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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' POST-TRIAL 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, though neither of these paramount considerations are bright-line rules. These federal requirements supersede state requirements, including, as pertinent here, Tennessee's constitutional requirement to avoid splitting counties. At bar, the Tennessee Constitution's requirement not to split counties is sometimes at odds with federal requirements to ensure population equality among the districts and the application of the test required by Section 2 of the Voting Rights Act.

Since neither federal requirement has a bright-line rule and both trump state

requirements, perfection cannot be the standard. If it was, litigation would never end. Maps would always be subject to challenge at any point so long as a marginally "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). Instead, the Supreme Court has permitted flexibility, upholding maps where it had been demonstrated that fewer counties could have been split.

Plaintiff Gary Wygant seeks to deny that flexibility here. He alleges 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). And the only testimony regarding the justification for each county split unequivocally affirmed that each individual split was justified by the federal "one person, one vote" requirement.

Plaintiff Francie Hunt alleges that the Senate Map fails to consecutively number the districts in Davidson County in violation of Article II, Section 6. But Ms. 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 simultaneous 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 Tennessee 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 Ms. Hunt did not demonstrate an injury in fact sufficient to convey standing to challenge the Senate Map, and because Mr. Wygant did not challenge the federal justification for each split and did not demonstrate that the General Assembly acted in bad faith or with improper motive when enacting the House Map, both claims should be dismissed.

LEGISLATIVE AND PROCEDURAL HISTORY

I. SENATE MAP—Senate Bill 0780, Public Chapter 596[1]

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"). 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 received five plans for consideration. The ultimately amended and adopted Senate Bill 0780 was subsequently referred to the Senate Judiciary Committee and

[1] Because Defendants defend the Senate Map only on standing grounds, the relevant legislative history is provided for context only and will not include unnecessary citations.

recommended for passage on January 18, 2022. As pertinent here, the Bill numbered the four Davidson County districts as Districts 17, 19, 20, and 21. Senate Bill 0780 came before the full Senate for third and final consideration on January 20, 2012. At that time, Senator Yarbro introduced an amendment which presented an entirely different plan for reapportionment of the State Senate. 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.

II. 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.[2] 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. (Ex. 15, TRO 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. (Ex. 15, TRO 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. (Ex. 15, TRO 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. (Ex. 15, TRO 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

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

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. (Ex. 15, TRO Ex. 1, Himes Aff. p. 6-7; Ex. Himes 3).

Next, counsel discussed the House Redistricting Guidelines codified at Tenn. Code Ann. § 3-1-103(b). These guidelines were first adopted by the General Assembly in 1992 in response to the redistricting cases in the 1980s: *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982) ("*Lockert I*"), *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983) ("*Lockert II*"), *Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985), and *State ex rel. Lockert v. Crowell*, 729 S.W.2d 88 (Tenn. 1987) ("*Lockert III*"). (Ex. 15, TRO 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

(Ex. 15, TRO 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. (Ex. 15, TRO 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. (Ex. 15, TRO 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. (Ex. 15, TRO 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. (Ex. 15, TRO Ex. 1, Himes Aff., p. 9; Ex. Himes 4). Additionally, all of 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. (Ex. 15, TRO 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*. (Ex. 15, TRO 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. (Ex. 15, TRO 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. (Ex. 15, TRO 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). (Ex. 15, TRO 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.

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. Trial in this matter was conducted on April 17-20, 2023.

ARGUMENT—SENATE MAP[3]

Plaintiff Francie Hunt is the only plaintiff challenging the Senate map. She is an individual Davidson County voter who lives in Senate District 17, but does not have standing to challenge the Senate map. Ms. Hunt only identifies an injury in law, not an injury in fact, as required for 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). Her trial testimony demonstrates that she has suffered no actual harm, and political realities reveal that her alleged harm is nothing more than speculative and hypothetical. Though Defendants do not defend the merits of the Senate map against Ms. Hunt's claim, she cannot reach the merits of her challenge because she cannot satisfy the first and third elements of standing.

LEGAL STANDARD

I. 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

[3] Because the legal standards applicable to the Senate map claim differ entirely from those applicable to the House map claim, the argument will be bifurcated rather than combine the standards of each into a single preliminary section.

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—dooms 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).

II. Tennessee Standing

In Tennessee, 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 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, at trial, Ms. Hunt's burden was to unequivocally prove that she had standing to bring her claim.

To meet the first essential element of standing, a plaintiff 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 standing does too. *See Metro. Gov't of Nashville v. Bd. of Zoning Appeals of Nashville*, 477 S.W.3d 750, 755 (Tenn. 2015).

III. Plaintiff Hunt has not demonstrated an actual or imminent injury in fact.

Here, Ms. Hunt failed to satisfy the first and most fundamental element of standing—injury in fact. She expressly denied suffering harm as a result of the 2022 election conducted with the challenged map, and her testimony further demonstrates that any such injury is not imminent, and is, in fact, unlikely.

First, Ms. Hunt testified that she has lived in Davidson County since 1999. (I, 74, ln. 13-20).[4] She presently resides in District 17 in Davidson County. (I, 77, ln. 8). She confirmed that her allegations are that "according to the Constitution, plainly stated, [Davidson County districts]

[4] Citations to the trial transcript will be by volume, page number, and, where appropriate, line number.

need[] to be consecutively numbered." (I, 77, ln. 20-22). She asserted that "the advantage of having staggered numbers [] or consecutive numbers is that it ensures proper staggering of elections." (I, 77, ln 12-18). She also claimed that the differences in turnout between a gubernatorial and presidential election "create[] a big problem, in terms of making sure that there's some fair and equitable representation in my county, in particular for my district and for me." (I, 79, ln. 5-13).

When asked by her counsel about how this affects her, Ms. Hunt testified that "to speak to the injury directly, you know, to contextualize it, in this moment, I think it's really clear that . . . there's a deep suspicion around the legitimacy of democracy right now." (I, 80, ln. 8-13). She also claimed that "where it's a 3-1 split, where three of those districts are going to be voting during an election cycle that has a lower turnout rate, by comparison to the presidential, it does continue to put us at a disadvantage." (I, 82, ln. 11-17). But she undercut that assertion when she twice agreed that "whether a voter votes in an election is the choice of the voter." (I, 100, ln. 14-19; I, 116, ln. 11-13).

Ms. Hunt was correct that voter turnout is attributable to the individual choices of each voter. A redistricting map does nothing to compel a voter to cast their ballot, nor does it dissuade a voter from exercising the elective franchise. Any injury demonstrated by turnout cannot be fairly attributed to the numbering of districts within a county—that effect is solely a result of individual decisions by individual voters. She is not constitutionally entitled to a political advantage, (I, 82, ln. 11-17), she is only entitled to vote—which she agreed was "an individual right." (I, 117, ln. 3). And she was able to vote and did vote, even if other voters in Davidson County chose not to. If this is her description of an injury in fact attributable to the non-consecutive numbering of Davidson County's districts, it fails. *City of Memphis*, 414 S.W.3d 88, 98.

Ms. Hunt also attempted to articulate a separate harm that "there's a structural aspect to ensuring that there is expertise in leadership in that incumbency that can be there over time." (I, 85, ln. 7-9). The Court in its "Order on Motions for Summary Judgment" on page 14 identified 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").

But Ms. Hunt flatly denied that she had suffered an injury in fact during the 2022 election even though three seats were up for election:

> Q. So you weren't deprived of the benefit of nonconsecutive numbering last year because only one of those seats turned over; right?
>
> A. That's correct.

(I, 118, ln. 15-18).

And Ms. Hunt was right that she suffered no injury during the 2022 election using the challenged map. It is undisputed that Davidson County did not have majority turnover of its Senators. In 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). (Ex. 79; Ex. 82). Only Senator Oliver was new to the General Assembly, and District 19 was previously represented by Senator Brenda Gilmore who retired. The harm Ms. Hunt bemoaned never materialized. Majority turnover did not occur, and she was not deprived of any benefit Art. II, § 3 confers to multi-district counties. Thus, Ms. Hunt accurately admitted that she had suffered no injury in fact.

Ms. Hunt also undermined any assertion that an injury for denial of the benefit of nonconsecutive numbering was imminent. She admitted that, in her many years as a political organizer and a citizen, she had not seen an incumbent lose a primary election or lose to other parties' candidates in a general election. (I, 83, ln. 12-21). It is not surprising that she does not recall such a time—it is exceedingly unlikely to occur in Davidson County. The following chart demonstrates the elected Senators for Davidson County for the past thirty (30) years, with incumbent reelection reflected in green, and turnover (whether by an election loss of an incumbent, an incumbent running for higher office, or a retirement) reflected in red:

ELECTION YEAR	Dist. 17	Dist. 18	Dist 19	Dist 20	Dist 21	Dist 23	Turnover?
1992 (98)	Rochelle		Harper	Haynes	Henry		0
1994 (99)	Rochelle		Harper	Haynes	Henry		0
1996 (100)	Rochelle		Harper	Haynes	Henry		0
1998 (101)	Rochelle		Harper	Haynes	Henry		0
2000 (102)	Rochelle		Harper	Haynes	Henry	Blackburn	0
2002 (103)			Harper	Haynes	Henry	Bryson	1
2004 (104)			Harper	Haynes	Henry	Bryson	0
2006 (105)			Harper	Haynes	Henry	Johnson	1
2008 (106)			Harper	Haynes	Henry	Johnson	0
2010 (107)			Harper	Haynes	Henry	Johnson	0
2012 (108)		Haile**	Harper	Dickerson	Henry		2**
2014 (109)		Haile	Harper	Dickerson	Yarbro		1
2016 (110)		Haile	Harper	Dickerson	Yarbro		0
2018 (111)		Haile	Gilmore	Dickerson	Yarbro		1
2020 (112)		Haile	Gilmore	Campbell	Yarbro		1
2022 (113)	Pody		Oliver	Campbell	Yarbro		1

**Kerry Roberts was the District 18 incumbent going into the 2012 Election and was redistricted out of the newly drawn District 18.

(Exs. 36-82). The non-occurrence of "majority turnover" for three decades—even when Davidson County's districts were nonconsecutively numbered for twenty (20) years in a row from 1992-2012—illustrates that any injury that the three odd-numbered incumbents might simultaneously

lose their elections is not imminent and is, in fact, highly unlikely. That is insufficient to demonstrate standing. *See Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001).

Her lack of a concrete or imminent injury in fact was also historically demonstrated by her decades-long residency in Davidson County. Davidson County was not consecutively numbered in the 1990s cycle, when its districts were numbered 17, 19, 20, and 21. (Ex. 31). Ms. Hunt testified that she was unaware of that period of non-consecutive numbering. (I, 97, ln. 18). Davidson County was also not consecutively numbered in the 2000s cycle, when its districts were numbered 19, 20, 21, and 23. (Ex. 32). Ms. Hunt admitted that she was not aware of the non-consecutive numbering then either. (I, 98, ln. 18-21). She instead insisted that she "had a palpable harm, but didn't know about it." (I, 13-16). She confirmed her belief that "you only know if the Davidson County districts are not consecutively numbered if you understand the maps." (I, 105, ln. 17-25; I, 106, ln. 1-7). She also admitted that there was "some connection" to her lack of awareness of non-consecutive numbering in the 1990s and 2000s "because [Tennessee] had a Democratic General Assembly and [she was] a Democratic voter." (I, 109, ln. 10-19). Reason demands that a "palpable" or "concrete" injury in fact would have necessarily been perceivable.

Even if she argued her injury occurred on a statewide level, Ms. 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. (Ex. 83; Ex. 84). 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. (*Id.*).

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 Davidson County Senatorial elections. Ms. 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.

Therefore, Ms. Hunt has neither suffered an actual injury, nor is she likely to imminently sustain this injury. And the burden of proof is hers. The trial record demonstrates that 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). By her own testimony, Ms. Hunt has failed to demonstrate standing sufficient to allow her claim to proceed to the merits. Defendants are entitled to dismissal of her challenge to the Senate Map.

ARGUMENT-HOUSE MAP

The standard of review controls the merits of the house map. Mr. Wygant is the only remaining plaintiff challenging this map. And Mr. Wygant can only succeed if the Court chooses the narrowest articulated standard of as few county splits as possible to comply with federal requirements as articulated in *Lockert I*. If the Court determines that the newer standards articulated and applied by Tennessee's appellate courts control, Defendants prevail.

LEGAL STANDARD

I. Standard of Review

A. Constitutional Challenges Generally

There is no dispute that as the House Map is a legislative enactment, the general 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 Mr. Hunt's 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).

B. Federal Redistricting Requirements.

Even though Mr. Wygant only brings a claim for an alleged violations of the Tennessee Constitution, federal redistricting requirements are relevant to the analysis of those claims, because "state constitutional prohibitions against the division of counties in establishing legislative districts must yield to federal constitutional requirements under the Equal Protection clause." *Lincoln Co. v. Crowell*, 701 S.W.2d 602, 603 (Tenn. 1985). Tennessee requirements must also yield to the vote-dilution prohibitions of Section 2 of the Voting Rights Act. *See Moore v. State*, 436 S.W.3d 775, 784 (Tenn. Ct. App. 2014) (citing *Perry v. Perez*, 565 U.S. 388 (2012)).

Therefore, the foremost standard the General Assembly must consider in redistricting is the requirement of equality of population among districts. *Lockert I*, 631 S.W.2d at 707 (citing *Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321 (1973); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1963)). The second priority to which the General Assembly must give "primary consideration" is preserving minority vote strength pursuant to Section 2 of the Voting Rights Act. *Lockert I*, 631 S.W.2d at 714.

1. Equal Protection—one person, one vote.

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 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); *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 10%. *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").

2. Section 2 of the Voting Rights Act

The second federal requirement concerns racial gerrymandering. 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.

42 U.S.C. § 1973. 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).

C. Standard of Review-County Splits

As discussed above, redistricting maps must comply first and foremost with federal requirements, and only then turn to state redistricting requirements. As neither federal requirement has a bright-line rule, flexibility is necessarily required. Here, Mr. Wygant narrowly focuses on the statement in *Lockert I* that a map "must cross as few county lines as is necessary to comply with the federal constitutional requirements. *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702, 715 (Tenn. 1982) ("*Lockert I*"). But that myopic position neglects what Tennessee's appellate courts have said and done since.

After *Lockert I*, the appellate courts have articulated and applied newer standards that deviate from the original holding upon which Mr. Wygant relies. For example, *Lockert II* instructs the General Assembly not to split an urban county if it has sufficient population to be evenly split without crossing county lines—even if it would reduce the overall number of splits statewide. *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836, 844 (Tenn. 1983) ("*Lockert II*"). Here, it was uncontroverted at trial that you could likely "draw fewer [total] splits if you were allowed to split urban counties." (III, 580, ln. 22-24). *Lockert II* also allowed thirty counties to be split after a

finding by the trial court that only twenty-five were needed. (*Id.*). Both of those holdings are flatly inconsistent with the *Lockert I* language Mr. Wygant prefers. (III, 654, ln. 4-7).

Soon after *Lockert II*, the Supreme Court considered a challenge to two districts that included two county splits. *Lincoln Co. v. Crowell*, 701 S.W.2d 602 (Tenn. 1985) ("*Lincoln Co.*"). Plaintiffs demonstrated that only one county split was necessary. *Id*. at 603. The Court noted that *Lockert II* permitted "considerable tolerance to the General Assembly" in making those determinations as to which counties should be split. *Id*. at 604. The Court further characterized *Lockert II* as requiring that no more than thirty counties be split. *Id*. at 603. And the Court further 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." *Id*. at 604. *Lincoln Co.* clearly did not narrowly apply the language in *Lockert I* that Mr. Wygant relies upon. (III, 654, ln. 18-23).

Finally, in *Moore v. State,* the Court of Appeals considered a challenge where plaintiffs demonstrated that two fewer county lines could be crossed as opposed to the adopted map. *Moore v. State*, 436 S.W.3d 775 (Tenn. Ct. App. 2014), *perm. app. denied.* ("*Moore*"). 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 slightly '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.

Id. at 788. Importantly, despite the passage of two decades (and therefore two redistricting cycles), the *Moore* court still applied the "upper limit of 30 suggested by the *Lockert* court." *Id*. 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." *Id*. at 786.

So where does this leave us? It is clear that Tennessee's appellate courts have upheld maps where more counties were split than was ultimately demonstrated to be necessary. Mr. Wygant's preferred standard of as few counties as necessary cannot be right, or Tennessee's appellate courts have not followed this standard in any case post-*Lockert I*. That leaves only three standards. The first, the "upper limit" of thirty splits is clearly satisfied by the enacted House map, which uncontrovertibly split thirty counties. (Ex. 29). The map also survives the second standard—the record is devoid of a showing of "bad faith" or "improper motive." And the third standard, no more than thirty with a federal justification for each, is also satisfied by the enacted map based upon the testimony at trial.

II. Mr. Wygant's Challenge to the House Map Should be Limited to the Split of Gibson County.

The only remaining plaintiff with respect to the House map is Mr. Wygant, a registered voter in Gibson County. Since Mr. Wygant brings his claim as a Gibson County registered voter, he only has standing to challenge the Gibson County split. Whether any other county in Tennessee is permissibly split affects Mr. Wygant no more than Ms. Turner was affected as a resident of a county that was not split. Thus, if the split of Gibson County is permissible, Mr. Wygant's challenge should end there.

Defendants note that there is a critical difference between this matter and the *Lockert* trilogy of cases wherein the Tennessee Supreme Court established the county-splitting standard for redistricting. In each of those cases, plaintiffs were relators suing in the name of the state of Tennessee. *See State ex rel. Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982); *State ex rel. Lockert*

v. Crowell, 656 S.W.2d 836 (Tenn. 1983); *Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985); *State ex rel. Lockert v. Crowell*, 729 S.W.2d 88 (Tenn. 1987). Of course, the State of Tennessee has standing statewide.

Mr. Wygant, however, does not. He is an individual voter suing in his own name. He is a registered voter in Gibson County, and only Gibson County. The Court held in its "Order on Motions for Summary Judgment," p. 13, that former Plaintiff Telise Turner lacked standing to bring a county-splitting claim because her county of residence, Shelby County, was not split. Thus, she raised only "a generalized grievance insufficient to show standing." *Id.* (*citing United States v. Hays*, 515 U.S. 737, 743 (1995). The Court held that Mr. Wygant, however, had standing because he lived in Gibson County which was split. *Id.* It further held that "Mr. Wygant has standing to contest the House map as a voter residing in Gibson County." *Id.*

The right to vote belongs to individual citizens. *City of Memphis v. Hargett*, 414 S.W.3d 88, 97 (Tenn. 2013). In the context of redistricting challenges, federal courts have routinely held that a plaintiff must reside in the challenged district to establish standing, absent specific evidence of some other distinct and palpable injury. *See, e.g., United States v. Hays*, 414 U.S. 737, 745 (1995); *Gill v. Whitford*, 138 S. Ct. 1916, 1929-31 (2018); *Baker v. Carr*, 369 U.S. 186, 204 (1962) (plaintiff must have "a personal stake in the outcome"). Where plaintiffs' alleged harm is dilution of their votes, "that injury is district specific." *Gill* at 1930. In redistricting cases, a plaintiff who does not live in an allegedly affected district, "assert[s] only a generalized grievance against governmental conduct of which he or she does not approve." *Hays* at 745. For instance, voters who complain of racial gerrymandering in their State cannot sue to invalidate the whole State's legislative districting map; such complaints must proceed "district-by-district." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015).

The federal courts' residency limitations in redistricting cases comport with Tennessee's standing requirements. Unless a plaintiff resides in a challenged district or alleges some other distinct injury, there is nothing to differentiate that plaintiff's interest from those shared in common with the general citizenry. *City of Memphis*, 414 S.W.3d at 98.

At summary judgment, Mr. Wygant claimed that two federal cases stood for the proposition that redistricting claims were statewide in nature: *Baker v. Carr* and *Reynolds v. Sims*. 369 U.S. 186, 204 (1962); 377 U.S. 533 (1964). He was mistaken. The U.S. Supreme Court recently held in *Gill v. Whitford* that the injuries of the plaintiffs in *Baker* and *Reynolds* were "individual and personal in nature." *Reynolds*, 377 U.S. at 561, 84 S. Ct. 1362, because the claims were brought by voters who alleged "facts showing disadvantage to themselves as individuals," *Baker*, 369 U. S., at 206, 82 S. Ct. 691. *Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018). The U.S. Supreme Court in *Gill* further stated that "[t]he plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were "statewide in nature" rests on a failure to distinguish injury from remedy." *Id.*

So we turn to the constitutionality of the split of Gibson County. The testimony at trial reflects that the ideal population for a house district is 69,806. (III, 527, ln. 18-21). In keeping with *Lockert II*'s instructions to not split counties that could be evenly split within the county's boundaries, the largest population deviation upward is Montgomery County, which is 5.09% above the ideal house district but can be divided into three complete districts within county lines. (II, 479, ln. 7-23). This means that a 4.91% negative deviation is at best the maximum low deviation that keeps a map under the *per se* unconstitutional line of 10% total deviation—although that is not a safe harbor and potentially an unsafe litigation risk. *See Moore v. State*, 436 S.W.3d at 785 (citing *Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., concurring)).

Gibson County's population is insufficient to form a district by itself. 5.09% above the ideal district population of 69,806 is 73,359. 4.91% below is 66,378. Gibson County's population is 50,429, well below the acceptable window. (Ex. 20). The counties adjacent to Gibson are Madison, Crockett, Dyer, Obion, Weakley, and Carroll. (Ex. 29). Madison County has a population of 98,823, and forms part of a majority-minority district, which preserves certain district configurations due to Section 2 of the Voting Rights Act. (Ex. 20; III, 558, ln. 23-25; III, 559, ln. 1-4). The remainder of Madison County that is not appended to the rural West Tennessee majority-minority district can and does remain whole. (Ex. 29). Crockett County has a population of 13,911, which is too little to append whole and is already kept whole in the enacted map. (Ex. 20; Ex. 29). Dyer County has 36,801, Obion has 30,787, Weakley has 32,902, and Carroll has 28,440—all of which have too much population to append to Gibson County without a split somewhere. (Ex. 20).

In other words, due to the rural West Tennessee majority-minority district required by the Voting Rights Act and the populations of each neighboring county, either Gibson County or any county appended to Gibson must be split to fall within 10% population variance. Since Gibson County is too small to comprise its own district and it cannot be wholly joined with another adjacent, whole county to form a district of permissible population deviation, any constitutional House district that contains Gibson County this redistricting cycle ***must*** split a county. Mr. Wygant has no constitutional right to force the split upon a neighboring county instead of his county of residence. Every county around Gibson County lost population in the 2020 census. (III, 556, ln. 1-6). The trial testimony reflects that the split of Gibson County was necessitated by population shift and core preservation. (III, 559, ln. 5-9).

The math dictates that the split of Gibson County is objectively justified by the federal constitutional requirement of "one person, one vote." It is certainly not a result of "bad faith" or "improper motive", and Mr. Wygant has no injury beyond the split of his resident Gibson County. His testimony reflects as much:

> Q. Do you have any individual and personal impact from the division in those other counties?
>
> A. Well, I do hear about it from the other county chairmen, yes. But that's really them relaying their feelings.

(I, 141, ln. 7-11). Accordingly, as Mr. Wygant has no injury in fact beyond this split of his county of residence, and because his alleged injury is constitutionally permissible, his challenge to the House map should terminate there.

III. Mr. Wygant Failed to Demonstrate that the General Assembly Acted in Bad Faith or with Improper Motive.

Even if permitted to challenge the constitutionality of county splits beyond his county of residence, Mr. Wygant's claim still fails because he failed to demonstrate that the General Assembly acted in bad faith or with improper motive. 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 motive. *See Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985).

Defendants' expert and the House mapdrawer Doug Himes testified about the order of precedence in redistricting requirements. He testified that federal constitutional provisions are of utmost importance, specifically one-person, one-vote, then federal legal requirements such as the

Voting Rights Act. (II, 459, ln. 1-21). After that, state constitutional provisions have precedence, then lastly the criteria adopted by the General Assembly. (II, 461, ln. 6-13). And Mr. Himes correctly testified that core retention and incumbent pairings are permissible redistricting criteria under Article II, Section 4 of the Tennessee Constitution. (II, 461-462). The correct ordering of redistricting priorities according to precedence cannot demonstrate bad faith or improper purpose.

Second, that hierarchy was faithfully applied. Mr. 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. Put more plainly, if a county was not required to be split due to population variance, the enacted map did not split that county. (III, 528, ln. 25; III, 529, ln. 1-6). Of the remaining 85 counties whose population was either too great or too little to form a district by themselves, 55 counties were able to remain whole under the enacted map. (III, 530, ln. 12-20). As an expert witness, Mr. Himes opined that the General Assembly made an honest and good-faith effort when enacting the House map. (III, 581, ln. 14-18).

Third, 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 Windrow Map unconstitutionally reduced majority-minority districts, had a population deviation of 24.23%, split urban counties unnecessarily, double split multiple counties, and was noncontiguous. (Ex. 23; II, 506, ln. 15-25; II, 507, ln. 1-9). The Equity Alliance, Wishart, Orrin et al., and the first and second democratic caucus maps all had similar problems that rendered them unacceptable alternatives. (II, 507-512). They were all clearly unconstitutional. (II, 513, ln. 4-9). The only house map

presented to the General Assembly that was not evidently 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 or improper motive.

Lastly, the post-hoc maps submitted by Dr. Cervas cannot demonstrate bad faith or improper purpose. Testimony at trial reflected that the COVID-19 pandemic delayed the census data, compressing the schedule for the General Assembly to analyze the data and create a constitutional map. (II, 501, ln. 11-25). Dr. Cervas's opinion that the General Assembly did not act in good faith was solely attributable to the refusal to split Shelby County, which is expressly prohibited by *Lockert II*. (Ex. 8; II, 416, ln. 1-4). He had not read *Lockert II* in its entirety prior to rendering this opinion. (II, 428, ln. 8-11). And compared to the General Assembly's five months, Dr. Cervas had nearly a year to create more than 60,000 maps. (II, 372, ln. 7-8). Almost all of Dr. Cervas' maps were flatly unconstitutional besides one with a higher population variance than the House map. (Ex. 14; Ex. 16).

At bar, nothing in the trial record supports a finding that the General Assembly acted in bad faith or with improper motive. The General Assembly chose the best map available to it, and the testimony of Mr. Himes demonstrates that its priorities were correct. Dr. Cervas's flawed maps do nothing to impugn the good-faith effort demonstrated by the General Assembly. Just as the Tennessee Supreme Court in *Lincoln Co*. declined to overturn an enacted map in favor of a better map that split fewer counties absent a showing of bad faith or improper purpose, so too should this Court decline to declare the enacted map unconstitutional here.

IV. Each County Split has a Federal Justification.

Mr. Wygant argued that even if the standard is not his preferred "least possible county splits," he 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.

As discussed above, keeping Montgomery County whole as required by *Lockert* II and given the per se unconstitutional line of 10% means that the population window for a federally-compliant district is 66,378-73,359. 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.[5]

As discussed before, only 10 counties could form a district by themselves. The other 85 across the state represent a complex puzzle. Mr. Himes testified that "there can be many different decisions for any given one of [the 85] counties depending on how the other puzzle pieces come together" and that "any one piece of that puzzle is inherently reliant on the other pieces around it." (III, 594, ln. 2-16). Dr. Cervas concurred that "there are more plans possible than atoms in the universe. There are trillions. We can't know them all. So it's very hard to know what the absolute minimum is." (II, 369, ln. 19-22). But for each of the 85 remaining counties, each must somehow end up in a district that complies with one person, one vote.

Put simply, federal law required that the General Assembly use the tools available to it to remedy the population issues in these counties and those with similar population problems. In this instance, the General Assembly utilized county splitting to ensure compliance with "one person, one vote." Mr. Himes confirmed as much—"all 30 of these [splits] are population equality." (III, 551, ln. 6-8). 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

[5] 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 post-trial brief.

preservation. As explained by Mr. Himes, "core preservation is a useful tool" that is "intertwined with one person, one vote." (III, 553, ln. 2-21). "Core preservation helps you assign what districts get put together and what shapes to use in furtherance of one person, one vote." (III, 554, ln. 1-7). Mr. Himes laboriously walked the Court through every single split and their justifications, and his explanation confirmed that the justification underpinning each split was population equality. (III, *passim*). The tools used to select which of the 85 counties would ultimately be split were utilized in furtherance of coming into compliance with "one person, one vote." (*Id.*). Nothing in the record disputes this point or specifically challenges Mr. Himes' explanation of each individual county split. Plaintiffs' expert Dr. Cervas offered no rebuttal testimony, and Mr. Himes was the only witness to proceed with a county-by-county explanation setting forth how the additional criteria were used to ensure federally-compliant districts.

Relying on those tools 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, strictly speaking, federal requirements, they created a neutral and 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 Mr. Wygant is wrong to narrowly characterize the use of non-federal statutory factors to resolve these counties' population issues as prioritizing statutory factors over Tennessee constitutional requirements.

Mr. Wygant argues that, hypothetically, fewer counties could have been split, which in his eyes undermines 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 Co.* rejected an argument asserting that splitting both Lincoln County and Marshall County was unconstitutional where it was possible to only split Lincoln County. 701 S.W.2d at 604.

By ignoring controlling precedent from *Lockert II*, *Lincoln Co.*, and *Moore*, Mr. Wygant prefers to send Tennessee courts into the county-splitting thicket. If he is correct, then only a Tennessee House map that perfectly splits the fewest counties possible while complying with federal redistricting requirements can survive a challenge. But such a standard is no standard at all—it would require the General Assembly to prove a negative, i.e., that a constitutional map with one fewer county split does *not* exist. His interpretation will transform Tennessee into a redistricting litigation hotbed and future three judge panels will have to pour over alternate maps with no guarantee that slightly "better" individual district lines could not be found at some point in the future.

Returning to the *Lockert I* county-splitting interpretation championed by Mr. Wygant would send Tennessee back to the 1980s and sanction serial redistricting litigation. *See, e.g., State ex. rel. Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982); *State ex. rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983); *Murray v. Crowell*, No. 3:84-0566 (M.D. Tenn. March 8, 1985); *Lincoln County v. Crowell*, 701 S.W.2d 602, 603 (Tenn. 1985); *State ex. rel. Lockert v. Crowell*, 729 S.W.2d 88 (Tenn. 1987). Preventing never-ending, interminable redistricting litigation and giving the General Assembly a workable rule for county splitting is why Tennessee's appellate courts introduced and have consistently applied a more flexible standard than the one Mr. Wygant

advances here.

Moreover, his interpretation requires the General Assembly to prove compliance with federal requirements for each county split even if no violation of federal law is raised. While federal requirements allow some flexibility, there are no safe harbors from "one person, one vote" or Voting Rights Act challenges. Compliance with the Voting Rights Act in particular is a difficult concept with ambiguous contours that continues to be illuminated by the U.S. Supreme Court even as this matter is pending. Mr. Wygant's preferred construction of the county-splitting prohibition provides no safe harbor and does not allow flexibility. Can a less perfect map with respect to federal requirements prevail because it has fewer county splits? What are the limits of the county-splitting prohibition if it only yields to federal constitutional requirements even when those same federal constitutional requirements are not bright line rules? Subsequent three judge panels in Tennessee will have to answer these questions.

Redistricting will effectively shift to the courts instead of the General Assembly, but the courts will fare no better if there is no clear standard for a constitutional map. Given the current U.S. Supreme Court guidance on population deviation, a map with fewer county splits could theoretically be found with enough time and resources—and a willingness to test the limits of federal redistricting requirements. Remedial maps chosen by the courts could be invalidated just the same as legislatively adopted ones.

In the end, Mr. Wygant invites chaos. Voters could find new district lines each time they vote for their state legislators throughout every judicially mandated redistricting cycle. Election administrators would have the unenviable task of realigning voters into new districts multiple times a decade. The General Assembly could never have confidence that their enacted state maps comply with the Tennessee Constitution.

The upper limit of 30 county splits adopted by the Tennessee Supreme Court and reaffirmed by the Court of Appeals eliminates the uncertainty Mr.Wygant's argument imposes. The Supreme Court in *Lockert II* adopted an upper limit of 30 county splits to end the 1980s redistricting litigation saga. Shortly after, *Lincoln Co.* allowed a map to survive despite the existence of a map that split fewer counties. In the 2010 cycle, *Moore* applied the upper limit of 30 county splits as justification to end that decade's single redistricting case in Tennessee. More importantly, in each case the respective court declined to require the minimal, optimal number of county splits. This Court should apply controlling precedent from *Lockert II*, *Lincoln Co*, and *Moore* and do the same here.

In sum, each of the 30 county splits in the Enacted House Map was federally justified by the population data and compliance with "one person, one vote." The additional statutory factors were neutral tools to remedy the federal shortcomings that would doom a map in which 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 Tennessee's appellate courts have thrice declined to set the standard at perfection or an optimal number of county splits. Mr. Wygant's challenge to the Enacted House Map therefore fails.

CONCLUSION

For the foregoing reasons, Defendants are entitled to judgment at trial and Plaintiffs' claims should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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