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**IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT**

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

PLAINTIFFS' PRETRIAL BRIEF

Plaintiffs Gary Wygant and Francie Hunt will be entitled to judgment in their favor at the close of trial on all claims for the reasons set forth herein below.

I. Plaintiff Hunt is entitled to judgment in her favor on her Senate claim.

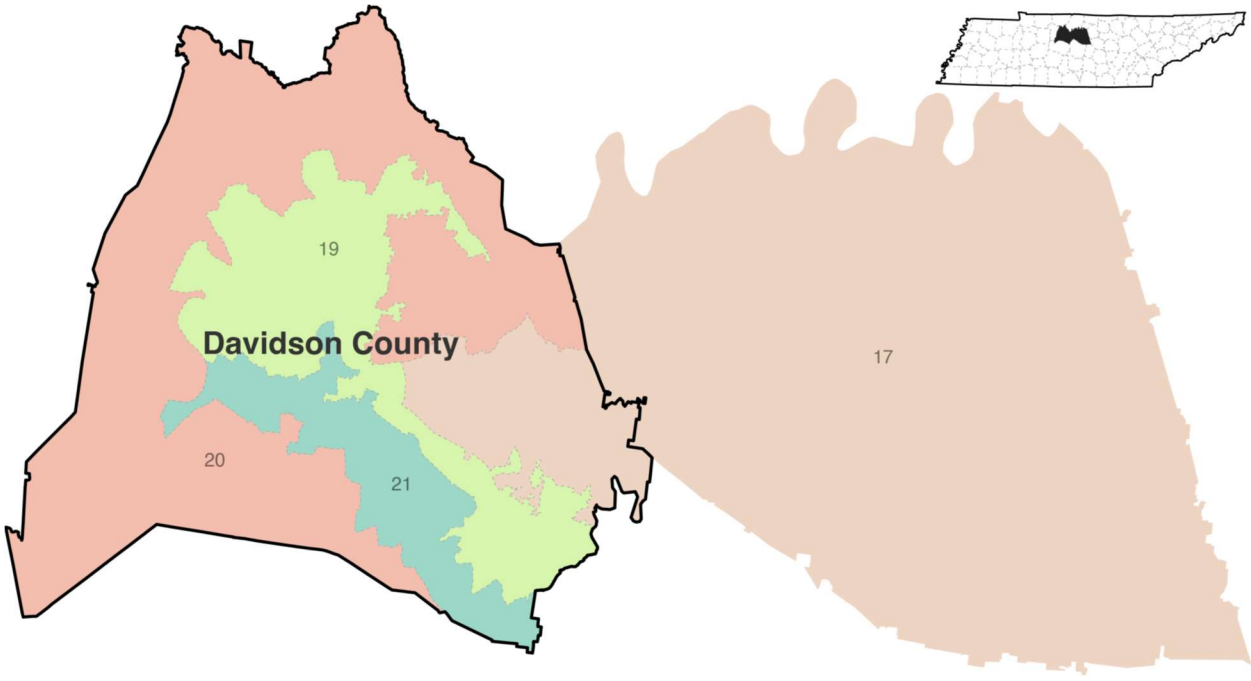
Defendants concede that Davidson County's Senate districts are numbered non-consecutively. Plaintiff Francie Hunt is entitled to judgment in her favor on her Senate claim because she lives in the non-consecutively numbered Senate district at issue herein and because the Enacted Senate Map deprives Ms. Hunt and her fellow voters in Senate District 17 of the ability to vote for, and to be represented by, the fully-staggered county Senate delegation guaranteed by the consecutive numbering provision of the Tennessee Constitution.

a. The Enacted Senate Map does not number Davidson County's senatorial districts consecutively.

The Tennessee General Assembly enacted its decennial reapportionment of the Tennessee Senate via Public Chapter 596, which amended Tennessee Code Annotated § 3-1-102 to codify

the State's new senatorial districts. This enacting legislation, as well as the Senate map it created, will be referred to herein as the "Enacted Senate Map."

In the Enacted Senate Map, Davidson County's four senatorial districts are numbered 17, 19, 20, and 21. These four districts are not numbered consecutively. The following illustration shows the four Davidson County senatorial districts, along with their numbering.



b. Defendants do not challenge Ms. Hunt's Senate claim on the merits.

Defendants agree the Enacted Senate Map's Davidson County senatorial districts are not consecutively numbered, and Defendants do not defend the Enacted Senate Map's Davidson County senatorial districts on the merits. (*See* Defs' Resp. to Motion to Compel, at p. 1 ("There is no dispute that the Senate districts in Davidson County are not consecutively numbered."); Defs' Memo. in Support of Defs' Motion for Summary Judgment, at p. 11 ("Defendants do not defend the merits of the Senate Map,").)

Defendants' handling of fact discovery reflects their decision not to defend the Enacted Senate Map's Davidson County senatorial districts on the merits. Responding to interrogatories, Defendants did not identify any witnesses on whom they will rely in defending the Senate claim.

Defendants' handling of expert discovery also reflects their decision not to defend the Enacted Senate Map's Davidson County senatorial districts on the merits. Plaintiffs' expert witness, Dr. Jonathan Cervas, produced an expert report stating his opinion that the General Assembly could have enacted a Senate map with all four Davidson County senatorial districts numbered consecutively. Defendants did not disclose an expert witness to respond to Dr. Cervas's report concerning the Senate claim, and Defendants' expert witnesses on the House claim testified in their depositions they were not retained to proffer expert opinions on the Senate claim.

c. Ms. Hunt lives and votes in Senate District 17.

Ms. Hunt will testify at trial that she lives in Hermitage, Tennessee, within the Enacted Senate Map's Senate District 17. Ms. Hunt will testify that she is registered to vote in District 17, that she has voted regularly in District 17, and that she intends to continue voting regularly in District 17. Ms. Hunt will also testify that she believes the Tennessee Constitution entitles her to vote for, and be represented by, the fully-staggered county Senate delegation guaranteed by the consecutive numbering provision of the Tennessee Constitution. Ms. Hunt will testify that the Enacted Senate Map has deprived her of that constitutional right.[1]

[1] Plaintiff Hunt is not a lawyer, but she hired lawyers to represent her here, including by articulating her claims with specificity through the pleadings and at trial. Plaintiff need not articulate her injury with the same precision as a lawyer at trial. That said, Ms. Hunt's testimony that she believes the Tennessee Constitution requires consecutive numbering of Davidson County's senatorial delegation and that the Enacted Senate Map's failure to do so violates her constitutional rights more than adequately articulates her injury to establish her standing to sue.

d. Article II, Section 3 of the Tennessee Constitution must be construed with precision, avoiding all surplusage.

Article II, Section 3 of the Tennessee Constitution states, in relevant part, in "a county having more than one senatorial district, the districts *shall* be numbered consecutively" (emphasis added). Tennessee's courts are bound to apply the plain meaning of this text because the meaning is unambiguous.

In *Shelby County v. Hale*, the Tennessee Supreme Court summarized this directive as follows: "The Court, in construing the Constitution must give effect to the intent of the people that are adopting it, as found in the instrument itself, and it will be presumed that the language thereof has been employed with sufficient precision to convey such intent; and where such presumption prevails nothing remains except to enforce such intent." 292 S.W.2d 745, 748 (Tenn. 1956) (citing *Prescott v. Duncan*, 148 S.W. 229, 234 (Tenn. 1912)). The Tennessee Supreme Court reaffirmed these long-settled rules of constitutional construction last year in its decision in *Metropolitan Government of Nashville & Davidson County v. Tennessee Department of Education*, 645 S.W.3d 141, 153 n.13 (Tenn. 2022).[2]

In addition to construing our Constitution's language as having been drafted with sufficient precision to reveal the framers' exact intent, "[n]o words in our constitution can properly be said

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

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

to be surplusage." *Id.* at 153 n.13; *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 14 (Tenn. 2020) (citing *Welch v. State*, 289 S.W. 510, 511 (Tenn. 1926)).

Article II, Section 3 is precise and free from ambiguity: "In a county having more than one senatorial district, the districts shall be numbered consecutively." Given this provision's singular meaning, "there is no occasion to resort to other means of interpretation," and the Court is bound to enforce the provision's clear meaning.[3] Defendants' argument that this language was only intended to avoid ***complete*** turnover of a county's senatorial delegation must be rejected because our Supreme Court's constitutional jurisprudence requires us to construe Article II, Section 3's actual intent as that reflected in its plain and unambiguous language: to require fully-staggered county senatorial delegations in our more populous counties. Additionally, Defendants' argument that Ms. Hunt has not suffered injury and will not suffer injury because one of Davidson County's senatorial districts is staggered (District 20) as compared to the other three districts (Districts 17, 19, and 21) must be rejected because Article II, Section 3 requires fully staggering Davidson County's terms through consecutive numbering. Any ruling to the contrary would impermissibly render the actual text of Article II, Section 3 surplus.[4]

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particularly pertinent when considering the use of two or more different words or terms within the same provision of the Constitution).

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

[3] Because the clear constitutional language here leaves "no occasion to resort to other means of interpretation," Defendants' repeated pleas for the Court to review the *Journal and Debates of the State of Tennessee Constitutional Convention of 1965* should be rejected.

[4] Defendants' *post hoc* factual argument that Ms. Hunt was not harmed in the 2022 elections because Districts 17 and 19 did not have contested primaries or general elections similarly fails, not only because Ms. Hunt was denied the right to vote for, and to be represented by, a fully-staggered, consecutively-numbered county Senate delegation in 2022, but also because binding precedent from our Supreme Court requires the Constitution's clear language to be applied regardless of the vicissitudes of any given election during the course of a decade's multiple legislative elections. Defendants offer no legal support for their claim that the lack of contested elections in 2022 overcomes our founding document's clear constitutional mandates.

e. Plaintiff Hunt has standing to bring her Senate claim, pursuant to all applicable caselaw.

"To establish constitutional standing, a plaintiff must satisfy three indispensable elements." *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013) (citations omitted). "First, a party must show an injury that is 'distinct and palpable' . . .." *Id.* "Second, a party must demonstrate a causal connection between the alleged injury and the challenged conduct." *Id.* Third, "the injury must be capable of being redressed by a favorable decision of the court."

Francie Hunt has standing to challenge the Enacted Senate Map because she has been denied the right to vote for, and be represented by, the fully-staggered county Senate delegation guaranteed by the consecutive numbering provision of the Tennessee Constitution. The Tennessee Constitution guarantees this right; the Enacted Senate Map violated this right in the 2022 election; and the Enacted Senate Map will continue to violate this right for the rest of the decade absent judicial intervention.[5]

i. Ms. Hunt lives in the Enacted Senate Map's non-consecutively numbered senatorial district.

In denying the Parties' Motions for Summary Judgment, the Court favorably cited the United States' Supreme Court's decision in *United States v. Hays*, 515 U.S. 737 (1995), for the proposition that individuals must live in a challenged legislative district to have constitutional standing to challenge that district, absent specific evidence endowing a non-resident plaintiff with standing. (Order Dated March 27, 2023, at p. 14.) As the Court noted, Ms. Hunt lives in the Enacted Senate Map's Senate District 17, which is not consecutively numbered with the rest of the

[5] Plaintiff Hunt's challenge to the Enacted Senate Map also meets the second and third elements of standing. The General Assembly's enactment of TENN. CODE ANN. § 3-1-102 caused Ms. Hunt's injury, and a court order requiring the General Assembly to remedy Section 3-1-102's constitutional violation would redress the injury.

senatorial districts in Davidson County. Thus, Ms. Hunt meets any residency requirement for standing under current constitutional jurisprudence.[6]

ii. Ms. Hunt's injury is not a generalized grievance.

Plaintiff Hunt's residence in District 17 also rebuts Defendants' assertion that Plaintiff Hunt lacks standing because her injury is "nothing more than a 'generalized grievance' shared with a large class of voters." (Defs' Memo. in Support, at p. 15.) Like in all constitutional challenges to legislative redistricting plans, Ms. Hunt shares her injury with her fellow voters in Senate District 17, in contrast to the hundreds of thousands or millions of other voters in counties with more than one senatorial district and in the rest of the State of Tennessee. But sharing her injury with the other voters in Ms. Hunt's specific locality does not render her Senate claim a generalized grievance devoid of standing.

In "one person, one vote" cases, plaintiffs share an injury with other voters whose legislative districts lack population equity. *See, e.g., Evenwel v. Abbott*, 578 U.S. 54, 62 (2016) (voters in two state senate districts alleging that their votes, and the votes of other voters in their district, were diluted by reapportionment). In gerrymandering cases, plaintiffs share an injury with other voters in a challenged district who share a racial or political identity. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 636 (1993) (five voters in one North Carolina county alleging racial gerrymander). In non-contiguity cases, plaintiffs share an injury with other voters from the non-contiguous portion of a challenged legislative district. *See, e.g., Mader v. Crowell*, 498 F. Supp. 226, 227 (M.D. Tenn. 1980). And, in county-dividing cases, plaintiffs share an injury with other voters from

[6] As Plaintiffs have previously noted, Plaintiffs assert any Davidson County resident voter would have standing to bring the Senate claim because the Enacted Senate Map's numbering of Davidson County's senatorial districts denies all Davidson County voters the right to vote for, and be represented by, the fully-staggered county Senate delegation guaranteed by the consecutive numbering provision of the Tennessee Constitution.

their improperly divided county. *See, e.g., Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982) (hereinafter, *Lockert I*) at 704. Here, Ms. Hunt shares her constitutional injury with other voters who live in the Davidson County portion of District 17, and that injury is distinct from the millions of other voters in Tennessee who live elsewhere.

Baker v. Carr, the landmark Supreme Court voting rights case arising from Tennessee's failure to reapportion legislative seats, squarely answers the question of whether a voter has Article III standing to challenge unconstitutional redistricting notwithstanding the fact that her injury is shared with others similarly situated. She does. In *Baker*, a Republican voter in Shelby county alleged that the legislature's failure to reapportion legislative districts placed him—and all voters in certain counties—"in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties." 369 U.S. 186, 207–08 (1962). The allegation that voters in certain counties were "disfavor[ed]" relative to voters in other counties gave them standing: they were asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the government be administered according to law." *Id.* at 208 (citations and internal quotation marks omitted). The complaint alleged an injury because voters in some counties were treated differently than voters in other counties, and that allegation conferred standing on any voter in the impacted counties. *See also Wesberry v. Sanders*, 376 U.S. 1, 5 (1964) (observing that *Baker* held that "qualified Tennessee voters there had standing to sue").

Here, Ms. Hunt alleges that voters in her portion of Davidson County are treated differently from voters in other counties whose Senate districts are consecutively numbered. Her and her fellow voters' interest in continuous representation, as other counties are afforded under the

Tennessee Constitution, gives rise to an injury to the "effectiveness of their votes," establishing standing under *Baker*.[7]

iii. Ms. Hunt is injured even though she remains able to vote and remains represented by a Senator in the State Senate.

Defendants have also repeatedly argued that Ms. Hunt lacks standing because she remains able to vote, because she was able to vote in the 2022 elections, and because she is currently represented by a Senator in the State Senate. The United States Supreme Court has expressly rejected this argument, and it also fails as a matter of common sense.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court analyzed malapportionment allegations concerning the state legislature of Alabama. There, the plaintiffs were not prevented from voting. Rather, they alleged the weight of their votes had been diluted through malapportionment. The United States Supreme Court agreed, noting that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting

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[7] The cases Defendants have previously cited for the proposition that Ms. Hunt lacks standing because she shares her injury with other voters fail to rebut the fact that redistricting cases necessarily involve injuries shared by a subset of voters who are affected by the same constitutional infirmity. In fact, Defendants to date have failed to cite a single redistricting opinion in support of their claim that Ms. Hunt lacks standing because her injury is shared with other disfavored voters. Instead, at the summary judgment phase of this litigation, Defendants cited the following non-redistricting cases when arguing Ms. Hunt lacks standing because her injury is generalized and shared with other voters: *Mayhew v. Wilder*, 46 S.W.3d 760 (Tenn. Ct. App. 2001) (suit seeking to invalidate budget legislation due to secret meetings convened in violation of the state and federal constitutions and the State Open Meetings Act); *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013) (constitutional challenge to Tennessee's photo ID requirement for voting, in which individual voters were found to have standing); *Warth v. Seldin*, 422 U.S. 490 (1975) (suit challenging zoning ordinances); *Hamilton v. Metropolitan Government of Nashville*, No. M2016-00446-COA-R3-CV, 2016 WL 6248026 (Tenn. Ct. App. 2016) (resident of a Nashville council district challenging election commission's decision of when to hold a special election for that district); *American Civil Liberties Union v. Darnell*, 195 S.W.3d 612 (Tenn. 2006) (action seeking to enjoin Secretary of State from including proposed constitutional amendment on ballot); *Parks v. Alexander*, 608 S.W.2d 881 (Tenn. Ct. App. 1980) (action seeking to have enacted constitutional amendment deemed null and void); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (action challenging regulation related to Secretary of Interior's role related to the Endangered Species Act). (*See* Defs' Memo. in Support of Defs' Motion for Summary Judgment.)

the free exercise of the franchise . . . The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote." *Id.* at 555, 567.

The extraordinary nature of Defendants' argument that voters who are able to vote cannot assert an injury to their constitutional rights may best be revealed by the fact that Defendants' argument, if embraced by this Court, would invalidate over 40 years of constitutional jurisprudence concerning the state Constitution's prohibitions on dividing counties to form legislative districts. Beginning with the Tennessee Supreme Court's *Lockert* cases in the 1980s, and continuing ever since, courts have heard county-splitting claims, analyzing therein whether the legislature created legislative districts that "cross as few county lines as is necessary to comply with federal constitutional requirements." *Lockert I*, 631 S.W.2d at 715; *Rural W. Tenn. Afr.-Am. Affairs Council, Inc. v. McWherter*, 836 F. Supp. 447 (W.D. Tenn. 1993); *Moore v. State*, 436 S.W.3d 775 (Tenn. Ct. App. 2014). Yet, voters in divided counties remain able to vote regardless of whether their counties have been divided or preserved intact.[8] If courts had applied Defendants' novel standing argument, none of the plaintiffs in these cases would have had standing to enforce the State Constitution's county-splitting provisions because all of these plaintiffs were allowed to vote.

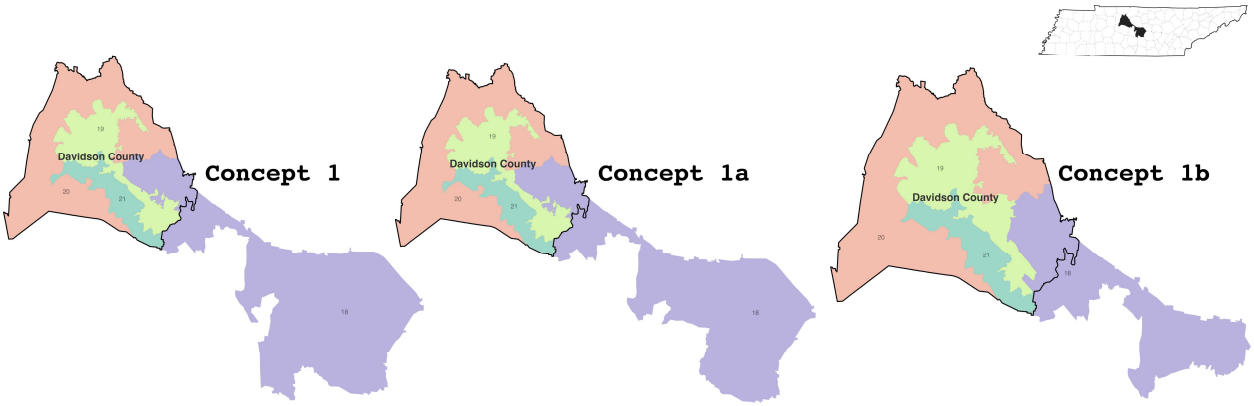
Here, the General Assembly's choice to violate the Constitution's senatorial numbering requirement debased, and thereby impaired, Ms. Hunt's right to vote by requiring her to vote in a constitutionally invalid Senate district and by depriving her of her right to vote for, and to be

[8] In *Lockert I*, the Tennessee Supreme Court recognized that seemingly abstract constitutional requirements like the prohibition on county-splitting are grounded in "excellent policy reasons for the presence of a provision that counties must be represented in the Senate" such as citizens' "constitutional right to be represented in the State Senate as a political group by senators subject to election by all voters within that political group." 631 S.W.2d at 709 (approvingly quoting complaint). This logic applies with equal force to the consecutive numbering requirement, which ensures that citizens of a county have continuous representation in the Senate rather than facing the possibility of many or all of the county's senators being replaced in the same election cycle, diminishing their legislative power and subjecting their county's representation to stronger political influences.

represented by, the fully-staggered county Senate delegation guaranteed by the consecutive numbering provision of the Tennessee Constitution. Thus, Plaintiff Hunt has proven she has been injured, and will continue to be injured, by the Enacted Senate Map's misnumbering of Senate District 17.

iv. The General Assembly could have numbered Davidson County's senatorial districts consecutively.

Given Defendants' choice not to challenge Ms. Hunt's Senate claim on its merits, Plaintiffs need not provide expert testimony in support of their Senate claim. Even so, Plaintiffs' expert witness, Dr. Jonathan Cervas, produced an expert report concerning the Enacted Senate Map in which he demonstrated the ease with which the General Assembly could have consecutively numbered Davidson County's four senatorial districts. Defendants did not retain expert witnesses to rebut this testimony. The following illustration, copied from Dr. Cervas's expert report, illustrates three similar Middle Tennessee Senate maps wherein all four of Davidson County's senatorial districts are consecutively numbered:



v. The Court should determine Ms. Hunt has standing and prevails on her Senate claim.

In its order denying the Parties' summary judgment motions, the Court states as follows: "As a Davidson County voter in Senate District 17, Ms. Hunt is potentially being deprived of the benefit of a stable senatorial delegation as prescribed by Article II, Section 3 of the Tennessee

Constitution." (Order Dated Marcy 27, 2023, at p. 14.) For the reasons stated above, the Court should strictly construe the Tennessee Constitution's plain language by determining Article II, Section 3 means what it says: that Davidson County's senatorial districts shall be consecutively numbered, thereby providing for fully-staggered terms throughout the county's senatorial delegation.

Applying this clear language, there is no question that Ms. Hunt has been deprived of the right to vote for, and be represented by, the fully-staggered county Senate delegation guaranteed by the consecutive numbering provision of the Tennessee Constitution. The Court, therefore, should rule in Plaintiff Hunt's favor on her Senate claim at the close of trial.

II. Plaintiff Wygant is entitled to judgment in his favor on his House claim.

Plaintiff Wygant is entitled to judgment in his favor on his House claim because Defendants cannot meet their burden of proving "that the General Assembly was justified in passing a reapportionment map that crossed county lines and [showing] that as few county lines as necessary were crossed to comply with the federal constitutional requirements." (Order Dated March 27, 2023, at p. 18.) Defendants have produced no evidence during this litigation showing that the General Assembly sought to create (or did create) a map that crossed as few county lines as necessary to comply with federal constitutional requirements. Defendants' only fact witness was prevented from testifying in his deposition about that question by a sustained attorney-client privilege objection, and Defendants' expert witnesses either have no opinion on the question or have testified that seven of the 30 county-splitting districts in the Enacted House Map were not justified by federal constitutional requirements. Finally, the legislative history, which represents the only evidence of intent outside of the Enacted House Map itself, demonstrates the General Assembly applied the wrong legal standard.

On these grounds alone, Plaintiff Wygant is entitled to judgment, even without presenting any expert testimony. Even so, Plaintiffs' expert witness will provide uncontested testimony that the General Assembly could have divided far fewer counties while still complying with federal constitutional requirements. In doing so, he will present illustrative maps showing, among other things, that the General Assembly could have maintained the exact same 13 majority-minority districts in the Enacted House Map (setting those alternative maps on the same Voting Rights Act footing as the Enacted House Map), while dividing significantly fewer counties and maintaining similar or lower total population variances as the Enacted House Map. Dr. Cervas will also testify that creating a county-splitting district that pairs a portion of Shelby County with a neighboring county may lead to the fewest possible county splits statewide based on the 2020 census results.

a. The Enacted House Map divides 30 counties, includes 13 majority-minority districts, and has a total population variance of 9.90 percent.

The Tennessee General Assembly enacted its decennial reapportionment of the Tennessee House of Representatives via Public Chapter 598, which amended Tennessee Code Annotated § 3-1-103 to codify the State's new House districts. This enacting legislation, as well as the House map it created, will be referred to herein as the "Enacted House Map."

The 2020 United States Census identified 6,910,840 people as the total population of Tennessee. Based on this total state population, each of Tennessee's 99 House districts would have ideally contained 69,806 people following the 2022 decennial reapportionment.

The Enacted House Map includes districts whose populations deviate from the ideal district population in a range from +5.09% (+3,552 people) to -4.81% (-3,361 people), with a total variance of 9.90%. The Enacted House Map contains 13 majority-minority House districts. The Enacted House Map split 30 counties, such that portions of these 30 counties share a House district with another county or counties.

b. The Court has already held that Plaintiff Wygant has standing.

Plaintiff Wygant lives and votes in Gibson County, Tennessee. In denying the Parties' summary judgment motions, the Court ruled that because "it is undisputed that the enacted House map divides Gibson County in violation of Article II, Section 5 of the Tennessee Constitution, Mr. Wygant has standing to contest the House map as a voter residing in Gibson County." (Order dated March 27, 2023, at p. 13.)

c. Defendants bear the burden of proof at trial.

Plaintiffs will present evidence first at trial, as is the custom in our judicial system. However, Defendants bear the burden of proof in this matter, and the fact that Plaintiffs will present first should not be misconstrued as Plaintiffs seeking to meet an affirmative burden of proof.[9] Rather, Plaintiffs will demonstrate during their affirmative case that Defendants cannot meet their burden of proof. Then, though not required to prevail on the merits, Plaintiffs will show, via the testimony of their expert witness, that the General Assembly could have created far fewer county splits while still complying with federal constitutional requirements.

In its order denying the Parties' summary judgment motions, the Court held that "Plaintiffs have sufficiently demonstrated that the House map violates the constitutional prohibition against crossing county lines." (Order dated March 27, 2023, at p. 18.) As such, the Court held, "the burden has shifted to Defendants to show that the General Assembly was justified in passing a reapportionment map that crossed county lines and to show that as few county lines as necessary were crossed to comply with the federal constitutional requirements." (*Id.* (citing *Lockert I*, 631 S.W.2d at 715; *Lockert II*, at 838 (*Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983)).)

[9] For this reason, Plaintiffs proposed allowing Defendants to present first, with the incumbent opportunity to have the last word on rebuttal. Defendants declined Plaintiffs' offer.

The applicable precedent resoundingly supports the Court's holding that Defendants bear the burden of proof at trial. In *Lockert I*, the Tennessee Supreme Court articulated the burden-shifting framework for cases attacking a redistricting act based on the Tennessee Constitution's county-splitting prohibition. In such cases, plaintiffs must first demonstrate a redistricting act splits counties, thereby violating the State's constitutional prohibition against crossing county lines. 631 S.W.2d at 714. Once plaintiffs do so, the burden shifts to the defendants "to show that the Legislature was justified in passing a reapportionment act which crossed county lines." *Id.* Defendants, therefore, must establish a challenged reapportionment act crosses "as few county lines as is necessary to comply with the federal constitutional requirements." *Id.* at 715.

Nearly three decades later, in *Moore v. State*, 436 S.W.3d 775 (Tenn. Ct. App. 2014), the Tennessee Court of Appeals reiterated that defendants must affirmatively justify the county splits included in a redistricting map. The *Moore* Court first noted, the "*Lockert* court held that after the plaintiffs in that case had demonstrated that the redistricting act violated the state constitutional prohibition against crossing county lines, '[t]he burden . . . shifted to the defendants to show that the Legislature was justified in passing a reapportionment act which crossed county lines.'" *Id.* at 784 (alterations in original). The Court then rejected language from the lower court suggesting the plaintiffs bore the burden of proof, noting, "[t]o the extent to which the trial court held that the burden was not on [the state defendants] to demonstrate that crossing county lines was justified by equal protection considerations, we reverse." *Id.* at 785.

As this Court held, and as the case law reflects, the law is clear. Defendants bear the burden of proving at trial "that the General Assembly was justified in passing a reapportionment map that crossed county lines and [showing] that as few county lines as necessary were crossed to comply with the federal constitutional requirements." (Order dated March 27, 2023, at p. 18.)

d. Defendants cannot rely on justifications outside the federal constitution for the Enacted House Map's county splits.

At trial, Defendants may argue that the Enacted House Map represents a justified balance of constitutional factors, statutory factors, and non-statutory redistricting practices. Defendants cannot meet their burden of proof based on such factors, however, because only federal law can trump the Tennessee Constitution's total ban on dividing counties when redistricting.

The order of operations in our legal system is clear. Pursuant to Article VI, Clause 2 of the United States Constitution, the "Constitution, and the Laws of the United States which shall be made in pursuance thereof," are the "supreme law of the land." Therefore, "state laws are preempted when they conflict with federal law." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Within Tennessee, the Tennessee Constitution is the supreme law of the land, and courts "must strike down statutes that violate . . . the state constitution." *State v. Booker*, 656 S.W.3d 49, 53 (Tenn. 2022). Thus, as described below, the General Assembly must violate the Tennessee Constitution's total prohibition on dividing counties during redistricting when required to do so by the *federal* Constitution's equal population requirement and equal rights clause, as well as the Voting Rights Act. However, neither any priority set forth in a state statute nor any extra-statutory state practice can justify violating the Tennessee Constitution's county-dividing prohibition.

Prior to the United States Supreme Court's decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1963), the Tennessee General Assembly could not divide counties at all when reapportioning or redistricting the House of Representatives. Article II, Section 5's unqualified requirement that "no county shall be divided in forming" a House district strictly prohibited such divisions. Then, following these two seminal cases Supreme Court cases, the Tennessee Supreme Court faced the novel question of how to balance the Tennessee Constitution's total prohibition on splitting counties with the reality that 95 counties of widely

varying populations cannot yield 99 House districts of roughly equal population without dividing some counties. The Supreme Court addressed this conflict of law in its *Lockert* decisions.

In *Lockert I*, the Supreme Court reconciled these conflicting constitutional mandates by holding that Tennessee redistricting plans "must cross as few county lines as is necessary to comply with the federal constitutional requirements." 631 S.W.2d at 715. When the state defendants then asked the Supreme Court to revise this ruling in *Lockert II*, the Court rejected the request by unequivocally reiterating its prior holding as follows: "This Court is not persuaded by . . . defendants' arguments that we should sanction a single county line violation not shown to be necessary to avoid a breach of federal constitutional requirements." 656 S.W.2d at 839.

The logic of the *Lockert* decisions makes sense. Before a conflict with *federal* law arose, the General Assembly could not divide counties at all when redistricting the House of Representatives because the Tennessee Constitution expressly prohibits the division of counties during redistricting. After a *federal* conflict arose, the Tennessee Supreme Court allowed our founding document's total ban on county division to be disregarded only "as is necessary to comply with the federal constitutional requirements." Outside this limited conflict with *federal* law, our constitution remains in full force. Thus, Defendants cannot justify the extent of the county splits in the Enacted House Map by claiming some of the splits were required by state statute or by a state redistricting practice because the Tennessee Constitution's total ban on county splitting would unequivocally preempt state statutes and state redistricting practices to the extent that they required the division of counties during redistricting.

Stated another way, the General Assembly's redistricting decisions are not entitled to deference when those decisions relied on state statutes or practices to violate the Tennessee Constitution because state statutes and practices cannot justify constitutional violations.

e. Defendants' only identified fact witness was instructed not to answer questions concerning whether the General Assembly sought to cross as few county lines as necessary to comply with federal constitutional requirements or whether the Enacted House Map does so.

Defendants identified Doug Himes in their responses to Plaintiffs' Interrogatories as their only fact witness, and Defendants (in their Interrogatory responses) and Mr. Himes himself identified Mr. Himes as the primary mapmaker of the map that became the Enacted House Map. Yet, during Mr. Himes' deposition, Defendants' counsel instructed Mr. Himes not to answer questions concerning his drafting process, his draft maps, or the instructions he received from members of the General Assembly concerning the redistricting process. Defendants also objected to producing Mr. Himes' draft maps and any written communications between Mr. Himes and members of the Legislature. Plaintiffs moved to compel Mr. Himes to testify on these topics and Defendants to produce these documents, and the Court denied the Motion. Thus, Defendants can offer neither testimony nor documentary evidence to meet their burden of proving the General Assembly, in drafting the Enacted House Map, sought to cross as few county lines as necessary to comply with federal constitutional guidelines or of proving that the Enacted House Map does so.

f. Defendants' expert witnesses claim not to have an opinion on the question of whether the General Assembly sought to cross as few county lines as necessary to comply with federal constitutional requirements or whether the Enacted House Map does so.

Defendants have identified two expert witnesses, Doug Himes and Sean Trende. At their depositions, both Mr. Himes and Mr. Trende testified that they do not have an opinion concerning whether the Enacted House Map crosses as few county lines as is necessary to comply with federal constitutional requirements. Defendants' expert witnesses also testified they have no opinion concerning whether the General Assembly sought to create a map that crosses as few county lines as is necessary to comply with federal constitutional requirements. Finally, Defendants' expert

witnesses testified that they did not do any mapmaking work to determine whether a House map could have been created that crossed fewer county lines while still complying with federal constitutional requirements. Thus, Defendants cannot offer expert testimony to meet their burden of proving the General Assembly, in drafting the Enacted House Map, sought to cross as few county lines as necessary to comply with federal constitutional guidelines or of proving that the Enacted House Map does so.

g. Defendants' expert witness believes that seven of the 30 county-splitting districts in the Enacted House Map were not required to comply with federal constitutional requirements.

In his capacity as an expert witness, Doug Himes produced an expert report and sat for an expert deposition. Despite claiming not to have an opinion on the question of whether the Enacted House Map divides counties only as necessary to comply with federal constitutional requirements, Mr. Himes included a footnote in his expert report in which he states his expert opinion on which factor or factors required each of the 30 county splits in the Enacted House Map. Footnote 12, included on page 38 of Mr. Himes's expert report, states as follows:

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

(emphasis added).

Core preservation and incumbency protection are not federal constitutional requirements. Yet, for six of the 30 county splits in the Enacted House Map (Carroll, Fentress, Hardin, Loudon, Monroe, and Roane Counties), Mr. Himes identifies only "core preservation" as the reason justifying the split. And, for a seventh county split (Dickson County), Mr. Himes identifies only "core preservation/incumbents" as the justification for the split. Thus, Defendants' own expert witness opines that approximately 23% of the county splits in the Enacted House Map (7 of 30 splits) were not necessary to comply with federal constitutional requirements.

h. The legislative history reveals the General Assembly applied the wrong legal standard -- striving only to divide 30 counties, rather seeking to divide as few counties as necessary to comply with federal constitutional requirements.

As previously noted, Doug Himes served as the House of Representatives' mapmaker for the 2021-2022 redistricting process. Throughout the legislative redistricting process, Mr. Himes advised the House of Representatives, including various committees, that the law required no more than 30 counties to be divided in the House of Representatives, but that the House could decide whether to divide fewer than 30 counties as a matter of discretionary policy. This, of course, is not the law. Mr. Himes never advised the House of Representatives in public hearings of the actual legal standard, that redistricting plans "must cross as few county lines as is necessary to comply with the federal constitutional requirements." *Lockert I*, 631 S.W.2d at 715.

On September 8, 2021, the House Select Committee on Redistricting held its first public hearing of the 2021/2022 redistricting cycle.[10] At that hearing, Mr. Himes gave a presentation on

[10] The Court may take judicial notice of the legislative history referenced herein under Rule 201 of the Tennessee Rules of Evidence. TENN. R. EVID. 201; *see, also, Wilds v. Coggins*, 496 S.W.2d 460, 461 (Tenn. 1973) ("the courts will take judicial notice of all entries relating to legislation."). All of the hearings cited herein remain available in video format on the website of the General Assembly, and Plaintiffs filed transcripts of the hearings in their Appendix of Documents Submitted to the Record, filed on January 20, 2023, in support of Plaintiffs' Motion for Summary Judgment. *See* Appendix Exhibits H through M.

the redistricting process. During his presentation, Mr. Himes described the Tennessee Constitution's prohibition on county splitting, as well as the Tennessee Supreme Court's guidance on county splitting, as follows:

> No more than 30 counties may be split to attach to other counties or parts of counties to form multi-county districts. So Article II, Section 5, of the Tennessee constitution tells us, Hey, House of Representatives, don't split any counties. The one person, one vote standard says, Well, you've got to have your districts substantially equal in population. And those two things -- they conflict. One's federal. One's our state constitution.
>
> In 1983, this issue came up in front of the state supreme court in the case *Lockert v. Crowell*, and the Supreme Court in its wisdom said, All right, House. In order for you to comply with one person, one vote, we know you're going to have to split counties. But we're going to put that limit at 30. You're not going to split more than 30, and you're not going to split, at the time, the four urban counties but for two reasons. So you're limited to 30, the four urbans would count if you had to split them for these reasons.

On December 17, 2021, the House Select Committee on Redistricting convened its final public hearing of the 2021/2022 redistricting cycle. During this hearing, the Committee voted to recommend the plan Mr. Himes created in consultation with unspecified House members to the House Public Service Subcommittee. This recommended plan included 30 county splits. During this hearing, Representative Bob Freeman had presented a proposed redistricting plan that split just 23 counties. Responding to Representative Freeman's proposed plan, Mr. Himes objected to the plan's creation of a county split in Shelby county. Mr. Himes then quoted a portion of the Tennessee Supreme Court's *Lockert II* decision as follows:

> I'll read you the holding -- the relevant part, "Turning to the limitation on dividing counties and creating house districts, we think an upper limit of dividing 30 counties in the multi-county category is appropriate, with a caveat that none of the 30 can be divided more than once."

After Minority Leader Karen Camper then asked why the Legislature should not be seeking to reduce county splits below 30, Mr. Himes stated as follows:

> Leader Camper, I -- you know, *Lockert* gives you an upper limit of 30, and it's something that -- since we had the *Lockert* decision, it's something that we placed in Tennessee code as one of our criteria. And it's consistently adopted as one of our criteria that our limit is 30. While it is true that you can sometimes draft plans with fewer county splits, you have the discretion to get to that -- to that limit, and that becomes a policy decision that you all -- that you make.

On January 12, 2022, the House Public Service Subcommittee convened a public hearing. At the hearing, Speaker Pro Tempore Pat Marsh presented House Bill 1035 ("HB 1035"), which represented the redistricting plan drafted by Mr. Himes and recommended by the House Select Committee on Redistricting. In presenting HB 1035, Speaker Marsh summarily stated the "plan complies with judiciary-interpreted state constitutional requirements concerning county splitting." Mr. Himes then noted, "There are 30 splits in this plan." Mr. Himes did not address the *Lockert* cases in this hearing.

On January 18, 2022, the House State Government Committee convened a public hearing. This hearing included the most direct questioning concerning whether HB 1035 sought to reduce county splits. Questioning Mr. Himes, Representative Bill Beck asked, "Is there -- is there a reason we didn't strive, in this plan, to split less counties?" Mr. Himes responded as follows:

> Representative Beck. I think, you know, under the *Lockert* decision, the maximum that that court -- Tennessee Supreme Court suggested that we split is 30. And this plan does split 30. And when you go east to -- we started, in some ways, going east. We had some -- there was population issues coming out of the northeast corner. And you start splitting counties that you don't have any choice but to split. Could you split -- well, yeah -- fewer? Possibly. And I think that becomes a policy decision about those. But you're always going to split more counties, probably closer to 26, 25, 27, 28, and then you have the discretion to split counties. Although we try not to. This one splits 30.

(25:25-28:10.)

On January 20, 2022, the House Calendar and Rules Committee considered and approved House Bill 1035 without discussion. On January 24, 2022, the House of Representatives considered and approved the Enacted House Map.

On January 26, 2022, the Senate considered and approved the Enacted House Map. At this public session, Senator Jeff Yarbro directly challenged the General Assembly's failure to apply the *Lockert* decisions' holding on county splitting, noting as follows:

> When we considered maps last week, the -- both the Senate and the House are subject to a constitutional prohibition on splitting counties. Which we only violate that rule to the extent that it's absolutely necessary to meet one person, one vote standards. So when we were considering Senate plans, I think both the plans -- there was an eight-county split plan and a nine-county split plan. Like both -- we all held ourselves to that standard. On the House map side here, they split 30 counties when you only have to split, you know, 20-- 20/23 in order to meet the population standards. And my question, Mr. Speaker, is why we're not going to hold the House to the same standards that we have applied to ourselves.

The Senate then approved the Enacted House Map, with no individual other than Senator Yarbro citing or paraphrasing the standard set forth by the Tennessee Supreme Court that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements." *Lockert II*, 656 S.W.2d at 838.

At no point during any of these meeting did Mr. Himes, or any individual recommending the plan Mr. Himes created, cite or paraphrase the standard set forth by the Tennessee Supreme Court that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements." *Lockert II*, 656 S.W.2d at 838. Rather, when members of the minority caucus asked why the map that became the Enacted House Map did not seek to reduce the number of county splits below 30, Mr. Himes advised it is a policy decision whether to divide fewer than 30 counties. This is not the law. The only evidence of the General Assembly's intent when enacting the Enacted House Map, therefore, reflects that the General Assembly sought to divide 30 counties, rather than seeking to divide counties only as necessary to comply with federal constitutional requirements.[11]

[11] As Plaintiffs have noted in previous filings, the Enacted House Map's enacting legislation sets forth various guidelines for the redistricting process, including noting that it is the intention

i. Plaintiffs' expert witness will offer unrebutted testimony that the Enacted House Map divides far more counties than necessary to comply with federal constitutional requirements.

Defendants cannot meet their burden of proof because they have not produced any evidence that "the General Assembly was justified in passing a reapportionment map that crossed county lines and [showing] that as few county lines as necessary were crossed to comply with the federal constitutional requirements." (Order dated March 27, 2023, at p. 18.) Defendants also fail to meet their burden of proof because their own expert witness asserts that seven of the 30 county splits in the Enacted House Map were not justified by federal constitutional requirements. In light of these facts, Plaintiff Wygant need not offer any expert proof to prevail at trial. Even so, Plaintiff Wygant will offer his expert witness's testimony that the General Assembly could have divided far fewer counties while still complying with federal constitutional requirements, and Plaintiff Wygant's expert witness will support this opinion with various illustrative maps.

Dr. Jonathan Cervas is eminently qualified to testify concerning redistricting. In 2022, the New York State Supreme Court hired Dr. Cervas as its Special Master to redraw the State Senate and Congressional district maps used from 2022 through 2030. Before that, in 2021, the Pennsylvania Legislative Reapportionment Commission hired Dr. Cervas to assist it in the creation of the State House of Representatives and Senate districts to be used from 2022 through 2030. In both engagements, Dr. Cervas served as the primary mapmaker for two statewide redistricting maps. Prior to these two engagements, Dr. Cervas served as assistant to the Special Master in three other redistricting lawsuits. In these cases, Dr. Cervas assisted Special Master Bernard Grofman

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of the General Assembly that, "No more than thirty (30) counties are split to attach to other counties or parts of counties to form multi-county districts." TENN. CODE ANN. § 3-1-103(b)(5). Like Mr. Himes at the public hearings discussed herein, this statute does not set forth the applicable standard that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements." *Lockert II*, 656 S.W.2d at 838.

in drawing new district maps for school board and county commission districts in San Juan County, Utah; for House of Delegates districts in the State of Virginia; and for school board districts in Sumter County, Georgia.[12] These five engagements illustrate Dr. Cervas's depth of experience as a redistricting mapmaker, both district-by-district and statewide, with the approval of four different courts and one legislative commission.[13]

Dr. Cervas's experience drawing redistricting maps for whole states and various political subdivisions qualifies him as an expert redistricting mapmaker standing alone. In addition, Dr. Cervas's educational background qualifies him as an expert. Dr. Cervas has a Ph.D. in Political Science from the University of California, Irvine, and he is a postdoctoral fellow at Carnegie Mellon University, where he teaches undergraduate and graduate courses for the Institute of Politics and Strategy, including a course on representation and voting rights. Dr. Cervas has authored eleven peer-reviewed articles on topics including political institutions, elections, redistricting, and voting rights.

First and foremost, Dr. Cervas will testify that the General Assembly could have divided far fewer counties than the Enacted House Map while still complying with federal constitutional requirements. Defendants do not challenge this opinion because Defendants did not retain their expert witnesses to opine on whether the Enacted House Map divides as few counties as necessary

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[12] As noted in Dr. Cervas's expert report, the four redistricting court cases in which Dr. Cervas served as Special Master or assistant to the Special Master are *Harkenrider v. Hochel*, No. E2022-0116CV (N.Y.); *Wright v. Sumter County Board of Education and Registration*, No. 1:14-cv-00042 (M.D. Ga.); *Bethune-Hill v. Virginia State Board of Elections*, No. 3:14-cv-00852 (E.D.Va.); and *Navajo Nation v. San Juan County*, No.2:12-cv-00039-RJS (D. Utah).

[13] As noted, Dr. Cervas has completed four statewide redistricting maps in the past few years (two in New York and two in Pennsylvania), and three redistricting projects for smaller political subdivisions. By contract, Defendants' expert witness, Doug Himes, has only completed 3 statewide redistricting maps (for the House of Representatives in the 2000s, 2010s, and 2020s) and has only completed one redistricting project for a smaller political subdivision (when he worked with then-Representative Steve Cohen on Shelby County's House districts in the 1990s).

to comply with federal constitutional requirements and because Defendants expert witnesses express no opinion on that question.[14] Defendants' expert witnesses confine their testimony to attacking the illustrative maps Dr. Cervas included in his expert reports.

Cervas House Plan 13c: Dr. Cervas will present the Court with an illustrative map he created labeled Cervas House Plan 13c. Dr. Cervas will testify that this map includes the exact same 13 majority-minority House districts as the Enacted House Map. This means that Plan 13c is no different under the Voting Rights Act or the Constitution's equal rights clause than the Enacted House Map. Dr. Cervas will further testify that Plan 13c divides six fewer counties than the Enacted House Map (24 total county splits) and does so with a total population variation of 9.96%, which falls below the 10% threshold under which redistricting plans are subject to less scrutiny for purposes of compliance with the "one person, one vote" doctrine, and which exceeds the Enacted House Map's total variance by just six hundredths of a percent (the Enacted House Map has a total variance of 9.90%).

Defendants' expert witness, Doug Himes, agreed at his deposition that Plan 13c does not have constitutional defects, but he criticized it for not preserving the cores of prior districts as fully as the Enacted House Map and for pairing more incumbents than the Enacted House Map.[15] Mr. Himes also expressed concern over Plan 13c's slightly higher total population variance. But core preservation and incumbency protection are not federal constitutional requirements, and they cannot justify the six additional county splits in the Enacted House Map as compared to Plan 13c.

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[14] Deposition of Sean Trende at 9:6-8 ("Q. Did you attempt to draw any new or alternate maps that splits fewer counties than the enacted map? A. No."); December 16, 2022, Deposition of Doug Himes at 10:2-7 ("Q. [D]id you take any affirmative action as an expert to look back at the map and see if there could have been fewer county splits while still complying with one person, one vote and the Federal Equal Rights clause? A. I did not on the enacted plan.").

[15] December 16, 2022, Deposition of Doug Himes at 79 (Himes: "13c is illustrative of one that is -- well, it's the only one that I think has – doesn't have Constitutional deficiencies.")

And, given that Plan 13c's total variance falls under 10% and exceeds the Enacted House Map's total variance by just six hundredths of a percent, its far superior number of county splits demonstrates that the Enacted House Map failed to divide counties only as necessary to comply with the federal constitution.

Cervas House Plan 13d_e: Dr. Cervas will also present the Court with an illustrative map he created labeled Cervas House Plan 13d_e. Dr. Cervas will testify that this map also includes the exact same 13 majority-minority House districts as the Enacted House Map and also divides six fewer counties than the Enacted House Map (24 total county splits). Dr. Cervas will further testify that Plan 13d_e has a total population variation of 9.89%, which falls below the Enacted House Map's total population variance of 9.90%, and it does so while preserving approximately the same prior district cores and protecting the same number of incumbents as the Enacted House Map. In other words, this map is legally equal to or superior than the Enacted House Map on all fronts and demonstrates the Enacted House Map does not divide counties only as necessary to comply with the federal constitution.

Defendants, unsurprisingly, do not want the Court to see this map or to hear about it. They have moved to have it excluded multiple times. Yet, as Plaintiffs have noted in briefing Defendants' multiple motions concerning Dr. Cervas and Map 13d_e, Plaintiffs produced this map three business days after Defendants' expert witnesses raised new criticisms about Dr. Cervas's House Plan 13d in their depositions. Plaintiffs offered to make Dr. Cervas available for a reconvened deposition on this map, but Defendants chose not to do so. Plaintiffs produced this map over three months before trial, and Defendants subsequently produced a supplemental expert report from Mr. Himes analyzing and substantively criticizing this map on its merits. Defendants then relied on Mr. Himes's supplemental expert report to critique Plan 13d_e in their briefing of

the Parties' motions for summary judgment. Defendants have not been ambushed by Dr. Cervas's Plan 13d_e, and it should not be excluded at trial.

Concerning Plan 13d_e, Defendants criticize it for having three noncontiguous census blocks, meaning in the entire state there are three small census blocks assigned to one district but not physically touching that district. These three census blocks are tiny, with two containing *zero* people and one containing 11 people. Dr. Cervas will acknowledge that the redistricting software he used for this matter has had trouble identifying small non-contiguities throughout this lawsuit, which is a point Mr. Himes testified to in his own deposition as well.[16] But, Dr. Cervas will also show how easily these three non-contiguous census blocks can be united with their proper districts without affecting either the total population variance or the number of county splits in the map. In other words, Dr. Cervas will show that Map 13d_e remains superior to the Enacted House Map on county splits (24 versus 30) and population variance (9.89% versus 9.90%) even after the three non-contiguous census blocks are properly paired with the House districts they abut.

Dr. Cervas's testimony, including his citation to these two illustrative maps, will demonstrate resoundingly that even if Defendants has tried to meet their burden of proof, their proof would have been insufficient because the General Assembly clearly could have divided far fewer counties than the Enacted House Map divides while still complying with federal constitutional guidelines.

Finally, Dr. Cervas will testify to his opinion that the General Assembly could have divided the fewest number of House districts across the state if they had included a 14th House district in Shelby County, with that 14th district being a county-dividing district that pairs a portion of Shelby County with a neighboring county.

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[16] December 16, 2022, Deposition of Doug Himes at 92:25-93:2 ("Dave's [Redistricting App] is limited in its ability to pick up non-contiguous districts but Maptitude is not . . ..")

j. The Court should determine Mr. Wygant prevails on his House claim.

For the reasons set forth above, the Court should rule in Mr. Wygant's favor on his House claim. Defendants have not marshaled, and cannot present, evidence sufficient to meet their burden of proving "that the General Assembly was justified in passing a reapportionment map that crossed county lines and [showing] that as few county lines as necessary were crossed to comply with the federal constitutional requirements." (Order Dated March 27, 2023, at p. 18.) In fact, Defendants' expert witness will testify that seven of the 30 county splits in the Enacted House Map were not justified by federal constitutional requirements. On these grounds alone, the Court should rule in Mr. Wygant's favor following trial, and the Court can do so knowing that the General Assembly could in fact have divided far fewer counties when redistricting the House while still complying with federal constitutional requirements because Plaintiffs' expert witness will testify to that fact and will support his opinion with illustrative maps that demonstrate its veracity.

III. Upon finding for the Plaintiffs, the Court should provide the General Assembly until August 31, 2023, to remedy the constitutional defects identified by the Court in the Enacted House and Senate Maps.

Tennessee Code Annotated §§ 20-18-101, *et seq.* apply to this case because Plaintiffs challenge two "statute[s] that apportion[] or redistrict[] state legislative or congressional districts." TENN. CODE ANN. § 20-18-101(a)(1).

Should the Court rule in Plaintiffs' favor following trial, Tennessee Code Annotated § 20-18-105(a) requires the Court to provide the General Assembly with an opportunity to remedy the identified constitutional defects. Section 105(a) requires the Court to provide the General Assembly with at least fifteen (15) days to remedy the constitutional defects, and Section 105(a) counsels the Court to "consider whether the general assembly is currently in session or out of session" when setting the period of time. In full, Section 105(a) states as follows:

> 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.

Pursuant to Tennessee Code Annotated § 105(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."

Given these statutory provisions, Plaintiffs ask the Court to provide the General Assembly with the time the Court deems appropriate to provide the General Assembly an opportunity to remedy the identified constitutional defects. Plaintiffs do not know at this time whether the General Assembly will be in session when the Court issues its ruling, but Plaintiffs note that the General Assembly has convened multiple special sessions in recent years to address pressing issues, and Plaintiffs note that the General Assembly's deadline should leave the Court with sufficient time to complete its own interim plan before the 2024 state legislative elections.

For these reasons, Plaintiffs respectfully request the Court provide the General Assembly until August 31, 2023, to remedy the constitutional defects the Court identifies. This deadline will fall more than four months after the conclusion of the trial, will allow the Court to adjudicate whether any new districting plans enacted by the General Assembly remedied the identified constitutional defects, and will allow ample time, if necessary, for the Court to retain a Special

Master and to work with the Special Master in order to implement interim districting plans sufficiently in advance of the 2024 legislative elections.[17]

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court rule in their favor following trial and provide the General Assembly until August 31, 2023, to enact new redistricting plans that remedy the constitutional defects identified by the Court. If the General Assembly fails to do so, the Court should retain a Special Master and the Court should implement an interim redistricting map, which will apply only to the 2024 legislative elections.

Dated: April 11, 2023

Respectfully submitted,

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[17] If Plaintiffs prevail and Defendants appeal, Plaintiffs assume Defendants will seek a stay of the deadline set by the Court for the General Assembly to remedy the identified constitutional defects. Plaintiffs reserve the right to oppose such a stay in the interest of ensuring new redistricting maps are in place before the 2022 elections. Notwithstanding, Plaintiffs also acknowledge the deadline set by the Court may require modification following any final appellate ruling.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Plaintiffs' Pretrial Brief* will be served on the following counsel for the defendants via electronic and U.S. mail on April 11, 2023.

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