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IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT

TELISE TURNER, GARY WYGANT, and FRANCIE HUNT,

Plaintiffs,

v.

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

Defendants.

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

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants William Lee, Tre Hargett, and Mark Goins, in their official capacities only, file this memorandum of law in opposition to Plaintiffs' Summary Judgment Motion, and in support thereof, state as follows:

INTRODUCTION

Plaintiffs' Motion for Summary Judgment is fatally flawed because their claims fail for two reasons: 1) they have not satisfactorily demonstrated constitutional standing to challenge the enacted State House and State Senate maps; and 2) because their overly-narrow view of the constitutional standard for determining violations of Article II, Section 6 fails to meaningfully engage with appellate precedent post-*Lockert I*. Their motion must therefore be denied.

On standing: Francie Hunt, the only plaintiff who is a Davidson County registered voter, does not have standing to challenge the Senate map because she only identifies an injury in law, not an injury in fact as required for constitutional standing. *See City of Memphis v. Hargett*, 414

S.W.3d 88, 98 (Tenn. 2013); *American Civil Liberties Union of Tenn. v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006).

Standing also dooms Plaintiffs' challenge to the House map. Plaintiffs are individual voters and therefore can only stand on the basis that their resident county was unconstitutionally split—a generalized grievance that does not personally affect them is insufficient. *United States v. Hays*, 515 U.S. 737, 743 (1995); *Hamilton v. Metropolitan Government of Nashville*, No. M2016-00446-COA-R3-CV, 2016 WL 6248026, at *4 (Tenn. Ct. App. Oct. 25, 2016). Davidson and Shelby County are not split at all by the House map and thus Plaintiffs Hunt and Turner do not have standing to bring Count II. And while Gibson County is split, Plaintiff Wygant's statement of undisputed material facts cited Defendants' expert's federal constitutional justification for its split. Moreover, the only map submitted by Plaintiffs' expert that wasn't overtly unconstitutional also split Gibson County while having a higher population deviation than the enacted House map.

Since all three Plaintiffs either do not live in a split county or acknowledge that the split of their home county is constitutionally justified to comply with federal requirements, they have failed to assert a redressable injury in fact.

On the standard for Article II, Section 6 challenges: No one denies that federal requirements—such as "one person, one vote" per the equal protection clause of the Fourteenth Amendment to the United States Constitution and Section 2 of the Voting Rights Act's prohibition against discrimination based on race—override state constitutional requirements.

Here, the House Map redistricting process clearly considered and attempted to comport with the constitutional guidelines regarding county splitting. No map presented to the General Assembly was even arguably constitutional besides the enacted plan. And the result still

complied with the "upper limit" of thirty county splits articulated by the Tennessee Supreme Court. *See State ex rel. Lockert v. Crowell*, 656 S.W.2d 836, 844 (Tenn. 1983); *see also Moore v. State*, 436 S.W.3d 775, 785 (Tenn. Ct. App. 2014). Moreover, Plaintiffs have made no showing of bad faith or improper purpose as required by those precedents.

Plaintiffs may choose to ignore the standards articulated in *Lockert II* and *Moore v. State*. This Court, respectfully, may not. If the Tennessee Supreme Court wishes to clarify the standard, it certainly may, but at the summary judgment stage at the trial level, it is clear that the enacted House map satisfies the presently-applicable constitutional standard articulated by the Tennessee Supreme Court in *Lockert II* and the Court of Appeals in *Moore*.

FACTUAL AND PROCEDURAL HISTORY

I. HOUSE MAP—House Bill 1035, Public Chapter 598

In accordance with the requirements of Art. II § 4, after the 2020 census the Tennessee House of Representative reapportioned the districts for the Tennessee State House. The initial bill, House Bill 1035, was introduced on February 10, 2021.[1] Prior to the introduction of that bill, the House established a redistricting website containing a map of the then-current House districts and a link to each specific district. (Addl. Fact 1-TRO Resp. Ex. 1, Himes Aff., p. 5)[2]. Information concerning the redistricting process was posted to the website and made available to the public as it became available. (Addl. Fact 2-TRO Resp. Ex. 1, Himes Aff., p. 5).

On August 25, 2021, the Speaker of the House of Representatives appointed the 16-member House Select Committee on Redistricting ("House Committee"), including the Chair and three Area Coordinators. (Addl. Fact 3-TRO Resp. Ex. 1, Himes Aff., p. 6). The House Committee

[1]The Legislative History is public record, which is accessible at Tennessee General Assembly Legislation (tn.gov).

[2] Citations to the Statement of Undisputed Material Facts will be cited as "Fact" followed by the respective number and supplemental citation to the record.

held its first public meeting on September 8, 2021. At that meeting, House Committee counsel made a presentation about the redistricting process. (Addl. Fact 4-TRO Resp. Ex. 1, Himes Aff., p. 6; Ex. Himes 3). As part of that presentation, counsel discussed the 2020 Census numbers—noting that the State's population growth was vastly uneven, with thirty (30) counties experiencing negative growth and seventeen (17) counties experiencing positive growth in excess of 10%. There were also six counties whose growth was essentially stagnant (less than 1%), including Shelby and Sullivan Counties. (Addl. Fact 5-TRO Resp. Ex. 1, Himes Aff. p. 6-7; Ex. Himes 3).

Next, counsel discussed the House Redistricting Guidelines codified at Tenn. Code Ann. § 3-1-103(b). These guidelines were first adopted by the General Assembly in 1992 in response to the redistricting cases in the 1980s: *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982) ("*Lockert I*"), *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983) ("*Lockert II*"), *Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985), and *State ex rel. Lockert v. Crowell*, 729 S.W.2d 88 (Tenn. 1987) ("*Lockert III*"). (Addl. Fact 6-TRO Resp. Ex. 1, Himes Aff., p. 7; Ex. Himes 3).

These guidelines reflect the legislative intent that any House redistricting plan comply with federal constitutional and statutory and state constitutional law and include the following:

> (1) Each district be represented by a single member;
>
> (2) Districts must be substantially equal in population in accordance with the constitutional requirements for "one (1) person one (1) vote" as judicially interpreted to apply to state legislative districts;
>
> (3) Geographic areas, boundaries and population counts used for redistricting shall be based on the [2020] federal decennial census;
>
> (4) Districts must be contiguous and contiguity by water is sufficient, and, toward, that end, if any voting district or other geographical entity designated as a portion of a district is found

> to be noncontiguous with the larger portion of such district, it shall be constitute a portion of the district smallest in population to which it is contiguous;
>
> (5) No more than thirty (30) counties may be split to attach to other counties or parts of counties to form multi-county districts; and
>
> (6) The redistricting plan will comply with the Voting Rights Act and the fourteenth and fifteenth amendments to the United States Constitution.

Tenn. Code Ann. § 3-1-103(b).

Finally, counsel discussed the procedures and deadline for submission of redistricting plans, as well as the redistricting timetable.

There were four (4) plans that were timely submitted to the House Committee. House Committee counsel conducted a standard basic evaluation of each of these plans. These evaluations, which were provided to the House Committee members and posted on the House Committee's website, evaluated the following aspects of each plan:

- Number of districts
- Number of majority-minority districts
- Overall variance (range) and the high and low
- Number of county splits
- Contiguity
- Unassigned areas
- Paired incumbents

(Addl. Fact 7-TRO Resp. Ex. 1, Himes Aff., p. 8; Ex. Himes 3).

The plan evaluations reflected that none of the plans fully complied with the statutory guidelines set forth in Tenn. Code Ann. § 3-1-103(b). Specifically, the Windrow Plan was non-contiguous, had an overall variance of 24.23% with 26 county splits, only 5 majority-minority districts (there are currently 13 majority-minority districts) and paired 46 incumbents. (Addl. Fact 8- TRO Resp. Ex. 1, Himes Aff., p. 8; Ex. Himes 4). The Equity Alliance and Memphis A. Phillip Randolph Institute Plan—while having a lower overall variance of 9.75% and split 30 counties—

was non-contiguous, had only 2 majority-minority districts and paired 51 incumbents. (Addl. Fact 9-TRO Resp. Ex. 1, Himes Aff., p. 9; Ex. Himes 4). Similarly, the Wishart Plan had an overall variance of 9.01% and split 30 counties, but it was also non-contiguous, only had 6 majority-minority districts and paired 26 incumbents. (Addl. Fact 10-TRO Resp. Ex. 1, Himes Aff., p. 9; Ex. Himes 4). Finally, the plan submitted by Orrin, Newton, Lichtenstein and Moore had an overall variance of 19.28%, split 58 counties, only had 10 majority-minority districts, paired 20 incumbents and was noncontiguous. (Addl. Fact 11-TRO Resp. Ex. 1, Himes Aff., p. 9; Ex. Himes 4). Additionally, all the plans split the four urban counties (Shelby, Davidson, Knox and Hamilton) and had multiple splits of some counties.

The Democratic Caucus attempted to submit a plan but failed to meet the submission deadline. And, as with the four timely-submitted plans, it did not comply with all the statutory guidelines. For example, while the plan had an overall variance of 6.71%, it only had 8 majority-minority districts, split 35 counties, including double splits of Sullivan, Washington, Wilson, and Blount Counties, and split three of the four urban counties (Davidson, Hamilton, and Shelby). The plan was also non-contiguous as it assigned one or more census blocks located in one district to another district approximately 18 times and it paired 24 incumbents. (Addl. Fact 12-TRO Resp. Ex. 1, Himes Aff., p. 9; Ex. Himes 5). In informing the Democratic Caucus that this plan had been rejected as untimely, House Committee counsel also explained the problems with their plan and, in particular, informed them that the double splits of Sullivan, Washington, Wilson and Blount Counties and that the splits of Shelby, Davidson and Hamilton County appeared to be in violation of Art. II, § 5 of the Tennessee Constitution as interpreted by the Tennessee Supreme Court in *Lockert II*. (Addl. Fact 13-TRO Resp. Ex. 1, Himes Aff., p. 9-10).

The House Committee scheduled another public meeting for December 17, 2021. The day before that meeting, the House Democratic Caucus submitted a new redistricting plan ("Democratic Caucus plan"). This new plan reduced the number of split counties from 35 to 23 and eliminated the double splits in Sullivan, Washington, Wilson and Blount Counties, but it continued to impermissibly double split Shelby County. (Addl. Fact 14-TRO Resp. Ex. 1, Himes Aff., p. 10; Ex. Himes 6). At the public meeting the next day, House Committee counsel noted that the plan double split Shelby County and that this split appeared to violate Art. II, § 5 of the Tennessee Constitution as interpreted by the Tennessee Supreme Court in *Lockert II*. No member of the House Committee made a motion to approve either the Democratic Caucus plan or any of the other four plans submitted. Instead, the only motion made was to approve the plan that counsel had prepared for the House Committee. (Addl. Fact 15-TRO Resp. Ex. 1, Himes Aff., p. 14).

That plan contains 99 single member districts, is wholly based on 2020 Census geography and population data and establishes 99 contiguous districts in accordance with Tenn. Code Ann. § 3-1-103(b)(1), (3) and (4). (Addl. Fact 16-TRO Resp., Ex. 1, Himes Aff., p. 14-15). The plan has an overall variance of 9.90%, which is within the parameters of constitutional requirements for "one person, one vote" as interpreted to apply to state legislative districts and in accordance with Tenn. Code Ann. § 3-1-103(b)(2), and splits a total of 30 counties, consistent with the requirements of Art. II, § 5 of the Tennessee Constitution, as interpreted by the Tennessee Supreme Court in *Lockert II* and in accordance with Tenn. Code Ann. § 3-1-103(b)(5). (*Id.*) Finally, the plan maintains 13 effective majority-minority districts in compliance with the Voting Rights Act and Tenn. Code Ann. § 3-1-103(b)(6). (*Id.*)

This plan was approved by the House Committee, became House Bill 1035, and was then referred to the House Public Service Committee and recommended for passage on January 12,

2022. House Bill 1035 was then referred to the House State Government Committee and recommended for passage on January 18, 2022. House Bill 1035 came before the full House for third and final consideration on January 24, 2022. At that time, Representative Dixie presented the Democratic Caucus plan as an amendment (Amendment 4) to House Bill 1035. That amendment was tabled, and the House voted to adopt House Bill 1035. This plan was ultimately adopted by both Houses of the General Assembly and signed by the Governor as Public Chapter 598 and became effective on February 6, 2022.

II. SENATE MAP—Senate Bill 0780, Public Chapter 596[3]

In accordance with the requirements of Art. II § 4, after the 2020 census, the Tennessee Senate reapportioned the districts for the Tennessee State Senate. The initial bill, Senate Bill 0780, was introduced on February 9, 2021. On September 17, 2021, the Lt. Governor appointed the members of the Senate Ad Hoc Committee on Redistricting ("Senate Committee"). Just as the House Committee, the Senate Committee established a website and posted information about redistricting as information became available. In particular, the Senate Committee posted Guidelines for the Submission of Senate redistricting plans and set a deadline of November 22, 2021, for submission of proposed plans.

The Senate Committee ultimately received five plans for consideration. Like the House Committee process, counsel for the Senate Committee conducted a standard basic evaluation of each of those plans and those evaluations were provided to the Senate Committee members and posted on the Senate Committee's website. Each of these plans had issues. For example, the Hildabrand plan had an overall deviation of 6.83% and split eight (8) counties, but only had three

[3] As Defendants are defending the Senate Map on the threshold ground of standing, the legislative history is included for context, but as it is not relevant for a standing analysis, it is not included in Defendants' additional statement of undisputed material facts.

majority-minority districts (there were four under the 2012 Senate plan) and it switched an even-numbered district with an odd-numbered district. The Lee Plan had an overall deviation of 5.49% but split 19 counties, only had three majority-minority districts and paired 12 incumbents. The Miles Plan had an overall deviation of 8.09%, split 15 counties and only had two majority-minority districts. It also paired six incumbents. The Trivette Plan also had an overall deviation of 8.09% but only split nine counties and had three majority-minority districts. The plan paired twelve incumbents and moved some incumbents from an odd-number district to an even-numbered district, and vice versa. Finally, the Puttbrese plan had an overall deviation of 7.70%, split eight counties and only had three majority-minority districts.

The Senate Committee considered all of these plans at their public meeting on December 14, 2021. At that same meeting, the Senate Committee considered the plan that had been prepared for the Committee. That plan had an overall deviation of 6.17%, split ten counties and paired no incumbents. It also had four majority-minority districts—making it the only plan presented to the Senate Committee for consideration which retained the number of majority-minority districts from the previous map. The Senate Committee ultimately adopted this plan which became Senate Bill 0780.

Senate Bill 0780 was subsequently referred to the Senate Judiciary Committee and recommended for passage on January 18, 2022. Senate Bill 0780 came before the full Senate for third and final consideration on January 20, 2012. At that time, Senator Yarbro introduced Amendment 2 which presented an entirely new and different plan for reapportionment of the State Senate. The Amendment 2 plan had an overall deviation of 7.7% and split eight counties while pairing no incumbents, but only had three majority-minority districts. That amendment was

ultimately tabled, and the Senate voted to adopt Senate Bill 0780. This plan was ultimately passed by both Houses of the General Assembly and signed by the Governor as Public Chapter 596.

III. Procedural History

Nearly two-and-half weeks after both the House and Senate redistricting plans became law, Plaintiffs filed their complaint challenging the constitutionality of each map. (Compl.) Plaintiffs alleged that the Senate Plan violated the Tennessee Constitution by failing to consecutively number the districts in Davidson County and that the House Plan violated the Tennessee Constitution by excessively dividing counties. (Compl. at ¶¶ 64-75).

Notably, Plaintiffs did not contemporaneously seek a temporary injunction. Instead, Plaintiffs delayed another two weeks before filing a motion for temporary injunction on March 11, 2022, alongside an amended verified complaint. (Plaintiffs' Mtn. for Temporary Injunction; Amend. Compl.). On April 6, 2022, a majority of the panel granted a temporary injunction with respect to the Senate plan. (Temp. Inj. Order).

The next day, Defendants filed for extraordinary appeal pursuant to Tenn. R. App. P. 10, and contemporaneously filed an emergency motion for stay pending extraordinary appeal pursuant to Tenn. R. App. P. 7. The Tennessee Supreme Court assumed jurisdiction of the application *sua sponte* and granted the application for extraordinary appeal. On April 13, 2022, the Supreme Court vacated the temporary injunction, determining that Plaintiffs failed to demonstrate that their alleged harms outweighed the electoral havoc created by delaying the Senatorial candidate filing deadline and its subsequent harms on the administration of the upcoming election. *Moore v. Lee*, 644 S.W.3d 59, 67 (Tenn. 2022).

On remand, Plaintiffs filed a second amended complaint on June 16, 2022, which reflected that relief was now sought in advance of the 2024 elections. (Second Amend. Compl.) And on

October 17, 2022, Plaintiffs filed their third amended complaint which substituted Plaintiff Francie Hunt for Plaintiff Akilah Moore. (Third Amend. Compl.).

STANDARD OF REVIEW

I. Summary Judgment Standard.

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. When the moving party does not bear the burden of proof at trial, that party may show that it is entitled to judgment as a matter of law by either "affirmatively negating an essential element of the nonmoving party's claim" or by "demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the non-moving party's claim or defense." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015).

When a summary judgment motion is made, any party opposing the summary judgment party must file a response to each fact set forth by the nonmovant in the manner provided in Tenn. R. Civ. P. 56.03. *Id.* at 265. To survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, set forth specific facts at the summary judgment stage "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06; *Rye* at 265. To survive summary judgment in such a case, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts" and must instead "demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party." *Id.* The focus at the summary judgment stage is on the

evidence the nonmoving party comes forward with at the summary judgment stage. *Id.*

II. Constitutional Challenge Standard.

As the House and Senate Maps are legislative enactments, the standard of review for constitutional challenges is applicable. When there is a challenge to the constitutionality of a state statute, courts must begin with the presumption that legislative acts are constitutional. *State v. Pickett*, 211 S.W.3d 696, 700 (Tenn. 2007) (citing *Gallaher v. Elam*, 104 S.W.2d 455, 459 (Tenn 2003); *State v. Robinson*, 29 S.W.3d 476, 469 (Tenn. 2000); *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997)). Thus, courts are directed to "indulge every presumption and resolve every doubt in favor of the statute's constitutionality." *Pickett*, 211 S.W.3d at 780 (quoting *State v. Taylor*, 70 S.W.3d 717, 720-21 (Tenn. 2002)). To be found invalid, a statute must be plainly at odds with a constitutional provision. *Perry v. Lawrence County Election Comm'n*, 411 S.W.2d 538, 539 (Tenn. 1967), and a "heavy burden" is placed on one who attacks a statute. *Bailey*, 188 S.W.3d at 547; *Tennessee ex rel. Maner v. Leech*, 588 S.W.2d 534, 540 (Tenn. 1979). Furthermore, a challenge to a statute's constitutionality does not give a court license to second-guess the General Assembly's policy judgments, *Draper v. Westerfield*, 181 S.W.3d 283, 290 (Tenn. 2005), or to inquire into the motives of the General Assembly. *Cosmopolitan Life Ins. Co. v. Northington*, 300 S.W.3d 911, 918 (Tenn. 1957).

The Tennessee Supreme Court has recognized that there is a distinction between a facial challenge and an "as applied" challenge to a statute's constitutionality. *See Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 454-55 (Tenn. 1995). A facial challenge to a statute involves a claim that the statute fails an applicable constitutional test and should be found invalid in all applications. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, the courts have recognized that a facial challenge to a statute is the most difficult challenge to mount successfully, *Lynch v.*

City of Jellico, 205 S.W.3d at 390, and the presumption of the statute's constitutionality applies with even greater force when a facial challenge is made. *In re Burson*, 909 S.W.2d 768, 775 (Tenn. 1995). Accordingly, the party asserting a facial challenge must establish that no set of circumstances exists under which the statute would be valid. *Lynch v. City of Jellico*, 205 S.W.3d at 390 (quoting *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993)).

In general, courts defer to legislative enactments because they represent "the duly enacted and carefully considered decision of a coequal and representative branch of our government," *Walters v. Nat. Assn. of Radiation Survivors*, 473 U.S. 305, 319 (1985), and because the legislature "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broadcasting Systems Inc. v. FCC*, 520 U.S. 180, 195-96 (1997) (quotations omitted).

This deference is particularly applicable within the context of redistricting. "A state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." *Connor v. Finch*, 431 U.S. 407, 414-15 (1977). *See also Petition of Below*, 855 A.2d 459 (2004) (recognizing that '[u]nlike the legislature, courts have no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name."). Consequently, in the absence of a clear, direct, irrefutable constitutional violation, judicial intervention is inappropriate given the complexity in delineating state legislative district boundaries and the political nature of such endeavors. *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 383 (W.Va. 2012). *See also Miller v. Johnson*, 515 U.S. at 915 (recognizing that judicial review of redistricting legislation represents a serious intrusion on the most vital of local functions and that States "must have the discretion to exercise the political judgment necessary to balance competing interests"); *Georgia*

v. Ashcroft, 539 U.S. 461, 123 S.Ct. 2498, 2511-12 (2003); *Maryland Commission for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964). Moreover, in reviewing Plaintiffs' arguments, this Court should "consider not only the specific violations claimed, but also those claims within the context of the entire plan, keeping in mind the difficulties in satisfying the various legal requirements statewide." *In Re Reapportionment of Town of Hartland*, 624 A.2d 323, 327 (Vt. 1993).

ARGUMENT

I. Plaintiffs are Not Entitled to Summary Judgment as to Count II Because Plaintiffs Lack Standing to Challenge the Enacted Senate Map.

The only Plaintiff who lives in Davidson County, Francie Hunt, cannot articulate how the nonconsecutive numbering harms her, other than it violates the Tennessee Constitution. Nonconsecutive numbering does not impact her right to vote, nor does it create the risk that all senators from Davidson County could be subject to turnover in the same election cycle. Injuries in law are not injuries in fact, and the Tennessee Constitution requires an injury in fact to bring suit. *See City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013); *American Civil Liberties Union of Tenn. v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006). Thus, Plaintiff Hunt does not have standing to challenge the Enacted Senate Map.

As noted in Defendants' Response in Opposition to Plaintiffs' Motion to Compel and Defendants' Motion for Summary Judgment, Defendants do not defend the merits of the Senate Map because Plaintiffs cannot demonstrate constitutional standing sufficient to allow the Court to reach the merits of their challenge to the Senate Map. For this threshold reason, Plaintiffs are not, as a matter of law, entitled to summary judgment as to Count II.

The United States Constitution confines the jurisdiction of the federal courts to "cases" and "controversies." U.S. Const. art III, § 2, cl 1. Although the Tennessee Constitution does not

include a similar express limitation on the exercise of judicial power, Tennessee Courts have long recognized that "the province of a court is to decide, not advise, and to settle rights, not to give abstract opinions." *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Co.*, 301 S.W.3d 196, 203 (Tenn. 2009) (quoting *State v. Wilson*, 70 Tenn. 204, 210 (1879)). To determine whether a particular case involves a legal controversy, Tennessee courts utilize justiciability doctrines that mirror those employed by the United States Supreme Court and the federal courts. *Id.* One of these justiciability doctrines—standing—is at issue in this motion for summary judgment.

The requirement of standing is "rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). Courts employ the doctrine to "determine whether a particular 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). Standing is a prerequisite for judicial consideration of the merits of a claim. *Fisher v. Hargett,* 604 S.W.3d 381, 396 (Tenn. 2020). By limiting the class of parties who may properly invoke intervention of the courts, the doctrine of standing also promotes healthy restraint in the exercise of judicial power. As the Tennessee Supreme Court observed in *Am. Civil Liberties Union of Tennessee v. Darnell*, 195 S.W.3d 612 (Tenn. 2006):

> Grounded upon "concern about the proper—and properly limited—role of the courts in a democratic society," *Warth [v. Seldin],* 422 U.S. [490,] 498 [(1975)], the doctrine of standing precludes courts from adjudicating an action at the instance of one whose rights have not been invaded or infringed." *Mayhew v. Wilder,* 46 S.W.3d 760, 767 (Tenn.Ct.App.2001), *perm. app. denied* (Tenn. April 30, 2001).
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> * * *
>
> The doctrine of standing restricts "[t]he exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, ... to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.* 454 U.S. 464, 473, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). **Without limitations such as standing**

> **and other closely related doctrines "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights**." *Warth,* 422 U.S. at 500.

Id. at 619-620 (emphasis added).

Constitutional standing is one of the "irreducible . . . minimum" requirements that a party must meet to present a justiciable controversy. *City of Memphis*, 414 S.W.3d 88, 98. To establish constitutional standing, a plaintiff must demonstrate: (1) that the plaintiff has suffered a distinct and palpable injury, (2) that a causal connection exists between the alleged injury and the challenged conduct, and (3) that the injury is capable of being redressed by a favorable decision of the court. *Id*.

A plaintiff must show these three essential elements of standing "'*by the same degree of evidence*' as other matters on which the plaintiff bears the burden of proof." *Darnell,* 195 S.W. 3d at 620 (emphasis added) (citing *Petty v. Daimler/Chrysler Corp.*, 91 S.W. 3d 765, 767 (Tenn. Ct. App. 2002)). The degree of evidence depends upon the stage of litigation at which standing is challenged. "'Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported . . . with the manner and degree of evidence required at the successive stages of litigation.'" *Metropolitan Gov. or Nashville and Davidson County v. Tenn. Dept. of Education,* 645 S.W.3d 141, 148 (Tenn. 2022) (quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561 (1992)). Therefore, Plaintiffs cannot rest upon "mere allegation or denials," but must "set forth" by affidavit or other evidence specific facts demonstrating each of the three essential elements of standing. Tenn. R. Civ. P. 56.06.

A. Plaintiffs fail to show any injury in fact.

To meet the first essential element of standing, Plaintiffs must show a distinct and palpable injury, one that is not merely conjectural or hypothetical. *Darnell*, 195 S.W.3d at 620. "'The sort of distinct and palpable injury that will create standing must be an injury to a recognized legal right or interest.'" *Metro. Gov't of Nashville v. Bd. of Zoning Appeals of Nashville*, 477 S.W.3d 750, 755 (Tenn. 2015) (quoting *State v. Harrison*, 270 S.W.3d. 21, 27-28 (Tenn. 2008)). Moreover, the injury complained of must be "if not actual, then at least imminent." *Calfee v. Tenn. Dep't of Transp.*, No. M2016-01902-COA-R3-CV, 2017 WL 2954687, at *9 (Tenn. Ct. App. July 11, 2017) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "'In other words, the harm must have already occurred or it must be likely to occur 'imminently.'" *Id.* (quoting *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 710 (6th Cir. 2015)); *see also Town of Collierville v. Town of Collierville Bd. of Zoning Appeals*, No. W2013-02752-COA-R3-CV, 2015 WL 1606712, at *4 (plaintiff is required to show that he or she "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant").

Not only must Plaintiffs' asserted injury be concrete and palpable, but it must also be "distinct from an injury shared by the public at large." *Mayhew v. Wilder* 46 S.W.3d 760, 768 (Tenn. Ct. App. 2001). An injury that is "predicated on an interest that a litigant shares in common with the general citizenry" is insufficient. *City of Memphis*, 414 S.W.3d at 98. "In determining whether a plaintiff has a personal stake sufficient to confer standing, the focus should be on whether the complaining party has alleged an injury in fact, economic or otherwise, which distinguishes that party, in relation to the alleged violations from the undifferentiated mass of the public." *Mahew* at 767 (Tenn. Ct. App. 2001).

A plaintiff raising only a generalized grievance about improper or unconstitutional governance "shared in substantially equal measure by all or a large class of citizens does not state

an injury in fact sufficient to confer standing." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also United States v. Hays*, 515 U.S. 737, 743 (1995); *Hamilton v. Metropolitan Government of Nashville*, No. M2016-00446-COA-R3-CV, 2016 WL 6248026, at *4 (Tenn. Ct. App. Oct. 25, 2016) ("a plaintiff's interest must be different from not only the general public, but also from any large class of citizens"). A plaintiff challenging the constitutionality of a statute is required to show that he or she "'*personally* has sustained or is in immediate danger of sustaining, some direct injury and not merely that he [or she] suffers in some indefinite way in common with people generally.'" *Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001) (quoting *Parks v. Alexander*, 608 S.W.2d 881, 885 (Tenn. Ct. App. 1980) (emphasis added). Otherwise, the State would be required to defend against "a profusion of lawsuits" from taxpayers and citizens. *Darnell*, 195 S.W.3d at 620 (quoting *Parks v. Alexander*, 608 S.W.2d 881, 885 (Tenn. Ct. App. 1980)).

Here, Plaintiffs fail to satisfy the first and most fundamental element of standing – injury in fact. Alleging nothing more than a "generalized grievance" shared with a large class of voters, Plaintiffs fail to demonstrate any concrete or particularized injury. Plaintiffs challenge the non-consecutive numbering of the Senate districts in Davidson County as violating article II, § 3 of the Tennessee Constitution, but they fail to say—or show—how the numbering of these districts harms them in any distinct or palpable way.

Clearly, Plaintiffs Turner and Wygant allege no cognizable injury, because neither resides in Davidson County or in any non-consecutively numbered senatorial district. In the context of redistricting challenges, federal courts have routinely held that a plaintiff must reside in the challenged district to establish standing, absent specific evidence of some other distinct and palpable injury. *See, e.g., Hays*, 515 U.S. at 745; *Gill v. Whitford*, 138 S. Ct. 1916, 1929-31 (2018).

For instance, where plaintiffs' alleged harm is dilution of their votes, "that injury is district specific." *Gill* at 1930. In such redistricting cases, a plaintiff who does not live in an allegedly affected district, "assert[s] only a generalized grievance against governmental conduct of which he or she does not approve." *Hays* at 745. The federal courts' residency requirement in redistricting cases comports with Tennessee's standing requirements. Unless a plaintiff resides in a challenged district or alleges some other distinct injury, there is nothing to differentiate that plaintiff's interest from those shared in common with the general citizenry. *City of Memphis*, 414 S.W.3d at 98. Thus, Plaintiff Turner, who resides in Shelby County (Addl. Fact 17-Third Amend. Compl., ¶ 15; Deposition of Telise Turner, p. 14), and Plaintiff Wygant, who resides in Gibson County (Addl. Fact 18-Third Amend. Compl., ¶ 16; Deposition of Gary Wygant, p. 5), could never establish standing to challenge the numbering of Senate districts in Davidson County on residency alone. Moreover, Plaintiffs Turner and Wygant do not allege any injury flowing from the numbering of the districts under the Senate plan.

Plaintiff Hunt does at least reside within Davidson County, and within the non-consecutively numbered Senate District 17, (Addl. Fact 20-Deposition of Francie Hunt, p. 45; Third Amend. Compl., ¶ 17), but she nevertheless fails to demonstrate—or even articulate—any cognizable injury flowing from the nonconsecutive numbering of districts under the Senate plan. Ms. Hunt states that she "felt compelled" to bring this lawsuit to "uphold the letter of the Constitution," but she is unable to identify any concrete harm that she has personally suffered because of such numbering. (Addl. Fact 21-Hunt Depo., p. 50-54). Ms. Hunt maintains that she is "harmed whenever the Constitution is not adhered to the way it's intended." (Addl. Fact 22-Hunt Depo., p. 54). She further insists that "if that's how [the Constitution] is written, that's how it ought to be applied." (*Id.*) But this is precisely the kind of "undifferentiated, generalized

grievance about the conduct of government that our courts have refused to countenance in the past." *Lujan*, 377 U.S. at 561. Certainly, Ms. Hunt made no similar complaint when she resided on Eastland Avenue in the 2000's and her district was not consecutively numbered with other Davidson County senatorial districts.[4] (Addl. Fact 23-Hunt Depo., p. 66; Addl. Fact 25-Hunt Depo., p. 8-10, 22; SB 197, Pub. Ch. 466 (2002)). Ms. Hunt only discovered her alleged "injury" and felt compelled to vindicate an abstract interest in having consecutively numbered Davidson County senatorial districts when she was asked to join as a plaintiff in this already-pending litigation. (Addl. Fact 26-Hunt Depo., p. 30-34).

Notably, Plaintiffs allege no constitutional deficiency in the Senate plan other than non-consecutive numbering of the Senate districts in Davison County. Plaintiffs do not complain about how the boundaries of the Senate districts were drawn or the composition of the Senate districts. In the latest iteration of their Complaint, Plaintiffs identify one practical consequence of the non-consecutive numbering: Davidson County's three odd-numbered Senate districts (17, 19, and 21) will come up for election in the gubernatorial election cycle, while District 20 will come up for election in the national presidential election cycle. (Third Amended Complaint, ¶¶ 30, 31). Plaintiffs allege that consecutive numbering of senatorial districts and staggered election cycles "entitle the citizens of more heavily populated Tennessee Counties, like the citizens of Tennessee itself, to elect approximately half of their Senators every two years." (*Id.* at ¶ 33). Plaintiffs further allege that the newly enacted Senate map "violates Ms. Hunt's constitutional right, as a Davidson County resident and voter, to representation by a consecutively numbered county senatorial delegation and her right to vote in a senatorial district constructed in compliance with the Tennessee Constitution." (*Id.* at ¶ 76). Plaintiffs' own framing of their theory of injury

[4] Indeed, the Senatorial Districts in Davidson County were nonconsecutively numbered from 2000-2010. (Addl. Fact 24-SB 197, Pub. Ch. 466 (2002) (Davidson County's Senatorial Districts were numbered 19, 20, 21, and 23)).

underscores the fact that Ms. Hunt has suffered no *concrete* or *particularized* injury because of non-sequential numbering of her Senate district. Ms. Hunt apparently seeks to uphold some abstract interest held in the aggregate by "citizens of more heavily populated Tennessee counties," "Davidson County residents," or Tennesseans generally, "to elect approximately half of their Senators every two years." But Ms. Hunt still may exercise her right to vote in an election for State Senate in her assigned district every four years. And, like all Tennessee registered voters, Ms. Hunt is represented by only one State Senator. Logically, there can exist no *individual* right "to elect half [the] senators every two years." It is apparent, therefore, that nonconsecutive numbering of the Davidson County senatorial districts infringes upon no distinct individual right held by Ms. Hunt. Plaintiffs' strained theory of injury is simply insufficient to support standing because it alleges nothing more than an amorphous, generalized grievance shared by a large class of voters.

B. Non-consecutive numbering of the Senate districts in Davidson County does not burden Plaintiffs' fundamental right to vote.

The Supreme Court has long recognized that a person's right to vote is "individual and personal in nature." *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). Thus, "voters who allege facts showing disadvantage *to themselves as individuals* have standing to sue" to remedy that disadvantage. *Baker v. Carr*, 369 U.S. 186, 206 (1962) (emphasis added). Consistent with these principles, the Tennessee Supreme Court has made it clear that standing is lacking when a plaintiff's own right to vote has not been compromised. *ACLU v. Darnell*, 195 S.W.3d 612, 624-625 (Tenn. 2006) (citations omitted). Further, the Tennessee Supreme Court has rejected the proposition that standing may be predicated simply upon "plaintiffs' status as voters." *Id.*

Importantly, Plaintiffs' constitutional challenge to the non-consecutive numbering of Senate districts in Davidson County is not premised upon any infringement of their *own* rights to

vote. Clearly, the numbering of Senate districts in Davidson County does not affect Mr. Turner's and Mr. Wygant's right to vote, since neither resides in a county with non-consecutive numbering of Senate districts. (Addl. Fact 17-Third Amended Complaint, ¶ 15; Turner Depo., p. 14; Addl. Fact 18-Third Amended Complaint, ¶ 16; Wygant Depo., p. 5). Furthermore, at the time of their respective depositions, Plaintiffs Turner and Wygant were not even aware of the numbers of their own Senate districts. (Addl. Fact 19-Wygant Depo., p. 9; Turner Depo., p. 14). Although Ms. Hunt resides in a non-consecutively numbered Senate district, she, likewise, has sustained no particularized disadvantage to her right to vote. She was able to vote in both the August and November 2022 elections, and, to the best of her knowledge, her vote counted. (Addl. Fact 27-Hunt Depo., p. 52-53). And she may still vote for whichever candidate she prefers in Senate District 17 in future elections (assuming she continues to reside within Senate District 17). Notably, Ms. Hunt only alleges that any harm results to her from the particular composition of Senate District 17, but she does not claim that her vote carries less weight under the Senate plan. (Addl. Fact 28-Hunt Depo., p. 53-54, 58-59, 44).

Contending that Plaintiffs have standing to challenge the Senate plan, Plaintiffs rely upon Tennessee precedent wherein the Tennessee Supreme Court found standing present "when the fundamental voting rights of Tennessee citizens are threatened." (Reply ISO Motion for Temporary Injunction at 4) (citing *Fisher v. Hargett*, 604 S.W.3d 381, 396 (Tenn. 2020) and *City of Memphis v. Hargett*, 414 S.W.3d 88, 98-99 (Tenn. 2013). The court relied on the same authority in its Order, April 6, 2022 when it found "on a preliminary basis" that all three Plaintiffs had standing to sue. (Order at 9). However, neither *Fisher* nor *City of Memphis* supports a finding of standing here, because non-consecutive numbering of Senatorial districts does not burden Plaintiffs' fundamental right to vote. In both *Fisher* and *City of Memphis*, the plaintiffs'

fundamental right to vote was threatened. In *Fisher,* the plaintiffs sought expansion of the state's vote-by-mail procedures to all registered Tennessee voters who wished to vote by absentee ballot during the COVID-19 pandemic. Plaintiffs were registered voters with special vulnerability to COVID-19, and therefore "asserted a sufficient infringement and . . . alleged sufficient injury facts regarding injury to establish constitutional standing." *Fisher*, 604 S.W.3d at 396. Similarly, in *City of Memphis,* the voter identification requirements at issue impacted the individual plaintiffs' ability to cast a ballot. Analyzing the burden upon each plaintiff's own right to vote, the Tennessee Supreme Court held in *City of Memphis*:

> The individual Plaintiffs have met the first, or "injury," element of standing by asserting multiple infringements of their right of suffrage, including claims that the photo ID requirement established by the Act unlawfully burdens their ability to cast an in-person ballot, impermissibly adds a voting qualification to those enumerated in our constitution, and violates the right to equal protection by imposing different requirements for in-person and absentee voters. These claimed injuries are palpable, as opposed to conjectural or hypothetical, because they are founded upon the undisputed allegations that Ms. Turner-Golden and Ms. Bell attempted to cast in-person ballots . . . but were unable to do so because they did not possess photo ID cards recognized by election officials as valid evidence of identification under the Act.

City of Memphis, 414 S.W.3d at 99. Because Plaintiffs Hunt, Turner, and Wygant show no similar disadvantage to themselves as individual voters flowing from the non-consecutive numbering of the Senate districts in Davidson County, they lack standing to challenge the Senate plan. Plaintiffs' reliance on *Fisher* and *City of Memphis* is misplaced, and they cannot remedy the obvious absence of "injury in fact" by bootstrapping their claims to "the fundamental right to vote."

C. History of Tennessee's adoption of the consecutive numbering requirement demonstrates that the interests implicated by that requirement are shared by a large class of voters.

Interestingly, the consecutive numbering requirement for counties with more than one senatorial district originated in the Tennessee Constitutional Convention of 1965. Prior to that

time, Tennessee state senators served two- year terms, like state representatives. With the adoption of a new four-year term for state senators, the Constitutional Convention of 1965 simultaneously adopted a staggered senatorial election schedule in which approximately one-half of the senators would be up for election every two years. The consecutive numbering requirement for counties with more than one senatorial district was a means to achieve this staggered schedule in the more populous counties. By a coin flip during the proceedings of the Convention, it was determined that, in 1968, senators in the even numbered districts would be elected to four-year terms, and senators in the odd-numbered districts would be elected to abbreviated two-year terms. Thereafter, in 1970, senators in the odd-numbered districts would be elected for four-year terms. The *Journal and Debates of the State of Tennessee Constitutional Convention of 1965* contains only one reference to the consecutive numbering requirement. Convention delegate Graves explained that the purpose of the consecutive numbering requirement for multi-county senatorial districts was to avoid complete turnover in senate representation in the state's most populous counties every two years. Thereby, some degree of institutional knowledge and experience might be retained. *Journal and Debates of the State of Tennessee Constitutional Convention of 1965*, Resolution 94 (August 11, 1965), at 502-503 (copy attached to Defendants' Mtn. for Summary Judgment). This purpose is not frustrated by the non-consecutive numbering of the Davidson County Senate districts. Under the Senate plan, the staggered election schedule ensures that District 18 would still be on a different election cycle than Districts 17, 19, and 21. Consequently, there would not be complete turnover in Davidson County's senatorial delegation in any one election cycle.

As relevant to the standing analysis, any interest in avoiding complete turnover in the Senate delegations of Tennessee's most populous counties is not an *individual* or *personal* interest held by Ms. Hunt. Neither does it affect her right as an individual to cast her vote and have her

vote counted. Even if the non-consecutive numbering of Senate District 17 impaired the interest in institutional continuity underlying adoption of the consecutive numbering requirement (and it does not), such an interest would be shared by all voters in Davidson County. Accordingly, Ms. Hunt can show no *distinct* harm or disadvantage sufficient to establish the most fundamental element of standing—injury in fact.

Although Defendants argued in briefing before the Tennessee Supreme Court that Plaintiffs lacked standing to challenge the Senate plan, the court declined to address Defendants' standing argument. The Tennessee Supreme Court emphasized in a footnote, however, that Defendants' standing argument remains viable: "[n]othing in this decision prevents the Defendants from challenging the Plaintiffs' standing on remand." *Moore v. Lee*, 644 S.W.3d 59, 64 (Tenn. 2022). *Id.* at n. 6. At this summary judgment stage, Plaintiffs fail to set forth specific facts establishing injury in fact and, therefore, cannot carry their burden of establishing standing. Accordingly, Plaintiffs are not entitled to summary judgment.

II. Plaintiffs are Not Entitled to Summary Judgment on Count I Because Plaintiffs Cannot Show the Enacted House Plan's County Splits are Unconstitutional.

A. Plaintiffs offered no proof that the General Assembly demonstrated bad faith in passing the Enacted House Plan.

Tennessee's courts agree that the balancing between strict compliance with federal constitutional requirements and compliance with state requirements is a difficult burden placed upon the General Assembly. Flexibility is required, and Tennessee's courts acknowledge that reality, requiring "an honest effort" from the General Assembly. *Moore v. State*, 436 S.W.3d 775 (Tenn. Ct. App. 2014). Accordingly, enacted maps that comply with federal constitutional requirements will only be struck down upon a showing of bad faith or improper purpose. *See Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985); *State ex rel. Lockert v. Crowell*, 729

S.W.2d 88, 91 (Tenn. 1987) ("*Lockert III*")[5] ("The chancellor found that the Legislature acted in good faith . . . We concur in that finding.").

Plaintiffs cannot show bad faith or improper purpose. The House Map redistricting process clearly considered and attempted to comport with the constitutional guidelines regarding county splitting. For reference, the following reflects the applicable information regarding the adopted House map:

Adopted House Plan-Public Chapter 598

13 majority-minority districts

Overall Range	=	9.90%
High	=	+5.09% (+3,552)
Low	=	-4.81% (-3,361)
County Splits:		30
Contiguity:		Yes
Unassigned Areas:		No

(Addl. Fact 16, TRO Resp., Ex. 1, p. 14-15).

To start, the General Assembly enacted Tenn. Code Ann. § 3-1-103(b) evidencing its intent to comply with the "upper limit" of thirty county splits articulated by the Tennessee Supreme Court and subsequently reiterated by the Court of Appeals two redistricting cycles later. *See State ex rel. Lockert v. Crowell*, 656 S.W.2d at 844; *see also Moore v. State*, 436 S.W.3d at 785. House Committee counsel Doug Himes testified that he attempted to comply with each of the guidelines "to the fullest extent possible." (Addl. Fact 29-TRO Resp., Ex. 1, Himes Aff., p. 5). He also testified that he discussed these guidelines with the Committee. (Addl. Fact 30-TRO Resp., Ex. 1, Himes Aff., p. 7).

[5] The *Lockert* trilogy of cases are as follows: *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982) ("*Lockert I*"), *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983) ("*Lockert II*"), *Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985), and *State ex rel. Lockert v. Crowell*, 729 S.W.2d 88 (Tenn. 1987) ("*Lockert III*").

More importantly, those guidelines were put into practice. House Committee counsel Himes explained that in drafting the ultimately-enacted map, he created "whole districts in each county with a population sufficient to support at least one whole district within the county, single county districts in those counties which constitute a single district, and multi-district counties in those counties which divide evenly into multiple districts within judicially recognized deviation limitations." (Addl. Fact 31-TRO Resp., Ex. 1, Himes Aff., p. 14-15). Put more plainly, if a county was not required to be split due to population variance, the enacted map did not split that county. (Addl. Fact 32-TRO Resp., Ex. 1, Himes Aff., p. 14-15.)

It is clear that the General Assembly did not ignore state constitutional requirements when it enacted the House map. The General Assembly and House Committee counsel Himes faithfully followed Tennessee Supreme Court precedent regarding county splitting, and no evidence exists to the contrary that calls their honest effort into question. Accordingly, they did not act in bad faith or with improper motive in drafting and passing the enacted House map.

Nor can bad faith or improper purpose be imputed from the General Assembly's rejection of alternative house maps proposed to it during the process. As detailed below, each of the alternative maps proposed to and rejected by the General Assembly were facially unconstitutional in violation of federal and state requirements.

Windrow Plan[6]

5 majority-minority districts

Overall Range = 24.23%

High = +11.48% (+8,013)

Low = -12.75% (-8,902)

[6] For ease of reference concerning the alternative maps presented to the General Assembly and those created by Dr. Cervas, elements of each plan that are constitutionally impermissible are highlighted in red. Elements that would increase the risk of litigation for potential violation of federal constitutional requirements are highlighted in yellow.

County Splits: 26[7]

Contiguity: No[8]

Unassigned Areas: Yes[9]

(Addl. Fact 8-TRO Resp. Ex. 1, Himes Aff., p. 8; Ex. Himes 4).

Equity Alliance and Memphis A. Phillip Randolph Institute Plan

2 majority-minority districts

Overall Range = 9.75%

High = +4.86% (+3,395)

Low = -4.89% (-3,411)

County Splits: 30[10]

Contiguity: No[11]

Unassigned Areas: None

(Addl. Fact 9-TRO Resp. Ex. 1, Himes Aff., p. 9; Ex. Himes 4).

Wishart Plan

6 majority-minority districts

Overall Range = 9.02%

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[7] The splits of Davidson, Hamilton, Knox, Rutherford, and Shelby counties violates Article II, Section 5 of the Constitution of Tennessee as interpreted by *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983). Of these counties, Knox and Rutherford counties are double split.

[8] Six unpopulated census blocks assigned to District 35 within District 34; one populated and one unpopulated census blocks assigned to District 63 within District 64; two unpopulated census blocks assigned to District 69 between Districts 55 and 67; two unpopulated census blocks assigned to District 69 within District 67; two populated census blocks assigned to District 92 within District 93.

[9] Multiple unassigned populated census blocks totaling 320 people.

[10] The splits of Sullivan, Grainger, Lincoln, Wilson, Williamson, Sumner, Madison, Hardeman, Fayette, Lauderdale, Tipton, Davidson, Hamilton, Rutherford, and Shelby counties violate Article II, Section 5 of the Constitution of Tennessee as interpreted by *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983). Sullivan, Grainger, Lincoln, Wilson, Sumner, Williamson, Fayette and Lauderdale counties are double split. Rutherford, Hardeman, Tipton, and Madison counties are triple split. Shelby County is quintuple split.

[11] One unpopulated census block assigned to District 44 within District 50; one unpopulated census block assigned to District 96 within District 90.

High = +5.05% (+3,525)

Low = -3.97% (-2,771)

County Splits: 30[12]

Contiguity: No[13]

Unassigned Areas: None

(Addl. Fact 10-TRO Resp. Ex. 1, Himes Aff., p. 9; Ex. Himes 4).

Orrin, Newton, Lichtenstein, Moore Plan

10 majority-minority districts

Overall Range = 19.28%

High = +9.58% (+6,688)

Low = -9.70% (-6,772)

County Splits: 58[14]

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[12] The splits of Sullivan, Hawkins, Sevier, Blount, Knox, Loudon, Campbell, McMinn, Bradley, Hamilton, Warren, Putnam, Rutherford, Williamson, Davidson, Maury, Sumner, Montgomery, Gibson, Madison, and Shelby counties violate Article II, Section 5 of the Constitution of Tennessee as interpreted by *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983). Bradley, McMinn, Gibson, Madison, Maury, Warren, Campbell, Sevier, and Putnam counties are double split. Sumner, Hawkins, Loudon, Hamilton, Blount, Sullivan, and Montgomery counties are triple split. Rutherford County is quadruple split. Williamson County is quintuple split. Davidson County is sextuple split.

[13] One unpopulated census block assigned to District 14 between Districts 13 and 18; multiple populated and unpopulated census blocks assigned to district 24 between Districts 23 and 26; multiple populated and unpopulated census blocks assigned to District 24 within District 23; multiple populated and unpopulated census blocks assigned to District 26 within District 29; multiple populated and unpopulated census blocks assigned to District 27 within District 29; one unpopulated census block assigned to District 27 between Districts 26 and 29; one unpopulated census block assigned to District 29 within District 23; multiple populated census blocks assigned to District 45 within District 54; one populated census block assigned to District 6 within District 7; one unpopulated census block assigned to District 78 assigned to District 69; one unpopulated census block assigned to District 86 assigned to District 98; multiple populated and one unpopulated census blocks assigned to District 87 between Districts 85 and 91; one unpopulated census block assigned to District 88 between Districts 86 and 90; four unpopulated census blocks assigned to District 88 between Districts 97 and 98; one unpopulated census block assigned to District 88 between Districts 98 and 99; multiple populated and unpopulated census blocks assigned to District 89 between Districts 20 and 32; two unpopulated census blocks assigned to District 92 between Districts 29 and 39; multiple populated census blocks assigned to District 93 between Districts 84 and 87.

[14] More than thirty counties are split. The splits of Sullivan, Hawkins, Greene, Anderson, Knox, Hamilton, Lincoln, Bedford, White, Putnam, Sumner, Rutherford, Williamson, Davidson, Maury, Dickson, Montgomery, Humphreys, Madison, and Lauderdale counties violate Article II, Section 5 of the Constitution of Tennessee as interpreted by *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983). Lauderdale, Humphreys, Dickson, Sumner, Wilson, Hamilton, Washington, Sullivan, Bedford, Lincoln, Putnam, White, Anderson, Greene, and Hawkins counties are double split. Davidson, Williamson, Montgomery, Madison, and Maury counties are triple split. Rutherford County is quadruple split.

Contiguity: No[15]

Unassigned Areas: Yes[16]

(Addl. Fact 11-TRO Resp. Ex. 1, Himes Aff., p. 9; Ex. Himes 4).

Democratic Caucus Plan A

8 majority-minority districts

Overall Range = 6.71%

High = +4.31% (+3,008)

Low = -2.40% (-1,674)

County Splits: 35[17]

Contiguity: No[18]

Unassigned Areas: None

(Addl. Fact 12-TRO Resp. Ex. 1, Himes Aff., p. 9; Ex. Himes 5).

Democratic Caucus Plan B

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[15] One unpopulated census block assigned to District 11 within District 17; one unpopulated census block assigned to District 14 within District 13; two populated and three unpopulated census blocks assigned to District 30 between Districts 22 and 29; one populated census block assigned to District 37 within District 46; one unpopulated census block assigned to District 48 within District 62; one unpopulated census block assigned to District 65 between Districts 61 and 69; one populated census block assigned to District 68 within District 69; one unpopulated census block assigned to District 82 within District 73; one unpopulated census block assigned to District 85 between Districts 84 and 87.

[16] One unpopulated census block in District 81; one unpopulated census block in District 3; one unpopulated census block in District 22; one unpopulated census block in District 70.

[17] More than thirty counties are split. The splits of Blount, Sullivan, Washington, and Shelby counties violate Article II, Section 5 of the Constitution of Tennessee as interpreted by *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983). Blount, Sullivan, and Washington counties are double split.

[18] One unpopulated census block assigned to District 23 within District 24; one populated census block assigned to District 35 within District 33; two unpopulated census blocks assigned to District 44 within District 67; one unpopulated census block assigned to District 48 within District 37; one unpopulated census block assigned to District 50 within District 56; one populated and one unpopulated census blocks assigned to District 53 between Districts 57 and 63; one populated census block assigned to District 53 within District 57; one populated census block assigned to District 61 within District 63; one populated census block assigned to District 63 with District 65; one populated census block assigned to District 63 with District 77; one unpopulated census block assigned to District 67 within District 89; one unpopulated census block assigned to District 7 within District 19; one unpopulated census block assigned to District 7 between Districts 19 and 22; one unpopulated census block assigned to District 83 within District 85; one unpopulated census block assigned to District 85 with District 84; one unpopulated census block assigned to District 87 between Districts 83 and 91; one unpopulated census block assigned to District 91 within District 86; one unpopulated census block assigned to District 99 between Districts 88 and 94.

13 majority-minority districts

Overall Range = 9.72%

High = +4.98% (+3,552)

Low = -4.74% (-3,311)

County Splits: 23[19]

Contiguity: Yes

Unassigned Areas: None

(Addl. Fact 14-TRO Resp. Ex. 1, Himes Aff., p. 10; Ex. Himes 6).

As demonstrated above, each of these alternatives to the enacted House map are uncontrovertibly unconstitutional. The closest of these flawed alternatives, Democratic Caucus Plan B, is only unconstitutional in one aspect—the split of Shelby County. But the Tennessee Supreme Court's command regarding splitting urban counties is clear: "none of the four urban counties can be split even once unless justified by either (1) the necessity to reduce a variance in an adjoining district or (2) to prevent the dilution of minority voting strength." *State ex rel. Lockert v. Crowell*, 656 S.W.2d at 836. Neither justification is present here; there is thus no need to split Shelby County. Accordingly, Plaintiffs cannot demonstrate that the General Assembly acted in bad faith or improper motive based upon its rejection of facially unconstitutional alternatives.

And finally, the maps presented *after the fact* by Plaintiffs that they contend are superior do not transform an honest effort into bad faith. As discussed above, the standard is not whether the General Assembly made a good faith effort to balance the constitutional issue, it is whether the General Assembly acted in bad faith or improper motive—which Dr. Cervas expressly declined to opine. (Addl. Fact 34-Cervas Depo, p. 137-138). *See Lincoln County v. Crowell*, 701 S.W.2d 602

[19] The split of Shelby County violates Article II, Section 5 of the Constitution of Tennessee as interpreted by *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983).

(Tenn. 1985); *accord Moore v. State*, 436 S.W.3d at 785 (both holding that "it would be improper to set aside individual district lines on the ground that they theoretically might have been drawn more perfectly, in the absence of any proof whatever of bad faith or improper motives."). Thus, as a matter of law, Dr. Cervas's opinion cannot stand for the proposition that the General Assembly acted in bad faith or improper motive. And, unlike the plans presented to the General Assembly, it is impossible to intuit bad faith or improper motive from maps that were never presented for legislative debate, acceptance, or rejection. The post-hoc maps created by Dr. Cervas thus cannot serve as evidence that the General Assembly acted in bad faith or with improper motive.

But even if Dr. Cervas did opine that the General Assembly acted in bad faith based upon his maps, it still would not matter because the maps submitted as part of his expert report are each constitutionally deficient or create an additional risk of litigation regarding federal constitutional requirements.

Cervas Plan 13a

12 majority-minority districts

Overall Range = 9.96%

High = +5.09% (+3,552)

Low = -4.87% (-3,400)

County Splits: 24

Contiguity: No[20]

Unassigned Areas: No

(Addl. Fact 37-Expert Deposition of Doug Himes, Ex. 3, p. 19-20, 41; Expert Deposition of Sean Trende, Ex. 1, p. 9-12; Cervas Depo., Ex. 4, p. 13).

[20] One unpopulated census block assigned to District 12 within District 11; one unpopulated census block assigned to District 13 within District 49; one unpopulated census block assigned to District 49 between Districts 13 and 63.

Cervas Plan 13b

12 majority-minority districts

Overall Range = 9.96%

High = +5.09% (+3,552)

Low = -4.87% (-3,400)

County Splits: 25[21]

Contiguity: No[22]

Unassigned Areas: No

(Addl. Fact 38-Himes Expert Depo., Ex. 3, p. 22-24, 42; Trende Depo., Ex. 1, p. 12-13; Cervas Depo., Ex. 4, p. 14).

Cervas Plan 14a

12 majority-minority districts

Overall Range = 9.98%

High = +5.09% (+3,552)

Low = -4.89% (-3,416)

County Splits: 24[23]

Contiguity: No[24]

Unassigned Areas: No

(Addl. Fact 39-Himes Expert Depo., Ex. 3, p. 25-27, 43; Trende Depo., Ex. 1, p. 13-14; Cervas Depo., Ex. 4, p. 15).

Cervas Plan 13.5a

[21] The split of Madison County appears to violate Article II, Section 5 of the Constitution of Tennessee.

[22] One unpopulated census block assigned to District 12 within District 11; one unpopulated census block assigned to District 13 within District 49; one unpopulated census block assigned to District 49 between Districts 13 and 63.

[23] The split of Madison County appears to violate Article II, Section 5 of the Constitution of Tennessee.

[24] One unpopulated census block assigned to District 12 within District 11; one unpopulated census block assigned to District 13 within District 49; one unpopulated census block assigned to District 49 between Districts 13 and 63.

10 majority-minority districts

Overall Range = 9.98%

High = +5.09% (+3,552)

Low = -4.89% (-3,416)

County Splits: 22[25]

Contiguity: No[26]

Unassigned Areas: No

(Addl. Fact 40-Himes Expert Depo, Ex. 3, p. 28-32, 44; Trende Depo., Ex. 1, p. 14-18; Cervas Depo., Ex. 4, p. 16).

Cervas Plan 13.5b

11 majority-minority districts

Overall Range = 9.82%

High = +4.98% (+3,475)

Low = -4.84% (-3,378)

County Splits: 24[27]

Contiguity: No[28]

Unassigned Areas: No

(Addl. Fact 41-Himes Expert Depo., Ex. 3, p. 32-37, 45; Trende Depo., Ex. 1, p. 14-18; Cervas Depo., Ex. 4, p. 17).

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[25] The splits of Shelby and Madison counties appear to violate Article II, Section 5 of the Constitution of Tennessee.

[26] One unpopulated census block assigned to District 12 within District 11; one unpopulated census block assigned to District 13 within District 49; one unpopulated census block assigned to District 49 between Districts 13 and 63; one unpopulated census block assigned to District 91 within District 86; one unpopulated census block assigned to District 99 between Districts 86, 88 and 95.

[27] The splits of Shelby and Madison counties appear to violate Article II, Section 5 of the Constitution of Tennessee.

[28] One unpopulated census block assigned to District 12 within District 11; one unpopulated census block assigned to District 13 within District 49; one unpopulated census block assigned to District 49 between Districts 13 and 63; two unpopulated census blocks assigned to District 68 within District 67; five unpopulated census blocks assigned to District 75 with District 74.

Cervas Plan 13c

13 majority-minority districts

Overall Range = 9.96%

High = +5.09% (+3,552)

Low = -4.87% (-3,398)

County Splits: 24

Contiguity: Yes

Unassigned Areas: No

(Addl. Fact 42-Himes Affidavit, Ex. A; Cervas Depo., Ex. 5, p. 3-4).

Cervas Plan 13d

13 majority-minority districts

Overall Range = 9.89%

High = +5.09% (+3,552)

Low = -4.80% (-3,350)

County Splits: 24[29]

Contiguity: No[30]

Unassigned Areas: No

(Addl. Fact 43-Himes Affidavit, Ex. A; Cervas Depo., Ex. 5, p. 4-5).

Cervas Plan 13d_e

13 majority-minority districts

Overall Range = 9.89%

High = +5.09% (+3,552)

Low = -4.80% (-3,350)

County Splits: 24

[29] The double split of Sullivan County appears to violate Article II, Section 5 of the Constitution of Tennessee.

[30] One populated census block assigned to District 78 within District 69; one populated census block assigned to District 78 between Districts 68 and 69.

Contiguity: No[31]

Unassigned Areas: No

(Addl. Fact 44-Himes Affidavit, Ex. A; Cervas Supp. Rebuttal Expert Report, p. 1-3).

The only map that isn't overtly unconstitutional is Cervas Plan 13c. But the variance is higher than the map enacted by the General Assembly. That creates an additional risk of litigation regarding federal constitutional requirements. Under the principle of "one person, one vote" state legislatures are required to "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). And while Cervas Plan 13c's variance is under ten percent, that is no guarantee of constitutionality. *Moore v. State*, 436 S.W.3dat 785 (no "'safe harbor' for plans achieving population variances of less than 10%."). "[E]qual protection considerations are paramount," and the General Assembly should be expected to err on the side of caution when it comes to federal constitutional requirements. *Id*. Plaintiffs' position—if countenanced by this Court—would compel the General Assembly to play chicken with variance percentages and risk federal litigation to find the floor for county splits by testing the maximum variance. This is hardly "flexible," and therefore, even if this plan had been presented to the General Assembly and subsequently rejected, it would not create any inference of bad faith or improper motive. *Id*.

Again, the standard is not perfection. Plaintiffs must demonstrate that the General Assembly acted in bad faith or with improper motive to succeed on the merits of their claim. *See Lincoln Co. v. Crowell*, 701 S.W.2d at 604. They cannot do so. The House Map redistricting process clearly considered and attempted to comport with the constitutional guidelines regarding county splitting. No other map presented to the General Assembly was even arguably

[31] One populated census block assigned to District 78 between Districts 68 and 69; one populated census block assigned to District 1 within District 3; one unpopulated census block assigned to District 1 between Districts 3 and 4.

constitutional—apart from the one ultimately enacted. And the result still complied with the "upper limit" of thirty county splits articulated by the Tennessee Supreme Court and subsequently reiterated by the Court of Appeals two redistricting cycles later. *See State ex rel. Lockert v. Crowell*, 656 S.W.2d at 844; *see also Moore v. State*, 436 S.W.3d at 785.

Even if Plaintiffs' post hoc maps were more constitutional (and they are not), the existence of an arguably superior map does not matter under Tennessee Supreme Court precedent. So long as federal requirements are met, only bad faith and improper purpose can doom an enacted map. And third—perhaps most importantly—bad faith cannot be intuited from a map that was never presented to the General Assembly. Plaintiffs are not entitled to summary judgment on Count I.

B. Plaintiffs misinterpret the *Lockert* trilogy on county-splitting and advocate for an incorrect standard.

i. Plaintiffs fail to recognize the different categories of county splitting.

The analysis of "how many county splits are too many?" is too complex to distill into a single line from *Lockert I* without the added context of *Lockert II*, *Lockert III,* and subsequent case law. Here, Plaintiffs ask the Court to allow any Tennessee registered voter to invalidate a statewide redistricting plan simply because, theoretically, fewer counties could have been split. This incomplete interpretation of Tennessee redistricting jurisprudence ignores the prohibition against the unjustified splitting of urban counties and fails to appreciate the difference between multi-district counties and multi-county districts illuminated by *Lockert II*. It also disregards the importance of *Lockert II*'s "upper limit of 30" that every enacted House redistricting plan for the last forty (40) years has followed. Plaintiffs seek to invalidate the Enacted House Plan because, in the context of county splits, individual district lines could have been drawn more perfectly or a hypothetical better map may exist—exactly what our Supreme Court said the courts should avoid. *Lincoln County v. Crowell*, 701 S.W.2d 602, 604 (Tenn. 1985); *see also Rural West*

Tennessee African-American Affairs Council v. McWherter, F. Supp. 447, 451 (W.D. Tenn. 1993).

In *Lockert II*, the Supreme Court clarified the *Lockert I* ruling that "the State's constitutional prohibition against crossing county lines must be enforced insofar as is possible and that any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements. *Lockert II* at 838 (*citing Lockert I* at 715). But the analysis did not stop there. Multi-district counties and multi-county districts are distinguishable. *Lockert II* at 839. Multi-district counties are counties which can contain two or more districts within their own county borders, while multi-county districts encompass counties too small to form a district alone. *Id.* With respect to multi-district counties, the Supreme Court declared that "none of the four urban counties [Shelby, Davidson, Knox, and Hamilton] can be split even once unless justified by either (1) the necessity to reduce a variance in an adjoining district or (2) to prevent the dilution of minority vote strength." *Id* at 841, 843. Yet, Plaintiffs urge this Court to ignore that holding. Plaintiffs also ignore *Lockert III* where the Supreme Court affirmed the trial court's decision upholding a district that split of Shelby County and included all of Tipton and Lauderdale Counties. The justification for this Shelby County split was that if the district was unsplit and Shelby County was kept whole, many other district changes would lead to a higher total population variance. Thus, a *Lockert II* federal exception to the prohibition on splitting the urban counties was appropriately implemented.

In their memorandum, Plaintiffs argued extensively that the upper limit of 30 count splits stated by the *Lockert II* court is not a safe harbor. (*See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment, pg. 24-26).

Plaintiffs simply fail to address this upper limit in context:

> Turning to the limitation on dividing counties in creating House districts, we think an upper limit of dividing 30 counties ***in the multi-county category*** is appropriate, with the caveat that none of the thirty can be divided more than once. In addition, with respect to the four urban counties we have left open the possibility of a small split per county only if justified by the necessity of reducing a variance in an adjoining district or to prevent the dilution of minority voting strength.

Lockert II at 844 (emphasis added).

Lockert II simply clarified how legislators were to apply the *Lockert I* guidance on county splitting. And Plaintiffs' only citation in support of their argument, from the *Rural West Tenn.* federal case, states just the opposite: ". . . It is true, as defendants point out, that the *Lockert II* court loosened the standards imposed by the court below of 10% deviation and 25 split counties." *Rural West Tenn. African-American Affairs Council v. McWherter*, 836 F. Supp. 447, 450-51 (W.D. Tenn. 1993). While federal courts have disregarded the population deviation standard imposed in *Lockert II*, *see Cox v. Larios*, 543 U.S. 947, 949 (2004) ("There is no safe harbor" for overall population deviation), no Tennessee court has ever tightened the 30 multi-county district upper limit since its inception. It remains good precedent.

Thus, the appropriate legal standard for county splitting in Tennessee redistricting is not found in *Lockert I* alone, as preferred by Plaintiffs. The correct standard is the two-fold analysis from *Lockert II*:

> (i) Counties in the multi-district category have an upper limit of thirty (30) splits; and
>
> (ii) Urban counties (Shelby, Davidson, Hamilton, and Knox) cannot be split unless:
>
> a. A split is necessary to reduce the population variance in an adjoining district; or
> b. A split prevents the dilution of minority vote strength.

Moreover, this standard has been repeated utilized since *Lockert II*. It was used by the

Supreme Court in *Lincoln County v. Crowell* when it stated "[t]here is no question but that the statute in question meets the general guidelines established by this Court in [*Lockert I* and *II*] in that it does not divide more than thirty counties and does not divide any county more than once . . ." 701 S.W.2d 602, 603 (Tenn. 1985). And most recently, the *Moore* court correctly applied this standard during the last redistricting cycle with respect to the Senate plan. There, the *Moore* court affirmed the trial court upholding the 2010s Senate plan because "crossing county lines was necessary to best achieve population equality while simultaneously crossing far fewer county lines than the upper limit of 30 suggested by the *Lockert* courts." 436 S.W.3d at 788. Moreover, in agreement with the United States Supreme Court's decision in *Tennant v. Jefferson Cnty. Com'n*, 567 U.S. 758 (2012), the Court of Appeals observed that "the State carries a 'flexible' burden to demonstrate that it achieved the appropriate balance." *Moore*, 436 S.W.3d at 786. And, it should be noted that the Supreme Court ultimately denied an application for permission to appeal *Moore*.

ii. Plaintiffs ask the Court to abrogate *Lockert II* and allow urban counties to be split for reasons other than federal constitutional justifications.

Demonstrating their results-oriented approach to picking their preferred redistricting precedent, Plaintiffs asked the Court to sanction the splitting of an urban county to minimize the number of total county splits. In other words, Plaintiffs ask the Court to overrule the Tennessee Supreme Court precedent in *Lockert II*. Plaintiffs are incorrect in stating this situation is "similar to but not addressed by" *Lockert II* and *Lockert III*. The Enacted House Plan does not split urban counties for reasons other than federal constitutional requirements. No one asked the *Lockert* courts to allow county splits that were justified by a reduction in the total number of county splits.

Plaintiffs were also incorrect that the General Assembly rejected Representative

Freeman's plan—no House Committee member ever moved to adopt this plan and thus it was never rejected. (Himes TI Affidavit, ¶ 37, n.4). Finally, Plaintiffs argue that just because some of Dr. Cervas' plans and Representative Freeman's plan have fewer county splits than the Enacted House Plan, the Court should invalidate the Enacted House Plan ***without determining*** whether those alternate plans "pass constitutional muster." (*See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment, pg. 34) (emphasis added). The *Moore* court rejected Plaintiffs' line of thinking when they rejected an alternate plan simply because it had fewer county splits than the enacted 2010s Senate plan. *Moore v. State*, 436 S.W.3d 775, 788 (Tenn. Ct. App. 2014).

C. Plaintiffs lack standing or, in the alternative, are not entitled to summary judgment because it is undisputed that none of them live in unconstitutionally split counties.

If Plaintiffs' narrow theory of the county-splitting standard is adopted (and the precedent after *Lockert I* is ignored), then the Defendants would have to prove that each county split "was excused by the requirements of [equal protection or equal population]." 631 S.W.2d at 710. For an individual voter to have standing to challenge the Enacted House Map under plaintiffs' theory, then one of the Plaintiffs must ***live in a county they allege was split for an illegal reason*** by the Enacted House Map. It is undisputed that none of the Plaintiffs do.

Plaintiffs Hunt and Turner live in counties that were not split. While Plaintiff Wygant lives in a county that was split – Gibson County—Plaintiffs' own statement of undisputed material facts agrees that it was split to comply with federal constitutional requirements. Plaintiffs also failed to offer a constitutional alternative map that does not split Gibson County. Plaintiffs' county splitting claim necessitates individualized harm that none of them have suffered.

i. An individual voter can only challenge an unconstitutional split of their county of residence.

In the context of redistricting challenges, federal courts have routinely held that a plaintiff must reside in the challenged district to establish standing, absent specific evidence of some other distinct and palpable injury. *See, e.g., United States v. Hays*, 414 U.S. 737, 745 (1995); *Gill v. Whitford*, 138 S. Ct. 1916, 1929-31 (2018); *Baker v. Carr*, 369 U.S. 186, 204 (1962) (plaintiff must have "a personal stake in the outcome"). Where plaintiffs' alleged harm is dilution of their votes, "that injury is district specific." *Gill* at 1930. In redistricting cases, a plaintiff who does not live in an allegedly affected district, "assert[s] only a generalized grievance against governmental conduct of which he or she does not approve." *Hays* at 745. For instance, voters who complain of racial gerrymandering in their State cannot sue to invalidate the whole State's legislative districting map; such complaints must proceed "district-by-district." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015).

Similarly, when the plaintiff voters in *Gill v. Whitford* attempted to bring a partisan gerrymandering claim—since ruled nonjusticiable in federal courts—against a Wisconsin redistricting plan, the U.S. Supreme Court opined that those plaintiffs "alleged they had a personal stake . . . but never followed up with the requisite proof" because none of the plaintiffs lived in the districts they alleged were politically gerrymandered. 138 S.Ct. at 1923. The *Gill* court further stated that even in equal population cases where districts throughout a state had been malapportioned, the injuries that gave rise to those claims were "individual and personal in nature," *Reynolds v. Sims*, 377 U.S. 533, 561 (1964), and those plaintiff voters alleged "facts showing disadvantage to themselves as individuals." *Gill*, 138 S.Ct. at 1930 (*citing Baker*, 369 U.S. at 206). Federal redistricting jurisprudence is clear: for a plaintiff to suffer an injury in fact, he or she must live in a district that contains the alleged illegality.

The federal courts' residency requirement in redistricting cases comports with Tennessee's standing requirements. Unless a plaintiff resides in a challenged district or alleges some other distinct injury, there is nothing to differentiate that plaintiff's interest from those shared in common with the general citizenry. *City of Memphis*, 414 S.W.3d at 98. Since the *Lockert* decisions, individual voters bringing county splitting claims in Tennessee have typically lived in a county they alleged was illegally split. *See, e.g.*, *Lockert I*, 631 S.W.2d at 703 (plaintiff voters resided in the split Bedford, Cheatham, and Wilson Counties); *Lincoln County*, 701 S.W.2d 602 (Marshall and Lincoln County officials alleged their counties were unnecessarily split); *Moore v. State*, 436 S.W.3d 775 (plaintiff voters resided in split Shelby County).

When plaintiffs in Tennessee redistricting cases have been successful in challenging a county split, there has been proof that a county split was for an illegal reason or that the split was not necessary to decrease the total variance. *See, e.g.*, *Lockert II*, 656 S.W.2d at 839 (witness testified that a county split "did not diminish the total variance and that eliminating the division of Washington County would not increase the variance."). Finally, when Tennessee courts have held a county split was illegal, they have usually specified which counties were illegally split. *See Lockert II*, 656 S.W.2d at 839 ("We affirm the chancellor in holding that any plan that splits Washington County is unconstitutional."); *Id.* at 840-43 ("it is unnecessary to subdivide the excess population of Knox County or Davidson County into two segments to comply with the one person, one vote requirement of federal law").

Federal and Tennessee case law establishes that individual voters can only bring county splitting claims for their county of residence.

ii. Plaintiffs Hunt and Turner have no standing to bring a county splitting claim because Davidson and Shelby Counties are not split.

Plaintiff Telise Turner is a resident of Shelby County, Tennessee and is registered to vote in Shelby County, Tennessee. (Plaintiffs' SUMF, ¶ 1). Plaintiff Francie Hunt is a resident of Davidson County, Tennessee and is registered to vote in Davidson County, Tennessee. (Plaintiffs' SUMF, ¶ 5). The Enacted House Plan does not split Shelby County or Davidson County. Thus, Plaintiffs Turner and Hunt do not have standing to challenge the Enacted House Plan on county splitting grounds.

Regardless, Plaintiff Turner is not actually bringing a county splitting claim. Instead, she has filed suit alleging that by the House Enacted Plan only having thirteen (13) districts in Shelby County instead of fourteen (14) districts as the county had last cycle, deprives her of an alleged "constitutional right, as a Shelby County resident and voter, to representation by a Shelby County House delegation constructed in compliance with the Tennessee Constitution and her right to vote in a House district constructed in compliance with the Tennessee Constitution. (Third Amended Compl. ¶ 73). Plaintiff Turner has no "constitutional right" to any type of Shelby County house delegation because she is not represented by the entire Shelby County delegation. She, as an individual voter, is represented by a single House member like every other Tennessee registered voter. Plaintiff Turner's district is wholly within Shelby County and she has made no allegations related to the particular district in which she lives. At best, Plaintiff Turner's grievance is for malapportionment yet Plaintiffs made no such allegations and offered no proof to that effect. Nevertheless, she lacks standing to bring a county splitting claim.

iii. Plaintiff Wygant lacks standing because Gibson County is split for a constitutional reason.

Plaintiff Gary Wygant is a resident of Gibson County, Tennessee and is registered to vote in Gibson County, Tennessee. (Plaintiffs' SUMF, ¶ 4). Plaintiffs listed each of the thirty (30) county splits in the Enacted House Map in their Statement of Undisputed Material Facts, and

Plaintiffs identified Gibson County, Tennessee as being a county split by a House district in the Enacted House Map. (Plaintiffs' SUMF, ¶ 57). Plaintiffs did not dispute and, in fact, adopted the justifications identified by Doug Himes in their Statement of Undisputed Material Facts for each county split. (Plaintiffs' SUMF, ¶ 57). Doug Himes identified the justification for the splitting of Gibson County as "population shift/core preservation." (Plaintiffs' SUMF, ¶ 57). Population shift necessitates the redrawing of district lines to account for equal population pursuant to the "one person, one vote" principle, a federal redistricting requirement under the Fourteenth Amendment of the United States Constitution. Neither Mr. Wygant in his deposition nor Plaintiffs' extensive pleadings in this case allege Gibson County was split for any particular reason and have offered no proof as to the reason behind the Gibson County split specifically besides adopting Mr. Himes' testimony.

Since Plaintiffs have argued to the Court that Gibson County was split to comply with a requirement of the United States Constitution, they cannot now credibly argue the Gibson County split was for an unconstitutional reason. Plaintiffs' expert also failed to produce a constitutional map that did not split Gibson County. Consequently, Plaintiff Wygant does not have standing to challenge the Enacted House Map because he does not allege the Gibson County split within the Enacted House Map was not justified by federal requirements.

In sum, Plaintiffs have not alleged that any of their counties of residence are split illegally. 436 S.W.3d at 785. In fact, their statement of undisputed material facts quotes Defendant's expert that the only split county of residence, Gibson County, was justified by "population shift." (Plaintiffs' SUMF, ¶ 57). Thus, Plaintiffs are in the unenviable position where they either must admit they do not have standing to challenge an unconstitutional split in the Enacted House Plan

or dispute their own statement of undisputed material facts and torpedo their motion for summary judgment.

iv. Even if Plaintiff Wygant has standing, it is undisputed that the Gibson County split was justified.

Even if Plaintiff Wygant has standing to bring a county splitting claim solely because his home county of Gibson County is split, it is undisputed the split was constitutional. *Lockert II* informs us that there are two ways to invalidate a county split: (i) there has been proof that a county split was for an unconstitutional reason, or (ii) that it was not necessary to decrease the total variance. *See Lockert II*, 656 S.W.2d at 839. It is undisputed that Gibson County was split to comply with a federal constitutional requirement. Plaintiffs have also failed to offer a constitutional alternative map that has a lower overall deviation and fewer county splits while not splitting Gibson County. Thus, Defendants have successfully negated an essential element of the nonmoving party's claim and Plaintiffs are not entitled to summary judgment.

a. It is undisputed that the Enacted House Plan split Gibson County due to a federal constitutional requirement.

In their statement of undisputed material facts, Plaintiffs adopted Defendants' expert Doug Himes' justifications for each county split. (*See* Plaintiffs' SUMF, ¶ 57). Himes' justification for the Gibson County split was "population shift," which relates to equal population—a federal constitutional requirement. *Id.* Consider the population of Gibson County according to the census: 50,429. (Addl. Fact 45, TRO Resp. Ex. 1, Himes Aff. Ex. Himes 1, County Growth Table). The ideal population assuming a perfectly equal division is 69,806. (Addl. Fact 46, TRO Resp. Ex. 1, Himes Aff. Ex. Himes 1, 10/20 Malapportionment Table). The downward 5% deviation from ideal is a population of 66,316. Evaluating the maps presented by Plaintiffs' expert, there is no question that Gibson County falls below that number and can be split to satisfy the federal "one person, one

vote" standard. Defendants agree with Plaintiffs—the split of Gibson County was justified by compliance with federal equal-protection requirements.

b. Plaintiffs offered no constitutional map that did not split Gibson County.

As the Memorandum in Support of Defendants' Summary Judgment Motion extensively explained, Plaintiffs' expert Dr. Cervas offered only one map in this case that *might* be constitutional: Cervas House 13c. However, 13c has a higher population deviation than the Enacted House Plan so it certainly cannot be described as a better plan. *See Moore*, 436 S.W.3d at 787 (the Court of Appeals noted than no plan had a lower deviation and fewer county splits than the enacted plan). It also splits Gibson County. (Addl. Fact 47, Rebuttal Report of Plaintiffs' Expert Regarding Tennessee House Reapportionment, pg. 3, Fig. 1). Plaintiffs have proffered no constitutional map that does not split Gibson County. Thus, they cannot advance an argument that Gibson County does not need to be split to comply with federal redistricting requirement.

Defendants have carried the burden of proving that Gibson County was split due to a federal constitutional requirement—Plaintiffs' statement of undisputed material facts says as much—and the record contains no constitutional House map that does not split Gibson County. Defendants have not only negated an essential element of Plaintiffs' county splitting claim but are also entitled to summary judgment themselves as to Count I.

D. Plaintiffs distorted the procedural history of this case and their own proof.

i. Plaintiffs misrepresented their attempts to obtain privileged communication.

In their memorandum in support of summary judgment, Plaintiffs proclaimed "Defendants shielded all non-public evidence of the mapmaking process from use in this litigation." (*See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment, pg. 12). Plaintiffs are simply incorrect. The Defendants did not "shield" privileged communications and

work product from the Defendants; the Court did. (*See* Order Denying Plaintiffs' Motion to Compel the Production of Non-Privileged Documents and Testimony). Moreover, Plaintiffs are incorrect that "Defendants did not have to adopt this litigation strategy" and mischaracterize the withholding of privileged documents as a "strategic choice." (*See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment, pg. 29, 30). The privilege was not these Defendants' to waive.

Plaintiffs' cited examples of a "different" litigation strategy from *Lockert II* were the testimony of non-lawyers. The first was Terry Dial, one of the state's mapmakers, who was research analyst with a degree in mathematics. 656 S.W.2d at 842. The other witness was Frank Hinton, the director of the division of local government in the comptroller's office. *Id.* at 839. Neither Mr. Dial or Mr. Hinton are identified as lawyers and they seemingly did not provide legal advice to the General Assembly. In fact, *Lockert II* states that Mr. Dial had to ask for legal advice from the Attorney General on the legally permissible total deviation. *Id.*

Plaintiffs' implication that the Court's ruling to not allow Plaintiffs to obtain the thoughts, mental impressions, and work product of attorneys somehow bolsters Plaintiffs' argument or diminishes Defendants' position is wholly without merit.

ii. Plaintiffs' expert has not produced a legal, better map than the Enacted House Plan.

Plaintiffs also argued in their memorandum that since Defendants' expert witnesses agree that Cervas House Map 13c and Cervas House Map 13d seemingly comply with federal redistricting criteria while "dividing" fewer counties, those maps are somehow better than the Enacted House Plan. First, Plaintiffs' expert Cervas admitted he conducted no Voting Rights Act analysis on any of his maps to ensure compliance with federal law. (Addl. Fact 48, Cervas Depo. 120:24-25; 121:1-3; 145:5-10). Nevertheless, if the standard was that maps only had to comply

with federal redistricting criteria, then Plaintiffs would have no lawsuit here because they have only brought claims based on state redistricting criteria. (*See* Plaintiffs' Third Amended Complaint). Plaintiffs are essentially arguing that since Cervas House Map 13c and Cervas House Map 13d have fewer county splits, they are somehow better. The *Moore* court rejected this singular reasoning based on fewer county splits alone. 436 S.W.3d 775 (Tenn. Ct. App. 2014) (upholding the enacted 2010 Senate plan even though an alternate map had fewer county splits). As discussed above, the fatal deficiencies of each of Plaintiffs' expert's maps are well documented in the record. (*See* Defendants' Motion to Disqualify Jonathan Cervas; Expert Report of Douglas Himes; Expert Report of Sean Trende). Cervas House Map 13d and Cervas House Map 13d_e have fatal non-contiguity issues, while Cervas House Map 13c has a higher overall deviation than the Enacted House Plan. Cervas House Map 13c also splits Gibson County—the exact grievance of Plaintiff Wygant. (Addl. Fact 47, Rebuttal Report of Plaintiffs' Expert Regarding Tennessee House Reapportionment, pg. 3, Fig. 1). Moreover, the plan presented by Representative Freeman impermissibly double splits Shelby County in open violation of *Lockert II*. The record in this case demonstrates that Plaintiffs failed to produce a legal map with lower population deviation and fewer county splits than the Enacted House Plan.

E. The plain language of Art. II, Sec. 4 of the Tennessee Constitution permits the General Assembly to redistrict the House using its adopted criteria.

Plaintiffs make much of the legislature's decision to also consider the criteria of paired incumbents and core retention along with state and federal constitutional requirements—as if the consideration of these additional factors necessarily impugns the General Assembly's expressed intent to follow precedent with regard to county splitting. But the Tennessee Constitutions expressly permits this:

> Nothing in this Section nor in this Article II shall deny to the General

> Assembly the right at any time to apportion one House of the General Assembly using geography, political subdivisions, substantially equal population and other criteria as factors; provided such apportionment when effective shall comply with the Constitution of the United States as then amended or authoritatively interpreted.

Tenn. Const., Art. II, § 4.

The plain language of Art II, § 4 allows the General Assembly to adopt other factors in addition to geography, political subdivisions, substantially equal population in redistricting. Additionally, "Nothing in this Section nor in this Article II" shall deny the General Assembly's right to use these factors and others of their choosing as long as the plan complies with the U.S. Constitution. The only requirement regarding these additional criteria is compliance with the federal constitution.

Unlike the statutes at issue in the *Lockert* cases[32], the General Assembly chose to list six (6) factors in Tenn. Code Ann. § 3-1-103 which guided the drafting of the House Enacted Plan:

> (b) It is the intention of the general assembly that:
>
> (1) Each district be represented by a single member;
>
> (2) Districts are substantially equal in population in accordance with constitutional requirements for "one (1) person one (1) vote" as judicially interpreted to apply to state legislative districts;
>
> (3) Geographic areas, boundaries, and population counts used for redistricting are based on the 2020 federal decennial census;
>
> (4) Districts are contiguous and contiguity by water is sufficient, and, toward that end, if any voting district or other geographical entity designated as a portion of a district is found to be noncontiguous with the larger portion of such district, it must be constituted a portion of the district smallest in population to which it is contiguous;
>
> (5) No more than thirty (30) counties are split to attach to other

[32] The General Assembly did not list factors in the statute which enacts the House redistricting plan until 2002 (*See* Pub. Ch. 468, HB 276 (2002)). The 2000s House map and the 2010 House map were not challenged in court.

> counties or parts of counties to form multi-county districts; and
>
> (6) The redistricting plan complies with the Voting Rights Act and the fourteenth and fifteenth amendments to the United States Constitution.

Additionally, Mr. Himes identified two (2) other practices as criteria utilized with respect to the House Enacted Plan:

> (7) preserves cores of prior districts; and
>
> (8) minimizes incumbent pairing.

(Addl. Fact 7 TRO Resp. Ex. 1, Himes Aff., p. 8; Ex. Himes 3). Plaintiffs do not dispute these eight (8) factors were chosen and applied by the General Assembly to redistrict the House.

These factors are not mutually exclusive of each other. The General Assembly, as discussed in detail above, made a good faith effort to comply with the Supreme Court's and the Court of Appeals' precedent regarding county splitting. The express language of Article II, Section 4 thus compels denial of Plaintiffs' Motion for Summary Judgment.

CONCLUSION

For these reasons, and the reasons stated in Defendants' Motion for Summary Judgment, Plaintiff's Motion for Summary Judgment should be denied and summary judgment should be entered in favor of Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically upon the following on this 10th day of February, 2023:

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