The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to john.jefferson@tncourts.gov .

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I serve as Chancellor for the 26th Judicial District of Tennessee (Chester, Henderson, and Madison Counties).

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1992; BPR # 015545

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee; BPR # 015545; October 23, 1992; Active

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Chancellor, State of Tennessee, 26th Judicial District	August 17, 2021- present
Attorney, Teel & Maroney, P.L.C.	March 26, 2003 – August 17, 2021
Attorney, Waldrop & Hall, P.A.	August 17, 1992 – March 25, 2003

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I do not currently engage in the practice of law, as I am serving as Chancellor of the 26th Judicial District. My responses to Nos. 8 through 10 below include information about matters I presently hear as a member of the judiciary, as well as my past practice areas.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

My law practice began thirty-three years ago. I was admitted to practice in the following courts effective the listed dates of admission: Tennessee State Courts, October 23, 1992; United States District Court, Western District, Tennessee, July 29, 1993; United States Court of Appeals for the Sixth Circuit, December 20, 2005.

I spent twenty-nine years in private practice, and the last four years as Chancellor.

My private practice was a general civil practice, with an emphasis on litigation in both state and federal courts. I maintained a wide variety of practice areas.

My first eleven years in practice were spent working for a mid-sized firm where I became a partner, primarily handling injury defense litigation on behalf of insurance carriers and their insureds. This was a high-volume litigation practice in which I took hundreds of medical depositions and tried numerous cases, both bench and jury trials.

I left that firm to join longtime friends as partners in a smaller firm. There, for the next eighteen years, I handled a broader range of civil litigation, trying bench and jury trials. I continued to handle some insurance defense matters, but my practice expanded to include direct representation of smaller business clients in defense of employment law matters, appeals of unemployment decisions, Fair Credit Reporting Act litigation, and other business litigation. As would be expected in a smaller general practice firm, I also represented some individuals who were plaintiffs in injury cases. In addition, my practice included divorce and post-divorce matters, adoptions, bankruptcy, contract disputes, and will contests. I also was a Rule 31 listed mediator in both Civil and Family law.

In the last nine years of private practice in that firm, my practice shifted to a heavy emphasis on

work for local governments. I served nine years as the Delinquent Tax Collection Attorney for Madison County, handling a high-volume litigation practice that included obtaining judgment for delinquent real property and personal property taxes and sale of real property, with corresponding real estate title work. I also served those nine years as the Madison County Attorney and the City Attorney for Three Way, Tennessee (and, for the last six years of private practice, as the City Attorney for Bolivar, Tennessee). This work involved advising the legislative bodies and officials for each entity, providing interpretation of statutes, as well as representing then in varied civil litigation in state and federal courts, including employment law matters; enforcement of zoning resolutions and ordinances; complex taxing disputes with other governmental entities; public nuisance cases; class action litigation; and, in one case, the ouster and removal from office of a county sheriff. This practice also required appearances for these clients in various administrative proceedings. Additional work during this period included the drafting and interpretation of resolutions, ordinances, private acts, and contracts. I also represented a local school system in a contractual dispute with a vendor.

My diverse legal experience resulted in my appearing in Chancery and Circuit Court in every Judicial District in Western Tennessee, and some in Middle Tennessee, including Davidson County. I also handled matters in United States District Court, and, on one occasion, the Sixth Circuit Court of Appeals. I have handled virtually every type of civil litigation which can be filed in Tennessee. Between 1992 and 2011, I handled twenty-six appellate matters in Tennessee State Courts, and in all but a handful of those, I both wrote the brief and appeared at oral argument.

I believe this varied practice for a wide variety of clients has given me a diverse perspective that would benefit the Court's work if I were selected for this position.

My experience as a trial judge is discussed in the response to No. 10 below.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

My response here addresses matters handled in my private practice. Matters handled since assuming the bench are addressed in the response to No. 10 below.

I prosecuted an ouster lawsuit against the elected Sheriff of Madison County, Tennessee on grounds of willful misconduct and violation of a penal statute involving moral turpitude. The allegations against the Sheriff included sexual harassment and misconduct. My prosecution of this lawsuit included successfully arguing a Motion to suspend the Sheriff from office pending a jury trial. After the suspension, the Sheriff resigned from office.

I successfully prosecuted a nuisance lawsuit under T.C.A. § 29-3-101, *et seq.* against the owner of real property in Madison County where a nightclub notorious for criminal incidents was located. The trial court declared the property a nuisance and entered an Order of Abatement, including a Permanent Injunction against the property owner. This case required me to defend a challenge to the constitutionality of the nuisance statutes cited above.

I filed suit on behalf of Madison County, Tennessee against the City of Jackson, Tennessee concerning the City's alleged breach of an agreement providing for the application of local

option sales tax revenue for educational purposes, pursuant to T.C.A. § 67-6-701, *et seq.* Unchallenged, this would have resulted in a twelve-million-dollar annual loss of education funding for Madison County. After a pre-trial hearing in which the trial judge commented on the strength of the County's presentation, the matter was compromised, saving millions annually for Madison County children and taxpayers.

I handled a hotly disputed case seeking the involuntary termination of parental rights on behalf of a couple seeking to adopt a neglected child placed in their custody following the incarceration of the child's parents. After much litigation, the effort succeeded, and the child thrived and was raised to adulthood in a loving home.

I defended a business owner accused of violating the Fair Credit Reporting Act (15 U.S.C. § 1681). A Motion for Summary Judgment in favor of my client was granted by the United Stated District Court in 2006.

In a reported case, *Jones v. Sterling Last Co.*, 962 S.W.2d 469 (Tenn. 1998), I successfully defended a worker's compensation claim on the ground that notice had not been given pursuant to statute. The published opinion (authored by Justice Drowota) addressed the sufficiency of notice and clarified that termination does not relieve an employee's burden to provide notice of a work-related injury.

Shortly after beginning my practice, I wrote the brief for the successful appellee in a case involving, among other things, the interpretation of the Restatement (Second) of Tort concerning Liability of Third Parties for Negligent Performance of Undertaking. The Court of Appeals issued an opinion which agreed with the brief's arguments on this subject and its application to the facts of the case. The reported case is *Dudley v. Unisys Corp.*, 852 S.W.2d 435 (Tenn.App.1992) (authored by Judge Crawford).

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I was appointed by Governor Bill Lee as Chancellor of the 26th Judicial District on August 13, 2021, and I took the oath of office on August 17, 2021. I continue to serve as Chancellor presently, having been elected to a full eight-year term on August 4, 2022.

I am the only Chancellor for the 26th Judicial District, which consists of Chester, Henderson, and Madison Counties. The District's total population was 144,006 as of the 2020 Census, making it the largest District in West Tennessee with a single Chancellor.

Based on statistical data from July 1, 2021-June 30, 2024, overlapping most of my first three years as Chancellor, 5213 cases were filed in the District and there were 5223 case dispositions (because some cases disposed of were filed prior to the three-year period). At the time of this submission, I do not yet have, and so have not included, official data for July 1, 2024-June 30, 2025, but anecdotally, the workload for the most recent year is comparable to the prior three.

My Chancery Court trials have all been bench trials. These trials have required me to make detailed findings of fact and provide analysis to support my conclusions of law. I have also presided over scores of bench hearings on various pre-trial and post-trial motions, including dispositive motions.

I have had several jury trials scheduled, but these resolved prior to trial (most after my rulings on jury instructions, dispositive motions, or similar rulings which narrowed the issues; in other words, the sort of rulings which commonly bring jury cases to the appellate level).

The breakdown of cases I have handled over my time as Chancellor, based upon the latest statistical data available, is as follows:

- Divorce without Children 40%
- Divorce with Children 21%
- Residential Parenting/Child Support 14%
- Miscellaneous General Civil 8%
- Probate/Trust 7%
- Adoption/Surrender 4%
- Contract/Debt/Specific Performance 3%
- Conservatorship/Guardianship 1%
- Orders of Protection 1%
- Real Estate Matter 1%

From September 1, 2023-August 31, 2024, I served as presiding judge of the 26th Judicial District. During this term, I oversaw the first updating of Local Rules for the District since 2000, personally rewriting the section on Local Rules applicable to the Chancery Court.

I have been appointed by the Tennessee Supreme Court to serve on a three-judge panel hearing a challenge to the constitutionality of the General Assembly's redistricting legislation following the 2020 census, and to another hearing challenges to the administrative system created by the Tennessee Workers' Compensation Reform Act of 2013. The experience of working with fellow judges in a collegial manner while grappling with the issues raised provided some parallels to appellate court service, or at least my expectations of such service.

The cases heard in Chancery Court typically address the most personal of issues to the litigants. I am regularly asked to decide questions affecting their family and their finances. I am required to hear difficult and deeply personal matters in order to make these decisions. I often hear about the litigant's worst and most embarrassing moments. While I knew this was part of the job, little can prepare one for the actual experience.

Many of the decisions required of me call for the wisdom of Solomon, and I make no claim of possessing that gift. What I have found is that making these difficult decisions is made somewhat easier by diligent research and consultation with the collective wisdom of Tennessee jurisprudence as developed over two centuries. By ensuring that case precedent and statutory factors are considered and followed in the decision-making process, the issues come into better focus, and any improper subjectivity is chipped away.

It is difficult to designate a portion of my cases as "noteworthy", as every case is noteworthy to the litigants. However, I have had some of my decisions receive scrutiny by appellate courts, and I address these below.

Moore v. Lee, 644 S.W.3d 59 (Tenn. 2022). This is the three-judge panel case addressing legislative redistricting (referenced above). I am hesitant to discuss the full case in detail, as it is presently on appeal and could theoretically be remanded to the trial court level for further handling (one of my attached writing samples is from the case and provides additional background). In the Supreme Court decision cited, I dissented from the panel majority's decision to grant a temporary injunction which, among other things, enjoined the holding of any election under the enacted Senate redistricting plan, required the General Assembly to remedy the alleged defects of said plan within fifteen days or face a remedy imposed by the panel, and modified the filing deadline for prospective state Senatorial candidates. After an expedited review, the Supreme Court vacated the injunction entered by the panel majority, which was consistent with my position.

Ruiz v. Butts Foods, L.P., 2025 WL 1099966 (Tenn. Ct. App.). In this case, it was necessary to interpret the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C. §§ 401-402 (EFAA). At the time the case came to my Court, the statute was barely six months old, and there was scant interpretive case law. The issue dealt with whether an arbitration agreement could be enforced when the alleged offenses occurred in part prior to enactment of the statute and when other allegations not covered by the statute were in the Complaint. The Court of Appeals affirmed my written decision (which is included with my writing sample attached to this application). The case is discussed in 2 Termination of Employment § 46:4, § 46:28 (October 2025 update).

Hight v. Hight, 2024 WL 5155742 (Tenn. Ct. App.). This involved a proposed parental relocation by a parent following a divorce, opposed by the other parent. The case required me to review the procedural requirements of Tennessee Code Annotated § 36-6-108 and conduct a best interest analysis pursuant to that statute. The factors themselves are straightforward, but the application, impacting one parent's employment opportunities and another parent's access to children, which was daily at the time of the dispute, was very difficult. My ruling was affirmed by the Court of Appeals.

Pallekonda v. Pallekonda, 2024 WL 983162 (Tenn. Ct. App.). This was a divorce case with significant parenting and alimony issues in which my decision was upheld on appeal. Notably, my ruling that the husband was willfully and voluntarily underemployed was heavily scrutinized and upheld. I also was required to make determination as to whether transitional or rehabilitative alimony was a proper remedy for the dependent spouse. The Court of Appeals agreed with my determination. The case was discussed in an article titled "Empty Pockets", found in the May/June 2024 issue of the Tennessee Bar Journal.

In re A.A., 2024 WL 2078423 (Tenn. Ct. App.). This case involved an unusual dispute over adoption. The child's biological mother had died from illness, and the biological father was unknown. Prior to the mother's death, the child has been placed in the joint temporary custody of the maternal grandfather and a maternal cousin. After the mother's death, both the grandfather and the cousin wanted to adopt the child. The case required me to conduct a comparative fitness analysis using the statutory factors for determining child custody found in Tennessee Code Annotated § 36-6-106. The Court of Appeals reviewed my analysis and affirmed the decision.

In re P.W., 2024 WL 4853478 (Tenn. Ct. App.); *In re D.S.*, 2024 WL 3813669 (Tenn. Ct. App.); *in re B.R.*, 2024 WL 3443817 (Tenn. Ct. App.); *In re T.T.*, 2024 WL 2784109 (Tenn. Ct. App.).

Each of these cases involve the termination of parental rights, arguably the most emotionally wrenching of civil cases. Such cases require a finding by clear and convincing evidence that 1) statutory grounds for termination have been established, and 2) the best interests of the child support termination. Because terminating parental rights carries constitutional dimensions, and because such cases are almost routinely appealed, trial courts are required to make detailed factual findings and conclusions of law. Failure to do so adequately will see such decisions remanded by the appellate courts. In these three cases, my findings and conclusions were weighed with heavy scrutiny and upheld.

The Tennessee Supreme Court appointed me to the Hearing Committee for Disciplinary District VII by Order entered November 10, 2020. I served in this capacity for less than a year, until my appointment as Chancellor on August 13, 2021. In that capacity, I was authorized to sit as part of a three-attorney panel to hear disciplinary complaints against members of the bar. Due to my short tenure, I only heard and ruled with a panel on a single case.

During my private practice, I was a Rule 31 listed mediator from 2009-2021. I only served as a mediator in one case, a routine civil dispute. As Chancellor, I have handled a judicial mediation of a personal injury case at the request of a judge from another district.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

The experiences listed below pre-date my judicial service; since becoming Chancellor, I have resigned or declined service in any fiduciary capacity.

University School of Jackson (USJ) Board of Trustees. USJ is a non-denominational, non-sectarian, college preparatory school located in Jackson, Tennessee with an enrollment of approximately 1100 students from Infant/Toddler to Twelfth Grade. During my ten years on the Board, I served as Chairman from 2012-2014 and Vice-Chairman from 2010-2012. I was a member of search committees that hired three Heads of School, including the current Head. I served on nearly every Board committee, chairing the Risk Management and Strategic Planning Committees.

West Tennessee Fellowship of Christian Athletes (FCA) Board of Directors. FCA is a para-church ministry which promotes the gospel. The ministry is geared toward student-athletes and coaches, though all are welcomed. Besides fundraising and committee service, I was invited on occasion to speak with groups of athletes and/or coaches outside of school hours.

Jackson Area Council on Alcoholism and Drug Dependency (JACOA) Board of Directors. JACOA provides inpatient and outpatient programs licensed to treat individuals with substance and/or alcohol use disorders, in addition to co-occurring mental health disorders. JACOA also offers long term recovery for individuals who successfully complete treatment, through transitional and permanent housing. My years on the JACOA Board raised my awareness of the terrible consequences of substance abuse. I believe this has been beneficial to me in understanding the background in many of the cases I now see in court. Raising awareness and support for JACOA in the community and in government isn't always easy for Board members. Many of the clients served have experiences that do not generate sympathy from all portions of

society. But the mission of JACOA to love those whom society may at times deem unlovable is one I'm proud to have supported.

I have only had one experience as guardian ad litem. I was asked to report to the Court on a proposed workers compensation settlement for an injured worker who did not speak English. I reviewed the proposed agreement, consulted with the injured worker through an interpreter, and reported to the Court that the proposed settlement was reasonable and in the best interest of the injured worker.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

Criminal law has not been a part of my practice. However, the only criminal matter on which I have ever worked was a capital murder case. Between my first and second year of law school, I clerked for the late Russell X. Thompson, who had been appointed to represent a defendant charged with murder. I spent the summer researching and writing numerous memorandums on the standards required to establish various aggravating circumstances and their applicability to the case being defended. Coming early in my legal education, the experience helped teach me the importance of legal research and made me better appreciate how real lives are affected by our practice of law.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I applied to fill a vacancy on the Tennessee Court of Appeals, Western Section, in 2014. A public hearing was held by the Commission then in existence for considering judicial appointments on May 16, 2014. At the hearing's conclusion, my name was one of the three finalists (out of eight applicants) submitted by the Commission to Governor Bill Haslam as a nominee, along with now-Judge Kenny Armstrong and the late Oscar "Bo" Carr. Governor Haslam selected Judge Armstrong for the position.

I also applied to fill a vacancy on the Tennessee Court of Appeals, Western Section, in 2019. A public hearing was held by the Governor's Council for Judicial Appointments on March 11, 2019. At the hearing's conclusion, I was again one of three finalists (out of fourteen applicants) submitted by the Council to Governor Bill Lee for consideration as a nominee, along with now-Judge Carma McGee and now-Justice Mary Wagner. Governor Lee selected Judge McGee for the position.

In 2021, I applied to fill a vacancy in the office of Chancellor of the 26th Judicial District. My name and the name of the only other applicant were submitted to Governor Lee. Governor Lee appointed me to the position on August 13, 2021.

I applied to fill a vacancy on the Tennessee Court of Appeals, Western Section, in 2024. A

public hearing was held by the Governor's Council for Judicial Appointments on November 18, 2024. At the hearing's conclusion, my name was one of the three finalists (out of six applicants) submitted by the Council to Governor Bill Lee for consideration as a nominee, along with Judge Valerie Smith and Chancellor James Newsom. Governor Lee selected Judge Smith for the position.

In 2008 and again in 2018, I submitted applications to the committees then meeting to recommend candidates for the position of United States Magistrate Judge for the Western District of Tennessee. However, I did not interview for these positions.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

The University of Memphis (then Memphis State University) Cecil C. Humphreys School of Law, August 1989-May 1992; Juris Doctorate

- Member, Moot Court Board
- Mead Data Central Writing Award
- American Jurisprudence Award, Corporations
- American Jurisprudence Award, Agency and Partnerships
- Winner, Best Brief, Advanced Moot Court Competition
- Finalist, Advanced Moot Court Competition.

Union University, August 1983-May 1987; Bachelor of Science

- Alpha Chi (Top Ten Percent)
- President, Junior and Senior Class
- President, Phi Beta Lambda Business Fraternity
- President, Sigma Alpha Epsilon, Social Fraternity

Between college and law school, I worked in banking and took a single adult enrichment course on banking at Jackson State Community College in the Fall of 1987.

PERSONAL INFORMATION

15. State your age and date of birth.

60; [redacted]1965

16. How long have you lived continuously in the State of Tennessee?

I have lived in Tennessee for my entire life.

17. How long have you lived continuously in the county where you are now living?

From August 1992-present, and from birth until December 1987.

18. State the county in which you are registered to vote.

I am registered to vote in Madison County.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

I once had a complaint filed against me with the Board of Professional Responsibility by a former client unhappy after I wrote to request payment of a long outstanding bill. I responded promptly to the Board's requests for documentation. The matter was dismissed with no further

action beyond the exchange of letters.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

I was listed as one of the Defendants when a former law firm client sued my former law partner and my firm concerning a real estate transaction handled by the former partner. I was not involved in, and had no knowledge of, the transaction. The case was settled out of court after the filing of an Answer, and an Order of Dismissal entered. There was no discovery or other advancement of the litigation beyond the initial filings. The case was filed in Madison County Chancery Court, Docket No. 67890 on June 9, 2011.

In 2014, I brought a public nuisance suit at the request of the Madison County Sheriff's Office against a property owner (in her nineties) and her son (who allegedly managed her affairs) concerning alleged criminal activity (including a shooting) at her public events building. The litigation was resolved by the parties entering an agreement prohibiting certain uses of the property in the future. Subsequently, on January 5, 2015, the son filed a *pro se* complaint against me alleging various unusual theories without merit. A preliminary Motion to Dismiss (during the hearing of which the son alleged I was a "sleeper cell" who had been activated against him) disposed of the matter. The case was filed in Madison County Circuit Court, Docket No. C-15-3, Div. II. Interestingly, the son, who became a Madison County Commissioner, later joined in my unanimous third reappointment as Madison County Attorney on March 20, 2017.

On October 14, 2020, a Bolivar City Councilman (who had recently been the subject of investigation and indictment) filed a *pro se* "lawsuit" against the City of Bolivar, the Bolivar City Council members, two investigators with the Tennessee Comptroller's office, and me as Bolivar City Attorney in Hardeman County Circuit Court, where it was assigned Docket No. 2020-cv-26. The "lawsuit" consisted of a printed email containing no complete sentences, only scattered phrases. The "lawsuit" made no direct allegations against me. At the beginning of a

hearing to consider a Motion to Dismiss, the plaintiff voluntarily dismissed his action.

On June 28, 2023, a *pro se* inmate filed a lawsuit in Madison County Circuit Court (docket no. C-23-176, Division III) against me and other judges in the 26th Judicial District alleging various deprivations of constitutional rights over his dissatisfaction with a post-conviction hearing presided over by one of our Circuit Court judges. Although I was named in the suit, the handwritten complaint did not make any direct allegations against me. On September 26, 2023, the case was dismissed on multiple grounds, including failure to state a claim upon which relief could be granted.

In 1993, my parked car was hit and sustained property damage. My insurance company paid me for my loss. It is my understanding that in 1993 or 1994, my insurance company filed a subrogation lawsuit in my name in Haywood County General Sessions Court against the individual who hit my car. However, the Haywood County General Sessions Court Clerk, while helpful, has been unable to find any records of the suit or its disposition. I mention this possible lawsuit out of an abundance of caution.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

In addition to the University School of Jackson Board of Trustees, referenced in the response to No. 11 above, I have belonged to the following organizations in the last five (5) years:

Fellowship Bible Church

Wyndchase Homeowners Association

In addition, while serving as an elected member of the Tennessee Republican Party State Executive Committee from 2018-2021, I was automatically added to the County Executive Committees of the Republican Party in Crockett, Dyer, Lake, Lauderdale, and Madison Counties.

With respect to the Madison County Republican Party specifically, I have additionally held the following offices: Chairman, 2001-2005 and 2007-2011; Immediate Past Chairman, 2005-2007 and 2011-2015; 2d Vice-Chairman, 1999-2001.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities, should you be nominated and selected for

the position for which you are applying, state your reasons.

I was initiated as a member of Sigma Alpha Epsilon social fraternity while attending Union University. Only males are members of this fraternity (sororities were active on the same campus and exclusively available for female membership). I do not intend to resign from the fraternity, unless required by the Rules of Judicial Conduct, but I have not been an active participant since graduation from college and plan no resumption of activities. Other than my college fraternity, I have never belonged to such an organization.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Trial Judges Association, 2021-present

- Executive Committee Member, 2023-present

Tennessee Judicial Conference, 2021-present

- Domestic Relations Committee Member 2021-present
- Legislative Committee Member, 2022-present

American Inns of Court, Howell E. Jackson Chapter, 2015-present

Federalist Society, 2013-present

Jackson-Madison County Bar Association, 1992-present

Tennessee Bar Association, 1992-2021

Tennessee County Attorney's Association, 2012-2021

Tennessee Municipal Attorneys Association, 2012-2021

Tennessee Association of Property Tax Professionals, 2012-2021

National Republican Lawyers, 2013-2021

International Municipal Lawyers Association, 2014-2021

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Union University, Distinguished Achievement Award for Government/Public Service, 2025.

30. List the citations of any legal articles or books you have published.

None.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

"What We Do and Why" - West Tennessee Legal Services - Chancellor James F. Butler Family Law Seminar. December 6, 2024

"Tips for Better Practice in Trial Court and Legislative Update" - West Tennessee Legal Services - Chancellor James F. Butler Family Law Seminar. December 1, 2023

"Tips for Better Practice in Trial Court and Legislative Update" - West Tennessee Legal Services - Chancellor James F. Butler Family Law Seminar. December 2, 2022

"From Practice to the Bench" – Cecil C. Humphreys School of Law/University of Memphis Lambuth – August 12, 2022

"A New View from the Bench" - West Tennessee Legal Services - Chancellor James F. Butler Family Law Seminar. December 3, 2021

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Chancellor of the 26th Judicial District. Governor Bill Lee appointed me on August 13, 2021, and I took the oath of office on August 17, 2021. On August 4, 2022, I was elected without opposition to a full eight-year term.

Member, Hearing Committee for Disciplinary District VII. The Tennessee Supreme Court appointed me on November 10, 2020. I served until my appointment as Chancellor.

Judge, Tennessee Court of Appeals, Western Section (Applicant). As referenced in my response to Question 13 above, I was an applicant and finalist for appointment to the Tennessee Court of Appeals, Western Section in 2014, 2019, and 2024.

United States Magistrate, Western District, Tennessee (Applicant). As referenced in my response to Question 13 above, I applied for appointment in 2008 and 2018.

Madison County Attorney. I was appointed by the Madison County Commission in 2012 and was reappointed biannually until my appointment as Chancellor in 2021.

Madison County Delinquent Tax Attorney. I was appointed by the Madison County Trustee and Madison County Mayor and was reappointed annually until my appointment as Chancellor in 2021.

City Attorney for Bolivar, Tennessee. I was appointed by the Bolivar City Mayor in 2015 and served until my appointment as Chancellor in 2021.

City Attorney for Three Way, Tennessee. I was appointed by the Three Way Board of Alderman

in 2012 and served until my appointment as Chancellor in 2021.

Madison County Public Records Commission. I was appointed by the Madison County Commission in 2012 and was reappointed annually until my appointment as Chancellor in 2021.

Tennessee Republican Party State Executive Committeeman, 27th District. In 2018, I won a contested popular election with 73% of the vote across five West Tennessee counties (Crockett, Dyer, Lake, Lauderdale, and Madison).

Madison County Election Commissioner. I was appointed to this position by the Tennessee State Election Commission and served until 2011.

Delegate to the 2020 Republican National Convention. I won popular election from Tennessee's Eighth Congressional District.

Alternate Delegate to the 2012 Republican National Convention. I was selected by the Tennessee Republican Party.

Alternate Delegate to the 2008 Republican National Convention. I was selected by the Tennessee Republican Party.

Alternate Delegate to the 2004 Republican National Convention. I was selected by the Tennessee Republican Party.

Delegate to the 2016 Republican National Convention (Candidate).

Delegate to the 2012 Republican National Convention (Candidate). In 2012 and 2016, I was an unsuccessful candidate as a delegate to the Republican National Convention from Tennessee's Eighth Congressional District, an elected position. Election as a delegate involves a formula requiring not only that the delegate candidate finish among the top vote recipients for a particular presidential candidate, but also that the presidential candidate to whom one is pledged be allocated a delegate in that congressional district. My accomplishment of the former was outweighed by the latter.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Please see the attached writings. Each of these reflects my personal effort exclusively.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I am seeking a better opportunity to serve Tennessee. My life has been blessed and benefited by

the service of others, beginning with my parents. I have tried to repay those efforts by looking for opportunities to serve, often in leadership roles. Through local government legal practice and service in the judiciary, I have seen that efforts can be leveraged for greater benefit through public service. The court system represents a unique vehicle to serve Tennessee and our fellow citizens.

Life is too brief to be wasted on personal indulgence. Public service and service to larger causes enables one to leave a meaningful legacy. For me, the greatest model of servant leadership is Jesus Christ.

I believe diverse professional experiences and a love of research and writing will enable me to make my best contribution by serving on the Court of Appeals.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

As Chancellor, I routinely encounter *pro se* litigants overwhelmed by the legal system. I work diligently to ensure they understand the process around them, and I zealously guard their rights. This includes my appointment of counsel to represent them as permitted by law.

During my practice, I provided *pro bono* legal services to various non-profit organizations. I also handled preparation of wills on a pro bono basis for clients in ministry. I met for free with countless individuals who simply had a problem and needed advice from an attorney on how to respond to it in a legally appropriate way.

I also represented some *pro bono* clients who came to me through West Tennessee Legal Services. Most of these involved drafting or assisting in the understanding of documents; however, I represented one of these individuals in litigation and trial at the General Sessions and Circuit Court level.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I am applying to serve as Judge on the Tennessee Court of Appeals, for the Western Section, which is bordered on the East and West by the Tennessee River and the Mississippi River, respectively. The full Court consists of twelve (12) judges, four (4) from each of Tennessee's three Grand Divisions. The Court handles direct appeal of civil cases from Tennessee trial courts. To assist in the administration of the docket, judges in the Western Section occasionally sit in Tennessee's Middle and Eastern Sections.

My twenty-nine years of practice and four years as Chancellor handling civil litigation in diverse areas of law would bring broad experience to this Court and assist its mission to review lower court decisions with efficiency and excellence.

My professional strength has been researching and writing, vital to this Court's work. As Chancellor, I routinely issue written opinions detailing my findings and analysis of legal

concepts.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I have been very active in public and governmental activities in West Tennessee. Most of these activities are no longer be available to me as a sitting judge. Some of my participation is also detailed in my responses to Nos. 11, 26, and 32 above.

Union University plays an important role in the educational, cultural and spiritual life of West Tennessee, and I was honored to serve as president of Union's National Alumni Association from 2001-2003.

Because elective office is a noble calling and recruiting and electing quality candidates matters, I served two terms as Chairman of the Madison County Republican Party. I was also appointed to the Madison County Election Commission, a bipartisan panel which ensures fair and free elections. I was elected to represent five West Tennessee counties by serving on the State Executive Committee of the Tennessee Republican Party, which recognized me in 2006 as its Statesman of the Year of the 8th Congressional District.

I served several years on the Board of Directors for the West Tennessee Fellowship of Christian Athletes and JACOA (an organization assisting those battling substance abuse), and I am grateful for their service to our community. Love for my children and education led me to serve ten years on the Board at their independent school, including two years as Chairman.

As judge, I no longer participate on these boards and committees. I will continue to attend and be actively involved in the ministry of Fellowship Bible Church.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I have had the opportunity to serve in leadership positions my entire life. Yet, in every organization where that has been the case, I was never anyone's first guess as an eventual leader. I was never the "kid picked first" for the team. Nonetheless, by consistently being available and working hard for the organization's mission, with a cheerful attitude, the effort usually resulted in leadership and organizational success. I have seen this pattern repeat itself throughout my life.

My parents modeled faith and work ethic for their children. We were taught that whatever you do, do it as though you were doing it for the Lord. My father came from modest means and was unable to afford college. Instead, he served honorably in the Navy. Thereafter, he worked hard, sometimes at two jobs, to give his children a college education. I regret that he did not live to see his son serve as judge.

I miss him every day but learned much from his example. If nominated, I will have much to learn from the example of the other members of the Court. I promise to work hard in the job of

appellate judge, with a servant's heart, for the sake of the mission - in this case, the fair application of justice for the State of Tennessee and the litigants who appear in our Courts. I will keep this promise - I don't know any other way to tackle an assignment.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

I firmly believe in the State and Federal Constitutions' separation of powers. A judge must apply the law as codified by the legislature. When a case requires interpretation of a statute or rule, this must be accomplished in an impartial, non-results-oriented manner. Therefore, even if the legislature acts in a manner not of my choosing, or if neutral application of that law ensures an outcome other than one I prefer, I follow my oath which mandates support for the Constitution, administration of justice without respect to persons, and faithful and impartial discharge of my judicial duty. As Chief Justice John Roberts has stated, "it's my job to call ball and strikes, and not to pitch or bat."

This point is not merely academic for me. Serving as Chancellor often puts me in positions where application of precedent and statutory directives mandates a correct, but difficult, outcome. I sometimes must deliver unpleasant news from the bench to litigants and see their hearts break. Sometimes my heart is breaking, too. Justice may be blind, but I am not.

As a licensed attorney, I regularly advised local officials from differing political persuasions on interpretation of Tennessee statutes and their application to local issues (often on live television). Occasionally, my legal opinions disagreed with my preferences, or those of politicians who appointed me, in areas such as conflicts of interest, public records, and open meetings. However, by giving opinions based on law, not preferences, I earned respect even from those who disliked my rulings.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Catherine Kwasigroh, Vice President for Institutional Advancement, Union University, [redacted]
B. Jody Pickens, District Attorney General, 26th Judicial District [redacted]
C. Senator Ed Jackson, 25th State Senate District, Tennessee [redacted]
D. Representative Chris Todd, 73rd State House District, Tennessee, [redacted]
E. Senator John Stevens, 25th State Senate District, Tennessee [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Appeals, Western Section of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: October 23, 2025.

Signature

When completed, return this application to Laura Blount at the Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

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

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

SEPARATE OPINION OF CHANCELLOR STEVEN W. MARONEY

I. Findings of Fact

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

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

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

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

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

A. 2022 Reapportionment of the General Assembly

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

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

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

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

B. The Enacted House Map

1. Doug Himes

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

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

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

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

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

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

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

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

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

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

2. The House Committee on Redistricting

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Competing Map Proposals

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

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

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

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

4. Gary Wygant

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

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

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

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

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

5. Expert Testimony concerning the Enacted House Map

i. Himes' Expert Testimony

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. Dr. Jonathan Cervas

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

iii. Sean Trende

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

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

C. The Enacted Senate Map

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

1. Francie Hunt

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

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

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

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

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

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

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

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

2. Expert Testimony

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

II. Conclusions of Law

A. The House Map

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

1. The Nature of Wygant's Challenge

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

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

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

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

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

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

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

2. The Applicable Standard

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

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

[9] Cervas' Map 13d_e.

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

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

a. Historical Review of the Standards

i. *Lockert I* and *Lockert II*

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

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

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

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

Lockert II, supra, at 838.

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

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

Lockert II at 844.

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

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

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

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

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

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

ii. House Reapportionment Act of 1984

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

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

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

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

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

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

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

[14] 52 U.S.C. § 10301 *et seq.*

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

iii. *Lincoln County v. Crowell*

(1) Legislative Guidelines

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

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

> **the *Lockert* case**, *supra,* have also been met, persuades us that it would be improper to set aside individual district lines on the ground that they theoretically might have been drawn more perfectly, in the absence of any proof whatever of bad faith or improper motives.

Id. at 604 (emphasis added).

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

(2) Burden Shifting

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

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

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

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

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

iv. *Moore v. State*

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

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

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

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

b. Current Standard for Burden of Proof

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

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

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

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

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

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

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

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

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

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

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

Lockert III, *supra*, at 90.

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

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

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

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

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

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

(b) Himes' Testimony Regarding the County Splits Statewide

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

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

(2) House Reapportionment Process

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

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

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

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

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

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

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

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

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

(4) Cervas' Opinion on Good Faith

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

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

(5) Himes' Opinion on Good Faith

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

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

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

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

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

(1) Wygant's Testimony as to Bad Faith

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

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

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

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

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

(2) Cervas' Testimony as to Bad Faith

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

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

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

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

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

3. Conclusion Regarding the House Map

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

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

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

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

B. The Senate Map

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

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

1. Elements of Standing

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

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

a. Generalized Grievances

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

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

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

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

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

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

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

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

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

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

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

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[21] As Tennessee's population count following the 2020 census is 6,910,840, the ideal Senate district population would be determined by dividing that number by the thirty-three Senate districts.

[22] The Board of Professional Responsibility recently identified 5322 active attorneys in East Tennessee. *See*, https://docs.tbpr.org/pub/annual-report-2021-2022.pdf. The age breakdown of these attorneys is not included in the report.

[23] https://data.census.gov/profile/Davidson_County,_Tennessee?g=050XX00US47037.

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

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

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

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

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

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

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

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

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

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

b. Injury in Fact

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

i. Right to Vote

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

ii. Equal Protection

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

iii. Vote Dilution

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

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

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

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

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

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

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

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

c. Distinct Standing Issues

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

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

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

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

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

2. Conclusion Regarding the Senate Map

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

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

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

III. Conclusion Summary

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

ENTERED this _____ day of November, 2023.

s/Steven W. Maroney
STEVEN W. MARONEY
CHANCELLOR

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

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

In Re: Adopted Child

Butler County Chancery Court Docket # xxxxx

[Because the subject of this writing sample concerns adoption, I have changed or omitted the names of parties and locations, relevant dates, and other factual matters which might contain identifying characteristics, to protect confidentiality.]

Counsel:

This matter came on for a hearing on _____, 20__ before the Chancery Court of Butler County, Tennessee upon the Amended Motion to Review Information from Adoption Records and to Set Aside Order Terminating Father's Parental Rights (f/k/a Motion to Unseal Records and to Transfer and Assign Case to Out-of-County Judge) filed by Movant on _____, 20__. Counsel for Movant, the adoptive parents ("Adopters"), and the biological mother ("Mother") and the State Attorney General, on behalf of the Commissioners of the Departments of Children's Services and Health, were present. The Court now issues its ruling in this correspondence.

The hearing specifically addressed Movant's request to unseal and review the adoption records of the case wherein the Adopters pursued the termination of the parental rights of the unknown father of Adopted Child ("Child") and the subsequent adoption of Child. Although the Movant's parallel Motion to set aside the Order Terminating Father's Parental Rights was not directly argued, and is not decided by this letter ruling, it is beneficial to put the present matter in context by referencing the underpinnings of that separate Motion. The Court further recognizes that resolution of Movant's request to unseal and review the adoption records may impact the ability to resolve other pending matters under consideration in this cause and may result in additional litigation.

Factual Background

Movant contends that he is the biological father of Child, and that that his parental rights were terminated without notice in violation of his constitutional right to due process. Movant further alleges that from approximately _____, 20__ until _____, 20__, he and Mother engaged in unprotected sexual intercourse on a regular and recurring basis. It is undisputed that Child was born _____, 20__. According to Movant, during _____, 20__, he learned from Mother's friend that Mother had given birth to a child. Significantly, Movant alleges he did not learn during this conversation that Mother had given up the child for adoption.

Movant then filed a Complaint to Establish Parentage against Mother in Butler County Juvenile Court on _____, 20__, which would be nineteen months following the _____, 20__ conversation with Mother's friend. Movant was then advised by the Adopters' counsel that they had adopted the child.

Sealing and Unsealing of Adoption Records

Tennessee Code Annotated § 36-1-126 provides that following the conclusion of adoption proceedings, including such adoption proceedings that are filed in conjunction with termination of parental rights proceedings, all records of such proceedings shall be placed and remain under seal, except as otherwise provided by Tennessee law, and shall be confidential. However, Tennessee Code Annotated § 36-1-138 makes allowance for the unsealing of these records in certain circumstances and provides the procedure by which such unsealing shall occur, if appropriate. The Court notes that there is little to no developed law concerning the factors for consideration under Tennessee Code Annotated § 36–1–138.

Specifically, Tennessee Code Annotated § 36-1-138(c) provides that the record of the adoption proceeding, the adoption record, sealed adoption record, sealed record, post-adoption record or adoption assistance record may be opened, under whatever conditions the court shall determine necessary, if the court finds, for good cause shown, that the best interests of the adopted person or of the public require such disclosure, and that at least one of seven listed requirements are met. Movant alleges that two such listed requirements are met in the present case, to wit:

1. (c)(2) The information is needed for purposes of establishing legal status or standing for inheritance or for property rights determinations or for the determination of legal relationships for third parties.
2. (c)(3) The information is necessary for the movant to prosecute or defend a legal proceeding and that alternative information sources or other means of accomplishing this end are not available

Movant's arguments, which will be addressed in more detail below, are based in his assertion of his constitutional right to due process. In essence, these arguments focus on his rights and what is in his best interests, which is a logical and appropriate position for any litigant to take. The Court notes, at the outset, that resolution of the present question does not focus solely on the rights and interests of Movant. Rather, it requires the Court to consider whether the best interests of the adopted person or the public require disclosure, provided the Movant can demonstrate his need satisfies the statutory requirement(s). Stated another way, it is theoretically possible for Movant to establish that he has met the requirements of (c)(2) or (c)(3), yet still fail to establish that the best interests of the adopted person or the public require disclosure. Further, if Movant fails to even meet the requirements of (c)(2) or (3), then this failure does not even trigger the Court's duty to then consider whether the best interests of the adopted person or the public require disclosure.

The Court will first address the statutory requirements which Movant asserts he has satisfied.

Tennessee Code Annotated § 36-1-138(c)(2)

As noted above, to satisfy this statutory requirement, Movant must demonstrate that the information sought from the sealed adoption proceedings "is needed for purposes of

establishing legal status or standing for inheritance or for property rights determinations or for the determination of legal relationships for third parties."

It is significant to note what is absent in the statute: a comma after the phrase "legal status". Therefore, it is insufficient for the Movant to simply show that he needs the information for the purpose of establishing his legal status generally; he must show that he needs the information to establish legal status (or standing) 1) for inheritance; 2) for property rights determinations; or 3) for the determination of legal relationships for third parties.

At the risk of belaboring the point, the sentence structure of this portion of the statute can be visually explained by this diagram:

It is clear from the record that Movant is not seeking to establish his legal status or standing for inheritance or property rights determinations. Is he, then, seeking this information to establish his legal status or standing for the purpose of determining legal relationships for third parties? This answer turns on whether the adopted child is a third party, as contemplated by the statute.

A "third party", as defined by Miriam-Webster, is "a person other than the principals". Black's Law (5th ed.) defines the phrase as "[o]ne who is not a party to an agreement or transaction but who may have rights therein." Although the phrase is capable of differing definitions depending on the context, it is generally used to reference a party other than those principally discussed up to the point the phrase is used in the matter under discussion.

This becomes significant in considering Tennessee Code Annotated § 36-1-138(c) as a whole. Up to the point in Tennessee Code Annotated § 36-1-138(c)(2) where the phrase "third party" appears, the statute has referred to the following principals: 1) the adopted child; 2) the public; and 3) the movant. It is not logical to suggest that the Movant would need information for the purpose of determining his legal relationship to the public, or to himself, so the "third party" does not refer to those principals. But neither is it logical that the Court would consider the "adopted child" the "third party", as that phrase is used

in this sentence, when the adopted child has already been specifically identified in the statutory section. "Third party", as used in this part of the statute, must refer to one other than "the adopted child."

Further, the statute does not state the Movant must show the information is needed for the purpose of determining his legal relationship *to* third parties, but *for* third parties. This further supports that the statute is not referring to a movant seeking to establish his legal relationship to the adopted person.

Reading the whole statute in light of these individual elements, then, means that Movant's request is not for the purpose of establishing his legal status or standing for determination of legal relationships for third parties (nor for the purpose of inheritance, nor for the purpose of property rights determinations). Therefore, the Court holds that Movant has failed to meet the requirements of Tennessee Code Annotated § 36-1-138(c)(2).

Tennessee Code Annotated § 36-1-138(c)(3)

To satisfy this statutory requirement, Movant must show that the information is necessary for him to prosecute or defend a legal proceeding and that alternative information sources or other means of accomplishing this end are not available.

Movant alleges that he did not receive proper notice of the underlying termination of the parental rights of Child's father (whom Movant claims to be), and so he wants to unseal the adoption records and review, among other things, the record concerning efforts to serve Child's father, the method of service, affidavit(s) filed in support of constructive service, order(s) concerning any evidentiary hearing concerning constructive service, the motion and order pertaining to any default judgment against Child's father, and the final decree of adoption. Movant asserts the information gained from such a review are necessary for him to prosecute his legal proceeding to set aside the termination of the parental rights of Child's father and the subsequent adoption.

Movant must also show that alternative information sources or other means of accomplishing this end are not available. Movant asserts that the Adopters, through counsel, have refused to provide such information. Movant has also sought formal discovery (which has not yet been accomplished due to pending objections), but notes that neither Mother nor the Adopters, as lay persons, will likely be able to provide sufficient answers regarding these technical issues of service of process.

The Adopters assert that the requested information is not necessary for Movant to prosecute a legal proceeding because the legal proceeding proposed (seeking to set aside the adoption of Child and the corresponding termination of the parental rights of Child's father) is barred by the applicable statutes of repose. Under this theory, if there is no legal proceeding available to him, Movant has not met the statutory requirement of showing he needs the information for such a legal proceeding.

There are two statutes of repose for consideration in the present matter. Tennessee Code Annotated § 36-1-113(q) provides for a one-year statute of repose for challenging the

termination of parental rights. Tennessee Code Annotated § 36-1-122 provides for a one-year statute of repose for challenging a decree of adoption. It is settled under Tennessee law that once a parent's rights have been properly terminated, that parent is not entitled to further notice of subsequent adoption proceedings. Tennessee Code Annotated § 36-1-113 (l)(1).

Therefore, the first matter to address in this portion of the inquiry is whether the statute of repose prevents Movant from initiating a legal proceeding to set aside the termination of the parental rights of Child's father. If such a legal proceeding is barred, then Movant cannot show there is a legal proceeding available which necessitates his access to the adoption records. Further, if such a legal proceeding is barred, and the termination stands as final, then Movant had no right to notice of the adoption proceedings, assuming for the sake of argument that he is Child's father, and Movant would not be able to prosecute a legal proceeding to attack that adoption on grounds of insufficient notice, notwithstanding the statute of repose applicable to adoptions.

Tennessee Code Annotated § 36-1-113(q)

Tennessee Code Annotated § 36-1-113(q) provides:

> After the entry of the order terminating parental rights, no party to the proceeding, nor anyone claiming under such party, may later question the validity of the termination proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, except based upon a timely appeal of the termination order as may be allowed by law; and *in no event, **for any reason**, shall a termination of parental rights be overturned by any court or collaterally attacked by **any person** or entity **after one (1) year** from the date of the entry of the final order of termination. This provision is intended as a statute of repose.*

(Emphasis added).

Movant's position, in essence, is that if he is Child's father, that status confers upon him constitutional rights which cannot be abrogated by an act of the Tennessee Legislature. Thus, the argument goes, the statute is inapplicable if his constitutional right to due process was not satisfied by the underlying termination of the parental rights of Child's father.

Both parties cite the case of *Turner v. Turner,* 473 S.W.3d 257 (Tenn. 2015) in support of their positions. *Turner* held, *inter alia*, that constructive service on a mother by publication was ineffective, and the judgment terminating the mother's parental rights was void for lack of personal jurisdiction. This is essentially what Movant believes occurred in the present matter: that procedures to acquire service on Child's father (whom he claims to be) either were not undertaken or were taken with fatal defects such that he has a basis for prosecuting a legal proceeding to set aside the judgment terminating the parental rights of Child's father as void for lack of personal jurisdiction. (*Turner* went on to hold that, while void judgments may be attacked at any time, relief from a void judgment may

nonetheless be denied if certain exceptional circumstances exist. The matter at hand does not call for a conclusion to be drawn presently on whether such a situation exists).

The Adopters note that *Turner* did not address the question of whether the statute of repose set forth in Tennessee Code Annotated § 36-1-113(q) would have barred the claim of the mother in that case. In a footnote to the case, the Supreme Court stated:

> We decline to address in this appeal Father's assertion that the one-year statute of repose applicable to termination of parental rights proceedings, Tennessee Code Annotated section 36–1–113(q), bars Mother's claim. As the Court of Appeals recognized, Father failed to argue that this statute applies to bar challenges to void judgments, and the Attorney General asserted that the statute of repose does not apply to void judgments, like the judgment at issue in this appeal. Thus, we decline to address the question in this appeal. *We note, however*, that Mother argued that applying the statute of repose in these circumstances would be unconstitutional, and *most state courts have held that a state-law time limit, even those imposed on judgments terminating parental rights or finalizing adoptions, cannot be applied in a manner that would deprive the party challenging the judgment of Due Process*. See *In re E.R.*, 385 S.W.3d at 562 & n. 21 (collecting cases).

Turner, supra, at fn. 24 (emphasis added).

The earlier Court of Appeals decision in *Turner* also declined to address the applicability of the statute of repose to termination of parental rights proceedings, as the father in that case declined to argue that this statute applies to bar challenges to void judgments. Nonetheless, the Court of Appeals stated, "we must read Tennessee Code Annotated § 36–1–113(q) *in conjunction with* Tennessee Code Annotated § 36–1–117(m)(3)'s requirement that in order to utilize service by publication, a party seeking to terminate parental rights must first seek the approval of the trial court to do so, by filing an affidavit detailing the party's efforts to locate the absent parent." *Turner v. Turner*, 2014 WL 3057320, at p. 15 (Tenn.App.)(emphasis added).

Although both the Supreme Court and the Court of Appeals declined to address the issue of the statute of repose, the cited language (including review of cases from other jurisdictions as cited in footnote 24 of the Supreme Court's *Turner* decision) indicates to this Court that the appellate courts are not likely to hold that the statute of repose will bar a request for relief from a void judgment. This Court holds, therefore, that Tennessee Code Annotated § 36–1–113(q) would not bar a legal proceeding to set aside a termination of parental rights where the grounds asserted are that the judgment against the terminated parent was a void judgment.

The Court's ruling in the preceding paragraph makes it unnecessary to determine whether the one-year statute of repose located in Tennessee Code Annotated § 36–1–122 would bar a legal proceeding to challenge an adoption decree. However, as an alternative finding, the Court notes the same constitutional concerns that trump the applicability of Tennessee Code Annotated § 36–1–113(q) in the case of a void judgment would be present

when considering the applicability of Tennessee Code Annotated § 36–1–122. Therefore, the Court holds that Tennessee Code Annotated § 36–1–122 would not bar a legal proceeding to set aside an adoption where the grounds asserted are that the underlying judgment against the terminated parent was a void judgment.

At this juncture, however, the present case is distinct from *Turner*. In *Turner*, the terminated mother, Stephanie D. Turner, was known to father (Kevin Turner) who petitioned for the termination of mother's parental rights. Stephanie D. Turner was named in the litigation, and the service (which ultimately proved defective) in that case was aimed at serving Stephanie D. Turner. A judgment was taken against Stephanie D. Turner, who ultimately demonstrated that said judgment was void. In challenging the judgment taken against her, at no time was there ever any dispute or question that Stephanie D. Turner was a proper party in the case with standing to contest the judgment taken against her.

In the present case, it is asserted, but not established, that Movant is the father of Child. Movant was not a named respondent in the Petition to terminate parental rights. The issue then is not whether Movant was properly served, but rather, whether he *should have been* made a party to any termination or adoption proceedings. Otherwise stated, does Movant have any *standing* to prosecute a legal proceeding to set aside the termination or adoption?

To establish one's standing to bring an action, "a party must demonstrate (1) that it sustained a distinct and palpable injury, (2) that the injury was caused by the challenged conduct, and (3) that the injury is apt to be redressed by a remedy that the court is prepared to give." *City of Chattanooga v. Davis*, 54 S.W.3d 248 (Tenn. 2001)(citations omitted).

Tennessee Code Annotated § 36–1–117, as it existed at the time of the proceeding, required that the legal parent, guardian, or *the* [not *any*, as the statute now reads] putative father of a child must be made a party to a proceeding to terminate parental rights to said child. At the time of the proceedings in question, the definition of "putative father" was a biological or alleged biological father of a child who, at the time of the filing of a petition to terminate the parental rights of such person or, if no such petition is filed, at the time of the filing of a petition to adopt a child, meets at least one (1) of the criteria set out in § 36-1-117(c) and is not a legal parent. Those statutory criteria, at the time of the proceeding, were:

> (1) The biological father of a child has filed with the putative father registry, pursuant to § 36-2-318, as described in § 36-1-113(d)(3)(A), a statement of an intent to claim paternity of the child at any time prior to or within thirty (30) days after the child's birth and has notified the registry of all address changes;
>
> (2) [Deleted by 2018 Pub.Acts, c. 875, § 20, eff. July 1, 2018.]
>
> (3) The biological father has claimed to the child's biological mother, or to the petitioners or their attorney, or to the department, a licensed child-placing agency, or a licensed clinical social worker who or that is involved in the care, placement,

supervision, or study of the child that the biological father believes that the biological father is the father of the child; provided, that if the biological father has previously notified the department of the biological father's claim to paternity of the child pursuant to the putative father registry, § 36-2-318(e)(3), the biological father shall be subject to all the requirements for waiver of notice provisions of § 36-2-318(f)(2) and to all requirements for filing a paternity petition;

(4) The biological father is recorded on the child's birth certificate as the father of the child;

(5) The biological father is openly living with the child at the time the adoption proceeding is commenced and is holding himself out as the father of the child; provided, that if custody of the child has been removed from the biological mother by court order, notice shall be given to any man who was openly living with the child at time of the initiation of the custody or guardianship proceeding that resulted in the removal of the custody or guardianship of the child from the biological mother or biological father, if the man held himself out to be the father of the child at the time of the removal; or

(6) The biological father has entered a permanency plan under title 37, chapter 2, part 4, or under similar provisions of any other state or territory in which the biological father acknowledges paternity of the child.

All the statutory criteria required for the definition of "the" putative father contemplate 1) status or 2) activities undertaken by the putative father before or at the time of the proceedings. Movant had either not been designated such status or accomplished such activities at that time because he claims to have been unaware of the child's existence until after the proceedings were complete. Movant does not appear to meet the statutory definition of the putative father who was required to have been made a party.

Movant's claim finally rests on whether he is, in fact, already a party named in the petition - the Unknown Father. The Court recognizes that there is a circular element to this question. The concept behind naming an "unknown father", as opposed to naming an identified individual by his legal name, is so that a person who *may* be that father can be apprised of the situation and step forward so a determination can be made as to whether he is that party and, if so, as to his rights. Movant is a person who *may* be Child's unknown father, a party to the action. *Turner* demonstrates that a party against whom a void judgment is taken has standing to prosecute a legal proceeding to set aside that judgment. Therefore, as Movant seeks to prosecute such a legal proceeding to set aside a judgment taken against a party whom he may be, the Court holds that he has met the statutory requirement that he needs information from the adoption record to determine the existence and methods of service on Child's father in the termination of parental rights proceeding.

The question then becomes whether alternative information sources or other means of accomplishing this end are unavailable, such that unsealing the records is unnecessary. The only other practical way for Movant to learn of the service methods employed in the

parental termination would be for the Adopters to volunteer this information, or to provide it through discovery. It is undisputed that the Adopters have declined to volunteer this information. As lay people, they may be incapable of adequately explaining legal methods in response to discovery, even with diligent efforts to comply, as they undoubtedly relied on legal counsel in their filings. This could also involve privileged communications. The Court therefore rules that no practical alternative information sources or other means of determining service are available to Movant. He has therefore met his statutory burden under Tennessee Code Annotated § 36–1–138 (c)(3).

Having undertaken an exhaustive analysis of whether Movant has satisfied the statutory requirements of Tennessee Code Annotated § 36–1–138 (c)(3), and determining that he has, this does not settle the question of unsealing the adoption records. Instead, this now triggers the Court's duty to consider whether the best interests of the adopted person or the public require disclosure of the adoption records.

The Best Interests of the Adopted Person

Tennessee Code Annotated § 36–1–101 makes plain that the best interests of the adopted person are of paramount importance in all adoption related proceedings. Tennessee Code Annotated § 36–1–101(d) states:

> In **all** cases, when the best interests of the child and those of the adults are in conflict, such conflict shall **always** be resolved to favor the rights and the best interests **of the child, which interests are hereby recognized as constitutionally protected** and, to that end, this part shall be **liberally construed**.

(Emphasis added). This language could not be plainer, and it expressly notes that the best interests of the child are recognized as constitutionally protected.

Other statutes and case law addressing the best interests of the adopted person consider those interests in the context of a termination or custody determination, which is not the immediate question presented to the Court. However, even those determinations of best interests are generally reached through implied, and occasionally express, considerations of permanency and stability for the adopted person.

For example, Tennessee Code Annotated § 36–1–101(a)(3) references the "best interests" of the adopted person in conjunction with "the rights of children to be raised in loving homes that are capable of providing proper care for adopted children." Tennessee Code Annotated § 36–1–101(a)(5) states that adoption proceedings are to be "held in an expeditious manner **to enable the child to achieve permanency, consistent with the child's best interests**, at the earliest possible date" (emphasis added).

The lengthy list of considerations for the Court to consider in determining whether parental termination is in the "best interests" of the prospective adopted child are found at Tennessee Code Annotated § 36–1–113(i). Among the impacts considered on the child are:

1. the child's critical need for stability and continuity of placement throughout the child's minority.
2. the child's emotional, psychological, and medical condition.
3. the cultivation (or lack thereof) of a relationship with the prospective terminated parent.
4. the child's emotionally significant relationships and/or healthy attachment to persons other than the prospective terminated parent.
5. The physical and emotional well-being and safety of the child.

Further, the relevancy and weight to be given each factor depends on the unique facts of each case. *In re Marr*, 194 S.W.3d 490 (Tenn.App. 2005).

The Court notes that the Movant asserts he is the father of Child and that he needs to review the sealed record to determine what steps were taken to provide him notice of the termination proceedings. No evidence of paternity has been presented beyond his assertion that he is Child's father. If Movant is correct that service on the unknown father was defective, this fact alone would not establish his paternity. Therefore, the Court must consider whether it is in the best interests of the adopted person to have her adoption records unsealed based upon the mere assertion of an individual that he is, or may be, her father.

In the present case, Child, the adopted person, is ___ years old. She has been in the custody of her adopted parents, the Adopters, since she was less than __ months old. Child knows no life other than as the daughter of the Adopters. She has no knowledge of, nor relationship with, Movant. The Court holds that the constitutionally protected best interests rights of the child, including her permanency of placement, stability, and emotional well-being, are not advanced in any way by permitting her sealed adoption records to be unsealed by an individual who asserts that he *may* be her father.

The Court notes that Tennessee Code Annotated § 36-1-138(c) does not call for a balancing of interests between the adopted child and the movant. But even if such a balancing were to occur, conflicts between the constitutionally protected rights of the child and an adult are to be resolved in favor of the adopted child. Courts are instructed to give liberal application of this principle.

Further, while Movant asserts constitutional rights in seeking to set aside the underlying termination of parental rights, it is nowhere established that there exists a constitutional right to access sealed adoption records. The Court notes that Movant asserts that he first became aware of Child and formed the belief that he might be Child's father in the _____, 20__. Yet he took no legal steps to establish parentage of Child until filing an action in Juvenile Court in _____, 20__, nineteen months after acquiring such knowledge. This was critical time during which Child was developing and bonding with her new family. Movant's delay in asserting rights cannot now be excused so as to deprive Child of her own recognized rights to stability and permanency.

Therefore, the Court declines to find that the best interests of Child require disclosure of her sealed adoption records.

The Best Interests of the Public

The Court also is not persuaded that the best interests of the public require disclosure of sealed adoption records. No such argument has been advanced, and for good reason. The public, through its elected representatives, has spoken on this subject by coming down on the side of keeping adoption records sealed except in specific circumstances requiring scrutiny. The weight of public interest leans against, not for, disclosure of sealed adoption records. There has been no showing that the public's interests are advanced by disrupting the life of Child. Therefore, the Court declines to find that the best interests of the public require disclosure of the sealed adoption records in this case.

Conclusion

Based upon the foregoing, and the record as a whole, the Movant's Amended Motion to Review Information from Adoption Records is respectfully denied. All other matters are reserved.

IN THE CHANCERY COURT OF MADISON COUNTY, TENNESSEE AT JACKSON

JANICE L. RUIZ

Plaintiff,

v. No. 81762

BUTTS FOODS, L.P., QUIRCH FOORDS, LLC, and JAMES GOODRICH

Defendants

ORDER DENYING MOTION TO COMPEL ARBITRATION AND TO DISMISS OR ALTERNATIVELY TO STAY THE LAWSUIT

This cause came to be heard before the Honorable Chancellor Steven W. Maroney of the Madison County Chancery Court, on the 29th day of March, 2023, upon the Motion to Compel Arbitration and to Dismiss or Alternatively to Stay the Lawsuit, filed on November 30, 2022 by Defendants Butts Foods, L.P. and Quirch Foods, LLC ("Employers"). Based upon the pleadings, and the entire record as a whole, this Court hereby Finds, Orders, Adjudges and Decrees as follows:

The Court reviews the Motion to Compel Arbitration and Motion to Dismiss pursuant to Section 4 of the Federal Arbitration Act and Rule 12.02(6) of the Tennessee Rules of Civil Procedure. A Motion to Dismiss requires the Court to take the allegations in the complaint as true for purposes of considering the Motion. *Crews v. Buckman Lab'ys Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002).

FINDINGS OF FACT

Plaintiff Janice L. Ruiz ("Plaintiff") filed a Complaint against all Defendants in

September 25, 2022. Plaintiff filed an Amended Complaint for Damages on November 15, 2022. Plaintiff's Amended Complaint asserts claims under the Tennessee Human Rights Act against her Employers for sexual harassment, sexually hostile work environment, hostile work environment due to sex, and sex discrimination. In addition, Plaintiff asserts claims against some or all Defendants for retaliation; intentional infliction of emotional distress; negligent infliction of emotional distress; negligence; gross negligence and recklessness; negligent supervision, training and retention; battery; and punitive damages.

On January 14, 2022, as part of her hiring process, Plaintiff had executed a Mutual Agreement to Arbitrate Claims ("Arbitration Agreement"), which has been made a part of the record and which provides that should disputes arise between the employer and employee, the parties to the agreement waive any right to a trial by judge or jury and instead will submit the dispute(s) to arbitration for resolution. Employers filed the present Motion to compel arbitration and dismiss Plaintiff's Amended Complaint, citing the executed Arbitration Agreement.

CONCLUSIONS OF LAW

In support of their Motions, Employers correctly point out that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, governs in this matter. *See*, *Rosenberg v. BlueCross BlueShield of Tenn., Inc.*, 219 S.W. 3d 892, 907 (Tenn.App. 2006). The FAA requires state courts to recognize and compel arbitration when a lawsuit asserts claims which fall within the scope of a properly executed and enforceable arbitration agreement.

Much of Employers' arguments point to the validity and enforceability of the Arbitration Agreement. Employers argue the agreement is supported by mutual assent and

consideration, that it contains certain and definite terms, and that Plaintiff is asserting claims in her lawsuit which are of the sort covered by the Arbitration Agreement. Plaintiff does not challenge these arguments. In her response to the Motion, Plaintiff states, "[the Employers] spent the vast majority of their Motion to Compel on issues that are not actually in dispute." (Plaintiff's Response, pg. 6). For purposes of the Motions before it, the Court finds Employers' arguments valid.

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

However, the ultimate issue which must be resolved in order to address Employers' Motion is the proper Application of the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021" ("EFAA"), 9 U.S.C. § 401, 402, which was signed into law by President Joseph R. Biden on March 3, 2022.

Section 402 of the EFAA provides:

> (a) In general.--Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to ***a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.***

(emphasis added).

The definitions adopted for the EFAA are found in § 401 of the EFAA:

> (1) Predispute arbitration agreement.--The term "predispute arbitration agreement" means any agreement to arbitrate a dispute that had not yet arisen at the time of the

making of the agreement.

(2) Predispute joint-action waiver.--The term "predispute joint-action waiver" means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

(3) Sexual assault dispute.--The term "sexual assault dispute" means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent.

(4) Sexual harassment dispute.--The term "sexual harassment dispute" means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.

Not present in the codified version of the Act, but present in the version of the Act found in United States Public Laws 117-90, March 3, 2022, is the following note relative to 9 U.S.C. § 401: "**SEC. 3. APPLICABILITY.** This Act, and the amendments made by this Act, shall apply with respect to ***any dispute or claim that arises or accrues on or after the date of enactment of this Act.***" (emphasis added).

In the Amended Complaint, Plaintiff makes numerous allegations of sexual harassment and of a sexually hostile work environment stemming from the alleged behaviors of Defendant James Goodrich ("Goodrich"). Plaintiff alleged the following:

(a) Goodrich made frequent sexual comments directed at the Plaintiff while at

work. A majority of these comments occurred after March 3, 2022.

(b) Goodrich made comments to the Plaintiff about him having affairs with women. The majority of these comments occurred after March 3, 2022.

(c) Goodrich pulled the hair of the Plaintiff on two occasions, without her permission or authority. On the first occasion he said "I know you like that" - referring to pulling her hair in a sexual manner. One occasion occurred in February 2022 and then the second hair pulling event occurred after March 3, 2022.

(d) Goodrich asked the Plaintiff to have sex with him on multiple occasions. The majority of these comments occurred after March 3, 2022.

(e) Goodrich showed the Plaintiff a naked picture of his body including his penis, while at work. This occurred after March 3, 2022.

(f) Goodrich, while showing the Plaintiff a picture of his naked body with his penis, said "this is what you are working with". This was a statement designed to inform the Plaintiff that he wanted to have sexual relations with her and that she could have his penis if she wanted. This occurred after March 3, 2022.

(g) Goodrich said to Plaintiff that her jeans looked good on her - on multiple occasions. The majority of these comments occurred after March 3, 2022.

(h) Goodrich said that the clothes the Plaintiff wore looked good on her "ass" on multiple occasions. The majority of these comments occurred after March 3, 2022.

(i) Goodrich, while at work and on multiple occasions, would act like Plaintiff grabbed his buttocks and fake like she did this in the workplace, despite the fact

that she did not touch him or his buttocks. The majority of these events occurred after March 3, 2022.

(j) Goodrich, as well as other workers at the facility where Plaintiff worked, have had frequent sexual discussions, sexual comments and sexual jokes openly in the workplace. The majority of these comments occurred after March 3, 2022.

(k) Goodrich, after Plaintiff got engaged, got mad at the Plaintiff and said to her that he hopes she keeps her "legs closed" because nobody wants to "smell that" on a day where the Plaintiff wore a dress. This happened after March 3, 2022.

(l) Goodrich made a comment openly in the workplace, in front of Plaintiff, that he does not put his fingers in dirty assholes. This happened after March 3, 2022.

It is clear that Plaintiff's allegations, which must be considered true for purposes of evaluating a Motion to Dismiss, fall within the statutory definitions of a "sexual assault dispute" or "sexual harassment dispute" as those terms are defined by the EFAA in 9 U.S.C. § 401. As the nature of the dispute in Plaintiff's claims under the Tennessee Human Rights Act against her Employers for sexual harassment, sexually hostile work environment, hostile work environment due to sex, and sex discrimination fit the statutory definitions of the EFAA, Plaintiff then would have the right under the EFAA to opt out of the Arbitration Agreement and seek redress for those claims in her lawsuit, provided that the EFAA is applicable to her claims. Employers assert that the EFAA is inapplicable to Plaintiff's claims, not because of the character of her claims, but rather, the timing of those claims. The Court therefore next considers this assertion.

Application of the EFAA

The EFAA is a relatively new act, and there is scant interpretive case law. Of the

available case law, much discussion has centered around whether the EFAA is applicable when the lawsuit in question alleges that the sexual assault dispute or sexual harassment dispute at issue involves conduct which occurred wholly or in part prior to the effective date of the EFAA, March 3, 2022 (as is the case in the present case). Both counsels have pointed to case law from other jurisdictions which they believe support their respective positions as to applicability or inapplicability of the EFAA.

Grimsley v. Patterson Company, LLC.

A recent Tennessee decision from the 21st Judicial District decided the EFAA was applicable in a case with different facts from the present case insofar as the timing of the offensive conduct. In that case, *Grimsley v. Patterson Company, LLC.*, Case No. 22CV-51320, Judge Michael Binkley ruled the EFAA was applicable, where the entirety of the alleged offensive sexual conduct occurred prior to March 3, 2022, while the lawsuit based upon that offensive conduct was filed on March 16, 2022. Judge Binkley ruled that the EFAA was applicable to all lawsuits filed after March 3, 2022, because, in summary, the EFAA merely made a procedural change affecting the venue where a plaintiff could seek redress for grievances and did not operate as a retroactive change in the substantive rights of the parties. *Grimsley* has been appealed, oral argument has been heard before the Tennessee Court of Appeals, and a decision is pending.

Should the Court of Appeals affirm the trial court's logic and decision in *Grimsley*, then the current case dispute will be resolved in favor of Plaintiff, inasmuch as her lawsuit was filed on September 26, 2022, well after March 3, 2022. If the Court of Appeals disagrees with the *Grimsley* trial court that the EFAA merely made a procedural change affecting the venue where a plaintiff could seek redress for grievances, this does not

necessarily mean the present Plaintiff's argument fails. Both parties in the present case style their arguments around the timing of the dispute or claim arising or accruing, rather than the venue for hearing claims. Therefore, in the current absence of benefit from the appellate opinion in *Grimsley* (and cognizant that the pending *Grimsley* opinion has the potential to require this court to reconsider its ruling), this Court now considers the timing of the dispute or claim arising or accruing in the instant case and its impact on applicability of the EFAA.

The Timing of the Dispute or Claim Arising or Accruing

Plaintiff asserts in her Amended Complaint that the sexually offensive conduct began "[w]ithin a few weeks" after Plaintiff began her employment with Employers in January, 2022. The Affidavit of Teresa Santiago, attached to Employers' Motion, states that Plaintiff was hired January 18, 2022. Therefore, it appears that at least some of the sexually offensive conduct began prior to March 3, 2022. Plaintiff then provides in her Amended Complaint an exhaustive list of sexually offensive conduct which is expressly dated after March 3, 2022.

It may be suggested that the note that the EFAA applies to "any dispute or claim that arises or accrues" after the enactment of the EFAA shall be read to mean " a dispute which arises" or a "claim which accrues". But this Court does not read the language so narrowly, noting such a limiting construction could easily have been expressly noted, had this been the intent of the drafters. Rather, this Court concludes four possible constructions to which the EFAA applies:

1. A dispute arising after March 3, 2022;
2. A dispute accruing after March 3, 2022;

3. A claim arising after March 3, 2022; or

4. A claim accruing after March 3, 2022.

When does a dispute arise?

When does a dispute arise? Whether it "arises" or "accrues", a "dispute" suggests a disagreement, which may or may not result in a corresponding injury. Black's Law Dictionary defines "dispute" as a "conflict or controversy." Merriam-Webster defines the noun "dispute" as a "verbal controversy," "debate," or "quarrel." See, *Julius v. Accurus Aerospace Corp.*, 2019 WL 5681610 (Del. Ch.). Although all lawsuits (at least, properly pled ones) are disputes, not all disputes are filed lawsuits. For example, "alternative dispute resolution" is often utilized to address disputes prior to, or in lieu of, litigation being commenced.

Although Tennessee courts routinely refer to litigated cases as disputes which have arisen (see, e.g., *Heyne v. Metro. Nashville Bd. of Public Educ.*, 380 S.W.3d 715, 732 (Tenn.2012); *Regency Const., LTD, Inc. v. Leslie*, 2011 WL 2848184 at pg. 1 (Tenn.App.)), they also often describe a dispute as having arisen at the time of some offense upon which the subsequent litigation is based (see, e.g., *Provectus Biopharmaceuticals v. Culpepper*, 2020 WL 1867043 at pg. 1 (Tenn.App.); Pediatrix Medical Group of Tennessee, P.C. v. Thomas, 2012 WL 5293044 at pg. 1 (Tenn.App.). This Court concludes, then, that a dispute may arise either a) when litigation is commenced, or b) when the underlying conduct at issue in the litigation occurs.

When does a dispute accrue?

References to a "dispute accruing" are remote, at best, under Tennessee law, but appear to refer to the conduct at issue, rather than the subsequent litigation based upon that

conduct (see, e.g., *Shofner v. Jackson*, 2007 WL 1002492 at p.5, (Tenn.App.)(Koch Concurrence).

When does a claim arise?

Black's Law gives multiple definitions of a "claim" depending on context, but among these, and the one most consistent with the use under the EFAA, is one which defines a "claim" as a "cause of action". As with a "dispute", a "claim" is commonly said to "arise" out of the underlying conduct which gives rise to litigation (*See., e.g., Cochran v. Town of Jonesborough*, 586 S.W.3d 909 (Tenn.App. 2019); Hillman v. Young Street Partners II, LLC, 2022 WL 1597240 (Tenn.App.)). Unlike the phrase "dispute arises", however, Tennessee courts do not generally seem to use the phrases "claim arises" or "claim arose" in reference to the actual commencement of litigation. This Court concludes, then, that a claim "arises" when the facts giving rise to judicial relief occur, and not when the judicial relief is actually sought by commencement of litigation.

When does a claim accrue?

A claim under the THRA, whether based upon a discrete discriminatory act or upon a theory of continuing violations, is ultimately said to "accrue" based upon the conduct at issue. See, e.g., *Jackson v. City of Cleveland*, 2016 WL 4443535 (Tenn.App.). A claim normally "accrues" when "the plaintiff has a complete and present cause of action." *Rotkiske v. Klemm*, —- U.S. ——, 140 S. Ct. 355, 360, 205 L.Ed.2d 291 (2019) (citation omitted).

In summary, this Court finds that the language of the EFAA that it applies to "any dispute or claim that arises or accrues" after its enactment is to be read broadly so as to include both conduct giving rise to litigation, as well as to the litigation itself. Therefore,

the Court finds that the EFAA applies in the present case to this litigation which was filed after the enactment of the EFAA on March 3, 2022 (albeit for reasons independent of, though not inconsistent with, Judge Binkley's finding that the EFAA applies to suits filed after March 3, 2022 for reasons based upon venue).

Plaintiff's Separate Claims of a Non-sexual Nature Facially

In addition to her claims of sexual harassment, sexually hostile work environment, hostile work environment due to sex, sexual discrimination under the THRA, and retaliation under the THRA – all of which clearly address claims covered by the scope of the EFAA – Plaintiff has also alleged separate claims of: 1) intentional infliction of emotional distress; 2) negligent infliction of emotional distress; 3) negligence; 4) gross negligence and recklessness; negligent supervision, training and retention against Employers, as well as punitive damages against Employers and Goodrich based upon the alleged intentional or reckless actions of all Defendants.

9 U.S.C. § 402 provides that the EFAA applies to "**a case** which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute" (emphasis added). In the present matter, this Court agrees with the Court in *Johnson v. Everyrealm, Inc.*, —— F.Supp.3d ——, 2023 WL 2216173 (S.D.N.Y) that a "case" refers to a legal proceeding as an undivided whole which does not differentiate among causes of action within it. The term "case" is distinguishable from the terms "claim" and "cause of action." *Id.* at p.17.

The Court in *Johnson* has noted:

> With the ordinary meaning of "case" in mind, the text of § 402(a) makes clear that its invalidation of an arbitration agreement extends to the entirety of the case

relating to the sexual harassment dispute, not merely the discrete claims in that case that themselves either allege such harassment or relate to a sexual harassment dispute (for example, a claim of unlawful retaliation for a report of sexual harassment). If further confirmation of that understanding were needed, a surrounding EFAA provision—the one that sets the EFAA's effective date—uses the narrower term "claim." As enacted in the Statutes at Large, the EFAA provides that "the amendments made by [it], shall apply with respect to any dispute *or claim* that arises or accrues on or after Mar. 3, 2022." *See* Pub. L. No. 117-90, § 3, 136 Stat. 26, 28 (2022) (emphasis added)[footnote omitted]. Congress, in enacting the EFAA, thus can be presumed to have been sensitive to the distinct meanings of the terms "case" and "claim." "When Congress includes particular language in one section of a statute but omits it in another, th[e] Court presumes that Congress intended a difference in meaning." *Digital Realty Tr., Inc. v. Somers*, —— U.S. —, 138 S. Ct. 767, 777, 200 L.Ed.2d 15 (2018) (internal alterations omitted). Courts presume "that Congress intended the words in a statute to carry weight." *Williams*, 44 F.4th at 128; *see Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595, 602 (2d Cir. 2021) ("[T]he canon against surplusage ... advises courts to interpret a statute to effectuate all its provisions, so that no art will be inoperative or superfluous." (internal quotation marks omitted)); *see also King v. Burwell*, 576 U.S. 473, 504, 135 S.Ct. 2480, 192 L.Ed.2d 483 (2015)(Scalia, J., dissenting) (Congress "knew how to equate two different types of Exchanges when it wanted to do so" and it is "telling[ ]" that it had not.). The reading of the EFAA that lends coherence to the use of these separate terms assigns distinct meanings to "case" and "claim," with

the former referring to the entirety of the lawsuit in which claim(s) implicating a sexual harassment dispute are brought.

Johnson, *supra*, at 18.

This Court is mindful that *Johnson* has been distinguished, and the EFAA interpreted more narrowly, in *Mera v. SA Hosp. Grp., LLC*, 2023 WL 3791712 (S.D.N.Y. June 3, 2023)). The distinction in *Mera* was that the plaintiff had alleged wage and hour claims, in addition to claims akin to a sexual harassment dispute, whereas the *Johnson* plaintiff had raised separate claims of retaliation and racial discrimination in addition to the sexual harassment claims. How appellate courts may ultimately reconcile these distinctions or provide instructive guidance is a question whose answer will be known in the future; for today, this Court must solely rely on its own reading of the statute's plain wording.

In the present case, the Court finds that the present non-sexual harassment dispute claims nonetheless relate closely enough to the sexual harassment dispute that the *Mera* distinction is inapplicable and insufficient to cause this Court to stray from the plain meaning of "case" as used in 9 U.S.C. § 402. Therefore, the Court finds that all of Plaintiff's present claims in her Amended Complaint for Damages are removed from the requirement of the Arbitration Agreement and may be litigated in court.

Consequently, the Motion to Compel Arbitration and to Dismiss or Alternatively to Stay the Lawsuit must DENIED.

Alternative Finding

Due to the unknown outcome of the pending appellate decision in *Grimsley*, this Court makes the alternative finding that even if the EFAA is to be considered only with

respect to the timing of the underlying conduct alone and not the time of filing of a lawsuit based upon that conduct, the EFAA is still applicable to the allegations by Plaintiff against Employers.

With respect to the alleged pre-March 3, 2022 conduct, although not fully dated in the Complaint, this appears to consist of three circumstances of bad conduct (each circumstance being repeated in separate acts after March 3, 2022): (a) Goodrich made frequent sexual comments directed at Plaintiff while at work; (b) Goodrich made comments to Plaintiff about him having affairs with women; (c) Goodrich pulled the hair of Plaintiff without her permission or authority, saying "I know you like that" - referring to pulling her hair in a sexual manner (the comment was not alleged to have been repeated post-March 3, 2022, though the hairpulling was so alleged).

It is suggested by Plaintiff that since these pre-March 3, 2022 circumstances of offensive conduct were repeated post-March 3, 2022, all of the conduct is subject to the EFAA because these constitute "continuing violations" and/or part of an overall constellation of activity that constitutes a hostile work environment. On the other hand, Employers assert that the claim arises or accrues on the first date of sexually offensive conduct (pre-March 3, 2022), and that the post-March 3, 2022 conduct was all a continuing violation from the first offense.

Courts have generally held that a cause of action for sexual harassment does not accrue until the working environment has become sufficiently hostile or abusive that it alters the employee's working conditions, and that a determination on this issue must be made by looking at the totality of the circumstances. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26 (Tenn.1996); *Grissom v.*

Metropolitan Gov't of Nashville, 817 S.W .2d 679 (Tenn.Ct.App.1991).

In considering statute of limitations questions (which are not at issue presently), Tennessee courts have considered whether the underlying conduct in sexual harassment claims brought under the THRA constitute individual discrete events or collectively represent a "continuing violation", such that the cause of action does not accrue the latest of a series of offensive acts (thereby saving a claim for earlier offensive acts which individually might be barred by the statute of limitations). Tennessee courts have considered three factors to determine whether a defendant's conduct was a series of discrete acts or a continuing violation. *See, Booker v. Boeing Co.*, 188 S.W.3d 639 (Tenn. 2006).

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a bi-weekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

Spicer v. Beaman Bottling Co., 937 S.W.2d 884, 890 (Tenn.1996) (quoting *Berry v. Bd. of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983)).[1]

Hostile work environment harassment occurs "where conduct has the purpose or

[1] The Tennessee Supreme Court has overruled Spicer "to the extent that it imposed a 'discovery rule' on continuing violation claims." *Booker, supra*, at 649. As our Supreme Court stated, continuing violations cease when they end, "not when the employee's awareness of [them] should alert him or her to assert his or her rights." *Id.* at 649.

effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 65 (1986).

The allegations in the Amended Complaint state that it was in April, 2022 that the sexual harassment of Plaintiff by Goodrich reached the level of severity and pervasivity such that she reported it to management, which failed to act to stop the harassing conduct. Further, Plaintiff alleges that she made additional complaints to management in August, 2022, which led to management failing to act to protect Plaintiff. Finally, Plaintiff alleges that after filing the original Complaint on September 26, 2022, she has been excluded from notifications about work events, has been provided a continued cold shoulder by coworkers and management in Retaliation for her reports about sexual harassment, and has not been properly informed of information related to her job that she needs in order to accomplish her job in an efficient manner, causing a direct impact on the ability of Plaintiff to perform her job.

The allegations detailed in the preceding paragraph, taken as true for purposes of this Motion to Dismiss, reflect that the offensive conduct first became sufficiently hostile or abusive so as to alter Plaintiff's working conditions, unreasonably interfering with her work performance and creating an intimidating, hostile, or offensive working environment for her in April, 2022 and thereafter, well past the March 3, 2022 date when the EFAA became applicable.

The Court further holds that the allegations made in the Amended Complaint, taken at face value for purposes of this Motion, amount to a continuing violation. They allege the same types of offensive conduct occurring on a repeated basis by Goodrich. They are

alleged to have occurred with frequency, though not tied to a recurring event such as a paycheck. The offensive conduct is alleged to have continued well past the threshold date of March 3, 2022. The permanence issue, having been subsequently limited by the Tennessee Supreme Court, is of lesser weight here inasmuch as the statute of limitations is not at issue. Considering the totality of these circumstances, this Court finds that the offensive conduct amounted to a continuing violation for which the cause of action did not accrue until the last offensive act, which was after March 3, 2022.

Therefore, the Court makes the alternative finding that the underlying conduct alleged in the Amended Complaint sufficiently alleges a hostile work environment for which a cause of action accrued no earlier than April, 2022. This alternative finding does not alter this Court's analysis above regarding Plaintiff's allegations which are facially of a non-sexual nature. Consequently, on this alternative basis considering only the timing of the underlying conduct alone and not the time of filing of a lawsuit based upon that conduct, the Motion to Compel Motion to Compel Arbitration and to Dismiss or Alternatively to Stay the Lawsuit is DENIED.

CONCLUSION

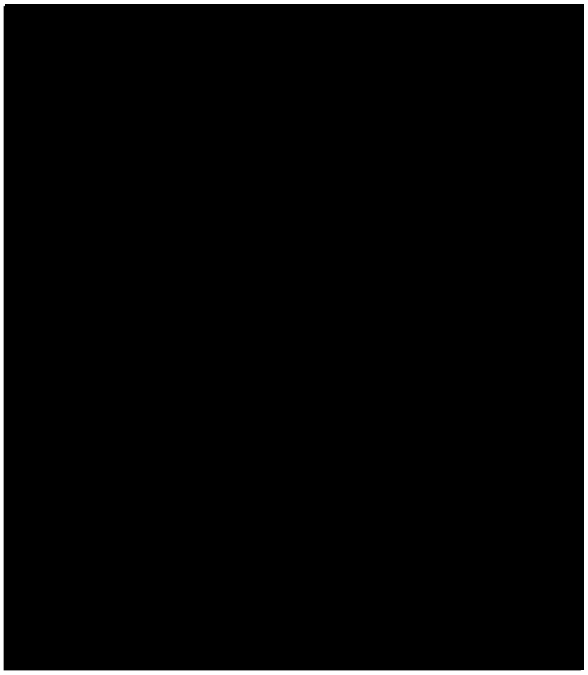
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Employers' Motion to Compel Arbitration and to Dismiss or Alternatively to Stay the Lawsuit is hereby DENIED.

ENTERED This the _____ day of June, 2023.

STEVEN W. MARONEY, CHANCELLOR

CERTIFICATE OF SERVICE

I, Clerk and Master, hereby certify that on the ____day of _____, 2023, I mailed a copy of this document to the following persons:



_____

Pam Carter, Clerk and Master