IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT

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

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs Telise Turner, Gary Wygant, and Francie Hunt submit this Memorandum in Support of their Motion for Summary Judgment.

INTRODUCTION

Plaintiffs allege the newly enacted district maps applicable to the Tennessee Senate and to the Tennessee House of Representatives violate the express language of the Tennessee Constitution, as interpreted by the Supreme Court of Tennessee.

Senate Claim: The Tennessee Constitution states, in "a county having more than one senatorial district, the districts *shall* be numbered consecutively." Tenn. Const. art. II, Sec. 3 (emphasis added). In February 2022, the General Assembly enacted a new Senate map that numbers Davidson County's four senatorial districts 17, 19, 20, and 21. Defendants do not contest

this claim on the merits.[1] For these reasons, the Court should determine Tennessee Code Annotated § 3-1-102, which codifies the new Senate map, violates the Tennessee Constitution. The Court should grant Plaintiffs' Motion for Summary Judgment on Plaintiffs' Senate claim and direct the General Assembly to remedy these violations as required by Tennessee Code Annotated § 20-18-105.

House of Representatives Claim: The Tennessee Constitution requires the House of Representatives to be divided into 99 districts and requires, "no county shall be divided in forming such a district." Tenn. Const. art. II, § 5. In light of the federal 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). Once a plaintiff has demonstrated the General Assembly split counties in forming House districts, the burden shifts to defendants "to show that the Legislature was justified in passing a reapportionment act which crossed county lines" by establishing that dividing counties was necessary to comply with federal constitutional requirements. *Lockert v. Crowell*, 631 S.W.2d 702, 714 (Tenn. 1982).

Plaintiffs are entitled to summary judgment on their House of Representatives claim because Defendants have not produced evidence sufficient to meet their burden of proving the 30 county splits in the Enacted House Map were necessary to comply with federal constitutional requirements. Defendants chose to shield all evidence outside the legislative history from use in this litigation based on an assertion of privilege, and the legislative history demonstrates the

[1] Responding to Plaintiffs' Motion to Compel, Defendants stated, "There is no dispute that the Senate districts in Davidson County are not consecutively numbered. Defendants are prepared to stipulate to that fact. And to the extent that stipulation does not suffice, Defendants are also prepared to stipulate that they will only defend the challenged Senate map on standing grounds, not on the merits." (Resp. to Motion to Compel, at pp. 1-2.)

General Assembly applied an incorrect legal standard concerning county splitting. Specifically, the legislative history reveals the General Assembly, through its mapmaker, sought only to split no more than 30 counties, rather than applying the Tennessee Supreme Court's holding that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements." *Lockert II*, 656 S.W.2d at 838. Moreover, Defendants' own expert witness states that seven of the 30 county splits included in the Enacted House Map were not justified by federal constitutional requirements.

For these reasons, the Court should determine Tennessee Code Annotated § 3-1-103, which codifies the new House of Representatives map, violates the Tennessee Constitution. The Court should grant Plaintiffs' Motion for Summary Judgment on Plaintiffs' House of Representatives claim and direct the General Assembly to remedy these violations as required by Tennessee Code Annotated § 20-18-105.

FACTS

I. Facts Underlying Plaintiffs' Challenge to the Enacted Senate Map

The Tennessee General Assembly enacted its decennial reapportionment of the Tennessee Senate via Public Chapter 596, which amended Tennessee Code Annotated § 3-1-102 to codify the State's new senatorial districts.[2] This enacting legislation will be referred to herein as "Public Chapter 596." Governor Lee signed Public Chapter 596 into law on February 6, 2022.[3] The reapportioned Senate district map enacted by Public Chapter 596 will be referred to herein as the "Enacted Senate Map."

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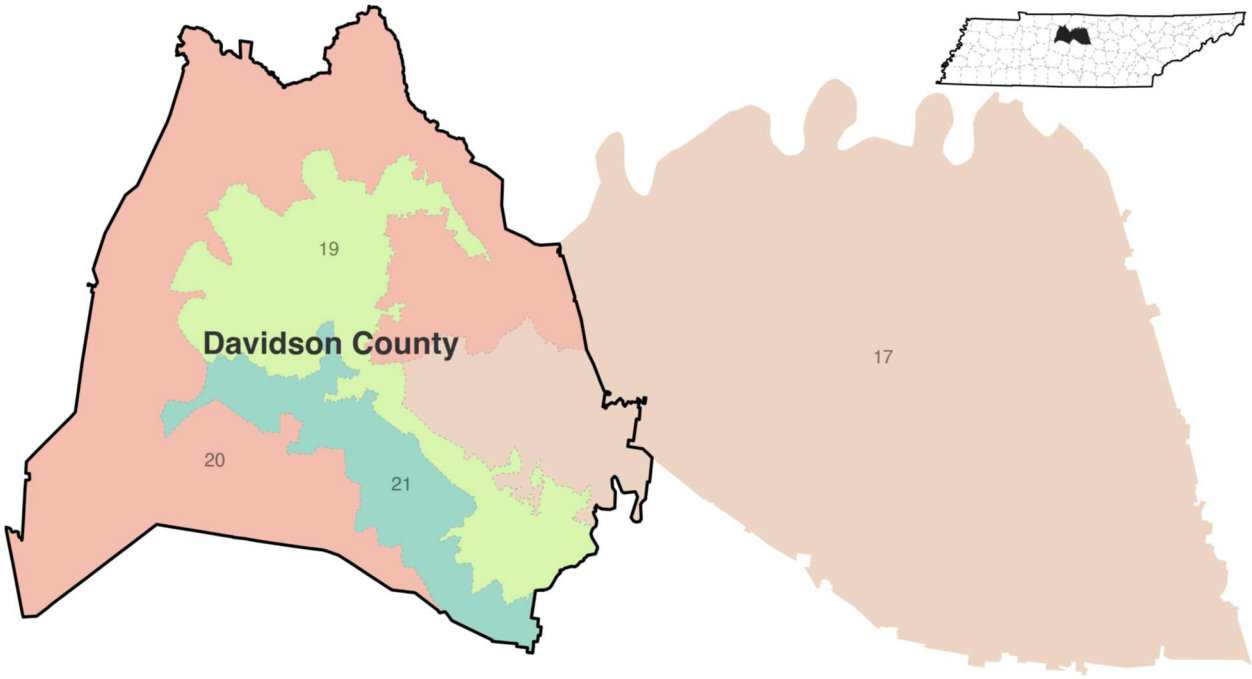
2 Plaintiffs' Statement of Material Facts (hereinafter "SMF") at ¶ 6.

3 SMF ¶ 7.

Public Chapter 596 created four senatorial districts within Davidson County.[4] Three of these districts are wholly within Davidson County.[5] These three districts are numbered 19, 20, and 21.[6] The fourth district includes a portion of Davidson County as well as all of Wilson County.[7] This district is numbered 17.[8] Thus, Tennessee Code Annotated § 3-1-102 now numbers Davidson County's four senatorial districts 17, 19, 20, and 21.[9] The following image depicts the four Davidson County senatorial districts created by Public Chapter 596.



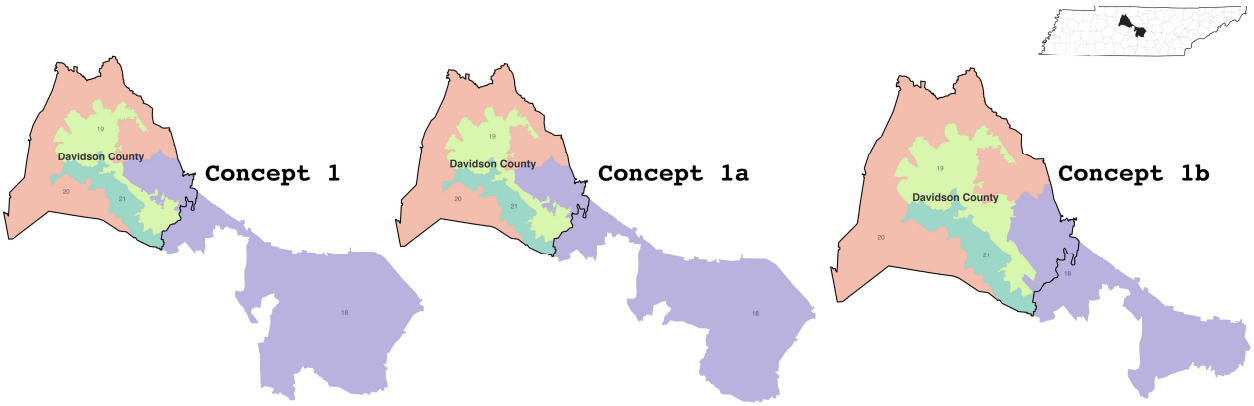
Defendants agree the Enacted Senate Map's Davidson County senatorial districts are not consecutively numbered, and Defendants have represented to the Court they will not defend the Enacted Senate Map's Davidson County senatorial districts on the merits. Responding to Plaintiffs' Motion to Compel, Defendants stated, "There is no dispute that the Senate districts in

4 SMF ¶ 8.
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*

Davidson County are not consecutively numbered. Defendants are prepared to stipulate to that fact. And to the extent that stipulation does not suffice, Defendants are also prepared to stipulate that they will only defend the challenged Senate map on standing grounds, not on the merits." (Resp. to Motion to Compel, at pp. 1-2.)

Defendants' handling of fact discovery reflects their decision not to defend the Enacted Senate Map's Davidson County senatorial districts on the merits. Responding to interrogatories, Defendants did not identify any witnesses on whom they will rely in defending the Senate claim.[10]

Defendants' handling of expert discovery also reflects their decision not to defend the Enacted Senate Map's Davidson County senatorial districts on the merits. Plaintiffs' expert witness, Dr. Jonathan Cervas, produced an expert report stating his opinion that the General Assembly could have enacted a Senate map with all four Davidson County senatorial districts numbered consecutively.[11] In his report, Dr. Cervas created three illustrative maps, each of which reflect Dr. Cervas's opinion that the General Assembly could have created consecutively numbered districts in Davidson County by creating a District 18 that pairs the portion of Davidson County currently included in District 17 with a portion of Rutherford County.[12]



10 SMF ¶ 9.
11 SMF ¶ 10.
12 *Id.*

Defendants did not disclose an expert witness to respond to Dr. Cervas's report concerning the Senate claim, and Defendants' expert witnesses on the House claim testified in their depositions they were not retained to proffer expert opinions on the Senate claim.[13] Thus, Defendants do not challenge Dr. Cervas's expert opinions concerning Plaintiffs' Senate claim.

II. Facts Underlying Plaintiffs' Challenge to the Enacted House of Representatives Map

a. The Enacted House Map

The Tennessee General Assembly enacted its decennial reapportionment of the Tennessee House of Representatives via Public Chapter 598, which amended Tennessee Code Annotated § 3-1-103 to codify the State's new House districts.[14] This enacting legislation will be referred to herein as "Public Chapter 598." Governor Lee signed Public Chapter 598 into law on February 6, 2022.[15] The reapportioned House of Representatives district map enacted by Public Chapter 598 will be referred to herein as the "Enacted House Map."

The 2020 United States Census identified 6,910,840 people as the total population of Tennessee.[16] Based on this total state population, each of Tennessee's 99 House districts would have ideally contained 69,806 people following the 2022 decennial reapportionment.[17] The Enacted House Map includes districts whose populations deviate from the ideal district population in a range from +5.09% (+3,552 people) to -4.82% (-3,361 people), with a total variance of 9.90%.[18] The House map applicable to the prior decade included districts deviating from that decade's ideal district population with a total variance of 9.74%.[19]

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13 SMF ¶ 11.
14 SMF ¶ 12.
15 SMF ¶ 13.
16 SMF ¶ 14.
17 *Id.*
18 SMF ¶ 15.
19 SMF ¶ 16.

The Enacted House Map contains 13 majority-minority House districts.[20] The House Map applicable to the prior decade also contained 13 majority-minority House districts.[21]

The Enacted House Map split 30 counties, such that portions of these 30 counties share a House district with another county or counties.[22] The House Map applicable to the prior decade split 28 counties.[23]

The following table summarizes these data points as applicable to the Enacted House Map and the House map applicable to the prior decade (the "2012 House Map").

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

b. The House's mapmaker repeatedly claimed in public hearings that the House map must include no more than 30 county splits but that legislators could choose, as a matter of policy, whether to reduce county splits below 30.

Doug Himes served as the House of Representatives' mapmaker for the 2021-2022 redistricting process.[24] Mr. Himes is Ethics Counsel to the House of Representatives, and he served as counsel to the House Select Committee on Redistricting during the 2021-2022 redistricting process.[25]

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20 SMF ¶ 17.

21 SMF ¶ 18.

22 SMF ¶ 19. The following are the 30 counties divided in the Enacted House Map: 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.

23 SMF ¶ 20.

24 SMF ¶ 21.

25 SMF ¶ 22.

On September 8, 2021, the House Select Committee on Redistricting held its first public hearing of the 2021/2022 redistricting cycle.[26, 27] At that hearing, Mr. Himes gave a presentation on the redistricting process.[28] During his presentation, Mr. Himes described the Tennessee Constitution's prohibition on county splitting, as well as the Tennessee Supreme Court's guidance on county splitting, as follows:

> No more than 30 counties may be split to attach to other counties or parts of counties to form multi-county districts. So Article II, Section 5, of the Tennessee constitution tells us, Hey, House of Representatives, don't split any counties. The one person, one vote standard says, Well, you've got to have your districts substantially equal in population. And those two things -- they conflict. One's federal. One's our state constitution.
>
> In 1983, this issue came up in front of the state supreme court in the case *Lockert v. Crowell*, and the Supreme Court in its wisdom said, All right, House. In order for you to comply with one person, one vote, we know you're going to have to split counties. But we're going to put that limit at 30. You're not going to split more than 30, and you're not going to split, at the time, the four urban counties but for two reasons. So you're limited to 30, the four urbans would count if you had to split them for these reasons.[29]

Neither Mr. Himes nor any other person during the September 8, 2021, hearing cited or paraphrased the standard set forth by the Tennessee Supreme Court that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements."[30] *Lockert v. Crowell*, 656 S.W.2d 836, 838 (Tenn. 1983) ("*Lockert II*").[31]

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26 SMF ¶ 23.

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

28 SMF ¶ 24.

29 SMF ¶ 25.

30 SMF ¶ 26.

31 The Tennessee Supreme Court issued three opinions in the 1980s colloquially referred to as the *Lockert* trilogy. The full citations for these cases are as follows: *Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982) ("*Lockert I*"); *Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983) ("*Lockert II*"); and *Lockert v. Crowell*, 729 S.W.2d 88 (Tenn. 1987) ("*Lockert III*").

On December 17, 2021, the House Select Committee on Redistricting convened its second and final public hearing of the 2021/2022 redistricting cycle.[32] During this hearing, Mr. Himes presented several redistricting plans, including plans submitted by the public, a plan created by Democratic House members, and a plan Mr. Himes created as the Committee's principal mapmaker in consultation with unspecified members of the House of Representatives.[33] The Committee ultimately voted to recommend the plan Mr. Himes created in consultation with unspecified House members to the House Public Service Subcommittee.[34] This recommended plan included 30 county splits.[35]

During this hearing, Representative Bob Freeman presented a proposed redistricting plan that split just 23 counties.[36] Responding to Representative Freeman's proposed plan, Mr. Himes objected to the plan's creation of a county split in Shelby county.[37] Mr. Himes then quoted a portion of the Tennessee Supreme Court's *Lockert II* decision as follows:

> I'll read you the holding -- the relevant part, "Turning to the limitation on dividing counties and creating house districts, we think an upper limit of dividing 30 counties in the multi-county category is appropriate, with a caveat that none of the 30 can be divided more than once."[38]

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

> Leader Camper, I -- you know, *Lockert* gives you an upper limit of 30, and it's something that -- since we had the *Lockert* decision, it's something that we placed in Tennessee code as one of our criteria. And it's consistently adopted as one of our criteria that our limit is 30. While it is true that you can sometimes draft plans with

32 SMF ¶ 27.
33 SMF ¶ 28.
34 SMF ¶ 29.
35 SMF ¶ 30.
36 SMF ¶ 31.
37 SMF ¶ 32.
38 *Id.*

> fewer county splits, you have the discretion to get to that -- to that limit, and that becomes a policy decision that you all -- that you make.[39]

At no point during this meeting did Mr. Himes, or any individual recommending the plan Mr. Himes created, cite or paraphrase the standard set forth by the Tennessee Supreme Court that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements."[40] *Lockert II*, 656 S.W.2d at 838.

On January 12, 2022, the House Public Service Subcommittee convened a public hearing.[41] At the hearing, Speaker Pro Tempore Pat Marsh presented House Bill 1035 ("HB 1035"), which represented the redistricting plan drafted by Mr. Himes and recommended by the House Select Committee on Redistricting.[42] In presenting HB 1035, Speaker Marsh summarily stated the "plan complies with judiciary-interpreted state constitutional requirements concerning county splitting."[43] Mr. Himes then noted, "There are 30 splits in this plan."[44] Mr. Himes did not address the *Lockert* cases in this hearing, and neither Mr. Himes, nor any individual recommending HB 1035, cited or paraphrased the standard set forth by the Tennessee Supreme Court that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements."[45] *Lockert II*, 656 S.W.2d at 838.

On January 18, 2022, the House State Government Committee convened a public hearing.[46] This hearing included the most direct questioning concerning whether HB 1035 sought to reduce

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39 SMF ¶¶ 33-34.
40 SMF ¶ 35.
41 SMF ¶ 36.
42 SMF ¶ 37.
43 SMF ¶ 38.
44 SMF ¶ 39.
45 SMF ¶ 40.
46 SMF ¶ 41.

county splits. Questioning Mr. Himes, Representative Bill Beck asked, "Is there -- is there a reason we didn't strive, in this plan, to split less counties?"[47] Mr. Himes responded as follows:

> Representative Beck. I think, you know, under the *Lockert* decision, the maximum that that court -- Tennessee Supreme Court suggested that we split is 30. And this plan does split 30. And when you go east to -- we started, in some ways, going east. We had some -- there was population issues coming out of the northeast corner. And you start splitting counties that you don't have any choice but to split. Could you split -- well, yeah -- fewer? Possibly. And I think that becomes a policy decision about those. But you're always going to split more counties, probably closer to 26, 25, 27, 28, and then you have the discretion to split counties. Although we try not to. This one splits 30.[48]

(25:25-28:10.) At this hearing, neither Mr. Himes, nor any individual recommending HB 1035, cited or paraphrased the standard set forth by the Tennessee Supreme Court that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements."[49] *Lockert II*, 656 S.W.2d at 838.

On January 20, 2022, the House Calendar and Rules Committee considered and approved House Bill 1035 without discussion.[50] On January 24, 2022, the House of Representatives considered and approved the Enacted House Map.[51] Neither Mr. Himes, nor any individual recommending HB 1035, cited or paraphrased to the Committee or the House the standard set forth by the Tennessee Supreme Court that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements."[52] *Lockert II*, 656 S.W.2d at 838.

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47 SMF ¶ 42.
48 SMF ¶ 43.
49 SMF ¶ 44.
50 SMF ¶ 45.
51 SMF ¶ 46.
52 SMF ¶ 47.

On January 26, 2022, the Senate considered and approved the Enacted House Map.[53] At this public session, Senator Jeff Yarbro directly challenged the General Assembly's failure to apply the *Lockert* decisions' holding on county splitting, noting as follows:

> When we considered maps last week, the -- both the Senate and the House are subject to a constitutional prohibition on splitting counties. Which we only violate that rule to the extent that it's absolutely necessary to meet one person, one vote standards. So when we were considering Senate plans, I think both the plans -- there was an eight-county split plan and a nine-county split plan. Like both -- we all held ourselves to that standard. On the House map side here, they split 30 counties when you only have to split, you know, 20-- 20/23 in order to meet the population standards. And my question, Mr. Speaker, is why we're not going to hold the House to the same standards that we have applied to ourselves.[54]

The Senate then approved the Enacted House Map, with no individual other than Senator Yarbro citing or paraphrasing the standard set forth by the Tennessee Supreme Court that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements."[55] *Lockert II*, 656 S.W.2d at 838.

c. Defendants shielded all non-public evidence of the mapmaking process from use in this litigation.

During his fact witness deposition, Doug Himes acknowledged he created multiple draft maps and received feedback from multiple members of the General Assembly during his mapmaking process.[56] Defendants objected to producing all draft maps and all communications between Mr. Himes and members of the General Assembly based on the attorney-client privilege.[57] Plaintiffs sought to compel production of these documents, and the Court denied Plaintiffs' motion. (Order Denying Motion, dated December 19, 2022.) Thus, because Defendants successfully withheld all non-public evidence concerning the mapmaking process that led to the Enacted House

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53 SMF ¶ 48.
54 SMF ¶ 49.
55 SMF ¶ 50.
56 SMF ¶ 51.
57 SMF ¶ 52.

Map, the above-referenced public hearings constitute all evidence available to the parties concerning the mapmaking process in the House of Representatives, as well as all evidence available to the parties concerning the priorities and constraints communicated by the General Assembly to the House mapmaker during that mapmaking process.

d. Defendants' expert witnesses do not proffer opinions on whether the Enacted House Map split as few counties as necessary to comply with federal constitutional requirements.

Defendants have identified two expert witnesses—Doug Himes and Sean Trende. Neither Mr. Himes nor Mr. Trende offer opinions concerning whether the Enacted House Map split as few counties as necessary to comply with federal constitutional requirements.[58] At their expert witness depositions, Mr. Himes and Mr. Trende testified they had not analyzed the Enacted House Map to determine whether it splits as few counties as necessary to comply with federal constitutional requirements.[59] Mr. Himes and Mr. Trende also testified they do not have an opinion on that point.[60] Mr. Himes further testified it is "theoretically possible" to create a House redistricting plan that would have split fewer counties.[61]

e. Defendants' expert witness states that seven of 30 county splits were not necessary to comply with federal constitutional requirements.

In his capacity as an expert witness, Doug Himes produced an expert report and sat for an expert deposition. In Mr. Himes' report, he included a footnote in which he states his expert opinion on which factor or factors required each of the 30 county splits in the Enacted House Map.[62] Footnote 12, included on page 38 of Mr. Himes's expert report, states as follows:

> Chapter 598's split counties and justifications: Anderson – population; Bradley – population/core preservation; ***Carroll – core preservation***; Carter – population

58 SMF ¶ 53.
59 SMF ¶ 54.
60 SMF ¶ 55.
61 SMF ¶ 56.
62 SMF ¶ 57.

> shift/core preservation/county splitting; Claiborne – population shift/district contraction/county splitting; ***Dickson – core preservation/incumbents***; ***Fentress – core preservation***; Gibson – population shift/core preservation; Hamblen – population shift/district contraction; Hardeman – VRA/core preservation; ***Hardin – core preservation***; Hawkins – population shift/county splitting; Haywood – VRA/population shift/core preservation; Henderson –population shift; Henry – population shift/district contraction; Jefferson – population shift/core preservation; Lawrence – population shift/core preservation; Lincoln – population shift/core preservation; ***Loudon – core preservation***; Madison – population/VRA/core preservation; Maury – population; ***Monroe – core preservation***; Obion – population shift; Putnam – population/core preservation; ***Roane – core preservation***; Sevier – population/core preservation; Sullivan – population/county splitting; Sumner – population; Wilson – population; Williamson – population.

(emphasis added).[63]

Core preservation[64] and incumbency protection are not federal constitutional requirements.[65] Yet, for six of the 30 county splits in the Enacted House Map (Carroll, Fentress, Hardin, Loudon, Monroe, and Roane Counties), Mr. Himes identifies only "core preservation" as the reason justifying the split. And, for a seventh county split (Dickson County), Mr. Himes identifies only "core preservation/incumbents" as the justification for the split. Thus, Mr. Himes opines that approximately 23% of the county splits in the Enacted House Map (7 of 30 splits) were not necessary to comply with federal constitutional requirements.

f. Defendants' expert witnesses agree two illustrative maps created by Plaintiffs' expert witness comply with federal constitutional requirements while dividing fewer counties than the Enacted House Map.

Plaintiffs assert the facts referenced in this subsection (f) are not essential to Plaintiffs' Motion for Summary Judgment because the above-stated facts demonstrate Defendants lack sufficient evidence to meet their burden of proving the General Assembly was justified in passing

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63 SMF ¶ 57.

64 Mr. Himes identifies "core preservation" as a Tennessee redistricting practice. Per Mr. Himes, "core preservation" refers to the extent to which a reapportioned legislative district preserves the core of the previous redistricting plan's district. *See* SMF ¶ 58.

65 This fact is a statement of law. Mr. Himes and Mr. Trende agree these redistricting practices are not federal constitutional requirements. *See* SMF ¶ 59.

a reapportionment act which crossed 30 county lines. In addition, and further reflecting Defendants' inability to meet their burden of proof, Plaintiffs note that Defendants' own expert witnesses agree two of the illustrative maps prepared by Plaintiffs' expert comply with federal constitutional requirements while dividing fewer counties than the Enacted House Map.

In his rebuttal expert report, Plaintiffs' expert witness, Jonathan Cervas, created an illustrative map he labeled "Cervas House Map 13c."[66] Cervas House Map 13c includes 24 county splits and the same 13 majority-minority districts included in the Enacted House Map.[67] At his expert witness deposition, Doug Himes stated Cervas House Map 13c was not constitutionally deficient.[68] Mr. Himes criticized Cervas House Map 13c only because it paired more incumbents than the Enacted House Map, preserved the cores of prior districts less than the Enacted House Map, and had a slightly larger population deviation than the Enacted House Map (9.96% in Enacted House Map versus 9.90% in Cervas House 13c).[69] Mr. Trende also identified the lack of core preservation and incumbent protection as the two concerning aspects of Cervas House 13c.[70] Thus, Defendants' own experts agree Cervas House Map 13c splits six fewer counties than the Enacted House Map while still complying with federal constitutional requirements.

Dr. Cervas also created an illustrative map he labeled "Cervas House Map 13d," which met or improved upon the Enacted House Map's county splits (24 versus 30), population deviation by district (9.89% versus 9.90%), majority-minority districts (both maps have the same exact 13

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66 SMF ¶ 60. Cervas House Map 13c can be seen on page 3 of Dr. Cervas's rebuttal expert report. *See* Exhibit 4 to Mr. Himes's expert witness deposition, dated December 16, 2022, located at **Exhibit E** to Plaintiffs' Appendix.

67 SMF ¶ 61.

68 SMF ¶ 62.

69 SMF ¶ 63.

70 SMF ¶ 64.

majority-minority districts), core preservation, and incumbency protection.[71] Mr. Himes identified only two concerns with this map at his deposition. First, Mr. Himes identified a single non-contiguous census block, which he agreed could be easily fixed.[72] Second, Mr. Himes identified a "double split" in Sullivan County, Tennessee.[73] In response, Dr. Cervas revised Cervas House 13d to correct the non-contiguity and to remove the double split.[74] This revised plan is titled "Cervas House Map 13d_e."[75] This revised plan still contains 24 county splits.[76] Thus, Defendants' experts agree the modified version of Cervas House Map 13d (labeled "Cervas House Map 13d_e") splits six fewer counties than the Enacted Map while still complying with federal constitutional requirements and preserving similar cores and incumbents as the Enacted House Map.

III. The Plaintiffs

Plaintiff Telise Turner is a resident of Shelby County, Tennessee, and Plaintiff Turner is registered to vote in Shelby County, Tennessee.[77] Plaintiff Turner voted in Shelby County in 2022.[78] Shelby County had 14 House districts in the prior decade's district map, and the Enacted House Map reduces Shelby County to 13 House districts.[79]

Plaintiff Gary Wygant is a resident of Gibson County, Tennessee, and Plaintiff Wygant is registered to vote in Gibson County, Tennessee.[80] Plaintiff Wygant voted in Gibson County in

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71 SMF ¶ 65. Cervas House Map 13d can be seen on page 5 of Dr. Cervas's rebuttal expert report. *See* Exhibit 4 to Mr. Himes's expert witness deposition, dated December 16, 2022, located at **Exhibit E** to Plaintiffs' Appendix.

72 SMF ¶ 66.

73 SMF ¶ 67.

74 SMF ¶ 68.

75 *Id.* Cervas House Map 13d_e can be seen on page 2 of Dr. Cervas's Response to Defendants' Expert Depositions. *See* **Exhibit O** to Plaintiffs' Appendix.

76 *Id.*

77 SMF ¶ 1.

78 SMF ¶ 1.

79 SMF ¶ 2.

80 SMF ¶ 3.

2022.[81] Gibson County was kept whole in the prior decade's district map, and the Enacted House Map splits Gibson County between two House districts.[82]

Plaintiff Francie Hunt is a resident of Davidson County, Tennessee.[83] Plaintiff Hunt lives in the Davidson County portion of District 17.[84] Plaintiff Hunt is registered to vote in District 17, and Plaintiff Hunt did vote in District 17 in the 2022 elections.[85]

SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate only if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Thompson v. Memphis City Sch. Bd. of Educ.*, 395 S.W.3d 616, 622 (Tenn. 2012) (citing TENN. R. CIV. P. 56.04; *Martin v. Norfolk S. Ry.*, 271 S.W.3d 76, 83 (Tenn. 2008)). "The moving party bears the burden of establishing that summary judgment is appropriate as a matter of law because no genuine issues of material fact are in dispute." *Id.* (citing *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn.1993)). "In adjudicating motions for summary judgment, courts must view the evidence in the light most favorable to the nonmoving party and resolve doubts concerning the existence of genuine issues of material fact in favor of the nonmoving party." *Id.* (citing *Martin*, 271 S.W.3d at 84). "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Id.* (citing *Byrd*, 847 S.W.2d at 215).

When "the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the

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81 SMF ¶ 3.
82 SMF ¶ 4.
83 SMF ¶ 5.
84 SMF ¶ 5.
85 SMF ¶ 5.

nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015). In such cases, "to survive summary judgment, the nonmoving party 'may not rest upon the mere allegations or denials of [its] pleading,' but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, 'set forth specific facts' at the summary judgment stage 'showing that there is a genuine issue for trial.'" *Id.* at 265 (citing TENN. R. CIV. P. 56.06). "The nonmoving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Id.* (citation omitted). "The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial." *Id.*

ARGUMENT

I. Plaintiffs are entitled to summary judgment on their Senate claim because Tennessee Code Annotated § 3-1-102 violates the Tennessee Constitution by not numbering Davidson County's senatorial districts consecutively.

Article II, Section 3 of the Tennessee Constitution requires, in "a county having more than one senatorial district, the districts *shall* be numbered consecutively." Tenn. Const. art. II, Sec. 3 (emphasis added). TENN. CODE ANN. § 3-1-102, which numbers the Davidson County senatorial districts 17, 19, 20, and 21, violates this provision of the Tennessee Constitution.

Article II, Section 3 sets up a staggered election cycle such that even-numbered senatorial districts hold elections in presidential election years (*e.g.*, 2016, 2020, 2024) and odd-numbered senatorial districts hold elections in gubernatorial election years (*e.g.*, 2018, 2022, 2026). *See* Tenn. Const. art II, § 3. This constitutional framework ensures the citizens of the State of Tennessee benefit from the continuity of government inherent to a legislative body comprised of

staggered-term legislators. *See, e.g., Legislature v. Reinecke*, 516 P.2d 6, 12 (Cal. 1973) ("The state may rationally consider stability and continuity in the Senate as a desirable goal which is reasonably promoted by providing for four-year staggered terms."); *Denish v. Johnson*, 910 P.2d 914, 924 (N.M. 1996) ("Staggered terms preserve continuity in the public entity by preventing the theoretical possibility of all appointees being replaced at once. This continuity ensures there will be no erratic changes of the entity's policies." (concerning staggered terms on an appointed board of regents)) (citations omitted). By requiring senatorial districts to be numbered consecutively in counties having more than one senatorial district, the Tennessee Constitution ensures the citizens of counties with larger populations also benefit from staggered terms within their county's senatorial delegation.

Defendants do not "dispute that the Senate districts in Davidson County are not consecutively numbered," and Defendants previously represented to the Court that they are "prepared to stipulate that they will only defend the challenged Senate map on standing grounds, not on the merits."[86] (Resp. to Motion to Compel, at pp. 1-2.) Defendants have not identified any fact witnesses on whom they intend to rely concerning Plaintiffs' Senate claim, and Defendants' expert witnesses do not proffer any opinions concerning Plaintiffs' Senate claim.

TENN. CODE ANN. § 3-1-102 violates Article II, Section 3 because it creates senatorial districts in Davidson County numbered 17, 19, 20, and 21; *i.e.*, districts that are ***not*** "numbered

[86] Based on longstanding precedent in redistricting litigation, Plaintiff Francie Hunt has standing to challenge the unconstitutional numbering of Davidson County's senatorial districts because she is a resident of District 17, because she is registered to vote in District 17, and because she voted in District 17 in the 2022 elections. Most notably, Tennessee citizens successfully challenged the non-consecutive numbering of senatorial districts in *Lockert I* and *II*. At the temporary injunction phase of this litigation, the Court preliminarily held that residents of Davidson County have standing to challenge the misnumbering of Davidson County's senatorial districts. (Order dated April 6, 2022, at p. 10.) Should Defendants articulate a standing challenge in response to this motion or via a cross motion, Plaintiffs will respond to Defendants' specific standing defense in reply or response.

consecutively." In *Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982) (*Lockert I*), the plaintiffs challenged multiple aspects of the newly redistricted Senate, including challenging the non-consecutive numbering of senatorial districts under Article II, Section 3. The Supreme Court reversed the Chancery Court in *Lockert I*, noting that in reviewing the "constitutionality of a state apportionment plan . . . [i]n a county having more than one senatorial district, *such districts shall be numbered consecutively." Id.* at 710-11 (emphasis added). The Supreme Court then held that "constitutional standards which *must* be dealt with in any plan include contiguity of territory and *consecutive numbering of districts*." *Id.* at 715 (emphasis added).

Because TENN. CODE ANN. § 3-1-102 fails to number Davidson County's senatorial districts consecutively, the Enacted Senate Map violates the plain language of the Tennessee Constitution.[87] The Tennessee Supreme Court held this language must be dealt with when reapportioning the Senate. Therefore, the Court should grant Plaintiffs' Motion for Summary Judgment and hold that TENN. CODE ANN. § 3-1-102 violates the Tennessee Constitution. In doing so, the Court should provide the General Assembly with 15 days or more during which to remedy this constitutional violation, as required by TENN. CODE ANN. § 20-18-105(a). If the General Assembly fails to produce a constitutional districting plan by the deadline, the Court should impose an interim districting plan, as required by TENN. CODE ANN. § 20-18-105(b).

[87] Plaintiffs' expert witness created three illustrative maps demonstrating Davidson County's senatorial districts could have been consecutively numbered if the portion of Davidson County currently included in Senate District 17 were instead paired with a portion of Rutherford County, with the resulting senatorial district numbered District 18. Dr. Cervas's opinion on this point is not necessary given the clear and uncontested constitutional violation in the Enacted Senate Map. Nonetheless, his undisputed opinion demonstrates this constitutional violation can be remedied.

II. Plaintiffs are entitled to summary judgment on their House claim because Defendants cannot meet their burden of proving the Enacted House Map splits counties only as necessary to comply with federal constitutional requirements.

Defendants have produced no evidence to meet their burden of proving the Enacted House Map splits counties only as necessary to comply with federal constitutional requirements. To the contrary, the contemporaneous legislative history demonstrates the General Assembly applied a different, incorrect standard concerning county splits. Moreover, Defendants' expert witness stated in his expert report and testified in his deposition that seven of the 30 county splits in the Enacted House Map are justified only by non-statutory state redistricting practices. Thus, Defendants' own expert witness acknowledged that seven of the Enacted House Map's 30 county splits were not required to comply with federal constitutional requirements.[88]

Because Defendants cannot meet their burden of proving the Enacted House Map splits counties only as necessary to comply with federal constitutional requirements, Plaintiffs are entitled to summary judgment on their House claim.

a. The Tennessee Supreme Court's *Lockert* decisions hold that Article II, Section 5 of the Tennessee Constitution requires reapportionment plans to cross as few county lines as is necessary to comply with federal constitutional requirements.

Article II, Section 5 of the Tennessee Constitution requires the General Assembly to apportion the House of Representatives into 99 districts. When creating those 99 districts, Article II, Section 5 constrains the General Assembly by requiring that "no county shall be divided in forming such a district." Tenn. Const. art. II, § 5.[89]

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[88] Though not essential to the Court's analysis because Defendants cannot meet their burden of proof regardless of what Plaintiffs' expert witness has opined, Plaintiffs' expert witness has produced two illustrative maps that Defendants' expert witnesses agree contain fewer county splits than the Enacted Map while still complying with federal constitutional requirements.

[89] Article II, Section 6 of the Tennessee Constitution identically requires that "no county shall be divided in forming" senatorial districts.

In the years following the United States Supreme Court's decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1963), Tennessee's courts had to determine how to reconcile the new "one person, one vote" doctrine with the Tennessee Constitution's prohibition on county splitting. In a trilogy of cases titled *Lockert v. Crowell*, the Tennessee Supreme Court undertook this analysis and established the county splitting framework that applies to this day.[90]

In *Lockert I*, the Tennessee Supreme Court held that redistricting plans "must cross as few county lines as is necessary to comply with the federal constitutional requirements."[91] 631 S.W.2d at 715. The *Lockert I* plaintiffs had challenged an enacted Senate map that achieved a total district population variance of 1.65% but split 16 counties in doing so. *Id.* at 706. Based on the minimal population variance in the Senate plan, the Supreme Court noted that "the variance between largest and smallest districts could increase substantially in order to preserve county boundaries and comply with other constitutional standards." *Id.* at 708. The Supreme Court then reversed the Chancery Court's summary judgment determination and remanded the matter for trial. In doing so, the Supreme Court summarized its legal holdings "[a]s a guide to the trial court and the General Assembly," noting, "we hold that the plan adopted must cross as few county lines as is necessary to comply with the federal constitutional requirements." *Id.* at 714-15.

In *Lockert II*, the Tennessee Supreme Court reinforced this holding. There, the plaintiffs' amended claims challenged excessive county splitting in the enacted Senate map and the enacted

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[90] The full citations of the *Lockert* trilogy are as follows: *Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982) ("*Lockert I*"); *Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983) ("*Lockert II*"); and *Lockert v. Crowell*, 729 S.W.2d 88 (Tenn. 1987) ("*Lockert III*").

[91] The "federal constitutional requirements" referred to throughout the *Lockert* decisions are the federal constitution's equal population and equal protection requirements. *See Lockert I*, 631 S.W.2d at 714-15 (enumerating equal population and equal protection as the two federal constitutional requirements against which the Tennessee Constitution's county-splitting prohibition must be balanced).

House map. 656 S.W.2d at 838. Before addressing the merits of the case, the Supreme Court addressed the defendants' request to "reconsider our holding that the State's constitutional prohibition against crossing county lines must be enforced insofar as is possible and that any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements." *Id.* The Supreme Court unequivocally rejected the request, stating, "This Court is not persuaded by . . . defendants' arguments that we should sanction a single county line violation not shown to be necessary to avoid a breach of federal constitutional requirements." *Id.* at 839. The Supreme Court then upheld the Chancery Court's ruling that the House map split more counties than necessary to comply with federal constitutional requirements. *Id.* at 843.

In the years since the *Lockert* trilogy, the county splitting standard it set out in *Lockert I* and reinforced in *Lockert II* has remained in full force.[92] The Tennessee Supreme Court has not revisited the *Lockert* standard, and other courts in Tennessee have applied that standard without modification. *See, e.g., Rural West Tenn. African-American Affairs Council, Inc. v. McWherter*, 836 F. Supp. 447, 450 (W.D. Tenn. 1993) (holding reapportionment plan unconstitutional based on *Lockert I* and *II*'s holding). Thus, it remains binding law today that the General Assembly, when reapportioning the House of Representatives, must cross as few county lines as necessary to comply with the federal Constitution's equal population and equal protection requirements.[93]

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[92] Although the *Lockert* trilogy includes three Tennessee Supreme Court decisions, only *Lockert I* and *II* are addressed in this section. *Lockert III* addressed the narrower question of when a multi-district county can have its county border crossed, creating a county-splitting district within a multi-district county. Plaintiffs address this issue, and *Lockert III*, in Section III, below.

[93] Reapportionment plans must also comply with the Voting Rights Act of 1965. This federal statute takes precedence over the Tennessee Constitution. However, Defendants have offered no evidence that compliance with the VRA required the 30 county splits in the Enacted House Map.

b. *Lockert II* did not create a safe harbor for reapportionment plans that split 30 counties.

The General Assembly's mapmaker and attorney, Doug Himes, repeatedly misstated the law concerning county splits in public hearings during the 2021/2022 reapportionment process. At those hearings, Mr. Himes repeatedly claimed the Tennessee Constitution requires reapportionment plans to cross no more than 30 county lines, but that the General Assembly can choose whether to reduce county splits below 30 as a discretionary policy choice. Mr. Himes' statements on this issue conflict with the *Lockert* decisions themselves, as well as subsequent caselaw rejecting the argument that the *Lockert* decisions created a safe harbor for reapportionment plans that cross 30 county lines.

Presumably, Mr. Himes's mistaken statement of law derives from the Tennessee Supreme Court's decision in *Lockert II*. There, the Chancery Court had determined the House plan in question violated the federal and state constitutions, and the Chancery Court had determined the General Assembly could enact a House plan with a total population variance under ten percent and with no more than 25 counties split. 656 S.W.2d at 843-44. Based on its own detailed review of "the proof in this record," the Tennessee Supreme Court affirmed the Chancery Court's finding of constitutional violations but determined "it may be very difficult to keep the total deviation . . . below 10% and remain close to the limits of State violations set by the Chancellor." *Id.* The Supreme Court then revised the Chancery Court's holding to permit "an upper limit" of dividing 30 counties. *Id.* Notwithstanding this upper limit, the Supreme Court expressly rejected the defendants' request to revisit *Lockert I*'s holding, noting "This Court is not persuaded by . . . defendants' arguments that we should sanction a single county line violation not shown to be necessary to avoid a breach of federal constitutional requirements." *Id.* at 839.

In the subsequent decade, the District Court for the Western District of Tennessee expressly rejected the argument that *Lockert II* created a safe harbor for reapportionment plans that split 30 counties. Responding to the defendants' articulation of this "safe harbor" argument, the Court rejected the argument in detail as follows:

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

Rural West Tenn. African-American Affairs Council v. McWherter, 836 F. Supp. 447, 450-51 (W.D. Tenn. 1993). The Court then further differentiated the 1980s redistricting from the 1990s redistricting based on the fact that the State had purchased a $400,000 computer system in the intervening years that allowed the State to replace "a system of pencil, paper and pocket calculator, allowing a drop in the time required to produce plans that may satisfy the one person, one vote requirement." *Id.* at 451. This distinction remains applicable today, as mapmakers continue to have powerful computing tools at their disposal to draw maps that can more and more precisely meet constitutional and statutory redistricting requirements.

Under the *Lockert* and *Rural West* holdings, no safe harbor protects reapportionment plans that split 30 or fewer counties from constitutional scrutiny. Rather, the *Lockert* holdings remain

the law of the land and require reapportionment plans to "cross as few county lines as is necessary to comply with the federal constitutional requirements." *Lockert II*, 656 S.W.2d at 838.

c. Defendants bear the burden of proving the General Assembly was justified in enacting a House map that crosses 30 county lines.

The Supreme Court's *Lockert I* decision sets forth a burden-shifting framework for cases attacking the validity of a redistricting act. Plaintiffs in such cases must first demonstrate a redistricting act splits counties, thereby violating the State's constitutional prohibition against crossing county lines. 631 S.W.2d at 714. Once plaintiffs do so, the burden shifts to the defendants "to show that the Legislature was justified in passing a reapportionment act which crossed county lines." *Id.* Defendants, therefore, must establish a challenged reapportionment act crosses "as few county lines as is necessary to comply with the federal constitutional requirements. *Id.* at 715.

Here, to establish a *prima facie* violation of Article II, Section 5 of the Tennessee Constitution, Plaintiffs need only establish the Enacted House Map created at least one district crossing county lines to pair a portion of one county with at least one adjacent county. *See Moore v. State*, 436 S.W.3d 775, 784-85 (Tenn. Ct. App. 2014) ("Consistent with *Lockert*, after Appellants demonstrated that the Act violated the Tennessee Constitution by crossing county lines, the burden shifted to Appellees to demonstrate that the divisions were excused by the requirements of equal representation." (internal quotations omitted) (quoting *Lockert I*, 631 S.W.2d at 710)). The Enacted House Map includes 30 county splits. Accordingly, Plaintiffs have made a *prima facie* showing of a violation of Article II, Section 5 of the Tennessee Constitution.

Since Plaintiffs have established a *prima facie* violation of Article II, Section 5 of the Tennessee Constitution, the burden of proof shifts to the Defendants to establish that the General Assembly was "justified in passing a reapportionment act which crossed county lines," *Lockert I*, 631 S.W.2d at 714; that is, that the Enacted House Map's division of 30 counties was "necessary

to comply with federal constitutional requirements." *Rural West Tenn. African-American Council*, 836 F. Supp. at 451 (quoting *Lockert II*, 56 S.W.2d at 838).

d. The legislative history reveals the General Assembly applied the wrong legal standard by seeking to split no more than 30 counties rather than seeking to split as few counties as necessary to comply with federal constitutional requirements.

Doug Himes, as counsel to the House Select Committee on Redistricting and Ethics Counsel to the House of Representatives, served as the primary mapmaker for the 2021-2022 redistricting process. Mr. Himes's presentations during public hearings throughout the redistricting process reveal that he, as the mapmaker and counsel, applied the wrong standard to county splits and instructed the House on the wrong standard as well.

During the public hearings addressed in detail above, Mr. Himes repeatedly cited an incorrect legal standard and never cited or paraphrased the standard set forth by the Tennessee Supreme Court that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements." *Lockert II*, 656 S.W.2d at 838. The following points briefly summarize Mr. Himes's repeated misstatements of the applicable law:

> **September 8, 2021 House, Select Committee on Redistricting Hearing**: Mr. Himes cites only the Supreme Court's guidance, applicable to the 1980 census data, that the General Assembly should not exceed 30 county splits when redrawing the 1980s districting maps to remedy the constitutional deficiencies identified by the court.
>
> **December 17, 2011, House Select Committee on Redistricting Hearing**: Mr. Himes again cites only the 1980's maximum of 30 county splits. When pressed by Leader Camper on why the plan should not reduce county splits below 30, Mr. Himes states, "While it is true that you can sometimes draft plans with fewer county splits, you have the discretion to get to that -- to that limit, and that becomes a policy decision that you all -- that you make."
>
> **January 18, 2022, House State Government Committee Hearing**: When pressed by Representative Beck on why the proposed plan does not seek to reduce county splits below 30, Mr. Himes restates his belief that a maximum of 30 county splits applies and states, "Could you split -- well, yeah -- fewer? Possibly. And I think that becomes a policy decision about those. But you're always going to split more counties, probably closer to 26, 25, 27, 28, and then you have the discretion to split counties."

Mr. Himes repeatedly instructed members of the House of Representatives that they could split no more than 30 counties but that whether to split fewer than 30 counties was a discretionary policy decision. This is not the law. The *Lockert* cases and their progeny hold and restate the standard the General Assembly's mapmaker and attorney should have applied but did not apply, that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements." *Lockert II*, 656 S.W.2d at 838.

e. Tennessee Code Annotated § 3-1-103 also states the incorrect legal standard.

Tennessee Code Annotated § 3-1-103 codifies the boundaries of the districts in the Tennessee House of Representatives, and it is amended each time the General Assembly reapportions the House. In 1992, the General Assembly amended this Code section to include a new subsection (b) stating certain intentions of the General Assembly. *See* 1992 Tennessee Laws Pub. Ch. 836. Beginning with this revision, and continuing through today, subsection 3-1-103 (b)(5) has stated the following legislative intent concerning county splits:

> (b) It is the intention of the General Assembly that:
>
> > (5) No more than thirty (30) counties may be split to attach to other counties or parts of counties to form multi-county districts;[94]

The General Assembly's inclusion of this language, rather than the *Lockert* decisions' holding that apportionment plans must "cross as few county lines as is necessary to comply with the federal constitutional requirements," represents a misstatement of constitutional law regarding county splits in Tennessee redistricting.

[94] Subsection 3-1-103(b)(5) has been edited slightly since 1992 to change the words "may be split . . ." to "are split."

f. Defendants' choice to shield all non-public evidence related to the mapmaking process from use in this litigation prevents Defendants from meeting their burden of proving the Enacted House Map splits counties only as necessary to comply with federal constitutional requirements.

Defendants chose to shield all non-public draft House redistricting maps and communications between Mr. Himes and members of the General Assembly from use in this litigation. As a result, the public hearings cited and discussed above provide the entire record of contemporaneous evidence in this litigation. As discussed above, the public hearings do not demonstrate the Enacted House Map splits counties only as necessary to comply with federal constitutional requirements.

Responding to Plaintiffs' Interrogatories, Defendants identified Mr. Himes as the only witness on whom they intended to rely concerning the Enacted House Map. Yet, Defendants objected to producing any non-public draft redistricting maps created by Mr. Himes and any communications between Mr. Himes and General Assembly members concerning redistricting. Defendants' counsel then instructed Mr. Himes during his deposition not to answer questions concerning his non-public draft maps and communications with legislators. The Court denied Plaintiffs' Motion to Compel these documents and information.

Defendants did not have to adopt this litigation strategy. In *Lockert II*, for instance, the State defendants proffered one of their mapmakers, Terry Dial, who described his role as follows: "I was an advisor with the current plan. . . . Upon receiving instructions from the leadership and instructions from the Attorney General's office, I began working with the individual members of the General Assembly. . . . I was responsible for mainly the rural areas and the coordination over all." *Lockert II*, 656 S.W.2d at 842. Mr. Dial testified, among other things, to the population variance percentage the Attorney General's office instructed him to strive to meet. *Id.* (The Attorney General's office instructed him, "We would be in awfully good shape if we got less than

two percent total variance.") In the same action, the state defendants also proffered the "principal staff person for the Senate Reapportionment Subcommittee," Frank Hinton, who testified concerning his mapmaking process. *Id.* at 839.

Defendants' strategic choice to withhold such fact witnesses and underlying factual documents leaves Defendants with only two avenues to meet their burden of proof: the legislative history and expert analysis. As discussed above, the legislative history does not support Defendants' burden of proof. And, as discussed below, Defendants did not retain expert witnesses to analyze whether the Enacted House Map crosses as few county lines as necessary to comply with federal constitutional requirements.

g. Defendants' expert witnesses do not proffer opinions concerning whether the Enacted House Map crosses as few county lines as necessary to comply with federal constitutional requirements.

Defendants' expert witnesses testified at their depositions they have not analyzed the Enacted House Map to determine whether it splits as few counties as necessary to comply with federal constitutional requirements. Both witnesses further testified they do not have an opinion on that point. Therefore, Defendants cannot meet their burden through expert witness testimony of establishing the Enacted House Map crossed as few county lines as necessary to comply with federal constitutional requirements.

h. Defendants' expert witness states that seven of the 30 county splits are justified only by state redistricting practices, not federal constitutional requirements.

Although Defendants' expert witness, Doug Himes, did not perform an analysis seeking to prove that the Enacted House Map crosses as few county lines as necessary to comply with federal constitutional requirements, Mr. Himes opines in his expert report that seven of the 30 county splits in the Enacted House Map were justified only by redistricting practices not required by the federal constitution.

Mr. Himes's expert report includes a footnote stating the justification or justifications for each of the 30 county splits contained in the Enacted House Map. In Footnote 12, Mr. Himes identifies six county splits as having been justified only by core preservation (Carroll, Fentress, Hardin, Loudon, Monroe, and Roane Counties) and a seventh county split as having been justified only by core preservation and incumbency protection (Dickson County). In his expert witness deposition, Mr. Himes explained this footnote as follows:

> [I]t lists by county each of the 30 counties that were split and justifications for each of those splits based on, um, the redistricting guidelines, practices, and/or Constitutional requirements.

Mr. Himes testified he determined the justification for each county split by comparing the Enacted House Map with the previous decade's House map. Mr. Himes also confirmed he performed this analysis and reached this conclusion in his capacity as Defendants' expert witness.[95]

The federal Constitution neither requires nor mentions core preservation or incumbency protection as redistricting requirements. Mr. Himes and Mr. Trende agree these factors are not federal constitutional requirements. Thus, in Mr. Himes's expert opinion, seven of the 30 county splits in the Enacted House Map (over 23% of the total county splits) are not justified by federal constitutional requirements.

* * *

For the reasons stated above, Plaintiffs are entitled to summary judgment on their House of Representatives claim. Defendants lack the evidence necessary to establish the Enacted House Map crosses as few lines as necessary to comply with federal constitutional requirements, and Defendants' expert witness testified the Enacted House Map divided seven counties for reasons not required by the federal constitution. Thus, Defendants cannot meet their burden of proof, and

[95] Defendants' second expert witness, Sean Trende, does not offer an opinion concerning the justification for each of the 30 county splits in the Enacted House Map.

Plaintiffs' Motion for Summary Judgment should be granted. In doing so, the Court should provide the General Assembly with 15 days or more during which to remedy this constitutional violation, as required by TENN. CODE ANN. § 20-18-105(a). If the General Assembly fails to produce a constitutional districting plan by the deadline, the Court should impose an interim districting plan, as required by TENN. CODE ANN. § 20-18-105(b).

i. Defendants' expert witnesses agree Plaintiffs' expert witness created two illustrative House maps that divide six fewer counties than the Enacted House Map while still complying with federal constitutional requirements.

Defendants are unable to meet their burden of proof for the reasons stated above, regardless of whether Plaintiffs retained an expert witness and regardless of Plaintiffs' expert witness's opinions. Notwithstanding this fact, Plaintiffs' expert's testimony is instructive here because Defendants' expert witnesses agree two of the illustrative House maps created by Plaintiffs' expert witness split six fewer counties than the Enacted House Map while still complying with federal constitutional requirements.

In Cervas House Map 13c, Plaintiffs' expert witness created a statewide House map that splits 24 counties while maintaining a population variation across all districts under 10% and while containing the exact 13 majority-minority districts included in the Enacted House Map. In his expert witness deposition, Mr. Himes criticized this map only because it does not preserve prior district cores as much as the Enacted House Map, because it pairs more incumbents than the Enacted House Map, and because its total population deviation is slightly larger than the Enacted House Map's deviation (9.96% compared to 9.90%).

In Cervas House Map 13d, Plaintiffs' expert witness created a statewide House map that splits 24 counties while having a slightly lower total population deviation than the Enacted House Map (9.89% compared to 9.90%), that contains the exact 13 majority-minority districts as the

Enacted House Map, and that preserves prior district cores and incumbents to the same extent as the Enacted House Map. Mr. Himes criticized this map for only two reasons: (1) because the map contained a small non-contiguous census block, which Mr. Himes admitted could be remedied easily, and (2) because this map had a "double-split" in Sullivan County. Dr. Cervas subsequently corrected these two issues in a revised map titled Cervas House Map 13d_e.

As illustrated here, Defendants' expert witnesses agree that two of Dr. Cervas's illustrative maps split six fewer counties than the Enacted House Map while still complying with federal constitutional requirements. Plaintiffs are entitled to summary judgment regardless of Dr. Cervas's opinions due to Defendants' failure to produce evidence sufficient to meet their burden of proof, but the fact that Defendants' expert witnesses agree two of Dr. Cervas's illustrative House maps are constitutional confirms Defendants' expert witness's opinion that 20% or more of the county splits included in the Enacted House Map were not required to comply with federal constitutional requirements. Thus, Plaintiffs' Motion for Summary Judgment should be granted.

III. The Court should determine that Shelby County can include a county-splitting district if doing so allows for fewer county splits across the entire state.

During the 2021/2022 redistricting process, Representative Bob Freeman proposed an alternative House redistricting plan that would have split 23 counties, while still having a total population variance below 10%. Mr. Himes advised the General Assembly this alternative plan violated *Lockert II* because it created a district that crosses the Shelby County border. In granting Plaintiffs' Motion for Summary Judgment, the Court should clarify for the General Assembly that creating a county-splitting district in Shelby County will not violate the Tennessee Constitution's county-splitting prohibition if doing so leads to fewer county splits across the state as a whole.

a. *Lockert II* and *Lockert III* set limitations on crossing Shelby County's border based on the 1980s U.S. Census.

In *Lockert II*, the Tennessee Supreme Court reviewed the evidence underlying the Senate map at issue in that litigation. Therein, the Court reached various findings concerning whether multi-district counties had to keep all of their districts within their borders or if such counties could have one county-splitting district that paired a portion of the county with a neighboring county or counties. Based "on the record before us," the Court determined Shelby County could not include a county-slitting district in that cycle. 656 S.W.2d at 841. The Court did "not foreclose the possibility," however, that Shelby County could include a county-splitting district if creating such a district were "justified by either (1) the necessity to reduce a variance in an adjoining district or (2) to prevent the dilution of minority voting strength." *Id.*

In *Lockert III*, the Tennessee Supreme Court faced this same question, albeit limited only to Shelby County. The Senate map in question paired a portion of Shelby County with Tipton and Lauderdale Counties to form one county-splitting district. The Court upheld this county split based on evidence demonstrating that keeping Shelby County's districts fully within the Shelby County border would have had an adverse domino effect on districts across West Tennessee and into Middle Tennessee, all leading to higher total population variations. The Court, on this basis, affirmed the Chancery Court's decision permitting one county-splitting Shelby County district.

b. The General Assembly should be permitted to create a county-splitting district in Shelby County if doing so reduces the total number of county-splitting districts across the State.

The instant case presents a similar situation to, but not addressed by, *Lockert II* and *Lockert III*. Here, the General Assembly rejected a redistricting plan presented by Representative Freeman that included a county-splitting House district in Shelby County but that led to seven fewer county splits across the state. Like Representative Freeman's rejected plan, Plaintiffs' expert witness

created two illustrative plans that include a county-splitting district in Shelby County. One of these two maps includes just 22 county-splitting districts, which is the fewest county splits out of all of the maps he generated.

The Court need not determine whether the plan proposed by Representative Freeman or the plans generated by Dr. Cervas pass constitutional muster. However, because the General Assembly rejected the 23-county-split map proposed by Bob Freeman following Doug Himes's advice that the 23-county-split map unconstitutionally created a county-splitting district in Shelby County, the Court here should hold that the General Assembly can breach the Shelby County border if it determines doing so allows for the fewest county-splitting House districts across the state as a whole.

CONCLUSION

Defendants stated they are not contesting the merits on Plaintiffs' Senate claim; Defendants have produced no evidence to meet their burden of proving the Enacted House Map splits counties only as necessary to comply with federal constitutional requirements; and Defendants' expert witness testified that seven of the 30 county splits in the Enacted House Map were not required to comply with federal constitutional requirements. For these reasons, the Court should grant Plaintiffs' Motion for Summary Judgment and direct the General Assembly to remedy these violations as required by Tennessee Code Annotated § 20-18-105.

Dated: January 20, 2023

Respectfully submitted,

/s/ Scott P Tift

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Plaintiffs' Memorandum in Support of Motion for Summary Judgment* will be served on the following counsel for the defendants via electronic and U.S. mail on January 20, 2023.

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I hereby certify that a true and exact copy of the foregoing *Plaintiffs' Memorandum in Support of Motion for Summary Judgment* will be served on the following counsel for the defendants via electronic mail on January 20, 2023.

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