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IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT

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

PLAINTIFFS' POST-TRIAL BRIEF

Plaintiffs Gary Wygant and Francie Hunt tried their claims before the Three-Judge Panel from April 17, 2023, through April 19, 2023. Plaintiff Hunt is entitled to judgment in her favor on her Senate claim because she proved the merits of her claim—with Defendants doing nothing to contest them—and clearly has standing to pursue it. Plaintiff Wygant is entitled to judgment in his favor on his House claim because Defendants failed to meet their burden of proving "that the General Assembly was justified in passing a reapportionment map that crossed county lines and [showing] that as few county lines as necessary were crossed to comply with the federal constitutional requirements," (Order Dated March 27, 2023, at p. 18.), and because the General Assembly could have created a House map that crossed far fewer county lines while complying with federal constitutional requirements and while matching or outperforming the Enacted House Map on all other redistricting criteria.

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

a. Ms. Hunt prevails on the merits of her Senate claim because she lives and votes in Davidson County, in the non-consecutively numbered Senate district that violates Article II, Section 3 of the Tennessee Constitution.

The Parties agree the Enacted Senate Map does not number Davidson County's senatorial districts consecutively. The uncontested trial record establishes that Ms. Hunt lives and votes in the Enacted Senate Map's non-consecutively numbered Davidson County Senate district—Senate District 17. Thus, the Enacted Senate Map infringes Ms. Hunt's constitutional right to vote in a Senate district numbered consecutively with the other three Davidson County Senate districts.

i. The Enacted Senate Map violates the Tennessee Constitution by numbering Davidson County's senatorial districts non-consecutively.

The Enacted Senate Map violates the unambiguous mandate set forth in Article II, Section 3 of the Tennessee Constitution that, "[i]n a county having more than one senatorial district, the districts shall be numbered consecutively." In early 2022, the Tennessee General Assembly enacted its decennial reapportionment of the Tennessee Senate via Public Chapter 596, which amended Tennessee Code Annotated § 3-1-102 to codify the State's new senatorial districts.[1] In the Enacted Senate Map, Davidson County's four senatorial districts are numbered non-consecutively, as Senate Districts 17, 19, 20, and 21. *See* TENN. CODE ANN. § 3-1-102. The Enacted Senate Map's nonconsecutive numbering of Davidson County's four senatorial districts violates Article II, Section 3's intra-county numbering mandate.

[1] This enacting legislation, and the Senate map it created, are referred to herein as the "Enacted Senate Map."

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

Ms. Hunt lives in Hermitage, Tennessee, within the Enacted Senate Map's Senate District 17.[2] Ms. Hunt is registered to vote in District 17.[3] Ms. Hunt voted in District 17 in all three elections that took place in 2022 and intends to continue voting regularly in District 17 in future elections.[4] Defendants did not contest these facts at trial.

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

Defendants do not defend the numbering of the Enacted Senate Map's Davidson County senatorial districts on the merits.[5] Plaintiffs' expert witness, Dr. Jonathan Cervas, offered testimony at trial demonstrating that the General Assembly could have numbered Davidson County's four senatorial districts consecutively and could have done so with minimal changes to the rest of the Enacted Senate Map. Defendants did not rebut this testimony. Indeed, Defendants offered neither factual evidence nor expert testimony concerning Ms. Hunt's Senate claim at trial.[6]

* * *

The uncontested facts presented at trial proved Ms. Hunt lives and votes in Senate District 17, which the General Assembly chose not to number consecutively with Davidson County's other

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[2] The Parties jointly filed the three-volume trial transcript on May 16, 2023. *See* Trial Transcript, Volume I, Hunt Testimony, at 73:25-74:8, 77:6-8.

[3] *Id.* at 73:25-74:8, 76:9-11, 77:6-8.

[4] *Id.* at 76:20-77:5.

[5] Defendants have repeatedly stated that they do not contest the merits of Ms. Hunt's Senate claim. (*See* Defs' Pretrial Brief, at p. 11 ("Though Defendants do not defend the merits of the Senate map against Plaintiff Hunt's claim, . . ."); Defs' Memo. in Support of Defs' Motion for Summary Judgment, at p. 11 ("Defendants do not defend the merits of the Senate Map, . . ."); Defs' Resp. to Motion to Compel, at p. 1 ("There is no dispute that the Senate districts in Davidson County are not consecutively numbered.").)

[6] Trial Transcript, Vol I, Himes Testimony, at 162:15-17 ("Q. And you were not involved in drawing the senate map in the 2021-2022 cycle; correct? A. I was not involved."); Vol II, Trende Testimony, at 343:18-21 ("Q. You have no opinions about the state senate map, correct? A. I was not asked to look at it and I have not. I have no opinions."); Vol. III, Himes Testimony, at 591:14-18 ("Q. Mr. Himes, you agree you have not provided an expert opinion concerning the enacted senate map from this last redistricting cycle, correct? A. I agree.").

three senatorial districts, in violation of Article II, Section 3 of the Tennessee Constitution. Ms. Hunt is, therefore, entitled to judgment in her favor on her Senate claim.

b. Ms. Hunt has standing to pursue her Senate claim.

Defendants agree the General Assembly violated the Tennessee Constitution's plain language by failing to number Davidson County's senatorial districts consecutively. Yet, Defendants argue the courts have no role when the Legislature violates this constitutional provision because all Tennesseans lack standing to bring senatorial misnumbering claims.[7] This is a truly remarkable position, since it would completely shield violations of Article II, Section 3 of the Tennessee Constitution from judicial review.

In redistricting litigation here and around the country, citizens who live in legislative districts that have been constructed in violation of constitutional redistricting mandates are routinely permitted to challenge their respective legislature's violation of applicable constitutional provisions. As a resident and voter in misnumbered Senate District 17, Ms. Hunt similarly has standing to pursue the Senate claim she asserts herein.

i. Tennessee courts apply a three-pronged constitutional standing test.

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

[7] At the summary judgment oral argument, when the Court asked Defendants' counsel who would have standing to bring the Senate claim if Ms. Hunt does not have standing, counsel noted his belief that no one would have standing to bring such claims.

Ms. Hunt has standing to challenge the Enacted Senate Map because the Enacted Senate Map has infringed her constitutional right to vote in a senatorial district consecutively numbered with the other senatorial districts in her county of residence—a distinct and palpable injury caused directly by the challenged action. The plain language of the Tennessee Constitution guarantees this right; the Enacted Senate Map infringed this right in the 2022 elections; and the Enacted Senate Map will continue to infringe this right for the rest of the decade absent judicial intervention, which can redress the injury. Ms. Hunt has standing to bring her Senate claim.[8]

ii. Tennessee courts have long permitted Tennessee voters to challenge the General Assembly's failure to apply the Tennessee Constitution's redistricting mandates.

Ms. Hunt's standing does not present a novel question. Rather, it aligns with decades of constitutional jurisprudence in Tennessee, wherein Tennessee courts have routinely permitted Tennessee voters to challenge the General Assembly's failure to follow the redistricting mandates set forth in the Tennessee Constitution.

Senate Misnumbering Claims: Perhaps most notably, Tennessee's courts have previously adjudicated the exact type of Senate misnumbering claims Ms. Hunt asserts in the case at bar. In *Lockert I* (*Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982)) and *Lockert II* (*Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983)), Tennessee voters challenged the General Assembly's failure to number senatorial districts consecutively in populous counties. The Tennessee Supreme Court adjudicated the plaintiffs' claims on the merits, holding that "constitutional standards which must be dealt with in any plan include contiguity of territory and consecutive numbering of districts," *Lockert I*, 631 S.W.2d at 715, and then upholding the trial court's injunction requiring the General

[8] Defendants claim Ms. Hunt cannot meet the injury element or the redressability element of the test for constitutional standing. Ms. Hunt addresses both elements in this post-trial brief. Concerning causation, Defendants do not dispute that the General Assembly's enactment of TENN. CODE ANN. § 3-1-102 caused Ms. Hunt's alleged injury.

Assembly to remedy its violation of the Constitution's Senate numbering provision, *Lockert II*, 656 S.W.2d at 838. Had the Tennessee Supreme Court determined voters did not have standing to challenge nonconsecutive numbering in the Senate, the Court would have dismissed the plaintiffs' nonconsecutive numbering claims.[9] It did not do so.

Defendants claim the *Lockert* cases are not persuasive concerning Ms. Hunt's standing because some of the *Lockert* plaintiffs brought their claims as relators on behalf of the State of Tennessee. Yet, only some of the *Lockert* plaintiffs brought their claims as relators, and ***all*** plaintiffs prevailed in *Lockert II*. Moreover, Tennessee voters have routinely been permitted to challenge the General Assembly's failure to follow other redistricting mandates set forth in the Tennessee Constitution as well.

County-Dividing Claims: After *Lockert I* and *II*, Tennessee voters brought multiple cases challenging the General Assembly's enactment of redistricting maps that divided counties, allegedly in violation of the Tennessee Constitution's prohibitions on doing so in the House of Representatives (Article II, Section 5) and the Senate (Article II, Section 6): *Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985); *Lockert III* (*Lockert v. Crowell*, 729 S.W.2d 88 (Tenn. 1987)); *Rural West Tennessee African-American Affairs Council v. McWherter*, 836 F. Supp. 447 (W.D. Tenn. 1993); and *Moore v. State*, 436 S.W.3d 775 (Tenn. Ct. App. 2014). The Tennessee Supreme Court, the District Court for the Western District of Tennessee, and the Tennessee Court

[9] *See Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004) (dismissing case for lack of standing and stating, "we must consider the issue of standing, even though it was not raised below by the parties."); *see also United States v. Hays*, 515 U.S. 737, 742 (1995) ("[W]e are required to address the issue [of standing] even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines.") (alterations in original; internal citations omitted).

of Appeals all adjudicated the respective plaintiffs' claims on the merits, holding that the Constitution had been violated in some cases and not in others.

Contiguity Claims: In *Mader v. Crowell*, 498 F. Supp. 226 (M.D. Tenn. 1980), Tennessee voters challenged the General Assembly's enactment of a Senate redistricting map under yet another redistricting mandate set forth in the Tennessee Constitution—Article II, Section 6's requirement that legislative districts be contiguous. *Id.* at 227-28. Again, the District Court for the Middle District of Tennessee adjudicated the plaintiffs' claims on the merits.

As these cases indicate, Plaintiff Hunt's standing is grounded in decades of caselaw where Tennessee courts have adjudicated challenges to redistricting plans brought by voters under the redistricting mandates set forth in the Tennessee Constitution.

iii. Ms. Hunt has standing because she lives and votes in the Senate district that violates Article II, Section 3's consecutive numbering mandate.

On at least two occasions, the United States Supreme Court dismissed constitutional redistricting challenges for lack of standing because the plaintiffs did not live in the legislative districts they sought to challenge. These cases support Ms. Hunt's standing to challenge the Enacted Senate Map because Ms. Hunt does live in the non-consecutively numbered Senate district that Defendants agree violates the Tennessee Constitution.

In *United States v. Hays*, 515 U.S. 737 (1995), voter plaintiffs from Louisiana challenged the state's congressional map as an unconstitutional racial gerrymander, in violation of the Equal Protection Clause of the Fourteenth Amendment to the federal constitution. The Supreme Court dismissed the plaintiffs' claims on standing grounds because the plaintiffs did "not live in the district that is the primary focus of their racial gerrymandering claim." 515 U.S. at 739. Even assuming the Louisiana legislature created congressional districts in violation of the federal constitution, the plaintiffs could not establish injury because an unconstitutional racial

gerrymander only infringes the right to vote of, and thereby injures, the voters who live in the gerrymandered district.

Similarly, in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), voter plaintiffs brought constitutional partisan gerrymandering challenges under the federal constitution's First and Fourteenth Amendments. *Id.* at 1923. However, the plaintiffs only offered specific proof about one plaintiff, who lived in a district that would have been heavily Democratic under any reasonable redistricting method. *Id.* at 1932. Because the plaintiffs had not offered proof that any of them lived in a district created by a deliberate partisan gerrymander, the Court held that the plaintiffs lacked standing because none of them could prove injury. *Id.* at 1933.

In both cases, the Supreme Court held that the injury stemming from a legislature's decision to violate a constitutional redistricting mandate falls on the voters who live in the constitutionally defective legislative district, and not on voters who live in other districts. This logic prevented the non-resident plaintiffs in *Hays* and *Gill* from establishing standing, but it supports Ms. Hunt's claim that she has been and will continue to be injured by the General Assembly's decision to violate Article II, Section 3 of the Tennessee Constitution by misnumbering the senatorial district in which she lives—Senate District 17.

* * *

The Court can end its standing analysis here. The General Assembly violated Article II, Section 3 of the Tennessee Constitution when it chose not to number Davidson County's senatorial districts consecutively. Ms. Hunt lives in the non-consecutively numbered Senate District 17, and the General Assembly's passage of the Enacted Senate Map injured her by infringing her right to vote in a senatorial district consecutively numbered with Davidson County's other three senatorial districts. Pursuant to decades of case law, Ms. Hunt has standing to pursue her Senate claim.

The above-cited cases notwithstanding, Defendants have asserted an evolving laundry list of specific standing arguments in hopes of avoiding the loss they concede on the merits. None of Defendants' arguments undermine Ms. Hunt's standing in this action.

iv. Plaintiff Hunt has standing even though she voted in the 2022 State Senate elections and even though she can vote in future State Senate elections.

Defendants have repeatedly argued Ms. Hunt cannot prove injury, and thus lacks standing, because she voted in her district's State Senate elections in 2022 and remains eligible to vote in future State Senate elections. Not only is the constitutional provision at issue devoid of any such qualifiers, but the United States Supreme Court has rejected this argument.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court analyzed malapportionment allegations concerning the state legislature of Alabama. There, the plaintiffs were not prevented from voting. Rather, they alleged the weight of their votes had been diluted through malapportionment. The United States Supreme Court agreed, noting that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 555.

With this holding, the Supreme Court acknowledged a fact—that plaintiffs in constitutional redistricting challenges remain able to vote—and held that unconstitutional redistricting plans injure such plaintiffs even though they remain able to vote. This holding recognizes a commonsense reality applicable to all redistricting cases. In county-splitting cases, for instance, plaintiffs can vote, but they are injured when the General Assembly divides their county of residence because the Tennessee Constitution prohibits such divisions. Likewise, plaintiffs in contiguous-district cases can vote, but they are injured when the General Assembly draws them into a noncontiguous legislative district because the Tennessee Constitution requires contiguous districts. And here, even though Ms. Hunt can still vote, the General Assembly's decision to violate

the Tennessee Constitution has impaired her right to vote by preventing her from voting in a senatorial district consecutively numbered with Davidson County's other three senatorial districts.

v. Ms. Hunt does not assert a generalized grievance.

Defendants also argue Ms. Hunt cannot prove injury, and thus lacks standing, because she asserts "nothing more than a 'generalized grievance' shared with a large class of voters." (Defs' Memo. in Support of Motion for Summary Judgment, at p. 15.) Ms. Hunt's residence in District 17 rebuts this argument. Like all constitutional challenges to legislative redistricting plans, Ms. Hunt shares her injury with a subset of voters who have been treated differently than the much larger universe of voters statewide. Ms. Hunt shares her injury with her fellow voters in the Davidson County portion of Senate District 17, in contrast to voters in Tennessee's other populous counties. Sharing her injury with the subset of other voters in her locality does not render Ms. Hunt's Senate claim a generalized grievance with insufficient particularity to establish injury.

In 1962, the United States Supreme Court confirmed that voters have Article III standing to bring constitutional challenges to redistricting plans notwithstanding the fact that they share their injuries with other similarly situated voters. In *Baker v. Carr*, a voter in Shelby County alleged that the legislature's failure to reapportion legislative districts placed him—and all voters in certain counties—"in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties." 369 U.S. 186, 207-08 (1962). The allegation that voters in certain counties were "disfavor[ed]" relative to voters in other counties gave those disfavored voters standing, as they asserted "a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the government be administered according to law." *Id.* at 208 (citations and internal quotation marks omitted).

As in *Baker*, plaintiffs in all types of constitutional redistricting challenges share their injuries with a subset of voters who have been treated differently than the rest of the voters in their state. In "one person, one vote" cases, plaintiffs share an injury with other voters whose legislative districts lack population equity. In gerrymandering cases, plaintiffs share an injury with other voters from their district who share a racial or political identity. In non-contiguity cases, plaintiffs share an injury with other voters from the noncontiguous portion of a challenged legislative district. And, in county-dividing cases, plaintiffs share an injury with other voters from their improperly divided county. The glue that binds these cases is that a challenged redistricting plan allegedly violated the constitutional rights of some, but not all, of the voters in a state. Thus, those disfavored voters are injured, and have standing to sue, even though they share their injury with a subset of similarly situated voters.

Here, Ms. Hunt alleges the Enacted Senate Map disfavors voters in the Davidson County portion of Senate District 17, as compared to voters in the State's other populous counties, where each county's Senate districts are consecutively numbered in compliance with Article II, Section 3. While Ms. Hunt shares her constitutional injury with other voters who live in the Davidson County portion of District 17, the General Assembly's irrational decision to disfavor the Davidson County residents of Senate District 17, as compared to the voters in other populous counties, constitutes a shared injury sufficient to establish constitutional standing.[10]

vi. Ms. Hunt has been injured because the Enacted Senate Map violated her constitutional right to vote in a senatorial district consecutively numbered with the other three senatorial districts in Davidson County.

Defendants blithely assert that Ms. Hunt's "quarrel" is simply "with the number assigned to her district" (Defs' Pretrial Brief, at p. 15.), as if the numbering of her district had no practical

[10] Defendants' pretrial brief did not address whether Plaintiff Hunt's Senate claim is a generalized grievance in the same detail as Defendants addressed the issue in previous briefs. It is

effect. But the Constitution gives Ms. Hunt the right to vote in a senatorial district consecutively numbered with Davidson County's other senatorial districts, and that right ensures that two of the county's four senatorial districts will be up for election every two years. Ms. Hunt, therefore, was injured when the General Assembly denied her the right to vote in a senatorial district consecutively numbered with her county's other three senatorial districts.

The Tennessee Constitution has always prioritized the county unit over other political subdivisions by giving ***counties'*** citizens additional, unique voting rights. In the original 1796 Constitution, Article I, Section 4 concerned the Senate and included the following mandate: "When a District shall be composed of two or more Counties, they shall be adjoining, and no County shall be divided in forming a District."[11] This prohibition on dividing counties has remained in the Constitution ever since, having moved to Article II, Section 6 in the 1834 Constitution.

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possible Defendants have abandoned this argument. If not, Plaintiffs note the cases Defendants previously cited for the proposition that Ms. Hunt lacks standing because she shares her injury with other voters fail to rebut the fact that redistricting cases necessarily involve injuries shared by a subset of voters who are affected by the same constitutional infirmity. In fact, Defendants to date have failed to cite a single redistricting opinion in support of their claim that Ms. Hunt lacks standing because her injury is shared with other disfavored voters. Instead, at the summary judgment phase of this litigation, Defendants cited the following non-redistricting cases when arguing Ms. Hunt lacks standing because her injury is generalized and shared with other voters: *Mayhew v. Wilder*, 46 S.W.3d 760 (Tenn. Ct. App. 2001) (suit seeking to invalidate budget legislation due to secret meetings convened in violation of the state and federal constitutions and the State Open Meetings Act); *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013) (constitutional challenge to Tennessee's photo ID requirement for voting, in which individual voters were found to have standing); *Warth v. Seldin*, 422 U.S. 490 (1975) (suit challenging zoning ordinances); *Hamilton v. Metropolitan Government of Nashville*, No. M2016-00446-COA-R3-CV, 2016 WL 6248026 (Tenn. Ct. App. Oct 10, 2016) (resident of a Nashville council district challenging election commission's decision of when to hold a special election for that district); *American Civil Liberties Union v. Darnell*, 195 S.W.3d 612 (Tenn. 2006) (action seeking to enjoin Secretary of State from including proposed constitutional amendment on ballot); *Parks v. Alexander*, 608 S.W.2d 881 (Tenn. Ct. App. 1980) (action seeking to have enacted constitutional amendment deemed null and void); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (action challenging regulation related to Secretary of Interior's role related to the Endangered Species Act). (*See* Defs' Memo. in Support of Defs' Motion for Summary Judgment.)

[11] *See* https://sos.tn.gov/civics/guides/tennessee-state-constitution.

In 1965, Tennessee's citizens expanded upon the Constitution's county-protective redistricting mandates as part of restructuring the State Senate.[12] Prior to the 1965 amendments, Tennessee's State Senators and Representatives all served two-year terms, with all seats elected every two years, and with no county being divided to form a senatorial district. The 1965 amendments extended all Senate terms to four years, staggered the elections of the Senate districts, and applied the staggered-term mechanism not only to the State at large but also to those populous counties represented by more than one State Senator. This county-protective provision comports with the Constitution's longstanding protection against county divisions. By including this provision in the 1965 Constitution, the amendment's framers gave voters in populous counties additional county-protective voting rights by guaranteeing them the right to vote in a senatorial district that has been numbered consecutively with their county's other senatorial districts.

In 1982, the Tennessee Supreme Court recognized that the Constitution's county-protective redistricting mandates give citizens of Tennessee's counties unique voting rights. In *Lockert I*, the Supreme Court noted that seemingly abstract constitutional requirements like the prohibition on county-splitting are grounded in "excellent policy reasons" such as citizens' "constitutional right to be represented in the State Senate as a political group by senators subject to election by all voters within that political group." 631 S.W.2d at 709 (approvingly quoting complaint).

And in 2018, the Tennessee General Assembly codified a cause of action for people who have been "affected" by constitutional violations to challenge those violations in court. Specifically, TENN. CODE ANN. § 1-3-121 states as follows:

> Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any

[12] *See Journals and Debates of the Constitutional Convention of 1965*, summary of nine proposed constitutional amendments, at Proposal 1, attached to this brief as Exhibit 1.

> action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages.

Without a doubt, voters in populous counties are "affected" when the General Assembly violates the Constitution's intra-county consecutive numbering mandate because the Constitution guarantees them the right to vote in a senatorial district consecutively numbered with their county's other senatorial districts, leading to fully staggered Senate terms within populous counties and ensuring that half of the Senate districts within each populous county are elected in gubernatorial election years and half are elected in presidential election years. The General Assembly's enactment of Section 1-3-121 joins centuries-old language from the Constitution itself and the Tennessee Supreme Court's *Lockert I* decision in affirming that a voter suffers a concrete harm when the General Assembly violates the Constitution's county-protective redistricting requirements as to the voter's county of residence.

Defendants' citations to the United States Supreme Court's decision in *TransUnion, LLC v. Ramirez*, 141 S.Ct. 2190 (2021), and to the Sixth Circuit's decision in *Ward v. National Patient Account Services Solutions, Inc.*, 9 F.4th 357 (6th Cir. 2021), do not alter this analysis. In fact, both cases are inapposite because they concern claims that Congress created a new injury by ***statute***, whereas the instant case concerns rights granted to Tennessee voters by their ***constitution***, the abridgement of which cause injury. *See Elrod v. Burns,* 427 U.S. 347, 373 (1976) (holding that a violation of a constitutional right "for even minimal periods of time, unquestionably constitutes irreparable injury.") These cases also fail to undermine Ms. Hunt's standing because both cases concern the purported creation of an injury where no harm had been recognized in jurisprudence prior to the enactment of a statute. Here, by contrast, the Tennessee Constitution has contained county-protective redistricting requirements since Tennessee's founding in 1796, and the

Tennessee Supreme Court has recognized the individual voter's right to such protections as a voting right since the 1980s.

Notwithstanding the inapposite statutory injury cases cited by Defendants, the abridgement of a constitutional right constitutes an injury in and of itself. Ms. Hunt has standing here because the Enacted Senate Map injured her by infringing her constitutional right to vote in a senatorial district consecutively numbered with Davidson County's other three senatorial districts.

vii. Defendants' *post hoc* election analysis does not negate the injury inflicted on Ms. Hunt by the Enacted Senate Map.

Defendants' final argument against Ms. Hunt's injury is that the Court should look to whether more than two Davidson County Senate seats actually changed hands in the 2022 election (or in elections prior to 2022). This is a red herring. This argument fails because the unambiguous text of Article II, Section 3 speaks of no such analysis, and longstanding constitutional jurisprudence requires the Court to interpret constitutional text strictly, without resorting to other means of interpretation when the text is clear and unambiguous.

Over sixty years ago, in *Shelby County v. Hale*, the Tennessee Supreme Court noted that "The Court, in construing the Constitution must give effect to the intent of the people that are adopting it, as found in the instrument itself, and it will be presumed that the language thereof has been employed with sufficient precision to convey such intent; and where such presumption prevails nothing remains except to enforce such intent." 292 S.W.2d 745, 748 (Tenn. 1956) (citing *Prescott v. Duncan*, 148 S.W. 229, 234 (Tenn. 1912)). Therefore, when "the words are free from ambiguity and doubt, and express plainly and clearly the sense of the framers of the Constitution there is no occasion to resort to other means of interpretation." *Id.* at 749 (1956) (citations omitted). The Tennessee Supreme Court reaffirmed these long-settled rules of constitutional construction

last year in its decision in *Metropolitan Government of Nashville & Davidson County v. Tennessee Department of Education*, 645 S.W.3d 141, 153 n.13 (Tenn. 2022).[13]

Article II, Section 3 is precise and free from ambiguity: "In a county having more than one senatorial district, the districts shall be numbered consecutively." Given this provision's singular meaning, "there is no occasion to resort to other means of interpretation," and the Court is bound to enforce the provision's clear meaning. Defendants' argument that the Court should not do so, but should instead look to Defendants' framing of the benefit of Article II, Section 3 must be rejected because our Supreme Court's constitutional jurisprudence requires us to construe Article II, Section 3's intent as that reflected in its plain and unambiguous text: to require consecutive numbering of senatorial districts in our more populous counties.

To condone the General Assembly's violation of Article II, Section 3's intra-county numbering mandate because of the results of 2022's election would impermissibly render the text of Article II, Section 3 surplusage, in direct contravention of the Tennessee Supreme Court's guidance that "[n]o words in our constitution can properly be said to be surplusage." *Id.* at 153

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

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

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

n.13; *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 14 (Tenn. 2020) (citing *Welch v. State*, 289 S.W. 510, 511 (Tenn. 1926)). Contrary to this canon of constitutional construction, Defendants ask the Court to hold that the phrase "shall be numbered consecutively" does not mean what it says, but rather means "shall be numbered consecutively unless no more than half of a populous county's senate seats actually change hands in any given election." Under Defendants' analysis, the Enacted Senate Map could be constitutional today and unconstitutional next year. Nothing in the Tennessee Constitution envisions such a result.

Similarly, Defendants' analysis of election results dating back to the 1990s does not alter Ms. Hunt's injury because the Constitution guarantees Ms. Hunt's right to vote in a Senate district numbered consecutively with Davidson County's other Senate districts regardless of the actual results in any Senate race. Whether more than two Davidson County Senate seats changed hands in the past 30 years or will change hands over the coming decade does not alter the fact that the Enacted Senate Map has already infringed Ms. Hunt's right to vote in a Senate district that is consecutively numbered with Davidson County's other three Senate districts and will continue to do so for the rest of the decade, absent judicial intervention.[14]

viii. Ms. Hunt's injury is redressable.

In their pretrial brief, Defendants claimed for the first time that Ms. Hunt's injury is not redressable because "no mechanism" exists to change the number of a sitting Senator's district halfway through his or her four-year term. (Defs' Pretrial Brief, at p. 28.) This is not true. The General Assembly has the power to set the number of all of the State's legislative districts, and

[14] Even if Defendants were correct that there has to be an imminent threat of more than two Davidson County Senate seats changing hands in 2026 or 2030 for Ms. Hunt to establish injury, past election results do not reliably predict future election results, as local and geopolitical events, paired with individual candidates' strengths and weaknesses, regularly cause sea changes in legislative bodies that could not have been predicted based on prior election results. As anyone familiar with the 1948 "Dewey Defeats Truman" headline knows, voters are rarely predictable.

swapping the numbers of two Senators' legislative districts during their four-year terms in office will not prevent those Senators from serving their full terms. Thus, the General Assembly can redress Ms. Hunt's injury by enacting a remedial redistricting plan that corrects the Enacted Senate Map's unconstitutional misnumbering of Davidson County's senatorial districts.

Plaintiffs' expert witness, Dr. Jonathan Cervas, produced three illustrative remedial Senate maps, each of which make limited changes to the Enacted Senate Map for the purpose of remedying its unconstitutional numbering of Davidson County's four senatorial districts.[15] Dr. Cervas's maps pair the Davidson County portion of the Enacted Senate Map's District 17 with the portion of Rutherford County included in the Enacted Senate Map's District 14. To ensure consecutive numbering with Davidson County's other three Senate districts (numbered 19, 20, and 21), Dr. Cervas numbers this new Davidson / Rutherford District as District 18. This, in turn, requires Rutherford County's second Senate district (the Enacted Senate Map's District 13) to become District 17, so that Rutherford County's two senatorial districts are themselves consecutively numbered. Finally, to allow for the new numbering of these two districts, the Enacted Senate Map's District 17 swaps its number with District 13, and the Enacted Senate Map's District 18 (minus its Davidson County portion) swaps its number with District 14. Dr. Cervas deliberately switched one odd-numbered district's number for another odd-numbered district's number, and one even-numbered district's number for another even-numbered district's number, so that swapping the districts' numbers would not require any Senator who was elected in 2022 (from an odd-numbered Senate district) to run for reelection in 2024, halfway through his or her

[15] *See* Trial Exhibit 7, Report of Plaintiffs' Expert Regarding Tennessee State Senate Reapportionment. This report supports all facts stated in this paragraph. Defendants did not contest this report or any of Dr. Cervas's opinions concerning Ms. Hunt's Senate claim.

elected term. Defendants did not contest Dr. Cervas's expert opinions on Ms. Hunt's Senate claim, including the illustrative maps in Dr. Cervas's Senate report.[16]

Defendants provide no authority for the argument that the General Assembly cannot swap Senate district numbers as part of a remedial redistricting plan. The General Assembly has the authority to set legislative district numbers, and it does so at least every 10 years during the decennial redistricting required by the Constitution. Concerning the four Senators whose district numbers would be swapped in Dr. Cervas's illustrative plans, two of the four districts are even-numbered districts that will be up for reelection in 2024 regardless of what even number they are assigned in a remedial redistricting plan. Thus, only the two Senators serving in odd-numbered Senate districts could arguably have their four-year terms disrupted by a remedial redistricting plan, but Dr. Cervas's uncontested illustrative Senate maps demonstrate that neither of these Senators' four-year terms need to be disturbed in a remedial redistricting plan. Dr. Cervas's uncontested illustrative Senate maps demonstrate this fact as follows:

> Current Senate District 13: Senator Dawn White was elected as the Senator for Senate District 13 in 2022. Senate District 13 currently contains, generally speaking, the southern portion of Rutherford County. In Dr. Cervas's illustrative Senate plan 1, this district remains exactly the same, with only its number changing, from 13 to 17.
>
> Current Senate District 17: Senator Mark Pody was elected as the Senator for Senate District 17 in 2022. Senate District 17 currently contains all of Wilson County and the portion of Davidson County where Ms. Hunt lives. In Dr. Cervas's illustrative Senate plans 1 and 1a, Wilson County is paired with Dekalb and Warren Counties to form Senate District 13. Senator Pody lives in Wilson County, and no current senator lives in Dekalb or Warren Counties.[17] Therefore, Mr. Pody can continue representing his county of residence through

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16 *See supra* Footnote 6.

17 The General Assembly's website identifies Senator Pody as living in Lebanon, Tennessee, within Wilson County. The General Assembly's website identifies Senate District 16's current Senator as Janice Bowling, notes that Ms. Bowling lives in Coffee County (Tullahoma), and notes that District 16 currently includes Coffee and Dekalb Counties.
(District 16: https://wapp.capitol.tn.gov/apps/legislatorinfo/member.aspx?district=S16)
(District 17: https://wapp.capitol.tn.gov/apps/legislatorinfo/member.aspx?district=S17)

2024 and need not be drawn in with any other sitting Senator to remedy the misnumbering of Davidson County's four senatorial districts.

Thus, Dr. Cervas's uncontested illustrative Senate maps show that the only Senators whose odd-numbered senatorial districts would have to be swapped to allow for consecutive numbering in Davidson and Rutherford Counties can continue representing either the exact same voters who elected them or the voters of the county in which they reside through the end of their terms in 2026, while not being drawn into any other sitting Senator's district.[18]

Defendants' redressability argument fails, therefore, because the General Assembly can remedy the Enacted Senate Map's unconstitutional misnumbering of Davidson County's four senatorial districts without disturbing the four-year term of any sitting Senator.[19] And, should the General Assembly instead choose to enact a remedial plan that does affect a sitting Senator in a way this Court determines would violate the Constitution, the Court can then intervene by enacting an interim constitutional redistricting plan, applicable only to the 2024 State Senate elections, as authorized by TENN. CODE ANN. § 20-18-105(b).

c. Conclusion – Ms. Hunt is entitled to judgment in her favor.

Ms. Hunt lives and votes in the Davidson County senatorial district that the General Assembly chose not to number consecutively with the other three Davidson County senatorial

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[18] The fact that some voters will be moved into or out of a sitting Senators' district does not violate any constitutional rights, as voters are drawn into and out of senatorial districts midway through four-year terms every ten years to correct the malapportionment that results from normal population shift. *See, e.g., Lockert I*, 631 S.W.2d at 704 (the plaintiffs claimed that redrawing district lines "transferred [voters] from odd to even numbered districts, and vice versa. The effect of this would be to preclude many voters from voting in a Senate race as frequently as every four years, contrary to Art. I, s 5 of the Constitution. The Chancellor held that this was a necessary by-product of reapportionment and did not violate the Constitution.").

[19] Plaintiffs do not concede that the Tennessee Constitution grants an individual Senator the right to serve a four-year term. This question need not be addressed in adjudicating Ms. Hunt's Senate claim, however, because Dr. Cervas's uncontested illustrative maps show that the General Assembly does not have to draw any Senator out of his or her district to remediate the unconstitutional misnumbering of Davidson County's four senatorial districts.

districts, in violation of Article II, Section 3 of the Tennessee Constitution. The General Assembly's enactment of the Enacted Senate Map, therefore, injured Ms. Hunt in the 2022 State Senate elections by denying her constitutional right to vote in a senatorial district consecutively numbered with Davidson County's other three senatorial districts. Absent judicial intervention, the Enacted Senate Map will injure Ms. Hunt again in 2026 and 2030. Defendants do not defend Ms. Hunt's claims on the merits, and Dr. Cervas's uncontested illustrative maps demonstrate that a remedial redistricting plan will redress her injury moving forward. Ms. Hunt, therefore, prevails on her Senate Claim.

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

Plaintiff Wygant is entitled to judgment in his favor on his House claim for two reasons. First, Defendants proffered neither facts nor expert testimony showing that the General Assembly sought to create (or did create) a House redistricting plan that crossed as few county lines as necessary to comply with federal constitutional requirements. Second, Defendants agreed with Plaintiffs' expert witness that the General Assembly could have divided far fewer counties while still complying with federal constitutional requirements. For these reasons, Defendants wholly failed to meet their burden of proving "that the General Assembly was justified in passing a reapportionment map that crossed county lines and [showing] that as few county lines as necessary were crossed to comply with the federal constitutional requirements." (Order Dated March 27, 2023, at p. 18.)

Defendants produced no ***facts*** at trial showing that the General Assembly sought to create (or did create) a map that crossed as few county lines as necessary to comply with federal constitutional requirements. Defendants' only fact witness, Doug Himes, did not testify on those questions because Defendants asserted the attorney-client privilege. The legislative history,

therefore, provided the only primary evidence at trial concerning whether the General Assembly sought to create (or did create) a map that crossed as few county lines as necessary to comply with federal constitutional requirements, and the legislative history reveals that the General Assembly applied the wrong legal standard concerning the Constitution's county-dividing prohibition.

Defendants also produced no ***expert testimony*** at trial opining that the General Assembly sought to create (or did create) a map that crossed as few county lines as necessary to comply with federal constitutional requirements. Defendants' expert witnesses either expressed no opinion on these questions (Sean Trende) or agreed with Plaintiffs' expert witness that the General Assembly could have divided far fewer counties than the Enacted House Map while complying with federal constitutional requirements (Doug Himes).

Finally, Plaintiffs' expert witness testified to his expert opinion that the General Assembly could have created a House map that crossed far fewer county lines than the Enacted House Map while still complying with federal constitutional requirements. Dr. Cervas supported his opinion with multiple illustrative maps, including his illustrative House Plan 13d_e, which divides six fewer counties than the Enacted House Map while complying with federal constitutional requirements and either matching or outperforming the Enacted House Map on all other redistricting criteria. Mr. Himes agreed with this analysis at trial.

In light of Defendants' total failure to meet their affirmative burden of proof, and considering the preclusive effect of Dr. Cervas's agreed expert opinion, Plaintiff Wygant is entitled to judgment in his favor on his House claim.

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

The Tennessee General Assembly enacted its decennial reapportionment of the Tennessee House of Representatives via Public Chapter 598, which amended Tennessee Code Annotated

§ 3-1-103 to codify the State's new House districts. This enacting legislation, as well as the House map it created, will be referred to herein as the "Enacted House Map."

The 2020 United States Census identified 6,910,840 people as the total population of Tennessee.[20] Based on this total state population, each of Tennessee's 99 House districts would have ideally contained 69,806 people following the 2022 decennial reapportionment.[21]

The Enacted House Map includes districts whose populations deviate from the ideal district population in a range from +5.09% (+3,552 people) to -4.81% (-3,361 people), with a total population variance of 9.90%.[22] The Enacted House Map contains 13 majority-minority House districts.[23] The Enacted House Map split 30 counties, such that portions of these 30 counties share a House district with another county or counties.[24]

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

Plaintiff Wygant lives and votes in Gibson County, Tennessee.[25] In denying the Parties' summary judgment motions, the Court ruled that because "it is undisputed that the enacted House map divides Gibson County in violation of Article II, Section 5 of the Tennessee Constitution, Mr. Wygant has standing to contest the House map as a voter residing in Gibson County." (Order dated March 27, 2023, at p. 13.)

c. Defendants bore the burden at trial of proving that the Enacted House Map crossed as few county lines as necessary to comply with federal constitutional requirements.

In denying the Parties' Motions for Summary Judgment, this Court correctly articulated the burden of proof as follows: "the burden has shifted to Defendants to show that the General

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20 Trial Transcript, Vol. I, Doug Himes Testimony, at 172:14-21.
21 *Id.*
22 Trial Exhibit 15, Doug Himes Affidavit dated March 22, 2022, at ¶ 38, 38.n5.
23 Tral Transcript, Vol. I, Himes Testimony, at 174:12-14.
24 *Id.* at 166:21-167:1.
25 Trial Transcript, Vol I, Wygant Testimony, at 119:23-120:1; 122:2-17.

Assembly was justified in passing a reapportionment map that crossed county lines and to show that as few county lines as necessary were crossed to comply with the federal constitutional requirements." (Order dated March 27, 2023, at p. 18 (citing *Lockert I*, 631 S.W.2d at 715; *Lockert II*, 656 S.W.2d at 838).)

i. Defendants bore the burden of proof at trial.

This Court's articulation of Defendants' burden of proof applies well-settled precedent from prior county-dividing litigation in the State of Tennessee. The Tennessee Supreme Court articulated this burden of proof in the first case it adjudicated under the Tennessee Constitution's county-dividing prohibition, and Tennessee's Courts have applied this burden of proof in county-dividing cases ever since.

In *Lockert I*, the Tennessee Supreme Court articulated a two-step burden shift for use in county-dividing cases. First, plaintiffs must demonstrate that a redistricting plan pairs at least one portion of a county with an adjacent county or counties to form a legislative district, thereby violating the State's constitutional prohibition against crossing county lines. 631 S.W.2d at 714. Once plaintiffs do so, the burden shifts to the defendants "to show that the Legislature was justified in passing a reapportionment act which crossed county lines." *Id.* To do so, the defendants must prove that a challenged reapportionment act crosses "as few county lines as is necessary to comply with the federal constitutional requirements." *Id.* at 715.

Nearly three decades later, in *Moore v. State*, 436 S.W.3d 775 (Tenn. Ct. App. 2014), the Tennessee Court of Appeals confirmed that defendants must affirmatively justify the county splits included in a redistricting map. The *Moore* Court first reiterated that the "*Lockert* court held that after the plaintiffs in that case had demonstrated that the redistricting act violated the state constitutional prohibition against crossing county lines, '[t]he burden . . . shifted to the defendants

to show that the Legislature was justified in passing a reapportionment act which crossed county lines.'" *Id.* at 784 (alterations in original). The Court then rejected language from the lower court suggesting the plaintiffs bore the burden of proof, noting, "[t]o the extent to which the trial court held that the burden was not on [the state defendants] to demonstrate that crossing county lines was justified by equal protection considerations, we reverse." *Id.* at 785.

ii. Defendants had to prove the General Assembly made an honest and good faith effort to comply with the applicable legal standard.

Defendants proffered neither facts nor expert opinions at trial sufficient to meet their affirmative burden of proof. Instead, Defendants attempted to sidestep their burden by repeatedly arguing that "perfection is not the standard," as if Plaintiffs had argued that the Tennessee Supreme Court requires perfection in redistricting.[26] But Plaintiffs agree the Tennessee Supreme Court does not require perfection. Rather, since *Lockert I*, the Supreme Court has required the General Assembly to undertake an honest and good faith effort to create redistricting plans that cross as few county lines as is necessary to comply with federal constitutional requirements.

In *Lockert I*, the Court set the applicable legal standard (*i.e.*, that reapportionment plans "must cross as few county lines as is necessary to comply with the federal constitutional requirements") and required the General Assembly to undertake an honest and good faith effort to meet that standard. 631 S.W.2d at 715-16. Specifically, the Court stated: "Upon establishing, as this record does, that county lines must be breached to meet federal population requirements, the determinative issue of the constitutionality of chapter 538 is whether or not the State has made an honest and good faith effort to construct districts breaching as few county lines as practical to comply with federal population guidelines."[27] 631 S.W.2d at 716.

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[26] *See* Defendants' Pretrial Brief at pp. 1, 30, 43, 56, and 59.

[27] Defendants have repeatedly raised the specter that "litigation would never end" if perfection were required because maps "would always be subject to challenge at any point so long

Bearing this in mind, Plaintiffs prevail in the case because the General Assembly wholly failed to undertake the required honest and good faith effort, which resulted in the enactment of a redistricting plan that Defendants agree crosses far more county lines than necessary to comply with federal constitutional requirements.

iii. Plaintiffs do not have to prove bad faith.

Defendants also attempt to sidestep their affirmative burden of proof by arguing, instead, that Plaintiffs must prove bad faith to prevail. The Court rejected this argument by affirming, in its Order denying the Parties' Motions for Summary Judgment, that Defendants bear the burden of proof. Notwithstanding the Court's ruling, Defendants again asserted at trial that Plaintiffs must prove bad faith to prevail.[28] Defendants' argument on this point fails because it relies on an inaccurate rewriting of the applicable legal standard.

Defendants' argument on bad faith ignores the burden shifting framework set forth in *Lockert I* and rests entirely on a misreading of the Tennessee Supreme Court's decision in *Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985). To understand the inapplicability of *Lincoln County*'s bad faith discussion, that decision must be read in context with the rest of the Tennessee redistricting litigation that took place in the 1980s.

In 1982, the Tennessee Supreme Court issued its decision in *Lockert I*. There, the Court first articulated the legal standard and then remanded the matter to the trial court for a "full

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as a 'better' map could be conceived *post hoc*." (Defs' Pretrial Brief, at p. 1.) Under the applicable honest and good faith effort standard, however, litigation will be avoided (or quickly dispatched) if the General Assembly creates a public record of trying to draw redistricting plans that cross county lines only when required to comply with federal constitutional requirements. The General Assembly did not do so here, as reflected in the total absence of references to such efforts in the Enacted House Map's legislative history.

[28] Defs' Pretrial Brief at pp. 2-3 ("because Plaintiffs cannot demonstrate that the General Assembly acted in bad faith or with improper motive when enacting the House Map, their claims should be dismissed.")

evidentiary hearing" on whether "the state made an honest and good faith effort to construct senatorial districts which comply with both federal and state constitutions . . .." 631 S.W.2d at 714.

In 1983, the Tennessee Supreme Court issued its decision in *Lockert II*. In the year since *Lockert I*, the trial court had conducted an evidentiary hearing and had ruled that the challenged reapportionment plans violated the Tennessee Constitution's county-dividing prohibition under the legal standard articulated in *Lockert I*. 656 S.W.2d at 837-38. The trial court then determined the General Assembly could have created a House plan with a total population variance under 10% and with "reasonably close to" 25 county-dividing districts. *Id.* at 838. On appeal, the Tennessee Supreme Court conducted its own detailed review of the record and determined "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." *Id.* at 844. Then, based on its own "interpretation of the proof in th[e] record," the Court held that the 1980 census data "justified" a House map with no more than 30 county splits.[29] *Id.*

Following *Lockert II*, in 1984, the General Assembly enacted a new House map with 30 county splits. *Lincoln County*, 701 S.W.2d at 602. The Middle District of Tennessee then swiftly heard a declaratory judgment action and determined the new map complied with federal constitutional requirements. *Id.* at 602-603. On this set of facts, the Supreme Court in *Lincoln*

[29] At trial, Defendants argued that the *Lockert II* Court had agreed with the trial court that the General Assembly could have complied with federal constitutional requirements while dividing just 25 counties but then provided the General Assembly with a 5-county-split cushion, permitting up to 30 county splits. This is inaccurate. The *Lockert II* court first affirmed *Lockert I*'s holding by expressly refusing 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, and then revised the Chancellor's guidance to the General Assembly by increasing the limit for House plans in the 1980s from 25 county splits to 30 county splits based on its own detailed review of the record and its determination 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." *Id.* at 844.

County heard a challenge arguing that two specific counties had been unnecessarily divided in the newly enacted map. *Id.* at 603.

In *Lincoln County*, the Supreme Court first assessed, on the record before it, whether the county splits in the newly enacted plan were justified, as the *Lockert* burden of proof requires Defendants to prove. On county splits, the Court determined "[t]here is no question but that the statute in question meets the general guidelines established by this Court in the *Lockert* case [] in that it does not divide more than thirty counties and does not divide any county more than once." *Id.* On compliance with federal constitutional requirements, the Court then determined the new map "complies with the maximum population deviation suggested in [*Lockert II*] and it has been successfully defended in federal litigation which has now proceeded to final judgment." *Id.* Given that the defendants' burden of justifying the enacted plan had been met on federal grounds by the federal district court's recent decision and had been met on state grounds by compliance with *Lockert II*'s 1980s-specfic maximum of 30 county-dividing districts, the Court rejected the plaintiffs' claims because the plaintiffs had failed to proffer any evidence of bad faith or improper motive. *Id.* The Court summarized its application of this final 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.

Defendants crystalized their misinterpretation of the burden of proof in their pretrial brief by arguing, based on *Lincoln County*, that "enacted maps that comply with federal constitutional requirements will only be struck down upon a showing of bad faith or improper purpose." (Defs' Pretrial Brief, at p. 42.) Yet, Defendants' argument conflicts with the Supreme Court's guidance

in *Lockert I*, *Lockert II*, and in *Lincoln County* itself, where defendants must first prove compliance with federal ***and state*** law, and if defendants do so, then the burden shifts back to the plaintiffs to prove bad faith. By continuing to claim Plaintiffs must prove bad faith, Defendants ask the Court to eschew the burden shifting framework articulated and applied in *Lockert I*, *Lockert II, Lincoln County*, *Rural West*, and *Moore*.

iv. Incumbency protection and core preservation cannot justify the Enacted House Map's county splits.

Defendants have also argued that incumbency protection and / or core preservation can justify splitting a county despite the Tennessee Constitution's total ban on dividing counties when redistricting. Defendants cannot meet their burden of proof based on such factors because only federal law preempts the Tennessee Constitution's ban.

The order of operations in our legal system is clear. Pursuant to Article VI, Clause 2 of the United States Constitution, the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof," are the "supreme Law of the Land." Therefore, "state laws are preempted when they conflict with federal law." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Within Tennessee, the Tennessee Constitution is the supreme law of the land, and courts "must strike down statutes that violate . . . the state constitution." *State v. Booker*, 656 S.W.3d 49, 53 (Tenn. 2022). Thus, as described below, the General Assembly ***must*** violate the Tennessee Constitution's total prohibition on dividing counties when required to do so by the ***federal*** Constitution, but the General Assembly ***cannot*** violate the Tennessee Constitution's county-dividing prohibition based on ***state*** statutes or practices.

Prior to the United States Supreme Court's decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964), the Tennessee General Assembly could not divide counties for any reason when redistricting the House of Representatives. Article II, Section 5's

unqualified requirement that "no county shall be divided in forming" a House district strictly prohibited such divisions. Then, following these two seminal Supreme Court cases, the Tennessee Supreme Court faced the novel question of how to balance the Tennessee Constitution's total prohibition on splitting counties with the reality that 95 counties of widely varying populations cannot yield 99 House districts of roughly equal population without dividing some counties. The Supreme Court addressed this conflict of law in its *Lockert* decisions.

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

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

counties during redistricting. Stated another way, the General Assembly's redistricting decisions are not entitled to deference when those decisions violate the Tennessee Constitution to comply with state practices because the Tennessee Constitution preempts contrary state practices.

d. Defendants offered no facts at trial to support their burden of proof.

Defendants' only fact witness offered no testimony at trial concerning whether the General Assembly sought to create (or did create) a map that crossed as few county lines as necessary to comply with federal constitutional requirements. Instead, Defendants shielded all such testimony behind the attorney-client privilege. Thus, the legislative history comprises the entire factual record concerning the General Assembly's drafting of the Enacted House Map, and the legislative history reveals that the General Assembly applied the wrong legal standard when drafting and enacting the Enacted House Map.

i. Defendants' only fact witness offered no testimony to support Defendants' burden of proof.

Defendants called one fact witness to testify at trial: Doug Himes. Mr. Himes served as the primary mapmaker of the map that became the Enacted House Map.[30] Yet, Defendants' counsel objected based on the attorney-client privilege and instructed Mr. Himes not to answer any questions at trial concerning his drafting process, his draft maps, or the instructions he received from members of the General Assembly concerning the redistricting process.[31] Defendants also objected during discovery to producing Mr. Himes' draft maps and any written communications between Mr. Himes and members of the Legislature.[32] Thus, Defendants offered neither testimony

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30 Trial Transcript, Vol. I, Himes Testimony, at 162:11-14.

31 *Id.* at 168:20-25 ("Mr. Tift: And to avoid belaboring with more questions, do we correctly understand that the State takes the position that all of the private nonpublic drafting process that Mr. Himes did is subject to the privilege? MR. RIEGER: Yes."), 167-169, 173-74, 177-78, 180, 195-96, 198-201.

32 *See* Order Denying Motion to Compel, Dated December 19, 2022.

nor documentary evidence to meet their burden of proving the General Assembly sought to create (or did create) a House redistricting plan that crossed as few county lines as necessary to comply with federal constitutional requirements.

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

Given the total absence of testimony or documentary evidence at trial concerning the General Assembly's drafting and enactment of the Enacted House Map, the legislative history comprises the entire factual record on these points. Defendants cannot meet their burden of proof through the legislative history, however, because the legislative history reveals that the General Assembly applied the wrong legal standard when drafting and enacting the Enacted House Map.

On September 8, 2021, the House Select Committee on Redistricting held its first public hearing of the 2021/2022 redistricting cycle.[33] At that hearing, Mr. Himes gave a presentation on the redistricting process. During his presentation, Mr. Himes described the Tennessee Constitution's prohibition on county splitting, as well as the Tennessee Supreme Court's guidance on county splitting, as follows:

> No more than 30 counties may be split to attach to other counties or parts of counties to form multi-county districts. So Article II, Section 5, of the Tennessee constitution tells us, Hey, House of Representatives, don't split any counties. The one person, one vote standard says, Well, you've got to have your districts substantially equal in population. And those two things -- they conflict. One's federal. One's our state constitution.
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> 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

[33] The Court may take judicial notice of the legislative history referenced herein under Rule 201 of the Tennessee Rules of Evidence. TENN. R. EVID. 201; *see, also, Wilds v. Coggins*, 496 S.W.2d 460, 461 (Tenn. 1973) ("the courts will take judicial notice of all entries relating to legislation.").

> reasons. So you're limited to 30, the four urbans would count if you had to split them for these reasons.[34]

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

> I'll read you the holding -- the relevant part, "Turning to the limitation on dividing counties and creating house districts, we think an upper limit of dividing 30 counties in the multi-county category is appropriate, with a caveat that none of the 30 can be divided more than once."[35]

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

> Leader Camper, I -- you know, *Lockert* gives you an upper limit of 30, and it's something that -- since we had the *Lockert* decision, it's something that we placed in Tennessee code as one of our criteria. And it's consistently adopted as one of our criteria that our limit is 30. While it is true that you can sometimes draft plans with fewer county splits, you have the discretion to get to that -- to that limit, and that becomes a policy decision that you all -- that you make.[36]

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

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34 Trial Exhibit 94, Transcript of September 8, 2021, Hearing, at 15:2-22.
35 Trial Exhibit 95, Transcript of December 17, 2021, Hearing, at 23:10-15.
36 *Id.* at 47:14-23.

> 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.[37]

(25:25-28:10.)

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

> When we considered maps last week, the -- both the Senate and the House are subject to a constitutional prohibition on splitting counties. Which we only violate that rule to the extent that it's absolutely necessary to meet one person, one vote standards.·So when we were considering Senate plans, I think both the plans -- there was an eight-county split plan and a nine-county split plan. Like both -- we all held ourselves to that standard. On the House map side here, they split 30 counties when you only have to split, you know, 20-- 20/23 in order to meet the population standards. And my question, Mr. Speaker, is why we're not going to hold the House to the same standards that we have applied to ourselves.[38]

The Senate then approved the Enacted House Map.

At no point during any of these meeting did Mr. Himes, or any individual recommending the plan Mr. Himes created, cite or paraphrase the standard set forth by the Tennessee Supreme Court that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements."[39] *Lockert II*, 656 S.W.2d at 838. Rather, when

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[37] Trial Exhibit 96, Transcript of January 18, 2022, Hearing, at 26:6-20.

[38] Plaintiffs did not proffer a transcript of the January 26, 2022, Senate Session, but official video remains available on the Tennessee General Assembly's website at the following URL: https://tnga.granicus.com/player/clip/25829?view_id=611&redirect=true&h=41eb4a920506333727a9fd3a22c9b38c.

[39] Mr. Himes verified the hearing excerpts included herein and confirmed he did not advise the House subcommittees in these hearings of the General Assembly's obligation to create a House redistricting plan that crosses as few county lines as is necessary to comply with federal

members of the minority caucus asked why the map that became the Enacted House Map did not seek to reduce the number of county splits below 30, Mr. Himes advised it is a policy decision whether to divide fewer than 30 counties. This is not the law. The only evidence of the General Assembly's intent when enacting the Enacted House Map, therefore, reflects that the General Assembly sought to divide 30 counties, rather than seeking to divide counties only as necessary to comply with federal constitutional requirements.

e. Defendants offered no expert testimony at trial to support their burden of proof.

Defendants' two expert witnesses either offered no opinion concerning whether the General Assembly sought to create (or did create) a map that crossed as few county lines as necessary to comply with federal constitutional requirements or agreed with Plaintiffs' expert witness that the General Assembly could have divided far fewer counties while either matching or outperforming the Enacted House Map on all other redistricting criteria.

i. Sean Trende offered no opinion concerning whether the General Assembly sought to create (or did create) a map that crossed as few county lines as necessary to comply with federal constitutional requirements.

Defendants hired Sean Trende, their first expert witness, only "to examine Dr. Cervas' report."[40] Thus, Mr. Trende testified that he does not have an opinion concerning whether the Enacted House Map crosses as few county lines as is necessary to comply with federal constitutional requirements.[41] Mr. Trende also testified he has no opinion concerning whether the General Assembly sought to create a map that crosses as few county lines as is necessary to comply

constitutional requirements. *See* Trial Transcript, Vol. I, Himes Testimony, at 182:21-183:8, 187:10-16; 189:6-190:15.

[40] Trial Transcript, Vol. II, Trende Testimony, at 333:25-334:3.

[41] *Id.* at 342:23-343:3 ("Q. Now, Mr. Trende, you have 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? A. That is correct.").

with federal constitutional requirements.[42] Finally, Mr. Trende testified that he did not do any mapmaking work to determine whether a House map could have been created that crossed fewer county lines while still complying with federal constitutional requirements.[43]

Thus, Mr. Trende neither opined on whether the General Assembly made a good faith effort to cross as few county lines as is necessary to comply with federal constitutional requirements nor whether the Enacted House Map actually does so. Mr. Trende's testimony offered no support to meet Defendants' burden of proof.

ii. Doug Himes agreed that the General Assembly could have divided far fewer counties while still complying with federal constitutional requirements.

Doug Himes served as Defendants' second expert witness. In his expert report, and at trial, Mr. Himes agreed that the General Assembly could have divided far fewer counties while still complying with federal constitutional requirements.

1. Mr. Himes's expert report shows that seven of the Enacted House Map's 30 county splits were not necessitated by federal constitutional requirements.

On October 10, 2022, Mr. Himes produced an expert report that included a footnote stating his opinion that seven of the 30 county splits in the Enacted House Map were not required by federal constitutional requirements.[44] On Page 38, Mr. Himes wrote that "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." Mr. Himes then appended the following Footnote 12 to the end of this sentence.

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[42] *Id.* at 343:4-10 ("Q. You also have 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 constitutional requirements, right? A. That is correct.").

[43] *Id.* at 334:18-23 ("Q. . . . you didn't on your own determine whether you could draw state house maps for Tennessee with fewer than 30 county splits that still met federal constitutional standards and met other requirements, right? A. I didn't go looking for maps that you described.").

[44] Mr. Himes's expert report was admitted at trial as Trial Exhibit 14.

> 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).

In this footnote, Mr. Himes stated that seven of the 30 county splits in the Enacted House Map were justified by either "core preservation" or "core preservation/incumbents." For the other 23 county splits, Mr. Himes included "population" or "population shift" as at least one of the reasons for each split. The only reasonable reading of this list of justifications, read as a whole, is that Mr. Himes believed when he wrote his report that 23 counties had to be split for population-related reasons, and the remaining seven counties were only split to preserve prior district cores or to avoid incumbent pairings. But the federal constitution does not require core preservation and incumbency protection.[45] Mr. Himes, therefore, opined in his expert report that the Enacted House Map divided seven of its 30 divided counties for reasons other than compliance with federal constitutional requirements.

Perhaps recognizing the devastating effect of Footnote 12 on his employer's case, Mr. Himes unpersuasively attempted to backtrack at trial. Note that Defendants had produced Mr.

[45] Mr. Himes agrees with the uncontestable legal fact that core preservation and incumbency protection are not federal constitutional requirements. *See* Trial Transcript, Vol. III, Himes Testimony, at 626:22-627:15.

Himes's report on October 10, 2022, and Plaintiffs highlighted Footnote 12's devastating admission in moving for summary judgment and in responding to Defendants' motion for summary judgment. Then, at trial, Mr. Himes claimed that even though he had not listed population-related justifications for seven of the 30 county splits the Enacted House Map, he "would expect that everyone would understand that" the one person, one vote requirement necessitated all 30 county splits.[46] Under cross examination, though, Mr. Himes admitted that "when a county truly had to be divided for population reasons," he listed "population" as a justification in Footnote 12.[47] Here, Mr. Himes admitted what he wrote six months earlier: in his expert opinion, the Enacted House Map divided seven more counties than necessary to comply with federal constitutional requirements.

2. Mr. Himes agreed that Cervas House Plan 13d_e divides six fewer counties than the Enacted House Map while matching or outperforming the Enacted House Map on all other redistricting criteria.

Despite being Defendants' expert witness, Mr. Himes did not opine that the Enacted House Map crosses as few county lines as necessary to comply with federal constitutional requirements. Rather, on cross examination, he initially testified that he believed it was "theoretically possible" that Tennessee's 2020 census results would support a House redistricting plan with fewer county splits.[48] Then, when directed to Dr. Cervas's illustrative House Plan 13d_e, Mr. Himes agreed that

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[46] Trial Transcript, Vol. III, Himes Testimony, at 628:20-629:2 ("Q. You don't think 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.").

[47] *Id.* at 630:8-17 ("Q. So when a county truly had to be divided for population reasons, you listed population? A. That's right. Q. But you didn't list it for all of them. And you agree that for many of the under one district population counties, depending on how the puzzle pieces are put together, they either could be split or could not be split? A. I agree with you.").

[48] *Id.* at 608:6-12 ("Q. And as an expert, you do not have an opinion on whether or not the enacted house map split as few counties as necessary to comply with federal constitutional requirements? A. I believe I said I think it's theoretically possible that you could split fewer counties.").

the map showed that a House redistricting plan could have been enacted with six fewer county splits while matching or outperforming the Enacted House Map on all redistricting criteria.

When Plaintiffs' counsel directed Mr. Himes to review Dr. Cervas's illustrative House Plan 13d_e, Mr. Himes first testified that Plan 13d_e was constitutionally deficient because it included three census blocks that were not contiguous with the districts to which they were assigned. Mr. Himes then agreed that those three noncontiguous census blocks could be corrected without affecting the plan's performance on other redistricting factors.[49] Finally, Mr. Himes agreed that, after correcting those three census blocks, Plan 13d_e would still have six fewer county splits than the Enacted House Map (24 v. 30), would still have a lower total population variance than the Enacted House Map (9.89% v. 9.90%), and would still contain the exact same 13 majority-minority districts as the Enacted House Map.[50] On core preservation and incumbency protection, Mr. Himes did not contradict Dr. Cervas's testimony and Mr. Trende's opinion that Plan 13d_e matches the Enacted House Map on both metrics.[51] Thus, Mr. Himes agreed that Plan 13d_e, with its non-contiguities corrected, divided six fewer counties than the Enacted House Map while matching or outperforming the Enacted House Map on all federal redistricting criteria.

* * *

Combined, Defendants' expert witnesses either offered no opinion at trial concerning Defendants' burden of proof or agreed with Plaintiffs' expert that the Enacted House Map divides far more counties than necessary to comply with federal constitutional requirements. Thus,

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49 *Id.* at 639:12-641:18.

50 Mr. Himes and Mr. Trende testified that the Enacted House Map complies with the Voting Rights Act. Since Cervas House Plan 13d_e contains the same 13 majority-minority districts as the Enacted House Map, it complies with the Voting Rights act as fully as the Enacted House Map and the Voting Rights Act. *See also infra* Footnote 54 for citations supporting the remaining data set forth in this paragraph.

51 Trial Transcript, Vol. III, Himes Testimony, at 649-650.

Defendants wholly failed to meet their affirmative burden of proof via expert testimony. Mr. Wygant is, therefore, entitled to judgment in his favor on his House claim.

f. Plaintiffs' expert witness proved that the Enacted House Map divides far more counties than necessary to comply with federal constitutional requirements.

Plaintiffs' expert witness, Jonathan Cervas, testified that the Enacted House Map could have divided far fewer counties while still complying with federal constitutional requirements. Defendants' expert witness, Doug Himes, agreed. Had Defendants proffered testimony claiming that the Enacted House Map crosses county lines only as needed to comply with federal constitutional requirements, Dr. Cervas's testimony would have rebutted that proof. Since Defendants did not offer such proof, Dr. Cervas's testimony simply stands as further proof that Plaintiff Wygant is entitled to judgment in his favor.

Dr. Cervas testified at trial that, in his expert opinion, the General Assembly could have divided far fewer counties than the Enacted House Map while still complying with federal constitutional requirements.[52] Defendants did not contest this opinion. Instead, Defendants' expert witnesses either expressed no opinion on this question[53] or agreed with Dr. Cervas's opinion, based on Cervas House Plan 13d_e.

Cervas House Plan 13d_e served as the centerpiece of Dr. Cervas's testimony because Plan 13d_e demonstrates that the General Assembly could have divided at least 20% fewer counties than the Enacted House Map while lowering its total population variance (from 9.90% to 9.89%), while exactly matching its majority-minority districts, and while preserving the same percentage of prior district cores and pairing the same number of incumbents. The following chart compares the Enacted House Map and Cervas House Plan 13d_e.

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52 Trial Transcript, Vol. I, Cervas Testimony, at 231:12-20.

53 *See* Section II.e.i, above, concerning Sean Trende's lack of testimony on these questions.

	County Splits	Total Population Variance	Majority-Minority Districts	Incumbents Paired	Core Retention
Enacted House Map	30	9.90%	13	6	80.1%
Plan 13d_e, after contiguity corrections	24	9.89%	Exact same 13	6	80.1%

Defendants agree, through their expert witnesses, with all of these data points.[54]

Cervas House Plan 13d_e matches or outperforms the Enacted House Maps on all redistricting criteria.[55] Seeking to avoid the implications of Plan 13d_e's success, Defendants first sought to exclude the map at trial, unsuccessfully. Next, Defendants argued Plan 13d_e was unconstitutional because it contained three census blocks that were assigned to noncontiguous House districts. Dr. Cervas rebutted this concern by demonstrating that these three noncontiguous census blocks could be corrected without affecting any of the redistricting criteria in Plan 13d_e.[56] Mr. Himes readily agreed, noting that one "can correct all of them and fix them," without affecting any of the above-referenced data points.[57]

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54 *See* Trial Transcript, Vol. III, Himes Testimony, at 637:15-21 (agreeing Plan 13d_e has a total population variance of 9.89%), 641:5-6 (agreeing Plan 13d_e has 24 county splits); 637:22-638:2 (agreeing Plan 13d_e has the same 13 majority-minority districts as the Enacted House Map); Trial Transcript, Vol II, Trende Testimony 338:11-340:20 (agreeing Plan 13d maintains the same core preservation and incumbent pairings as the Enacted House Map).

55 Dr. Cervas also created Cervas House Plan 13c. This map also has six fewer county splits than the Enacted House Map (24 v. 30) and has the exact same 13 majority minority districts as the Enacted House Map. (*See* Trial Transcript, Vol. III, Himes testimony, at 634:13-22.) This map remains under the 10% total population variation threshold, with a total population variance of 9.96% (just 0.06% higher than the Enacted House Map). (*Id.* at 633:25-634:2.) This map underperforms the Enacted House Map on core retention and incumbent protection, which are not required by the federal constitution. Mr. Himes agrees Map 13c is a constitutional map that divides six fewer counties than the Enacted House Map. (*Id.* at 632:2-5.) Thus, this map also supports Dr. Cervas's opinion that the General Assembly could have divided far fewer counties than it did in the Enacted House Map while still complying with federal constitutional requirements.

56 Trial Transcript, Vol. I, Cervas Testimony, at 266-273.

57 Trial Transcript, Vol. III, Himes Testimony, at 639:12-641:18.

As Plaintiffs have noted throughout this litigation, Plaintiffs could have prevailed even without proffering Dr. Cervas's testimony because Defendants did not proffer facts or expert testimony to meet their affirmative burden of proof. That said, Dr. Cervas's testimony (with which Mr. Himes agrees) shows that Plaintiffs prevail not just due to Defendants' absence of proof but also because the General Assembly could have divided far fewer counties than the Enacted House Map while still complying with federal constitutional requirements. Notably, both courts that have overturned state legislative redistricting plans in Tennessee to date did so, in part, with reference to an alternate map that proved that the challenged map could have divided fewer counties than it did while still complying with federal constitutional requirements, as Cervas House Plan 13d_e does here. *See Lockert II*, 656 S.W.2d 836; *Rural West*, 836 F. Supp. 447.

g. Conclusion – Mr. Wygant is entitled to judgment in his favor.

Defendants offered neither facts nor expert opinions to meet their burden of proving either that the General Assembly undertook an honest and good faith effort to create a House redistricting plan that crosses as few county lines as necessary to comply with federal constitutional requirements or of proving that the Enacted House Map in fact crosses as few county lines as necessary to comply with federal constitutional requirements. Instead, Defendants agreed with Plaintiffs' expert witness that the Enacted House Map could have divided at least six fewer counties (20% fewer) while still complying with federal constitutional requirements, as illustrated by Cervas House Plan 13d_e.

For these reasons, Plaintiff Wygant is entitled to judgment in his favor on his House claim.

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

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

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

> Pursuant to Article II, Sections 4, 5, and 6 of the Constitution of Tennessee, which vest the power of apportionment with the general assembly, a court, including the supreme court or a three-judge panel, shall not impose a substitute plan for a plan enacted by the general assembly apportioning or redistricting state legislative or congressional districts under this chapter unless the court first gives the general assembly a period of time to remedy any defects identified by the court in the court's findings of fact and conclusions of law. The period of time given must not be less than fifteen (15) calendar days from the issuance of the court's findings of fact and conclusions of law, and in setting the period of time, the court shall consider whether the general assembly is currently in session or out of session.

Pursuant to Tennessee Code Annotated § 105(b), "If the general assembly does not enact a new plan within the period of time set by the court pursuant to subsection (a), then the court may impose an interim districting plan for use only in the next election cycle, provided the interim districting plan differs from the districting plan enacted by the general assembly only to the extent necessary to remedy any defects identified by the court."

Given these statutory provisions, Plaintiffs ask the Court to provide the General Assembly with the time the Court deems appropriate to provide the General Assembly an opportunity to

remedy the identified constitutional defects. Although the General Assembly is currently not in session, the General Assembly has convened multiple special sessions in recent years to address pressing issues and Governor Lee recently announced that a special session concerning public safety will convene on August 21, 2023. Plaintiffs further note that the Court's deadline for the General Assembly to remedy the identified constitutional defects should leave the Court with sufficient time to complete its own interim plan before the 2024 state legislative elections if the General Assembly fails to enact remedial redistricting plans by the deadline.

For these reasons, Plaintiffs respectfully request the Court provide the General Assembly until August 31, 2023, to remedy the constitutional defects the Court identifies. This deadline falls more than four months after the conclusion of the trial, allows the Court ample time to adjudicate whether any new redistricting plans enacted by the General Assembly remedy the identified constitutional defects, and allows ample time, if necessary, for the Court to retain a Special Master to work with the Court to implement interim districting plans sufficiently in advance of the 2024 legislative elections.

CONCLUSION

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

Dated: May 24, 2023

Respectfully submitted,

/s/ Scott P Tift

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Plaintiffs' Post-Trial Brief* will be served on the following counsel for the defendants via electronic and U.S. mail on May 24, 2023.

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