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IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT

TELISE TURNER, GARY WYGANT, and FRANCIE HUNT,	)	
***Plaintiffs*,**	)	
v.	)	**CASE NO. 22-0287-IV**
	)	**THREE-JUDGE PANEL**
BILL LEE, Governor, TRE HARGETT, Secretary of State, MARK GOINS, Tennessee Coordinator of Elections; all in their official capacity only,	)	**CHANCELLOR PERKINS, CHIEF CHANCELLOR MARONEY CIRCUIT JUDGE SHARP**
***Defendants*.**	)	

PLAINTIFFS' REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants did not produce evidence sufficient to meet their burden of proof during discovery; Defendants did not attempt to meet their burden of proof in support of their Motion for Summary Judgment or in response to Plaintiffs' Motion for Summary Judgment; and Defendants have not set forth material facts pursuant to Tenn. R. Civ. P. 56 sufficient to meet their burden of proof. Instead, Defendants ask the Court to radically rewrite standing jurisprudence as applied to redistricting cases, and Defendants misstate the legal standard and the burden of proof in an attempt to distract the Court from their failure to prove the Enacted House Map crosses as few county lines as is necessary to comply with federal constitutional requirements.

Plaintiffs have standing to bring the claims they assert, and Plaintiffs are entitled to summary judgment because Defendants do not contest Plaintiffs' Senate claim on the merits and because Defendants have failed to meet their burden of proof on Plaintiffs' House claim.

I. Plaintiffs are entitled to summary judgment on their Senate claim.

Defendants respond to Plaintiffs' Motion for Summary Judgment on Plaintiffs' Senate claim by restating the arguments they set forth in support of their own Motion for Summary Judgment on the Senate claim: Ms. Hunt can still vote; she is still represented by a Senator; the Enacted House Map treats her the same as many other voters; and, therefore, she cannot prove injury and lacks standing.[1] Plaintiffs will spare the Court a similar cut and paste job, but incorporate their Response herein by reference. Briefly, however, as Plaintiffs stated in response to Defendants' Motion for Summary Judgment, and reiterate in the points below, Plaintiff Hunt has standing to pursue her claims because she lives and votes in the Enacted Senate Map's non-consecutively numbered Senate district and because the Enacted Senate Map has injured her, and will continue to injure her, by infringing her right to vote.

a. Plaintiff Hunt has standing pursuant to decades of Tennessee caselaw.

Defendants incorrectly argue that Plaintiffs exclusively ground Ms. Hunt's standing on the caselaw set forth in *Fisher v. Hargett*, 604 S.W.3d 381 (Tenn. 2020), and *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013).[2] (Defs' Resp. to Plfs' Motion for Summary Judgment, at p. 22.) To the contrary, Ms. Hunt's standing is grounded on a robust body of Tennessee caselaw concerning redistricting challenges from the past 50 years. The following Tennessee redistricting cases demonstrate that Ms. Hunt does have standing to challenge the Enacted Senate Map's failure to number Senate District 17 consecutively, even though Ms. Hunt can still vote, is still represented

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[1] Defendants cut and pasted the 14-page Senate argument from their own summary judgment papers, making only minor edits. (*Compare* Defs' Resp. to Plfs' Motion for Summary Judgment, at pp. 14-25, *with* Defs' Memo. in Support of Summary Judgment, at pp. 11-22.)

[2] Defendants also note Ms. Hunt did not challenge the numbering of Davidson County's senatorial districts in the decade from 2000 to 2010, even though she lived in Davidson County at the time. (Defs' Resp. to Plfs' Motion for Summary Judgment, at p. 20.) The fact that Ms. Hunt did not challenge a different redistricting statute 20 years ago is irrelevant to her standing to challenge the redistricting statute enacted last year.

by a Senator, and shares her injury with many other voters in the Davidson County portion of Senate District 17:

Senate Misnumbering Claims: In *Lockert I* (*Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982)) and *Lockert II* (*Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983)), Tennessee voters challenged the General Assembly's failure to number senate districts consecutively in counties having more than one senatorial district. These voters remained able to vote, remained represented by a Senator, and shared their alleged injury with other voters from their districts. The Tennessee Supreme Court adjudicated the plaintiffs' claims on the merits, holding that "constitutional standards which must be dealt with in any plan include contiguity of territory and consecutive numbering of districts," *Lockert I*, 631 S.W.2d at 715, and then upholding the trial court's injunction requiring the General Assembly to remedy its violation of the Constitution's Senate numbering provision, *Lockert II*, 656 S.W.2d at 838. Had the Tennessee Supreme Court determined voters do not have standing to challenge nonconsecutive numbering in the Senate, the Court would have dismissed their nonconsecutive numbering claims in both *Lockert I* and *Lockert II*.[3] It did not. In fact, it ruled in the plaintiffs' favor after noting that the plaintiffs' standing was "not in issue." *Lockert I*, 631 S.W.2d at 704.

County-Dividing Claims: In *Lockert I* and *II*; as well as *Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985); *Lockert III* (*Lockert v. Crowell*, 729 S.W.2d 88 (Tenn. 1987)); *Rural West Tennessee African-American Affairs Council v. McWherter*, 836 F. Supp. 447 (W.D. Tenn. 1993); and *Moore v. State*, 436 S.W.3d 775 (Tenn. Ct. App. 2014), Tennessee voters challenged

[3] TENN. R. APP. P. 13(b) requires appellate courts to "consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review." *See Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004) ("Consequently, we must consider the issue of standing, even though it was not raised below by the parties.") (dismissing action due to lack of standing where the parties did not raise standing as a defense).

the General Assembly's enactment of redistricting maps that divided counties between two or more legislative districts, allegedly in violation of the Tennessee Constitution's prohibitions on doing so in the House of Representatives (Article II, Section 5) and the Senate (Article II, Section 6). In all of these cases, the voters remained able to vote, remained represented by a Representative and a Senator, and shared their alleged injury with other voters from their counties. The Tennessee Supreme Court, the United States District Court for the Western District of Tennessee, and the Tennessee Court of Appeals all adjudicated the respective plaintiffs' claims on the merits, holding that the Constitution had been violated in some cases and had not been violated in other cases.

Contiguity Claims: In *Mader v. Crowell*, 498 F. Supp. 226 (M.D. Tenn. 1980), Tennessee voters challenged the General Assembly's enactment of a Senate redistricting map that combined two geographic areas into the same Senate district even though the two areas were connected only by a river with no bridge or ferry. *Id.* at 227-28. The voters who brought the case remained able to vote, remained represented by a Senator, and shared their alleged injury with other voters from their portion of the new Senate district. The United Stated District Court for the Middle District of Tennessee adjudicated the plaintiffs' claims on the merits, holding that continuity by water alone does not violate Article II, Section 6 of the Tennessee Constitution.

In all three types of cases, Tennessee Courts have permitted Tennessee voters to challenge redistricting plans despite the fact that those voters remained able to vote, remained represented in the General Assembly, and shared their injury with other voters from their legislative district or from their county. This makes sense, of course, given guidance from the United States Supreme Court that voters need not have been prevented from voting to have standing in redistricting cases. In *Baker v. Carr*, for instance, a Republican voter in Shelby county alleged that the legislature's failure to reapportion legislative districts placed him—and all voters in certain counties—"in a

position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties." 369 U.S. 186, 207–08 (1962). The allegation that voters in certain counties were "disfavor[ed]" relative to voters in other counties gave them standing, as they were asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the government be administered according to law." *Id.* at 208 (citations and internal quotation marks omitted).

Subsequently, in *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court adjudicated claims in which the plaintiffs alleged the weight of their votes had been diluted in the Alabama state legislature through malapportionment. The Supreme Court agreed, noting that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise . . . The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote." *Id.* at 555, 567.

Here, Ms. Hunt alleges the Enacted Senate Plan treats voters in her portion of Davidson County differently from voters in other counties whose Senate districts are consecutively numbered—consistent with the Tennessee Constitution. Ms. Hunt and her fellow voters' interest in continuous representation, which the Constitution protects and which the Enacted Senate Plan affords to voters in the other large counties, gives rise to an injury to the "effectiveness of their votes," establishing standing under *Baker*. In the language of *Reynolds*, Ms. Hunt's "right of suffrage has been denied by a debasement or dilution of the weight" of her vote because Ms. Hunt, like other voters in the Davidson County portion of Senate District 17, has been denied her right

to vote in the time, place, and manner guaranteed by the Constitution and has been denied the benefits of staggered-term Senate representation.[4]

b. The records of the Constitutional Convention of 1965 are not relevant given the plain meaning of Article II, Section 3.

Defendants continue to rely on a comment from one delegate to the Constitutional Convention of 1965 as evidence of the framers' intent behind Article II, Section 3's consecutive numbering provision. These comments are neither relevant in the face of the unambiguous meaning of the plain language of Article II, Section 3, nor are they consonant with Article II, Section 3's actual language. Defendants' citations to the *Journal and Debates of the State of Tennessee Constitutional Convention of 1965* should, therefore, be ignored.

Tennessee's courts are bound to apply the plain meaning of the text of the Tennessee Constitution in cases where that meaning is unambiguous. In *Shelby County v. Hale*, the Tennessee Supreme Court summarized this directive as follows: "The Court, in construing the Constitution must give effect to the intent of the people that are adopting it, as found in the instrument itself, and it will be presumed that the language thereof has been employed with sufficient precision to

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[4] Contrary to Defendants' representations, Ms. Hunt repeatedly articulated, in lay terms, the injury she and other Davidson County residents would suffer if redistricting were allowed to stand in violation of the Constitution:

- "I do believe that it had a political motive to kind of take away our voice and to, you know, concentrate or diffuse the democratic vote or the progressive vote." (Hunt Dep. at 32:2-5);
- "But then, you know, I kind of feel like the -- not being a lawyer, that the -- my read of this is that our constitutional authors understood the important nature of like keeping -- like the consecutive nature that we, as a community, are -- have a voice collectively. So, when it's not consecutive, what it does for my particular district is that I'm not – we're not in – we're not voting in concert with the rest of our county. And so, that was something that I was concerned about." (*Id.* at 37:9-19);
- "Where I would feel like the way that the districts would be reconfigured would give me and the people around me in my community less of a voice." (*Id.* at 38:17-20);
- "I do think that there's a value in communities having a collective voice, so that we know that we are represented by people who actually understand our lives and that there is an accessibility there." (*Id.* at 50:22-51:1).

convey such intent; and where such presumption prevails nothing remains except to enforce such intent." 292 S.W.2d 745, 748 (Tenn. 1956) (citing *Prescott v. Duncan*, 148 S.W. 229, 234 (Tenn. 1912)). Thus, when "the words are free from ambiguity and doubt, and express plainly and clearly the sense of the framers of the Constitution there is no occasion to resort to other means of interpretation." *Id.* at 749 (citing *State ex rel. Coates v. Manson*, 58 S.W. 319, 320 (Tenn. 1900)). The Tennessee Supreme Court reaffirmed these long-settled rules of constitutional construction last year in its decision in *Metropolitan Government of Nashville & Davidson County v. Tennessee Department of Education*, 645 S.W.3d 141, 153 n.13 (Tenn. 2022).[5]

Article II, Section 3 is precise and free from ambiguity: "In a county having more than one senatorial district, the districts shall be numbered consecutively." Given this provision's singular meaning, "there is no occasion to resort to other means of interpretation," and the Court is bound to enforce the provision's clear meaning. Thus, Defendants' citation to the recorded comments of one delegate to the Constitutional Convention of 1965 are misplaced and irrelevant to the Court's adjudication of Ms. Hunt's claim.

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[5] Footnote 13 to the Supreme Court's 2022 decision in the cited case states, in relevant part:

> This interpretation is consistent with our principles of constitutional construction, particularly the presumption of precision in language to which this Court has ascribed for over sixty years. *See Shelby Cnty. v. Hale*, 200 Tenn. 503, 292 S.W.2d 745, 748 (1956) ("[I]t will be presumed that the language thereof has been employed with sufficient precision to convey [the intent of the people.]"); *Hooker v. Haslam*, 437 S.W.3d 409, 426 (Tenn. 2014); *see also Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 14 (Tenn. 2000) ("No words in our Constitution can properly be said to be surplusage ...."); *Wallace v. Metro. Gov't of Nashville & Davidson Cnty.*, 546 S.W.3d 47, 52 (Tenn. 2018) ("We presume that the Legislature intended each word in a statute to have a specific purpose and meaning." (quoting *Arden v. Kozawa*, 466 S.W.3d 758, 764 (Tenn. 2015))); *Welch v. State*, 154 Tenn. 60, 289 S.W. 510, 511 (1926) (noting that the presumption is particularly pertinent when considering the use of two or more different words or terms within the same provision of the Constitution).

645 S.W.3d at 153 n.13.

Even if it were appropriate to review the comments of individual delegates to the Constitutional Convention of 1965 in this case, Defendants' citation would have to be rejected as unpersuasive because it contradicts the plain language of Article II, Section 3. Defendants cite the *Journals and Debates* for the proposition that the framers included the senatorial numbering requirement in the Constitution to "avoid complete turnover in senate representation in the state's most populous counties every two years." (Defs' Resp. to Plfs' Motion for Summary Judgment, at 24.) But Article II, Section 3 does more than just avoid complete turnover in the Senate for populous counties every two years. Article II, Section 3 ensures that populous counties are represented by senatorial delegations with fully staggered terms, meaning that half of the senatorial districts in each populous county are elected every two years.

Had the Constitution's framers sought only to avoid complete turnover, they would have drafted a less restrictive clause. *See, Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 14 (Tenn. 2020) ("it will be presumed that the language [of the Constitution] has been employed with sufficient precision to convey [the framers'] intent.") (citation omitted). For example, the framers could have avoided complete turnover by requiring the Senate districts in populous counties to include at least one even-numbered district and at least one odd-numbered district.[6] But the framers did not do so. They required consecutive numbering for ***all*** Senate districts in "a county having more than one senatorial district." To ignore the full effect of Article II, Section 3 and instead construe it as solely reflecting an intent to avoid ***complete*** turnover would imbed surplusage in the clause's actual wording, in contravention of the Tennessee Supreme Court's repeated guidance that "[n]o words in our constitution can properly be said to be surplusage." *Metro. v. Tennessee*,

[6] For example, Article II, Section 3 could have read, "In a county having more than one senatorial district, the senatorial districts in that county shall include at least one odd-numbered district and at least one even-numbered district."

645 S.W.3d at 153 n.13; *Planned Parenthood v. Sundquist*, 38 S.W.3d at 14 (citing *Welch v. State*, 289 S.W. 510, 511 (Tenn. 1926)).

Article II Section 3's clarity speaks for itself, with no justification to seek the framers' intent within the records of the Constitutional Convention of 1965. Voters in populous counties are entitled to Senate delegations with fully staggered terms. Here, the Enacted Senate Map impairs the right to vote of Ms. Hunt and the other Davidson County voters in District 17 by denying them such protections, in contrast to all other voters in the other large counties around the State of Tennessee. Thus, Ms. Hunt has alleged injury sufficient to establish standing notwithstanding Defendants' misplaced citation to records from the Constitutional Convention.

II. Plaintiffs are entitled to summary judgment on their House claim.

Defendants attempt to shift the burden to Plaintiffs to provide evidence for a standard that does not exist. In reality, the case law is clear: once counties are split in violation of the plain words of our Constitution, the burden is on Defendants to justify each split using constitutional criteria. If, as here, Defendants cannot justify the splits using constitutional criteria, then the House Map must be redrawn. In their attempt to direct the Court away from their failure to meet their burden of proof, Defendants ignore the applicable law (arguing that a safe harbor exists for House redistricting plans with 30 county-splitting districts when decades of cases demonstrate there is no safe harbor); ignore the applicable burden of proof (arguing Plaintiffs must prove bad faith or improper motive because the Enacted House Map splits "only" 30 counties); misrepresent Plaintiffs' Statement of Material Facts (arguing Plaintiffs agree Gibson County was split due to population necessity); and misrepresent the illustrative maps produced by Plaintiffs' expert witness (arguing in conclusory fashion that most of Dr. Cervas's maps are unconstitutional).

Defendants' misdirection aside, Plaintiffs are entitled to summary judgment under the actual legal standards because Defendants have not met their burden of proving the Enacted House Map crosses as few county lines as is necessary to comply with the federal Constitution.

a. *Lockert II* categorically does not create a "30 split safe harbor."

Defendants erroneously claim the *Lockert II* Court set "an upper limit of thirty (30) splits" that acts as a safe harbor for all future redistricting plans, and Defendants claim this standard has been "repeatedly utilized since *Lockert II*." (Defs. Resp. to Plfs' Motion for Summary Judgment, at p. 39.) Though Defendants ***wish*** this to be true (given that it would insulate virtually any 30-split map ever passed by the General Assembly), it is plainly wrong. To the contrary, the *Lockert II* Court reaffirmed its *Lockert I* holding that reapportionment plans must cross as few county lines as is necessary to comply with the federal Constitution, and then the Court determined this standard could be met in the 1980s, based on the demographics of the 1980s, by reapportionment plans that divided no more than 30 counties.

In *Lockert I*, the Supreme Court set forth its holding as follows: "we hold that the plan adopted must cross as few county lines as is necessary to comply with the federal constitutional requirements." 631 S.W.2d at 715. In *Lockert II*, the Tennessee Supreme Court opened its analysis with an express rejection of the defendants' request for the Court to reconsider that ruling, noting, "This Court is not persuaded by . . . defendants' arguments that we should sanction a single county line violation not shown to be necessary to avoid a breach of federal constitutional requirements." 656 S.W.2d at 839.[7]

[7] Defendants argue Plaintiffs fail to recognize a distinction in the *Lockert* decisions between multi-county districts and multi-district counties. Yet, the Enacted House Map does not create a county-splitting district in any of the four large urban counties, which are the multi-district counties at issue in the *Lockert* decisions. Thus, the 30 county splits in the Enacted House Map are all in multi-county districts, and the *Lockert* holdings discussed herein are applicable regardless of the

After first reaffirming its *Lockert I* holding as described above, the Supreme Court in *Lockert II* then conducted a detailed analysis of the facts in the record concerning Tennessee demographics based on the 1980 U.S. Census and based on testimony from a mapmaker concerning the mapmaking possibilities stemming from those demographics. 656 S.W.2d at 844. The trial court below had ruled that the House map at issue violated the Tennessee Constitution's county-splitting prohibition and had also ruled, based on "the evidence" before it, that "the Legislature [could] adopt a House plan with a ten percent or less maximum gross deviation from the one person, one vote optimum and divide only 25 counties." *Id.* at 844. The Supreme Court agreed the House plan violated the Tennessee Constitution, but the Court determined "that slight modifications of the Chancellor's limitations are appropriate." *Id.* Based on "the proof in this record," the Supreme Court "raise[d] the 10% limit to 14% total deviation" and stated that "an upper limit of dividing 30 counties in the multi-county category is appropriate." *Id.*

These two holdings ("cross as few county lines as is necessary" and "an upper limit of dividing 30 counties") only work together when read as the Supreme Court applying its broad holding ("cross as few county lines as necessary") to the specific demographics reflected in the 1980 Census, leading to an "upper limit of dividing 30 counties" ***for House reapportionment plans enacted in the 1980s***. Defendants' attempt to rewrite the *Lockert II* "upper limit" as a safe harbor applicable to all future maps, drawn by all future General Assemblies, in all future decades, in contrast, would place an intractable internal conflict at the heart of *Lockert II*. In effect, Defendants' proposed reading would mean the Supreme Court opened its decision in *Lockert II* by expressly reaffirming *Lockert I*'s holding ("cross as few county lines as is necessary") but then abandoned that holding just a few pages later, without acknowledging it, by setting a bright line

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Enacted House Map's treatment of the four largest urban counties. Defendants' arguments on this point are entirely irrelevant.

"upper limit of dividing 30 counties," applicable to all future reapportionment plans regardless of demographic change. It is unreasonable to assume the Supreme Court silently reversed itself within the confines of a single written decision and with the end result of embedding an irreconcilable conflict at the heart of the opinion's holding and, in effect, give *carte blanche* to all future General Assemblies to do whatever they want, so long as they split 30 counties or fewer.

A decade after the *Lockert* decisions, the Western District of Tennessee applied Plaintiffs' reading of *Lockert II*, not Defendants' proposed reading. In *Rural West Tennessee African-American Affairs Council v. McWherter*, 836 F. Supp. 447 (W.D. Tenn. 1993), which was decided in the plaintiffs' favor on summary judgment, the General Assembly had enacted a House map with a total population variance between districts of 13.90% and with 30 county-splitting districts. *Id.* at 448. If *Lockert II* had actually created a "30 split safe harbor," this House map would have been constitutional. Instead, the District Court noted *Lockert I* and *II*'s reiterated holding that reapportionment plans must cross as few county lines as is necessary to comply with federal constitutional requirements, and the District Court granted summary judgment in the plaintiffs' favor when the defendants failed to prove the 30 county splits in the enacted map were required to comply with the federal Constitution. *Id.* at 450-52. In reaching this holding, the District Court did not require evidence of bad faith or improper motive. Rather, the District Court relied on the defendants' failure to justify the county-splitting districts in the enacted map in the face of an illustrative map, presented by the plaintiffs, with a total population variance below 10% and with 27 county-splitting districts. *Id.*

The *Rural West* holding reflects the Court's rejection of Defendants' argument that *Lockert II* established a "30 split safe harbor." But we need not glean this rejection from the mechanics of

the holding alone because the District Court in *Rural West* expressly rejected the argument that *Lockert II*'s numerical guidelines applied to future decades' redistricting maps:

> ***[N]owhere in the Lockert II opinion does the court purport to establish an absolute numerical standard, applicable in all redistricting contexts.*** On the contrary, the opinion sets forth in great detail the factual findings of the chancellor below concerning the population deviations for particular districts and the counties from which they were formed, under both the challenged state plan and alternative plans, 656 S.W.2d at 842-43. ***Each of these findings necessarily was based on population figures from the 1980 census, figures that are no longer either accurate or relevant.***

Id. at 450-51 (emphasis added).

In the case at bar, the legislative history and all produced evidence demonstrate the General Assembly sought only to create no more than 30 county-splitting districts, despite the longstanding legal requirement for the General Assembly to create as few county-splitting districts as is necessary to comply with federal Constitutional requirements. Defendants have offered no proof that the Enacted House Map crossed as few county lines as is necessary to comply with federal constitutional requirements, and Defendants' expert witness has testified that seven of the 30 county-splitting districts in the Enacted House Map were not required by federal constitutional requirements.[8] Defendants' mere direction to the fact that the Enacted House Map only divides 30 counties, therefore, fails to meet Defendants' burden of proof (discussed below), and Plaintiffs are entitled to summary judgment.

[8] As discussed in Section II(b), below, Defendants grossly misrepresent Plaintiffs' Statement of Material Facts as having adopted Mr. Himes's justifications for the 30 county-splits in the Enacted House Map. To the contrary, Plaintiffs' Material Fact Number 57 reflects the undisputed fact that Defendants' expert witness ***testified*** that seven of the 30 county-splitting districts in the Enacted House Map were not justified by federal constitutional requirements. Plaintiffs do not adopt Mr. Himes's stated justifications, but Mr. Himes' stated justifications mean that Defendants themselves agree the Enacted House Map includes seven county-splitting districts that were not required to comply with the federal Constitution.

b. Defendants continue to misstate the applicable burden of proof.

In redistricting cases brought under Article II, Section 5 of the Tennessee Constitution, the burden of proof is clear: (1) once plaintiffs demonstrate at least one county has been divided in a reapportionment plan; (2) defendants must justify the reapportionment plan by demonstrating that the plan crosses as few county lines as is necessary to comply with federal constitutional requirements; and (3) if defendants meet their burden of proof, then plaintiffs must prove bad faith or improper motive to prevail. Tennessee's Courts have consistently applied this legal standard for nearly 50 years, and Defendants' request to rewrite the standard now, in the face of their failure to meet their burden of proof, should be rejected.

The Tennessee Supreme Court articulated the first two prongs of the burden-shifting framework applicable to county-splitting claims in *Lockert I*.[9] First, plaintiffs must demonstrate a redistricting act splits counties, thereby violating the State's absolute constitutional prohibition against crossing county lines. 631 S.W.2d at 714. Once plaintiffs do so, "[t]he burden therefore shift[s] to the defendants to show that the Legislature was justified in passing a reapportionment act which crossed county lines." *Id.* The Court left no doubt concerning its holding, given its placement of the words "we hold" immediately prior to the articulated legal standard: "we hold that the plan adopted must cross as few county lines as is necessary to comply with the federal constitutional requirements." *Id.* at 715. Moreover, as detailed above, the Court expressly rejected the defendants' request to revise this holding in *Lockert II*.

In briefing their own summary judgment motion, Defendants failed to quote, analyze, or even acknowledge this language. Their Response to Plaintiffs' Motion for Summary Judgment

[9] Plaintiffs extensively briefed the applicable burden of proof in response to Defendants' Motion for Summary Judgment. Plaintiffs incorporate the analysis from their responsive brief herein by reference.

does little better, citing this holding only once, and then doubling down on their claim that Plaintiffs must prove bad faith or improper motive to prevail in this action. Yet, Defendants' repeated insistence that Plaintiffs must prove bad faith or improper motive to prevail in this action relies on a misreading of the Supreme Court's subsequent decision in *Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985).

The Supreme Court issued its decision in *Lincoln County* in 1985, two years after it issued its decision in *Lockert II*. As discussed above, the Court in *Lockert II* determined, based on "the proof in this record," that the 1980 census data "justified" a House map with no more than 30 county splits. 656 S.W.2d at 844. Following that guidance, in 1984, the General Assembly enacted a new House map with 30 county splits. *Lincoln County*, 701 S.W.2d at 602. The Middle District of Tennessee then swiftly heard a declaratory judgment action and determined the new map complied with federal constitutional requirements. *Id.* at 602-603. On this set of facts, the Supreme Court in *Lincoln County* heard a piecemeal challenge arguing two specific counties had been unnecessarily divided in the newly enacted map. *Id.* at 603.

In *Lincoln County*, the Supreme Court first determined on the record before it whether the county splits in the newly enacted plan were justified, as the *Lockert* burden of proof requires. On county splits, the Court determined "[t]here is no question but that the statute in question meets the general guidelines established by this Court in the *Lockert* case [] in that it does not divide more than thirty counties and does not divide any county more than once." *Id.* On compliance with federal constitutional requirements, the Court then determined the new map "complies with the maximum population deviation suggested in [*Lockert II*] and it has been successfully defended in federal litigation which has now proceeded to final judgment." *Id.* After reaching these two conclusions, the Court rejected the counties' claims because the counties had failed to proffer any

evidence of bad faith or improper motive, given that the plan had already been "justified" in the eyes of the Court as well as in the eyes of the United States District Court for the Middle District of Tennessee. *Id.* The Court summarized its application of this burden shift as follows:

> The determination of the District Court that federal guidelines have been met, together with the stipulation that the tolerances suggested by this Court in the *Lockert* case, *supra*, have also been met, persuades us 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.

Id. at 604.

Nearly three decades later, in *Moore v. State*, 436 S.W.3d 775 (Tenn. Ct. App. 2014), the Tennessee Court of Appeals reiterated defendants must affirmatively justify the county splits included in a redistricting map. The *Moore* Court first noted, the "*Lockert* court held that after the plaintiffs in that case had demonstrated that the redistricting act violated the state constitutional prohibition against crossing county lines, '[t]he burden . . . shifted to the defendants to show that the Legislature was justified in passing a reapportionment act which crossed county lines.'" *Id.* at 784 (alterations in original). The Court then rejected language from the lower court suggesting the plaintiffs bore the burden of proof, noting, "[t]o the extent to which the trial court held that the burden was not on [the state defendants] to demonstrate that crossing county lines was justified by equal protection considerations, we reverse. To the extent to which the trial court held that [the state defendants] ***carried*** their burden, we affirm." *Id.* at 785 (emphasis added). Finally, having determined the defendants met their burden, the Court noted the plaintiffs had "alleged no improper motive or bad faith," and the Court upheld the enacted map. *Id.* at 788-89.[10]

[10] As Plaintiffs noted in their Response to Defendants' Motion for Summary Judgment, the substantive holdings in *Lockert II* and *Rural West* further demonstrate that plaintiffs need not prove bad faith or improper motive if defendants first fail to justify challenged county splits. In both cases, the courts held that the challenged reapportionment plans violated the Tennessee Constitution when the defendants could not justify the number of county-splitting districts as

As set forth in detail in Plaintiffs' Memorandum in Support of their Motion for Summary Judgment, which Plaintiffs incorporate by reference herein, Defendants cannot meet their burden of proving that the county splits in the Enacted House Map are justified by federal constitutional requirements based on the evidence produced in discovery and now in the record. To the contrary, the legislative history and the evidence in the record shows the General Assembly erroneously sought only to divide no more than 30 counties in the Enacted House Map, viewing anything less than 30 county splits within a "safe harbor," and thus a discretionary policy decision needing no constitutional justification whatsoever. As a result, Defendants have not listed a single alleged material fact in their Rule 56 Statement of Material Facts or in response to Plaintiffs' Statement of Material Facts demonstrating the Enacted House Map crosses as few county lines as is necessary to comply with federal constitutional requirements. Moreover, neither of Defendants' expert witnesses opine on whether the Enacted House Map divides as few counties as necessary to comply with federal constitutional requirements, and one of Defendants' expert witnesses has testified that seven of the 30 county splits included in the Enacted House Map were justified only by state redistricting practices, not federal constitutional requirements.

Since Defendants have not proffered evidence sufficient to meet their burden of proof, Plaintiffs are entitled to summary judgment and need not prove bad faith or improper motive.

c. The Constitution's catch-all does not elevate redistricting practices to constitutional mandates.

Defendants argue that Article II, Section 4 permits "pairing incumbents" and "core retention" to be added to the list of constitutional justifications sufficient to support a county split.

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necessary for compliance with federal constitutional requirements. Neither court addressed any evidence of bad faith or improper motive. (*See* Plfs' Resp. to Defs' Motion for Summary Judgment, at pp. 17-18.)

(Defs' Resp. to Plfs' Motion for Summary Judgment, pp. 49-51.) This is incorrect, however, as the Tennessee Supreme Court's decision in *Lockert II* illustrates.

In *Lockert II*, the General Assembly had divided Washington County between two multi-county legislative districts for the express purpose of protecting two incumbents, both of whom lived in Washington County. 656 S.W.2d at 839. This county split was not necessary to comply with federal constitutional requirements, given that "dividing Washington County did not diminish the total variance and that eliminating the division of Washington County would not increase the variance." *Id.* Because federal constitutional requirements did not necessitate dividing Washington County, the Supreme Court rejected this county split. *Id.* This holding directly rebuts Defendants' claim that incumbency protection can justify a county split in the eyes of the Tennessee Constitution. And, it stands to reason that if one uncodified redistricting practice cannot justify a county split under the Tennessee Constitution, then no uncodified redistricting practice can justify a county split. Thus, neither incumbency protection nor core retention can justify the creation of county-splitting legislative districts under the Tennessee Constitution.

d. Plaintiff Wygant has standing to pursue Plaintiffs' House claim.

Having first misstated the legal standard and the burden of proof, Defendants next misrepresent the facts to argue Plaintiff Wygant lacks standing to challenge the Enacted House Map. Yet, Mr. Wygant lives in a county divided in violation of Article II, Section 5 of the Tennessee Constitution, giving him constitutional standing to challenge the Enacted House Map under that constitutional provision.

i. Plaintiffs did not adopt Defendants' expert's list of reasons he claims justify each of the 30 county splits in the Enacted House Map.

Defendants cite Plaintiffs' Statement of Material Fact Number 57 for their claim that Plaintiffs "adopted the justifications identified by Doug Himes in their Statement of Undisputed

Material Facts for each county split." (Defs' Resp. to Plfs' Motion for Summary Judgment, at p. 45.) This misrepresentation is categorically untrue. Statement of Fact Number 57 simply memorializes the fact that Defendants' expert witness ***claims*** seven of the 30 county splits in the Enacted House Map were not required for compliance with federal constitutional requirements.

Plaintiffs have repeatedly argued that Defendants compounded their failure to justify the Enacted House Map by proffering an expert witness who testified that seven of the 30 county splits in the Enacted House Map were not justified by federal constitutional requirements. In support of that claim, Statement of Material Fact Number 57 memorializes the undisputed fact that Mr. Himes has taken this position in this litigation:

57. Page 38 of Mr. Himes' expert report includes Footnote 12, in which Mr. Himes states his expert opinion on which factor or factors required each of the 30 county splits in the Enacted House Map. Footnote 12 states as follows:

> Chapter 598's split counties and justifications: Anderson – population; Bradley – population/core preservation; ***Carroll – core preservation***; Carter – population shift/core preservation/county splitting; Claiborne – population shift/district contraction/county splitting; ***Dickson – core preservation/incumbents; Fentress – core preservation;*** Gibson – population shift/core preservation; Hamblen – population shift/district contraction; Hardeman – VRA/core preservation; ***Hardin – core preservation***; Hawkins – population shift/county splitting; Haywood – VRA/population shift/core preservation; Henderson –population shift; Henry – population shift/district contraction; Jefferson – population shift/core preservation; Lawrence – population shift/core preservation; Lincoln – population shift/core preservation; ***Loudon – core preservation***; Madison – population/VRA/core preservation; Maury – population; ***Monroe – core preservation***; Obion – population shift; Putnam – population/core preservation; ***Roane – core preservation***; Sevier – population/core preservation; Sullivan – population/county splitting; Sumner – population; Wilson – population; Williamson – population.

(Plfs' Statement of Material Facts, at p. 16 (emphasis added).)

Had Plaintiffs sought to adopt Mr. Himes's above-referenced justifications, Plaintiffs would have set forth Mr. Himes's justifications as the undisputed facts, and Plaintiffs would have

cited Himes's Footnote 12 as support. Instead, Plaintiffs articulated the fact that Mr. Himes holds the stated opinion as the relevant material fact, noting that "Page 38 of Mr. Himes' expert report includes Footnote 12, in which Mr. Himes states his expert opinion on which factor or factors required each of the 30 county splits in the Enacted House Map."

Defendants' misrepresentation of Plaintiffs' Statement of Material Facts cannot supplant the actual text of those facts. Plaintiffs do not adopt Mr. Himes's opinions in Fact Number 57, and Plaintiffs have neither argued nor agreed at any point in this litigation that the Enacted House Map divides Gibson County in compliance with the Tennessee Constitution.

ii. Plaintiff Wygant has standing because the Enacted House Map divides Gibson County.

Notwithstanding Defendants' misrepresentation of the factual record, Plaintiff Wygant's standing analysis is simple. Article II, Section 5 of the Tennessee Constitution prohibits dividing counties when reapportioning the House of Representatives. The Enacted House Map undisputedly divides Gibson County between two multi-county districts, in violation of that constitutional prohibition. Thus, Mr. Wygant has alleged a constitutional injury sufficient to endow him with standing to challenge the Enacted House Map.

As detailed above, plaintiffs bringing county-splitting claims under Article II, Section 5 bear the initial burden of proving a reapportionment plan splits counties. *Lockert I*, 631 S.W.2d at 714. Here, the Enacted House Map undisputedly divides Mr. Wygant's county of residence, Gibson County, and 29 other counties. Whether or not Defendants can meet their burden of justifying the Enacted House Map's 30 county splits is a merits assessment for the Court's adjudication, but Mr. Wygant's residence in a divided county gives him standing to bring his challenge, just like the many residents of divided counties who brought county-splitting claims in

the 1980s (the *Lockert* cases), the 1990s (*Rural West*), and the 2010s (*Moore v. State*), some with success on the merits and some without success, but all with standing to pursue the claims.[11]

e. Plaintiff Turner has standing because Plaintiffs allege that including a county-split in Shelby County would have allowed for the fewest county splits statewide.

Defendants also argue Plaintiff Turner lacks standing to pursue Plaintiffs' House claim. Yet, Plaintiffs allege the General Assembly rejected a plan that would have created a county-splitting district in Shelby County, with the statewide domino effect of creating the fewest county-splitting House districts (23) credibly proposed as possible in this litigation. This allegation creates a case or controversy sufficient to bestow standing on Plaintiff Turner, a Shelby County voter.

During the legislative redistricting process, Representative Bob Freeman proposed a redistricting map that would have split just 23 counties.[12] As counsel to the Select Committee on Redistricting, Mr. Himes informed the General Assembly he objected to this map because it created a county-splitting House district in Shelby County.[13] Defendants claim this proposal was never voted on, but the House Public Service Committee voted it down during its January 12,

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[11] Though not required for standing, Defendants erroneously argue Plaintiff Wygant cannot prove his claims. To the contrary, Plaintiff Wygant has already proven his claims, and summary judgment is warranted. As noted, Defendants have not met their burden of proving the Enacted House Map crosses as few county lines as is necessary to comply with federal constitutional requirements. Moreover, Defendants' expert witness has testified that seven of the 30 county splits in the Enacted House Map were not necessary to comply with federal constitutional requirements, and Plaintiffs' expert witness has created multiple illustrative maps demonstrating that the House could have been redistricted with five to eight fewer county splits (including not splitting Gibson County) while still complying with federal constitutional requirements.

[12] Plaintiffs' Statement of Material Facts ¶ 31 (hereinafter "SMF").

[13] SMF ¶ 32. Defendants state the Democratic Caucus Plan B, proposed by Representative Freeman, "is only unconstitutional in one aspect—the split of Shelby County." (Defs' Resp. to Plfs' Motion for Summary Judgment, at p. 31.) Plaintiffs argue the limitations on splitting the four urban counties stated in the *Lockert* decisions should not prevent Shelby County from including a county-splitting district if doing so will allow for fewer county-splitting districts statewide than not doing so, and Plaintiffs note the *Lockert* decisions did not address such a situation. Defendants agree this issue was not at issue in the *Lockert* decisions: "No one asked the *Lockert* courts to allow county splits that were justified by a reduction in the total number of county splits." (*Id.* at p. 40.)

2022, meeting; and the full House of Representatives voted it down on January 24, 2022, when proposed as an amendment to the legislation that became the Enacted House Map.[14]

Plaintiffs allege that Shelby County may include a county-splitting House district when doing so allows for fewer county-splitting districts statewide than not doing so. Representative Freeman's proposed map includes a split in Shelby County, but creates 23 county-dividing House districts, and Plaintffs' expert witness's illustrative Cervas House Map 13.5a includes a split in Shelby County, but creates 22 county-dividing House districts. Plaintiffs, therefore, have plausibly alleged that Shelby County should have included a county-splitting House district to ensure the fewest possible county-splitting districts statewide. As a Shelby County voter, Ms. Turner has standing to bring this claim.

f. Defendants' conclusory misrepresentations concerning the illustrative maps generated by Plaintiffs' expert witness are not relevant to this stage of the litigation and should be disregarded.

Finally, Defendants seek to direct the Court's attention away from their failure to meet their burden of proof by serially misrepresenting Dr. Cervas's illustrative maps and by arguing based off of those misrepresentations that nearly all of those illustrative maps are themselves unconstitutional. Defendants' misrepresentations should be ignored at this stage of the litigation.

As a threshold issue, Plaintiffs reaffirm their position that Dr. Cervas's testimony is not essential to Plaintiffs' entitlement to summary judgment on Plaintiffs' House claim because Defendants have failed to meet their burden of justifying the Enacted House Map by demonstrating it crosses as few county lines as is necessary to comply with federal constitutional requirements and because Defendants' own expert witness has testified that seven of the 30 county splits in the

[14] *See* Transcript of January 12, 2022, hearing of the House Public Service Committee at 13:3-18:7 (Plaintiffs' Appendix Exhibit J); Transcript of January 24, 2022, session of the full House of Representatives at 28:25-35:5 (Plaintiffs' Appendix Exhibit L).

Enacted House Map were not necessitated by federal constitutional requirements. Thus, the Court should grant Plaintiffs' Motion for Summary Judgment without address Defendants' criticisms of Dr. Cervas.

If the Court determines Dr. Cervas's testimony requires analysis, the Court should reject Defendants' conclusory criticisms, which are rife with misrepresentation and omission. The following brief examples illustrate the role of misrepresentation at the heart of Defendants' criticisms of Dr. Cervas.

> **Non-Contiguities**: Defendants claim Cervas House Map 13b, 14a, 13.5a, and 13.5b are unconstitutional because they contain a small number of House districts with zero-population census blocks that are not contiguous with the rest of the districts. Defendants neglect to alert the Court that Dr. Cervas corrected these non-contiguities in his Rebuttal Report.
>
> **Majority-Minority House Districts**: Defendants claim Cervas House Map 13b has 12 majority-minority districts, even though it actually has 13 majority minority districts, like the Enacted House Map; Defendants claim Cervas House Map 14a has 12 majority-minority districts, even thought it actually has 15 majority-minority districts, two more than the Enacted House Map; and Defendants claim Cervas House Map 13.5b has 11 majority-minority districts, even though it actually has 13 majority-minority districts, like the Enacted House Map.
>
> **Voting Rights Act**: Defendants criticize Dr. Cervas for not having conducted a Voting Rights Act analysis on his Cervas House Maps 13c and 13d. Defendants neglect to inform the Court that both maps contain the exact same 13 majority-minority House districts as the Enacted House Map and are, thus, equally compliant with the Voting Rights Act.

Dr. Cervas's expert opinion is that the Enacted House Map splits far more counties than necessary to comply with federal constitutional requirements. To reach this conclusion, Dr. Cervas produced the seven primary and corrected maps in his expert reports, each of which demonstrate that the Enacted House Map could have had significantly fewer county splits while complying with federal constitutional requirements even if the General Assembly chose to focus on different factors (*e.g.*, 13 or 14 districts in Shelby County; 13 districts wholly in Shelby County and one county-splitting district in Shelby County; preserving more majority-minority districts than the

previous decade's House map or holding the number of majority-minority districts steady at 13; preserving more or less of prior districts' cores; protecting incumbents or pairing incumbents, etc.).

Rather than proffering evidence to meet its own burden of proving the Enacted House Map crosses as few county lines as is necessary to comply with the federal constitution, Defendants have focused their defense of Plaintiffs' House claim on attacking Dr. Cervas's maps. To be clear, Plaintiffs do not argue any of Dr. Cervas's maps have to be implemented or that the Court should order the General Assembly to enact any of Dr. Cervas's maps. Dr. Cervas's maps are merely proffered as illustrations that support Dr. Cervas's opinion that the Enacted House Map crosses significantly more county lines than is necessary to comply with federal constitutional requirements. Should the Court determine it cannot adjudicate Plaintiffs' House claim without assessing the constitutionality of Dr. Cervas's illustrative maps, then Plaintiffs' House claim should go to trial because the Parties hotly contest Dr. Cervas's testimony.

Since Defendants have failed to meet their burden of proof and have admitted, through their expert witness, that the Enacted Map divides seven counties for reasons other than federal constitutional compliance, Plaintiffs are entitled to summary judgment.

CONCLUSION

Defendants respond to Plaintiffs' Motion for Summary Judgment by arguing Tennessee voters cannot seek to enforce the Constitution when they are denied the Senate district they are guaranteed by the Constitution and by seeking to distract the Court's attention away from their failure to meet their burden of proof that the Enacted House Map crosses as few county lines as is necessary to comply with federal constitutional requirements.

For the reasons stated above, as well as in their Memorandum in Support of their Motion for Summary Judgment and in their Response to Defendants' Motion for Summary Judgment, Plaintiffs' Motion for Summary judgement should be granted.

Dated: February 24, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment* will be served on the following counsel for the defendants via electronic and U.S. mail on February 24, 2023.

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