶¶ 4, 110–11, 113, 118–28. Likewise, as to Shelby County, the Complaint pleads in detail that the Legislature took a state senate district that was on the cusp of electing a woman of color, reconfiguring it so that it centered around a much whiter neighborhood and thus removing any chance voters of color might elect their candidate of choice (as they had been able to do for decades). *Id.* ¶¶ 5, 134, 144–47, 149. The Complaint shows how race predominated in the drawing of these plans, *see id.* ¶¶ 101–151, satisfying the *Arlington Heights* factors and demonstrating that the maps were drawn with the intent to discriminate against voters of color. *See id.* ¶¶ 61–108, 101–151, 168–183. This Court is obliged to draw in Plaintiffs' favors all fair influences from these allegations as well as the multitude of other allegations in the Complaint supporting a finding of racial predominance and intentional discrimination in the drawing of the challenged districts. It should not accept Defendants' invitation to turn a Rule 12(b)(6) motion into a trial on the merits, based on a mélange of cherry-picked "facts" untested by discovery.

The same applies as to Defendants' argument that the Complaint is barred by the doctrine of laches, an affirmative defense that is rarely adjudicated at the motion to dismiss stage. Unsurprisingly, Defendants support their laches argument largely with cases decided in the context of applications for preliminary injunction, motions for summary judgment, or trial on the merits. But even if the Court were willing to entertain the argument now, it fails as a matter of law and logic. The maps were drawn in 2020, and the first elections subject to those maps took place in 2022. No doubt had Plaintiffs sued before those elections took place, Defendants would have asserted that it was too early to tell what effect the maps would have on voting patterns. Compl. ¶¶ 126, 133, 146. Defendants are effectively arguing that, even if Plaintiffs are correct, the people of Tennessee have no choice but to continue participating in a constitutionally unsound electoral

system for the next seven years (including elections in 2024, 2026, 2028, and 2030) because Plaintiffs failed to challenge the election in 2022. That cannot be correct.

Finally, Defendants argue Governor Lee is immune from suit because there is nothing specific to redistricting in Governor Lee's job description, *i.e.*, he is generally "responsible for the enforcement of all enacted laws." Defs' Br. 28. But that does not immunize the Governor from suit. Governor Lee signed both the Congressional and senate redistricting plans into law and that is enough. Moreover, the Governor's Office has been a party to redistricting lawsuits in the past.

For the reasons set forth below, Defendants' Motion to Dismiss should be denied in its entirety.

ARGUMENT

I. Applicable Legal Standard

Rule 12(b)(6) motions are governed by the facial plausibility standard in *Iqbal*, 556 U.S. at 678, and *Twombly*, 550 U.S. at 555. To establish "facial plausibility," the complaint need only plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Examining whether a complaint states a "plausible claim for relief" is a "context-specific task," (*id.* at 679) and requires a court to "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Wesley v. Campbell*, 779 F.3d 421, 428 (6th Cir. 2015) (citation omitted). A court "may not consider matters beyond the complaint," *Mediacom Se. LLC v. BellSouth Telecomms.*, 672 F.3d 396, 399 (6th Cir. 2012) (citation omitted), including outside evidence. *See Passa v. City of Columbus*, 123 F. App'x 694, 697 (6th Cir. 2005). Unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," a court should not grant a motion to dismiss under Rule

12(b)(6). *Handy-Clay v. City of Memphis*, 695 F.3d 531, 538 (6th Cir. 2012) (internal quotation omitted).

II. The Court Should Reject Defendants' 12(b)(6) Motion Because It Goes Beyond the Four Corners of the Complaint

Defendants urge this Court to ignore Plaintiffs' well-pleaded allegations and instead adopt Defendants' version of the facts, compiled from extra-pleading material—such as newspaper articles, YouTube videos, PowerPoint presentations, and various other sources—and mere attorney supposition. *See generally* Defs.' Br. Although a court may take judicial notice of material outside the four-corners of a complaint in adjudicating a Rule 12(b)(6) motion, the reception of such evidence is circumscribed and limited to facts that are "not subject to reasonable dispute" without disturbing the judicial notice standards articulated in the court's previous decision. *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 387 F.3d 468, 472 n.1 (6th Cir. 2004), *superseded on the merits by* 399 F.3d 651 (6th Cir. 2005). Such materials must be "public records or [] otherwise appropriate for the taking of judicial notice." *Id.*; *see also* Fed. R. Evid. 201. The plethora of extra-pleading materials relied upon by Defendants in their Motion comes nowhere near meeting that standard. It is one thing, perhaps, to cite to official records of public hearings. It is quite another thing to cite, as Defendants do, to a dozen newspaper and other media articles to support the contention that Plaintiffs' Complaint is "[a]t odds with the views of every neutral commentator in the press and political world that this was partisan redistricting" or that it was "self-evident" "to every commentator under the Sun" that there was "partisan motive behind the districts." Defs.' Br. 10, 13.

Furthermore, even as to those public records such as legislative hearings, the Court's exercise of its discretion to judicially notice them is limited to the fact of the documents' existence, and not for the truth of the matters asserted therein. *Platt v. Bd. of Comm'rs on Grievs. & Discip.*

of the Ohio Sup. Ct., 894 F.3d 235, 245 (6th Cir. 2018). Defendants' reliance on *Energy Automation Sys., Inc. v. Saxton*, 618 F. Supp. 2d 807 (M.D. Tenn. 2009), proves this point; as there, the court took judicial notice of a website that, among other things, evidenced the defendants' contacts with a forum state for the sole the purpose of deciding a Rule 12(b)(2) motion as to personal jurisdiction, not for the contents of that website.

Here, the narrative of partisan motivation being pushed by Defendants is not only in dispute but is also one of the key factual issues that will need to be resolved through fact and expert discovery in this case. Defendants' recasting of the Complaint through cherry-picked excerpts from the legislative record, untested by discovery, is impermissible at this stage of the proceedings. To elevate those assertions at the expense of Plaintiffs' factual allegations would fly in the face of the fundamental tenet requiring courts to construe a complaint in the light most favorable to the plaintiff with all reasonable inferences drawn in the plaintiff's favor. Accordingly, the Court should reject Defendants' invitation to consider untested extra-record materials at this stage or to adopt Defendants' competing interpretation of the well-pleaded facts alleged by Plaintiffs.

III. The Doctrine of Laches Does Not Bar Plaintiffs' Complaint

Defendants assert the equitable defense of laches bars Plaintiffs' claims altogether and calls for dismissal of the entire Complaint on this ground. Defs.' Br. 6–7, 8–12. The doctrine of laches "is an affirmative defense that the defendant must prove." *Audi AG v. D'Amato*, 469 F.3d 534, 546 (6th Cir. 2006). A party asserting laches must show "(1) unreasonable delay in asserting one's rights; and (2) a resulting prejudice to the defending party." *E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 439 (6th Cir. 2006) (citation omitted). Even if both elements are shown, the application of laches is discretionary with the trial court. *TWM Mfg. Co., Inc. v. Dura Corp.*, 722 F.2d 1261, 1268 (6th Cir. 1983); *Memphis A. Philip Randolph Inst. v. Hargett* (*MAPRI)*, 473 F.

Supp. 3d 789, 792 (M.D. Tenn. 2020). Here, Defendants fail to advance any argument that would justify the extraordinary relief of dismissal based on laches.

A. Defendants' Laches Defense Cannot Be Decided at the Pleadings Stage

At the outset, Defendants' motion fails because "Federal Rule of Civil Procedure 12(b)(6) is not the proper vehicle for bringing such a motion." *Kenyon v. Clare*, 2016 WL 6995661, at *4 (M.D. Tenn. Nov. 29, 2016) (citation omitted). This is because an "evaluation of a claim of laches is dependent upon the submission of evidence." *Id*. (quoting *Fed. Express Corp. v. U.S. Postal Serv.*, 75 F. Supp. 2d 807, 814 (W.D. Tenn. 1999)). Thus, "courts generally cannot grant motions to dismiss on the basis of an affirmative defense unless the plaintiff has anticipated the defense and explicitly addressed it in the pleadings." *Pfeil v. State St. Bank & Tr. Co.*, 671 F.3d 585, 599 (6th Cir. 2012), *rev'd on other grounds*. As Judge Richardson has previously clarified:

> The facts evidencing unreasonableness of the delay, lack of excuse, and material prejudice to the defendant, are seldom set forth in the complaint, and at this stage of the proceedings cannot be decided against the complainant based solely on presumptions. [] As the undersigned wrote years ago, the assessment of the laches factors is highly subjective. Eli J. Richardson, *Eliminating the Limitations of Limitations Law*, 29 Ariz. St. L. J. 1015, 1065–67 (1997). This reality likewise counsels against barring any claim based on laches.

Am. Addiction Ctrs. v. Nat'l Ass'n of Addiction Treatment Providers, 515 F. Supp. 3d 820, 839 (M.D. Tenn. 2021).

It is no surprise then that out of all the cases cited by Defendants in their laches argument, virtually none of them involved dismissals on laches grounds at the motion to dismiss stage. Indeed, six of the cases do not mention laches at all or view it through the special prism of Lanham Act cases, which look to state statute of limitations for a presumption of reasonableness of the

delay.[1] Four of the cases were decided by trial or summary judgment, where the court can rely on the submission of evidence on prejudice.[2] And four applied laches only in the context of a preliminary injunction motion, where the affirmative defense defeated the motion, but the case was still permitted to proceed. *Knox v. Milwaukee Cnty. Bd. of Elections Comm'rs*, 581 F. Supp. 399, 402–04 (E.D. Wisc. 1984) (applying laches to plaintiffs' request for injunctive relief filed seven weeks prior to election); *Sanders v. Dooly Cnty.*, 245 F.3d 1289, 1290–91 (11th Cir. 2001) (barring injunctive relief on laches grounds but declining to apply laches to plaintiffs' request for declaratory relief under Equal Protection Clause); *Crookston v. Johnson*, 841 F.3d 396, 399 (6th Cir. 2016); *MAPRI*, 473 F. Supp. 3d at 789.

The handful of cases Defendants cite that did address laches in the context of a motion to dismiss present extreme circumstances not present here. All of them rest on the premise that a complaint could be barred by laches if it was filed too late in time for the court to grant the only relief requested by it. In *Fouts v Harris*, 88 F. Supp. 2d 1351, 1353–55 (S.D. Fla. 1999), the court dismissed the complaint because it was filed after four elections under the challenged plan, 1992, 1994, 1996, and 1998, with only one election remaining before the next census, noting that it could not grant effective relief because of that. In *Marshall v. Meadows*, the court concluded that the

[1] *See North Carolina v. Covington*, 581 U.S. 486 (2017); *Evans v. Vanderbilt Univ. Sch. of Med.*, 589 F. Supp. 3d 870 (M.D. Tenn. 2022) (same); *Cheatom v. Quicken Loans*, 587 F. App'x 276, 279 (6th Cir. 2014) (same); *see also Tulis v. Orange*, 2023 WL 5012106, at *10 (M.D. Tenn. Aug. 7, 2023) (no discussion of laches at all, only of one-year statute of limitations as basis for barring plaintiffs' complaint); *Logan Farms v. HBH, Inc. DE*, 282 F. Supp. 2d 776, 790 (S.D. Ohio 2003) (applying state two-year statute of limitations period to bar plaintiffs' Lanaham Act complaint on laches grounds); *Potter Instrument Co. v. Storage Tech. Corp.*, 641 F.2d 190, 191–92 (4th Cir. 1981) (barring plaintiffs' patent infringement complaint because of plaintiffs' presumptive violation of statutory time limitation on damages for patent suits); *Am. Addiction*, 515 F. Supp. 3d at 839 (applying one-year statute of limitations, and not dismissing on Lanham Act grounds).

[2] *White v. Daniel*, 909 F.2d 99, 100–02 (4th Cir. 1990); *Lucking v. Schram*, 117 F.2d 160, 162 (6th Cir. 1941); *Stone v. U.S. Postal Serv.*, 383 F. App'x 873, 874 (11th Cir. 2010); *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980).

plaintiffs "slept on their rights" because they had pursued a non-litigation strategy outside court to avoid the costs and political consequences of litigation and chose to file suit only after they lost the advocacy campaign with the election they hoped to stop a mere ninety-five days away. 921 F. Supp. 1490, 1493–94 (E.D. Va. 1996).

The third case relied on by Defendants, in which a complaint was dismissed on unreasonable delay grounds, is also readily distinguishable. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887 (D. Ariz. 2005). In *Arizona Minority Coalition,* the plaintiffs filed their challenge to the redistricting plan in state court in 2002 and litigated that case for two years before obtaining a merits ruling that required a remedial plan to be submitted to the Department of Justice (DOJ) for preclearance under Section 5 of the Voting Rights Act ("VRA") ahead of the upcoming 2004 elections. *Id.* at 890, 893–94. When it became clear that the DOJ would not preclear the new map in advance of the 2004 elections, the plaintiffs brought suit in federal court requesting an injunction to bar the use of the old plan that had been struck down in the state court proceedings. *Id.* at 892–93. The plaintiffs' federal action raised several federal claims not previously alleged in the state matter, including that the use of an old plan violated Section 2 of the VRA. *Id.* at 901. In applying laches, among other reasons, to dismiss the Section 2 claim, the district court noted that the plaintiffs' inclusion of a Section 2 claim "is a transparent attempt to gain a federal jurisdictional foothold and secure the use of a plan they prefer, and their two-year delay in raising that claim is both inexcusable and unreasonable." *Id.* at 908–09. Most important for present purposes, the only relief that the complaint sought was an injunction against use of the plans in the 2004 election, and the plaintiffs had filed their suit "just weeks before critical election deadlines." *Id.* at 909. Nothing in *Arizona Minority Coalition* remotely approaches the facts of this case where Plaintiffs have filed a single complaint in federal

court early in the redistricting cycle and well before the election for which they are seeking a new redistricting plan.

B. Even if Cognizable at the Pleadings Stage, the Motion to Dismiss on the Basis of Laches Should Still Be Denied Because Defendants Have Not Demonstrated Undue Delay or Prejudice

1. Defendants Have Not Proven Unreasonable Delay in Filing the Complaint

The filing of the Complaint a mere eighteen months after the enactment of the challenged plans that will be used for the duration of the decade does not constitute undue delay. That some Plaintiff organizations provided public testimony during the redistricting process is not a reason for denying these groups the right to explore their claims and bring a lawsuit with the benefit of that careful consideration. *See* Defs.' Br. 10. In a partisan redistricting case brought over the last decade in Ohio, a three-judge panel consisting of two district court judges and one Sixth Circuit judge rejected Ohio's unreasonable delay argument that the plaintiffs waited *seven years* after the challenged maps were passed, noting the plaintiffs had a right to investigate their claims to account for factors such as "whether the plan is an outlier, whether the plan is a durable gerrymander that persists *across election cycles*, and whether districts have frozen the status quo despite *fluctuating vote totals* between the parties[.]" *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1166 (2019) (*dismissed and vacated on other grounds, Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (emphases in original).

None of the authority cited by Defendants supports a different outcome. In fact, all the cases relied upon by Defendants dealing with injunctions relating to voting—even those decided after full trial or summary judgment—similarly present circumstances of either delay far in excess of the timing involved in the filing of this case or the filing of an action too close in time for the court to grant effective relief. *See, e.g.*, *White*, 909 F.2d at 104 (decided after trial, applying laches

to a complaint filed *seventeen years* after redistricting and noting judicial relief would make "no sense" because there was no election before the next census); *Crookston*, 841 F.3d at 399 (finding application of laches appropriate where preliminary relief sought *forty-three days before election*); *MAPRI*, 473 F. Supp. 3d at 801 (preliminary relief sought *less than five months in advance of election*); *Knox*, 581 F. Supp. at 404 (preliminary relief sought against county's redistricting plan *one day before all candidate nomination papers were due* and seven weeks before the primary election). Moreover, at least two courts have found that the application of laches was not appropriate in redistricting cases where, as here, the injury was both constitutional and continuing. *See Luna v. Cnty. of Kern*, 291 F. Supp. 3d 1088, 1143–44 (E.D. Cal. 2018) (after merits trial in end-of-decade-redistricting challenge, rejecting defendants' affirmative defense of laches where violation considered ongoing because injury suffered by plaintiffs after each election was "getting progressively worse"); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990) (same).

2. Defendants Have Not Established Prejudice

Defendants' prejudice arguments are essentially twofold. First, they argue the death of John Ryder in May 2022, results in prejudice to them. They do not provide any information about Mr. Ryder other than that he is apparently a lawyer in private practice who was an "important attorney advisor and *potential* fact witness," and someone who "*could have* proven instrumental in assisting in the defense." Defs. Br. 11 (emphases added). Implicit in Defendants' reliance on Mr. Ryder's death to show laches-level prejudice is the suggestion that Plaintiffs should not only have filed before his death in May 2022, but also completed all discovery and perhaps even trial by then. Otherwise, Defendants would have been equally prejudiced due to the unavailability of Mr. Ryder to assist the defense. The date of the death of a potential witness (even if this person could have been deemed a potential witness—a fact not clear from Defendants' argument) cannot in and of itself set the standard for undue delay for purposes of laches. Beyond that, even if Mr.

Ryder's passing could serve as a basis for prejudice, Defendants have failed to provide any details to remove their alleged prejudice from the realm of speculation. *See e.g.*, *E.E.O.C v. Tepro, Inc.*, 133 F. Supp. 3d 1034, 1066 (E.D. Tenn. 2015) (finding no prejudice suffered from several witnesses dying or relocating because defendant "failed to offer any argument that those witnesses would have provided evidence in support of its case"); *Baptist Physician Hosp. Org., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 481 F.3d 337, 353 (6th Cir. 2007) ("Further, Defendant has not shown that it suffered prejudice in the form of lost evidence, deceased witnesses, or failed memory sufficient to impede the truth-finding process.")

Second, Defendants claim that a middle-of-the-decade-redistricting would impose financial and logistical burdens on the State, injecting "instability" into the system and confusing voters. Defs.' Br. 12. Again, the cases upon which Defendants rely are distinguishable on the facts. *See, e.g.*, *Ariz. Minority Coal.*, 366 F. Supp. 2d at 909 (concluding that a complaint "filed just weeks before critical election deadlines" would prejudice defendants because "counties conformed their precincts and readied their election machinery to implement [the old] Plan"); *see also White*, 909 F.2d at 104 (involving claims where the plaintiffs had waited seventeen years after the redistricting and the court found prejudice in the form of instability to the electoral system and confusion to voters). The remaining three cases from which Defendants cherry-pick language—*Sanders*, *MAPRI*, and *Crookston*—are inapplicable because they involved prejudice determinations made in the context of injunctive relief sought less than five months prior to election deadlines. *See Sanders*, 245 F.3d at 1291; *MAPRI*, 473 F. Supp. 3d at 793; *Crookston*, 841 F.3d at 398. There is no basis here for Defendants' claim of the wide-ranging burdens resulting from Plaintiffs' suit, which, if successful, would allow more than sufficient time for implementing a remedy that limits disruption in the electoral system and voter confusion.

IV. The Complaint States a Valid Racial Gerrymandering Claim

Defendants ask the Court to dismiss Plaintiffs' racial gerrymandering claims for three reasons, (1) Plaintiffs "made no effort" to "disentangle race from politics," (2) the challenged districts "are not unusually shaped," and (3) Plaintiffs did not introduce an alternative map. Defs.' Br. 13-17. Baked into their arguments is a fundamental misunderstanding of what is required at the pleading stage—which Plaintiffs dispatch with first.

A. Defendants Misstate the Legal Standards Governing Racial Gerrymandering Claims

Racial gerrymandering in violation of the Equal Protection Clause occurs when a redistricting plan "separate[s] voters into different districts on the basis of race," "regardless of the motivations" behind the use of race. *Shaw v. Reno*, 509 U.S. 630, 645, 649 (1991). To evaluate a claim of racial gerrymandering, courts first examine whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Courts must then utilize a strict scrutiny standard in assessing whether "the use of race is [] narrowly tailored to serve a compelling state interest." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 260–61 (2015) (citation omitted).

To prove that race was the predominant factor in the legislature's redistricting decisions, plaintiffs must show "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual share interests, to racial considerations." *Miller*, 515 U.S. at 916. While "these principles inform the plaintiff's burden of proof at trial," at the pleading stage (*id.*), plaintiffs can plausibly plead a racial gerrymandering

claim by alleging facts related to demographic impacts and racial disparities in the movement of voters into and out of the district, the shape of the district, and unexplained deviations from traditional redistricting criteria, including the preservation of communities of interest, compactness, core retention, respect for political subdivisions and boundaries, and contiguity. *See, e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 906 (1996); *Ala. Legis. Black Caucus*, 575 U.S. at 274. No single fact, such as unusual shape, is dispositive; rather, courts must look at all the evidence to assess racial predominance. *Cooper v. Harris*, 581 U.S. 285, 315–16 (2017). Pleadings as to discriminatory intent, while not essential, may also be relevant to the racial predominance inquiry. *See Ala. Legis. Black Caucus*, 575 U.S. at 266–67; *Cromartie I*, 526 U.S. at 546 (1999).

If partisanship is raised as a defense, *Cooper* instructs courts to make "a sensitive inquiry" into all "circumstantial and direct evidence of intent" to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines. 581 U.S. at 308 (quoting *Cromartie I*, 526 U.S. at 546). The plaintiffs may disentangle the two through circumstantial evidence including, but not limited to, showing the likelihood of movement of Black or other minority voters as compared with white voters. *Cooper*, 581 U.S. at 315–16. *Cooper* further cautions that race cannot be a means of achieving partisan ends "because race cannot be used as a proxy for other (including political) characteristics." *Id*. at 308 n.7 (citing *Bush v. Vera*, 517 U.S. 952, 969 (1996) and *Miller*, 515 U.S. at 914).

It is because of the need to perform this fact-specific "sensitive inquiry" that a motion to dismiss is simply not the appropriate time for the court to adjudicate whether partisan considerations or racial considerations explain the legislature's redistricting choices. Rather, that determination should be made only after the development and presentation of an evidentiary record following the completion of discovery and trial. *Cromartie I*, 526 U.S. at 552–54 (denying motion

for summary judgment and remanding for trial on the merits of racial gerrymandering claim); *see also Petteway v. Galveston Cnty.*, 2023 WL 2782705, at *12 (S.D. Tex. Mar. 30, 2023) (motion to dismiss denied and rejecting defendants' assertion that at the pleading stage, plaintiffs needed to "rebut" the argument that "partisanship better explains voting behavior . . . than race").

It is thus not particularly surprising that very few racial gerrymandering claims are decided by way of a motion to dismiss, and in fact, several from this last redistricting cycle have rejected motions to dismiss racial gerrymandering claims where the plaintiffs, in their complaints, alleged facts sufficient to plausibly establish that traditional redistricting principles were subordinated to racial considerations. *See, e.g.*, *S.C. State Conf. of NAACP v. Alexander*, 2022 WL 2334410, at *3 (D.S.C. June 28, 2022) (denying motion to dismiss racial gerrymandering claim); *Petteway*, 2023 WL 2782705, at *15–19 (same); *Common Cause Fla. v. Byrd*, Order Mot. Dismiss ECF No. 59, No. 4:22-cv-00109 (N.D. Fla. Nov. 8, 2022) (per curiam) (same); *Contreras v. Ill. State Bd. of Elections*, Order Mot. Dismiss ECF No. 67, No. 1:21-cv-03139 (N.D. Ill. May 19, 2021) (per curiam) (same); *League of United Latin Am. Citizens v. Abbott*, Order Mot. to Dismiss ECF No. 675, No. 1:21-cv-00991 (W.D. Tex. Jan. 18, 2022) (consolidated cases) (same).

Nevertheless, Defendants claim the Complaint ignores partisanship altogether and that this is fatal to Plaintiffs' racial gerrymandering claims. Defs.' Br. 14–16. First, as alleged in the Complaint, the only justification for the drawing of the challenged districts provided prior to enactment was population equalization. Compl. ¶¶ 132, 155. That Defendants seek to infuse partisanship into the case with their extra-pleading evidence does not undermine Plaintiffs' averments. Beyond that, whether partisanship or population equalization were true or pretextual justifications for the challenged maps is precisely the issue that will be tried in this case. Second, and even more important, the Complaint, as detailed below, is replete with a myriad of allegations

to the effect that race—not any other factor—predominated in the drawing of the maps. That fully meets the pleading requirements as to the burden that Plaintiffs bear on their racial gerrymander claim.

Defendants further contend the Complaint does not allege facts tending to show that the mapmakers could have achieved their partisan objectives in race-neutral ways and that Plaintiffs were required to present an alternative map. Defs.' Br. 17. This argument, however, was flatly rejected by the Court in *Cooper*, where the Court explained that an alternative map of the sort Defendants describe is "hardly the *only* means" of evidence in a race-versus-politics dispute. 581 U.S. at 318. So long as plaintiffs satisfy their burden of proof as to racial predominance, "a court could find that racial rather than political factors predominated in a district's design, with or without an alternative map." *Id*. As demonstrated in the next section, Plaintiffs have more than adequately pleaded what they have to prove on this claim.

B. The Complaint Alleges Facts Sufficient to State Valid Racial Gerrymander Claims in Congressional Districts 5, 6, and 7 and in Senate District 31

The Complaint alleges that racial considerations predominated over traditional redistricting principles in the legislature's drawing of CD-5, CD-6, and CD-7. The Complaint avers that at the time of redistricting, the total population of Davidson County was approximately 715,884, only 19,579 from the ideal population for a congressional district of 735,463. Compl. ¶ 114. Under the prior decade's Congressional Plan, all of the City of Nashville and Davidson County resided within CD-5. *Id*. ¶¶ 109, 113. With the total population of Davidson County nearly equaling that of the ideal district population, the legislature, consistent with historical practice, could have easily retained 19,579 individuals from neighboring communities already in CD-5 to make up the difference and allow the whole of Davidson County to remain in CD-5. *Id*. ¶¶ 113–114. Instead of doing that, the legislature split Davidson County into three separate districts and paired each

portion of Davidson County with its large populations of color, with more rural, predominately white counties and populations. *Id.* All told, 346,457 people from Davidson County remained in CD-5, 188,668 people were added to CD-6, and 180,759 people were added to CD-7. *Id.* ¶ 114. This significantly reshuffled the Black voters and other voters of color of Nashville and Davidson County such that voters of color that resided in CD-5 in the benchmark plan no longer have an opportunity to elect candidates of their choice in CD-5, CD-6, or CD-7. *Id.* ¶¶ 115–118, 125–126, 133.

CD-5, specifically, was drawn to include a much higher WVAP percentage and a much lower BVAP percentage. Prior to the most current redistricting, CD-5 was approximately 30% BVAP[3] and HVAP,[4] with BVAP making up nearly 21% of that figure. *Id.* ¶ 118 & Table. After the redistricting, the newly drawn CD-5 had a BVAP of a little over 11%, a decrease of approximately 10 percentage points. *Id.* ¶ 123 & Table. Meanwhile the WVAP[5] in CD-5 was 61% at the end of the decade, and after redistricting, it went up by approximately 10 percentage points to 71%. *Id.* ¶ 124.

The Complaint further identifies that in drawing Nashville's congressional districts, the legislature subordinated traditional redistricting principles—such as core retention, (*id.* ¶¶ 114–18) and maintaining communities of interest and political subdivisions whole—to race (*id.* ¶ 113). For example, Nashville, which historically has had its own congressional district since at least 1940, was built around an urban population with a significant population of color (African American and more recently, Hispanic). *Id.* ¶¶ 111, 118, 123. The Complaint alleges the newly drawn CD-5 is far less compact than it was under the old plans, under which Davidson County and

[3] BVAP stands for Black Voting Age Population.
[4] HVAP stands for Hispanic Voting Age Population.
[5] WVAP stands for White Voting Age Population.

Nashville were mostly whole. *Id.* ¶ 130. Under the 2022 plan, CD-5 now sprawls further north and south, with slender tentacles snaking out in either direction to pull in portions of more predominately, white rural counties such as Lewis, Maury, Marshall, Williamson, and Wilson. It also splits more political subdivisions, with three different counties (Davidson, Williamson, and Wilson) now split in the new plan. *Id*. And it splits communities of interest in Bordeaux, White's Creek, Whiteshire, Parkwood Estates, Troppard Heights, Talbot's Corner, and the East Bank. *Id.* ¶ 127. As for the legislature's justification for drawing this map, as the Complaint states, the *only* justification given by Tennessee Legislators was "the purported need to equalize the overall size of the populations in each district." *Id*. ¶ 132.

The Complaint also alleges racial considerations predominated over traditional redistricting principles in the legislature's drawing of SD-31. The Complaint alleges prior to the 2021 redistricting, SD-31 was anchored, at least partly, in Memphis, a majority-Black municipality. *Id*. ¶ 143. The Complaint further states that, "although SD-31 was majority white, it contained the thriving—and rapidly growing—Black and Hispanic neighborhood of Cordova in Memphis, a community of interest." *Id.* By the end of the decade, SD-31, with a WVAP of about 57.51% and a combined Black and Hispanic VAP of 35%, had come extremely close to electing a candidate of choice, who ended up losing by 1.8 percentage points. *Id.* After the redistricting, the newly drawn SD-31, which was becoming a competitive district by the end of the decade, saw its significant Black and Hispanic populations almost cut in half (20.26% Black and Hispanic VAP under the new Senate map versus 34.63% under the old Senate map). *Id*. ¶ 145. The BVAP was 28.27% at the time of redistricting, and after redistricting the BVAP was reduced to 16.55%. *Id.* ¶ 149 & Table. The Complaint further alleges traditional redistricting principles were subordinated, explaining that the cracking of voters of color in Cordova from SD-31 could not "be

justified by compactness concerns or respect for political subdivisions" as the new district was more sprawling and imposed artificial splits of the predominately Black city of Memphis—including historically coherent neighborhoods and communities of interest, such as Cordova—among the various districts. *Id.* ¶ 150. Similar to the justification provided for the districting choices in Nashville, the Complaint alleges that the legislature's "sole justification" was the need to equalize population. *Id.* ¶ 155.

The Complaint also avers a series of indicia of discriminatory purpose, discussed in the next point, that may also support a finding of racial predominance. *See Ala. Legis. Black Caucus*, 575 U.S. at 266–67; *Cromartie I*, 526 U.S. at 546 (1999). In sum, Plaintiffs have pleaded more than adequate facts to state claims for racial gerrymandering.

V. The Complaint States Valid Intentional Discrimination Claims

Defendants argue that Plaintiffs failed to state any intentional vote dilution claims because the Complaint does not allege both discriminatory intent and discriminatory effect. Defs.' Br. 17–18. At the outset, Plaintiffs note that Defendants' argument is based on an incorrect premise—that a discriminatory intent claim requires allegations of racial animus. *Id.* 2, 10, 19, 23–25. Plaintiffs need not allege or prove "racial animus" to support a discriminatory intent claim, only an "invidious purpose." *See Perez v. Abbott*, 253 F. Supp. 3d 864, 948 (W.D. Tex. 2017) ("a finding of intentional discrimination is not a finding that legislators harbored any ethnic or racial animus, in terms of dislike, mistrust, hatred, or bigotry, toward minority communities."); *see also Miller*, 515 U.S. at 904–05. Plaintiffs have pleaded abundant facts regarding the Tennessee Legislature's discriminatory intent under the appropriate standard set forth in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

Although the proof for the two claims may overlap depending on the specific facts of a case, intentional vote dilution claims are "analytically distinct" from racial gerrymandering claims and require a "different analysis," including at the pleading stage. *Miller*, 515 U.S. at 911; *Reno*, 509 U.S. at 650–52. In contrast to racial gerrymandering claims, intentional vote dilution claims concern whether the state intentionally sought "to minimize or cancel out the voting potential of racial or ethnic minorities." *Miller*, 515 U.S. at 911 (citation omitted); *see Rogers v. Lodge*, 458 U.S. 613, 616–18, 622 (1982) (finding unconstitutional vote dilution under Fourteenth and Fifteenth Amendments where at-large electoral scheme was maintained for invidious purpose of diluting voting strength of African American population). To succeed on such a claim, a plaintiff need not prove that discriminatory intent was the legislature's only concern, or even "the 'dominant' or 'primary' one." *Arlington Heights*, 429 U.S. at 265 (footnote omitted). The Complaint need show only "that a discriminatory purpose has been *a motivating factor* in the decision." *Id.* at 265–66 (emphasis added). This is a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," and "[d]emonstrating discriminatory intent . . . 'does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purpose[].'" *Id*. at 266; *Allen v. Milligan*, 599 U.S. 1, 37 (2023).

In *Arlington Heights*, the Supreme Court set forth a series of non-exclusive factors pertinent to adjudication of an intentional discrimination claim: (1) the discriminatory "impact of the official action," (2) the "historical background," (3) the "specific sequence of events leading up to the challenged decision," (4) departures from procedures or substance, and (5) the "legislative or administrative history," including any "contemporary statements" of the lawmakers. 429 U.S. at 266–68. Indeed, Defendants do not dispute, and in fact concede, that Plaintiffs have pleaded facts pertinent to each of these categories of circumstantial proof. *See* Defs.' Br. 19

("Plaintiffs' animus allegations point to procedural irregularities, a recent history of allegedly discriminatory conduct, and the legislative history.") These facts, as discussed further below, support a plausible claim of intentional vote dilution.

A. The Complaint Adequately Alleges the Redistricting Scheme Has a Discriminatory Effect

The Complaint alleges ample facts to support a reasonable inference that the enacted plans will have a dilutive and discriminatory effect on the voting strength of Black and Hispanic voters in CD-5, CD-6, and CD-7 and SD-31. Plaintiffs methodically lay out how the new maps dilute the voting strength of voters of color by highlighting how voters of color were shuffled into and out of districts. The Complaint devotes several pages to detailing the shifting demographics and boundaries of CD-5, CD-6, and CD-7 between the old and new maps and underscores that until the recent Congressional Plan was enacted, "all of Nashville and Davidson County had been fully contained in one Congressional district for over 50 years." Compl. ¶¶ 113–18. Specifically, the Complaint delineates how the splitting of Davidson County into three congressional districts, previously a single congressional district, destroys a functioning opportunity district, thereby actively prejudicing voters of color in Nashville and preventing them from electing their candidate of choice. *Id.* ¶¶ 109–18.

The Complaint also alleges how both the old CD-5 and SD-31 were redrawn in such a manner as to dilute the power of voters of color by ensuring that these districts encompassed much larger populations of rural, white voters. For instance, the Complaint alleges that CD-5 was "anchored in rural parts of the State, with large populations of white voters" (*id.* ¶ 119) and SD-31—which previously centered on Cordova, a community with a diverse population—now concentrates around Germantown, a much whiter neighborhood. *Id.* ¶¶ 134–47. Plaintiffs also highlighted the actual effects these maps had on the 2022 general election results—resulting in

losses for minority voters' candidates of choice. *Id.* ¶¶ 126, 133. Taken together, these allegations support an inference that the General Assembly intentionally drew lines that destroyed otherwise performing districts that permitted voters of color a meaningful opportunity to elect their candidate of choice—raising "serious questions" under the Fourteenth and Fifteenth Amendments. *Rogers*, 458 U.S. at 617–18; *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality opinion) ("[I]f there were a showing that a State intentionally drew district lines in order to destroy otherwise effective opportunity districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments.")

B. The Complaint Adequately Alleges the Redistricting Scheme Has a Discriminatory Purpose

Adhering to the framework set forth in *Arlington Heights*, the Complaint methodically outlines the events leading up to the enactment of the redistricting plans while pointing out the procedural abnormalities that occurred throughout the process, including (1) the shortened times for public comment and debate (Compl. ¶¶ 8, 68, 71), (2) the complete disregard for the concerns expressed by voters of color and community leaders (*id.* ¶¶ 9, 71, 92), and (3) the late-breaking maps revealed by the House Select Committee at the eleventh hour before voting took place. *Id.* ¶¶ 61–63, 72–108. Plaintiffs also meticulously detail the legislative history of the plans—describing concerns about racial gerrymandering and vote dilution raised by both Black community members and Black legislators—all of which were uniformly ignored by the white legislators. *Id.* ¶¶ 75, 81–84, 87, 89, 93, 97, 99. Furthermore, the Complaint clarifies that limited periods for public comment were all held *before* any of the official maps—which are now subject to this litigation—were released to the public and adopted and before any further feedback from the public was considered. *See id.* ¶¶ 74, 76.

In response, Defendants improperly attempt to reframe Plaintiffs' allegations, relying on their cherry-picked extra-pleading allegations to argue that the process was neither unusual nor opaque because Plaintiffs were provided with the opportunity to speak during a House Select Committee Meeting. Defs.' Br. 20. Leaving aside whether the Court can even consider these alleged facts at this stage of the proceedings, Defendants' Motion ignores other allegations in the Complaint, such as the fact that the maps that ultimately advanced out of committee were not publicly disclosed prior to the periods for public comment, thereby stifling any meaningful debate. Compl. ¶¶ 80–81. In fact, the Complaint alleges that some members of the House Select Committee—notably, Representative Karen Camper, one of only two Black lawmakers on the Committee—had not even seen the proposed maps prior to the final vote. *See id.* ¶¶ 81–82. Defendants' extra-pleading opinion—again, not cognizable by this Court—that "the 2020 redistricting was the most transparent and collaborative in state history" (Defs.' Br. 20)—disregards the Complaint's allegations that only the official maps submitted by the committees ever received a vote and that no community maps were discussed at length or formally considered by the Committee. Compl. ¶¶ 76, 78–80, 84. Finally, after improperly asserting its extra-pleading opinion that the redistricting process was not "unusually rushed" (Defs.' Br. 21), Defendants contradict their own argument and seem to concede that the pace was "expedited" due to the COVID-19 pandemic. *Id.* 22. Even were any of Defendants' assertions cognizable by this Court, at most they create an issue of factual dispute, and certainly do not approach a conclusion that Plaintiffs' claims are implausible as a matter of law.

The Complaint then juxtaposes the State's redistricting process against the other legislative initiatives that the Tennessee General Assembly was engaged in during the relevant period—providing contemporaneous examples of the body's intent, including "pressing race-centric

legislation with destructive and discriminatory effects and taking other actions intended to silence Black voices in the political arena." Compl. ¶¶ 101–08. Although Defendants acknowledge all these allegations, they nevertheless argue that these are insufficient to support an inference of racial discrimination because the "good faith of a state legislature must be presumed." Defs.' Br. 19, 24. No court has ever held that any presumption of legislative good faith operates as a matter of law to preclude allegations of racial discrimination, especially at the motion to dismiss stage, but that is precisely the path Defendants ask this Court to take. *See Iqbal*, 556 U.S. at 696 ("*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be.")

Here, where the Court must accept Plaintiffs' allegations as true and construe all inferences in Plaintiffs' favor, Defendants' attempts to disregard, dispute, or draw their own favorable inferences—based on extra-pleading allegations which are themselves of dubious admissibility in this Motion—must be rejected.

VI. Governor Lee Is a Proper Defendant for This Action

Although the Eleventh Amendment limits when a state can be a defendant in a lawsuit, this restraint is not absolute. As Defendants themselves note, the Sixth Circuit has expressly allowed for suits against governors. Defs.' Br. 27 n.42. The governor has been a named defendant in redistricting cases filed in Tennessee. *Rural W. Tenn. African-Am. Affairs Council, Inc v. McWherter*, 836 F. Supp. 447, 448 (W.D. Tenn. 1993) (naming Governor McWherter as a defendant); *Rural W. Tenn. African Am. Affairs Council, Inc. v. Sundquist*, 29 F. Supp. 2d 448, 450 (W.D. Tenn. 1998) (naming Governor Sundquist as a defendant). Moreover, recent cases in the Sixth Circuit have held governors are properly named where allegations involving systemic failures led to disenfranchisement or ongoing constitutional violations. *See, e.g.*, *League of Women*

Voters of Ohio v. Brunner, 548 F.3d 463, 475 n.16 (6th Cir. 2008) (refusing to dismiss an action against a governor that alleged disenfranchisement resulting from statewide systemic failures in the election process); *Lawson v. Shelby Cnty.*, 211 F.3d 331, 333, 335 (6th Cir. 2000) (holding that the Eleventh Amendment did not preclude the plaintiffs' voters' rights claims against the governor); *In re Flint Water Cases*, 960 F.3d 303, 333–35 (6th Cir. 2020) (holding action against governor was not barred by sovereign immunity when plaintiffs sought prospective injunctive relief against the governor to combat continuing effects of an ongoing violation of their constitutional rights); *Boler v. Earley*, 865 F.3d 391, 413 (6th Cir. 2017) (holding plaintiff's action against the governor was not barred by sovereign immunity because the "ineffective relief efforts" by the state's officials "ha[d] themselves prolonged the effects of the crisis," including a then-current State of Emergency). Defendants' contention that older case law governs this issue and that the Court should disregard recent precedent is unfounded and should be rejected.

A. The *Ex parte Young* Exception to the Eleventh Amendment Strips Governor Lee of His Immunity

The Eleventh Amendment's grant of sovereign immunity does not shield a state officer who violates or intends to violate federal law. *Ex parte Young*, 209 U.S. 123, 159–60, 167 (1908). In *Young*, the Supreme Court was clear that the Eleventh Amendment does not bar a lawsuit seeking prospective relief against a state official acting in his official capacity when that official has violated or seeks to violate federal law. *Id.* 152, 159–60; *see also Westside Mothers v. Haveman*, 289 F.3d 852, 860 (6th Cir. 2002) (holding that a lawsuit claiming state official's actions violated the U.S. Constitution was not barred by sovereign immunity "so long as the state official is the named defendant and the relief sought is only equitable and prospective"); *Alden v. Maine*, 527 U.S. 706, 747 (1999) (stating that it has long been established that suits for declaratory and prospective injunctive relief against state officials for violations of federal rights are not barred by

sovereign immunity). To determine whether the *Ex parte Young* exception applies, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n. of Md.*, 535 U.S. 635, 645 (2002) (citation omitted); *Dubuc v. Mich. Bd. of Law Exam'rs*, 342 F.3d 610, 616 (6th Cir. 2003) (applying *Verizon*'s "straightforward inquiry" approach in the Sixth Circuit).

Defendants attempt to muddle this "straightforward inquiry" by claiming *Young* is inapplicable because Governor Lee "lack[s] a special relation" to the unconstitutionally drawn maps. Defs.' Br. 27 (internal quotation omitted). But no such "special relation" is required. *Young* simply allows plaintiffs to sue a state officer when that officer's actions violate federal law so long as the officer's duty sufficiently connects him with the enforcement of the challenged legislative enactment. 209 U.S. at 161. Here, Governor Lee's signing the maps into law and continuing to enforce them by permitting elections to occur under the districts provides sufficient connection to the legislative enactment. Thus the Governor's continued enforcement of the unconstitutional maps violates Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment. The Tennessee State Constitution imposes an affirmative duty on the Governor to "take care that the laws be faithfully executed." Tenn. Const. art. III, § 10. The State Constitution further mandates that "[e]very Bill which may pass both Houses of the General Assembly shall, before it becomes a law, be presented to the Governor for his signature." *Id.* § 18. Defendants merely point to the duties imposed on *other* state officers, such as Tennessee's Chief Election Officer, to distract from Governor Lee's individual duties, which, like the duties of those other state officers, are sufficiently connected to the enforcement of the challenged legislation. Defs.' Br. 27. In doing so, Defendants conveniently ignore that Governor Lee's individual duty to enforce the laws of

Tennessee is sufficient to invoke the *Young* exception. *See Ex parte Young*, 209 U.S. at 161 (holding that a state officer, "by virtue of his office," was "sufficiently connected . . . with the duty of enforcement to make him a proper party to [the] suit" because he had a general duty imposed upon him "which include[d] the right and the power to enforce the statutes of the state"); *see also Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 665 n.5 (6th Cir. 1982) (noting that "even in the absence of specific state enforcement provisions, the substantial public interest in enforcing [the challenged] legislation . . . places a significant obligation upon the Governor to use his general authority to see that state laws are enforced" sufficiently to exceed the scope of Eleventh Amendment immunity).[6]

Defendants attempt to distinguish *Allied Artists* by noting that, if the Court were to grant Governor Lee immunity, Plaintiffs would not then be precluded from seeking relief against the remaining defendants. Defs.' Br. 28. But this alternative-party theory misstates the holding from *Allied Artists*. Defendants cannot simply offer up the other defendants to excuse Governor Lee when he has sufficient connection with the enforcement of the challenged legislative enactment that is a violation of the Tennessee State Constitution. Therefore, under *Young*, Governor Lee is "stripped of his official or representative character" and is a proper party to this action. 209 U.S. at 159–60.

[6] Defendants claim *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996), supports their argument that a general duty to enforce the law does not make the executive a proper defendant in every action attacking the constitutionality of a statute. Defs.' Br. 27. But Defendants' argument misses a key distinction. There, the plaintiffs were not seeking to enjoin enforcement of an allegedly unconstitutional statute but rather order the state official to take positive steps to enforce it. *Children's Healthcare*, 92 F.3d at 1416. Here, however, Plaintiffs seek to enjoin Governor Lee's ongoing enforcement of the challenged maps. Plaintiffs do not ask the Court to expand *Young*. Rather, like *Young*, Plaintiffs seek to stop the Governor from enforcing an unconstitutional law. Thus, *Children's Healthcare*'s holding has no bearing on this case.

B. The Complaint Adequately Establishes Standing

Governor Lee's enforcement of the unconstitutionally drawn maps is essential to the continued disenfranchisement of Plaintiffs. Whether Governor Lee is solely "responsible" for the unconstitutional maps is irrelevant. Defs.' Br. 29. Causation merely requires that the injury be "fairly traceable to the defendant's acts or omissions." *United States v. Perry*, 360 F.3d 519, 527–28 (6th Cir. 2004) (quoting *Arlington Heights*, 429 U.S. at 261); *see also Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019) ("Article III requires no more than *de facto* causality.") (internal quotation omitted) (citation omitted). Here, Plaintiffs' injury—the "diminished relative opportunities of Black and other voters of color . . . to elect candidates of their choice" (Compl. ¶ 60) in certain districts—is caused by the unconstitutional maps—maps that would have no legal implications without the Governor's signature. *See generally* Tenn. Const. art. III, § 18 ("Every Bill which may pass both Houses of the General Assembly shall, before it becomes a law, be presented to the Governor for his signature.") Therefore, Plaintiffs' injury is fairly traceable to Governor Lee's action.

Importantly, Plaintiffs' injury is ongoing. Accordingly, it is not merely Governor Lee's one-time act of signing the unconstitutional maps into law that caused Plaintiffs' injury but also his continuing obligation to ensure that elections are held in compliance with the redrawn maps. As the Supreme Court has made clear, causation is established when the defendant's conduct triggered a *predictable response* from third parties and such a response caused injury to the plaintiff. *See Dep't of Com.*, 138 S. Ct. at 2566. Likewise, here, Governor Lee's conduct—signing the redistricting maps into law—triggered a predictable response: enforcement of the very maps that he approved. Thus, while Defendants argue that because a governor's signing of a bill is part of the legislative process under *Smiley v. Holm*, 285 U.S. 355, 372–73 (1932) (Defs.' Br. 29)—and therefore entitled to legislative immunity—Governor Lee's conduct here is not singularly

legislative in nature. In other words, Defendants' argument that legislative immunity voids causation necessarily fails because causation is based not on a single, legislative act but rather on the Governor's continuing *enforcement* of the legislative enactment that is causing Plaintiffs' ongoing injury. *See League of Women Voters*, 548 F.3d at 475 (allowing action to proceed against the Governor when plaintiffs alleged that, absent injunctive relief, problems with Ohio's election machinery were chronic and would continue to violate their fundamental right to vote and rights under the Equal Protection Clause).

Defendants also claim that there is no causation because the Complaint failed to include "specific, plausible allegations" about what Governor Lee has done, is doing, or might do in the future that will harm Plaintiffs. Defs.' Br. 29 (citing *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1031–32 (6th Cir. 2022)). Defendants' reliance on *Universal Life Church* is misplaced. In that case, the plaintiffs failed to explain how the Governor caused the injury, merely asserting that the Governor's "take care" power made him a proper party. 35 F.4th at 1031. Here, by comparison, Plaintiffs articulated a causal connection. *See* Compl. ¶ 46 ("Defendant William B. Lee, as governor, signed the redistricting plan into law and is responsible for the enforcement of all enacted laws."); *Id*. ¶ 57 ("The new State Senate and Congressional redistricting plans adopted by Tennessee's Legislature *and signed into law by Governor William B. Lee on February 6, 2022*, do not reflect these changing demographics and are intentionally designed to diminish the voting rights and electoral power of Tennessee's ethnic and racial minorities.") (emphasis added). Plainly, Plaintiffs did more than just reference the Governor's "take care" power. Plaintiffs specified Governor Lee's harmful action, and Plaintiffs articulated the harmful effect of such an action. Therefore, Plaintiffs have pleaded sufficient facts demonstrating that Governor Lee's past and future conduct is fairly traceable to Plaintiffs' injury.

Finally, Defendants argue Governor Lee is unable to redress Plaintiffs' injury because he lacks the power to enforce the challenged maps. Defs.' Br. 29. However, this ignores several key facts. First, Governor Lee does not lack the power to enforce the redistricting maps. He *must* enforce them under the Tennessee State Constitution. *See* Tenn. Const. art. III, §§ 1, 10. Second, a favorable ruling is necessary to prevent the Governor from continuing to enforce the challenged maps. Such an outcome would redress Plaintiffs' injury because Plaintiffs would once again have a fair opportunity to elect their candidates of choice. Third, Defendants ignore a straightforward way in which the Governor may redress Plaintiffs' injury: Governor Lee would cure Plaintiffs' injury by approving of and signing a constitutionally invalid redistricting map into law. *See id.* § 18. Accordingly, Defendants' argument that Governor Lee "has no power to provide any of the relief requested" is false, and Plaintiffs have shown what the Court could order the Governor to do or refrain from doing to give them relief.

Governor Lee is a proper defendant and should not be dismissed as a party to this action.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny Defendants' Motion to Dismiss.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2023, the undersigned filed the foregoing document via this Court's electronic filing system, which sent notice of such filing to the following counsel of record:

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