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IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT

TELISE TURNER, GARY WYGANT, and FRANCIE HUNT,

Plaintiffs,

v.

WILLIAM LEE, as Governor of Tennessee, in his official capacity; TRE HARGETT, as Tennessee Secretary of State, in his official capacity; and MARK GOINS, as Tennessee Coordinator of Elections, in his official capacity,

Defendants.

CASE NO. 22-0287-IV
Chancellor Perkins
Chancellor Maroney
Judge Sharp

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Regarding the Senate Map: Plaintiffs broadly assert that Francie Hunt has been deprived of "the benefits of staggered-term Senate representation" due to the numbering assigned to the Senate Districts in Davidson County. Plaintiffs' Response in Opposition to Summary Judgment, *8-12. That is incorrect, and Plaintiffs' Third Amended Complaint confirms it. Davidson County's three odd-numbered Senate districts (17, 19, and 21) will come up for election in the gubernatorial election cycle, while District 20 will come up for election in the national presidential election cycle. (Third Amended Complaint, ¶¶ 30, 31). Nor did this apparently bother Plaintiff Hunt for the ten years she resided in Davidson County under the 2000 Senate Map.

And this is critical. Tennessee draws much of its constitutional-standing jurisprudence from federal Article III jurisprudence. *See Norma Faye Pyles Lynch Family Purpose, LLC v. Putnam Cnty*, 301 S.W.3d 196, 203 (Tenn. 2009). Two federal cases demonstrate why Plaintiffs

have failed to demonstrate an injury in fact despite alleging an injury in law. In *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190 (2021), the Supreme Court considered whether a class of plaintiffs had standing to sue TransUnion LLC over its credit-reporting practices. *See* 141 S. Ct. at 2200. In considering this question, the Court "[a]ssum[ed] that the plaintiffs [were] correct that TransUnion violated its obligations under the Fair Credit Reporting Act." *Id*. at 2208. But that violation, the Court concluded, was not enough to satisfy Article III for many plaintiff class members. *See id*. at 2209– 14. "To have Article III standing," the Court explained, "plaintiffs must demonstrate . . . that they suffered a concrete harm." *Id*. at 2200. This is true even if Congress "elevate[s] harms that exist in the real world" by giving them "actionable legal status." *Id*. at 2205 (cleaned up). Congress, in other words, "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *Id*.

In *Ward v. Nat'l Patient Acct. Servs. Solutions, Inc.*, 9 F.4th 357 (6th Cir. 2021), the Sixth Circuit applied *TransUnion* and concluded that a plaintiff lacked standing to bring claims under the Fair Debt Collection Practices Act where he "failed to show more than a bare procedural violation." 9 F.4th at 363. There, the plaintiff contended that "the violation of his procedural rights under the [Act] alone constitute[d] a concrete injury." *Id*. at 361. The Sixth Circuit disagreed. *TransUnion* and other Supreme Court decisions, the Sixth Circuit observed, "emphasize a basic guidepost in [the] standing analysis: [a plaintiff] does not automatically have standing simply because Congress authorizes [him] to sue" for statutory violations. *See id*. In sum, Article III "requires a concrete injury even in the context of a statutory violation." *TransUnion*, 141 S.Ct. at 2205; *see also Ward*, 9 F.4th at 362. Tennessee's constitutional standing does too. *See Metro. Gov't of Nashville v. Bd. of Zoning Appeals of Nashville*, 477

S.W.3d 750, 755 (Tenn. 2015).

Moreover, there is no imminency here. Tennessee has had an election to demonstrate as such. Of Davidson County's four senatorial districts, three were up for election in 2022: Districts 17, 19, and 21. Who won those races? Senator Jeff Yarbro (21), Senator Mark Pody (17), and Senator Charlaine Oliver (19). And how many of those races had contested primaries? One, District 19. And how many of those races had contested general elections? Again, only District 19. *See* Tennessee Election Results, 20221108ResultsbyCounty.pdf (tnsosgovfiles.com). The imagined harm that Plaintiffs bemoan never materialized. Incumbency is a powerful ally in an election, often ensuring institutional knowledge. These results demonstrate that even if Plaintiffs are right that Plaintiff Hunt *could* suffer harm as a result of the numbering in Davidson County (and Defendants vigorously contest this point), they've failed to demonstrate that it is necessarily imminent that she would be deprived of "the benefits of staggered-term Senate representation" as they assert. That is fatal. *Calfee v. Tenn. Dep't of Transp*., No. M2016-01902-COA-R3-CV, 2017 WL 2954687, at *9 (Tenn. Ct. App. July 11, 2017) (quoting *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 710 (6th Cir. 2015).

Another point before moving to the House map: Plaintiffs stretch *Lockert I* and *II* far beyond their holdings. They assert that the Tennessee Supreme Court would have dismissed the non-consecutive numbering claims in *Lockert I* and *Lockert II* had standing not been present. The Supreme Court in *Lockert I* never reached the non-consecutive numbering claims, because "[t]he Chancellor reserved this issue in view of his holding that the Act was unconstitutional for another reason and that the Senate districts must be redrawn." *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702, 704 (Tenn. 1982). Instead, the Plaintiffs rely on the Court's statement that "[t]he plaintiffs' standing to sue is not in issue." *Id.* But we don't know whether that issue was not

raised on appeal, contested at all in either the trial or appellate proceedings, or whether the Supreme Court examined standing in detail and considered the specific arguments raised here. There's simply no discussion of standing in *Lockert I* other than an ambiguous conclusory statement that was ancillary to the holding. In short, that statement either tells us nothing, or is dicta. And stare decisis applies to neither. *See Metro. Gov't of Nashville and Davidson Cnty v. Reynolds*, 512 S.W.2d 6, 10 (Tenn. 1974).

Plaintiffs' citation to Tenn. R. App. P. 13(b) is equally unhelpful. They assert that because the scope of review requires evaluation of jurisdiction, the Supreme Court necessarily determined that standing was present. *See* Tenn. R. App. P. 13(b) ("[t]he appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review.") But standing is a question of justiciability. *See City of Memphis v. Hargett*, 414 S.W.3d 88, 96 (Tenn. 2013). And "[i]n Tennessee, justiciability does not, strictly speaking, involve jurisdiction." *Shaw v. Metro. Gov't of Nashville and Davidson Cnty*, 651 S.W.3d 907, 911 (Tenn. 2022). So Tenn. R. App. P. 13(b) sheds no light on the subject.

This situation is similar to a recent matter decided by Tennessee's courts regarding whether a chancery court, which lacks jurisdiction over criminal matters, had subject matter jurisdiction to issue a declaratory judgment on the constitutionality of a criminal statute. Like standing, subject matter jurisdiction is a threshold issue that can preclude a merits determination. The Court of Appeals explained how to solve this dilemma:

> When the *Clinton Books* court considered the issue of subject matter jurisdiction to enter an injunction, the court acknowledged that in *Davis–Kidd* and another case, plaintiffs sought injunctive and declaratory relief regarding the constitutionality of criminal statutes, and the supreme court addressed the constitutional issues without addressing the chancery court's jurisdiction. *Id.* at 752–53. However, the supreme court explained that "stare decisis only applies with reference to decisions directly upon the point in

> controversy" and cautioned that "the omission of any discussion of the trial court's jurisdiction in [ ] *Davis–Kidd* should not be interpreted as altering the general rule prohibiting state equity courts from enjoining enforcement of a criminal statute." *Id.* at 753. In other words, we should not assume that subject matter jurisdiction existed based on the fact that the issue was not addressed. This seems to be the same approach the court of appeals used in *Blackwell*. We respectfully disagree with its conclusion that the supreme court "clearly departed from the unequivocal declaration" in *Zirkle* by its silence in *Davis–Kidd* and *Clinton Books.* We consider the supreme court's unequivocal statements in *Zirkle* and *Hill v. Beeler*, 199 Tenn. 325, 333, 286 S.W.2d 868, 871 (1956) to be controlling.

Memphis Bonding Co., Inc. v. Criminal Court of Tennessee 30th Dist., 490 S.W.3d 458, 467 (Tenn. 2015), *perm. app. denied*.

In short, this Court should not rely upon the analytical silence of the Tennessee Supreme Court to conclude that standing is present here and skip the identification of an imminent injury in fact as Plaintiffs would prefer. Instead, this Court should apply the well-settled and reiterated holdings of *Am. Civil Liberties Union of Tennessee v. Darnell*, 195 S.W.3d 612 (Tenn. 2006), *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013), and *Fisher v. Hargett*, 604 S.W.3d 381 (Tenn. 2020), and independently evaluate Plaintiff Hunt's standing.

Regarding the House Map: Standing also dooms Plaintiffs' challenge to the House map. It is undisputed that Defendants Hunt and Turner live in Davidson County and Shelby County, respectively, neither of which is split. Plaintiff Gary Wygant is a resident of Gibson County. Plaintiffs did not dispute and, in fact, adopted the justifications identified by Doug Himes in their Statement of Undisputed Material Facts for each county split. (P's SUMF, ¶ 57). Doug Himes identified the justification for the splitting of Gibson County as "population shift/core preservation." (P's SUMF, ¶ 57). Population shift necessitates the redrawing of district lines to account for equal population pursuant to the "one person, one vote" principle, a federal

redistricting requirement under the Fourteenth Amendment of the United States Constitution. Plaintiffs' expert also failed to produce a constitutional map that did not split Gibson County. Consequently, Plaintiff Wygant does not have standing to challenge the Enacted House Map because he does not allege the Gibson County split within the Enacted House Map was not justified by federal requirements. Nor could he. Consider the population of Gibson County according to the census: 50,429. (Def's Resp. to P's SUMF, Addl. Fact 45, TRO Resp. Ex. 1, Himes Aff. Ex. Himes 1, County Growth Table). The ideal population assuming a perfectly equal division is 69,806. (Def's Resp. to P's SUMF, Addl. Fact 46, TRO Resp. Ex. 1, Himes Aff. Ex. Himes 1, 10/20 Malapportionment Table). The downward 5% deviation from ideal is a population of 66,316. Evaluating the maps presented by Plaintiffs' expert, there is no question that Gibson County falls below that number and can be split to satisfy the federal "one person, one vote" standard. Defendants agree with Plaintiffs—the split of Gibson County was justified by compliance with federal equal-protection requirements. Therefore, no Plaintiff has standing to challenge the Enacted House Map on county-splitting grounds.

In their additional fact referenced in Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts, Plaintiffs point to four additional maps: Cervas 13b_e, Cervas 14a_e, 13.5a_e, and 13.5b_e. (P's Resp. to Def's SUMF, Add'l Fact 69). But while Dr. Cervas did correct the contiguity issues present in each, he did not remedy the other problems identified by Defendants' expert report. Cervas 13b_e splits Madison County unnecessarily instead of preserving a full district in that county. (Exhibit G to P's Mtn. for Sum. J., Depo Ex. Cervas 5, p. 5, fn. 9; Def's Mtn for Sum. J., Ex. 5, Expert Report of Doug Himes, p. 23-24). Cervas 14a_e does the same. (Exhibit G to P's Mtn. for Sum. J., Depo. Ex. Cervas 5, pg 5, fn 10; Def's Mtn for Sum. J., Ex. 5, Expert Report of Doug Himes, p. 27). Cervas 13.5a_e does the same, reduces

the number of majority-minority districts from 13 to 11[1], and splits Shelby County in violation of *Lockert II*. (Exhibit G to P's Mtn. for Sum. J., Depo. Ex. 5, pg 5, fn 11; Def's Mtn for Sum. J., Ex. 5, Expert Report of Doug Himes, p. 28-31). And Cervas 13.5b_e unnecessarily splits Madison and Montgomery Counties, and still impermissibly splits Shelby County. (Exhibit G to P's Mtn. for Sum. J., Depo. Ex. Cervas 5, pg 5, fn 10; Def's Mtn for Sum. J., Ex. 5, Expert Report of Doug Himes, p. 32-36). And each besides Cervas 13.5b_e has a higher deviation, which as previously discussed creates additional litigation risk for equal protection violations. (D's Memo. ISO Sum. J., pg. 46-47). None of these are constitutionally acceptable alternatives to the Enacted House Map.

Moreover, the parties deeply contest the standard for evaluating county splitting claims. Plaintiffs still ignore *Moore v. State*, which is binding upon this Court and for which permission to appeal was denied. *Moore v. State*, 436 S.W.3d 775 (Tenn. Ct. App. 2014), *perm. app. denied*. And *Moore* was clear that the standard is no more than thirty counties may be split. *Id*. at 785.[2] The Court cannot abrogate or ignore a holding of the Court of Appeals, even if direct appeal of this case bypasses that appellate court. Even so, the record reflects that Mr. Himes explained that in drafting the ultimately-enacted map, he created "whole districts in each county with a population sufficient to support at least one whole district within the county, single county districts in those counties which constitute a single district, and multi-district counties in those counties which

[1] Dr. Cervas's rebuttal report disputes this point, but he is using the wrong standard. Dr. Cervas asserts that Cervas 13a_e has 17 majority-minority districts. (Exhibit G to P's Mtn. for Sum. J., Depo. Ex. Cervas 5, pg 2, fn 3). He reaches this conclusion by lumping all of the non-White population together. That is incorrect. Compliance with Section 2 of the Voting Rights Act, looks at each discrete minority group in isolation, rather than combining all of the minority groups. *See Rural West Tenn. African American Affairs Council, Inc. v. McWherter*, 877 F.Supp. 1096, 1101 (W.D. Tenn. 1995); *see also Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

[2] Plaintiffs assert that the three-judge panel in *Rural West Tenn.* cabined *Lockert II* to the 1980 census only. But a federal court cannot limit the holding of a State Supreme Court's decision interpreting the requirements of the state constitution. *Moore* clearly says otherwise, and the Tennessee Supreme Court denied the resulting application for permission to appeal.

divide evenly into multiple districts within judicially recognized deviation limitations." (Def's SUMF, Fact 31-TRO Resp., Ex. 1, Himes Aff., p. 14-15).

And this comports with the instructions of the *Lockert II* court. It is undisputed by looking at the various maps in the record that splitting urban counties could reduce the overall number of county splits. But *Lockert II* instructed the General Assembly to only split urban counties as necessary to comply with federal requirements. Moreover, the *Lockert II* Court did not mathematically devise a specific number of county splits—instead, it set an "upper limit", undercutting Plaintiffs' myopic view that *Lockert I* and *II* compel perfection. What the enacted House map did by keeping counties whole that could support a full district is precisely what *Lockert II* required and is consistent with *Moore*. And finally, there is no indication that the Enacted House Map was drawn with bad faith or improper motive. *See Lincoln County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985).

By ignoring controlling precedent from *Lockert II*, *Lockert III*, and *Moore*, Plaintiffs wish to send Tennessee courts into the county-splitting thicket. If Plaintiffs are correct, then only a Tennessee House map that perfectly splits the fewest counties possible while complying with federal redistricting requirements can survive a challenge. But such a standard is no standard at all—it would require the General Assembly to prove a negative, i.e., that a constitutional map with one fewer county split does *not* exist. Plaintiffs' interpretation will transform Tennessee into a redistricting litigation hotbed and future three judge panels will have to pour over alternate maps with no guarantee that slightly "better" individual district lines could not be found at some point in the future.

Returning to the *Lockert I* county-splitting interpretation championed by Plaintiffs would send Tennessee back to the 1980s and sanction serial redistricting litigation. *See, e.g., State ex.*

rel. Lockert v. Crowell, 631 S.W.2d 702 (Tenn. 1982); *State ex. rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983); *Murray v. Crowell*, No. 3:84-0566 (M.D. Tenn. March 8, 1985); *Lincoln County v. Crowell*, 701 S.W.2d 602, 603 (Tenn. 1985); *State ex. rel. Lockert v. Crowell*, 729 S.W.2d 88 (Tenn. 1987). Ending never-ending, interminable redistricting litigation and giving the General Assembly a bright line rule for county splitting is why the Supreme Court in *Lockert II* introduced a more flexible standard than the one Plaintiffs advance here.

Plaintiffs' interpretation requires the General Assembly to prove compliance with federal requirements for each county split even if no violation of federal law is raised. While federal requirements allow some flexibility, there are no safe harbors from "one person, one vote" or Voting Rights Act challenges. Plaintiffs' interpretation of the county-splitting prohibition provides no safe harbor and does not allow flexibility. Can a less perfect map with respect to federal requirements prevail because it has fewer county splits? What are the limits of the county splitting prohibition if it only yields to federal constitutional requirements even when those same federal constitutional requirements are not bright line rules? Subsequent three judge panels in Tennessee will have to answer these questions.

Redistricting will effectively shift to Tennessee courts instead of the General Assembly, but the courts will fare no better if there is no clear standard for a constitutional map. Given the current U.S. Supreme Court guidance on population deviation, a map with fewer county splits could theoretically be found with enough time and resources—and a willingness to test the limits of federal redistricting requirements. Remedial maps adopted by the courts could be invalidated just the same as legislatively adopted ones.

In the end, Plaintiffs' theory invites chaos. Voters could find new district lines each time they vote for their state legislators throughout every judicially mandated redistricting cycle.

Election administrators would have the unenviable task of realigning voters into new districts multiple times a decade. The General Assembly could never have confidence that their enacted state maps comply with the Tennessee Constitution.

The upper limit of 30 county splits adopted by the Tennessee Supreme Court and reaffirmed by the Court of Appeals eliminates the uncertainty Plaintiffs' argument imposes. The Supreme Court in *Lockert II* adopted an upper limit of 30 county splits to end the 1980s redistricting litigation saga. In the 2010s, the Court of Appeals in *Moore* applied the upper limit of 30 county splits as justification to end that decade's single redistricting case in Tennessee. This Court should apply controlling precedent from *Lockert II* and *Moore* and do the same here.

CONCLUSION

For these reasons, and the reasons stated in Defendants' Motion for Summary Judgment and Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment, Plaintiffs' Motion for Summary Judgment should be denied and summary judgment should be entered in favor of Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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