IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART IV

AKILAH MOORE, TELISE TURNER, and GARY WRIGHT,	
Plaintiffs,	NF
v.	**CASE NO. 22-0287-IV**
BILL LEE, Governor, TRE HARGETT, Secretary of State, MARK GOINS, Tennessee Coordinator of Elections; All in their Official Capacity Only,	**Russell T. Perkins, Chief Judge** **J. Michael Sharp, Judge** **Steven W. Maroney, Chancellor**
Defendants.	

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ORDER

This reapportionment case was filed on February 23, 2022. Plaintiffs Akilah Moore, Telise Turner, and Gary Wright are suing Defendants Governor Bill Lee, Secretary of State Tre Hargett, and Tennessee Coordinator of Elections Mark Goins, in their official capacities, claiming that the State House and Senate maps are unconstitutionally drawn. Plaintiffs' original Complaint sought declaratory and injunctive relief. On March 1, 2022, the Tennessee Supreme Court entered an Order designating Chancellor Russell Perkins, Circuit Judge Mike Sharp, and Chancellor Steven Maroney as the Three-Judge Panel ("Panel") to hear this case.

On March 2, 2022, Plaintiffs filed Plaintiffs' Motion to Set Hearing and Expedited Briefing Schedule on Plaintiffs' Motion for Summary Judgment, or in the Alternative, for Expedited Trial. On March 3, 2022, Defendants filed Defendants' Response in Opposition to Plaintiffs' Motion to Set Hearing and Expedited Briefing Schedule on Plaintiffs' Motion for Summary Judgment, or in the Alternative, for Expedited Trial. On March 4, 2022, Plaintiffs filed Plaintiffs' Reply in Support of

Plaintiffs' Motion to Set Hearing and Expedited Briefing Schedule on Plaintiffs' Motion for Summary Judgment, or in the Alternative, for Expedited Trial. After conferring, the Panel entered an Order on March 3, 2022, setting Plaintiffs' Motion to Expedite for a telephonic hearing on March 7, 2022 at 2:30 p.m. On March 8, 2022, after hearing oral argument on March 7, 2022, the Court entered an Order denying Plaintiffs' Motion to Expedite.

On March 11, 2022, Plaintiffs filed their First Amended Complaint for Declaratory and Injunctive Relief ("First Amended Complaint") and Plaintiffs' Motion for Temporary Injunction, with accompanying materials. On March 16, 2022, the Panel entered an Order, setting Plaintiffs' temporary injunction motion for an in-person, non-evidentiary hearing on March 31, 2022 at 1:00 p.m. in Nashville. On March 25, 2022, Defendants filed Defendants' Response in Opposition to Plaintiffs' Motion for Temporary Injunction. On March 29, 2022, Plaintiff filed Plaintiffs' Reply in Support of Motion for Temporary Injunction. On March 31, 2022, Defendants filed Defendants' Notice of Filing Affidavit of Doug Himes in Response to Plaintiffs' Affidavit of Jonathan Cervas and the accompanying Affidavit of Doug Himes.

Overview

In our legal system, federal law is the supreme law of the land. Consequently, state statutes and state constitutional provisions are subject to federal law. When there is overlap or conflict between state and federal law, a court may strike down the state provision or keep the state provision intact to the extent that it does not encroach upon enforcement of federal law. Generally speaking, reapportionment disputes arise every ten years by operation of law because the decennial census requires legislative districts

around the county to be re-drawn to reflect population changes. In Tennessee, reapportionment cases typically involve state reapportionment statutes that are alleged to violate the Constitution of Tennessee and federal law.

There are two state constitutional provisions primarily at issue here, which provide as follows, with emphasis on the most pertinent language:

> The number of representatives shall be ninety-nine and shall be apportioned by the General Assembly among the several counties or districts as shall be provided by law. Counties having two or more Representatives shall be divided into separate districts. **In a district composed of two or more counties, each county shall adjoin at least one other county of such district; and no county shall be divided in forming such a district.**

Tenn. Const. art II, § 5 (emphasis added).

> The legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people. Representatives shall hold office for two years and senators for four years from the day of the general election, except that the Speaker of the Senate and the speaker of the House of Representatives each shall hold his office as Speaker for two years or until his successor is elected and qualified provided however, that in the first general election after adoption of this amendment Senators elected in districts designated by even numbers shall be elected for four years and those elected in districts designated by odd numbers shall be elected for two years. **In a county having more than one senatorial district, the districts shall be numbered consecutively.**

Tenn. Const. art II, § 3 (emphasis added).

There is no dispute about this constitutional language or what the framers of the Constitution of Tennessee meant by this language. Basically, these provisions provide that the Tennessee General Assembly cannot draw House of Representative districts which cross county lines and that Senatorial Districts are constitutionally mandated to be numbered consecutively. It is undisputed the House plan has thirty districts that cross county lines, that a set of Senatorial districts situated in Davidson County and a county

adjoining Davidson County are not numbered consecutively, and that neither the House plan nor the Senate plan comply with the language of the Constitution of Tennessee as written. The requisite inquiry, however, is far from over, given that there is applicable, overlapping federal law and Tennessee Supreme Court precedent which excuses, on a principled basis, a particular General Assembly's failure to follow the strict letter of the Constitution of Tennessee in reapportionment cases.

Plaintiffs seek a temporary injunction prohibiting and requiring the following actions:

> (1) Prohibiting Defendants, as well as their agents and successors in office, from enforcing or giving any effect to the boundaries of the House of Representatives and Senate districts as drawn in SB 0779 and SB 0780, including an injunction barring Defendants from conducting any further elections under the enacted maps;
>
> (2) Providing the General Assembly with 15 days to remedy the identified constitutional defects, per Tenn. Code Ann. § 20-18-105;
>
> (3) Enacting an interim redistricting plan applicable to the 2022 state legislative elections if the General Assembly fails to remedy the identified constitutional defects by the Court-imposed deadline; and
>
> (4) Delaying the April 7, 2022, candidate filing deadline until May 20, 2022, or such other date as the Court deems appropriate to allow for the remedial process set forth above.

Plaintiffs' Motion for Temporary Injunction, p. 2. Defendants counter, urging that Plaintiffs' application for a temporary injunction should be denied on several grounds.

Plaintiffs are alleging that the House reapportionment plan is unconstitutional because it permits the crossing of more county lines than is necessary and that the Senate reapportionment plan unconstitutionally fails to consecutively number certain senatorial districts. Defendants counter, asserting, among other things, that Plaintiffs do not have standing to bring this suit; Plaintiffs' request for a temporary injunction is barred by the

equitable doctrine of laches; the General Assembly properly drew both plans; Plaintiffs cannot overcome the presumption of constitutionality; and Plaintiffs have not made the requisite showing for the Court to grant temporary injunctive relief under Tenn. R. Civ. P. 65.04.

Temporary Injunction Standard

In deciding a motion for temporary injunction, the inquiry is based on the language of Tenn. R. Civ. P. 65.04(2), which reads in its entirety as follows:

> A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

Id. In following this language, Tennessee appellate courts have distilled four factors for the Court's consideration in determining whether to grant a temporary injunction:

1) The threat of irreparable harm to the applicant if the injunction is not granted;

2) The balance between the harm the applicant is seeking to prevent and the injury that granting the injunction would inflict on the party the applicant is proposing to enjoin;

3) The probability that the applicant will succeed on the merits; and

4) The public interest.

See Moody v. Hutchison, 247 S.W.3d 187, 199-200 (Tenn. Ct. App. 2007). These factors are considerations, not a hard and fast test. Ultimately, the above-quoted language of Tenn. R. Civ. P. 65.04(2) controls the Court's disposition of a temporary injunction request. Under Tenn. R. Civ. P. 65.04(6), the Court is required to "set forth findings of fact and conclusions of law which constitute the grounds of its action." *Id.*

Findings of Fact

Based on the current evidentiary record, the Panel hereby makes the following preliminary findings of fact:

1. Senate Bill 0779, Pub. Ch. 598 ("SB 0779"), passed by the General Assembly, memorialized the latest decennial reapportionment of the House of Representatives. SB 0779 became law on February 6, 2022.
2. The House map created by SB 0779 includes a range of districts whose population deviate from the equal population ideal in a range from -4.82% to +5.09% with a total variance of 9.91%. The average deviation from the ideal population across all districts is 3.37%.
3. The enacted House map divides 30 counties in the creation of multi-county districts. At least one legislator proposed an alternative House map with less than 30 county divisions and with a total population variance of 9.72%.
4. The record establishes that the House plan was formulated with a goal, among other goals, of splitting thirty counties or less.
5. Senate Bill 0780, Pub. Ch. 596 ("SB 0780") was passed by the General Assembly; it memorialized the latest decennial reapportionment of the Senate. SB 0780 became law on February 6, 2022.
6. Prior to SB 0780 becoming law, Davidson County was represented by four Senators. Three of these senatorial districts were wholly within Davidson County, and one district contained a portion of Davidson County, as well as Sumner and Trousdale Counties. These four senatorial districts were consecutively numbered as 18, 19, 20, and 21.

7. SB 0780 also creates four senatorial districts within Davidson County. Three of these districts are also wholly within Davidson County, and one district includes a portion of Davidson County, as well as all of Wilson County. SB 0780 numbers these four districts 17, 19, 20, and 21. One legislator proposed an amendment to the enacted Senate map; this map included senatorial districts numbered 18, 19, 20, and 21. This proposed amendment was tabled.
8. As to the House plan, the proof in the temporary injunction record was detailed and nuanced. The Panel concludes that a trial should be held before injunctive relief would potentially be appropriate on the House plan.
9. As to the Senate plan, the proof in the temporary injunction record did not include a detailed explanation as to why federal statutory or constitutional principles mandated the non-sequential numbering of the Davidson County senatorial districts.
10. Given the preliminary stage of these proceedings, the Panel is not in a position to make findings on the question of bad faith raised by Plaintiffs.

Threshold Issues

Defendants raise two threshold legal issues: (1) whether Plaintiffs have standing to bring this action; and (2) whether Plaintiffs' motion is barred by laches. Additionally, Defendants question whether the Panel has the authority to delay the qualifying deadline. On this issue, it is clear that this Panel has authority to delay the qualifying deadline. *See State ex rel. Hooker vs. Thompson*, 249 S.W.3d 331, 342 (Tenn. 1996).

Standing

Defendants argue that Plaintiffs lack standing to bring this action. "Courts use the doctrine of standing to determine whether a litigant is entitled to pursue judicial relief as to a particular issue or cause of action." *City of Memphis v. Hargett*, 414 S.W.3d 88, 97 (Tenn. 2013)(citing *ACLU of Tenn. v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006); *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976)). Standing is a threshold issue. *See Fisher v. Hargett*, 604 S.W.3d 381, 396 (Tenn. 2020)(citing *City of Memphis*, 414 S.W.3d at 96)("The question of standing is one that ordinarily precedes a consideration of the merits of a claim.").

> Our jurisprudence recognizes two categories of standing that govern who may bring a civil cause of action: non-constitutional standing and constitutional standing. Non-constitutional standing focuses on considerations of judicial restraint, such as whether a complaint raises generalized questions more properly addressed by another branch of the government, and questions of statutory interpretation, such as whether a statute designates who may bring a cause of action or creates a limited zone of interests. Constitutional standing, the issue in this case, is one of the "irreducible . . . minimum" requirements that a party must meet in order to present a justiciable controversy.

City of Memphis, 414 S.W.3d at 98 (citations & footnote omitted). Constitutional standing requires a plaintiff to establish three elements:

> 1) a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general public; 2) a causal connection between the alleged injury and the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision of the court.

Fisher, 604 S.W.3d at 396 (citing *City of Memphis*, 414 S.W.3d at 97).

It is the first element of constitutional standing - a distinct and palpable injury - that Defendants argue Plaintiffs cannot establish in the present case. The United States Supreme Court has "repeatedly refused to recognize a generalized grievance against

allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *United States v. Hays*, 414 U.S. 737, 743 (1995)(citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Ex parte Lévitt*, 302 U.S. 633 (1937)(per curiam)); *see also Hamilton v. Metropolitan Gov't of Nashville*, No. M2016-00446-COA-R3-CV, 2016 WL 6248026, at *4 (Tenn. Ct. App. Oct. 25, 2016)(quoting *Moncier v. Haslam*, 1 F. Supp. 3d 854, 859 (E.D. Tenn. 2014))(citations omitted)(alterations in original)("[W]hen a plaintiff asserts that the law has not been followed, the plaintiff's 'injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that [the Supreme Court] ha[s] refused to countenance in the past.'" The *Moncier* Court held that any person seeking to apply for an appellate court position would suffer the same alleged injury as the plaintiff, affirming that a plaintiff's interest must be different from not only the general public, but also from any large class of citizens.").

In reply, Plaintiffs note that Tennessee courts have regularly found standing when the fundamental voting rights of Tennessee citizens are threatened. *See Fisher*, 604 S.W.3d at 396; *City of Memphis*, 414 S.W.3d at 98-99. Plaintiff Wygant is a registered voter who lives in Gibson County. Previously, Gibson County was wholly within House District 79. Under the House redistricting plan, however, Gibson County will be one of the thirty divided counties. Plaintiff Wygant thus asserts his right to vote for a representative in an undivided county guaranteed by Article II, Section 3 of the Tennessee Constitution. *See* Plaintiffs' Reply, at p. 5 (citing First Amended Complaint,

¶¶ 16, 50, 65-66). Underlying this constitutional guarantee, Plaintiffs argue, is the integrity of the county as a political unit and the rights of the residents therein. Plaintiffs assert that Defendants' arguments ultimately go into the merits of Plaintiffs' challenge, which is well beyond the question of standing.

Plaintiffs next argue that the challenge to the non-consecutive Senate district numbering likewise demonstrates the necessary injury. Plaintiff Moore resides in Davidson County and asserts her right guaranteed by the Tennessee constitution to vote in a county with districts numbered consecutively. *See* Plaintiffs' Reply, at pp. 5-6 (citing First Amended Complaint, ¶¶ 57–63). As with the prohibition on the division of counties in creating House districts, Plaintiffs state the integrity of the county as a political unit and the rights of the residents therein underlie this constitutional guarantee. After careful review, the Panel concludes, on a preliminary basis, that all three Plaintiffs appear to have standing to sue.

Laches

Defendants first assert that Plaintiffs' request for a temporary injunction is barred in this instance by the doctrine of laches - a negligent and unintentional failure to protect one's rights. *See Long v. Board of Prof'l Responsibility*, 435 S.W.3d 174, 181-82 (Tenn. 2014)(quoting *Dennis Joslin Co. v. Johnson*, 138 S.W.3d 197, 200 (Tenn. Ct. App. 2003)("Under the defense of laches, 'equity will not intervene on behalf of one who has delayed unreasonably in pursuing his rights.'")); *see also United States v. City of Loveland*, 621 F.3d 465, 473 (6th Cir. 2010)(quoting *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991)("[L]aches is 'a negligent and unintentional failure to protect one's rights.'")). Mere delay is not enough; the doctrine "requires an

unreasonable delay that prejudices the party seeking to employ laches as a defense, and it depends on the facts and circumstances of each individual case." *Long*, 435 S.W.3d at 181-82 (citing *Jansen v. Clayton*, 816 S.W.2d 59, 51 (Tenn. Ct. App. 1991)).

Defendants argue Plaintiffs unreasonably delayed in seeking judicial intervention by waiting nearly three weeks to file their Complaint and then another two weeks to file their motion for a temporary injunction. Defendants further argue that the delay is inexcusable given that the qualifying deadline, which was statutorily set and acknowledged by Plaintiffs, falls within a month of the date Plaintiffs filed the instant motion. Such delay, Defendants continue, will prejudice them.

Defendants first point to some courts having simply recognized delay itself as constituting prejudice. *See Perry v. Judge*, 840 F. Supp. 2d 945, 954 (E.D. Va. 2012), *aff'd*, 471 F. App'x 219 (4th Cir. 2012)(citing *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990))("Prejudice can be inferred simply from the plaintiff's delay, or from evidence of specific harm."); *Memphis A. Philip Randolph Inst. v. Hargett*, 473 F. Supp. 3d 789, 800 (M.D. Tenn. 2020)("[T]he Court finds prejudice from the fact if injunctive relief were granted at this late date, the State would have to take such action much more quickly than if Plaintiffs had sought such injunctive relief as soon as they should have; quicker action tends to mean more expensive and error-prone action. . . . In addition, the Court believes that at this late stage, a certain amount of prejudice can be presumed."). Secondly, Defendants point to the U.S. Supreme Court's recognition that prevention of the State from enforcing its duly enacted statutes constitutes a type of irreparable harm. *See Abbott v. Perez*, 138 S. Ct. 2305, 2323 (2018)(citing *Carson v. American Brands, Inc.*, 450 U.S. 89, 89-90 (1981))(footnote omitted)("[H]ere the District Court's orders, for all

intents and purposes, constituted injunctions barring the State from conducting this year's elections pursuant to a statute enacted by the Legislature. Unless that statute is unconstitutional, this would seriously and irreparably harm the State . . . ."); *see also Abbott*, 138 S. Ct. at 2323 n.17 (citing *Maryland v. King*, 567 U.S. 1301 (2012)(Roberts, C.J., in chambers))("[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State."); *King*, 567 U.S. at 1303 (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)(Rehnquist, J., in chambers))("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). Defendants thus argue that the specific timing of the delay itself in this case should be a sufficient basis for a finding of prejudice, but, alternatively, the fact that Plaintiffs are seeking to enjoin a state statute would also be such a basis.

In reply, Plaintiffs assert that Defendants' laches defense must fail because Plaintiffs did not unreasonably delay in either the filing of this action or seeking a temporary injunction. Their argument points out that the period of time between the enactment of the redistricting plan and Plaintiffs' filing of the lawsuit, as well as the subsequent period before the instant motion, are considerably shorter than the delays that justified the application of laches in the cases cited by Defendants. Plaintiffs note further that this case was stayed in accordance with Tennessee Supreme Court Rule 54, § 2(g), after the filing of the request for a three-judge panel. That Notice was filed contemporaneously with the original Complaint. This stay was not lifted until the present Panel was appointed on March 1, 2022. Plaintiffs filed a motion to expedite these proceedings the next day. That motion was denied on Friday, March 8, 2022.

On Monday, March 11, 2022, Plaintiffs sought injunctive relief. As to Defendants' argument that they will suffer prejudice as a result of Plaintiffs' unreasonable delay, Plaintiffs rely on their subsequent arguments that the State will not suffer irreparable harm if the injunctive relief is granted. The Panel believes that Plaintiffs have the better argument on this issue and that this suit should not be barred on the basis of laches.

Discussion

In Tennessee, the courts are "charge[d] . . . to uphold the constitutionality of a statute wherever possible." *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009). When presented with a question of the constitutionality of a statute, the Court must "begin with the presumption that an act of the General Assembly is constitutional" and "indulge every presumption and resolve every doubt in favor of the statute's constitutionality." *State v. Pickett*, 211 S.W.3d 696, 700 (Tenn. 2007)(quoting *Gallaher v. Elam*, 104 S.W.3d 455, 569 (Tenn. 2003)); *see also Waters*, 291 S.W.3d at 917 (Koch, J., concurring in part and dissenting in part)(citing *Gallaher*, 104 S.W.3d at 459-60; *In re Adoption of E.N.R.*, 42 S.W.3d 26, 31 (Tenn. 2001); *State ex rel. Maner v. Leech*, 588 S.W.2d 534, 540 (Tenn. 1979))("This presumption places a heavy burden on the person challenging the statute."); *Perry v. Lawrence Cty. Election Comm'n*, 411 S.W.2d 538, 539 (quoting *Frazier v. Carr*, 360 S.W.2d 449 (Tenn. 1962); *Bell v. Bank of Nashville*, 7 Tenn. 269 (1823))("'[T]he Legislature of Tennessee, like the legislature of all other sovereign states, can do all things not prohibited by the Constitution of this State or of the United States.' . . . 'To be invalid a statute must be plainly obnoxious to some constitutional provision.'").

Article II, Section 3 of the Tennessee Constitution provides in its final sentence: "In a county having more than one senatorial district, the districts shall be numbered consecutively." Tenn. Const. art. II, § 3. In Section 5 of the same Article, the Tennessee Constitution flatly prohibits the division of counties when creating the 99 districts for the state House of Representatives. *See* Tenn. Const. art II, § 5 ("[N]o county shall be divided in forming such a district."). The Fourteenth Amendment to the United States Constitution and Tennessee's own Equal Protection provisions require "equality of population among districts, insofar as is practicable." *State ex rel. Lockert v. Crowell (Lockert I)*, 631 S.W.2d 702, 706-07 (Tenn. 1982)(citing U.S. Const., amend. XIV; Tenn. Const. art. II, §§ 4, 6; *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Mahan v. Howell*, 410 U.S. 315 (1973); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981); *Smith v. Craddick*, 471 S.W.2d 375 (Tex. 1971)). This principle, typically known as the "one person, one vote" principle, is the "overriding objective" of any redistricting plan. *Reynolds*, 377 U.S. at 579.

An additional federal requirement is established by Section 2 of the Voting Rights Act, formerly codified as 42 U.S.C. § 1973 but now 52 U.S.C. § 10301:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a

> protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301. "The essence of a [Section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).

The Tennessee Supreme Court has previously provided guidance on conflicts between these various provisions, explaining that Sections 3 and 5 of Article II remain binding unless federal standards would render it impossible for the General Assembly to comply with the requirement at issue. *See Lockert I*, 631 S.W.2d at 711, 714-15. The Court stated that "equality of population" is the "principal consideration[,]" but "[p]rimary consideration must also be given to preserving minority strength." *Id.* at 714. Though "of secondary import to equal protection requirements," the requirements of the Tennessee Constitution "are nonetheless valid and must be enforced insofar as possible." *Id.* at 714-15. Thus, "equal protection, preserving minority voting strength, . . . not crossing county lines, . . . contiguity of territory[,] and consecutive numbering of districts" are all part of any redistricting plan. *Id.* at 715. For example, with respect to the division of counties to create House districts, the Tennessee Supreme Court reconciled these distinct mandates by instructing the General Assembly that its plan "must cross as few county lines as is necessary to comply with the federal constitutional requirements." *Id.* at 715; *see also State ex rel. Lockert v. Crowell (Lockert II)*, 656 S.W.2d 836, 838 (Tenn. 1983)(reaffirming this instruction).

No safe harbor based upon prior decisions exists when resolving the tensions of competing constitutional mandates. *See Moore v. State*, 436 S.W.3d 775, 786 (Tenn. Ct. App. 2014)(citing *Cox v. Larios*, 542 U.S. 947, 949 (2004))("There is no safe harbor."); *Rural West Tenn. African-American Affairs Council, Inc. v. McWherter*, 836 F. Supp. 447, 450 (W.D. Tenn. 1993)(rejecting the defendants' argument that past decisions created a safe harbor for future redistricting plans); *see also Lockert I*, 631 S.W.2d at 714 ("The variance certainly should not be greater than any figure which has been approved by the United States Supreme Court; nor would such maximum figure automatically be approved, because the variance for any state will be judged solely by the circumstances present in that state."). In *Moore*, the Court of Appeals explained that in cases subsequent to *Lockert*, the Tennessee Supreme Court has specifically rejected the argument that a deviation of 10% is *de minimis*. *See Moore*, 436 S.W.3d at 786. Indeed, in some instances a deviation of less than 10% may not be justified, while in others a deviation of more than 10% may be justified. *See id.*

Defendants refer several times to this "ten percent rule" - the idea that a total population deviation between districts of less than 10% is considered to be a de minimis deviation.[1] However, the case they derive this rule from states that such a deviation "*as a general matter* . . . falls within this category of minor deviations." *Brown v. Thompson*, 462 U.S. 835, 842 (1983)(emphasis added). In *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973), where the U.S. Supreme Court stated "that minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification

[1] Defendants concede that the "ten percent rule" is neither firm nor universally acknowledged. *See* Defendants' Brief, at p. 14.

by the State," no "ten-percent" or "de minimis" rule was announced. *Id.* In fact, Justice Brennan, joined by Justices Douglas and Marshall, wrote that, in *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the U.S. Supreme Court "rejected the State's argument that 'there is a fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the "as nearly as practicable" standard.'" *Mahan*, 410 U.S. at 341 (Brennan, J., concurring).

The party challenging the constitutionality of a redistricting plan bears the burden of establishing its invalidity. *See Lockert I*, 631 S.W.2d at 709-10, 714-15. If the challenging party successfully establishes that the plan is in violation of a constitutional requirement, then the burden shifts to the defendants to show that their actions were necessary to comply with federal constitutional requirements. *See id.* at 714; *see also Moore*, 436 S.W.3d at 786 (quoting *Tennant v. Jefferson Cty. Comm'n*, 133 S. Ct. 3, 5 (2012))(If the party challenging the redistricting establishes that the population differences "could practicably be avoided," then the burden is on the State to demonstrate that those differences "were necessary to achieve some legitimate state objective."). Whether the defendants "made an honest and good faith effort" to "comply with both federal and state constitutions is an issue of fact which . . . requires a full evidentiary hearing as does the question of justification." *Lockert I*, 631 S.W.2d at 714.

Conclusions of Law

Based on the foregoing findings of fact, the applicable law, and the foregoing discussion, the Panel makes the following legal determinations and rulings under Tenn. R. Civ. P. 65.04:

1. Plaintiffs have made a showing of likelihood of success on the merits as to the Senate plan sufficient to warrant the grant of extraordinary relief in the form of a temporary injunction as to the Senate plan.
2. Plaintiffs have not made a showing of likelihood of success on the merits on the House plan sufficient to warrant the grant of extraordinary relief in the form of a temporary injunction as to the House plan.
3. Given the foregoing ruling on likelihood of success, the Panel concludes that Plaintiffs have shown that there is risk of irreparable harm sufficient to warrant the issuance of extraordinary relief in the form of a temporary injunction as to the Senate plan. Similarly, Plaintiffs have made a sufficient showing on the question of the public interest and the balancing of harms as to the Senate plan.
4. Given the foregoing ruling on likelihood of success, the Panel concludes that Plaintiffs have not shown that there is a risk of irreparable harm sufficient to warrant the issuance of extraordinary relief in the form of a temporary injunction as to the House plan. Similarly, Plaintiffs have not made a sufficient showing on the questions of the public interest and the balancing of harms as to the House plan.
5. Accordingly, the Panel hereby GRANTS Plaintiffs' application for a temporary injunction as to the Senate plan and hereby DENIES Plaintiffs' application for a temporary injunction as to the House plan.

The Panel, accordingly, temporarily enjoins the effectiveness of Senate Bill 0780, Pub. Ch. 596, and hereby enjoins and directs as follows:

1. The Panel hereby temporarily enjoins Defendants, as well as their agents and successors in office, from enforcing or giving any effect to the boundaries of the Senate districts as drawn in SB 0780. The Panel, therefore, temporarily enjoin Defendants from conducting any further election under the enacted map for the Tennessee Senate, pending further orders of the Panel.
2. The Panel embraces, and defers to, the General Assembly's statutory opportunity to remedy the constitutional defect in SB 0780 within fifteen days of entry of this temporary injunction.
3. In the event the General Assembly fails to remedy the constitutional defect in the Senate plan by the foregoing statutory deadline, then the Panel will impose an interim apportionment map that remedies the constitutional defect in the Senate plan; this Court-directed interim Senate plan will apply only to the 2022 Tennessee legislative election map.
4. The Panel hereby extends the April 7, 2022 filing deadline for prospective state Senatorial candidates until May 5, 2022 at Noon in an effort to ensure the enactment or imposition of the new legislative map pertaining to the Senate prior to the May 5, 2022 filing deadline.

Under Tenn. R. Civ. P. 65.05, the Panel directs Plaintiffs to post a bond in the amount of $1,000.00 as security for this temporary injunction. The Panel will hold a telephonic status call on Monday, April 11, 2022 at 1:00 p.m., Central Time, to discuss setting this case for trial on an expedited basis and to discuss other scheduling or logistical issues.

Conclusion[2]

As discussed above, the Panel hereby GRANTS in part and DENIES in part Plaintiffs' application for a temporary injunction.

IT IS SO ORDERED.

s/Russell T. Perkins
RUSSELL T. PERKINS,
Chief Judge

s/J. Michael Sharp
J. MICHAEL SHARP
Judge

s/Steven W. Maroney
STEVEN W. MARONEY
Chancellor, concurring in part and dissenting in part

CONCURRENCE IN PART AND DISSENT IN PART

MARONEY, Chancellor, concurring and dissenting.

I concur with my learned colleagues in finding that the Plaintiffs' Motion for Temporary Injunction is not barred by inadequate standing or laches, as well as in the Conclusions of Law with respect to the House Redistricting Plan. However, I respectfully dissent from that portion of the Order enjoining the enacted Senate Redistricting Plan.

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[2] One of the Judges on the Panel believes that both the House and the Senate plan should be temporarily enjoined, primarily because of the apparent reliance upon what amounts to a "safe harbor" approach in allowing counties to be split thirty times in the House plan when it may well have been possible to produce an acceptable House plan that split fewer counties. The Tennessee Supreme Court has expressly rejected this "safe harbor" approach on more than one occasion in favor of case-by-case review designed to ensure that county lines are crossed as few times as is necessary to comply with federal law. To this Panel member, the General Assembly's approach appears to fail to give appropriate weight to the Constitution of Tennessee as it has been interpreted by the Tennessee Supreme Court in reapportionment cases. The Panel member, however, concluded that this footnote would suffice, given that the majority of the Panel favored temporarily enjoining only the Senate plan and given that this Order, although weighty, is an interim Order that does not bind the Panel, one way or the other, in its final decision after a full, expedited consideration of this case on the merits.

While Plaintiffs have demonstrated that the enacted Senate Redistricting Plan violates the State Constitution's provisions on consecutive numbering, Plaintiffs' likelihood of success hinges on whether the Defendants can meet their burden to demonstrate that the General Assembly violated any state constitutional provisions only to the extent necessary. I believe a full evidentiary hearing is required to address this question. Therefore, I would not presently enjoin the enacted Senate Redistricting Plan. Consequently, I also would not extend the current filing deadline for prospective state senatorial candidates.

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