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4/11/2023 9:25 PM
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IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT

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' PRETRIAL BRIEF

Redistricting is one of the most difficult tasks the General Assembly is asked to perform. The General Assembly must utilize the most recent census data and evaluate population growth, decline, and shifts across Tennessee. Acceptable plans must conform to federal constitutional requirements of "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. These federal requirements supersede state requirements, including, as pertinent here, Tennessee's constitutional requirement to avoid splitting counties.

But perfection is not required. If it was, litigation would never end. Maps would always be subject to challenge at any point so long as a "better" map could be conceived post hoc. Recognizing the complexity of the process and the impossibility of exact mathematical precision, the Tennessee Supreme Court has held 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 motive." *Lincoln Co. v. Crowell*, 701 S.W.2d 602, 604 (Tenn. 1985).

Plaintiffs allege that the House Map splits too many counties in violation of Article II, Section 5 of the Tennessee Constitution and that the Senate Map fails to consecutively number the districts in Davidson County in violation of Article II, Section 6. But the House Map redistricting process clearly considered and attempted to comply with the constitutional guidelines regarding county splitting. No map presented to the General Assembly was even arguably constitutional besides the enacted plan. 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). With regard to the Senate Map claim, only one Plaintiff lives in a county with nonconsecutively numbered districts. That Plaintiff, 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. Indeed, the Tennessee State Senate is remarkably stable and the turnover of three (3) Davidson County Senators during the 2026 or 2030 election cycle would be unprecedented in modern Tennessee politics. 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).

Because Plaintiffs cannot demonstrate an injury in fact sufficient to convey standing to challenge the Senate Map, and because Plaintiffs cannot demonstrate that the General Assembly

acted in bad faith or with improper motive when enacting the House Map, their claims should be dismissed.

BACKGROUND

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. (TRO Resp. Ex. 1, Himes Aff., p. 5). Information concerning the redistricting process was posted to the website and made available to the public as it became available. (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. (TRO Resp. Ex. 1, Himes Aff., p. 6). The House Committee held its first public meeting on September 8, 2021. At that meeting, House Committee counsel made a presentation about the redistricting process. (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. (TRO Resp. Ex. 1, Himes Aff. p. 6-7; Ex. Himes 3).

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

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*"). (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

(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. (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. (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. (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. (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. (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*. (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 split Shelby County. (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 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. (TRO Resp. Ex. 1, Himes Aff., p. 14).

That plan contains 99 single member districts, is 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). (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[2]

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 Lieutenant 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 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

[2] As Defendants are defending the Senate Map on the threshold ground of standing, the legislative history is included for context.

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. 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.) On October 17, 2022, Plaintiffs filed their third amended complaint which substituted Plaintiff Francie Hunt for Plaintiff Akilah Moore. (Third Amend. Compl.). Both Parties filed for summary judgment. The Court granted Defendants' motion in part and dismissed Plaintiff Turner from the matter for lack of standing. The remaining grounds for summary judgment in both motions were denied.

ARGUMENT—SENATE MAP

Francie Hunt, an individual Davidson County voter who lives in Senate District 17, does not have standing to challenge the Senate map. Plaintiff Hunt 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). She has suffered no actual harm, and political realities reveal that her alleged harm is nothing more than speculative and hypothetical. Additionally, in this unique situation, Plaintiff Hunt cannot show that her alleged injury is capable of being redressed by the Tennessee General Assembly without placing any remedial map in legal peril. *City of Memphis*, 414 S.W.3d at 98. Though Defendants do not defend the merits of the Senate map against Plaintiff Hunt's claim, she cannot reach the merits of her challenge because she cannot satisfy the first and third elements of constitutional standing. Therefore, the Senate Map claim warrants dismissal for lack of standing.

LEGAL STANDARD

Standing Generally

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 with respect to Ms. Hunt's claim against the Senate map.

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

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, Plaintiff must allege sufficient facts to prove by a preponderance of the evidence that she has standing to bring her claim.

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").

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)).

An injury-in-law is not sufficient; a plaintiff must allege sufficient facts to meet the injury-in-fact requirement. In *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190 (2021), the Supreme Court considered whether a class of plaintiffs had standing to sue TransUnion LLC over its credit-reporting practices. *See* 141 S. Ct. at 2200. In considering this question, the Court "[a]ssum[ed] that the plaintiffs [were] correct that TransUnion violated its obligations under the Fair Credit Reporting Act." *Id*. at 2208. But that violation, the Court concluded, was not enough to satisfy Article III for many plaintiff class members. *See id*. at 2209– 14. "To have Article III standing," the Court explained, "plaintiffs must demonstrate . . . that they suffered a concrete harm." *Id*. at 2200. This is true even if Congress "elevate[s] harms that exist in the real world" by giving them "actionable legal status." *Id*. at 2205 (cleaned up). Congress, in other words, "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *Id*.

In *Ward v. Nat'l Patient Acct. Servs. Solutions, Inc.*, 9 F.4th 357 (6th Cir. 2021), the Sixth Circuit applied *TransUnion* and concluded that a plaintiff lacked standing to bring claims under the Fair Debt Collection Practices Act where he "failed to show more than a bare procedural violation." 9 F.4th at 363. There, the plaintiff contended that "the violation of his procedural

rights under the [Act] alone constitute[d] a concrete injury." *Id*. at 361. The Sixth Circuit disagreed. *TransUnion* and other Supreme Court decisions, the Sixth Circuit observed, "emphasize a basic guidepost in [the] standing analysis: [a plaintiff] does not automatically have standing simply because Congress authorizes [him] to sue" for statutory violations. *See id*. In sum, Art. III "requires a concrete injury even in the context of a statutory violation." *TransUnion*, 141 S.Ct. at 2205; *see also Ward*, 9 F.4th at 362. Tennessee's constitutional standing does too. *See Metro. Gov't of Nashville v. Bd. of Zoning Appeals of Nashville*, 477 S.W.3d 750, 755 (Tenn. 2015).

The third element of constitutional standing is that the injury is capable of being redressed by a favorable decision of the court. *City of Memphis*, 414 S.W.3d 88, 98.

I. Plaintiff Hunt cannot demonstrate an actual or imminent injury in fact.

Here, Plaintiff Hunt fails to satisfy the first and most fundamental element of standing—injury in fact. She fails to articulate an imminent, concrete harm as a result of the non-consecutive numbering of the Davidson County Senatorial districts. In her pleadings and arguments at summary judgment, she seems to have put forth two ways she has allegedly suffered harm:

(i) that her right to vote has been infringed or her vote has been diluted; and

(ii) she has been deprived of the benefit that Art. II, § 3 confers.

With respect to her vote infringement and dilution allegation, no such harm has occurred. Notably, Plaintiff Hunt brings no other type of redistricting claim against the Senate map. She has not alleged her vote is diluted by malapportionment or a Voting Rights Act § 2 violation. Her quarrel is with the ***number*** assigned to her district, not the composition of her district. Moreover, Plaintiff Hunt can only vote in District 17, so when District 17 elects its Senator in relation to the

other Davidson County districts neither infringes upon her right to vote nor dilutes her vote. Plaintiff's theory has no merit.

Plaintiff Hunt also alleges that the enacted Senate plan deprives her of the benefits consecutive numbering confers. While the Court in its "Order on Motions for Summary Judgment" on page 14 identifies this benefit as "a stable senatorial delegation" and "avoiding turnover in Senate representation in populous counties and in preserving institutional knowledge," Defendants submit this benefit can be distilled to ***avoiding the simultaneous turnover of more than half (i.e., 3 or all 4) of Davidson County's Senate districts in regularly scheduled elections.*** (hereafter referred to as "Majority Turnover"). Majority Turnover did not occur in 2022 even though three (3) of Davidson County's Senate seats were up for election. Thus, Ms. Hunt has suffered no actual harm and can only prevail if she shows the alleged harm is imminent. However, the political realities of incumbency; the Davidson County Senate districts' partisan composition; and historical election results from 1992 to 2012 when Davidson County's Senate districts were also not consecutively numbered show that Majority Turnover in Davidson County under the enacted Senate plan is merely conjectural or speculative—and certainly not actual or "imminent" as required for standing.

When asked to explain her alleged injury, Plaintiff Hunt stated that she "felt compelled" to bring this lawsuit to "uphold the letter of the Constitution," but was unable to identify any concrete harm that she has personally suffered because of such numbering. (Hunt Depo., p. 50-54). She maintained that she is "harmed whenever the Constitution is not adhered to the way it's intended." (Hunt Depo., p. 54). She further insisted 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, Plaintiff 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.[3] (Hunt Depo., p. 66; Hunt Depo., p. 8-10, 22; SB 197, Pub. Ch. 466 (2002)). She also made no such complaint when she lived on Ironwood in the late 1990's and her district was also not consecutively numbered with other Davidson County senatorial districts.[4] Plaintiff 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. (Hunt Depo., p. 30-34).

A. Plaintiff Hunt cannot show actual or imminent deprivation of the benefits of Davidson County being non-consecutively numbered.

At summary judgment and since she joined this case, Plaintiff Hunt has alleged that the Davidson County Senatorial districts being non-consecutively numbered deprives her of a benefit that Art. II, § 3 confers. The Court noted in its summary judgment order that Plaintiff Hunt is "potentially being deprived of the benefit of a stable senatorial delegation . . ." (Order on Motions for Summary Judgment, p. 14.) The practical effect of the non-consecutive numbering provision on Davidson County is permitting turnover of, at most, two of Davidson County's senators at one regularly scheduled election.

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[3] The Senatorial Districts in Davidson County from 2002-2012 were nonconsecutively numbered as 19, 20, 21, and 23. See SB 197, Pub. Ch. 466 (2002).

[4] The Senatorial Districts in Davidson County were also nonconsecutively numbered from 1992-2002 as Districts 17, 19, 20, and 21. See HB 2087, Pub. Ch. 826 (1992); HB297, Pub. Ch. 50 (1995) The 1995 Act changed one VTD block from Senate District 19 to Senate District 21 and did not affect the non-consecutive numbering of districts.

As discussed earlier, this benefit can be distilled to ***avoiding the simultaneous turnover of more than half (i.e., 3 or all 4) of Davidson County's Senate districts in regularly scheduled elections***, or "Majority Turnover." Of course, full turnover of the Davidson County Senatorial delegation is not possible at a regularly scheduled election under the enacted Senate plan. Thus, Majority Turnover is only possible if all three (3) Senate seats up for election during Gubernatorial years (2026 or 2030) turn over. Recent elections and two decades of historical data show us this would be unprecedented.

To show standing, Plaintiff Hunt would have to show that Majority Turnover has occurred or is imminently likely to occur in Davidson County under this Senate plan. *Calfee v. Tenn. Dep't of Transp.*, No. M2016-01902-COA-R3-CV, 2017 WL 2954687, at *9 (quoting *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 710 (6th Cir. 2015)). ("In other words, the harm must have already occurred or it must be likely to occur imminently"). Defendants submit that Plaintiff Hunt cannot show either actual harm or a likelihood of imminent harm and, thus, cannot show an injury-in-fact.

B. Plaintiff Hunt has suffered no actual harm because Majority Turnover has not occurred.

It is undisputed that Plaintiff Hunt has not suffered the actual harm of Majority Turnover. While this case has been pending, the 2022 Senate elections in Davidson County took place with the Senators representing Districts 17, 19, and 21 up for election. Who won those races? Incumbent Senator Jeff Yarbro (21), incumbent Senator Mark Pody (17), and Senator Charlane Oliver (19). Only Senator Oliver was new to the General Assembly, and District 19 was previously represented by Senator Brenda Gilmore who retired. *See* Tennessee Election Results, 20221108ResultsbyCounty.pdf (tnsosgovfiles.com). The harm Plaintiff Hunt bemoaned never materialized. Majority Turnover did not occur, and Plaintiff Hunt was not deprived of the benefit Art. II, § 3 confers to multi-district counties.

C. Political Realities show Majority Turnover is neither imminent nor likely in Davidson County.

Since Plaintiff Hunt has not been deprived of the benefit of consecutively numbered districts, she would have to show that Majority Turnover is imminent, not merely speculative or hypothetical, to prove an injury-in-fact.

As previously stated, Majority Turnover in Davidson County under the enacted Senate plan is only possible if all three (3) Senators up for re-election in 2026 or 2030 simultaneously retire or lose re-election. This scenario is highly unlikely for several reasons. First, incumbency is a powerful ally in electoral politics, often ensuring institutional knowledge—particularly in the State Senate where many members serve for decades. Second, the Davidson County Senatorial delegation was not consecutively numbered from 1992-2010 and Majority Turnover **never** occurred. Third, the current political composition of Davidson County shows that turnover due to three simultaneous general election losses of incumbents—two Democrats and one Republican—is implausible.

As previously stated, the 1990s Senatorial redistricting plan featured Davidson County with Districts 17, 19, 20, and 21. Similarly, the 2000s Senatorial redistricting plan featured Davidson County with Districts 19, 20, 21, and 23. Majority Turnover, or three of Davidson County's Senate seats turning over at one election, was theoretically possible during the 1994, 1998, 2002, 2006, 2010, and 2022 elections. Majority Turnover never occurred.

The lack of Davidson County Senatorial turnover goes even further though. From 1992-2000, the four Davidson County Senate districts did not turn over at all. Similarly, from 2002-2010, only one seat turned over on two occasions: District 23 in 2002 when Marsha Blackburn chose to run for Congress, and 2006 when Jim Bryson chose to run for Governor. Over these

twenty-two years' worth of elections, multiple Davidson County Senatorial seats never turned over at the same time.

Davidson County has had four Senate seats for the last few decades, and likely well before then. Since 1992, sixteen (16) Davidson County Senatorial elections have occurred. In that time, two Davidson County Senate seats have simultaneously turned over on only one (1) occasion. In 2012, District 19's Senator Joe Haynes retired and Senator Steven Dickerson was elected, while District 18's Senator Kerry Roberts was redistricted out of his district at the end of his term and Senator Farrell Haile was elected. Moreover, in the past sixteen (16) Senatorial elections in Davidson County, on only two occasions has a Senator representing a Davidson County district left office involuntarily: when Senator Kerry Roberts was ineligible to run for re-election in District 18 in 2012 due to redistricting[5], and when Senator Dickerson lost to now-Senator Heidi Campbell in the 2020 District 20 race. *See* Tenn. Code Ann. § 3-1-102 (2012); Tennessee Secretary of State, 2020 Election Results, November 3, 2020 Results by Office, https://sos-tn-gov-files.tnsosfiles.com/Nov%202020%20General%20Totals.pdf.

Plaintiff Hunt cannot rely on historical trends to show imminency. In fact, the last thirty years of Davidson County Senatorial elections reveal that turnover of more than one (1) Davidson County Senate seat at a time is extremely rare. Majority Turnover would be unprecedented.

Another reason Majority Turnover is conjectural or speculative is the current political composition of the Davidson County and the resulting Senatorial districts under the enacted Senate plan. It is no secret the Davidson County electorate leans heavily Democratic, with 199,703 votes for Democratic nominee Joseph Biden and 100,218 votes for Republican nominee Donald J.

[5] In 2014, Senator Kerry Roberts was elected to represent Senate District 25—his new district of residence under the 2010s Senate redistricting plan.

Trump in the November 3, 2020 United States President General Election—nearly a 2-to-1 margin. Tennessee Secretary of State, 2020 Election Results, November 3, 2020 Election Results by County, https://sos-tn-gov-files.tnsosfiles.com/Nov%202020%20General%20by%20County.pdf.

Davidson County's 2022 Gubernatorial vote reflects this consistent 2-to-1 margin in favor of Democrats, with Republican Nominee Bill Lee receiving 60,900 votes to Democratic Nominee Jason B. Martin's 112,708 votes. Tennessee Secretary of State, 2022 Election Results, November 8, 2022 Gubernatorial Election Results by County, https://sos-prod.tnsosgovfiles.com/s3fs-public/document/20221108GovbyCounty.pdf.

Davidson County's three odd-numbered Senate districts reflect the same partisan lean. The 2022 election results for District 19 show the winner, Democratic nominee Charlane Oliver, received 30,472 votes to the Republican nominee's 6,150 votes, which equates to the Democratic nominee receiving roughly 83.2% of the votes in District 19 excluding write-in votes. Tennessee Secretary of State, 2022 Election Results, November 8, 2022 Tennessee Senate Results by Office, https://sos-prod.tnsosgovfiles.com/s3fs-public/document/20221108TotalResults.pdf. In District 21, Democratic nominee and incumbent Senator Jeff Yarbro received 33,061 votes to the Republican nominee's 10,038 votes, which equates to the Democratic nominee receiving roughly 76.7% of the votes in District 21 excluding write-in votes. *Id*. District 17's incumbent Senator Mark Pody was again the Republican nominee and received 39,381 votes *Id*. While he had no Democratic opposition, note that his vote total was similar to the total number of votes in the District 19 and District 21 races. Additionally, just over two-thirds of District 17's population is in Wilson County, which skewed heavily in the 2022 Gubernatorial election with the Republican nominee Governor Bill Lee receiving 31,496 votes to the Democratic nominee's 12,208 votes. *Id*.

The 2022 results show that each of the three odd-numbered Davidson County districts lean heavily Democratic or Republican, respectively. The political disposition of these districts—which generally reflect Davidson County's overall current partisan lean—make the chances of involuntarily turnover remote and Majority Turnover hypothetical or speculative.

D. Institutional knowledge and experience is already protected by statewide staggered terms for Senators.

The Court identified in its summary judgment order that non-consecutive numbering "preserves institutional knowledge and experience." (Order on Motions for Summary Judgment, p. 14.) Plaintiff Hunt is not deprived of the benefit of preserving institutional knowledge and experience because the entire Senate has staggered terms. All Tennesseans, including Ms. Hunt, enjoy this benefit because, depending on the election year, only seventeen (17) or sixteen (16) senators are up for election at one time. Whether Davidson County elects on a "two-two" cycle or a "three-one" cycle does not affect the institutional knowledge of the State Senate because the "seventeen-sixteen" split is still in effect under the enacted Senate plan.

On the margins, the institutional knowledge of the Senate is not affected by one extra Senator in Davidson County being up for re-election every four years—especially when turnover of more than one Davidson County Senator at a time has only occurred once in the past sixteen (16) Davidson County Senatorial elections. Plaintiff Hunt is not deprived the benefit of consecutive numbering within Davidson County because statewide staggered terms preserve this benefit for every Tennessean, including her. Any claim otherwise amounts to nothing more than a generalized grievance insufficient to show standing. *Hays*, 515 U.S. at 743.

Even if this benefit is localized to Davidson County, Plaintiff Hunt would have to demonstrate that the institutional knowledge of the Senate is somehow not preserved by Davidson County having one extra Senator up for re-election every four years. She would also have to show

that there was an imminent risk of all three of the Davidson County Senate seats up for election in 2026 and 2030 turning over simultaneously due to retirement or losing re-election. Defendants submit this possibility is remote under the enacted Senate plan. It did not happen from 1992-2010. It also did not happen in 2022. The odds are extremely poor for Majority Turnover to occur in 2026 or 2030.

It is undisputed Plaintiff Hunt has not actually suffered an injury because the August and November 2022 State Senate elections in Davidson County did not result in Majority Turnover. She has also failed to show that she is in immediate danger of suffering Majority Turnover in Davidson County. She has challenged the non-consecutive numbering of the Senate districts in Davidson County as violating article II, § 3 of the Tennessee Constitution, but her claim amounts to nothing more than a hypothetical injury that does not threaten her with immediate harm. Turnover among the Davidson County Senatorial delegation over the past thirty years has been extremely rare, and only once have two Davidson County Senate seats turned over simultaneously. Ironically, that single instance was due to redistricting.

Therefore, Plaintiff Hunt has neither suffered an actual injury, nor is she likely to imminently sustain this injury. The chance of Majority Turnover among the Davidson County Senatorial delegation during the 2026 or 2030 elections is so remote that it constitutes the type of speculative and hypothetical harm that the standing doctrine disqualifies as a justiciable controversy. *See 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).

II. Non-consecutive numbering of the Senate districts in Davidson County does not burden Plaintiff Hunt's 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.*

Notably, Plaintiff Hunt does allege that any harm results to her from the particular composition of Senate District 17, and she does not claim that her vote carries less weight under the Senate plan. (Hunt Depo., p. 53-54, 58-59, 44). She has alleged no constitutional deficiency in the Senate plan—such as a malapportionment claim or Voting Rights Act violation—other than non-consecutive numbering of the Senate districts in Davison County. In short, her quarrel is not with the composition of her district—just the number assigned to her district.

Because of this, Plaintiff Hunt's right to vote is neither infringed nor is her vote diluted due to nonconsecutive numbering. Like all Tennessee registered voters, Plaintiff Hunt is represented by only one State Senator. Logically, there can exist no ***individual*** right "to elect half [the] senators every two years." Plaintiff Hunt was able to vote in both the August and November 2022 elections, and, to the best of her knowledge, her vote counted. (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). It is apparent, therefore, that nonconsecutive numbering of the Davidson County senatorial districts impairs no distinct individual right held by

Plaintiff Hunt. Her right to vote is neither infringed nor is her vote diluted by what numbers are assigned to the districts of Davidson County. As the Tennessee Supreme Court has made clear, the right to vote not being infringed is fatal to standing. *Darnell*, 195 S.W.3d at 624-625.

Plaintiff Hunt relies upon Tennessee precedent where 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). However, neither *Fisher* nor *City of Memphis* supports a finding of standing here, because non-consecutive numbering of Senatorial districts does not burden her fundamental right to vote. In both *Fisher* and *City of Memphis*, the plaintiffs' fundamental right to vote was implicated. 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. A plaintiff cannot remedy the obvious absence of "injury in fact" by bootstrapping their claims to "the fundamental right to vote."

Although Defendants argued in briefing before the Tennessee Supreme Court that Plaintiffs lacked standing to challenge the Senate plan, the Supreme 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 and every stage before it, Plaintiff Hunt has failed to set forth specific facts establishing injury in fact and, therefore, cannot carry her burden of establishing standing. Accordingly, her claim should be dismissed.

II. Plaintiff's claim cannot clearly be redressed by the General Assembly under this case's unique circumstances.

The third element of constitutional standing is that the injury is capable of being redressed by a favorable decision of the court. *City of Memphis*, 414 S.W.3d 88, 98. Plaintiff Hunt bears the burden of proving this element, just like the other two elements of constitutional standing. She has failed to do so, and it is questionable whether there is any way to remedy the non-consecutive numbering of Davidson County Senatorial districts without creating larger potential constitutional issues for other involved parties. Plaintiff Hunt has not proven, nor can she definitively show, that the General Assembly can redress her injury.

Recognizing that redistricting is primarily a legislative function, *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702, 706 (Tenn. 1982), the General Assembly enacted Tenn. Code Ann. § 20-18-105:

> (a) Pursuant to Article II, Sections 4, 5, and 6 of the Constitution of Tennessee, which vest the power of apportionment with the general assembly, a court, including the supreme court or a three-judge panel, shall not impose a substitute plan for a plan enacted by the general assembly apportioning or redistricting state legislative or congressional districts under this chapter unless the court first gives the general assembly a period of time to remedy any defects identified by the court in the court's findings of fact and conclusions of law. The period of time given must not be less than fifteen (15) calendar days from the issuance of the court's findings of fact and conclusions of law, and in setting the period of time, the court shall consider whether the general assembly is currently in session or out of session.
>
> (b) If the general assembly does not enact a new plan within the period of time set by the court pursuant to subsection (a), then the court may impose an interim districting plan for use only in the next election cycle, provided the interim districting plan differs from the districting plan enacted by the general assembly only to the extent necessary to remedy any defects identified by the court.

While the judiciary determines whether the map is constitutional, the General Assembly is charged with "remedy[ing] any defects identified by the court in the court's findings of fact and conclusions of law." *Id.* Only if the General Assembly does not enact a new plan within the period of time provided by the Court can the court impose an interim redistricting plan. This interim plan must differ from the enacted plan "only to the extent necessary to remedy any defects identified by the court." *Id.*

As has been discussed *supra*, the Senate features staggered terms. These staggered terms are determined by whether the district is odd-numbered (elected in Gubernatorial years) or even-numbered (elected in Presidential years). In redistricting, moving voters from odd-numbered districts to even-numbered districts or vice versa, depending on the year, creates some voters who go six (6) years without voting for a senator ("deferred voters") while others vote for a senator after two (2) years ("accelerated voters"). Tennessee accepts this byproduct of redistricting bodies with staggered terms because "[t]o obviate the inequality [between voters] would substantially interfere with the orderly operation of the four-year staggered terms system after every reapportionment." *Legislature v. Reinecke*, 516 P.2d 6, 12 (Cal. 1973). While other states have

every senator run for re-election after redistricting, this methodology was specifically rejected in Tennessee in *Mader v. Crowell*, where the United States District Court for the Middle District of Tennessee rejected an attempt to force each senator to run for re-election to prevent deferred voters. 498 F. Supp. 226, 231 (M.D. Tenn. 1980). The trial court in *State ex. rel. Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982) ("*Lockert I*") rejected this theory as well. It recognized that:

> One of these [causes of action] was that in this reapportionment, district lines were redrawn and voters were transferred from odd to even numbered districts, and vice versa. The effect of this would be to preclude many voters from voting in a Senate race as frequently as every four years, contrary to Art. I, § 5 of the Constitution. The Chancellor held that this was a necessary by-product of reapportionment and did not violate the Constitution.

While this concept has been explored in Tennessee with respect to voters, it has not with respect to officeholders. In Tennessee, each Senator is elected to represent a specific district, i.e., Senator Pody was elected to represent District 17; Senator Oliver was elected to represent District 19; and Senator Yarbro was elected to represent District 21.

However, Tennessee law has never addressed whether these changes in redistricting can cut a Senator's time in office short. Tenn. Const. Art. II, § 6(a) requires each Senator to be a qualified voter of that district, while Tenn. Const. Art. II, § 10 requires that each Senator shall have resided in their district for one year immediately preceding the election. There are two schools of thought if a Senator, due to redistricting, is removed from his district and placed in another after only two years:

(i) A Senator stays in office but is assigned a new District number; or

(ii) A Senator is immediately ineligible because he or she would no longer live in the district for which they were elected.

There is no mechanism for the former under Tennessee law, while the latter would result in any swapping of district numbers creating immediately ineligible Senators due to the residency

requirements of the Tennessee Constitution. Either option carries legal risk. The Tennessee Constitution and the state's redistricting case law is ill-equipped to answer this conundrum with any amount of certainty. In fact, Plaintiffs' expert acknowledges the difficulty of this scenario by stating that "changing an odd-numbered district to an even-numbered district (which could arguably cause a sitting senator's 4-year term to be cut in half) . . . " (Report of Plaintiffs' Expert Regarding Tennessee State Senate Reapportionment, p. 12).

In short, swapping the numbers of Senate districts has no precedent in Tennessee and is a legal conundrum for the General Assembly. Under these unique circumstances, there is no clear legal path as to how Plaintiff's injury can be redressed by the General Assembly or even the courts.

A. Plaintiffs' expert's proposed remedial Senate plan would place the General Assembly in legal peril and, in any event, is not the least restrictive remedial option.

Plaintiffs' expert Jonathan Cervas prepared his "Report of Plaintiffs' expert regarding Tennessee State Senate Reapportionment," dated October 10, 2022, to show remedial Senate plans. Note that this expert report was submitted in October 2022, well after Plaintiff and Dr. Cervas knew that the 2022 elections would take place under the current Senate plan. In his Report, Dr. Cervas states that he "will demonstrate that with minor changes . . . a plan can comply with all the criteria" he outlined. Furthermore, "the Legislature has ample discretion to enact a plan of its choosing." (Report of Plaintiffs' Expert Regarding Tennessee State Senate Reapportionment, p. 11) (hereinafter "Cervas Senate Report"). He is incorrect on both points. In fact, if his plan were enacted, the General Assembly may very well end up back in Court if they choose any of the possible remedial options.

In each of his three plans—Cervas Senate 1 Plan, Cervas Senate 1a Plan, and Cervas Senate 1b Plan—Dr. Cervas does the same maneuver: he recognizes the only even-numbered district

around Davidson County that can go into Davidson County and take extra population is District 14 in Rutherford County.[6] (Cervas Senate Report, p. 11-15). Defendants do not dispute his assertion. He then realizes that Rutherford County currently contains Districts 13 and 14. His proposal is to ***swap*** the numbers of Districts 18 and 14 as well as Districts 13 and 17. (*Id.*). This maneuver is not the least restrictive remedial option.

Plaintiff Hunt's standing in this case necessitates that she proves her alleged injury can be redressed. Ultimately, she must show a legal remedial plan that can be passed by the General Assembly that does not infringe upon the rights of any affected parties or beget additional litigation (trading a lawsuit for a lawsuit). She has not done so, and likely cannot do so. Thus, Plaintiff Hunt lacks standing to bring her consecutive numbering claim.

ARGUMENT-HOUSE MAP

Defendants are also entitled to dismissal of Count I regarding Plaintiffs' allegation that the House Map split too many counties. Plaintiffs argue that they only need to provide a constitutional map that splits fewer counties while still complying with the other state and federal constitutional requirements. They have not done so—the maps rejected by the General Assembly were each facially flawed for failing to satisfy a constitutional requirement, and the maps drafted by Plaintiffs' expert are likewise evidently unconstitutional. But even if Plaintiffs had submitted a better map, that is not the standard. Again, perfection is not required. *See Lincoln Co. v. Crowell*, 701 S.W.2d 602, 604 (Tenn. 1985) ("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 motive.").

Instead, the standard is whether the General Assembly acted in bad faith or with improper

[6] Note that Districts 18 and 14 are the only even-numbered districts adjoining Davidson County.

motive when it enacted a map that split thirty counties. Plaintiffs cannot satisfy this standard. The General Assembly expressly prioritized avoiding unnecessary county splits and remained under the thirty county "upper limit" articulated by the Tennessee Supreme Court. *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). Thus, Plaintiffs cannot show that the House Map is unconstitutional.

LEGAL STANDARD

I. Standard of Review—Constitutional Challenges

As the House Map is a legislative enactment, 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).

II. Relevant Redistricting Authority

U.S. Constitution—Equal Protection Clause of the Fourteenth Amendment:

The "overriding objective" of any legislatively adopted redistricting plan for a state legislature "must be substantial equality of population among the various [legislative] districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). This principle, often referred to as the "one person, one vote" principle, is grounded in the Equal Protection Clause of the Fourteenth Amendment. In *Reynolds*, the Supreme Court held that state legislatures are required to "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Id*. at 577.

While the Supreme Court has held that absolute population equality is required for congressional districts, *Karcher v. Daggett*, 462 U.S. 725, 732-33 (1983), it requires only "substantial" population equality for state legislative seats. *See Gaffney v. Cummings*, 412 U.S. 735, 748 (1973). Thus, the Supreme Court has recognized that minor deviations from absolute population equality may be necessary to permit states to pursue other legitimate and rational state policies. *See Reynolds v. Sims*, 377 U.S. at 577-81; *see also Mahan v. Howell*, 410 U.S. 315, 321-22 (1973). State policies that have been recognized as justifying minor deviations from absolute population equality generally include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Karcher v. Daggett*, 462 U.S. at 740; *see also Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp. 1022, 1056 (D. Md. 1994) (recognizing traditional districting principles include: maintaining equality of population, preserving the "cores" of existing districts, preventing contests between incumbents, and complying with the requirements of the Voting Rights Act).

In *Gaffney v. Cummings*, the Supreme Court observed that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." 412 U.S. at 745. Subsequently, in *Brown v. Thomson*, the Court reiterated this point holding that "an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a *prima facie* case of discrimination and therefore must be justified by the State." 462 U.S. 835, 842-43 (1983).

However, a plan with less than 10% overall population deviation does not fall within a safe harbor. *Moore v. State*, 436 S.W.3d 775, 786 (Tenn. Ct. App. 2014) (*citing Cox v. Larios*, 543

U.S. 947, 949 (2004) ("There is no safe harbor"); *Lockert I*, 631 S.W.2d at 714 ("The variance certainly should not be greater than any figure which has been approved by the United States Supreme Court, nor would such maximum figure automatically be approved, because the variance for any state will be judged solely by the circumstances present in that state."). *Reynolds* and its progeny also require a "good faith effort" by the state to achieve "as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. at 577. *See also Corbett v. Sullivan*, 202 F.Supp.2d 972, 987 n.7 (E.D. Mo. 2002) (citing *Karcher*, 462 U.S. at 738-40) (holding that "[e]ven deviations smaller than the census margin of error must be the result of a good faith effort to achieve population equality"). A number of courts, including our Supreme Court, have recognized that an overall population deviation of less than 10% identified in *Brown* does not completely insulate a state's districting plan from attack of any type. *See e.g., Moore*, 436 S.W.3d at 786; *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)); *Larios v. Perdue*, 306 F.Supp.2d 1190, 1202-03 (N.D. Ga. 2003); *Cecere v. County of Nassau*, 258 F.Supp.3d 184, 189-90 (E.D.N.Y. 2003); *Montiel v. Davis*, 215 F.Supp.2d 1279, 1286 (S.D. Ala. 2002); and *Hastert v. State Board of Elections*, 777 F. Supp. 634, 645 (N.D. Ill. 1991). Consequently, "if the plaintiff can present compelling evidence that the drafters of the plan ignored all the legitimate reasons for population disparities and created the deviations solely to benefit certain regions at the expense of others," a challenge to the plan will lie even with deviations below ten percent. *See Legislative Redistricting Cases*, 629 A.2d 646, 657 (1993); *see also Licht v. Quattrocchi*, 449 A.2d 887, 887 (R.I. 1982) (finding deviation of five percent to violate one-person, one-vote requirement because deviation "negate[d] the effects of reapportionment"); *Jackman v. Bodine*, 262 A.2d 389, 382-83, *cert. denied* 400 U.S. 849 (1970) (stressing that "there is no range of deviation 'within which a State may maneuver, with or without reason;' that 'the

command is to achieve equality, and a limited deviation is permissible if there exists an acceptable reason for the deviation'; and the 'deviation may not exceed what the purpose inevitably requires . . . In short, there must be selected the best plan the constitutional thesis will permit, and the best plan is the one with the least population deviation").

Voting Rights Act, 42 U.S.C. § 1973:

Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 2 is a "flexible, fact-intensive" doctrine, the "essence" of which is triggered when "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and [majority] voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).

TN Constitution, Article II, Section 4:

Art. II, § 4 contains general provisions and provides as follows:

> The apportionment of Senators and Representatives shall be substantially according to population. After each decennial census made by the Bureau of Census of the

> United States is available the General Assembly shall establish senatorial and representative districts. 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. If the Constitution of the United States shall required that Legislative apportionment not based entirely on population be approved by vote of the electorate, the General Assembly shall provide for such vote in the apportionment Act.

TN Constitution, Article II, Section 5:

Art. II, § 5 contains the more specific provisions governing the apportionment of state representatives and provides as follows:

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

Rural West Tennessee I and II:

Rural West Tennessee African-American Affairs Council, Inc. v. McWherter, 836 F.Supp. 447 (W.D. Tenn. 1993) ("*Rural West Tennessee I*")

Rural West Tennessee African-American Affairs Council, Inc. v. Sundquist, 29 F.Supp.2d 448 (W.D. Tenn. 1998) ("*Rural West Tennessee II*").

In *Rural West Tennessee I*, the federal court held that the House redistricting plan adopted in 1992—which deviated 14% between districts and divided 30 county lines—violated the "one person, one vote" doctrine of the Equal Protection Clause.

In 1994, the General Assembly passed Chapter 536 of the Public Acts, which provided a three-part apportionment plan for the House, consisting of Plan A, and alternative Plans B and C. Plan A split 29 counties and created 12 majority-minority House districts, but none of these

districts were located in the six-county area that plaintiffs described as rural West Tennessee. Plan B split 30 counties but created 13 majority-minority House districts, including one in rural West Tennessee. Plan B only took effect if the federal court found that Plan A violated the Voting Rights Act. Plan C, which called for the reinstatement of the redistricting plan that was held unconstitutional in *Rural West Tennessee I*, was rendered moot as a result of the Supreme Court's affirmance of *Rural West Tennessee I*. *See Millsaps v. Langsdon*, 510 U.S. 1160 (1994).

On January 23, 1995, the federal court issued an order finding that Plan A complied with the Equal Protection Clause's one person, one vote requirement. That court further ordered that it would delay consideration of other challenges to the House Plan until the Supreme Court ruled on appeals regarding the Senate Plan. The challenges to the Senate Plan were resolved in January 1996, and the plaintiffs then filed a second amended complaint challenging Plan A only on the grounds that it violated § 2 of the Voting Rights Act by diluting the voting power of black people in Tennessee, and in particular rural West Tennessee. *See Rural West Tennessee II*.

The federal district court found that Plan A unlawfully diluted minority voting strength in rural West Tennessee in violation of §2 of the Voting Rights Act and enjoined Plan A. *Id*. This decision was affirmed by the Sixth Circuit on appeal, and thus, by operation of state law, Plan B—which split 30 counties and had 13 majority-minority districts—went into effect. *Rural West Tennessee African-American Affairs Council v. Sundquist*, 209 F.3d 835 (6th Cir. 2000).

Lockert I:

State ex rel. Lockert v. Crowell, 631 S.W.2d 702 (Tenn. 1982) ("*Lockert I*")

In *Lockert I*, plaintiffs challenged the Senate Reapportionment Act of 1981 under several provisions of the Tennessee Constitution, but primarily arguing that the plan split counties in violation of Article II, Section 6. The Tennessee Supreme Court held that in adopting a

reapportionment plan, both the Fourteenth Amendment to the United States Constitution and Art. II, §§ 4 and 6, of the Tennessee Constitution mandate that the Legislature must consider "[f]irst and foremost. . . the requirement of equality of population among districts, insofar is practicable."

The Court further held that "a State's policy urged in justification of disparity in district population, however, rational, cannot constitutionally be permitted to emasculate the goal of substantial equality." The Supreme Court then articulated several principles to guide the General Assembly in reapportioning districts:

- The variance should be as low as possible because equality of population is still the principal consideration.
- Primary consideration must also be given to preserving minority strength to the extent required by the United States Supreme Court.
- The provisions of the Tennessee Constitution, although of secondary import to equal protection requirements, are nonetheless valid and must be enforced insofar as is possible.

Lockert II:

State ex rel. Lockert v. Crowell, 656 S.W.2d 836 (Tenn. 1983) ("*Lockert II*")

Lockert II first involved a challenge to the Senate Reapportionment Act of 1982 for dividing Washington, Knox, Davidson and Shelby Counties in violation of Article II, Section 6 of the Tennessee Constitution. The Supreme Court held that elimination of the Washington County division would not increase the variance and that any attempt to split Washington County would therefore be unconstitutional. With regard to Knox and Davidson Counties, the Court held that leaving the counties intact would approach tolerable limits of federal variance requirements and that the Tennessee Constitution must therefore yield. Regarding Shelby County, the Court

explained that where "near or near exact population districts [could] be established in the urban counties" it would not justify "breaching the State or Federal Constitutions." Accordingly, since splitting urban Shelby County was not demonstrated as necessary to comply with the federal requirements regarding variance or dilution of minority voting strength, the Court did not permit Shelby County to be split.

Lockert II also concerned a challenge to the House Reapportionment Plan of 1982 for crossing the lines of 57 counties and making 19 additional divisions of those counties. The Supreme Court held that "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." The Court placed an "upper limit of diving 30 counties in the multi-county category [was] appropriate, with the caveat that none of the thirty can be divided more than once. In addition, with respect to the four urban counties [the Court] 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 III:

State ex rel. Lockert v. Crowell, 729 S.W.2d 88 (Tenn. 1987) ("*Lockert III*")

Lockert III involved a challenge to the 1984 Senate Reapportionment Act based upon a detachment of Shelby County joined with Tipton and Lauderdale Counties to form Senate District 32. The Tennessee Supreme Court, considering Article II, Section 6 of the Tennessee Constitution and the Voting Rights Act, held that the split of Shelby County—which was otherwise impermissible under *Lockert II*'s reasoning—was justified to avoid diluting minority voting strength and colliding with federal requirements. The Court expressly affirmed the principles of

law in *Lockert I* and *Lockert II*. The Court also found that "the Legislature had acted in good faith in its efforts to comply with both federal and state constitutions in enacting" the Senate map.

Lincoln County v. Crowell:

Lincoln County v. Crowell, 701 S.W.2d 602 (Tenn. 1985)

This case concerned a challenge to the 1984 House Reapportionment Act for dividing Lincoln County and Marshall County in forming the 62nd and 65th districts. The chancery court held that Lincoln County was divided to a greater extent than necessary and declared those respective portions of the Act void for violating Article II, Section 5 of the Tennessee Constitution. The Tennessee Supreme Court reversed, citing *Lockert I* for the proposition that "exact mathematical equality was not possible . . . and that it would be necessary to cross some county lines in order to achieve acceptable levels of population . . . in accordance with federal requirements." The Court noted that *Lockert* permitted "considerable tolerance to the General Assembly" in making those determinations as to which counties should be split. Finally, the Court held 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."

Moore v. State

Moore v. State, 436 S.W.3d 775 (Tenn. Ct. App. 2014), *perm. app. denied*.

In *Moore*, plaintiffs challenged the 2012 Senate Reapportionment Act asserting that the number of county divisions violated Article II, Section 6 of the Tennessee Constitution. The Court of Appeals held that equal protection and compliance with the Voting Rights Act are of paramount

concern. The Court also noted that there was no "'safe harbor' for plans achieving population variances of less than 10%." The Court concluded:

> [T]he General Assembly has principal responsibility and . . . primary authority' for legislative redistricting, and in the absences of equal protection violations, bad faith or improper motives, the courts will not 'set aside individual district lines on the ground that they theoretically might have been drawn more perfectly.' A redistricting plan will not be set aside on constitutional grounds merely because a slight 'better' plan can be devised when the plan devised by the General Assembly yields to equal protection principles and makes an honest effort to balance legitimate state objectives against those principles.

Importantly, despite the passage of two decades (and therefore two redistricting cycles), the Court still applied the "upper limit of 30 suggested by the *Lockert* court." While agreeing with the 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."

II. Plaintiffs Cannot Demonstrate that the General Assembly Acted in Bad Faith or with Improper Motive.

As the above authority demonstrates, 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).

Plaintiffs cannot show bad faith or improper purpose. The House Map redistricting process clearly considered and attempted to comply with the constitutional guidelines regarding county

splitting. County splits were justified by variance concerns that could create litigation risk for violating the "one person, one vote" requirement of the equal protection clause of the Fourteenth Amendment to the United States Constitution and Section 2 of the Voting Rights Act. Even so, the enacted map 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.

Neither bad faith nor improper purpose can be imputed from the General Assembly's rejection of alternative house maps proposed to it during the process. The only house map presented to it that was not facially unconstitutional was the map it ultimately enacted. The General Assembly's decision to reject unconstitutional maps that split fewer counties was clearly not indicative of a bad-faith effort.

Finally, the maps presented *after the fact* by Plaintiffs that they contend are superior do not transform an honest effort into one of bad faith. First, as discussed in greater detail below, the post hoc maps submitted by Plaintiffs are each unconstitutional. Second, perfection is not the standard. Even if Plaintiffs' 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. Third, perhaps most importantly, bad faith cannot be divined from a map that was never presented to the General Assembly.

1. The House Redistricting Process Was Not Undertaken to Subvert Tennessee Constitutional Requirements.

Plaintiffs cannot show bad faith or improper purpose here because it is undisputed that minimizing county splits was a guideline expressly adopted by the General Assembly and

faithfully applied. 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

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

So what was the process for drafting this map and how did county splitting come into play? 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." (TRO Resp., Ex. 1, Himes Aff., p. 5). He also testified that he discussed these guidelines with the Committee. (TRO Resp., Ex. 1, Himes Aff., p. 7).

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." (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. (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.

2. The General Assembly Did Not Reject Any Proposed Map That Satisfied Federal and State Constitutional Requirements While Splitting Fewer Counties.

Plaintiffs also cannot use the General Assembly's choice to reject the alternative maps presented to it as evidence of bad faith or improper motive as the rejection of constitutionally unacceptable maps cannot demonstrate bad faith or improper motive. 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[7]

5 majority-minority districts

Overall Range = 24.23%

High = +11.48% (+8,013)

Low = -12.75% (-8,902)

[7] 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[8]

Contiguity: No[9]

Unassigned Areas: Yes[10]

(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[11]

Contiguity: No[12]

Unassigned Areas: None

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

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[8] The splits of Davidson, Hamilton, Knox, 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). Of these counties, Knox and Rutherford counties are double split.

[9] 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.

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

[11] 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.

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

Wishart Plan

6 majority-minority districts

Overall Range = 9.02%

High = +5.05% (+3,525)

Low = -3.97% (-2,771)

County Splits: 30[13]

Contiguity: No[14]

Unassigned Areas: None

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

Orrin, Newton, Lichtenstein, Moore Plan

10 majority-minority districts

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[13] 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.

[14] 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.

Overall Range = 19.28%

High = +9.58% (+6,688)

Low = -9.70% (-6,772)

County Splits: 58[15]

Contiguity: No[16]

Unassigned Areas: Yes[17]

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[15] 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.

[16] 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.

[17] 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.
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.

[17] 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).

(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[18]

Contiguity: No[19]

Unassigned Areas: None

(TRO Resp. Ex. 1, Himes Aff., p. 9; Ex. Himes 5).

Democratic Caucus Plan B

13 majority-minority districts

Overall Range = 9.72%

High = +4.98% (+3,552)

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[18] 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.

[19] 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.

Low = -4.74% (-3,311)

County Splits: 23[20]

Contiguity: Yes

Unassigned Areas: None

(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.

3. The Post Hoc Alternative Maps Proposed by Dr. Cervas Are Not Constitutional.

Plaintiffs' have submitted alternative maps created by their expert, Dr. Jonathan Cervas, to attempt to demonstrate that the General Assembly "has not given a good faith effort to balance the constitutional criteria in state and federal law." (Deposition of Jonathan Cervas, Ex. 4, p. 19). Yet, Dr. Cervas expressly disavowed making any opinion that the General Assembly acted in bad faith. (Cervas Depo, p. 137-138). Dr. Cervas also explained that he didn't "know anything about the Legislature or members of the Legislature or what their actions were." (Cervas Depo., p. 138).

[20] 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).

Instead, his contention that the General Assembly did not make a good faith attempt to reduce the number of county splits was based solely on his conclusory belief that "it was relatively easy to draw maps that actually reduced the number of county splits while still holding other criteria at similar levels." (Cervas Depo., p. 138).

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. *See Lincoln County v. Crowell*, 701 S.W.2d 602 (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 with an improper motive. 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.

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[21]

Unassigned Areas: No

(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).

Cervas Plan 13b

12 majority-minority districts

Overall Range = 9.96%

High = +5.09% (+3,552)

Low = -4.87% (-3,400)

County Splits: 25[22]

Contiguity: No[23]

Unassigned Areas: No

(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%

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[21] 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.

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

[23] 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.

High = +5.09% (+3,552)

Low = -4.89% (-3,416)

County Splits: 24[24]

Contiguity: No[25]

Unassigned Areas: No

(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

10 majority-minority districts

Overall Range = 9.98%

High = +5.09% (+3,552)

Low = -4.89% (-3,416)

County Splits: 22[26]

Contiguity: No[27]

Unassigned Areas: No

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

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

[25] 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.

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

[27] 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.

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[28]

Contiguity: No[29]

Unassigned Areas: No

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

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

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

Cervas Plan 13d

13 majority-minority districts

Overall Range = 9.89%

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

[29] 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.

High = +5.09% (+3,552)

Low = -4.80% (-3,350)

County Splits: 24[30]

Contiguity: No[31]

Unassigned Areas: No

(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

Contiguity: No[32]

Unassigned Areas: No

(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). While Cervas

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

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

[32] 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.

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 comply with the constitutional guidelines regarding county splitting. No other map presented to the General Assembly was even arguably 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. Accordingly, the General Assembly did not act in bad faith or with improper motive.

III. EACH COUNTY SPLIT IN THE ENACTED MAP HAS A FEDERAL JUSTIFICATION.

Plaintiffs have argued that even if the standard is not their preferred "least possible county splits," they would still succeed because they contend that Defendants cannot justify every county

split with a federal compliance rationale. The population numbers are undisputed, and they demonstrate the federal justification underlying each split.

To start: Evenly divided, the ideal population for each House district is 69,806. (TRO Resp. Ex. 1, Himes Aff. Ex. Himes 1, 10/20 Malapportionment Table). A downward 5% deviation from ideal is 66,316. An upward 5% deviation is 73,296. Given the per se unconstitutional line of 10%, the window to avoid crossing that threshold is 66,316-73,296.

The following table sets forth each split county and the division break points (above deviation threshold is in yellow, below threshold in brown):

County	**Population**	**2 district pop.**	**3 district pop.**	**4 district pop.**
Anderson	77123	38561	n/a	n/a
Bradley	108620	54310	n/a	n/a
Carroll	28440	n/a	n/a	n/a
Carter	56356	n/a	n/a	n/a
Claiborne	32043	n/a	n/a	n/a
Dickson	54315	n/a	n/a	n/a
Fentress	18489	n/a	n/a	n/a
Gibson	50429	n/a	n/a	n/a
Hamblen	64499	n/a	n/a	n/a
Hardeman	25462	n/a	n/a	n/a
Hardin	26831	n/a	n/a	n/a
Hawkins	56721	n/a	n/a	n/a
Haywood	17864	n/a	n/a	n/a
Henderson	27842	n/a	n/a	n/a
Henry	32199	n/a	n/a	n/a
Jefferson	54683	n/a	n/a	n/a
Lawrence	44159	n/a	n/a	n/a
Lincoln	35319	n/a	n/a	n/a
Loudon	54886	n/a	n/a	n/a
Madison	98823	49411	n/a	n/a
Maury	100974	50487	n/a	n/a
Monroe	46250	n/a	n/a	n/a
Obion	30787	n/a	n/a	n/a
Putnam	79854	39927	n/a	n/a

Roane	53404	n/a	n/a	n/a
Sevier	98380	49190	n/a	n/a
Sullivan	158163	79081	52721	n/a
Sumner	196281	98140	65427	n/a
Williamson	247726	123863	82575	61931
Wilson	147737	72368	49245	n/a

As reflected above, each of these counties has something in common. Each is non-compliant with federal "one person, one vote" equal protection requirements, and none can be evenly split into multiple districts within a single county to reach compliance. This means that each county presented a problem that had to be solved.[33]

Put simply, federal law required that the General Assembly use the tools available to it to remedy the constitutional defect in these counties and those with similar population issues. In this instance, the General Assembly utilized county splitting to ensure compliance with "one person, one vote." And to guide the decision as to which counties would ultimately be split, the General Assembly chose to utilize the other factors in Tenn. Code Ann. § 3-1-103(b), such as core preservation and minimization of incumbent pairings.

Relying on those factors did nothing to imperil the Enacted House Map. Indeed, the Tennessee Constitution permits the General Assembly to utilize additional factors at its discretion. *See* Tenn. Const. Art. II, § 4. And while the additional statutory factors are not federal requirements, they were tools to provide a neutral, reasoned framework on how to move the above counties into federal compliance. The federal justification of "one person, one vote" is the underlying foundation of these county splits, and Plaintiffs are wrong to narrowly characterize the

[33] Many other counties share this issue. However, except for the ones detailed in the table above, these other counties were able to avoid a county split in the Enacted House Map. Accordingly, they will not be addressed in this pretrial brief.

use of non-federal statutory factors to resolve these counties' population issues as prioritizing statutory factors over Tennessee constitutional requirements.

Plaintiffs will likely repeat their assertion that, hypothetically, fewer counties could have been split, in their eyes undermining the federal justification just discussed. But the Tennessee Supreme Court has twice rejected that approach. In explicit terms: "[i]t 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 motive." *Lincoln Co. v. Crowell*, 701 S.W.2d 602, 604 (Tenn. 1985). In practice: the chancery court in *Lockert II* determined that an optimal map would contain only 25 county splits. 656 S.W.2d at 844. The Supreme Court did not require perfection, instead allowing an upper limit of 30. *Id.* And the Supreme Court in *Lincoln County* rejected an argument asserting that splitting both Lincoln County and Marshall County was unconstitutional because it was possible to only split Lincoln County. 701 S.W.2d at 604.

In sum, each of the 30 county splits in the Enacted House Map was federally justified by the population data and the evident non-compliance with "one person, one vote." The additional statutory factors were neutral tools to remedy the federal shortcomings that would doom a map where each of these counties remained apart and whole. The General Assembly was constitutionally permitted to use these additional factors to solve the redistricting puzzle, and the Tennessee Supreme Court has twice declined to set the standard at perfection or an optimal number of county splits. Plaintiffs' challenge to the Enacted House Map therefore fails.

CONCLUSION

For the foregoing reasons, Defendants are entitled to judgment at trial.

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 11th day of April, 2023:

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