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3/29/2022 6:56 PM
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**IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT**

AKILAH MOORE, TELISE TURNER, and GARY WYGANT,	)	
***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' REPLY IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

Plaintiffs reply below to Defendants' Response in Opposition to Plaintiffs' Motion for Temporary Injunction.

I. Plaintiffs' Motion is Not Barred by Laches.

Defendants' laches defense fails because Plaintiffs did not unreasonably delay in filing this action or seeking a temporary injunction.

Most laches analyses concern the time between a challenged action and the commencement of legal proceedings. Looking to the cases in Defendants' brief that apply or uphold laches defenses, for example, the applicable timelines analyzed by the courts are as follows: the City of Loveland, Ohio waited four years before commencing legal action, *United States v. City of Loveland*, 621 F.3d 465 (6th Cir. 2010); an alleged property owner waited 14 years before challenging a purportedly fraudulent conveyance, *Jansen v. Clayton*, 816 S.W.2d 49 (Tenn. Ct. App. 1991); a group of voters waited 17 years before challenging a legislative apportionment plan,

White v. Daniel, 909 F.2d 99 (4th Cir. 1990); and several presidential candidates waited approximately five to six months before challenging a state restriction on gathering signatures for placement on Virginia's presidential primary ballot, *Perry v. Judd*, 840 F. Supp. 2d 945 (E.D. Va. 2021), *aff'd*, 471 F. App'x 219 (4th Cir. 2012). Even in the sole case Defendants cite where a judge considered both the time before commencing legal action and the further passage of time before the filing of a preliminary injunction motion, the judge determined that seven weeks between the Governor's declaration of a state of emergency and filing a lawsuit constituted unreasonable delay. *See Memphis A. Phillip Randolph Inst. v. Hargett*, 473 F. Supp. 3d 789 (M.D. Tenn. 2020).

Here, Plaintiffs filed this action just 17 days after Governor Lee signed SB 0779 and SB 0780 on February 6, 2022. Defendants cited no cases where the passage of such a short time between a legislative enactment and the filing of a lawsuit constituted unreasonable delay. A successful laches defense "requires more than mere delay," *Long v. Bd. of Pro. Resp. of Supreme Ct.*, 435 S.W.3d 174, 181 (Tenn. 2014), and Defendants have failed to prove based on the case law or the facts that the passage of 17 days in this instance constituted unreasonable delay.

Defendants also fail to prove that the passage of 16 days between the February 23, 2022, filing of this action and the March 11, 2022, filing of Plaintiffs' Motion for Temporary Injunction constituted unreasonable delay. Plaintiffs did not sleep on their rights during that window. Rather, Plaintiffs began the process of pursuing their claims for injunctive relief as soon they were able to do so. This case was initially stayed, pursuant to Tenn. Sup. Ct. R. 54, Section 2(g), through the Supreme Court's appointment of the three-judge panel on March 1, 2022.[1] The next day, on March 2, 2022, Plaintiffs filed a motion seeking an expedited briefing schedule and hearing on their claims for injunctive and declaratory relief. The Court heard Plaintiffs' Motion on March 7, 2022,

[1] Rule 54, Section 2(g), states: "The filing of a notice under this rule stays all proceedings in the trial court until the Supreme Court appoints a three-judge panel as provided in Section 3."

and denied it on March 8, 2022. Three days later, on March 11, 2022, Plaintiffs filed their Motion for Temporary Injunction. Neither the automatic stay set forth in Supreme Court Rule 54, nor the fact that Plaintiffs unsuccessfully sought an expedited adjudication, support a finding that Plaintiffs slept on their rights for 16 days and should be precluded from seeking injunctive relief as a result.

Defendants cite just one case where a judge even considered the amount of time between the filing of a lawsuit and the filing of a motion for preliminary injunction. In *Memphis A. Phillip Randolph Inst.*, the COVID-19 pandemic prompted the plaintiffs' attempt to invalidate absentee balloting laws that had been in place for 15 years. 473 F. Supp. 3d at 796, 801. There, the plaintiffs waited seven weeks after the Governor issued a state-of-emergency order before filing their lawsuit, and they waited an additional six weeks before filing a motion for preliminary injunction. *Id.* at 801. And, because the plaintiffs filed their injunction motion on June 12, 2020, the 52-day proximity of the August 3, 2020, primary election affected the Court's determination of whether plaintiffs had unreasonably delayed with respect to that election. *Id.* at 801. Concerning the November 3, 2020, general election, by contrast, the Court did not find unreasonable delay, given that the general election was nearly five months away. Here, in contrast to *Memphis A. Phillip Randolph Inst.*, Plaintiffs filed their lawsuit 17 days after Governor Lee signed the challenged statutes; Plaintiffs filed their injunction motion less than five weeks after Governor Lee signed the statutes; and Plaintiffs did so nearly five months before the August 4, 2022, elections.

Neither *Memphis A. Phillip Randolph Inst.*, nor any other case cited by Defendants, support a finding that Plaintiffs unreasonably delayed before filing this action or seeking injunctive relief.[2] Defendants have therefore failed to prove their affirmative defense of laches.

[2] Even if the timeline applicable to this action constituted unreasonable delay, the Defendants are not prejudiced by that delay, for the reasons articulated in Section VII below.

II. Plaintiffs have Standing to Pursue this Action.

Defendants challenge Plaintiffs' standing to assert that the 2022 Tennessee state House and Senate maps violate the Tennessee Constitution's prohibition on division of counties and non-consecutive Senate districts. Tenn. Const. Art. II, §§ 3, 5. Because Plaintiffs have alleged the requisite injury, these standing arguments should be rejected.

Standing is a judge-made doctrine used to determine if a particular party is an appropriate one to seek relief. *Fisher v. Hargett*, 604 S.W.3d 381, 396 (Tenn. 2020); *City of Memphis v. Hargett*, 414 S.W.3d 88, 97-99 (Tenn. 2013). As the Tennessee Supreme Court explained recently,

> 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 public; 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. As this Court has explained these three elements:
>
> > 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 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.

Fisher, 604 S.W.3d at 396 (citations omitted). The Court has regularly found standing where the fundamental voting rights of Tennessee citizens are threatened. *Id.* at 396 (challenge to absentee voting restrictions); *City of Memphis*, 414 S.W.3d at 98-99 (challenge to photo ID requirements).

In the present case, Plaintiffs challenge two different aspects of the 2022 redistricting legislation: Excessive county-splitting in the House map, in violation of Article II, Section 5, and non-consecutive Senate districts in violation of Article II, Section 3. Amended Complaint ¶¶ 64-75. Plaintiff Wygant is a registered voter who lives in Gibson County. *Id.* at ¶ 16. Gibson County

is wholly within House District 79 at this time.[3] Under Senate Bill 0779, Public Chapter 598 (the "Enacted House Map"), Gibson County will be one of 30 divided counties. *Id* at ¶ 50. As alleged, the General Assembly did not have to divide 30 counties to ensure compliance with the federal constitution. *Id.* at ¶¶ 51-56. In the Democratic Caucus Plan, for example, Gibson County would not be divided, and only 23 counties would be divided in total. *Id.* at ¶ 52; Affidavit of Bob Freeman, at ¶ 33. Plaintiff Wygant thus alleges that his right to vote for his representative in an undivided county under Article II of the Tennessee Constitution has been infringed. Amended Complaint ¶¶ 16, 50, 65-66. Such an infringement of the fundamental right to vote is an injury-in-fact that is palpable and concrete. *Fisher*, 604 S.W.3d at 396; *City of Memphis*, 414 S.W.3d at 98-99. Defendants' arguments go well beyond standing into the merits of the voters' challenge, which is not a question of standing. *Id*.

Likewise, the challenge to the non-consecutive Senate districts brought by Plaintiff Moore demonstrates the necessary injury-in-fact. 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, § 3 (emphasis added). As with the prohibition on dividing counties in apportionment of the House, it is the integrity of counties as units, and the rights of the residents of those counties, that underlie these requirements. *Id*. Ms. Moore lives in Davidson County, where she is a registered voter who has voted and intends to vote in a state Senate election. Davidson County's four Senate districts (17 and 19-21) are not numbered consecutively, as mandated by Art. II, Section 3, notwithstanding the feasibility of compliant numbering. Amended Complaint ¶¶ 57-63. As a resident of the affected county denied consecutively numbered districts,

[3] *See* Website of the Tennessee General Assembly, subpage concerning District 79, at: https://www.capitol.tn.gov/House/members/h79.html.

she has suffered the distinct and palpable injury which the Constitution is designed to prevent; that is, denial of Senate elections within a divided county between gubernatorial (odd-numbered districts) and presidential (even-numbered districts) election cycles. *Id*. Nothing in Article II, Section 3 suggests that only those voters living in the non-consecutively numbered ***district*** are entitled to this protection, which is based on ***counties***.[4] Indeed, the Amended Complaint alleges that the General Assembly rejected a map that would have numbered the four Davidson Senate districts consecutively, as mandated by the Tennessee Constitution. Amended Complaint ¶¶ 57-63.

The Tennessee Supreme Court has been careful to protect the rights of Tennessee voters, declining to whittle away those rights through standing or other procedural hurdles. *Fisher*, 604 S.W.3d at 396; *City of Memphis*, 414 S.W.3d at 98-99. Defendants may certainly defend their maps on the merits, but their attempt to forestall even consideration of this challenge by affected voters should be rejected.[5] *Id*.

III. Plaintiffs Have Shown a Likelihood of Success on the Merits with Respect to the Enacted House Map.

Plaintiffs have shown they are likely to succeed on the merits of their constitutional challenge to the Enacted House Map. Contrary to Defendants' arguments in their Response, the General Assembly violated Article II, Section 5 of the Tennessee Constitution by including more

[4] For the same reason, Defendants' arguments from federal cases are inapposite. Here, Plaintiffs assert their state constitutional rights based on the integrity of counties. Cases dealing with federal Article III standing to challenge federal districts are neither governing nor persuasive here. *See Fisher*, 604 S.W.3d at 396 ("the proper focus of the standing inquiry is on the asserted infringement to the right to vote and the alleged facts regarding that asserted infringement and resulting injury to the plaintiffs"). Even the principal case cited by Defendants, *Gill v. Whitford*, 138 S. Ct. 1916 (2018), was remanded for development of additional facts on injury to support federal standing to challenge statewide partisan gerrymandering.

[5] Plaintiffs submit that all Tennesseans have standing to bring a facial challenge concerning a statewide redistricting statute that violates the Tennessee Constitution. Plaintiffs' focus herein on their county-specific standing is not intended to waive Plaintiffs' claims to statewide standing.

county divisions in the Enacted House Map than necessary to meet federal constitutional requirements.

A. Defendants have not carried their burden to justify the Enacted House Map.

Defendants' Response ignores the burden of proof concerning the merits of Plaintiffs' allegations. Instead of offering proof that the General Assembly undertook a good faith effort to create only as many county divisions as necessary to comply with the Federal Constitution, Defendants focus their merits response on challenging the constitutionality of the proposed Democratic Caucus Plan. In doing so, Defendants entirely fail to meet their burden of proof.

Defendants do not challenge the fact that Plaintiffs established a *prima facie* violation of Article II, Section 5 of the Tennessee Constitution, given that 30 counties are divided in the Enacted House Map.[6] As a result, the burden of proof shifts to Defendants to establish that the General Assembly was "justified in passing a reapportionment act which crossed county lines." *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702, 714 (Tenn. 1982) ("*Lockert I*"). To do so, Defendants must prove the Enacted House Map's division of 30 counties was "necessary to comply with federal constitutional requirements." *Rural West Tenn. African-American Affairs Council, Inc. v. McWherter*, 836 F. Supp. 447, 451 (W.D. Tenn. 1993) (quoting *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836, 838 (Tenn. 1983) ("*Lockert II*")). Defendants did not even attempt to meet this burden in their Response.

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[6] Plaintiffs established a *prima facie* violation simply because the Enacted House Map splits counties. *See Moore v. State of Tennessee*, 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)). However, even if that were not the case, the Democratic Caucus Plan makes out a *prima facie* violation, since it divides only 23 counties—7 fewer than the Enacted House Map—while carrying a lower total population variance from the ideal population than the Enacted House Map.

Had Defendants attempted to carry their burden, they would have presented evidence showing that each county division, or all of the county divisions in the aggregate, were "necessary to avoid a breach of federal constitutional requirements." *Lockert II*, 656 S.W.2d at 839. Instead, Defendants submitted an affidavit by Doug Himes, who evaluated the various redistricting plans in his role as Counsel to the House Select Committee on Redistricting. Mr. Himes does not claim to have made any attempt to divide as few counties as necessary to ensure compliance with the federal constitution. Mr. Himes merely states that he followed redistricting guidelines set by state statute, aiming to ensure that the map met "one person one vote" constitutional requirements and complied with the Voting Rights Act, while splitting "no more than 30 counties . . . to attach to other counties or parts of counties to create multi-county districts." Himes Affidavit at ¶ 12. The *Lockert II* decision, however, did not create a safe harbor where 30 county-dividing districts will be deemed to have complied with the Tennessee Constitution. *See Rural West Tn. African-Am. Affairs Council*, 836 F. Supp. at 450 ("nowhere in the *Lockert II* decision does the court purport to establish an absolute numerical standard, applicable in all redistricting contests."). The controlling law requires that "any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements." *Id.* (citing *Lockert I*); *see also Moore v. State*, 436 S.W.3d 775, 785 (Tenn. Ct. App. 2014) ("the *Lockert II* court rejected the argument that the courts should 'sanction a single county line violation not shown to be necessary to avoid a breach of federal constitutional requirements.'").

Critically, Defendants have not submitted evidence that the General Assembly sought to create as few county divisions as necessary to comply with federal constitutional requirements. Mr. Himes does not claim to have made an effort to so in his affidavit. He only claims to have sought to include no more than 30 county-dividing districts in the Enacted House Map. Defendants

also do not cite any legislative history in which any legislator claimed that the Enacted House Map sought to do so.[7] Defendants failed to meet their burden, and on that ground alone Defendants should be required to enact a new House map that strives to divide as few counties as possible while still complying with federal constitutional mandates.

B. Defendants' attacks on the Democratic Caucus Plan are insufficient to save the Enacted House Map.

Instead of trying to meet their burden to justify the Enacted House Map, Defendants attack the alternate Democratic Caucus Plan, which they say is constitutionally infirm because it impermissibly divides Shelby County and dilutes minority voting power. But Defendants' focus on the Democratic Caucus Plan is a red herring.

Defendants cite *Lockert II* for the proposition that "none of the four urban counties [Shelby, Davidson, Knox, and Hamilton] can 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." *Lockert II*, 656 S.W.2d at 842, 844. However, it is clear the Tennessee Supreme Court used this language with respect to the precise facts before it in reviewing the 1981 redistricting statute, not to announce a new, generally applicable maxim applying in perpetuity to all future redistricting plans. In fact, the Court expressly left open the possibility of splitting Shelby County on different facts. *See Lockert II*, 656 S.W. at 841 ("The result is that *on the record before us* we find no justification for detaching any segment with Shelby County . . . . However, we will not foreclose the possibility that detachment of a single part of Shelby County may be justified . . . ."

[7] Defendants also fail to cite any legislative history in which Mr. Himes or any legislator claims that they pursued a goal in creating the Enacted House Map of creating as few county divisions as necessary to comply with the federal constitution. Nor do the transcripts of the December 17, 2021, meeting of the House Select Committee on Redistricting or of the January 12, 2022, meeting of the House Public Service Subcommittee, reveal any such statements. *See* Exhibits to Affidavit of Scott P. Tift.

(emphasis added)). Indeed, in *Lockert III*, the Tennessee Supreme Court affirmed a map that divided a portion of Shelby County based on the Legislature's good faith attempt to comply with the federal constitutional requirement of population equality and the state constitutional prohibition against dividing county lines. *See State ex rel. Lockert v. Crowell*, 729 S.W.2d 88, 91 (Tenn. 1987) ("*Lockert III*"). In doing so, the *Lockert III* court explained that the decision in *Lockert II* was limited "to the record before us." *Id.* at 89-90.

The Supreme Court's plain language in the *Lockert* decisions explains the absence of an urban county-splitting prohibition in Tenn. Code Ann. § 3-1-103(b), which Defendants contend set forth the guidelines for redistricting following the *Lockert* cases.[8] Far from prohibiting the splitting of an urban county, the *Lockert* cases contemplate that dividing a large county (or multiple large counties) is permissible to obtain a map with a lower overall population deviation. Defendants cannot rely on dicta from *Lockert II* to absolve the Legislature from complying with the constitutional requirement that it limit the number of counties split in the redistricting process.

C. Plaintiffs' expert affidavit further illustrates that Defendants have failed to meet their burden of proof.

Defendants argue that the Democratic Caucus Plan does not prove that the General Assembly could have divided fewer counties because the Democratic Caucus Plan divides Shelby County and because the Democratic Caucus Plan's 13 majority-minority districts have lower black voting-age populations than the Enacted House Map's 13 majority-minority districts. Plaintiffs reject both arguments as a misreading of applicable law, but even if Shelby County remains undivided and the Enacted House Map's majority-minority districts are largely preserved, the

[8] The factors set forth in Tenn. Code Ann. § 3-1-103(b) reflect only "legislative intent" with respect to the 2012 House redistricting plan. The statute cannot be read to control the 2022 redistricting process, as that would violate the state constitutional principle that one general assembly cannot bind a subsequent general assembly. *See Mayhew v. Wilder*, 46 S.W.3d 760, 770 (Tenn. Ct. App. 2001).

House of Representatives can still be apportioned with fewer county divisions and a lower total population deviation. Plaintiffs have submitted an affidavit in rebuttal of Defendants' arguments on these points by an experienced apportionment expert, Jonathan Cervas, who has assisted courts and legislatures with the apportionment of legislative bodies in Utah, Virginia, Georgia, and Pennsylvania in recent years. *See* Affidavit of Jonathan Cervas, at 1-3.

Plaintiffs asked Mr. Cervas to create alternative apportionment maps for the Tennessee House that do not divide Shelby County and that preserve the majority-minority districts from the Enacted House Map. *Id.* at 1. Mr. Cervas, using algorithmic mapping software, then created maps where Shelby County has 13 districts and where Shelby County has 14 districts, all contained within the county borders; and Mr. Cervas "froze" 12 of the 13 majority-minority districts from the Enacted House Map to ensure that the maps he drew were not subject to greater Voting Rights Act scrutiny than the Enacted House Map.[9] *See, generally, id.* Mr. Cervas generated approximately 120,000 maps, with half having 13 Shelby County districts and half having 14 Shelby County districts. *Id.* at 11. Mr. Cervas included five of each type of map in his affidavit. *Id.* at 12-17. Mr. Cervas consistently found that the House could be apportioned with these parameters, with lower total population deviations than the Enacted House Map, and with either 26 county-dividing districts (when Shelby County has exactly 13 districts) or 28 county-dividing districts (when Shelby County has exactly 14 districts).[10] *Id.* at 17. Mr. Cervas further opined that fewer county-dividing districts could be achieved if the excess population in Shelby were included in a divided-county district, rather than requiring Shelby County to contain exactly 13 or 14 districts. *Id.*

[9] Mr. Cervas ensured that the remaining majority-minority district retained a black voting age population greater than 51%. Cervas Affidavit at 9.

[10] Mr. Cervas notes that with more time to prepare maps, it is possible that additional county divisions could have been eliminated. *Id.* at 17.

Plaintiffs submit Mr. Cervas's example maps not to argue that they must be enacted, but rather as further proof that Defendants have critically failed to meet their burden of proof. Even removing Defendants' purported concerns about the Democratic Caucus Plan, Mr. Cervas's maps demonstrate that fewer counties could have been divided while still falling within acceptable population deviations. Since Defendants do not claim to have even tried to create fewer than 30 county divisions, and additionally since Plaintiffs have demonstrated that fewer than 30 county divisions could easily have been achieved, Plaintiffs' claims regarding the Enacted House Map are likely to succeed on the merits, and injunctive relief should issue.

IV. Plaintiffs Have Shown a Likelihood of Success on the Merits with Respect to the Enacted Senate Map.

Defendants do not—and cannot—argue that SB 0780 (the "Enacted Senate Map") complies with the plain language of the Tennessee Constitution. It does not. Instead, they dismiss the Tennessee Constitution's consecutive numbering requirement as "solely an administrative distinction" that they are free to "depart[] from." Defs' Resp. at 32, 34. Defendants offer no authority for their unilateral decision to ignore the Constitution's text—likely because the only existing authority contradicts their position, *see Lockert I*, 631 S.W.2d at 715 (holding that consecutive numbering is a constitutional standard that "must be dealt with" in redistricting). In defense, Defendants suggest, without evidence, that it would be "virtually impossible" to comply with the United States Constitution, Tennessee Constitution, and federal law all at the same time. Defs' Resp. at 33.[11]

But the simple fact remains: Plaintiffs' proposed map (the SA 0467 Plan) complies with the Tennessee Constitution's consecutive numbering requirement, and it stands to reason that

[11] The District Court in *Rural West Tn. African-Am. Affairs Council* rejected this concern, noting that "to the extent that this is a hardship, it is one imposed by the two documents defendants are sworn to uphold, the state and federal Constitutions." 863 F. Supp. at 451.

countless other iterations of a Senate apportionment map could consecutively number the senatorial districts as well. The Enacted Senate Map does not do so, and Defendants do not show that they were forced to violate the Tennessee Constitution in order to comply with federal law.

A. Defendants have not carried their burden to justify the Enacted Senate Map.

The Enacted Senate Map numbers the Davidson County senatorial districts 17, 19, 20, and 21. This violates Article II, Section 3 of the Tennessee Constitution, which expressly and unambiguously requires that in "a county having more than one senatorial district, the districts shall be numbered consecutively." Tenn. Const. Art. II, Sec. 3 (emphasis added). It also contravenes the Tennessee Supreme Court's express ruling in *Lockert I* that "constitutional standards which *must* be dealt with in any [redistricting] plan include contiguity of territory and *consecutive numbering of districts*." *Lockert I*, 631 S.W.2d at 715 (emphasis added). Such a requirement preserves continuity of government for larger-population counties by ensuring each such county's legislative delegation is comprised of legislators with staggered terms.

Defendants act as if they are unencumbered by the Tennessee Constitution and Supreme Court precedent. Indeed, they wave off the consecutive numbering requirement as an "administrative distinction" with no "practical effect." Defs' Resp. at 34, 35. And rather than grapple with a core holding of *Lockert I*, they tout other purported virtues of their plan (low total population variance, preservation of majority-minority districts), which, Defendants contend, adhere to the principles (if not the text) of *Lockert I*. Defendants seem to suggest—but never quite argue—that they were somehow forced to violate the Tennessee Constitution in order to enact a federally compliant plan.

But this was not the case. *See infra* Sec. IV.B (discussing the constitutionally compliant alternative proposal). And in any event, *Lockert I* stands for the proposition that misnumbering

senatorial districts in violation of the Constitution cannot be "a necessary by-product of reapportionment." 631 S.W.2d at 704, 715. It was neither necessary nor a permissible "trade-off" to violate the plain text of the Tennessee Constitution in enacting SB 0780.

B. Plaintiffs have proposed a constitutionally sound alternative.

Defendants' failure to carry their heavy burden of justifying their failure to comply with the Tennessee Constitution requires injunctive relief on its own. Additionally, the Senate Democrats' alternative proposal (SA 0467) demonstrates the unremarkable fact that the General Assembly can properly number 33 senatorial districts without otherwise violating the state and federal constitution. The SA 0467 Plan did just that, while maintaining a population variance well under 10%, while dividing fewer counties than the Enacted Senate Map (eight divided counties rather than nine), and while not disturbing the term of any sitting member of the Senate. Other proposals the General Assembly draws at the direction of this Court can meet all of these requirements at once, too. For these reasons, the Enacted Senate Map should be enjoined and the legislature given 15 days to remedy this constitutional defect.

V. The Court can Postpone the Qualifying Deadline to Remedy These Constitutional Defects.

Defendants maintain the Court lacks authority to postpone the qualifying deadline because Plaintiffs have not challenged the constitutionality of the deadline itself. That is incorrect. Tennessee courts have "broad equitable powers, and there is ample precedent for extending [a] qualifying deadline." *State ex rel. Hooker v. Thompson*, 249 S.W.3d 331, 342 (Tenn. 1996) (postponing qualifying deadline where candidate reasonably relied on official opinion). Here, the Court can act within its broad equitable powers to postpone the qualifying deadline to allow the General Assembly to adopt constitutionally sound redistricting maps. And in any event, Plaintiffs' Amended Complaint implicitly challenges the constitutionality of the qualifying deadline to the

extent it is imposed on candidates before new maps are adopted by the General Assembly or imposed by the Court. *See* Amended Compl. at ¶ 9 and Prayer for Relief ¶ F (asking the Court to "[e]xtend the April 7, 2022, filing deadline for prospective legislative candidates as needed to ensure the enactment or imposition of the new legislative maps prior to the filing deadline"). To hold otherwise would perversely require the Court to violate constitutional rights to remedy violations of constitutional rights.[12]

VI. Plaintiffs will Suffer Irreparable Harm if Injunctive Relief is Denied.

Defendants' argument that Plaintiffs will not suffer irreparable harm if injunctive relief is denied relies on Defendants' claim that Plaintiffs do not have standing. Plaintiffs incorporate their response on standing from Section II, above, and reiterate from their initial memorandum that the abridgement of a constitutional right is irreparable harm *per se*. *See, e.g., Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) ("When constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury."). If Plaintiffs' participation in the upcoming election takes place under constitutionally infirm legislative maps, Plaintiffs will be irrevocably harmed. *See Bonnel v. Lorenzo*, 241 F.3d 800, 809 (6th Cir 2001) (citations omitted) ("a successful showing

[12] Defendants cite only *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446 (Tenn. 1995) and *Dennis v. Sears, Roebuck & Co.*, 446 S.W.2d 260 (Tenn. 1969) in support of their contention that this Court is powerless to move a qualifying deadline in order to allow the legislature to remedy its constitutionally defective maps. *Richardson* involved the question of when an administrative agency may resolve constitutional questions, and Defendants cite it for the unremarkable proposition that the legislative branch has authority to make, alter, and repeal law. *Id.* at 453 (noting also that "the judicial branch has the authority to interpret and apply the law"). *Dennis*, meanwhile, merely holds that courts may not set aside laws unless they are unconstitutional. 446 S.W.2d at 266. Neither opinion constrains the Court's broad equitable power to fashion relief and avoid constitutional violations.

on the first factor [*i.e.*, likelihood of success] mandates a successful showing in the second factor—whether the plaintiff will suffer irreparable harm.").

VII. The State will Not Suffer Substantial Harm from Injunctive Relief.

Defendants' final line of argument opposing Plaintiffs' motion asks the Court to prioritize the administrative burden of compressing this year's election calendar over the protection of Tennesseans' constitutional rights. Plaintiffs acknowledge that compressing this year's election schedule will require state election officials to bear some additional administrative burden, but "to the extent that this is a hardship, it is one imposed by the two documents defendants are sworn to uphold, the state and federal Constitutions." *Rural W. Tenn. African-Am. Affairs Council*, 863 F. Supp. at 451 (internal quotations and citations omitted).

Defendants quote heavily from the United States Supreme Court's decision in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), in which the Supreme Court vacated an appellate court stay that would have changed Arizona's voter identification law approximately four weeks before the November 2006 election. Despite the longer time period at issue here (*i.e.*, over four months until the election versus one month), Defendants quote *Purcell* for the proposition that the proximity of an impending election increases the risk that court orders affecting elections will "result in voter confusion and consequent incentive to remain away from the polls." Defs' Resp. at 38. Defendants omit the Court's countervailing statement reiterating the principle that "[c]ountering the State's compelling interest in preventing voter fraud is the plaintiffs' strong interest in exercising the 'fundamental political right' to vote." *Purcell v. Gonzalez*, 549 U.S. at 4.

Like in *Purcell*, many of the other decisions Defendants cite blocking or denying election-based injunctive relief present a meaningfully more compressed timeline than the timeline facing the Court in the instant matter. In *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968), the United States

Supreme Court demurred, on October 15, 1968, from making the State of Ohio include the Socialist Labor Party on the November 5, 1968, ballot due to the extreme proximity of the election, the inability to print new ballots on such short notice, and the risk of voter confusion. In *Alpha Phi Alpha Fraternity, Inc. v. Raffensperger*, --- F. Supp. 3d ---, 2022 WL 633312, at *71-*76 (N.D. Ga. Feb. 28, 2022), the Court denied injunctive relief on February 28, 2022, which fell less than three months prior to the May 24, 2022, primary.

Here, the primary election remains over four months away, and Plaintiffs have asked the Court only to extend the April 7, 2022, candidate qualifying deadline "as needed to ensure the enactment or imposition of the new legislative maps prior to the filing deadline." Amended Complaint, Prayer for Relief ¶ F. In support of their Motion for Temporary Injunction, Plaintiffs argued that this deadline could be moved as late as May 20, 2022, without critically disrupting the election process, but the Court could certainly move the deadline less further out to address the concerns of the election officers who submitted affidavits in support of Defendants' Response. If the Court issues injunctive relief, it is required to provide the legislature with at least 15 days to remedy the identified constitutional defects. TENN. CODE ANN. § 20-18-105. Thus, the Court could require the legislature to act on or before April 15, 2022; the Court could provide itself with one week thereafter (or less) to impose an interim districting plan if the Legislature fails to act; and the Court could set the qualifying deadline for two weeks later, on May 5, 2022. This schedule would compress the time between the qualifying deadline and the election by less than a month and would provide the state's election officers with 15 additional days to undertake the requisite tasks leading up to the August 2022 primary elections.

Defendants submitted affidavits from the Administrators of Elections for Shelby, Wilson, and Knox Counties. Therein, each administrator attests that moving the candidate qualifying

deadline to May 20, 2022, would prevent their offices from mailing absentee ballots to citizens in the military by the deadline imposed by federal law. Affidavit of Linda Phillips ¶ 27; Affidavit of Tammy Smith ¶ 23; Affidavit of Chris Davis ¶ 26. Each Administrator further testifies that it takes approximately three days to one week after ballots are printed to prepare military absentee ballots for mailing, Phillips Aff. ¶ 9 (one week); Smith Aff. ¶ 7 (three days); Davis Aff. ¶ 11 (one week); that it takes one to two weeks to build the ballots, Phillips Aff. ¶ 13 (at least one week); Smith Aff. ¶ 11 (two weeks); Davis Aff. ¶ 15 (one week to 10 days); and that it takes up to a week for the Secretary of State's Coordinator of Elections to approve the ballots, Phillips Aff. ¶ 13 (two days to a week), Smith Aff. ¶ 11 (2 days to a week), David Aff. ¶ 16 (2 to 3 days to a week). If the qualifying deadline were delayed until May 5, 2022, the candidate withdrawal and executive committee review periods would end on May 19, 2022 (two weeks after the deadline). TENN. CODE. ANN. §§ 2-5-204. Combining each Administrator's stated time frames, each election commission could complete the process of building ballots, having them approved, and mailing absentee ballots to members of the military in the four and a half weeks between May 19, 2022, and the deadline to mail military absentee ballots, on June 22, 2022. Concerning the preparations for early voting and election day addressed in each Administrator's affidavit, the offices would have an additional three and a half weeks until the July 15, 2022, commencement of early voting, and nearly three more weeks until election day on August 4, 2022. Thus, even crediting, *arguendo*, the administrative burden posited by Defendants, there is still sufficient time to produce constitutionally appropriate maps and conduct the upcoming elections appropriately.

It is well settled that citizens have a "strong interest in exercising the 'fundamental political right' to vote," *Purcell*, 549 U.S. at 4 (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972)), and the Supreme Court further instructs that "'administrative convenience' is not adequate justification for

burdening fundamental rights." *Harding v. Edwards*, 487 F. Supp. 3d 498, 527 (M.D. La. 2020), *appeal dismissed sub nom. Harding v. Ardoin*, No. 20-30632, 2021 WL 4843709 (5th Cir. May 17, 2021) (citing *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975)). Here, Defendants have demonstrated the uncontested point that the administration of elections across Tennessee is a complex task, but Defendants have failed to prove that the constitutional rights of Tennesseans cannot be protected at this time without unduly compromising the integrity of Tennessee's 2022 primary and general elections. The requested injunction should, therefore, be granted.

Dated: March 29, 2022

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' Reply in Support of Motion for Temporary Injunction* has been served on the following counsel for the defendants via electronic and U.S. mail on this 29th day of March, 2022.

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