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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART IV

GARY WYGANT and FRANCIE HUNT,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CASE NO. 22-287-IV**
	)	
BILL LEE, Governor, TRE HARGETT, Secretary of State, MARK GOINS, Tennessee Coordinator of Elections; All in their Official Capacity Only,	)	**Russell T. Perkins, Chief Judge** **J. Michael Sharp, Judge** **Steven W. Maroney, Chancellor**
	)	
Defendants.	)	

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MEMORANDUM AND FINAL ORDER

For the reasons set out in Pages 1-37 of the Separate Opinion of Chancellor Steven W. Maroney, the majority of the Panel concludes that the House plan is constitutional. Accordingly, Pages 1-37 of the Separate Opinion of Chancellor Steven W. Maroney are adopted as the majority decision of the Panel on the House plan and are incorporated in this Memorandum and Final Order as Exhibit "A." Additionally, a majority of the Panel adopts the Findings of Fact in the Separate Opinion of Chancellor Steven W. Maroney to the extent that those Findings of Fact are related to the House plan. All of Plaintiffs' claims pertaining to the redistricting of the House are accordingly DISMISSED with prejudice. Chancellor Steven W. Maroney and Judge J. Michael Sharp join in this result. Chancellor Russell T. Perkins dissents from the Panel's majority decision upholding the House plan at Pages 17-24 of the Separate Opinion of Chancellor Russell T. Perkins.

For the reasons set out in Pages 9-17 of the Separate Opinion of Chancellor Russell T. Perkins, the majority of the Panel concludes that the Senate plan is unconstitutional. Accordingly, Pages 9-17 of the Separate Opinion of Chancellor Russell T. Perkins are adopted as the majority

decision on the Senate plan and are incorporated in this Memorandum and Final Order as Exhibit "B." The Panel hereby GRANTS judgment in favor of Plaintiff Hunt on her claim that the Senate plan is unconstitutional and the Senate plan is hereby struck down. Chancellor Russell T. Perkins and Judge J. Michael Sharp join in this result. Chancellor Steven W. Maroney dissents from the Panel's majority decision striking down the Senate plan at Pages 37-46 of the Separate Opinion of Chancellor Steven W. Maroney.

In light of the foregoing, the Panel DETERMINES that the foregoing majority decisions of the Panel are hereby implemented as follows:

1. Under Tenn. Code Ann. § 28-18-105(a), the Tennessee General Assembly will have until January 31, 2024 to adopt a Senate plan that complies with the state constitutional requirement that the Senate districts be consecutively numbered.
2. Under Tenn. R. Civ. P. 54.02, the Panel hereby DETERMINES that there is no just reason for delay and further hereby DIRECTS the Davidson County Clerk and Master's Office to immediately enter final judgment on this Memorandum and Final Order.
3. The Panel hereby DETERMINES that court costs are taxed one-half to Plaintiffs and one-half to Defendants.

IT IS SO ORDERED.

s/Russell T. Perkins
RUSSELL T. PERKINS,
Chief Judge

s/J. Michael Sharp
J. MICHAEL SHARP
Judge

s/Steven W. Maroney
STEVEN W. MARONEY
Chancellor

cc: David W. Garrison, Esq.
Scott P. Tift, Esq.
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EXHIBIT A

SEPARATE OPINION OF

CHANCELLOR STEVEN W. MARONEY

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
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BILL LEE, Governor, TRE HARGETT, Secretary of State, MARK GOINS, Tennessee Coordinator of Elections; All in their Official Capacity Only,	)	**Russell T. Perkins, Chancellor** **J. Michael Sharp, Judge** **Steven W. Maroney, Chancellor**
	)	
Defendants.	)	

SEPARATE OPINION OF CHANCELLOR STEVEN W. MARONEY

I. Findings of Fact

This reapportionment case was filed on February 23, 2022. Plaintiffs Akilah Moore ("Moore"), Telise Turner ("Turner"), and Gary Wygant ("Wygant") brought suit against Defendants Governor Bill Lee, Secretary of State Tre Hargett, and Tennessee Coordinator of Elections Mark Goins, in their official capacities, claiming that the State House and Senate maps are unconstitutionally drawn. Plaintiffs' original Complaint sought declaratory and injunctive relief. On March 1, 2022, the Tennessee Supreme Court entered an Order designating Chancellor Russell T. Perkins, Circuit Judge J. Michael Sharp, and Chancellor Steven W. Maroney as the Three-Judge Panel ("Panel") to hear this case.

On March 11, 2022, together with an Amended Verified Complaint, Plaintiffs filed a Motion seeking injunctive relief which would enjoin the House and Senate maps from being utilized and require the General Assembly to redraw the maps, while also delaying the filing deadlines for the 2022 elections until a remedial map could be adopted. On April 6, 2022, a majority of the Panel granted a temporary injunction with respect to the Senate plan. On April 7, 2022, Defendants filed for extraordinary appeal pursuant to Tenn. R. App. P. 10. The Tennessee Supreme Court assumed jurisdiction and granted the application for

extraordinary appeal. On April 13, 2022, the Tennessee Supreme Court vacated the temporary injunction, determining that Plaintiffs failed to demonstrate that their alleged harms outweighed the electoral harm created by delaying the Senatorial candidate filing deadline and its subsequent harms on the administration of the upcoming election.

On remand, Plaintiffs filed a Second Amended Complaint on June 16, 2022, which reflected that the requested relief was now sought in advance of the 2024 elections. On October 17, 2022, Plaintiffs filed their Third Amended Complaint, which substituted Plaintiff Francie Hunt ("Hunt") for Plaintiff Moore. On March 27, 2023, following a hearing on Motions for Summary Judgment, the Panel dismissed Plaintiff Turner, and dismissed each side's motions for summary judgment with respect to the enacted House map. The Panel reserved ruling with respect to the issue of standing of Hunt to challenge the enacted Senate map, raised by each side in its respective motions.

After ruling on the motions for summary judgment, the only remaining claims were Plaintiff Wygant's challenge to the enacted House map, and Plaintiff Hunt's challenge remained to the enacted Senate map, pending a ruling on whether Hunt has standing to bring her challenge. Trial on these claims was held on April 17, 18, and 19, 2023, in the Davidson County Chancery Court.

A. 2022 Reapportionment of the General Assembly

The Tennessee Constitution requires the General Assembly to reapportion both houses of the General Assembly after each decennial census made by the Bureau of Census of the United States is available to the General Assembly. Article II, § 4 of the Tennessee Constitution. The Tennessee Constitution permits the General Assembly to use geography, political subdivisions, and substantially equal population as considerations when drawing legislative districts. *Id.* The Tennessee Constitution requires the General Assembly to apportion the House of Representatives into 99 districts. Article II, § 5 of the Tennessee Constitution. The Tennessee Constitution sets the length of individual Senate terms at four years. Article II, § 3 of the Tennessee Constitution. Further, the Tennessee Constitution staggers the election of senatorial districts with respect to those in even-numbered and odd-

numbered districts such that roughly half[1] of Tennessee's Senate seats are up for election every two years.

The Tennessee Constitution provides that, "[i]n a county having more than one senatorial district, the districts shall be numbered consecutively." Article II, § 3 of the Tennessee Constitution. The General Assembly enacted a Senate map ("the "enacted Senate map") which numbers Davidson County's four senatorial districts 17, 19, 20, and 21. The Senate map is codified at Tennessee Code Annotated § 3-1-102. Hunt argues that Tennessee Code Annotated § 3-1-102 violates Article II, § 3 of the Tennessee Constitution and asks this Panel to direct the General Assembly to remedy these alleged violations as required by Tennessee Code Annotated § 20-18-105.

The Tennessee Constitution also requires the House to be divided into 99 districts and that " no county shall be divided in forming such a district." Article II, § 5 of the Tennessee Constitution. The enacted House map crosses 30 county lines. Wygant asserts that Defendants cannot show that the 30 county splits were necessary to comply with federal constitutional requirements, which take precedence over state constitutional requirements. The House map is codified at Tennessee Code Annotated § 3-1-103. Wygant argues that Tennessee Code Annotated § 3-1-103 violates Article II, § 5 of the Tennessee Constitution and asks this Panel to direct the General Assembly to remedy these alleged violations as required by Tennessee Code Annotated § 20-18-105.

B. The Enacted House Map

1. Doug Himes

Testimony was provided in the present case by Doug Himes ("Himes"), House Ethics Counsel for the Tennessee House of Representatives, concerning the enacted House map. Himes took the lead in developing the ultimate House map, as well as reviewing alternative House maps submitted by House Democrats and members of the public.

[1] Tennessee has thirty-three state senators, so sixteen are elected to a four-year term in one general election cycle, and two years later, seventeen are elected to a four-year term in the following general election cycle.

In preparing to draw a new House map, Himes considered several concerns: population equality between districts, as required by federal equal protection considerations; compliance with the federal Voting Rights Act ("VRA"), 52 U.S.C. § 10301 *et seq.*; statutory factors; census data; and prevention of multi-member districts. Insofar as conflicting considerations were present, Himes prioritized these (consistent with State law) as follows: 1) federal constitution; 2) federal statutes; 3) state constitution; 4) state statutes; and 5) adopted House criteria.

Himes' map drawing process began even before the 2020 Census data was received. He obtained information from the State Comptroller to assist his efforts. The General Assembly ensured that the technology and staffing for mapmaking was supplied. Staff meetings ensued in preparation for the Census data.

Due to the COVID-19 pandemic, there was delay of several months in receiving Census data. Initial data was received in April, 2021. The follow up micro-data (critical because it contains census block data) was not received until August, 2021, which enabled him to work on a first draft of a House map.

Himes utilized a mapmaking software named "Maptitude". Maptitude is a highly rated software used by multiple state and local governments, as well as federal agencies. County, precinct voting district, and census block data were all loaded into Maptitude.

The initial consideration for Himes after the data was loaded into Maptitude was considering which counties are of sufficient size to contain whole districts and which ones must be divided. Based on the 2020 Census numbers, Tennessee's ideal House District would contain precisely 69,806 residents. Ten counties were sufficient in population to support whole districts.

Next considered were areas where population growth or loss had occurred. Thirty Tennessee counties lost population since the prior census, a very significant and unusual occurrence. In fact, two-thirds of the counties in West Tennessee lost population since the last census. Most of the growth in Tennessee occurred in the counties around the Nashville area.

Due to population shifts, three new House districts were needed in Middle Tennessee, meaning three districts would be lost from other parts of the state. One of the new districts came from Shelby County, one came from northwest Tennessee, and one

came from eliminating a district from Montgomery County which was formerly split with another county.

2. The House Committee on Redistricting

A Redistricting Committee (the "Committee") was created by the Speaker of the House of Representatives which, for the first time, was composed of members from both political parties, not merely the majority party. The Committee adopted guidelines. The time delay caused by the COVID-19 pandemic meant that there were five months, rather than eleven, to complete the map creation before the full General Assembly considered a new map. Therefore, the Committee took the unusual step of publishing map proposals to the public prior to the beginning of the 2022 legislative session. A website was created providing redistricting information to the public.

A "concept map" was prepared by members of the Committee in September, 2021, and a near final map was produced in a December 2021 House Committee meeting. In between the September 2021 and December 2021 meetings, multiple revisions took place. Ultimately, the enacted House map was produced.

One of the factors to be considered in production of the enacted map was compliance with federal equal protection considerations (popularly referred to as "one man, one vote"). This requires a determination of the ideal exact population makeup of each House district. As noted above, Tennessee's ideal House District would contain precisely 69,806 residents.

At the state level, some variance from the ideal is permitted. Total population variance is determined by adding together the highest and lowest individual district population deviation from the ideal population split. A total population variance from the ideal district size exceeding 10% establishes a prima facie case that the redistricting plan violates the Equal Protection Clause. *Voinovich v. Quilter*, 507 U.S. 146 (1993). However, a variance under 10% does not establish a corresponding "safe harbor" insulating the state map from an equal protection challenge. *Cox v. Larios*, 542 U.S. 947 (2004).

Although the Tennessee Constitution prohibits splitting of counties to form House districts, this provision must yield to federal constitutional considerations because it is

impossible to produce a map with 99 House districts and no county splits without exceeding a 10% total population variance. The enacted House map produced a total population variance of 9.90%, and it splits thirty counties.

This was accomplished by examining the population shifts within the individual counties. As already noted, ten counties could be kept whole because their population was in excess of 69,806. In order to place complete House districts within these ten counties, it was necessary for the largest individual district to represent in excess of 73,000 citizens, creating an excess population variance of 5.09% in that county. The district within the enacted House map containing the greatest decrease from the ideal population had a variance of 4.91 % from ideal. Adding together the greatest excess (5.09%) and diminished (4.91%) population individual county variances generates the total population variance of 9.90%. After that, the remaining 85 counties had to be adjusted to accommodate the remaining House districts.

In addition, legislative maps which decrease the number of House districts composed at least 50% plus 1 by a racial/ethnic majority ("majority-minority districts") face scrutiny as potentially violative of the VRA by causing voter dilution. *See*, *Rural W. Tenn. African–Am. Affairs Council v. Sundquist*, 209 F.3d 835 (6th Cir. 2000). The enacted House map produced thirteen majority-minority House districts, the same number as following the 2010 census. The enacted House map complies with the VRA, at least to this extent.

The Tennessee General Assembly, in response to the decisions in *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982)("*Lockert I*") and *State ex rel. Lockert v. Crowell,* 656 S.W.2d 836 (Tenn. 1983)("*Lockert II*"), adopted House Redistricting Guidelines in 1984, which have been readopted in subsequent redistricting legislation, including that which enacted the House map at issue in this case. These guidelines are listed in Tennessee Code Annotated § 3-1-103(b) as follows:

> (b) It is the intention of the general assembly that:
>
> (1) Each district be represented by a single member;
>
> (2) Districts are substantially equal in population in accordance with constitutional requirements for "one (1) person one (1) vote" as judicially interpreted to apply to state legislative districts;

(3) Geographic areas, boundaries, and population counts used for redistricting are based on the 2020 federal decennial census;

(4) Districts are contiguous and contiguity by water is sufficient, and, toward that end, if any voting district or other geographical entity designated as a portion of a district is found to be noncontiguous with the larger portion of such district, it must be constituted a portion of the district smallest in population to which it is contiguous;

(5) No more than thirty (30) counties are split to attach to other counties or parts of counties to form multi-county districts; and

(6) The redistricting plan complies with the Voting Rights Act and the fourteenth and fifteenth amendments to the United States Constitution.

In a December 17, 2021 House Committee hearing on redistricting, Himes informed the Committee that the House had discretion to split up to thirty counties, consistent with the upper limit expressed in the House guidelines and *Lockert II* (notwithstanding that *Lockert I* also held that an adopted map should split as few county lines as is necessary to comply with the federal constitutional requirements).

Himes also advised the Committee that the House could not accomplish a lesser number of county splits without splitting Shelby County. This result would conflict with *Lockert II*, which held that Shelby County could not be split even once unless justified by either (1) the necessity to reduce a variance in an adjoining district or (2) to prevent the dilution of minority voting strength, due to Article II, §§ 5 and 6 of the Tennessee Constitution. *Lockert II*, *supra*, at 841.

Himes met with all House members to receive their input because population shifts would affect their districts. Input from individual legislators was only necessary to receive guidance regarding district contraction where necessary. Otherwise, Himes was guided by the adopted House guidelines.

3. Competing Map Proposals

Citizens were invited to submit proposed redistricting maps between September 8, 2021 and November 12, 2021. However, only four citizen maps were submitted: 1) the

Brett Windrow map; 2) the Orrin Map; 3) the Equity Alliance map; and 4) the Zach Wishart map. In addition, the Democratic House Caucus also submitted a map, which was later resubmitted to address concerns raised. No other alternative maps were submitted for consideration to the Committee.

All of the maps submitted by the public had constitutional deficiencies in areas such as excess population variance, reduction of majority-minority districts, and excess county splitting. The original alternative map submitted by the Democratic House Caucus split too many counties. A revised alternative map submitted by the Democratic House Caucus remedied this by crossing only 23 counties, but at the cost of splitting Shelby County in violation of *Lockert II.*

On February 6, 2022, the General Assembly adopted the enacted House map in Public Chapter 598 (now codified at Tennessee Code Annotated § 3-1-103). As described above, the enacted House map has a population variance of 9.90% and maintains 13 majority-minority counties; however, in creating the House districts, the enacted House map crosses thirty counties.

4. Gary Wygant

Plaintiff Wygant is a retired Coca-Cola employee, who relocated from Atlanta, Georgia to Trenton, Tennessee (in Gibson County) in 2015. He has spent his time in Gibson County in volunteer activities, such as coaching, serving in his church, and serving as Chairman of the Gibson County Democratic Party. He is a regular voter in local, state, and federal elections, both primary and general.

Wygant resides in House District 79 and has done so before and after the enacted House map. Under the enacted House map, Gibson County is divided with a portion of the county in District 79 and the other portion in District 82. The dividing line between the two districts roughly corresponds with Highway 45W in Gibson County. In the prior legislative map, the entirety of Gibson County was in House District 79, along with a portion of Carroll County, which was split. At that time, District 79 was represented by the now-retired Curtis Halford, who was a Gibson County resident. Now, District 79

Representative Brock Martin and District 82 Representative Chris Hurt are both residents of other counties, so no Gibson County resident serves in the State House.

Wygant testified about his objections to the enacted House map. As a resident of Gibson County, he dislikes the fact that Gibson County has been split into District 79 and District 82. Wygant is displeased that as result of this split, his county now has two representatives, neither of whom reside in Gibson County. Wygant also dislikes the requirement for some Gibson County citizens to obtain new voting cards. Wygant feels the redistricting process wasn't transparent and surprised citizens, despite his admission that he discussed redistricting with his then-representative, Curtis Halford. Wygant is dissatisfied with the input he received from Representative Halford.

At no time did Wygant testify as to any individualized harm the enacted House map had caused to him by its split of counties in other parts of Tennessee, such as Grainger or Sullivan Counties, for example. When asked whether he had sustained any individual and personal impact from the division of other counties, Wygant replied "Well, I do hear about it from the other county chairmen, yes. But that's really them relaying their feelings." Although Wygant did not like the enacted House map, Wygant did not testify concerning lack of good faith, nor the presence of bad faith or improper motives by the General Assembly.

5. Expert Testimony concerning the Enacted House Map

i. Himes' Expert Testimony

Testifying in his capacity as an expert, and not as a fact witness, Himes explained the concept of "core preservation" and its importance. Core preservation, in a redistricting context, refers to an attempt to retain as much of the prior district ("the core") of a prior legislative district as possible in redrawing a new district so as to avoid sweeping changes and minimize electorate confusion. Although attempts at core preservation are not always successful due to population distribution, these have been recognized by the United States Supreme Court as an example of justifiable legislative redistricting polices (for example,

with respect to variance; *see*, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)).[2] Nonetheless, core preservation, like avoidance of placing incumbents within the same new district, has not been raised to a constitutional or statutory level, notwithstanding its utility to the legislature in creating a constitutionally compliant map.

Also testifying in his capacity as an expert, Himes reviewed the enacted House map and addressed counties with commentary on the splits reflected therein. He cited reasons such as population totals and shifting[3], core preservation[4], district contraction[5], unique geographic shaping of counties[6]; and counties which can support individual districts but with excess population insufficient to complete an additional district[7]

He also cited unique county splitting issues. Carter County is split because the counties surrounding it are incapable of supporting their own individual districts. Splitting Carter solves the problem of forming districts posed by the unique geography of these counties.

Gibson County, home of Plaintiff Wygant, presents unique issues because every county around it (except Madison County) lost population. This requires splits in the rural West Tennessee counties (and Madison County is not an option because of VRA concerns, as addressed in the next paragraph). The Gibson County split in the enacted House map keeps most Gibson County municipalities (except Humboldt) in District 79, supporting core preservation. Gibson County's population is insufficient to support an entire district. Therefore, it must be combined with another county in forming a district, and, as a consequence, either Gibson County or the county it combines with, must be split.

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[2] *But see*, *Allen v. Milligan*, 599 U.S. 1 (2023), holding that core retention may not serve as justification for a violation of § 2 of the VRA (VRA). *Allen* involved a challenge to a redistricting map which alleged the map utilized racial gerrymandering. The present lawsuit includes no such allegation of gerrymandering.

[3] Bradley County; Carter County; Claiborne County; Gibson County; Giles County; Grainger County; Hamblen County; Hawkins County; Haywood County; Henderson County; Henry County; Jefferson County; Lawrence County; Lewis County; Lincoln County; Maury County; Obion County; Putnam County; Sevier County; Sullivan County.

[4] Bradley County; Carroll County; Carter County; Dickson County; Fentress County; Gibson County; Hardeman County; Hardin County; Jefferson County; Lawrence County; Lincoln County; Loudon County; Monroe County; Putnam County; Roane County; Sevier County.

[5] Claiborne County; Grainger County; Hamblen County; Henry County.

[6] Cheatham County; Claiborne County; Hawkins County.

[7] Anderson County; Bradley County; Sullivan County, Sumner County, Williamson County; Wilson County.

Hardeman, Haywood, and Madison Counties present unique issues. These counties contain House Districts 73, 80, 81, and 94. Following the 1990 decennial redistricting, litigation ensued alleging VRA violations as detailed in *Rural W. Tenn., supra.* The result was a ruling that the 1990 map unlawfully diluted African–American voting strength in violation of § 2 of the VRA and led to the creation of a majority-minority district in rural West Tennessee a decade later. Because of the African-American population in Haywood, Hardeman, and Madison Counties, any changes in the districts contained within these counties invite close scrutiny. The enacted House map balances these concerns by closely following the post-2010 census drawn map.

Hardeman County is split essentially in the same manner as the prior House map enacted after the 2010 census, thus supporting core preservation as well as compliance with VRA concerns. Haywood County has suffered population loss; however, the enacted House map preserves its historic core (complying with the VRA) while preserving a historic Tipton-Haywood Counties district. Due to its higher population, Madison County must contain one whole district (District 73) plus another (District 80) which splits Madison County to join another county. The enacted House map makes a very similar split of Madison County as compared with the map after the 2010 census, thus supporting both core preservation and VRA compliance.

One county, Dickson, is drawn in a way that supports core preservation. However, it also appears to have incumbent protection as a concern, the only such time this is apparent.[8] Nearby Cheatham County is adjacent to three counties which cannot be divided, so it must attach to Dickson.

The enacted House map is similar to maps adopted and proposed by the House in recent redistricting cycles insofar as the number of splits is concerned.

Himes noted that construction of a constitutional map requires the mapmaker to consider other constitutional factors (both explicit and derived from case law) that have been less emphasized in the present case but are nonetheless valid. For example, the prohibition against splitting urban counties as a result of the *Lockert* trilogy hampers a mapmaker. Double splitting of counties is a prohibited practice under Article II, § 5 of the

[8] It is noted that Plaintiffs argue that Washington County is split purely to avoid placing incumbents within the same district.

Tennessee Constitution, and the implication of double splitting on vote dilution in the context of VRA jurisprudence creates an additional challenge for the mapmaker to navigate.

In his capacity as an expert, Himes testified that he believed the enacted House map represents an honest and good faith effort by the General Assembly to adopt a constitutionally compliant map.

ii. Dr. Jonathan Cervas

Dr. Jonathan Cervas ("Cervas") provided testimony as an expert on behalf of Plaintiffs. Cervas produced many maps (introduced in the hearing) during the course of the litigation in an effort to produce a map that split fewer counties than the enacted House map, while complying with federal constitutional requirements and the goals of Tennessee Code Annotated § 3-1-103(b). His proposed maps were reviewed during the litigation process by Himes, who then advised Cervas of deficiencies in the proposed maps based upon constitutional criteria. Cervas acknowledged that not all of the maps he produced adhered to the law, leading to revisions and/or new maps by Cervas.

In preparing his maps, Cervas referenced a publication ("Red Book") by the National Conference of State Legislatures, the Tennessee House Redistricting Committee website, and the Tennessee Constitution. However, Cervas, who is not an attorney, did not read any of the Tennessee appellate opinions on redistricting so as to have his work product informed by their holdings. Cervas also displayed limited knowledge of Tennessee geography, which was reflected in the process by which his numerous maps were created. Cervas was assisted in his work by Zach Griggy, an undergraduate student at the University of California-Irvine.

Cervas and Griggy utilized a free website redistricting tool known as "Dave's Redistricting" ("Dave's"). The state's expert, Sean Trende ("Trende")(whose testimony is detailed later in this Order) testified that Dave's is "okay" as a tool, but that Maptitude is the gold standard of redistricting software. Himes, who used the Maptitude software, described Dave's as a fun tool for the public to use, but he would not use it in a professional

capacity. Himes testified that Dave's includes partisan factors that can lend confusion and affect the finished product.

Cervas disagreed and felt that Dave's is sufficient and adequate. However, Cervas acknowledged elsewhere in his testimony that the repeated problems he encountered with non-contiguity in his maps stemmed from the use of the free Dave's software. Further, Plaintiffs declined Cervas' request to use commercial software (rather than Dave's) due to the price of the license. Although Cervas testified that Maptitude is not as easy to use as Dave's, a past commercial advertisement was introduced at the hearing in which Cervas praised and promoted Maptitude for its ease of use. The Court finds Maptitude is superior to Dave's as a mapmaking tool.

Cervas prepared what he referred to as his "13" series of maps, so identified by him because these maps contained thirteen House districts within Shelby County. Map 13a split fewer counties than the enacted House map, but proposed fewer majority-minority districts. In particular, Map 13a did not keep an individual district wholly within Madison County and undid the presently constructed House District 80, a majority-minority district created in response to the decision in *Rural W. Tenn., supra.* This would have revived the VRA concerns remedied by that decision.

Map 13b was better, and split only twenty-five counties, but still fell short in compliance with constitutional standards in that it split, and did not keep an individual district wholly within, Madison County (raising the above described VRA concerns). It had the additional characteristic of creating a House District 80 within which the current incumbent, Representative Johnny Shaw, would not live. Cervas acknowledged that his map did not attempt to meet core preservation.

Map 13b also had contiguity issues. Contiguity essentially means that one can walk to any point within a district without leaving that district. There were individual census blocks (the lowest micro-level of data provided by the Census Bureau) which were not connected within particular districts. Non-contiguity was a problem which was repeatedly pointed out to Cervas by Himes in the Cervas maps, leading to numerous revisions. Cervas explained that this was because he was utilizing the free Dave's software to create his maps.

Map 13b_e corrected the contiguity issue, but retained the other problems from Map 13b. The total population variance in Map 13b_e was 9.96%, higher than the enacted House map's total population variance of 9.90%.

Map 13c split fewer counties than the enacted House map (24 vs. 30), but had a higher overall population variance (9.96% vs. 9.90%), again bringing a risk of litigation over federal equal protection considerations, which are of greater priority than state constitutional considerations. Map 13c did return Districts 73 and 80 (which encompass the entirety of Madison County) to the same district lines as the enacted House map, to remedy the VRA issues addressed above. Non-contiguity issues also were present in Map 13c.

Map 13d was produced in response to criticism that Map 13c was deficient in total population deviation, core preservation, and pairing of incumbents within the same district. Map 13d proved problematic, however, because it provided for a "double split" of Sullivan County. Article II, § 5 of the Tennessee Constitution prohibits splitting a county more than once. This provision created particular problems in creating the enacted House map in the northeastern part of the shape due to a combination of population shifts in that region and the unique geographic shape of those counties, located as they are in a narrow corner of the state. Map 13d also contained more contiguity issues (which were remedied in Map 13d_e).

Cervas also prepared a "14" series of maps which contained fourteen House districts within Shelby County. Cervas explained that having 14 districts within Shelby County creates equal protection concerns, although it is theoretically possible to keep under the 10% threshold which is *per se* violative of equal protection. Map 14a had only 24 county splits, but a 9.98% total population variance, bringing increased risk of litigation over equal protection concerns. As noted, since there is no safe harbor for equal protection considerations, the higher the variance approaching the ten percent prohibition, the greater the litigation risk.

Map 14a also did not keep an individual district wholly within Madison County and double split Madison County in violation of Article II, § 5 of the Tennessee Constitution, as well as creating VRA concerns by undoing the delicate creation of the majority-minority District 80 partially located in Madison County as a result of the *Rural W. Tenn.* decision.

In fact, Map 14a reduced the number of majority-minority districts from the number in the enacted House map.

Cervas created a "13.5" series of maps which creates 13 complete House districts within Shelby County, plus one which is connected with another county. This reduces the total population variance, but at the cost of violating *Lockert II's* prohibition against such a split. Map 13.5a has only 22 county splits, but a total population variance of 9.98%. Further, it completely remakes District 80, which, as detailed above, was created in response to the decision in *Rural W. Tenn., supra.* The reconstruction of District 80 would have revived the VRA concerns remedied by that decision.

Map 13.5b was better than Map 13.5a in regard to the total number of majority-minority districts, but still impermissibly split Shelby and Madison Counties. These maps also contained contiguity issues which could be remedied.

Cervas ultimately produced a map (13d_e) that was submitted by Plaintiffs to the State on January 9, 2023, nearly a year after the commencement of litigation. Cervas' Map 13d_e marginally improved upon the enacted House map's variance (9.89% vs. 9.90%) and split fewer counties than the enacted House map (24 vs. 30). Map 13d_e solved the Sullivan County double splitting problem, but at the expense of losing constitutionally required contiguity (Cervas has revised the map to remedy the non-contiguity). With respect to the final version of Cervas' Map 13d_e, Himes agrees it is a constitutional map.

Although not expressly questioned on the point, there is nothing to suggest that Cervas' map production was lacking in good faith despite the fact that it took him multiple efforts to ultimately prepare a constitutional map (13d_e), and then only after his interim expert report of October 10, 2022 and his deposition of December 13, 2022. Nonetheless, Cervas opined that the House was not justified in enacting a map with thirty (30) county splits. However, Cervas testified, "there are no perfect plans. There's lots of tradeoffs in redistricting." He also testified that accomplishing lower population deviations require more county splits.

Cervas testified that none of his maps is a "best" map because "[b]est is not a quantity that can be defined in redistricting." He further testified that the General Assembly could adopt any of his maps, as long as they first ensured the maps complied

with the VRA; yet, some of his maps were shown in the hearing to present VRA concerns, as he acknowledged at the time of their presentation by subsequently revising them.

The only time a Cervas reference to "good faith" by the General Assembly came out in the hearing was with respect to Cervas' introduced October 10, 2022 interim report in which he stated that the General Assembly did not give a good faith effort to balance the constitutional criteria established by federal and state law because the enacted House map overpopulates Shelby County, which should have been split in his opinion. However, as noted, such a split of Shelby County would have been in violation of *Lockert II*.

iii. Sean Trende

The State offered the expert testimony of Sean Trende, a PhD. Candidate at Ohio State University and an analyst for RealClearPolitics.com. Trende was hired to evaluate the Cervas maps which had been prepared at the time of his review.

Trende testified that mapmaking involves balancing multiple considerations. Trende offered no opinion on whether the General Assembly attempted, or could have attempted, to enact a map with fewer county splits than the enacted House map. Trende did agree that Cervas' map 13d, prepared by Cervas subsequent to Trende's initial examination of Cervas then-existing maps, maintains the same core preservation and the same incumbent protection as the enacted House map.

C. The Enacted Senate Map

On February 6, 2022, the General Assembly adopted the enacted Senate map in Public Chapter 596 (now codified at Tennessee Code Annotated § 3-1-102). As described above, the enacted Senate map includes four Senate districts within Davidson County, which are numbered as District 17, 19, 20, and 21. However, the four districts are not consecutively numbered, as required by Article II, § 3 of the Tennessee Constitution.

1. Francie Hunt

Plaintiff Hunt is the Executive Director for Tennessee Advocates for Planned Parenthood and has also been active as a child advocate. Since 2017, Hunt has resided at 532 New Castle Lane, Hermitage, Tennessee, which is located within District 17 of the enacted Senate map. Hunt has been a registered voter in Davidson County since 1999 and has been a regular voter since that time.

District 17, along with Districts 19, 20, and 21, is located within Davidson County. As is evident, these four districts are not consecutively numbered, as required by Article II, § 3 of the Tennessee Constitution. As a result, elections for three of Davidson County's Senate districts are held during the same year as the gubernatorial race, while the remaining Senate district holds its election in a presidential election year.

Hunt's challenge is solely based upon the non-consecutive numbering of senate districts in Davidson County. She is not bringing a challenge based on racial disparity or political gerrymandering.

At trial, when asked about the impact non-sequential numbering had on her as a voter, Hunt expressed concern about a "deep suspicion around the "legitimacy of democracy"; concerns about "an individual's right to bodily autonomy and to my right to make my own private decisions over my own healthcare"; whether she can rely upon the Constitution; and the personal negative feelings she experienced when *Roe v. Wade,* 410 U.S. 113 (1973), was overturned by *Dobbs v. Jackson Women's Health Organization,* —— *U.S.* ——, 142 S. Ct. 2228, 213 L.Ed.2d 545 (2022).

Hunt also feels that the "supermajority" of the Republican Party in the State legislature does not reflect her view and the view of Nashville. She is displeased about certain recent legislative actions by the General Assembly which she perceives as hostile to Nashville's local governing authorities, including the reduction of Metro Nashville Council seats from twenty to forty and the recent expulsion of two Tennessee House members. She testified that the non-sequential numbering of Davidson County Senate districts contributed to a concentration of power that prevents her from using her voice. Hunt described the present situation as "incredibly painful".

Hunt lived in Davidson County subsequent to redistricting after the 1990 and 2000 census, when Davidson County also had non-consecutively numbered Senate districts. She was unaware of this at the time. Hunt added that one reason she didn't notice the previous

non-consecutive numbering of Senate districts in Davidson County was probably related to the fact that the General Assembly was under the control of the Democratic Party at the time. She explained that was "forced" to pay more attention after the change in partisan control of the General Assembly to the Republican Party led to attacks on "bodily sovereignty". District 17 is represented by Senator Mark Pody, who "appalls" Hunt because she feels he is disconnected from the life experiences in her geographic area, and because, in her words, he wants husbands to have control over the autonomy of their wives.

Following adoption of the enacted Senate map, Hunt voted in the August, 2022 primary election and the November, 2022 general election. She agrees that her vote counted in both elections.

2. Expert Testimony

Although the State offers no defense on the merits as to the Senate map, such that resolution of the Senate map dispute turns on Hunt's standing, Cervas testified there was no justification for failing to number the Senate districts within Davidson County sequentially and that he did not know the motivation for failing to do so in the enacted Senate map. Cervas was asked by Plaintiffs to come up with an alternate plan to the enacted Senate map because the Senate Districts in or a part of Davidson County (Districts 17, 19, 20, and 21) were not sequentially numbered. He ultimately developed Maps labeled 1, 1a, and 1b, which sequentially numbered the districts within Davidson County and, with each successive map, lowered the total variance such that it was ultimately lower than the enacted Senate map. Trende expressed no opinion on the enacted Senate map.

II. Conclusions of Law

A. The House Map

I would dismiss Plaintiff Gary Wygant's claim and hold that the enacted House map is constitutionally sound.

1. The Nature of Wygant's Challenge

The initial question to be resolved is whether Wygant's challenge is properly stated as a challenge to the enacted House map statewide, or whether his challenge to the enacted House map is limited to the split of Gibson County, where he resides and is a registered voter, because he only has standing to challenge the Gibson County split.

This Panel has previously dismissed the claim of former Plaintiff Turner, holding she lacked standing to bring a county-splitting claim because of her county of residence (Shelby County). The present case (where Wygant has sued as an individual in his own name) is distinguishable from other cases addressing county splits which addressed a disputed reapportionment map on a statewide basis (e.g., the *Lockert* trilogy of cases) because in the latter cases, the plaintiffs were relators suing in the name of the State of Tennessee.

The case of *Gill v. Whitford*, 138 S. Ct. 1916, 1929-31 (2018) is instructive here. In *Gill*, multiple plaintiffs sought to throw out the reapportionment map created by the Wisconsin legislature on grounds it was politically gerrymandered. The plaintiffs argued that their legal injury was not limited to the injury that they allegedly suffered as individual voters, but extended also to the statewide harm to their interest "in their collective representation in the legislature," and in influencing the legislature's overall "composition and policymaking." *Id.* at 1931. However, these plaintiffs were found by a unanimous United States Supreme Court to lack standing to assert these claims on a statewide basis because "[t]o the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific.... In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district." *Id.* at 1930. *Gill* was remanded to give plaintiffs an opportunity to prove concrete and particularized injuries using evidence that would tend to demonstrate a burden on their *individual* votes. *Id.* at 1934.

In the present case, only Wygant's challenge to the enacted House map has survived to trial. The challenges to the enacted House map by Hunt and Turner have been dismissed as they have not shown they live within a county split by the enacted House map. Only Wygant has made such a showing, and the county in which he lives and votes is Gibson County.

The entirety of Wygant's testimony dealt with how he felt the split of Gibson County had negatively impacted residents of Gibson County. For example, he was displeased that as result of the split of Gibson County into Districts 79 and 82, his county now has two representatives, neither of whom reside in Gibson County. Wygant disliked the requirement for some Gibson County citizens to get new voting cards. Wygant was dissatisfied with the input he received from his former Gibson County State Representative concerning the reapportionment process.

At no time did Wygant testify as to any individualized harm the enacted House map had caused to him by its split of counties in other parts of Tennessee, such as Grainger or Sullivan Counties, for example. In fact, he was expressly asked whether he had sustained any individual and personal impact from the division of other counties. In response, he replied "Well, I do hear about it from the other county chairmen, yes. But that's really them relaying their feelings." Second hand relation of complaints from residents of other counties does not constitute individualized harm to Wygant.

Wygant's alleged harm, simply put, is that Gibson County should not have been split into two districts. He has no basis to challenge the split of any other Tennessee county, notwithstanding any prior ruling on his standing at preliminary stages of this litigation. As noted in *Gill*, *supra*, "The facts necessary to establish standing…must not only be alleged at the pleading stage, but also proved at trial." *Id.* at 1931. I would dismiss Wygant's claim as to all Tennessee counties other than Gibson County due to lack of standing, consistent with the standards established by *Gill*, *supra*.

2. The Applicable Standard

Resolution of this dispute turns on which party bears the burden when considering maps which cross county lines, what must be demonstrated by that party to meet that burden, and the sufficiency of the proof at our trial to meet the established burden.

In the present case, Plaintiff Wygant asserts that once he proved that a House map[9] could be drawn which met federal constitutional requirements, with districts that crossed fewer counties than the enacted House map, the burden shifted to Defendants to show that

[9] Cervas' Map 13d_e.

the General Assembly acted in good faith in adopting the enacted House map. Wygant then argues that Defendants cannot meet this burden because they offered Himes as their only fact witness, yet Himes was not allowed to then testify concerning his thoughts and impression and advice at trial, as these had previously been ruled protected by attorney-client privilege during the discovery phase of this litigation. Wygant argues that with no other fact witness to address the creation of the enacted House map, Defendants have failed to meet their burden to show good faith. Consequently, Wygant argues, the enacted House map must be declared unconstitutional.

Defendants argue that Wygant wrongly assumes a too rigid application of the burden as stated in *Lockert I* while de-emphasizing more recent appellate decisions. Defendants say that Wygant must demonstrate bad faith or improper motive on the part of the General Assembly, and that he has failed to do so. Additionally, Defendants claim that they have shown through their proof that the county splits in the enacted House map are supported by constitutional considerations (presumably, establishing good faith by the General Assembly).

a. Historical Review of the Standards

i. *Lockert I* and *Lockert II*

Plaintiffs rely on the holding from *Lockert I* concerning a burden shifting when counties are split in contravention of the Tennessee Constitution's prohibition of the practice. Recognizing that county splitting is virtually always necessary in order to comply with federal constitutional requirements, the Tennessee Supreme Court in *Lockert I* held that if there is no way to comply with the mandates of the federal and state constitutions without crossing county lines, then the redistricting plan adopted must cross as few county lines as necessary to comply with the federal constitutional requirements. *Lockert I, supra*, at 715. The Tennessee Supreme Court also held, in the context of plaintiffs' motion for summary judgment, that once a challenge had been brought to a legislative map demonstrating that county lines have been crossed, the burden shifted to the defendants to

show that the Legislature was justified in passing a reapportionment act which crossed county lines. *Id.* at 714.

In *Lockert II*, one year later, the Supreme Court stated:

> In spite of the fact that the law of this case was established in *Lockert I,* defendants ask that we reconsider our holding that the State's constitutional prohibition against crossing county lines must be enforced insofar as is possible and that any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements.

Lockert II, *supra*, at 838.

In its opinion in *Lockert II*, the Supreme Court did not immediately respond to the defendants' request for reconsideration. First, the Supreme Court went through a detailed analysis that addressed the splitting of large urban counties and the subjective nature of what upper limits of total population deviation will meet federal constitutional requirements of equal protection. The Supreme Court then held:

> Turning to the limitation on dividing counties in creating House districts, we think an upper limit of dividing 30 counties in the multi-county category is appropriate, with the caveat that none of the thirty can be divided more than once. In addition, with respect to the four urban counties we have left open the possibility of a small split per county only if justified by the necessity of reducing a variance in an adjoining district or to prevent the dilution of minority voting strength.

Lockert II at 844.

The Supreme Court in *Lockert II* did not expressly state that thirty county splits constituted a "safe harbor"[10], and that conclusion need not necessarily be reached presently (nor should it be absent clarifying instruction from the Supreme Court). But it does appear that *Lockert II*, which followed a "full evidentiary hearing"[11], recognized the General Assembly's need for greater flexibility when tasked with balancing conflicting constitutional standards in the creation of a reapportionment map. The need for such

[10] However, it is interesting that *Lockert II* approved an upper limit of thirty counties while approving a map which only crossed twenty-five counties.

[11] *Lockert II* at 838. *Lockert I*'s stricter and more objective standard, relied upon heavily by Wygant, was expressly stated in the context of addressing burden shifting at the summary judgment stage.

flexibility becomes apparent when an objective state constitutional standard comes into conflict with a subjective, yet superior, federal constitutional standard.

In fact, rigid adherence to *Lockert I*'s language in a vacuum becomes problematic. Consider: a total population variance from the ideal district size exceeding 10% establishes a prima facie case that the redistricting plan violates the Equal Protection Clause. *Voinovich, supra.* Conversely, however, a variance under 10% does not establish a "safe harbor" insulating the States map from an equal protection challenge. *Cox, supra. Cox* was decided well after *Lockert I.*[12]

Thus, the State has to ensure that its enacted map complies with equal protection requirements while not having the security of an objective standard that will suffice; its only objective standard is what violates equal protection (10% population variance). Adopting Plaintiff's adherence to the *Lockert I* objective standard of splitting as few lines as possible puts the Legislature in a potential conflict with the subjective standard of federal equal protection requirements. The Legislature, having no clear objective standard of acceptable population variance, must play Russian roulette. Does the Legislature select a map whose districts cross the fewest counties but has a higher population variance (while remaining under ten percent) over maps with lower population variance which cross more counties (while still following the *Lockert II* and statutory "guidelines")?[13] And if the Legislature, with the resources available to it, struggles with this balance, are the Courts really in a superior position to accomplish this goal?

ii. House Reapportionment Act of 1984

In response to *Lockert I* and *Lockert II*, the General Assembly enacted 1984 Tenn.Pub.Acts Ch. 778, known as the House Reapportionment Act of 1984 (now codified at Tennessee Code Annotated § 3-1-103). That Act sought to create legislative redistricting

[12] In addition, the Tennessee Supreme Court in 1983, without the benefit of the 2004 *Cox* decision, stated "that appropriate State limits can be attained without exceeding 14% total deviation for Federal equal protection requirements." This statement is not likely to be sustained in 2023.

[13] As discussed elsewhere in this opinion, Plaintiffs' expert witness Dr. Jonathan Cervas did in fact produce a map that split fewer counties than the enacted map while providing a population variance of 9.89% vs. the 9.90% variance in the enacted House map. That it took Dr. Cervas' several months, long past the start of this litigation, and several failed attempts to accomplish this returns this opinion to the question of the applicable burden and what quality and level of faith must be shown to meet it.

standards, consistent with *Lockert I and Lockert II,* which have survived subsequent revisions to the statute and are now listed in Tennessee Code Annotated § 3-1-103(b) as follows:

> (b) It is the intention of the general assembly that:
>
> (1) Each district be represented by a single member;
>
> (2) Districts are substantially equal in population in accordance with constitutional requirements for "one (1) person one (1) vote" as judicially interpreted to apply to state legislative districts;
>
> (3) Geographic areas, boundaries, and population counts used for redistricting are based on the 2020 federal decennial census;
>
> (4) Districts are contiguous and contiguity by water is sufficient, and, toward that end, if any voting district or other geographical entity designated as a portion of a district is found to be noncontiguous with the larger portion of such district, it must be constituted a portion of the district smallest in population to which it is contiguous;
>
> (5) No more than thirty (30) counties are split to attach to other counties or parts of counties to form multi-county districts; and
>
> (6) The redistricting plan complies with the Voting Rights Act[14] and the fourteenth and fifteenth amendments to the United States Constitution.

For the same reasons addressed above, Wygant argues that Tennessee Code Annotated § 3-1-103(b)(5) is in conflict with *Lockert I* to the extent it implies thirty or fewer county splits is an acceptable safe harbor, whereas *Lockert I* held the enacted map must split as few counties as possible. Thus, Plaintiffs argue, the state statute must yield to the state constitution.

The favorability shown to these House guidelines by the Supreme Court in *Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn.1985), is noted below. Further, Article II, Section 4 of the Tennessee Constitution provides that nothing in Article II "shall deny to the General Assembly the right at any time to apportion one House of the General Assembly using geography, political subdivisions, substantially equal population **and other criteria** as factors" (emphasis added). Whether Article II, Section 4 in fact cloaks

[14] 52 U.S.C. § 10301 *et seq.*

the criteria adopted by Tennessee Code Annotated § 3-1-103(b)(5) with constitutional status, placing its standards on equal terms with those found in *Lockert I* and/or creating a safe harbor of thirty county splits, need not be decided by this Panel. But that constitutional language will factor into the discussion below of good faith on the part of the General Assembly.

iii. *Lincoln County v. Crowell*

(1) Legislative Guidelines

Of course, *Lockert I* and *Lockert II* were not the last time the Tennessee Supreme Court has considered redistricting challenges, nor do they represent the last time the burden of proof has been addressed. In *Lincoln County*, *supra*, a constitutional challenge was raised to a reapportionment map which crossed counties. The Supreme Court overruled the trial court, which had concluded that Lincoln County was divided to a greater extent than was necessary to meet the federal constitutional requirements and declared unconstitutional and void those portions of the reapportionment act which pertained to the 62nd and 65th Districts. *Lincoln County*, *supra*, at 603. In so doing, the Supreme Court noted:

> There is no question but that the statute [present Tennessee Code Annotated § 3-1-103] in question meets **the general guidelines** established by this Court in [*Lockert II*] in that it does not divide more than thirty counties and does not divide any county more than once.
>
> ....
>
> [In *Lockert II*,] [t]he Court allowed **considerable tolerance** to the General Assembly in adopting a reapportionment plan, recognizing that county lines and even voting precinct lines have not been drawn in accord with strict mathematical equality in population.
>
> ....
>
> 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 (emphasis added).

The holdings in *Lincoln County* suggest the Tennessee Supreme Court has viewed the holdings of *Lockert I* and *Lockert II* with more flexibility than Plaintiffs now insist that *Lockert I* imposes on redistricting legislation. Indeed, *Lincoln County* speaks favorably of the same *Lockert II* inspired legislative guidelines codified in Tennessee Code Annotated § 3-1-103(b) which Plaintiffs now insist are contrary to the *Lockert I*, particularly the guideline which places an upper limit of thirty on county splits.

(2) Burden Shifting

Post-*Lockert I* opinions also suggest that the burden shifting utilized in that case has been applied less rigidly by the Tennessee Supreme Court and the Court of Appeals than Plaintiffs insist. For example, in *Lincoln County,* which dealt with the splitting of counties, both the challengers and defenders of the redistricting map asserted that the other bore the burden of proof in the case. *Id.* at 603. As cited above for other purposes, the Supreme Court held:

> 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.**

Rather than requiring that the State must put forth affirmative proof of good faith to justify its choices in county splitting, *Lincoln County* suggests that the burden falls to one challenging a redistricting map on the basis of county splitting to establish bad faith or improper motive on the part of the General Assembly in order to successfully invalidate

the county splitting. At minimum, *Lincoln County* and *Lockert I* reflect differing statements by the Supreme Court as to the definition and placement of the burden.

Wygant argues in his post-trial brief that *Lincoln County* does not imply a modification of *Lockert I* because in *Lincoln County*, the State had already satisfied its burden as required by *Lockert I* and only then did the burden shift back to the challengers to demonstrate bad faith or improper motive. But even if Wygant is correct in his reading of *Lincoln County*, the result actually supports a finding of good faith by the General Assembly in the present case. In *Lincoln County*, the burden of justifying the disputed county splits in the newly enacted plan was met, according to Wygant, by demonstrating compliance with *Lockert II*'s upper limit of thirty county splits – as has been shown by our Defendants with respect to the enacted House map.

iv. *Moore v. State*

In *Moore v. State*, 436 S.W.3d 775 (Tenn.Ct.App.2014), a decision joined by now-Chief Justice Kirby, the Court of Appeals overruled the trial court on the issue of which party bore the burden when considering a Motion to Dismiss in a case involving county splitting. In so ruling, the Court of Appeals stated, "[a]fter Appellants demonstrated that the Act violates Tennessee's constitutional prohibition against crossing county lines, the burden shifted to Appellees to demonstrate that the Act fulfills the requirements of equal protection while fulfilling, insofar as possible, state constitutional requirements." *Id.* at 785.

Moore is consistent with *Lockert I*'s placing of the burden upon the State rather than the challenger to a redistricting map once the challenger establishes county splitting[15]. However, *Moore*, with the benefit of both *Lockert I and II*[16] and the added *Cox* decision holding there is no equal protection safe harbor, did not define the State's burden as showing, after meeting federal constitutional requirements, that it split the fewest lines possible, but rather as showing that it fulfilled state constitutional requirements **insofar as possible**. It is a subtle distinction, but a distinction nonetheless. In fact, *Moore* saw the

[15] Note that *Moore*, like *Lockert I*, addressed the burden at a preliminary stage, not at trial.
[16] Indeed, *Moore* cites *Lockert I* and *Lockert II* throughout its opinion.

Court of Appeals uphold an adopted map which complied with the *Lockert II* upper limit of thirty crossed counties, despite the fact that the challengers demonstrated that a map crossing two fewer county lines could be created.

b. Current Standard for Burden of Proof

Whether *Lincoln County* overruled *Lockert I* as to the burden of proof is for the Supreme Court, and not this Panel, to hold, if it deems necessary. At minimum, however, *Lincoln County*'s apparent requirement for the challenger to demonstrate bad faith or improper motives by the General Assembly suggests that Plaintiff's assertion that the State has the burden of proving good faith is far from settled by the Tennessee Supreme Court. *Moore* further raises questions concerning Plaintiff's contentions.

In the absence of a clarifying ruling from the Supreme Court, and the existence of differing holdings on which party bears the burden of proof, and what must be shown to meet that burden, I consider the application of each of these standards to the present case.

i. Has the State shown Good Faith by the Legislature?

(1) Himes' Expert Testimony Regarding Constitutional Justifications for County Splits in the Enacted House Map

In *State ex rel. Lockert v. Crowell*, 729 S.W.2d 88 (Tenn.1987)("*Lockert III*"), the Tennessee Supreme Court cited approvingly the testimony of Frank Hinton, director of the division of local government in the comptroller's office and principal staff person for the Senate Reapportionment Sub-committee (*see*, *Lockert II*, *supra*, at 839). The testimony by Mr. Hinton cited in *Lockert III* addressed the reasons that a portion of Shelby County was detached and joined with Tipton and Lauderdale Counties to form Senate District 32, contrary to Article II, Section 6, Tennessee Constitution. Mr. Hinton provided the following testimony, which the Supreme Court found confirmed by the map proposals before it and supportive of a trial court's finding of good faith:

A (by Hinton): If Tipton and Lauderdale Counties are not included in the district with Shelby County, then the fifty-five thousand, fifty-six thousand people in those two counties must be located in other districts. It is a spreading operation. Which district in West Tennessee would basically all have to be redrawn and the size of the district increased to a much higher level? And it would involve, I think, not only all of West Tennessee, but probably necessarily, in my opinion, some of Middle Tennessee, as well, including [the] Davidson County area.

Q (by Counsel): How many people are in Tipton and Lauderdale Counties that you're attempting to spread out?

A: I believe about fifty-six thousand in the two counties, jointly.

Q: What is the effect, then, on those counties—on those districts in West Tennessee in terms of their population deviation?

A: It is obviously going to increase those districts on the plus side, because we have got that many additional people to utilize in the district somewhere. And where you use them depends a whole lot on county size and what kind of groupings you can put together to create a district.

We cannot create a district of an exact population size, because we're restricted from dividing these rural counties, and, therefore, we have to use the building blocks as we find them. I have not been able to utilize the extra number of individuals that have to be assimilated into the districts without coming into about half of Middle Tennessee.

Lockert III, *supra*, at 90.

The testimony by Mr. Hinton cited in *Lockert III* as supporting a showing of good faith is analogous to the expert testimony provided in the present case by Himes concerning the enacted House map. As noted, Himes took the lead in developing the ultimate House map, as well as review of alternative House maps proposed by House Democrats and members of the public, who were invited to submit proposed maps.

(a) Himes' Testimony Regarding Gibson County's Split

Himes' testimony concerning the split of Gibson County supports a finding of good faith by the General Assembly in its adoption of the enacted House map and a rejection Wygant's claim that Gibson County was impermissibly split. The ideal House district would contain a population of 69,806. Gibson County's population of 50,429 is insufficient to form a complete district. Therefore, any Gibson County district must necessarily attach with an adjacent county.

The largest such adjacent county is Madison County. However, Himes explained in detail that Madison County's districts (73 and 80) were formed after lengthy litigation over VRA issues as described in *Rural W. Tenn., supra.* Adjusting Madison County risks enhanced scrutiny of VRA compliance, and I cannot find fault with the General Assembly's determination to mitigate this litigation risk to ensure compliance with federal standards.

Gibson County is larger than its remaining adjacent counties, and all of the adjacent counties lost population since the prior census. Adding Crockett County (population 13,911), which is already kept whole in the enacted House map, only generates a population of 64,340, much smaller than the ideal House District of 69,806. The 4.91% lower threshold of total population variance in the enacted House map provides for a floor of 66,378, meaning a Crockett-Gibson only district would create a statewide House map that exceeds the 10% total variance barrier and thus constitute a prima facie case of equal protection violation.

The remaining adjacent counties – Carroll, Dyer, Obion, and Weakley – each have too much population (28,440; 36,801; 30,787, 32,902 respectively) to add to Gibson County without either Gibson or the companion county being split in order to ensure total population deviation standards statewide are satisfied. Having accounted for the prioritized federal concerns of equal protection and compliance with the VRA, I find that the enacted House map reflects good faith on the part of the General Assembly with respect to Gibson County specifically.

(b) Himes' Testimony Regarding the County Splits Statewide

Although I find that Wygant's challenge should be limited to the split of Gibson County, the record supports a finding of good faith even if the challenge is expanded to the entirety of the enacted House map statewide. Testifying in his capacity as an expert, and not as a fact witness, Himes reviewed the enacted House map and addressed in great detail the counties which were split in the enacted House map and the constitutional considerations supporting those splits. This included a breakdown of the express constitutional provisions applicable, as well as federal and state appellate decisions. Himes placed particular emphasis on federal considerations of equal protection and VRA compliance.

Himes also addressed issues created by Tennessee's unique geography and the population distribution shift within the state since the last decennial redistricting. All of this is consistent with the type of testimony given by Frank Hinton in *Lockert III* and cited by the Supreme Court in that case as evidence of good faith on the part of the General Assembly in drawing its map.

(2) House Reapportionment Process

Further evidence of good faith by the General Assembly is demonstrated by the process which it undertook in developing the enacted House map. The General Assembly supplied the staffing and technology for mapmaking, including the superior Maptitude software. The Speaker of the House of Representatives created a Redistricting Committee which, for the first time, was composed of members from both political parties, not merely the majority party. The Committee published map proposals to the public prior to the beginning of the 2022 legislative session, and a website was created providing redistricting information to the public.

Significantly, the public was invited to submit alternative map proposals. Only four such proposals were submitted by the public at large. None of the proposals were from Wygant. All of the maps submitted by the public had constitutional deficiencies in areas such as excess population variance, reduction of majority-minority districts, and excess county splitting.

The House Democratic Caucus also proposed two maps for consideration. The original map submitted by the Democratic House Caucus contained districts which crossed too many counties. A revised map submitted by the Democratic House Caucus reduced the number of county splits, but only at the cost of splitting Shelby County in a manner that violated *Lockert II.*

Nonetheless, the request for submissions evidences a good faith effort to maximize the proposals for consideration by the General Assembly before its ultimate adoption of the enacted House map. The adoption of the enacted House map coming only after consideration was given to every alternative map proposed, and rejecting them as constitutionally defective, further supports that this adoption was made in good faith.

That the enacted House map is similar to maps adopted and proposed by the House in recent redistricting cycles insofar as the number of splits is concerned is further evidence that the legislature acted in good faith.

(3) General Assembly's Right Pursuant to Article II, Section 4 of the Tennessee Constitution to Establish Criteria in Apportionment and the Adoption of House Redistricting Guidelines

Article II, Section 4 of the Tennessee Constitution provides that nothing in Article II "shall deny to the General Assembly the right at any time to apportion one House of the General Assembly using geography, political subdivisions, substantially equal population **and other criteria** as factors" provided the result is in conformity with the federal constitution (emphasis added). As noted above, in response to *Lockert I* and *Lockert II*, the General Assembly adopted legislative redistricting standards (now codified at Tennessee Code Annotated § 3-1-103). These have been cited approvingly by the Tennessee Supreme Court in the post-*Lockert I* and *Lockert II* decision in *Lincoln County*, *supra.*

As noted previously, this Panel need not decide whether Article II, Section 4 confers constitutional status on the criteria adopted by Tennessee Code Annotated § 3-1-103(b)(5) and its approval of up to thirty county splits in reapportionment. But the mere ambiguity raised by that question must confer deference to the General Assembly as having

acted in good faith in adopting a map with districts crossing thirty counties. If nothing else, the express adoption of the standards presently codified in Tennessee Code Annotated § 3-1-103(b) in the most recent redistricting legislation adopting the enacted House map reflects some good faith effort by the legislature to adhere to constitutional standards and the "tolerances" of *Lockert I* and *Lockert II.*

(4) Cervas' Opinion on Good Faith

The only time Cervas references "good faith" – as opposed to "bad faith" – was in noting, during his multiple efforts to create a map better than the enacted House map, that the General Assembly did not make a good faith effort to balance the constitutional criteria in state and federal law because it overpopulated the House districts within Shelby County. This does not address the dispute with respect to Gibson County specifically. Even considering the enacted House map statewide, Cervas' statement about the General Assembly's lack of good faith is conclusory, at best. He provides no support for the statement other than his disagreement with the legislative outcome.

Interestingly, under the standard Cervas proffers, several of his own maps (of which he still speaks approvingly) would also reflect a lack of good faith effort due to similar shortcomings pointed out during the course of this litigation. While I do not accept Cervas' opinion on the issue of the General Assembly's good faith, and while there was no burden to demonstrate good faith on his part, I find that all of Cervas' maps (including the constitutionally deficient ones) were proposed in good faith. Indeed, the difficulties he encountered over many months in good faith attempts to construct a constitutional map lend support to the idea that the General Assembly's efforts were in similar good faith.

(5) Himes' Opinion on Good Faith

On the other hand, in his capacity as an expert, Himes testified that he believed the enacted House map represents an honest and good faith effort by the General Assembly to adopt a constitutionally complaint map. Himes noted that construction of a constitutional map requires the mapmaker to consider other constitutional factors (both explicit and

derived from case law) that have been less emphasized in the present case but are nonetheless valid. For example, the prohibition against splitting urban counties as a result of the *Lockert* trilogy hampers a mapmaker. Double splitting of counties is a prohibited practice under Article II, § 5 of the Tennessee Constitution, and the implication of double splitting on vote dilution in the context of VRA jurisprudence creates an additional challenge for the mapmaker to navigate.

I am satisfied that the foregoing, notwithstanding the contrary opinion offered by Cervas, makes a sufficient showing of good faith on the part of the General Assembly such that the enacted House map is constitutionally sound.

ii. Has Wygant demonstrated Bad Faith or Improper Motives by the Legislature?

Next, I consider whether, as in *Lincoln County*, the burden falls on Wygant to establish bad faith or improper motives on the part of the General Assembly in its adoption of the enacted House map.

(1) Wygant's Testimony as to Bad Faith

Wygant's proof made no such demonstration of bad faith or improper motives on the part of the General Assembly. Wygant testified about his objections to the enacted House map. As a resident of Gibson County, he dislikes the fact that Gibson County has been split into District 79 and District 82. His testimony focused on concerns such as having two representatives for Gibson County rather than one (with neither of the two residing in Gibson County); the requirement for some Gibson County citizens to get new voting cards; and that people were surprised by redistricting and that the process should have been more open.

Insofar as the splitting of Gibson County was concerned, Gibson County's population was insufficient to maintain a whole county itself. The population of Gibson County was just over 50,000, short of the 69,806 residents in an ideal district. Gibson County therefore had to be joined with an adjacent county to form a district, and either Gibson County or the other County had to be split to form a district with constitutionally

sufficient population variance. That Gibson County was chosen for the split may be disappointing to Wygant, but that does not make the enacted House map which made this selection constitutionally suspect.

Wygant's complaint about surprise and openness fails to consider the fact that decennial redistricting has been a part of American legislative practice since the beginning of the republic, nor does it appreciate the public nature of the General Assembly's process which included a website which invited, and inspired, alternative maps from the general public. The complaint that the public was surprised by redistricting also fails to contemplate that Wygant himself was aware of the process, as he testified that he discussed the redistricting process with his then-representative, Curtis Halford (notwithstanding Wygant's dissatisfaction with that conversation).

At no time did Wygant assert bad faith or improper motives by the General Assembly; rather, he testified that he did not like the outcome. Dissatisfaction with legislative action has occurred in our democratic republic since its inception. Dissatisfaction with legislative action will occur in our democratic republic "as long as we can keep it."[17] But dissatisfaction with a legislative action does not demonstrate bad faith or improper motives by the legislature.[18] While Wygant described his interaction with Representative Halford as frustrating due to the lack of information he gleaned, this was the only real testimony Wygant could contribute about the General Assembly leading up to its enactment of the disputed House map.

(2) Cervas' Testimony as to Bad Faith

Wygant also challenged the House map with the testimony of Cervas. Cervas went through a lengthy explanation of the numerous maps he prepared in an effort to improve upon the enacted House map as to compliance with federal constitutional standards and state constitutional prohibitions against districts crossing county lines. After numerous

[17] Reportedly, at the conclusion of the 1787 Constitutional Convention in Philadelphia, Pennsylvania, a lady approached the exiting delegate Benjamin Franklin and inquired, ""Well, Doctor, what do we have, a republic or a monarchy?" Franklin's sage reply was, "a republic, if you can keep it."

[18] In fact, dissatisfaction with a legislative action without more is quite similar to the sort of generalized grievance that calls standing into question; but as standing in county splitting cases has been regularly recognized by our appellate courts, I recognize no such challenge to Wygant's standing in the present case.

efforts and well into this litigation, he did produce a map (titled "13d_e") that slightly improves upon overall variance (9.89% vs. 9.90%) and split 24 counties rather than 30, while remaining consistent with various Tennessee appellate decisions which have added additional interpretive standards.[19]

In essence, the most detrimental thing Cervas could say about the actions of the General Assembly is that it could have produced a map with fewer county splits, as he was able to do after months of unsuccessful efforts, well past the time a map had to be established for the 2022 legislative elections. But at no time did Cervas suggest bad faith or improper motives on the part of the General Assembly in adopting the enacted House map. Neither do I find any evidence of bad faith or improper motives on the part of the General Assembly demonstrated in the record before this Panel.

3. Conclusion Regarding the House Map

Composing a constitutional map is like piecing together a complex puzzle because one may not focus on a single factor (e.g., county splitting) to the exclusion of other constitutional factors (e.g., population variance, Voting Rights Act concerns). Further, as the varying constitutional requirements are in some conflict, the legislature must prioritize certain constitutional requirements over others. Another layer of complexity is added when evaluating the tension between constitutional standards which may be objectively measured (e.g., the number of counties split) versus those which are more subjective in measure (e.g., the degree of population variance sufficient to satisfy federal equal protection concerns).

The nature of constructing a puzzle whose pieces have inherent conflict means that a perfect map will never be constructed by, nor required of, the General Assembly. The requirement is for the General Assembly to construct a constitutional map. I conclude that the enacted House map reflects a good faith effort by the General Assembly to construct a

[19] This consistency with the standards set forth in those Tennessee appellate decisions comes notwithstanding that Cervas did not read any of those decisions, including *Lincoln County*, *supra*. His failure to read those opinions evidently did not impact his testimony that "I believe I understand the Law on redistricting as well as probably anybody else in this country."

constitutional map, and I find no bad faith or improper motive in the effort. I would uphold the enacted House map.

B. The Senate Map

I respectfully dissent from the Panel majority on the issue of standing of Plaintiff Frankie Hunt to bring this action challenging the enacted Senate map.

Defendants moved this Panel to dismiss Hunt's claim due to lack of standing at the summary judgment phase, and again by moving for a directed verdict at the close of Plaintiffs' proof. Plaintiffs moved this Panel to find by summary judgment that Hunt's standing has been successfully established (and that the Senate map be found unconstitutional, as there was no merits defense raised by Defendants). The Panel reserved ruling on all of these motions and allowed the completion of the proof at trial and the development of a full evidentiary record. The trial having been completed, I would dismiss Hunt's claim due to a lack of standing.

1. Elements of Standing

"To establish constitutional standing, a plaintiff must satisfy three elements: 1) a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general citizenry; 2) a causal connection between the alleged injury and the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision of the court." *Fisher v. Hargett*, 604 S.W.3d, 381, 396 (Tenn. 2020). As all three elements must be present, whether the first of these elements – "a distinct and palpable injury" – is present ultimately determines whether or not Hunt has standing. I conclude she has not.

In order to be distinct, the injury in an action alleging unconstitutional conduct by the State must be personal and not speculative, and linked to more than citizenship alone. *See*, *City of Memphis v. Hargett*, 414 S.W.3d 88, 99 (Tenn. 2013). A palpable injury is one that is actual and not conjectural or hypothetical. *Id.* at 99.

a. Generalized Grievances

"[G]eneralized grievance[s] against allegedly illegal governmental conduct" have repeatedly been found insufficient to establish standing by the United States Supreme Court. *See*, *United States v. Hays*, 414 U.S. 737, 745 (1995). While standing is insufficient if the litigant's injury is predicated upon an interest that she shares in common with the general citizenry, *City of Memphis*, *supra*, at 98, this does not mean that standing may only be rejected when all citizens share the alleged injury. The term "general citizenry" may also refer to a "large class of citizens" constituting a subset of "all citizens".

In *Moncier v. Haslam*, 1 F.Supp.3d 854 (E.D.Tenn.2014), the plaintiff sought to have his name placed on a statewide ballot as a candidate for the Tennessee Court of Criminal Appeals following a recent vacancy from the Eastern District of Tennessee, despite the fact that the incumbent had recently been appointed by the Governor of Tennessee and was subject to a retention vote only. Significantly, although the election was statewide, all Tennessee citizens were not eligible to hold the judgeship. Tennessee law provided that the vacancy in question be filled by a licensed attorney at least thirty (30) old who had resided in Tennessee for at least five (5) consecutive years, and had resided in East Tennessee for at least one (1) year. Tennessee Code Annotated § 16-4-102(a).[20]. "While the Court recognizes plaintiff's injury in that he was denied the opportunity to be placed on the August 2014 ballot, it is difficult to find, on the basis of his allegations and arguments, that his claim is not a generalized grievance shared by *a large class of citizens*, all of whom are denied the opportunity to be placed on the August 2014 ballot." *Moncier*, supra, at 862 (emphasis added).

The "large class of citizens" referenced in *Moncier* was not the entire citizenry of Tennessee nor even only citizens residing within East Tennessee. This "large class of citizens" referred only to licensed attorneys at least thirty (30) old who had resided in Tennessee for at least five (5) consecutive years, and had resided in East Tennessee for at least one (1) year. Tennessee Code Annotated § 16-4-102(a). This number would certainly be significantly smaller than the 209,419 individuals who reside within an ideal Tennessee

[20] Tennessee Code Annotated § 16-4-102(a) provides, "The court of appeals shall be composed of twelve (12) judges, of whom no more than four (4) shall be residents of the same grand division of the state."

Senate district.[21] Yet this smaller number of individuals, likely less than 6,000[22], was deemed a "large class of citizens" sharing a common generalized grievance with the *Moncier* plaintiff such that he was found to lack standing.

In the present case, it is undisputed that Hunt resides within a non-consecutively numbered Senate district in the enacted Senate map. However, she fails to articulate or demonstrate how the non-consecutive numbering of the Senate district in which she resides has caused her to sustain a distinct and palpable injury that is not conjectural, hypothetical, or predicated upon an interest that she shares in common with a "large class of citizens", namely, all 715,884 citizens of Davidson County[23], including those with whom she does not share a Senate voting district.

In her deposition testimony, submitted in support of Defendants' Motion for Summary Judgment, Hunt was asked how the non-consecutive numbering of Davidson County Senate districts affects her. She responded with three (3) ways she was affected:

1. that she is "harmed whenever the Constitution is not adhered to the way it's intended" (Hunt depo., p. 50).
2. that "geography protects a community's voice within a certain area without diluting that voice" (Hunt depo., p. 52).
3. that:

> a lot of ways that I'm personally impacted are based in what I see as a dishonoring of the Constitution. I mean, I'm seeing that with, in my mind, the way Roe was overturned, you know, and also with the trigger ban that was enacted here in the state. I believe that those are unconstitutional acts. And so, I think that truly taking a stand to uphold the letter of the Constitution needs to – is important.

(Hunt depo., p. 53-54.)

The first and third of these responses clearly represent the sort of generalized grievance against allegedly illegal governmental conduct common with the general

[21] As Tennessee's population count following the 2020 census is 6,910,840, the ideal Senate district population would be determined by dividing that number by the thirty-three Senate districts.
[22] The Board of Professional Responsibility recently identified 5322 active attorneys in East Tennessee. *See*, https://docs.tbpr.org/pub/annual-report-2021-2022.pdf. The age breakdown of these attorneys is not included in the report.
[23] https://data.census.gov/profile/Davidson_County,_Tennessee?g=050XX00US47037.

citizenry – indeed, theoretically all Tennessee citizens - that has repeatedly been found insufficient to support standing. Further, there is no demonstrable causal connection between these generalized grievances and the non-consecutive numbering of Senate districts within Davidson County. Such a causal connection is the second element necessary to necessary to establish standing. *Fisher*, *supra*, at 396. The inability of these grievances to rise to the level of a distinct and palpable injury renders moot the question of their redressability, the third required element. *Id.*

Hunt's second response represents a similar generalized grievance on behalf of a "community", or "large class of citizens", even if not all Tennessee citizens. The constitutional provision requiring non-consecutive numbering of Senate districts in a county with more than one Senate district is designed to avoid simultaneous turnover of a high population county's entire Senate delegation (see JOURNAL AND DEBATES OF THE STATE OF TENNESSEE CONSTITUIONAL CONVENTION OF 1965, RESOLUTION 94 (AUGUST 11, 1965)). This necessarily impacts a large class of citizens, the entire citizenry of a high population county, rather than an individual citizen such as Hunt, because no individual citizen within a high population county has an individual right to elect the entire Senate delegation of that county.

When asked at trial about the impact of non-sequential numbering of the Davidson County Senate districts on her as a voter, Hunt again responded with essentially political concerns. It is neither necessary nor proper for the Court to evaluate the merits of her concerns, but they are noted to demonstrate their nature as interests shared by the general citizenry (regardless of whether the general citizenry agrees or disagrees with Hunt regarding these concerns).

For example, at trial, when asked about the impact of the non-consecutive numbering of Davidson County Senate districts on her as a voter, Hunt responded by expressing concern about the existence of a "deep suspicion" and the "legitimacy of democracy"; "bodily autonomy"; the "meaning of the Constitution" and whether she can depend upon it; and the personal negative feelings she experienced when *Roe v. Wade, supra*, was overturned by *Dobbs, supra*. Members of the general citizenry who both agree and disagree with Hunt concerning these issues share her interest in them. These expressions represent generalized grievances that address issues of broad interest to the

general citizenry. These additional claims at trial do not constitute particularized injuries, nor an impairment in any way on her participation in the voting process (such as denying her right to vote, denying her equal protection, or diluting her vote). Further, there is no apparent causal connection between the alleged injuries detailed in this paragraph and the non-consecutive numbering of Senate districts in Davidson County. Once again, redressability of these claims is rendered moot by their insufficient nature and disconnection from the challenged State conduct.

Hunt continued her response at trial about the impact of non-sequential numbering of the Davidson County Senate districts on her as a voter by expressing concern that the "supermajority" of the Republican Party in the General Assembly does not reflect her view and the view of Nashville citizens. She went on to speak of her displeasure about certain recent legislative actions by the General Assembly which she perceived as hostile to Nashville's local governing authorities. Again, these expressions represent generalized grievances concerning issues of broad interest to the general citizenry which represent no impairment on her right to vote or participate in the electoral process. Further, while the issues themselves at least relate to the Tennessee General Assembly, there was still no demonstrated causal connection between these alleged injuries and the challenged non-consecutive numbering of Davidson County Senate districts. Hunt's feelings of displeasure with the General Assembly's performance and policy preferences, while sincerely held, are insufficiently distinct and palpable and lacking in establishing causality such that the question of their redressability is moot.

With respect to the non-consecutive numbering of Davidson County Senate districts, at trial Hunt described this as causing her "palpable harm". However, this statement is merely conclusory. Hunt gave no testimony detailing individualized actual harm beyond what is referenced in the preceding paragraphs.

When Hunt lived in Davidson County subsequent to redistricting after the 1990 and 2000 census, Davidson County also had non-consecutively numbered Senate districts. Hunt was unaware of that fact at that time, meaning that living for more than a full decade in a Davidson County with non-consecutively numbered Senate districts had not generated any injury which was palpable to her. She testified that she probably didn't notice the prior non-consecutive numbering of Senate districts in Davidson County because the

Democratic Party was in control of the General Assembly at the time. Hunt testified she was "forced" to pay more attention after the Republican Party's control of the General Assembly to led to attacks on "bodily sovereignty".

Again, this Panel is not required to evaluate the merits of Hunt's sincerely held political beliefs and concerns. But Hunt's trial testimony has not added evidence of any distinct and palpable injuries brought about by the non-consecutive numbering of Senate districts beyond the sort of generalized grievance concerning political issues which are of common interest to the general citizenry. Additionally, there was still no demonstrated causal connection between these alleged injuries and the challenged non-consecutive numbering of Davidson County Senate districts. This again renders the redressability of these alleged injuries moot.

b. Injury in Fact

"In Tennessee, the standing doctrine requires that the person challenging the constitutionality of a statute "must show that he personally has sustained or is in immediate danger of sustaining, some direct injury ... and not merely that he suffers in some indefinite way in common with people generally." *Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn.App.2001)(citing *Parks v. Alexander*, 608 S.W.2d 881, 885 (Tenn.Ct.App.1980)). At no point has evidence been put in the record to demonstrate that Hunt has individually sustained a distinct and palpable injury that is neither conjectural nor hypothetical.

i. Right to Vote

"It is beyond question that the right to vote is a 'precious' and 'fundamental' right." *Fisher*, *supra*, at 400 (Tenn. 2020)(citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670, (1966)). While voters who allege an impairment on their right to vote have standing to sue to remedy that situation, Hunt has alleged no such impairment on her right to vote. In fact, since enactment of the Senate map, Hunt has voted in the August, 2022 and November, 2022 elections. The enacted Senate map poses no harm to Hunt's right to vote.

ii. Equal Protection

In addition, Hunt cannot establish a *prima facie* case that the redistricting plan violates her rights under the federal constitution's Equal Protection Clause because the enacted Senate map provides for a variance of 6.2%[24], well below the threshold of ten percent. *Moore, supra*, at 785, 786 (Tenn.App. 2014)(citing *Voinovich, supra,* at 161).[25]

iii. Vote Dilution

Further, nothing in the record demonstrates that the numbering labels affixed to the Senate districts in Davidson County act to dilute Hunt's vote.

Claims for vote dilution typically arise in the context of alleged violations of the VRA. "The essence of a § 2 [of the VRA] claim…is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters….That occurs where an 'electoral structure operates to minimize or cancel out' minority voters' 'ability to elect their preferred candidates.' …. Such a risk is greatest 'where minority and majority voters consistently prefer different candidates' and where minority voters are submerged in a majority voting population that 'regularly defeat[s]' their choices." *Allen*, *supra*, at 17, 18 (2023)(citing *Thornburg v. Gingles*, 478 U.S. 30, 47, 48 (1986)). Hunt asserts no such race-based claim in the present case.

In the redistricting challenge case of *Gill, supra*, the claims of certain plaintiffs based in vote dilution (as opposed to vote denial) due to alleged partisan (not racial)

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[24] "Report of Plaintiffs' Expert Regarding Tennessee State Senate Reapportionment" by Jonathan Cervas, October 10, 2022, at pg.8 (copy attached to Deposition of Jonathan Cervas, December 13, 2022, Exhibit Five of Defendants' Motion for Summary Judgment).

[25] While a variance below ten percent does not constitute a guaranteed "safe harbor", *Moore*, *supra*, at 785, 786, the further a mapped district falls below ten percent variance, the more likely it will survive scrutiny for an alleged Equal Protection violation. As compliance with federal constitutional requirements take precedence over state constitutional requirements, the enacted Senate map may represent a prioritization of compliance with the federal constitution requirements over compliance with state constitutional requirements. However, Defendants, in relying on standing without addressing the merits of Hunt's claims, have not made this argument; therefore, it is not considered here.

gerrymandering[26] were dismissed by the United States Supreme Court on standing grounds. *Gill* held that the plaintiffs' interest in collective representation in the Wisconsin legislature and in influencing that legislature's overall composition and policymaking did not present an individual and personal injury of the kind required for standing. *Id.* at 1931. "A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable 'general interest common to all members of the public.'" *Id.* (citing *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam)).[27]

In a similar fashion, Hunt's claim is not that her individual vote has been diluted or otherwise impaired. Under the enacted Senate map, and assuming she does not relocate, Hunt votes for her preferred Senate candidate in District 17 every four years, and she has no candidates to vote for in any of the other three Davidson County Senate district elections (whether held the same year or two years after she votes) – just as is true for every Davidson County voter, regardless of the numbering label affixed to the voter's Senate district. Indeed, every Tennessee voter (assuming he/she does not relocate) votes for a Senate candidate in his/her district every four years and does not participate in any of the state's other Senate elections occurring during the same year or two years after he/she votes.

Essentially, Hunt's claim, like the rejected claims of the plaintiffs in *Gill*, is that she has an interest in the collective representation of Davidson County as a whole, including Senate districts within which she does not reside, so as to influence the overall composition of all four Davidson County Senate districts. Her sole remaining expressed harm at the summary judgment level - that "geography protects a community's voice within a certain area without diluting that voice" – is precisely the sort of collective grievance that *Gill* rejected.

c. Distinct Standing Issues

Hunt points out that other redistricting cases in Tennessee (such as the *Lockert* trilogy) have either found standing when the issue in question was the crossing of counties

[26] Hunt expressly disavowed any allegation of partisan or racial gerrymandering in the enacted Senate map.
[27] *Gill* was remanded to give plaintiffs an opportunity to prove concrete and particularized injuries using evidence that would tend to demonstrate a burden on their *individual* votes.

or at least been silent such that no dismissal due to lack of standing occurred. However, challenging reapportionment maps on the basis of the consecutive or non-consecutive numbering of Senate districts within a single county carries distinct and unique standing considerations. There is no presented case analyzing standing within the context of the state constitutional requirement of non-consecutive numbering of Senate districts[28]. As stated above, with respect to non-consecutive numbering of Senate districts, this constitutional requirement necessarily impacts a large class of citizens, because no individual citizen within a high population county has an individual right to elect the entire Senate delegation of that county.

It is suggested that, under this analysis, the non-consecutive numbering of Senate districts in a high population county could never be challenged because no individual voter will legally vote in multiple Senate districts. This is not necessarily so. However, such a voter must demonstrate a particularized injury in fact that Hunt has been unable to demonstrate in the present record. The voter must also demonstrate a causal connection between the particularized injury and the non-consecutive numbering of Senate districts in a high population county, and that the injury is redressable.

Further, as the rationale behind the clause is to address the interests of a high population county, the local government of such a county could theoretically assert a claim if it felt violation of the clause impaired its representation and influence in the General Assembly.[29] Indeed, governmental entities have brought claims of constitutional violations previously. *See, e.g., City of Memphis, supra.*

2. Conclusion Regarding the Senate Map

[28] As a guideline to trial courts and the General Assembly, *Lockert I, supra*, referenced that constitutional standards of consecutive numbering of Senate districts must be addressed in reapportionment maps, but standing in such circumstances was not analyzed in the opinion. The trial court had reserved addressing the issue of consecutive numbering prior to the summary judgment ruling which led to *Lockert I.* It is unclear from the published opinions whether the issue of standing with respect to consecutive numbering was raised at any time in *Lockert I* or *Lockert II.*

[29] The question of standing in such a circumstance need not be addressed presently; it is merely presented to point out that challenge is not forever foreclosed merely by finding Hunt lacks standing based upon the present record.

For the foregoing reasons, I find Hunt's claim for standing lacking. I would have granted summary judgment to Defendants and dismissed Hunt's claim at that time due to her lack of standing. I would have granted Defendants' Motion for Directed Verdict at the close of Hunt's proof for the same reason. Finally, following the full trial of this matter, I would dismiss Hunt's claim against the enacted Senate map due to her lack of standing.[30]

III. Conclusion Summary

For the reasons, set forth above, I would dismiss the claims raised against the enacted House map by Plaintiff Wygant and hold that the enacted House map is constitutionally sound. I would also dismiss Plaintiff Hunt's claim against the enacted Senate map due to her lack of standing.[31]

s/Steven W. Maroney
STEVEN W. MARONEY
CHANCELLOR

cc: David W. Garrison, Esq.
Scott P. Tift, Esq.
John Spragens, Esq.
Janet M. Kleinfelter, Esq.

[30] I joined in the Panel's preliminary finding of standing by previous Plaintiff Akilah Moore in their April 6, 2022 Order (while dissenting as to other aspects of that Order). Moore at the time was challenging the enacted Senate map over the issue of numbering of Senate districts in Davidson County, as is now asserted by Hunt after Moore's dismissal and Hunt's entry into this case. As noted at the time, the Panel's order stated its conclusion on standing was preliminary, as the Panel was confronted with an expedited request for injunctive relief due to the then-pending filing deadline for the 2022 state Senate candidates. A "fuller evidentiary record" (*see*, *Moore v. Lee*, 644 S.W.3d 59, 62 (Tenn. 2022)) has now been developed than was available at the time of that hearing, a record which includes the particular allegations of Hunt, who was not a party at the time of the April 6, 2022 Order. As previously noted above, in *Gill*, *supra*, a unanimous United States Supreme Court agreed "[t]he facts necessary to establish standing…must not only be alleged at the pleading stage, but also proved at trial." *Id.* at 1931.

[31] In closing, I share the sentiments expressed by Chancellor Perkins in his separate Notice that, while the Panel's decision is not unanimous, the Panel members have worked well together in reaching a final result. Judge Sharp and Chancellor Perkins have conducted themselves with the utmost professionalism and, even where different conclusions have been reached, all opinions expressed by Panel members, both publicly and during deliberations, have been supported by thoughtful reasoning and respectfully considered. Special thanks are extended to Chancellor Perkins and his entire staff for the courtesy shown in making his courtroom and workspaces available for the many hearings held in this matter.

Alexander S. Reiger, Esq.
Pablo A. Varela, Esq.
Jacob R. Swatley, Esq.

EXHIBIT B

SEPARATE OPINION OF

CHANCELLOR RUSSELL T. PERKINS

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART IV

GARY WYGANT and FRANCIE HUNT,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CASE NO. 22-287-IV**
	)	
BILL LEE, Governor, TRE HARGETT, Secretary of State, MARK GOINS, Tennessee Coordinator of Elections; All in their Official Capacity Only,	)	**Russell T. Perkins, Chief Judge**
	)	
Defendants.	)	

SEPARATE OPINION OF CHANCELLOR RUSSELL T. PERKINS

In early 2022, the Tennessee General Assembly passed redistricting plans for the Senate and the House of Representatives. Three plaintiffs sued, claiming that both plans violated the Constitution of Tennessee. In April 2022, the Three-Judge Panel ("Panel"), by a 2-1 vote, issued a temporary injunction enjoining the Senate plan, which the Tennessee Supreme Court vacated a week later. Through motion practice, a new plaintiff joined the suit and two original plaintiffs were dismissed or dropped as parties.[1] After counsel for of the State of Tennessee conceded in October 2022 that they would not defend the Senate plan on the merits and after the Panel decided discovery and case dispositive motions, a three-day bench trial on the merits of the House plan and on the question of whether the new plaintiff, Francie Hunt, had standing to challenge the Senate plan was held before the Panel in April 2023.

[1] The remaining plaintiffs are Gary Wygant and Francie Hunt. Mr. Wygant is an original plaintiff and a resident of Gibson County. He is challenging the House plan. Ms. Hunt, a resident of Davidson County, was added as a party in October 2022. She is challenging the Senate plan. In the Panel's March 27, 2023 summary judgment decision, the Panel determined as a matter of law that Mr. Wygant had standing to challenge the House plan. In that same Order, the Court reserved ruling on the question of whether Ms. Hunt had standing to challenge the Senate plan.

Background and Overview

In Tennessee, the decennial undertaking of drafting redistricting plans requires the legislature to ensure that those plans: 1) do not violate federal law, the supreme law of the land; 2) follow the language of the Tennessee Constitution, the supreme law of Tennessee; and 3) if applicable, resolve potential conflicts between 1 and 2 by carefully following the formulation prescribed by the Tennessee Supreme Court, the final arbiter of disputes arising under the Tennessee Constitution.

Admittedly, legislative redistricting is inherently complex. In the context of the Senate and House plans currently before the Court, however, there is a measure of overarching structural simplicity. First, the legislature must enact redistricting plans that comply with federal law. Secondly, the legislature is required to follow the language of the state constitution. Finally, the legislature may deviate from the clear language and meaning of the state constitution, but only to the extent that federal law commands it. These straightforward propositions provide the timeless template for the legislative undertaking of preparing and adopting redistricting plans every ten years in Tennessee.

Although federal law impacts this case, there are no federal claims here. Additionally, the parties do not appear to have any dispute about how the language of the operative state constitutional provisions are to be interpreted. It is, accordingly, undisputed that our state constitution forbids the crossing of county lines and failing to consecutively number Senate districts, unless compliance with federal law requires it. In other words, the parties do not dispute what the language mandating consecutive numbering or the language prohibiting the crossing of county lines means or that neither the House plan nor the Senate plan complies with the letter of the Constitution of Tennessee. Additionally, given that Defendants have declined to defend the

constitutionality of the Senate plan on the merits, this Court is not necessarily called upon to make a detailed contested determination regarding whether it passes constitutional muster. If Ms. Hunt has standing to challenge the Senate plan, then it will be struck down as unconstitutional given that it clearly violates the language of the Constitution of Tennessee.

In Tennessee, the complexity of the ninety-five county, ninety-nine district, decennial census-driven puzzle known as the House redistricting process viewed in the context of the supremacy of federal law and the clear language of the Constitution of Tennessee militate in favor of a nuanced, sensitive inquiry and counsels against a safe harbor. This is especially true where, as here, the Tennessee Supreme Court has declined to expressly adopt a safe harbor approach. The current approach of not specifically adopting a safe harbor promotes balance in considering competing considerations in a manner that puts appropriate emphasis and priority on compliance with federal law and the language of the Constitution of Tennessee, while leaving an appropriately fulsome zone of constitutionally permissible legislative autonomy and discretion for policy makers. To the undersigned, therefore, it is arguably inconsistent for Defendants to emphasize how complex redistricting is while promoting positions which appear to move the redistricting process in the direction of a thirty-county split safe harbor with respect to the House plan and limited publicly available legislative history. In other words, complexity appears to militate in favor of tilting the process in the opposite direction. Here, Plaintiffs assert, among other things, that the Tennessee legislature upset this balance by intermingling the overarching federal and state constitutional factors with policy factors (such as core preservation and incumbency pairing concerns),[2] instead of first giving separate credence and preeminence to the foregoing

[2] The undersigned notes that core preservation, incumbency pairing concerns, and other political considerations are legitimate legislative concerns in the redistricting context. The difficulty here is that Defendants did not meet their burden of proof (or even a lighter burden of production) on the question of whether they made an effort to develop a House plan that crossed as few county lines as possible.

constitutional constraints upon the legislature's discretion before turning to policy considerations. The undersigned agrees.

As indicated above, this lawsuit challenges the constitutionality of the Tennessee House and Senate reapportionment maps enacted by the General Assembly in 2022. Plaintiffs allege that Defendants have not met their burden of showing that the House plan divides as few counties as necessary to ensure that all districts have approximately equal populations or of showing that the reapportionment of the Senate map fails to consecutively number the four senatorial districts included in Davidson County. Defendants vigorously urge that the House plan does not violate the Constitution of Tennessee and that Plaintiff Hunt does not have standing to challenge the Senate plan.

On March 1, 2022, pursuant to Tenn. Sup. Ct. R. 54, the Tennessee Supreme Court ordered a three-judge panel to preside over this case pursuant to Tenn. Code Ann. § 20-18-101. On April 17-19, 2023, this case was tried before the Panel, which consists of Russell T. Perkins, Chancellor; J. Michael Sharp, Circuit Judge; and Steven W. Maroney, Chancellor. The parties filed the trial transcript on May 16, 2023 and their post-trial briefs on May 24, 2023.

From its inception in 1796, the Constitution of Tennessee has featured provisions geared toward county-intactness. Currently, the provisions against non-consecutive numbering of certain Senate districts and the prohibition against crossing county lines in House districts are consistent with this enduring state constitutional value. Although a party, a court, or the state legislature might reasonably view this constitutional value as outdated in terms of its wisdom and/or utility, the constitutional language and the judicial precedent interpreting this language controls.

The Tennessee Constitution provides that, "in a county having more than one senatorial district, the districts shall be numbered consecutively." Tenn. Const. art. II, § 3. The Senate map

enacted by the General Assembly numbers Davidson County's four senatorial districts 17, 19, 20, and 21. The Senate map is codified at Tenn. Code Ann. § 3-1-102. Plaintiffs seek a judgment that Tenn. Code Ann. § 3-1-102 violates the Tennessee Constitution.[3] Plaintiffs are requesting this Panel to direct the General Assembly to remedy these alleged violations as required by Tenn. Code Ann. § 20-18-105.

The Tennessee Constitution requires that the House be divided into 99 districts and that "no county shall be divided in forming such a district." Tenn. Const. art. II, § 5. In light of the United States Constitution's equal population and equal protection requirements, the Tennessee Supreme Court has held that Tennessee House districts must "cross as few county lines as is necessary to comply with federal constitutional requirements." *Lockert v. Crowell*, 656 S.W.2d 836, 838 (Tenn. 1983)("*Lockert II*"). The enacted House map crosses 30 county lines. Plaintiffs assert that Defendants cannot show that the 30 county splits were necessary to comply with federal constitutional requirements. Plaintiffs are asking this Court to determine that Tenn. Code Ann. § 3-1-103 violates the Tennessee Constitution and to direct the General Assembly to remedy these alleged violations as required by Tenn. Code Ann. § 20-18-105.

The Tennessee Constitution requires an injury in fact to bring suit. *See City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013); *ACLU of Tenn. v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006). Defendants assert that Plaintiff Hunt cannot demonstrate an injury in fact sufficient to grant her standing to challenge the Senate map. Defendants further assert that Plaintiffs cannot demonstrate that the General Assembly acted in bad faith or with improper motive when enacting

[3] Defendants do not contest this claim on the merits. For this reason, Defendants did not offer any evidence at trial offering a merit-based justification for the legislature's failure to consecutively number the Davidson County Senate districts.

the House map. The undersigned opines that a showing of bad faith is not necessary under the circumstances of this case.

This case is about the legislature's duty to comply with the Constitution of Tennessee when drafting redistricting plans and, also, the extent to which Tennessee courts are open to hear Tennessee citizens' challenges to such plans. On the question of legislative duty in this complex undertaking, it is axiomatic that the Tennessee General Assembly scrupulously follow applicable Tennessee Supreme Court precedent and develop a fulsome, reviewable public record for the public and the courts to review to ascertain whether they have done so or not.[4] Secondly, as more fully discussed below, the undersigned concludes that, under the unique circumstances presented here, a Tennessee voter affected by the Senate redistricting plan that clearly does not comply with the unambiguous language of the Constitution of Tennessee has standing to challenge it.

Procedural History

Approximately two and a half weeks after both the House and Senate redistricting plans became law, Plaintiffs filed their Complaint, challenging the constitutionality of each map. Plaintiffs allege that the House plan violates the Tennessee Constitution by excessively dividing counties and that the Senate Plan violates the Tennessee Constitution by failing to consecutively number the districts in Davidson County. On March 11, 2022, together with an Amended Verified Complaint, Plaintiffs sought a temporary injunction. On April 6, 2022, a majority of the Panel granted a temporary injunction with respect to the Senate plan. On April 7, 2022, Defendants filed for extraordinary appeal pursuant to Tenn. R. App. P. 10.

[4] Although the Panel unanimously ruled in Defendants' favor on the discovery dispute, which allowed them to withhold under legislative prerogatives otherwise discoverable information clearly relevant to Plaintiffs' claims, that does not mean that the issue of what was not disclosed or produced in discovery disappears from this case altogether. This is particularly true where complex factual questions are presented for the Panel's consideration on the constitutionality of the House plan and about whether the General Assembly's approach is consistent with Plaintiff's meritorious assertion that the legislative effectively utilized a thirty-county safe harbor in adopting the House plan.

The Tennessee Supreme Court assumed jurisdiction and granted the application for extraordinary appeal. On April 13, 2022, the Tennessee Supreme Court vacated the temporary injunction, determining that Plaintiffs failed to demonstrate that their alleged harms outweighed the electoral harm created by delaying the Senatorial candidate filing deadline and its subsequent harms on the administration of the upcoming election. On remand, Plaintiffs filed a Second Amended Complaint on June 16, 2022, which reflected that relief was now sought in advance of the 2024 elections. On October 17, 2022, Plaintiffs filed their Third Amended Complaint, which substituted Plaintiff Francie Hunt for Plaintiff Akilah Moore.

After the Tennessee Supreme Court vacated the Panel's temporary injunction enjoining the Senate plan, Defendants stated several months later in the technical record that they were no longer defending the constitutionality of the Senate plan on the merits, asserting that their sole defense of the Senate plan would be on standing.[5] In this same time frame, the Panel ruled that information relevant to legislative intent and redistricting approaches discussed by the legislature behind closed doors was not discoverable. Given Defendants' concession that they would not be defending the Senate plan on the merits, the information shielded from discovery relates to the House plan, which was vigorously contested on the merits at trial.

Gary Wygant is a resident and registered voter of Gibson County. For the decade preceding the General Assembly's 2022 reapportionment of the Tennessee House of Representatives, Gibson County was not divided between two House districts. Rather, Gibson County fell wholly within House District 79. Under the General Assembly's 2022 reapportionment, Gibson County will be split between two House districts, with each district paired with a neighboring county or counties.

[5] Although the Tennessee Supreme Court did not reverse the Panel's grant of a temporary injunction as to the Senate plan on the basis of standing, the high Court made it clear that the standing issue remained an open question for this Panel's consideration.

Plaintiffs allege that the newly enacted House map violates Mr. Wygant's constitutional right to countywide representation by a single House member and his right to vote in a House district constructed in compliance with the Tennessee Constitution.

Francie Hunt is a resident of Davidson County and resides within Senate District 17, which was created by the legislature's 2022 reapportionment. Ms. Hunt is registered to vote in Davidson County. Senate District 17 is not consecutively numbered with the other three Davidson County senatorial districts, which are numbered 19, 20, and 21. Plaintiffs allege that the newly enacted Senate map violates Ms. Hunt's constitutional right, as a Davidson County resident and voter, to representation by a consecutively numbered county senatorial delegation and her right to vote in a senatorial district constructed in compliance with the Tennessee Constitution.

The Tennessee Constitution requires the General Assembly to reapportion both houses of the General Assembly after each decennial census made by the Bureau of Census of the United States is available to the General Assembly. *See* Tenn. Const. art. II, § 4. The Tennessee Constitution permits the General Assembly to use geography, political subdivisions, and substantially equal population as considerations when drawing legislative districts. *See id.* The Tennessee Constitution requires the General Assembly to apportion the House of Representatives into 99 districts. *See* Tenn. Const. art. II, § 5. The Tennessee Constitution sets the length of individual senate terms at four years. *See* Tenn. Const. art II, § 3. Further, the Tennessee Constitution staggers the election of senatorial districts such that half of Tennessee's Senate seats are up for election every two years.

Discussion

The Senate Map

In 2022, the legislature reapportioned the districts for the Senate. The initial bill, Senate Bill 0780, was introduced on February 9, 2021. The plan had an overall deviation of 6.17%, split 10 counties, paired no incumbents, and had four majority-minority districts. Senate Bill 0780 was referred to the Senate Judiciary Committee and was recommended for passage on January 18, 2022. When Senate Bill 0780 came before the full Senate for third and final consideration on January 20, 2022, Senator Yarbro introduced Amendment 2, which presented a new and different plan for reapportionment. Amendment 2 had an overall deviation of 7.7%, split 8 counties, paired no incumbents, and had 3 majority-minority districts. Amendment 2 was ultimately tabled, and the Senate voted to adopt Senate Bill 0780.

Senate Bill 0780 created four senatorial districts within Davidson County. Three of these districts are wholly within Davidson County. These three districts are numbered 19, 20, and 21. The fourth district includes a portion of Davidson County as well as all of Wilson County. This district is numbered 17.

The Tennessee General Assembly completed its latest decennial reapportionment of the Senate through its enactment of Senate Bill 0780, Pub. Chap. 596. The Tennessee Senate passed SB 0780 on January 20, 2022, with a vote of 26 in favor and 5 opposed. The Tennessee House of Representatives passed SB 0780 on January 24, 2022 with a vote of 71 in favor and 26 opposed. Governor Lee signed SB 0780 on February 6, 2022. The Senate map is codified at Tenn. Code Ann. § 3-1-102.

When a single county contains more than one senatorial district, the Tennessee Constitution requires the districts in that county to be numbered consecutively. *See* Tenn. Const. art. II, § 3.

This requirement ensures that half of a large county's senatorial districts will be on the ballot in presidential election years (even-numbered districts) and the other half will be on the ballot in gubernatorial election years (odd-numbered districts). The General Assembly's new Senate map creates four senatorial districts within Davidson County, including three districts that are entirely within Davidson County and a fourth district that includes a portion of Davidson County with all of Wilson County. The General Assembly numbered these districts 17, 19, 20, and 21. Thus, three districts will be on the ballot during gubernatorial elections and one district will be on the ballot during presidential elections. Ms. Hunt alleges that the Senate apportionment map violates the Tennessee Constitution's requirement that senatorial districts shall be numbered consecutively. *See* Tenn. Const. art. II, § 3. Defendants are not defending this claim on the merits, but vigorously assert that Ms. Hunt does not have standing to challenge the Senate plan even though she is clearly in the subset of voters who reside in the Davidson County portion of non-consecutively numbered Senate District 17. The undersigned respectfully agrees with Ms. Hunt and would hold that she has standing to challenge the facially unconstitutional Senate plan.

Standing

As a threshold issue, Defendants assert that Plaintiffs cannot demonstrate an injury in fact sufficient to convey standing to challenge the Senate map. Questions of justiciability must be considered before proceeding to the merits of any remaining claims.[6] *See UT Med. Grp., Inc. v. Vogt*, 235 S.W.3d 110, 119 (Tenn. 2007). To qualify as justiciable, an issue must place a real interest in dispute and not be merely theoretical or abstract. *See Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cty.*, 301 S.W.3d 196, 203 (Tenn. 2009); *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 838 (Tenn. 2008). A justiciable issue is one that gives rise to "a genuine,

[6] As stated above, Defendants are not defending the merits of the Senate map.

existing controversy requiring the adjudication of presently existing rights." *Vogt*, 235 S.W.3d at 119. Justiciability encompasses several distinct doctrines, including standing.

Standing determines whether a litigant is entitled to pursue judicial relief for a particular issue or cause of action. *See ACLU of Tenn.*, 195 S.W.3d at 619. "The primary focus of a standing inquiry is on the party, not on the merits of the claim." *Metro. Air Research Testing Auth. v. Metro. Gov't of Nashville & Davidson Cty.*, 842 S.W.2d. 611, 615 (Tenn. Ct. App. 1992). Standing requires a "careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984).

> Our jurisprudence recognizes two categories of standing that govern who may bring a civil cause of action: non-constitutional standing[7] and constitutional standing. Non-constitutional standing focuses on considerations of judicial restraint, such as whether a complaint raises generalized questions more properly addressed by another branch of the government, and questions of statutory interpretation, such as whether a statute designates who may bring a cause of action or creates a limited zone of interests. Constitutional standing . . . is one of the "irreducible ... minimum" requirements that a party must meet in order to present a justiciable controversy.

City of Memphis, 414 S.W.3d at 98 (internal citations omitted).

Here, Defendants vigorously and thoughtfully assert that Ms. Hunt does not have constitutional standing to challenge the Senate plan. To establish constitutional standing, a plaintiff must satisfy three criteria:

> First, a party must show an injury that is "distinct and palpable"; injuries that are conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general citizenry are insufficient in this regard. Second, a party

[7] To establish prudential standing:

> (1) a plaintiff must assert his own legal rights and interests, without resting the claim on the rights or interests of third parties; (2) the claim must not be a 'generalized grievance' shared by a large class of citizens; and (3) in statutory cases, the plaintiff's claim must fall within the 'zone of interests' regulated by the statute in question.

Wuliger v. Mfrs. Life Ins. Co., 567 F.3d 787, 793 (6th Cir. 2009)(quoting *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999)).

> must demonstrate a causal connection between the alleged injury and the challenged conduct. While the causation element is not onerous, it does require a showing that the injury to a plaintiff is "fairly traceable" to the conduct of the adverse party. The third and final element is that the injury must be capable of being redressed by a favorable decision of the court.

Id. (internal citations omitted).

A generalized grievance against allegedly illegal governmental conduct is insufficient to show standing. *See United States v. Hays*, 515 U.S. 737, 743 (1995).

> "The Supreme Court has long held that a plaintiff does not have standing 'to challenge laws of general application where their own injury is not distinct from that suffered in general by other . . . citizens.'" *Johnson v. Bredesen*, 356 Fed. Appx. 781, 784 (6th Cir. 2009)(quoting *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598, 127 S. Ct. 2553, 168 L. Ed. 2d 424 (2007)). "This is because the judicial power of the United States defined by Art. III is not an unconditional authority to determine the constitutionality of legislative or executive acts." *Id.* (alteration, internal quotation marks, and citation omitted). Thus, when a plaintiff asserts that the law has not been followed, the plaintiff's "injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that [the Supreme Court] ha[s] refused to countenance in the past." *Lance v. Coffman*, 549 U.S. 437, 442, 127 S. Ct. 1194, 167 L. Ed. 2d 29 (2007) (per curiam). *Cf. Baker v. Carr*, 369 U.S. 186, 207-08, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (finding voters had standing to challenge state apportionment statute under Equal Protection clause).

Moncier v. Haslam, 1 F. Supp. 3d 854, 859 (E.D. Tenn. 2014).

" . . . [T]he 'party who seeks the exercise of jurisdiction'" has the burden "'to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *Hays*, 515 U.S. at 743 (quoting *McNutt v. GMAC*, 298 U.S. 178, 189 (1936); *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). A person's right to vote is individual and personal in nature, and "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

As to the Senate map, Defendants argue that Plaintiffs have alleged only a generalized grievance shared by a large class of Tennessee voters and, thus, cannot show an injury in fact.

More specifically, Defendants assert that Plaintiff Francie Hunt was not articulated how the non-consecutive number of Senate districts in Davidson County harms her in any distinct or palpable way.

Ms. Hunt, however, resides in Davidson County within a non-consecutively numbered senatorial district. The consecutive numbering requirement is grounded in the specific constitutional concern about avoiding turnover in Senate representation in populous counties and in preserving institutional knowledge and experience. Additionally, the constitutional requirement of consecutive numbering of Senate districts in populous counties is a straightforward example of what the undersigned is characterizing as the county-intactness constitutional value imbedded in the Constitution of Tennessee. As a Davidson County voter in Senate District 17, Ms. Hunt is being deprived of the benefit of a stable senatorial delegation as prescribed by Article II, Section 3 of the Tennessee Constitution.

The legislature decided, without any discernable substantive justification, not to number the Davidson County senatorial districts consecutively. This was contrary to the plain language of Article II, Section of the Constitution of Tennessee, the county-intactness value imbedded in the Constitution of Tennessee, and Ms. Hunt's constitutional right to vote in a senatorial district consecutively numbered with Davidson County's other three senatorial districts. Defendants have taken the position that no one has standing to challenge the clearly unconstitutional Senate plan. Under applicable case law, however, the undersigned concludes that Ms. Hunt has standing to challenge the Senate plan.

As alluded to earlier, the parties agree that Tennessee's three-pronged constitutional standing test applies. "To establish constitutional standing, a plaintiff must satisfy three indispensable elements." *Hargett*, 414 S.W.3d at 98 (citation 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 construct." *Id.* Third, "the injury must be capable of being redressed by a favorable decision of the court." *Id.* Defendants are claiming the first (injury) and third (redressability) elements of this test. Defendants are not disputing that the legislature's enactment of Tenn. Code Ann. § 3-1-102 caused any alleged cognizable injury Ms. Hunt might be experiencing.

The undersigned concludes that the Senate map has infringed upon Ms. Hunt's constitutional right to vote in a senatorial district consecutively numbered with the other senatorial districts in her county of residence. This is an injury distinct to her; the injury is palpable, readily perceptible, tangible, noticeable and admittedly directly caused by the challenged legislation. The fact that Ms. Hunt shares her injury with other voters in the Davidson County portion of Senate District 17, in contrast to voters in Tennessee's other populous counties, does not operate to close the courthouse doors to her. A voter's injury does not have to be individualized for that voter to have standing to bring a constitutional challenge to a legislative redistricting plan especially given that the legislature arguably had knowledge to a substantial certainty that the Senate plan was unconstitutional and that it would affect a discrete subset of voters in a particular populous county. Similarly, given that one of the laudatory purposes of decennial redistricting is to preserve the federal constitution's context-driven value of one-person one-vote, it does not follow that a person has to literally be denied the right to vote altogether before he or she is eligible to challenge a redistricting plan that affects her vote in a fashion clearly prohibited by the state constitution.

Standing, of course, must be evident in the record. This does not mean that a non-attorney litigant such as Ms. Hunt should be required to explain why she should be allowed to challenge the Senate plan with the same clarity and detail as, for example, a member of the bar would. Ms.

Hunt lives in the Davidson County portion of non-consecutively numbered senatorial District 17. She is registered to vote, and she does vote.

The Tennessee General Assembly enacted a Senate map via Public Chapter 596, amending Tenn. Code Ann. § 3-1-02. In this Senate plan, Davidson County's four senatorial districts are numbered non-consecutively as Senate Districts 17, 19, 20, and 21. As forestated, this violates the clear language of 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." Tenn. Const. Art. II, § 3. As mentioned earlier, the Defendants did not defend the constitutionality of the Senate plan on the merits.

Ms. Hunt lives in Hermitage, Davidson County, Tennessee, within Senate District 17. It is undisputed that Ms. Hunt is registered to vote in District 17, that she voted in District 17 in all three elections held in 2022, and that she intends to continue voting regularly in District 17 in the future.

Ms. Hunt asserts that she has standing to challenge the 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 injured caused directly by the challenged action." Plaintiffs' Post-Trial Brief, p. 5. Ms. Hunt contends that this is a continuing infringement on this right for the remainder of the decade, unless her injury is redressed by judicial intervention. Defendants assert that this Panel has no judicial power to redress, or even entertain, this clear violation of the Constitution of Tennessee.

Tennessee courts have previously adjudicated Senate mis-numbering claims on the merits in *Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982) and *Lockert II (Locket v. Crowell*, 656 S.W.2d 836 (Tenn. 1983)). In other contexts, redistricting challenges were dismissed for lack of standing

because the plaintiffs did not live in the allegedly adversely affected district. *United States v. Hayes*, 515 U.S. 737, 739 (1995); *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

Ms. Hunt is not, as Defendants allege, asserting a generalized grievance shared with a large non-discrete class of voters. Ms. Hunt's injury, although shared with a subset of other Davidson County voters residing in Senate District 17, stem from being treated differently from a larger group of voters in populous counties in Tennessee. Ms. Hunt's injury is not merely a theoretical disagreement with the Senate plan.

Defendants also assert that Ms. Hunt's injury is not redressable because there is now no mechanism available to change the number of a sitting Senator's district halfway through his or her four-year term. The undersigned respectfully disagrees. The General Assembly has the power to swap the numbers of two Senators' districts during the term of office without affecting their ability to serve their full terms. The General Assembly can adopt a remedial, constitutional plan for the Senate.[8]

The undersigned believes the following analysis at Pages 10-11 of Plaintiffs' Post-Trial Brief is persuasive:

> 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

[8] The Court is not aware of Defendants offering proof supporting this particular redressability argument.

> 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.

Plaintiffs' Post-Trial Br., pp. 10-11.

Plaintiff Hunt is requesting that the unconstitutional Senate plan be corrected before the 2024 legislative elections. She is asking this Panel to give the General Assembly a minimum of 15 days to enact a new Senate plan that correct its constitutional infirmity. *See* Tenn. Code Ann. § 20-18-105(a). If the General Assembly does not enact new maps by the Panel's deadline, then Plaintiffs are requesting that the Panel impose an interim districting plan to be applied only to the 2024 legislative election cycle. *See* Tenn. Code Ann. § 20-18-105(b).

The House Map

As the House map is a legislative enactment, the standard of review for constitutional challenges is applicable. Where there is a challenge to the constitutionality of a state statute, legislative acts are presumed to be constitutional and every doubt is to be resolved in favor of the statute's constitutionality. *See State v. Pickett*, 211 S.W.3d 696, 700, 780 (Tenn. 2007). To be invalid, a statute must be plainly at odds with a constitutional provision. *See Perry v. Lawrence Cty. Election Comm'n*, 411 S.W.3d 538, 539 (Tenn. 1967).

The party challenging the constitutionality of a redistricting plan bears the burden of establishing its invalidity. *See Lockert I*, 631 S.W.2d at 709-10, 714-15. If the challenging party successfully establishes that the plan is in violation of a constitutional requirement, then the burden

shifts to the defendants to show that their actions were necessary to comply with federal constitutional requirements. *See id.* at 714; *see also Moore v. State*, 436 S.W.3d 775, 786 (Tenn. Ct. App. 2014)(quoting *Tennant v. Jefferson Cty. Comm'n*, 133 S. Ct. 3, 5 (2012))(If the party challenging the redistricting establishes that the population differences "would practicably be avoided," then the burden is on the State to demonstrate that those differences "were necessary to achieve some legitimate state objective.").

Tennessee Constitution Article II, Section 5 provides in pertinent part:

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

Tenn. Const. art. II, § 5.

There is no dispute about this constitutional language or what the framers of the Constitution of Tennessee meant by this language. In sum, this provision provides that the Tennessee General Assembly cannot draw House districts that cross county lines. It is undisputed that the House plan has 30 districts that cross county lines and that the House plan does not comply with the language of the Tennessee Constitution as written. However, the requisite inquiry is far from over, given there is overlapping federal law and Tennessee Supreme Court precedent which may excuse, on a principled context-sensitive basis, a particular General Assembly's failure to follow the strict letter of the Tennessee Constitution in reapportionment cases.

The Fourteenth Amendment to the United States Constitution and Tennessee's equal protection provisions require "equality of population among districts, insofar as is practicable." *Lockert I*, 631 S.W.2d at 706-07; U.S. Const. amend. XIV; Tenn. Const. art. II, §§ 4, 6. This

principle, known as the "one person, one vote" principle, is the overriding objective of any redistricting plan. *See Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

An additional federal requirement is established by Section 2 of the Voting Rights Act, formerly codified as 42 U.S.C. § 1973 but now as 52 U.S.C. § 10301:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id. "The essence of a [Section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).

The Tennessee Supreme Court has previously provided guidance on conflicts between these various provisions, explaining that Sections 3 and 5 of Article II of the Tennessee Constitution remain binding unless federal standards would render it impossible for the General Assembly to comply with the requirement at issue. *See Lockert I*, 631 S.W.2d at 711, 714-15. "Equality of population" is the "principal consideration[,]" but "[p]rimary consideration must also be given to preserving minority strength." *Id.* at 714. Though "of secondary import to equal

protection requirements," the requirements of the Tennessee Constitution are nonetheless valid and must be enforced insofar as possible." *Id.* at 714-15. Thus, "equal protection, preserving minority voting strength, . . . not crossing county lines, . . . contiguity of territory[,] and consecutive numbering of districts" are all part of any redistricting plan. *Id.* at 715. With respect to the division of counties to create House districts, the Tennessee Supreme Court reconciled these mandates by instructing the General Assembly that its plan "must cross as few county lines as is necessary to comply with the federal constitutional requirements." *Id.* at 715; *see also Lockert II*, 656 S.W.2d 836, 838 (Tenn. 1983).

No safe harbor[9] based upon prior decisions exists when resolving the tensions of competing constitutional mandates. *See Moore*, 436 S.W.3d at 786 (citing *Cox v. Larios*, 542 U.S. 947, 949 (2004)("There is no safe harbor.")); *Rural West Tenn.*, 836 F. Supp. at 450 (rejecting Defendants' argument that past decisions created a safe harbor for future redistricting plans); *Lockert I*, 631 S.W.2d at 714 ("The variance certainly should not be greater than any figure which has been approved by the United States Supreme Court; nor would such maximum figure automatically be approved, because the variance for any state will be judged solely by the circumstances present in that state."). The Tennessee Supreme Court has specifically rejected the argument that a deviation of 10% is *de minimis*. *See Moore*, 436 S.W.3d at 786. While in some instances a deviation of less than 10% may not be justified, in others a deviation of more than 10% may be justified. *See id.*

After the 2020 census, the legislature reapportioned the districts for the Tennessee House of Representatives. The initial bill, House Bill 1035, was introduced on February 10, 2021. This plan contains 99 single member districts; is wholly based on 2020 census geography and

[9] Plaintiffs vigorously assert that the legislature used what amounted to a safe harbor approach in favor of allowing 30 counties to be split in formulating the House plan. The undersigned respectfully agrees.

population data; and establishes 99 contiguous districts. The plan has an overall variance of approximately 9.91%, splits a total of 30 counties, and maintains 13 majority-minority districts.

During the legislative process, State Representative Bob Freeman proposed an alternative House map with only 23 county divisions. This alternate proposal included a range of districts whose populations deviated from the equal population ideal in a range from -4.74% to +4.98% with a total variance of 9.72%. This alternative proposed House map divided seven fewer counties than the enacted House map while achieving a smaller total population variance and a superior average deviation from the ideal district population across all districts. Additionally, the alternate proposed House map divided fewer political subdivisions (18) than the enacted map (65).

The House voted to adopt House Bill 1035. It was then referred to the Tennessee Senate (Senate Bill 0779, Pub. Chap. 598 ("SB 0779")). The Tennessee General Assembly completed its latest decennial reapportionment of the House through its enactment of SB 0779. The House passed SB 0779 on January 24, 2022 with a vote of 70 in favor and 27 opposed. The Senate passed SB 0779 on January 26, 2022 with a vote of 23 in favor and 6 opposed. Tennessee Governor Bill Lee signed SB 0779 on February 6, 2022. Under the enacted map, House District 71 will comprise four counties, three of which – Lawrence, Hardin, and Maury – are divided.

The 2020 census identified 6,910,840 people as the total population of Tennessee. By dividing this total population among Tennessee's 99 House districts, each House district would contain 69,806 people, if every House district contained an equal population. The House map created by SB 0779 includes a range of districts whose populations deviate from the equal population ideal in a range from -4.82% to +5.09%, with a total variance of approximately 9.91%. The enacted House map also divides 30 counties in the creation of multi-county districts: Anderson, Bradley, Carroll, Carter, Claiborne, Dickson, Fentress, Gibson, Hamblen, Hardeman,

Hardin, Hawkins, Haywood, Henderson, Henry, Jefferson, Lawrence, Lincoln, Loudon, Madison, Maury, Monroe, Obion, Putnam, Roane, Sevier, Sullivan, Sumner, Williamson, and Wilson. The House map is codified at Tenn. Code Ann. § 3-1-103.

The Tennessee Constitution prohibits the division of individual counties when creating multi-county House districts, and the Fourteenth Amendment to the U.S. Constitution requires the creation of legislative districts with roughly equal populations. The Tennessee Supreme Court has reconciled these two constitutional provisions by holding that the General Assembly must create as few county-dividing districts as is necessary to ensure that all legislative districts contain roughly equal populations. *See Rural West Tenn. African-Am. Affairs Council, Inc. v. McWherter*, 836 F. Supp. 447, 450 (W.D. Tenn. 1993)("*Rural West Tenn.*"); *Lockert II*, 656 S.W.2d at 838. Plaintiffs allege that the General Assembly's reapportionment of the House of Representatives violates this constitutional mandate by creating significantly more county-dividing House districts than necessary to maintain districts with roughly equal populations. The House reapportionment plan crosses 30 county lines.

At trial, Plaintiffs sufficiently demonstrated that the House map violates the constitutional prohibition against crossing county lines. As such, the burden shifted to Defendants to show that the General Assembly was justified in passing a reapportionment map that crossed county lines and to show that as few county lines as necessary were crossed to comply with the federal constitutional requirements. *See Lockert I*, 631 S.W.2d at 715; *see also Lockert II*, 656 S.W.2d at 838.

The undersigned believes that the House plan can be properly analyzed in a series of steps. Before getting to the battle of the experts and the other particularized proof on the details and merits of the House plan, the first thing to determine is whether the legislature followed the

bedrock principle, memorialized in judicial precedent, that the boundaries set by the clear language of the Constitution of Tennessee, which prohibits the crossing of county lines, should not be traversed unless compliance with federal law mandates it. If the House plan complies with this principle, then the details of the proof, expert and otherwise, viewed in light of the totality of the circumstances, should be examined consistent with applicable precedent.

The undersigned, however, opines that the legislature's approach to formulating the House plan had the effect, perhaps unintended, of imbedding a thirty-county split safe harbor in its House plan. Alternatively, along the same lines, the undersigned is convinced that Defendants did not meet their burden of proof, or even their burden of production, on the question of whether the legislature actively sought to ascertain whether it could prepare a House plan that complied with federal law and crossed as few county lines as this possible.

Given this conclusion, the undersigned need not present a lengthy discourse on the "battle of experts" that occupied the bulk of trial time, especially given that the majority of the Panel has concluded that the House plan is constitutional. Suffice it to say that the undersigned opines that Plaintiffs presented solid expert proof in a context where they did not bear the burden of proof.

The undersigned respectfully DISSENTS from the majority of the Panel's decision to hold that the House plan is constitutional. The House plan is unconstitutional for the following reasons:

1. Mr. Wygant was adjudged to have standing in the Panel's March 27, 2023 summary judgment decision.

2. The legislature never undertook to develop and adopt a House plan that crossed as few county lines as possible. Instead, the legislature treated the thirty-county split as a safe harbor, contrary to Tennessee precedent.

3. Defendants had the burden of proof on the question of whether the House plan crossed as few county lines as necessary to comply with federal constitutional requirements. Defendants made no real effort to meet this burden of proof. In any event, it is clear to the undersigned that Defendants did not meet this burden of proof at trial.

4. The expert proof established that the legislature could have developed a plan that complied with federal law that crossed substantially fewer counties than the House plan.

Conclusion

Based on the foregoing, the undersigned would hold that the Senate plan and the House plan should both be struck down as violative of the Constitution of Tennessee.

s/Russell T. Perkins
RUSSELL T. PERKINS,
Chief Judge

cc: David W. Garrison, Esq.
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RULE 58 CERTIFICATION
A Copy of this order has been served by U. S. Mail upon all parties or their counsel named above.

Deputy Clerk and Master
Chancery Court

11/22/23
Date