IN THE SUPREME COURT OF TENNESSEE

GARY WYGANT
and FRANCIE HUNT,

Plaintiffs / Appellants,

v.

BILL LEE, Governor;
TRE HARGETT, Secretary of State;
and MARK GOINS,
Coordinator of Elections;
in their Official Capacities Only,

Defendants / Appellees.

Case No. M2023-01686-SC-R3-CV

Appeal from the Final Judgment of the Three-Judge Panel,
Davidson County Chancery Court, Case No. 22-0287-IV

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

In early 2022, the General Assembly enacted a new House of Representatives map based on a misreading of the applicable law. During the legislative process, the General Assembly's mapmaker and lawyer inaccurately advised the Legislature that the law required it to enact a House map with no more than 30 divided counties and that it could choose whether to divide fewer than 30 counties as a discretionary policy choice. The General Assembly then enacted a House map that divides 30 counties, even though the agreed trial proof shows that the Legislature could have divided at least six fewer counties while still complying with federal law.

In the 1980s, this Court articulated the legal standard that the General Assembly should have applied when redistricting the House. Guided by settled federal preemption doctrine, the Court held that legislative districts "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, 714-15 (Tenn. 1982). This Court unequivocally affirmed this holding the following year. *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836, 839 (Tenn. 1983).

The General Assembly's pursuit of the wrong legal standard prevented Defendants from proving through facts or expert testimony that the General Assembly undertook an honest and good faith effort to enact a House map that crosses county lines only as necessary to comply with federal law. Instead,

Defendants shielded all probative facts behind the attorney-client privilege, and Defendants' primary expert witness agreed with Plaintiffs' expert witness that the General Assembly could have divided at least six fewer counties while still complying with federal law.

The Trial Court majority should be reversed for misinterpreting the law, including by relaxing the standard articulated in the *Lockert* cases, by determining that *Lockert II* created a 30-split safe harbor, and by shifting the burden of proof from Defendants to Plaintiffs. The Trial Court majority should also be reversed because Defendants failed to meet their affirmative burden of proving that the General Assembly undertook an honest and good faith effort to create a House map that crosses county lines only as necessary to comply with federal law.

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JURISDICTIONAL STATEMENT

Plaintiffs appeal the Trial Court majority's final determination upholding the General Assembly's 2022 redistricting of the Tennessee House of Representatives directly to the Tennessee Supreme Court as a matter of right pursuant to TENNESSEE CODE ANNOTATED § 20-18-105(c), which states as follows:

> A party in an action challenging a statute that apportions or redistricts state legislative or congressional districts that is dissatisfied with the final judgment of the three-judge panel may appeal to the supreme court, as a matter of right, within thirty (30) days from the entry of the judgment of the three-judge panel.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the Trial Court majority err in holding that this Court's *Lockert* standard—*i.e.*, that redistricting plans must cross county lines only as necessary for compliance with federal law—is "problematic" and should be read more flexibly than the *Lockert* opinions' express language requires?

II. Did the Trial Court majority err by treating *Lockert II*'s approval of a House map with 30 county splits as a safe harbor for establishing an honest and good faith effort beyond the 1980s?

III. Did the Trial Court majority err in holding that the burden of proof is unsettled and may have required Plaintiffs to prove bad faith or improper motive?

IV. Did the Trial Court majority err in holding that Defendants met their affirmative burden of proof?

V. Did the Trial Court majority err in holding that Plaintiff Wygant only has standing to challenge the division of the county where he lives?

STATEMENT OF THE CASE[1]

On February 6, 2022, Tennessee Governor Bill Lee signed Senate Bill 0779, which enacted the General Assembly's latest decennial reapportionment of the Tennessee House of Representatives.[2] Just over two weeks later, on February 23, 2022, Plaintiffs filed this action in the Chancery Court for the State of Tennessee, Twentieth Judicial District.[3]

Plaintiffs allege that the 2022 redistricting of the Tennessee House of Representatives violated the Tennessee State Constitution's prohibition against dividing counties by dividing more counties than necessary to comply with federal law.[4] The Complaint also alleges that the contemporaneous redistricting of the Tennessee Senate violated Article II, Section 3 of the State Constitution by not numbering Davidson County's four Senate districts consecutively.[5]

On March 11, 2022, Plaintiffs filed a Motion for Temporary Injunction, supported by an Amended Verified Complaint.[6] The Trial Court determined that the adjudication of the challenge to the Enacted House Map required a full evidentiary

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1 All citations herein to "T.R" refer to the Technical Record filed by the Clerk of the Appellate Courts on April 5, 2024.

2 *See* TENN. CODE ANN. § 3-1-103.

3 T.R. 1: Complaint. Plaintiff Wygant filed the Complaint with two co-plaintiffs: Telise Turner and Akilah Moore. The Trial Court subsequently permitted Plaintiff Moore to withdraw and to be replaced by Plaintiff Francie Hunt. The Trial Court later dismissed Plaintiff Turner at the summary judgment stage of the litigation.

4 *Id.*

5 Plaintiffs prevailed on their challenge to the Enacted Senate Map.

6 T.R. 72: Motion for Temporary Injunction; T.R. 75: Amended Verified Complaint.

hearing and denied the Motion as to the House claim.[7] On the Senate claim, the Trial Court determined that the Enacted Senate Map violates the Constitution's consecutive numbering mandate and enjoined the enforcement of the map.[8]

This Court reviewed the Trial Court's injunction of the Enacted Senate Map on an expedited basis. On April 13, 2022, this Court reversed the injunction due to the temporal proximity of the 2022 elections.[9]

During discovery, Defendants withheld all non-public draft redistricting maps created by the General Assembly's mapmaker and refused to produce all substantive communications between General Assembly members and the mapmaker concerning the redistricting process. Defendants claimed that all such documents were protected from disclosure by one or more of the attorney-client privilege, the work product doctrine, and the legislative privilege. Plaintiffs moved to compel production of these documents, arguing that documents reflecting the mapmaking process and not including legal advice were not protected from disclosure by any of the asserted privileges. The Trial Court denied the Motion and held that the attorney-client privilege applied to all withheld documents.[10]

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7 T.R. 470: Order dated April 6, 2022.

8 *Id.*

9 T.R. 511: Opinion dated April 13, 2022.

10 The Trial Court's order denying Plaintiffs' Motion to Compel is not included in the technical record, but the Chief Judge read its holding into the record at Transcript, Vol. III, 545-56. The Chief Judge also summarized the Trial Court's holding in his Separate Opinion dated November 22, 2023, as follows: "the Panel ruled that information relevant to legislative intent and redistricting approaches discussed by the legislature behind closed doors was not discoverable." *See*, T.R. 3476, Separate Opinion of Chancellor Russell T. Perkins, at 3483.

On January 20, 2023, Plaintiffs and Defendants filed cross motions for summary judgment.[11] On March 27, 2023, the Trial Court dismissed Plaintiff Turner for lack of standing; permitted Plaintiff Wygant to proceed to trial on his challenge to the Enacted House Map; and permitted Plaintiff Hunt to proceed to trial on her challenge to the Enacted Senate Map.[12] The Trial Court's order did not adjudicate the merits of either claim.[13]

On April 17-19, 2023, the Trial Court presided over a trial of Plaintiffs' challenges to the Enacted House Map and to the Enacted Senate Map.

On November 22, 2023, the Trial Court issued its Memorandum and Final Order.[14] A majority of the Three-Judge Panel dismissed Plaintiffs' challenge to the Enacted House Map, and a different majority of the Panel held that the Enacted Senate Map violates the Tennessee Constitution and set a deadline for the General Assembly to enact an alternative Senate map that complies with the Tennessee Constitution's consecutive numbering mandate.[15]

Plaintiffs filed a timely Notice of Appeal directly to this Court, as authorized by TENNESSEE CODE ANNOTATED § 20-18-105, on November 29, 2023.[16] This Court

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11 T.R. 3024: Plaintiffs' Motion for Summary Judgment; T.R. 2035: Defendants' Motion for Summary Judgment.

12 T.R. 3385: Order dated March 27, 2023.

13 *Id.*

14 T.R. 3425: Memorandum and Final Order dated November 22, 2023.

15 *Id.*

16 T.R. 3503: Notice of Appeal.

stayed the Trial Court's order as it relates to the Enacted Senate Map on December 8, 2023.[17]

[17] T.R.: 3508: Order dated December 8, 2023.

STATEMENT OF FACTS

The following two sets of facts lie at the heart of Plaintiffs' appeal:

(1) Plaintiffs' expert produced an alternative House of Representatives map that divides six fewer counties than the Enacted House Map. Defendants' expert agrees that this alternative map complies with federal law, does not divide Gibson County (where Plaintiff Wygant lives), and matches or improves upon the Enacted House Map on all other redistricting metrics.

(2) Defendants offered no proof that the General Assembly undertook an honest and good faith effort to create a House map that divides counties only as necessary to comply with federal law, and the facts in the record demonstrate otherwise.

These two sets of facts demonstrate that at least 20 percent of the county splits in the Enacted House Map were not required for federal compliance, that Plaintiff Wygant's home county did not need to be divided to comply with federal law, and that Defendants failed to meet their affirmative burden of proof.

I. Defendants agree that the General Assembly could have created a House map that divided six fewer counties than the Enacted House Map, that did not divide Gibson County, and that complied with federal law.

a. The Enacted House Map.

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.[18] Governor Lee signed Public Chapter 598 into law on February 6, 2022. The

[18] *See* TENN. CODE ANN. § 3-1-103.

reapportioned House of Representatives district map enacted by Public Chapter 598 is referred to herein as the "Enacted House Map."

The 2020 United States Census identified 6,910,840 people as the total population of Tennessee.[19] If each of Tennessee's 99 House districts contained exactly equal populations, each district would contain 69,806 people.[20]

Population Variance: The Enacted House Map includes districts whose populations deviate from the ideal district population in a range from +5.09% (+3,552 people) to -4.82% (-3,361 people), with a total variance of 9.90%.[21] The previous decade's House map included districts deviating from that decade's ideal district population with a total variance of 9.74%.[22]

Majority-Minority Districts: The Enacted House map contains 13 majority-minority House districts.[23] The previous decade's House map also contained 13 majority-minority House districts.[24]

County Splits: The Enacted House Map splits 30 counties, such that a portion of each of these 30 counties shares a House district with another county or counties.[25] The previous decade's House map split 28 counties.[26]

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19 Transcript, Vol. I, 172:14-21.
20 Transcript, Vol. I, 169:16-18.
21 T.R. 298: Affidavit of Doug Himes, at 311.
22 Trial Exhibit 14: Himes Expert Report, at 37.
23 Transcript, Vol. II, 361:17-24; Vol. III, 637:22-25.
24 Trial Exhibit 95: Transcript of December 17, 2021, hearing, 15:21-16.4.
25 Transcript, Vol. I, 166:21-167:1.
26 Transcript, Vol. III, 579:13-14.

Plaintiff Wygant's Residence: Plaintiff Wygant lives and votes in Gibson County, Tennessee.[27] Gibson County is one of the 30 counties divided by the Enacted House Map.[28] The previous decade's House map did not split Gibson County.[29]

The following table summarizes these data points:

	Total Variation	Majority-Minority Districts	County Splits
Enacted House Map	9.90%	13	30
2012 House Map	9.74%	13	28

b. Dr. Cervas's alternative House map: House Map 13d_e.

Plaintiffs' expert witness produced an alternative House map that divides six fewer counties than the Enacted House Map, that does not split Gibson County, that complies with federal law, and that matches or improves upon the Enacted House Map on all other redistricting metrics. This map is referred to as House Map 13d_e.

The Trial Court certified Dr. Jonathan Cervas to testify as Plaintiffs' "expert in the matters of writing maps and other issues related to redistricting."[30] Dr. Cervas recently served as the Special Master appointed by the New York Supreme Court to redraw the statewide redistricting maps of New York's Congressional and State Senate districts.[31] Dr. Cervas also recently served as the redistricting consultant and

27 Transcript, Vol. I, 119:23-120:1, 122:2-17.
28 *See* TENN. CODE ANN. § 3-1-103.
29 Transcript, Vol. II, 660:22-25.
30 Transcript, Vol. I, 214:23-24.
31 Transcript, Vol. I, 207.

mapmaker appointed by the Pennsylvania Legislative Reapportionment Commission to redraw the statewide redistricting maps of Pennsylvania's State House of Representatives and Senate.[32] Dr. Cervas also served as Assistant to the Special Master on three other redistricting lawsuits in three other states, and he teaches at Carnegie Mellon University in the institute of politics and strategy.[33]

Plaintiffs retained Dr. Cervas to determine if the General Assembly could have created "a map that was compliant with all federal and state statutory law that split fewer than 30 counties."[34] In support of his "unequivocal" opinion that the General Assembly could have created a House redistricting plan with "substantially fewer county splits than 30," Dr. Cervas created the alternative House map titled House Map 13d_e.[35]

House Map 13d_e splits just 24 counties, which is 6 fewer county splits than the Enacted House Map, representing a 20% reduction in the number of county splits as compared to the Enacted House Map.[36] House Map 13d_e does not split Plaintiff Wygant's home county, Gibson County.[37]

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32 Transcript, Vol. I, 209-210.
33 Transcript, Vol. I, 206, 210-212.
34 Transcript, Vol. I, 231:10-11.
35 Transcript, Vol. I, 231: 17-20.
36 Transcript, Vol. II, 351:6-8.
37 Transcript, Vol. II, 661:6-10.

House Map 13d_e has a total population variance of 9.89%, which is lower than the Enacted House Map's 9.90% total population variance.[38] And, House Map 13d_e contains the exact same 13 majority-minority districts as the Enacted House Map.[39] The following table summarizes this data:

	Total Variation	**Majority-Minority Districts**	**County Splits**
Enacted House Map	9.90%	13	30
House Map 13d_e	9.89%	13	24

These three metrics derive from the federal Constitution (population variation), from the federal Voting Rights Act (majority-minority districts), and from the state Constitution (county splits). Defendants' sole fact witness also testified about two non-statutory "redistricting practices" that he claimed the State of Tennessee adheres to during redistricting, including pairing as few incumbent legislators as possible and attempting to preserve as much of each prior district's core as possible.[40] House Map 13d_e and the Enacted House Map are identical on these two metrics, as they pair the exact same 6 incumbents and retain the same percentage of prior district cores.[41] Thus, the full comparison of House Map 13d_e and the Enacted House Map is as follows:

38 Transcript, Vol. II, 350:20-23.
39 Transcript, Vol. II, 350:24-351:2.
40 Transcript, Vol. II, 462:2-7.
41 Transcript, Vol. II, 297:11-298:1, 351:18-352:1, 362:7-363:8.

	Total Variation	Majority-Minority Districts	County Splits	Paired-Incumbent Districts	Core Retention
Enacted House Map	9.90%	13	30	6	80.1%
House Map 13d_e	9.89%	13	24	6	80.1%

House Map 13d_e originally contained three non-contiguous census blocks, but Dr. Cervas demonstrated at trial that these three census blocks could be reassigned without altering the above-stated redistricting metrics.[42] After applying these three corrections, House Map 13d_e complies with the Tennessee Constitution's contiguity requirement and with federal law and matches or improves upon the Enacted House Map on all redistricting metrics.

c. Defendants agree House Map 13d_e divides six fewer counties than the Enacted House Map, does not divide Gibson County, complies with federal law, and matches or improves on the Enacted House Map on all other redistricting metrics.

Defendants called Doug Himes as one of their two expert witnesses at trial. Himes served as the primary mapmaker for the House of Representatives during the 2021-2022 redistricting process and has worked for the General Assembly, including on redistricting, for much of the past three decades.[43] Accordingly, Defendants called Himes both as a fact witness and as an expert witness.

42 Transcript, Vol. I, 268-273; Transcript Vol. II, 361-363.
43 Transcript, Vol. II, 452-456.

At trial, Himes agreed with Dr. Cervas on the following points:

- House Map 13d_e has a 9.89% total population variation;[44]
- House Map 13d_e includes the same 13 majority-minority districts as the Enacted House Map;[45] and
- House Map 13d_e includes 24 county splits.[46]

Himes also agreed with Dr. Cervas that the three non-contiguous census blocks in House Map 13d_e could, in fact, be corrected without affecting any of the map's other redistricting metrics.[47]

Defendants also called Sean Trende as an expert witness at trial. Trende agreed with Dr. Cervas that House Map 13d_e and the Enacted House Map have the same number of paired incumbents and core retention.[48]

Combined, Himes and Trende's testimonies confirmed that corrected House Map 13d_e is a constitutional alternative to the Enacted House Map that splits six fewer counties, while not dividing Gibson County, while complying with federal law, and while matching or improving upon the Enacted House Map on all other redistricting metrics. Himes efficiently summarized this concession at the end of his cross examination. Asked if he agreed, having just had to analyze House Map 13d_e, "that you can have a map based on 2020 census data with six fewer splits that's

44 Transcript, Vol. III, 637:15-21.
45 Transcript, Vol. III, 637:22-638:2; 642:17-19.
46 Transcript, Vol. III, 641:5-11.
47 Transcript, Vol. III, 639:12-641:18.
48 Transcript, Vol. II, 339-340.

constitutional under the Federal Constitution," Himes pointed to the demonstrative copy of House Map 13d_e and agreed: "It's right there."[49]

II. Defendants did not present facts concerning whether the General Assembly undertook an honest and good faith effort to divide counties only as necessary to comply with federal law.

Defendants bore the burden of proving that the General Assembly made an honest and good faith effort to split counties only as necessary to comply with federal law. Far from doing so, Defendants failed to proffer any fact testimony to meet this burden. In fact, by relying on evidentiary privileges to shield evidence of how and why district lines were drawn, Defendants denied Plaintiffs the opportunity even to take factual discovery on why or how any decisions were made that resulted in the legislative map at issue.

a. Defendants instructed their only fact witness not to testify concerning the nonpublic redistricting process and concerning communications with General Assembly members.

In discovery, Plaintiffs sought documents and information concerning the nonpublic drafting process, including production of all draft maps, and Plaintiffs sought all communications between General Assembly members and the House's primary mapmaker, Doug Himes. Defendants objected to producing such information based on the attorney-client privilege, the work product doctrine, and / or the legislative privilege. Plaintiffs moved to compel production of such

[49] Transcript, Vol. III, 643:7-12.

documents and information, and the Trial Court denied Plaintiffs' Motion.[50] As a result, the Court permitted Defendants to withhold all nonpublic draft maps, data, documents, and materials and all communications between legislators and Himes concerning the redistricting process.[51]

At trial, Himes testified that he "continuously worked on" revising the House map from September 2021 "until it passed," which occurred in February 2022.[52] Yet, Defendants again asserted these privileges and instructed their only fact witness, Himes, not to testify concerning the nonpublic drafting process and his redistricting-related communications with legislators. Specifically, Defendants instructed Himes not to testify as follows:

County Splits: Concerning county splits, Defendants took "the position that all of the private nonpublic drafting process that Himes did is subject to the privilege."[53] As a result, Defendants instructed Himes not to answer the following questions:

- "Did you ever try to create a house map with fewer than 30 county-splitting districts?"[54]
- "Did you ever actually create any house maps with fewer than 30 county-splitting districts?"[55]

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50 *See* footnote 10, *supra*.
51 *Id.*
52 Transcript, Vol. I, 163-64.
53 Transcript, Vol. I, 168:20-25.
54 Transcript, Vol. I, 167:23-168:4.
55 Transcript, Vol. I, 168:13-15.

Federal Redistricting Requirements: Concerning federal one-person, one-vote compliance and federal Voting Rights Act compliance, Defendants instructed Himes not to answer the following questions:

- "During your drafting process, did you try to make any maps with a total population variance lower than 9.90 percent?"[56]
- "During your drafting process, did you, in fact, make any maps with a total population variance lower than 9.90 percent?"[57]
- "During your drafting process, did you try to make any maps of more than 13 majority-minority districts?"[58]
- "During the process, did you, in fact, make any maps with more than 13 majority-minority districts?"[59]

Lockert Standard: Concerning the standard set out in *Lockert I* and *Lockert II* that redistricting maps shall divide counties only as necessary to comply with federal law, Defendants instructed Himes not to answer the following questions.

- "During the drafting process, did you seek to divide as few counties as necessary to comply with the equal protection clauses protections related to minority vote dilution?"[60]
- "During the drafting process for the enacted house map, did you seek to divide as few counties as necessary to comply with the Voting Rights Act?"[61]

56 Transcript, Vol. I, 173:15-17.
57 Transcript, Vol. I, 174:1-3.
58 Transcript, Vol. I, 177:24-25.
59 Transcript, Vol. I, 178:7-9.
60 Transcript, Vol. I, 180:4-7.
61 Transcript, Vol. I, 180:13-16.

- "During the drafting process, did you seek to divide as few counties as necessary to comply with the federal courts one-person, one vote doctrine?"[62]

Communications with Legislators: Himes testified that he met with all 99 House members during the redistricting process and tried to incorporate their priorities where possible.[63] Yet, once again, Defendants objected and instructed Himes not to testify concerning "any communications about redistricting between Mr. Himes and members of the General Assembly or their staff."[64] Himes was prohibited from answering the following questions:

- Did any General Assembly members ever ask you:
    - "to ensure the house redistricting plan that you were working on crossed as few county lines as necessary to comply with federal constitutional requirements?"[65]
    - "to divide a specific county or counties in the map that became the Enacted House Map."[66]
    - "to keep a specific county undivided?"[67]
    - "to divide a county that you had not divided in a previous map during the redistricting drafting process?"[68]
    - "to put a county back together, that you had divided in the previous drafting of the redistricting map?"[69]

62 Transcript, Vol. I, 180:20-22.
63 Transcript, Vol. I, 195:7-197-14.
64 Transcript, Vol. I, 201:9-16.
65 Transcript, Vol. I, 198:24:199:3.
66 Transcript, Vol. I, 199:10-12.
67 Transcript, Vol. I, 199:17-18.
68 Transcript, Vol. I, 199:23-25.
69 Transcript, Vol. I, 200:5-7.

- "to divide a county for a reason, other than a federal constitutional requirement?"[70]

- "to divide a county for a reason, other than federal constitutional requirements or the Voting Rights Act?"[71]

- "Did you ever inform a member of the General Assembly that the redistricting map for the '21-2022 redistricting process should cross as few county lines as is necessary to comply with federal constitutional requirements?"[72]

Defendants instructed Himes not to answer these questions on cross examination. However, Defendants' counsel then tried to elicit similar information from Himes on direct examination. Defendants' counsel asked Himes to "talk about each of the county splits" in the Enacted House Map, in alphabetic order, and to "explain the split" in his capacity as Defendants' only fact witness.[73] Plaintiffs objected that Defendants could not proffer fact evidence about the motivation or explanation underlying each county split when Defendants had withheld all such information from the discovery process. The Court sustained Plaintiffs' objection, citing the Court's prior denial of Plaintiffs' Motion to Compel.[74]

In sum, as a result of Defendants' sustained privilege objections, Defendants' only fact witness offered no testimony concerning whether the General Assembly

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70 Transcript, Vol. I, 200:12-14.
71 Transcript, Vol. I, 200:19-21.
72 Transcript, Vol. I, 200:25-201:4.
73 Transcript, Vol. III, 536:8-10.
74 Transcript, Vol. III, 536-544 (Plaintiffs' objection lodged and argued), 545-548 (Trial Court ruling).

made an honest and good faith effort to split counties only as necessary to comply with federal law.

III. The legislative history reveals that the General Assembly applied an incorrect legal standard when creating the Enacted House Map.

Given the absence of fact-witness testimony concerning the nonpublic drafting process and the intentions of General Assembly members, the legislative history constitutes the sole probative factual record. The legislative history, however, reveals that the General Assembly did not seek to divide counties only as necessary to comply with federal law. Instead, the General Assembly simply sought to avoid dividing more than 30 counties.

On September 8, 2021, the House Select Committee on Redistricting held its first public hearing of the 2021/2022 redistricting cycle.[75] At that hearing, Himes gave a presentation on the redistricting process in which he described the Tennessee Constitution's prohibition on county splitting, as well as this Court's guidance on county splitting, as follows:

> 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.[76]

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75 Trial Exhibit 94, Transcript of September 8, 2021, hearing.

76 *Id.* at 15:12-22.

On December 17, 2021, the House Select Committee on Redistricting convened its final public hearing of the 2021/2022 redistricting cycle.[77] During this hearing, Representative Bob Freeman presented a proposed redistricting plan that split just 23 counties.[78] Responding to Representative Freeman's proposed plan, Himes quoted a portion of this 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."[79]

After Minority Leader Karen Camper then asked why the Legislature should not be seeking to reduce county splits below 30, 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.[80]

On January 18, 2022, the House State Government Committee convened a public hearing.[81] This hearing included the most direct questioning concerning whether HB 1035 sought to reduce county splits. Questioning Himes, Representative

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77 Trial Exhibit 95, Transcript of December 17, 2021, hearing.
78 *Id.* at 13:18-21:16.
79 *Id.* at 23:10-15.
80 *Id.* at 47:14-23.
81 Trial Exhibit 96, Transcript of January 18, 2022, hearing.

Bill Beck asked, "Is there -- is there a reason we didn't strive, in this plan, to split less counties?"[82] 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.[83]

After reviewing each of these quotations from the transcript of the legislative hearings during trial, Himes agreed that than neither he, nor any individual recommending HB 1035 at the hearings, cited or paraphrased the standard that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements."[84]

Defendants presented no facts at trial to rebut what the transcripts of these hearings reveal: During the public legislative process, neither Himes nor any individual speaking in support of the Enacted House Map stated that the General Assembly was required to make an honest and good faith effort to create a map that crossed county lines only as necessary to comply with federal law or indicated that the General Assembly had actually tried to do so. Instead, Himes repeatedly claimed

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82 *Id.* at 25:25-26:2.
83 *Id.* at 26:6-20.
84 Transcript, Vol. I, 189:10-190:15.

the law only required splitting no more than 30 counties and that the question of whether to split fewer than 30 counties was subject to the Legislature's discretion.

IV. Defendants' experts either agreed that the General Assembly could have divided at least six fewer counties while still complying with federal law or expressed no opinion on the topic.

Absent supportive fact testimony or legislative history, Defendants still could have sought to meet their burden of proof with expert testimony. Yet, Defendants retained their expert witnesses only to critique Plaintiffs' expert witness and did not ask their expert witnesses to assess whether the Enacted House Map divides counties only as necessary to comply with federal law. And then, at trial, Himes ultimately agreed with Dr. Cervas that the Legislature could have created a constitutional House map that divided significantly fewer counties than the Enacted House Map. Defendants' other expert witness expressed no opinion on that pivotal question.

a. Doug Himes

Himes testified that Defendants did not ask him "to opine on whether the enacted map crossed as few county lines as necessary to comply with federal constitutional requirements."[85] Himes also testified that he had "done no affirmative work as an expert to see if the General Assembly could have enacted a house map based on 2020 census data with fewer county splits while still complying with federal constitutional requirements."[86] Yet, when first pressed on whether the

[85] Transcript, Vol. III, 604:12-17.
[86] Transcript, Vol III, 605:2-7.

Enacted House Map split as few counties as necessary to comply with federal constitutional requirements, Himes opined that "it's theoretically possible that you could split fewer counties."[87] Then, as detailed in Fact Section I.c, above, Himes ultimately agreed that House Map 13d_e, with three non-contiguous census blocks corrected, splits six fewer counties while still complying with federal law. When asked after agreeing on this point if he "now [had] an opinion about whether the General Assembly could have, in fact, divided far fewer counties while still complying with federal constitutional requirements," Himes referenced House Map 13d_e and stated, "It's right there."[88]

Himes actually agreed on this point from the outset, as evidenced by his inclusion of a footnote in his initial expert report opining that seven of the 30 county splits in the Enacted House Map were justified by non-federal redistricting considerations. On page 38, Himes wrote as follows: "Each split is justified by a legitimate redistricting objective such as population, the Voting Rights Act, or other criteria utilized by the Tennessee House of Representatives for state House redistricting."[89] Himes appended footnote 12 to this sentence, which reads 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

87 Transcript, Vol. III, 608:6-12.
88 Transcript, Vol. III, 642:25-643:12
89 Trial Exhibit 14, Himes Expert Report, at 38.

> – 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).[90]

In this footnote, written in late 2022 and before facing any critique from Plaintiffs, Himes included "population" or "population shift" as a justification for 23 of the 30 county splits in the Enacted House Map. But, for six of the 30 county splits (Carroll, Fentress, Hardin, Loudon, Monroe, and Roane Counties), Himes identified only "core preservation" as the reason justifying the split. And, for a seventh county split (Dickson County), Himes identified only "core preservation/incumbents." Thus, in his expert report, Himes opined that approximately 23% of the county splits in the Enacted House Map (7 of 30 splits) were justified not by federal law but by state redistricting practices. At trial, Himes

[90] *Id.*

tried to distance himself from this footnote, stating that he "would expect that everyone would understand" that population was a factor for all 30 county splits.[91]

b. Sean Trende

Defendants' second expert witness, Sean Trende, explained that Defendants hired him "to examine Dr. Cervas' maps," and testified that he did not undertake any affirmative steps to "determine whether fewer counties could be split while still meeting federal constitutional standards."[92] As a result, Trende agreed he has "no opinion concerning whether the General Assembly could have created a house map with fewer county splitting districts than the enacted map while still complying with federal constitutional requirements."[93] Trende similarly agreed he has "no opinion concerning whether the General Assembly actually tried to create a house map with fewer county splitting districts than the enacted house map while still complying with federal law."[94]

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91 Transcript, Vol III, 628:20-629:3 ("Q. You don't think that it would be helpful in a redistricting lawsuit where the Federal Constitution's one person, one vote requirement, by your own admission is the most important requirement, to not list that when it was affecting counties? A. I would expect that everyone would understand that. This was just offered as an explanation under the standards.").

92 Transcript, Vol II, 333:25-335:15.

93 Transcript, Vol II, 342:23-343:3.

94 Transcript, Vol II, 343:4-10.

ARGUMENT

The General Assembly included 30 county splits in the Enacted House Map based on inaccurate advice from its mapmaker and lawyer that the law only required it to divide no more than 30 counties. Defendants, therefore, could not prove at trial that the General Assembly undertook an honest and good faith effort to cross county lines only as necessary to comply with federal law. This failure of proof was then conclusively confirmed by Defendants' agreement with Plaintiffs' expert witness that the General Assembly could have created a House map that divided at least six fewer counties while still complying with federal law.

The Trial Court majority should be reversed because it misinterpreted multiple holdings in the applicable caselaw and because Defendants wholly failed to meet their burden of proof.

I. Standard of Review.

Plaintiffs allege the Trial Court erred by misinterpreting the Tennessee Constitution and the applicable case law. "The construction of a statute and its application to the facts of a case are questions of law," which Tennessee's appellate courts review "*de novo* with no presumption of correctness." *Fayne v. Vincent*, 301 S.W.3d 162, 169 (Tenn. 2009) (citations omitted).

Concerning "a trial court's findings of fact in a non-jury civil trial," Tennessee's appellate courts also review such findings *de novo*, but they do so "with

a presumption of the correctness of the finding, unless the evidence preponderates otherwise." *Id.* (citing TENN. R. APP. P. 13(d), with other citations omitted).

II. The Trial Court majority misinterpreted the applicable law.

This Court's *Lockert* decisions prohibit redistricting plans from dividing counties for reasons other than compliance with federal law and, therefore, require the General Assembly to undertake an honest and good faith effort to create redistricting maps that cross county lines only as necessary to comply with federal law. The Trial Court majority should be reversed because it misinterpreted *Lockert II* as creating a safe harbor for House redistricting plans that cross 30 county lines and because it erroneously placed the burden of proof on Plaintiffs despite Defendants' failure to meet their affirmative burden of proof.

a. The United States Supreme Court's articulation of the one-person, one-vote doctrine created a conflict with the Tennessee Constitution's ban on dividing counties when creating legislative districts.

Tennessee's original Constitution, enacted in 1796, included a prohibition on dividing counties when drawing legislative districts for the Senate.[95] In 1965, following a limited constitutional convention, Tennesseans amended the Constitution to include an identical ban on dividing counties when drawing legislative districts for the House of Representatives.[96] Thus, for the past 6 decades,

[95] *See* Tennessee's 1796 Constitution, https://sos.tn.gov/civics/guides/tennessee-state-constitution, at Article I, Section 4. This prohibition is currently located at Article II, Section 6.

[96] *See Journals and Debates of the Constitutional Convention of 1965.*

the Tennessee Constitution has restrained the General Assembly's decennial redrawing of House of Representatives districts by mandating that "no county shall be divided in forming such a district." Tenn. Const. art. II, § 5.[97]

In the 1960s, the United States Supreme Court articulated the "one person, one vote" doctrine.[98] In *Reynolds v. Sims*, 377 U.S. 533, 568 (1963), the Court held that the newly articulated doctrine applies to state legislative districts, specifically holding that the "Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." This holding resulted in a conflict of law between the federal law's requirement that state legislative districts contain substantially equal populations and Tennessee's constitutional ban on dividing counties.

In the 1970s, a string of lawsuits led Tennessee's courts to begin applying the "one person, one vote" doctrine to the redistricting of Tennessee's legislature, but this string of cases did not directly address the question of how to reconcile the Tennessee Constitution's county-dividing ban with "one person, one vote." *See Kopald v. Carr*, 343 F. Supp. 51 (M.D. Tenn. 1972) (invalidating House of

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[97] Article II, Section 5 of the Tennessee Constitution requires the House of Representatives to include exactly 99 representatives, and Article II, Section 4 requires the General Assembly to reapportion the House of Representatives and the Senate "[a]fter each decennial census."

[98] The Supreme Court articulated the "one person, one vote" doctrine for the first time in *Gray v. Sanders*, 372 U.S. 368, 381 (1963): "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."

Representatives map due to 21% total population variance); *White v. Crowell*, 434 F. Supp. 1119 (W.D. Tenn. 1977) (invalidating mid-decade revisions to 6 legislative districts due to population variation increase); *Sullivan v. Cromwell*, 444 F. Supp. 606 (W.D. Tenn. 1978) (invalidating mid-decade revisions that increased population variation and invalidating multi-member districts); *Mader v. Crowell*, 498 F. Supp. 226 (M.D. Tenn. 1980) (upholding mid-decade revision with low total population variance).

Then, in the 1980s, the General Assembly enacted a new set of district maps. Litigation challenging the new maps required this Court to address the novel question of how to resolve conflicts between the federal Constitution's equal population mandate and the Tennessee Constitution's ban on county divisions. In the first two of this Court's three *Lockert* decisions, this Court set the standard that endures to this day.

b. In the *Lockert* decisions, this Court held that the Tennessee Constitution must yield to the federal Constitution, but only to the extent necessary to comply with federal law.

The *Lockert* cases presented this Court with a novel federal preemption question. In *Lockert I* (*State ex rel. Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982)), this Court resolved that question by holding that legislative districts "must cross as few county lines as is necessary to comply with the federal constitutional requirements." *Id.* at 714-15. Then, in *Lockert II* (*State ex rel. Lockert v. Crowell*,

656 S.W.2d 836 (Tenn. 1983)), this Court expressly rejected the defendants' request to revise that holding, noting that "[t]his 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." *Id.* at 839. The Trial Court majority's claim that "rigid adherence to *Lockert I*'s language in a vacuum becomes problematic" belies this Court's *Lockert I* holding, as reiterated in *Lockert II*.[99]

In *Lockert I*, a group of counties, elected officials, and registered voters challenged the Senate Reapportionment Act of 1981, which enacted a Senate map that achieved a low total district population variance (1.65%), but which did so while dividing 16 counties. 631 S.W.2d at 703-706. The plaintiffs alleged this map violated the Tennessee Constitution's county-dividing ban by "cross[ing] the boundaries of 16 of the State's 95 counties in setting up the thirty-three Senate districts." *Id.* at 706. The defendants responded that the map's total population variance was "close to mathematical perfection" and that, therefore, "there was no basis under the Tennessee Constitution on which to hold the Act invalid." *Id.* at 704.

This Court's legal analysis began by recognizing that the United States Supreme Court had approved population variances that were significantly higher than the challenged Senate map's 1.65% variance when those variances had been

[99] T.R. 3429: Separate Opinion of Steven W. Maroney, at 3451.

justified by a "rational state policy."[100] *Id.* at 706-708 (citing *White v. Regester*, 412 U.S. 755 (1973) (9.9% total variance affirmed); *Gaffney v. Cummings*, 412 U.S. 735 (1973) (7.83% affirmed); *Mahan v. Howell*, 410 U.S. 315 (1973) (16.4% affirmed)). "Applying these principles to the reapportionment of the Tennessee Senate," the Court then determined that "the variance between largest and smallest districts could increase substantially in order to preserve county boundaries and comply with other constitutional standards." *Id.* at 708.

The *Lockert I* Court ultimately remanded the matter for trial, but the Court summarized its legal holdings "[a]s a guide to the trial court and the General Assembly." *Id.* at 714. Concerning the interplay between the Constitution's county-dividing ban and conflicting federal law, the Court summarized its holding as follows:

> The provisions of the Tennessee Constitution, although of secondary import to equal protection requirements, are nonetheless valid and ***must be enforced insofar as is possible***. If the State is correct in its insistence that there is no way to comply with the mandates of the federal and state constitutions without crossing county lines, then ***we hold that the plan adopted must cross as few county lines as is necessary to comply with the federal constitutional requirements***.

Id. at 714-15 (emphasis added).

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[100] In *Reynolds v. Sims*, the Supreme Court held that legislative districts need be only "as nearly of equal population as is practicable," rejecting the notion that the equal protection clause requires mathematical precision. 377 U.S. at 577 ("Mathematical exactness or precision is hardly a workable constitutional requirement.").

This guidance reflects longstanding principles of federal preemption. *Lockert I* presented the Court with "an inescapable contradiction between state and federal law" because the geographic distribution of the population, based on the 1980 federal census, made it impossible for the General Assembly to enact a Senate map with sufficient population equity without dividing counties. *State ex rel. McQueen v. Metro. Nashville Bd. of Pub. Educ.*, 587 S.W.3d 397, 402–03 (Tenn. Ct. App. 2019). Courts refer to this type of conflict, and the resulting preemption, as "implied conflict preemption."[101] *Id.* In such cases, courts construe the applicable state law as preempted only "to the extent that it actually conflicts with federal law." *Morgan Keegan & Co. v. Smythe*, 401 S.W.3d 595, 605 (Tenn. 2013). Thus, the *Lockert I* Court rightly held that the General Assembly must depart from the Tennessee Constitution's ban on county divisions, due to the preemptive effect of the federal Constitution, but that it must do so only "as is necessary to comply with the federal constitutional requirements." 631 S.W.2d at 715. Beyond that limited preemptive result, the Tennessee Constitution's ban on county division "must be enforced insofar as is possible." *Id.*

[101] "Courts recognize both 'express preemption' and 'implied preemption.' Express preemption occurs when Congress explicitly defines the extent to which its enactments preempt state law. Implied preemption typically falls into one of three categories: direct conflict preemption; 'purposes and objectives' conflict preemption; and field preemption. *Morgan Keegan & Co.*, 401 S.W.3d at 605.

In *Lockert II*, the plaintiffs' amended complaint challenged excessive county splitting in both the enacted Senate map[102] and the enacted House map. 656 S.W.2d at 838. Before addressing the merits of the case, the Court addressed the defendants' request to "reconsider our holding that the State's constitutional prohibition against crossing county lines must be enforced insofar as is possible and that any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements." *Id.* The Court unequivocally rejected the request, stating, "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."[103] *Id.* at 839. The Court then upheld the Chancery Court's ruling that the House map split more counties than necessary to comply with federal constitutional requirements. *Id.* at 843.

The *Lockert II* Court's county-specific analysis also reiterated that county splits cannot be permitted where they are only justified by state law or practice. Concerning the division of Washington County, the Court cited testimony from the "principal staff person for the Senate Reapportionment Sub-committee" that

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[102] Following this Court's decision in *Lockert I*, the General Assembly revised the challenged Senate map via Chapter 909, Public Acts 1982. 656 S.W.2d at 838. Thus, *Lockert II* concerned a different Senate map than *Lockert I*.

[103] The Trial Court majority wrongly claims this Court "did not immediately respond to the defendants' request for reconsideration." (T.R. 3429: Separate Opinion of Steven W. Maroney, at 3450.) This Court rejected the defendants' request for reconsideration just two paragraphs after restating the request and before analyzing the merits of the case before it. 656 S.W.2d at 838-39.

Washington County had been split solely "to avoid placing the two incumbents who reside in Washington County in a single district." *Id.* at 839. The Court invalidated this county split, in line with longstanding federal preemption doctrine and the *Lockert I* holding, because violations of the state Constitution (*i.e.*, county splits) can only be permitted where necessary to comply with federal law. *Id.*

The Trial Court majority's analysis of *Lockert I* and *II* focuses on the interplay between total population variance and the total number of divided counties. On these issues, the majority concluded that "rigid adherence to *Lockert I*'s language" is "problematic" and claimed that this Court "recognized the General Assembly's need for greater flexibility when tasked with balancing conflicting constitutional standards in the creation of a reapportion map."[104] But this line of analysis is inapposite because Plaintiffs do not allege that the Enacted House Map violates one-person, one-vote. Plaintiffs challenge the Enacted House Map for violating the ***Tennessee Constitution*** by dividing more counties than necessary to comply with federal law or, alternately stated, for dividing counties for reasons other than compliance with federal law. On this issue, the *Lockert* decisions are clear that Courts should not "sanction a single county line violation not shown to be necessary to avoid a breach of federal constitutional requirements." *Id.* at 839.

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104 T.R. 3429: Separate Opinion of Steven W. Maroney, at 3449-3451.

In the years since the *Lockert* decisions, the county splitting standard set out in *Lockert I* and reinforced in *Lockert II* has remained in force. This Court has not revisited the *Lockert* standard, and it has been applied in redistricting litigation since that time, without modification. *See, e.g., Rural West Tenn. African-American Affairs Council, Inc. v. McWherter*, 836 F. Supp. 447, 450 (W.D. Tenn. 1993) (holding reapportionment plan unconstitutional based on *Lockert I* and *II*'s holding). Thus, to this day, redistricting plans must only divide counties as necessary to comply with federal law, and the General Assembly remains bound to undertake an honest and good faith effort to divide counties only as necessary to comply with federal law.

c. *Lockert II* did not create a 30-county-split safe harbor.

The Trial Court majority claims not to have decided whether *Lockert II* created a safe harbor for House redistricting plans that split 30 counties, but the majority's analysis of whether the General Assembly acted in good faith relies in part on the fact that the Enacted House Map fell within *Lockert II*'s 30-split guidance. The majority opinion should be reversed on this point because the *Lockert II* Court based its 30-split guidance on its analysis of the 1980 federal census results and did not create a 30-split safe harbor applicable to future decades.[105]

[105] Following *Lockert II*, the Legislature memorialized a 30-split maximum as a redistricting standard reflected in TENN. CODE. ANN. § 3-1-103. Yet, *Lockert II* did not create such a safe harbor, and the Legislature cannot through legislation render constitutional a set of facts that the courts have already determined violate the Constitution.

In *Lockert II*, this Court's review focused on two trial court findings: first, that the House plan in question violated the federal and state constitutions; and second, that the General Assembly could have enacted a House plan with a total population variance under 10 percent and with no more than 25 counties split. 656 S.W.2d at 843-44. To adjudicate these two findings, this Court first reviewed the underlying demographic facts in detail. *Id.* at 841-43. After doing so, based on the Court's "interpretation of the proof in this record," the Court agreed with the trial court that the challenged House plan violated the two constitutions but expanded the specific limitations set by the trial court because "it may be very difficult to keep the total deviation . . . below 10% and remain close to the limits of State violations set by the Chancellor." *Id.* at 844. This Court then determined that future House redistricting maps for the 1980s would likely be constitutional if they contained a total population variance of 14% or less and "an upper limit" of dividing 30 counties. *Id.*

The *Lockert II* Court's 30-split guidance reflected the Court's application of the *Lockert I* holding to the demographic facts presented by the 1980 Census. Had the *Lockert II* Court intended to create a 30-split safe harbor untethered from future Census results, it would have had to relax its *Lockert I* holding that House redistricting plans "must cross as few county lines as is necessary to comply with the federal constitutional requirements." 631 S.W.2d at 715. But the *Lockert II* Court did not to so. To the contrary, the Court embraced its prior holding, noting that

"[t]his 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." *Id.* at 839.

In the subsequent decade, the federal District Court for the Western District of Tennessee confirmed that the *Lockert II* Court did not create a safe harbor for House reapportionment plans that split 30 counties. Responding to the defendants' argument that the redistricting plan in question fell within a *Lockert II* "safe harbor," the Court clarified as follows:

> [N]owhere in the *Lockert II* opinion does the court purport to establish an absolute numerical standard, applicable in all redistricting contexts. On the contrary, the opinion sets forth in great detail the factual findings of the chancellor below concerning the population deviations for particular districts and the counties from which they were formed, under both the challenged state plan and alternative plans, 656 S.W.2d at 842–43. Each of these findings necessarily was based on population figures from the 1980 census, figures that are no longer either accurate or relevant. The guidelines imposed by the *Lockert II* court when it directed the legislature to try again necessarily were limited to the particular circumstances of the case. The very paragraph in which the court approved a 14% total variance begins with the limiting words, "Our interpretation of the proof *in this record* is that it may be very difficult to keep the total deviation in either body below 10% and remain close to the limits of State violations set by the Chancellor...." 656 S.W.2d at 844 (emphasis supplied). It is true, as defendants point out, that the *Lockert II* court loosened the standards imposed by the court below of 10% deviation and 25 split counties. But as the passage just quoted indicates, there was some question as to whether such a plan would be possible on the evidence in the record.

Rural West, 836 F. Supp. at 450-51. Ultimately, after rejecting the defendants' safe harbor argument, the District Court in *Rural West* invalidated the House map at issue

therein, which contained 30 county splits and which would have been presumptively constitutional if *Lockert II* had created a 30-split safe harbor.

As *Lockert II* and *Rural West* confirm, no safe harbor protects reapportionment plans that split 30 counties from constitutional scrutiny.[106] Yet, after claiming that whether *Lockert II* created a safe harbor "need not necessarily be reached presently" and "need not be decided by this Panel," the Trial Court majority ultimately gave "deference to the General Assembly as having acted in good faith in adopting a map with districts crossing thirty counties."[107] Thus, the Trial Court majority should be reversed for construing *Lockert II*'s 30-split guidance, and the Legislature's subsequent codification of that guidance, as probative of good faith for decades beyond the 1980s.

d. Defendants bore the burden of proof at trial.

The Trial Court majority inaccurately characterized the burden of proof in county dividing cases as "far from settled."[108] Yet, in *Lockert I* and *Lincoln County*, this Court articulated the three-step burden of proof that has applied to redistricting challenges ever since: First, plaintiffs must demonstrate that a challenged

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106 The *Lockert II* decision adjudicated county-dividing challenges to the enacted House and Senate maps. On the Senate map, the Court permitted just three county divides. 656 S.W.2d at 844. If the *Lockert II* decision were read as creating safe harbors, the resulting safe harbor for Senate maps would be three county splits. The Senate Map enacted in 2022 vastly exceeds this figure by splitting nine counties. *See* TENN. CODE ANN. § 3-1-102.

107 T.R. 3429: Separate Opinion of Steven W. Maroney, at 3450, 3453, 3460-61.

108 T.R. 3429: Separate Opinion of Steven W. Maroney, at 3456.

redistricting map divides at least one county. Then, defendants bear the burden of justifying the challenged map by demonstrating that the General Assembly made a good faith effort to cross county lines only as necessary to comply with federal law. Finally, if, and only if, the defendants meet their burden, the plaintiffs then bear the burden of proving bad faith or improper motive. Here, because the Enacted House Map divides 30 counties, Defendants bore the affirmative burden at trial of proving the General Assembly made an honest and good faith effort to enact a redistricting plan that crossed county lines only as necessary to comply with federal law.

This Court articulated the first two prongs of this burden-shifting framework in *Lockert I*. First, because Article II, Section 5 of the Tennessee Constitution prohibits dividing counties, plaintiffs must demonstrate that a redistricting act splits counties.[109] 631 S.W.2d at 714. Once plaintiffs do so, "[t]he burden therefore shift[s] to the defendants to show that the Legislature was justified in passing a reapportionment act which crossed county lines." *Id.* To meet this burden, defendants must establish that the General Assembly made an honest and good faith

[109] Under *Lockert I*, Plaintiffs need only demonstrate that a challenged redistricting map divides one or more counties to shift the burden of proof to Defendants. The Trial Court majority mischaracterized Plaintiffs' articulation of the first prong of the burden of proof as follows: "Plaintiff Wygant asserts that once he proved that a House map could be drawn which met federal constitutional requirements, with districts that crossed fewer counties than the enacted House map, the burden shifted to defendants . . ." (T.R. 3429: Separate Opinion of Steven W. Maroney, at 3448.)

effort to enact a redistricting plan that crosses "as few county lines as is necessary to comply with the federal constitutional requirements." *Id.* at 715.

Throughout this litigation, Defendants inaccurately argued that this Court's subsequent decision in *Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985), abrogated the standard set forth in *Lockert I* and replaced it with a standard requiring plaintiffs to prove bad faith or improper motive. In actuality, *Lincoln County* first applied *Lockert I*'s two-step burden of proof and then added a third and final step when the defendants in that case successfully met their burden. In such cases, the Court held, plaintiffs must prove bad faith or improper motive to prevail.

Understanding *Lincoln County*'s articulation of the third step of the burden of proof requires recognizing two events that took place between the issuance of the *Lockert* decisions and the issuance of the *Lincoln County* decision. First, following *Lockert II*, the General Assembly enacted a new House map with 30 county splits. *Lincoln County*, 701 S.W.2d at 602. Second, the Middle District of Tennessee heard a declaratory judgment action challenging that new map and held that the new map complied with federal law. *Id.* at 602-603. These two events are essential predicates to the Court's articulation of the "bad faith or improper motive" prong of the applicable burden of proof.

As the *Lockert I* standard requires, the *Lincoln County* Court began its analysis by determining whether the defendants had met their burden of justifying the

challenged House map. First, on the question of county splits, the Court determined "[t]here is no question but that the statute in question meets the general guidelines established by this Court in the *Lockert* case [] in that it does not divide more than thirty counties and does not divide any county more than once." *Id.* at 603. In other words, because *Lockert II* and *Lincoln County* both concerned maps based on the 1980 federal census, the *Lincoln County* Court was able to use the *Lockert II* guidance to determine that the new map's 30 county splits passed constitutional muster without undertaking any new factual analysis. Second, on compliance with federal constitutional requirements, the Court determined the new map "complies with the maximum population deviation suggested in [*Lockert II*] and it has been successfully defended in federal litigation which has now proceeded to final judgment." *Id.* Combined, these two conclusions satisfied the *Lincoln County* defendants' burden of justifying the challenged map. As a result, the Court held that it would not overturn the challenged map absent evidence of bad faith or improper motive. The Court summarized its application of this burden shift as follows:

> The determination of the District Court that federal guidelines have been met, together with the stipulation that the tolerances suggested by this Court in the *Lockert* case, *supra*, have also been met, persuades us that it would be improper to set aside individual district lines on the ground that they theoretically might have been drawn more perfectly, in the absence of any proof whatever of bad faith or improper motives.

Id. at 604.

The next decade, in *Rural West*, the District Court applied this three-step burden of proof in striking down a House redistricting map "which deviates 14% from district to district and breaks 30 county lines." *Rural West*, 836 F. Supp. at 448. In that litigation, the plaintiffs had proffered a viable alternative House map with a population variance of less than 10% that split only 27 counties. *Id.* at 448. Because the defendants failed to meet their burden of justifying the county splits in the challenged map, the Court struck down the challenged House map without shifting the burden back to the plaintiffs to prove bad faith or improper motive.

Two decades later, in *Moore v. State*, 436 S.W.3d 775 (Tenn. Ct. App. 2014), the Tennessee Court of Appeals also faithfully applied the three-step burden of proof. First, the Court reiterated that defendants must justify the county splits included in a redistricting map:

> The *Lockert* court held that after the plaintiffs in that case had demonstrated that the redistricting act violated the state constitutional prohibition against crossing county lines, "[t]he burden . . . shifted to the defendants to show that the Legislature was justified in passing a reapportionment act which crossed county lines."

Id. at 784 (alterations in original). The Court then rejected language from the lower court suggesting the plaintiffs bore the burden of proof, noting, "[t]o the extent to which the trial court held that the burden was not on [the state defendants] to demonstrate that crossing county lines was justified by equal protection considerations, we reverse. To the extent to which the trial court held that [the state

defendants] carried their burden, we affirm." *Id.* at 785. Finally, having determined that the defendants ***met*** their burden, the Court upheld the challenged map because the plaintiffs had "alleged no improper motive or bad faith." *Id.* at 788-89.

In the case at bar, the Enacted House Map crosses 30 county lines. Thus, the burden of proof at trial rested on Defendants to establish that the General Assembly was "justified in passing a reapportionment act which crossed county lines," *Lockert I*, 631 S.W.2d at 714. To meet this burden, Defendants bore the burden of proving that the General Assembly made an honest and good faith effort to enact a redistricting plan that crosses "as few county lines as is necessary to comply with the federal constitutional requirements." *Id.* at 715.

The Trial Court majority should be reversed for mischaracterizing the burden of proof as "far from settled" and then opining that "*Lincoln County* suggests that the burden falls to one challenging a redistricting map on the basis of county splitting to establish bad faith or improper motive on the part of the General Assembly in order to successfully invalidate the county splitting."[110] Because Defendants failed to meet their affirmative burden of proof, the burden never shifted back to Plaintiffs at trial, and proof of bad faith or improper motive was not required.

[110] T.R. 3429: Separate Opinion of Steven W. Maroney, at 3456, 3454.

III. The Trial Court majority should be reversed because Defendants failed to meet their burden of proving that the General Assembly undertook an honest and good faith effort to enact a House map that crosses county lines only as necessary to comply with federal law.

Each of the following reasons, standing alone or viewed together, require reversal of the Trial Court majority:

First, Doug Himes's agreement that House Map 13d_e divides six fewer counties than the Enacted House Map and still complies with federal law precluded Defendants from meeting their burden of proof.

Second, Defendants' failure to proffer probative fact evidence precluded Defendants from meeting their burden of proof, particularly when paired with Himes's repeated misstatements of law during the hearings that comprise the legislative history.

Third, Himes's testimony as an expert witness failed to establish that the General Assembly undertook an honest and good faith effort to create a House map that crosses county lines only as necessary to comply with federal law.

a. Himes's agreement that House Map 13d_e divides six fewer counties while still complying with federal law precluded finding that the General Assembly undertook an honest and good faith effort to cross county lines only as necessary to comply with federal law.

Plaintiffs' expert, Dr. Cervas, presented an alternative House map at trial that divides six fewer counties than the Enacted House Map (*i.e.*, 20 % fewer county divisions) while still complying with federal law. Himes agreed on cross

examination that this alternative map divides six fewer counties while still complying with federal law and without dividing Gibson County. The Trial Court majority should be reversed because this admission precludes finding that the General Assembly undertook an honest and good faith effort to enact a House map that crosses county lines only as necessary to comply with federal law.

Prior to trial, Defendants' expert witnesses had criticized Dr. Cervas's House Map 13d_e for containing three non-contiguous census blocks. At trial, Dr. Cervas demonstrated that these three census blocks could be reassigned to correct the non-contiguities without affecting any other redistricting metrics. Dr. Cervas then testified that the corrected map divides six fewer counties than the Enacted House Map, does not divide Gibson County, complies with federal law, and matches or improves upon the Enacted House Map on all other redistricting metrics, as summarized by the following table:

	Total Variation	**Majority-Minority Districts**	**County Splits**	**Paired-Incumbent Districts**	**Core Retention**
Enacted House Map	9.90%	13	30	6	80.1%
House Map 13d_e	9.89%	13	24	6	80.1%

Himes agreed with Dr. Cervas that the non-contiguities in House Map 13d_e could be corrected and that, after those corrections, House Map 13d_e is a constitutional alternative to the Enacted House Map that divides six fewer counties

than the Enacted House Map. And, while not required for compliance with the *Lockert* standard, Himes also agreed that House Map 13d_e matches or improves on the Enacted House Map on all other redistricting metrics. By reducing the number of divided counties by 20 percent, from 30 to 24, House Map 13d_e demonstrates that the General Assembly did not undertake an honest and good faith effort to cross county lines only as necessary to comply with federal law.

In all three instances where Tennessee courts have overturned legislative maps based on the interplay of the one-person, one-vote standard and the Tennessee Constitution's ban on dividing counties, the courts have recognized the probative impact of a viable alternative map presented at trial. In *Lockert II*, this Court affirmed the trial court's invalidation of a challenged Senate map that split 4 counties after referencing as probative an alternative map, presented at trial, which split only 2 counties. 656 S.W.2d at 841. In *Lockert II*, this Court also affirmed the trial court's invalidation of a challenged House map that split 57 counties[111] after referencing as probative four alternative lower-split maps presented at trial. *Id.* at 842-43. And similarly, in *Rural West*, the District Court invalidated a challenged House map that split 30 counties after referencing as probative an alternative map presented at trial that split only 27 counties. 836 F. Supp. at 448, 452.

[111] The Court states that the challenged House map contains 53 county splits in the introduction and 57 county splits in the analysis section. *See* 656 S.W.2d at 838, 841-42.

Dr. Cervas's House Map 13d_e fatally undercut Defendants' attempt to justify the Enacted House Map, just as the alternative maps presented in *Lockert II* and *Rural West* fatally undercut the maps challenged therein. This is particularly true here, given Himes's agreement as Defendants' expert witness that House Map 13d_e is a constitutional alternative that divides six fewer counties than the Enacted House Map while still complying with federal law and while not dividing Gibson County.[112] For this reason on its own, the Trial Court majority should be reversed.

b. Defendants' withholding of privileged facts, alongside Himes's misstatements of law during the legislative process, precluded finding that the General Assembly undertook an honest and good faith effort to cross county lines only as necessary to comply with federal law.

The Trial Court's majority opinion also requires reversal because Defendants failed to marshal facts at trial sufficient to meet their burden of proof and because the legislative record reveals that the General Assembly applied the wrong legal standard during its creation of the Enacted House Map.

Unlike in the *Lockert* decisions, where the Senate Reapportionment Sub-committee's principal staff person (Frank Hinton) testified based on his first person knowledge to the facts underlying and motivating the actual redistricting process, Defendants here proffered the House's principal staff person (Doug Himes) but

[112] In addition to precluding a finding of good faith, House Map 13d_e definitively proves that the Enacted House Map did not, in fact, divide counties only as necessary to comply with federal law. The Trial Court did not address this fact, even though *Lockert II* instructs courts not to "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.

invoked the attorney-client privilege to prevent him from testifying about the non-public mapmaking process and about his redistricting-related communications with General Assembly members.[113] When Defendants then asked Himes to explain the reasoning behind various redistricting decisions on direct examination, the Court sustained Plaintiffs' objection, citing its prior order denying Plaintiffs' Motion to Compel, and thereby left no doubt that the facts underlying the decisions reflected in the Enacted House Map were not presented in any form at trial.[114]

Given this absence of probative fact testimony, the legislative history provided the only fact evidence at trial on the question of whether the General Assembly sought to enact a House map that only crosses county lines when necessary to comply with federal law. Yet, during the committee hearings that comprise the legislative history, the House of Representatives' mapmaker and lawyer (Doug Himes) repeatedly, and incorrectly, advised the Legislature that the *Lockert* cases only required them to divide no more than 30 counties and that the question of whether to divide fewer than 30 counties was a "policy decision" left wholly to the General Assembly's discretion.

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113 *See* Fact Section II.a, above, for a complete list of the exact questions Defendants objected to and instructed Himes not to answer.

114 *See* footnote 10, *supra*.

During the September 8, 2021, meeting of the House Select Committee on Redistricting, Himes described the *Lockert II* holding as only requiring that House maps divide no more than 30 counties:

> 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.[115]

During the December 17, 2021, meeting of the House Select Committee on Redistricting, Minority Leader Karen Camper asked Himes why the Legislature should not be seeking to reduce county splits below 30. Himes responded 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.[116]

During the January 18, 2022, meeting of the House State Government Committee, Representative Bill Beck asked, "Is there -- is there a reason we didn't strive, in this plan, to split less counties?"[117] Himes responded as follows:

> Representative Beck. I think, you know, under the Lockert decision, the maximum that that court -- Tennessee Supreme Court suggested that

115 Trial Exhibit 94: Transcript of September 8, 2021, hearing, 15:2-22.
116 Trial Exhibit 95: Transcript of December 17, 2021, hearing, 47:14-23.
117 Trial Exhibit 96: Transcript of January 18, 2022, hearing, 25:25-26:2.

> 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.[118]

Himes agreed at trial that neither he, nor any individual recommending the Enacted House Map, cited or paraphrased the standard that any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements. Instead, as these excerpts and the full transcripts reveal, the House's lawyer and mapmaker repeatedly, and inaccurately, informed the General Assembly that the law only required splitting no more than 30 counties and that the question of whether to split fewer than 30 counties was subject to the Legislature's discretion.

Even if Defendants' agreement on House Map 13d_e did not preclude Defendants from meeting their burden of proof on its own, House Map 13d_e would necessitate reversal when viewed beside the revelations of the legislative record. Instructed by their lawyer and mapmaker that the law only required them to divide no more than 30 counties, the General Assembly enacted a 30-split plan. Had they undertaken an honest and good faith effort to divide counties only as necessary to comply with federal law, however, House Map 13d_e shows that the Legislature

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118 *Id.* at 26:6-20.

would have divided significantly fewer counties and could have avoided dividing Gibson County. Defendants presented no facts to the contrary, and so the Trial Court majority should be reversed.

c. Defendants' expert testimony precluded finding that the General Assembly undertook an honest and good faith effort to cross county lines only as necessary to comply with federal law.

The Trial Court majority upheld the Enacted House Map based on a portion of Himes's direct testimony as an expert witness in which Himes opined on why various of the Enacted House Map's divided counties may have been divided. This Court need not reach this portion of the majority's opinion because the above-described misstatements of law (by the Trial Court majority) and failures of proof (by Defendants) all require reversal. Should this Court nevertheless reach the Trial Court majority's analysis of Himes's expert witness testimony, the majority should be reversed because Himes's testimony, viewed as a whole, failed to prove that the General Assembly undertook an honest and good faith effort to create a House map that crosses county lines only as necessary to comply with federal law.

A chronological review of Himes's opinions as an expert witness demonstrates his failure to support Defendants' burden of proof.[119] First, in his

[119] Defendants' other expert witness, Sean Trende, testified that Defendants hired him only "to examine Dr. Cervas' maps." Trende agreed he has "no opinion concerning whether the General Assembly" (1) "could have created a house map with fewer county splitting districts than the enacted map while still complying with federal constitutional requirements," or (2) "actually tried to create a house map with fewer county splitting districts than the enacted house map while still complying with federal constitutional requirements."

November 2022 expert report, Himes opined that seven of the 30 county splits in the Enacted House Map were necessitated by non-federal redistricting considerations. On page 38, Himes wrote as follows: "Each split is justified by a legitimate redistricting objective such as population, the Voting Rights Act, or other criteria utilized by the Tennessee House of Representatives for state House redistricting." Footnote 12, appended to this sentence, reads 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).

This footnote revealed Himes's actual opinion from the outset. On his own volition, before being deposed or testifying at trial, Himes omitted "population" or "population shift" as a justification for seven of the 30 county splits in the Enacted House Map. For those seven counties, Himes listed only "core preservation" or "core

preservation/incumbents." But core preservation and incumbency protection are, by Himes's own admission and per *Lockert II*'s express analysis, state practices that cannot justify dividing a county in violation of Tennessee's Constitution. Thus, Himes opined in his own expert report that approximately 23% of the county splits in the Enacted House Map were justified not by compliance with federal law but by state redistricting practices.[120] This admission alone shows that the General Assembly did not undertake an honest and good faith effort to create a House map that crosses county lines only as necessary to comply with federal law.

Himes's subsequent admissions further undercut the Trial Court majority's reliance on a portion of his direct examination. At trial, Himes admitted Defendants did not ask him to opine on whether the Enacted House Map crosses county lines only as necessary to comply with federal law.[121] Himes then admitted he did not do any work as an expert (either mapmaking or analysis) to determine if Tennessee's 2020 census results allowed for a House redistricting map with fewer county splits than the Enacted House Map while still complying with federal law.[122] When pressed, Himes then opined that "it's theoretically possible that you could split fewer

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120 At trial, Himes unconvincingly tried to distance himself from this footnote by claiming, even though he only listed "population" or "population shift" as a justification for 23 of the 30 counties splits, that he "would expect that everyone would understand" that population was a factor for all 30 county splits.

121 Transcript, Vol. III, 604:12-17, 607:19-608:5.

122 Transcript, Vol. III, 604:17-606:14.

counties."[123] Himes next confirmed that he has "no opinion on whether the General Assembly itself actually tried to pass a house map with as few county splits as needed for federal constitutional requirements."[124] And finally, on cross examination, Himes agreed that House Map 13d_e is a constitutional map that divides six fewer counties than the Enacted House Map while complying with federal law and while not dividing Gibson County.

The majority neither cites nor discusses these devastating admissions by the very witness on whom it relies in upholding the Enacted House Map. Instead, the majority relies on a fraction of Himes's direct examination, where he opines not as a fact witness but as an expert witness on why the General Assembly might have decided to divide each of the 30 counties it divided in the Enacted House Map. This reliance must be rejected for three reasons.

First, Himes testified on cross examination that the House redistricting process is a "95 county, 99 piece puzzle," where "you can't just see a few pieces and know how everything else is going to work."[125] He went on to explain that Tennessee has 20 counties that "don't have enough population for a full district,"[126] and that "looking at any one of these counties in isolation," including Gibson, there is "no way as an expert to say whether they have to be divided or could be kept whole and

123 Transcript, Vol. III, 608:6:12.
124 Transcript, Vol. III, 610:21-25, 613:6-12.
125 Transcript, Vol. III, 594:23-24, 597:22-598:2
126 Transcript, Vol. III, 532:6-10, 592:14-23.

paired with another county."[127] Yet, in the county-by-county analysis cited by the majority, Himes looked only to the 30 divided counties in isolation and not to the statewide "puzzle" and the implications of its dozens of other puzzle pieces.

Second, even if Himes's county-by-county speculation were considered probative in isolation, the rest of Himes's testimony would have negated its probative value. Again, Footnote 12 claims the Enacted House Map divided seven counties for reasons other than federal law; Himes claimed not to have opinion concerning whether the General Assembly tried to pass a House map that divides counties only as necessary to comply with federal law; and Himes agreed that House Map 13d_e proves the General Assembly could have divided at least 20% fewer counties while still complying with federal law. Combined, as in isolation, these opinions preclude upholding the Enacted House Map based solely on Himes's brief analysis of potential reasons underlying the Enacted House Map's 30 county splits.

And third, the Trial Court majority improperly equates Himes's county-by-county testimony with Frank Hinton's testimony in *Lockert III*. The crucial difference between Himes's testimony and Hinton's *Lockert III* testimony is that Hinton was a ***fact witness*** testifying as the Senate Reapportionment Sub-committee's principal staff person on the actual reasons that motivated certain

[127] Transcript, Vol. III, 592:24-593:4. Concerning Gibson County, specifically, Himes testified that "there's no way in isolation to say whether or not it has to be divided or can't be divided." Transcript Vol. III, 593:5-9.

contested county divisions. *State ex rel. Lockert v. Crowell*, 729 S.W.2d 88 (1987). In contrast, Himes the fact witness was instructed not to provide such information due to the attorney-client privilege. And Himes the expert witness agreed that the Legislature could have divided at least six fewer counties while still complying with federal law and while not dividing Gibson County.

All that remains is to address Himes's affirmative response to the following direct examination question: "In your expert opinion, did the General Assembly make an honest and good faith effort here?"[128] Even if this question had addressed the operative standard, Himes's fulsome testimony would have rendered his answer uncreditable, as noted above. But defense counsel did not ask Himes the relevant question: whether he believed the General Assembly undertook an honest and good faith effort ***to cross county lines only as necessary to comply with federal law***. We know from the legislative history that Himes misinterprets the *Lockert* decisions as only requiring the Legislature to divide no more than 30 counties, and Himes did not retract or revise that opinion at trial. Having never agreed that the Legislature must make an honest and good faith effort to divide counties only as necessary to comply with federal law, Himes's bald agreement that the Legislature acted in good faith holds no weight.

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[128] Transcript, Vol. III, 581:14-18.

For these reasons, the Trial Court majority should be reversed because Himes's testimony as an expert witness did not satisfy Defendants' burden of proof.

IV. Wygant has standing to challenge the Enacted House Map statewide.

The Trial Court ruled at summary judgment that, "[b]ecause 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."[129] Following trial, the Court confirmed Wygant's standing but erroneously restricted his standing only to allow him to challenge the division of his resident county.[130] Wygant has standing to challenge the Enacted House Map beyond Gibson County because his individualized injury—the division of his resident county—was caused by statewide action and can only be remedied by statewide relief.[131]

As previously discussed, Himes testified to the very factors that require statewide analysis and statewide remedies in county-dividing lawsuits like this one. Because Tennessee has 20 counties that "don't have enough population for a full district," an expert cannot view any of these 20 counties in isolation, including Gibson County, and "say whether they have to be divided or could be kept whole

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129 T.R. 3385: Order dated March 27, 2023, at 3397.

130 T.R. 3429: Separate Opinion of Steven W. Maroney, at 3447-48.

131 Given the Trial Court's agreement that Plaintiff Wygant has standing, Plaintiffs do not include herein an analysis of the three-prong test for standing.

and paired with another county."[132] Moreover, because each piece of the redistricting "puzzle is inherently reliant on the other pieces around it," even district line decisions within a whole region of the state can prompt revisions to decisions in other regions of the state due to the interrelated nature of redistricting decisions.[133]

The math underlying Himes's county-by-county testimony illustrates this point. Concerning Gibson County, Himes testified about the population implications of combining Gibson with any one of its neighboring counties. For five of its six neighbors, Gibson and the neighbor would combine to include a larger population than a single legislative district can support.[134] For the sixth neighbor, Gibson and the neighbor would combine to include a smaller population than a single district must contain.[135] Analyzing Gibson and its neighboring counties in isolation, therefore, cannot prove that Gibson had to be divided to comply with federal law.[136] By contrast, Himes's agreement that House Map 13d_e complies with federal law while dividing six fewer counties than the Enacted House Map and while ***not dividing Gibson County*** confirms via statewide proof that Gibson County did not have to be divided to comply with federal law and that statewide relief can reduce

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132 Transcript, Vol. III, 592:24-593:4. Concerning Gibson County, specifically, Himes testified that "there's no way in isolation to say whether or not it has to be divided or can't be divided." Transcript Vol. III, 593:5-9.

133 Transcript, Vol. III, 594.

134 Transcript, Vol. III, 656-58.

135 *Id.*

136 The Trial Court majority relied on Himes's analysis of Gibson County and its neighboring counties as proof of good faith. As shown here, however, Himes's analysis of these seven counties actually fails to prove that Gibson County had to be divided to comply with federal law.

the number of split counties in the Enacted House Map by at least 20%, including by no longer splitting Gibson County.

Like county-dividing cases, malapportionment cases often present individualized injuries that require statewide relief. For that reason, the U.S. Supreme Court permits individual voters to invalidate statewide district maps in such cases. In *Baker v. Carr*, 369 U.S. 186 (1962), the U.S. Supreme Court first authorized such cases, finding that Tennessee voters from five counties could challenge a Tennessee districting map statewide where the alleged malapportionment pervaded the state. *Id.* at 204. Shortly thereafter, in *Reynolds v. Sims*, the Court affirmed the invalidation of a statewide redistricting map on a challenge brought by voters from a single Alabama county based on similar allegations. 377 U.S. at 537.

In *Gill v. Whitford*, 585 U.S. 48 (2018), the Supreme Court explained why a single voter's individualized injury in such cases can prompt statewide relief. Distinguishing the gerrymandering claims before it from malapportionment claims, the Court noted that the injuries alleged in *Baker* and *Reynolds* were "individual and personal in nature" but they justified a statewide remedy because "the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale restructuring of the geographical distribution of seats in a state legislature." *Id.* at 67 (citations and quotations omitted). Similarly here, the Enacted

House Map's statewide division of more counties than necessary to comply with federal law caused the unnecessary division of Gibson County, and Plaintiff Wygant's individualized injury can only be remedied by redrawing the map statewide.

The Trial Court majority's reliance on *Gill* as purported authority for limiting the scope of Wygant's standing, therefore, is misplaced. First, the majority failed to acknowledge the above-cited analysis, which controls here because Defendants' own expert witness demonstrated that Wygant's individualized injury can only be remedied by statewide revisions to the Enacted House Map. Second, the Trial Court majority failed to note that the voter plaintiffs in *Gill*, ***unlike Wygant***, failed to prove individualized injury by failing to prove that they lived in districts actually affected by partisan gerrymandering. *Id.* at 69-72.

Plaintiff Wygant's standing to seek statewide relief, like that of malapportionment plaintiffs, is further reflected in the fact that plaintiffs pursuing county-division claims have had standing to seek statewide relief for many decades, in multiple states. The *Lockert* plaintiffs included individual voters, and the two Texas cases on which *Lockert I* heavily relies were brought by individual voters. *See Smith v. Craddick*, 471 S.W.2d 375 (Tex.1971), *Clements v. Valles*, 620 S.W.2d 112 (Tex.1981). Each of these cases led to statewide relief. Similarly, eight Shelby County voters served as plaintiffs in *Moore v. State* and were permitted to challenge

a statewide redistricting plan on its merits. 436 S.W.3d at 778. Outside of Tennessee, in just the past year, both the Supreme Court of Kentucky and the Supreme Court of Missouri expressly held that individual voters who live in divided counties have standing under similar constitutional restrictions to challenge redistricting maps that divide counties. *See Graham v. Sec'y of State Michael Adams*, 684 S.W.3d 663 (Ky. 2023); *Faatz v. Ashcroft*, 685 S.W.3d 388 (Mo. 2024).

As these cases reveal, Plaintiffs from divided counties pursuing county-dividing claims under constitutional bans have long had standing to seek statewide relief. Like those plaintiffs, Plaintiff Wygant has standing to challenge the Enacted House Map because he sufficiently alleged (and proved) that his individualized injury resulted from statewide action—the Legislature's adoption of a redistricting map with at least six too many divided counties—and can only be remedied by statewide relief—an order requiring the Legislature to work in good faith to adopt a new map that divides counties only where required to comply with federal law. Defendants' expert confirmed this fact by testifying that each piece of the redistricting puzzle inherently relies on every other piece of the puzzle and by agreeing that the Enacted House Map divides six more counties statewide than necessary to comply with federal law.

CONCLUSION

The Trial Court majority should be reversed. For the reasons set forth herein, this Court should hold as follows:

(1) Defendants failed to prove that the General Assembly undertook an honest and good faith effort to create a House map that crosses county lines only as necessary to comply with federal law, and

(2) the Enacted House Map impermissibly violates the Article II, Section 5 of the Tennessee Constitution by dividing counties for reasons other than compliance with federal law.

The Court should then set a deadline for the General Assembly to remedy the Enacted House Map's constitutional deficiencies, as required by TENNESSEE CODE ANNOTATED § 20-18-105.

Dated: May 6, 2024

Respectfully submitted,

_____

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CERTIFICATE OF COMPLIANCE

Pursuant to Tennessee Rule of Appellate Procedure 30(e), I hereby certify that this brief contains 14,994 words, excluding the Title/Cover page, Table of Contents, Table of Authorities, Certificate of Compliance, Attorney Signature Block, and Certificate of Service.

_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2024, a true and exact copy of the foregoing *Brief of Appellant Gary Wygant* was served via first class U.S. Mail, postage prepaid, as well as by electronic mail, on the following counsel for the Appellees:

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CONCLUSION

The Trial Court majority should be reversed. For the reasons set forth herein, this Court should hold as follows:

(1) Defendants failed to prove that the General Assembly undertook an honest and good faith effort to create a House map that crosses county lines only as necessary to comply with federal law, and

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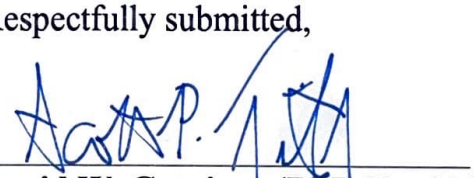

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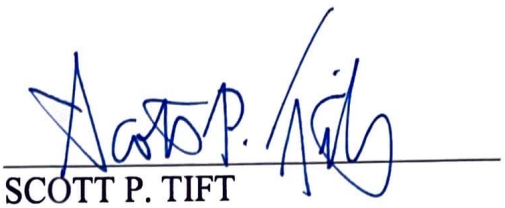

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