ORIGINAL

No. M2023-01686-SC-R3-CV

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

GARY WYGANT & FRANCIE HUNT,

Plaintiffs-Appellants,

v.

BILL LEE, et al.,

Defendants-Appellees.

On Appeal from the Judgment of the
Davidson County Chancery Court
Case No. 22-287-IV

REPLY BRIEF FOR DEFENDANTS-APPELLEES

JACOB R. SWATLEY
Harris Shelton Hanover
Walsh, PLLC
6060 Primacy Parkway
Suite 100
Memphis, TN 38119

JONATHAN SKRMETTI
Attorney General and Reporter

J. MATTHEW RICE
Solicitor General

PHILIP HAMMERSLEY
Assistant Solicitor General

Office of the Attorney General
Post Office Box 20207
Nashville, Tennessee 37202
(615) 532-7874
Philip.Hammersley@ag.tn.gov

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Hunt's response confirms her efforts to fundamentally transform "[t]he judicial power of this State." Tenn. Const. art. VI, § 1. Despite having nothing more than a generalized grievance about how the General Assembly numbered her state senate district, Hunt asks this Court to decide "abstract questions of wide public significance even though other governmental institutions may be more competent to address [those] questions." *ACLU v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

Hunt fails to acknowledge or distinguish this Court's precedents establishing that bare constitutional injuries (like the one alleged here) fail to confer standing. Appellee Br. 63-67. Instead, she argues that her vote has been diluted and that Tenn. Code Ann. § 1-3-121 gives her standing to bring this action. But Hunt proves no actionable vote dilution. And the fact that she can point to a cause of action does not mean she has standing to bring her claim. The Court should apply its settled standing principles and reverse the chancery court's judgment in Hunt's favor.

ARGUMENT

I. Hunt Lacks Standing to Challenge the Senate Map.

The chancery court erred by holding that Hunt has standing to challenge the constitutionality of her misnumbered district. *See* Appellee Br. 62-71. Hunt's response ignores this Court's precedents and standing first principles, all of which foreclose her claim that she has standing.

A. Hunt suffers no legally cognizable injury from the misnumbered senate district.

The trial testimony confirms that Hunt brought her suit to ensure that "the word of the Constitution" is "being followed to the letter." Trial Tr. 81:8-9. As the State's opening brief demonstrated, that generalized interest does not establish standing. *See* Appellee Br. 62-65.

1. In response, Hunt argues that she suffers a cognizable injury because living in a misnumbered district "dilutes the political power of her vote." Resp. Br. 13; *see id.* at 14 n.22. But she fails to explain how that dilution occurs or how it "concrete[ly]" affects her voting power. *ACLU*, 195 S.W.3d at 622. And because it is not enough merely to recite the words "vote dilution" to prove standing, her failure to "develop an argument" (and then prove through evidence at trial) how the misnumbered district concretely impairs her vote dooms her case. *See State v. Hester*, 324 S.W.3d 1, 80 (Tenn. 2010).

Even setting that failure aside, the fatal problem with Hunt's vote-dilution theory is that "the power of [her] vote was the same as those cast by all other voters." *Hudson v. Haaland*, 843 F. App'x 336, 338 (D.C. Cir. 2021) (unpublished). "[N]othing in the record demonstrates that the numbering labels affixed to the Senate districts in Davidson County act to dilute Hunt's vote." R. XXII, 3471 (Maroney, C., dissenting). On the contrary, everybody casting ballots in Senate District 17 and elsewhere votes on equal footing; Hunt's vote counts just as much as her neighbor's.

Hunt's ostensible injury thus looks nothing like the vote-dilution injuries that courts have found sufficient for standing purposes. In one-person-one-vote cases, which the chancery court analogized to below, *see* R. XXII, 3492-93, "'vote dilution' ... refers to the idea that each vote must carry equal weight"—"[i]n other words, each representative must be accountable to (approximately) the same number of constituents," *Rucho v. Common Cause*, 588 U.S. 684, 709 (2019). No such vote dilution happened here because Hunt's vote carried equal weight as any other voter and because Senate District 17's senator represents roughly the same number of constituents as all the other districts. Courts routinely reject efforts by plaintiffs like Hunt who seek to expand vote dilution outside that context. *See, e.g.*, *Wood v. Raffensperger*, 981 F.3d 1307, 1314-16 (11th Cir. 2020); *Bognet v. Sec'y of Commonwealth of Penn.*, 980 F.3d 336, 352-60 (3d Cir. 2020), *cert. granted and judgment vacated*, 141 S. Ct. 2508 (2021), *dismissed as moot*, 849 F. App'x 37, 38 (3d Cir. 2021).

Left without any articulated vote-dilution theory, the State can only speculate about the basis for Hunt's claim. Because she disavows injury from actual turnover of the Davidson County senate delegation, Resp. Br. 13 n.20,[1] perhaps she believes dilution occurs because the misnumbering

[1] In a footnote, Hunt points in passing to her testimony that "the intra-county staggering of terms promotes 'expertise in leadership' and 'institutional knowledge.'" Resp. Br. 14 n.22. That may well be true. But Hunt does not argue that the misnumbered district undermines those interests by causing turnover—for good reason, as the State's opening

of her district forces her to vote during years when there is usually lower turnout—as she seemed to suggest at trial, *see* Trial Tr. 82, 93, 100, 116.

That could-be theory suffers from multiple problems.

First, Senate District 17's elections occur during presidential election years, *see* Trial Ex. 81, when voter turnout reaches its apex. That means, based on Hunt's own testimony suggesting that low turnout is harmful, *see* Trial Tr. 82:6-22, she *benefits* from being in a misnumbered district because it means (in her view) there will be greater turnout.

Second, voter turnout—whether high or low—does not dilute Hunt's vote compared to other voters. The touchstone for vote dilution is whether the plaintiff's vote has been devalued compared to other similarly situated voters. *See In re U.S. Catholic Conf.*, 885 F.2d 1020, 1028 (2d Cir. 1989) ("The wrong that plaintiffs sought to vindicate in *Baker v. Carr* and in those cases that construed it was the dilution of their vote relative to the vote of other citizens of the same state."). But whether turnout is high or low, all the votes in Senate District 17 are "weighed

---

brief shows. *See* Appellee Br. 69-71 (explaining why Hunt cannot establish standing based on a theory that her district's numbering causes instability in the Davidson County senate delegation). Instead, she concedes that "[w]hether any given election actually causes broad turnover in Davidson County's Senate seats does not affect the injury analysis because the misnumbering ... infringes Hunt's right to vote." Resp. Br. 13 n.20. Her testimony about staggered terms thus does her no good.

and ... counted equally." *Hudson*, 843 F. App'x at 338.[2] That dispels the notion that turnout causes actionable vote dilution. Holding otherwise, and finding an injury based on changes to voter turnout, would mean that anyone who votes during years with low or high turnout would have standing to bring whatever legal challenges they want to their district.

Third, whatever alleged injury that *does* derive from voter turnout is caused by the independent decisions of voters rather than the number attached to Hunt's district. Each voter decides whether to turn out for any given election. Trial Tr. 100:14-19. That choice is not made for them by the number attached to their district or the date of their district's election. And because voter turnout depends on "independent action" from third parties, Hunt cannot establish causation or redressability insofar as she asserts vote dilution tied to voter turnout. *Rutan-Ram v. Tenn. Dep't of Children's Servs.*, 2023 WL 5441029, at *12 (Tenn. Ct. App. 2023); *see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 415 n.5 (2013).

---

[2] It is not enough for vote-dilution purposes for a plaintiff to establish that more voters cast ballots in an election, thereby decreasing the relative outcome-determinative significance of each ballot cast. For purposes of standing, "vote dilution" qualifies as an injury when a "single voter is specifically disadvantaged"—not merely whenever the challenged conduct has a "mathematical impact on the final tally and thus a proportional effect of every vote." *Wood*, 981 F.3d at 1314 (citation omitted). Hunt's vote carries the same proportional weight as every voter in Senate District 17—a fact she does not dispute. That more people vote in an election does not cause an injury sufficient to confer standing. *Id.*

Fourth, even accepting the premise that the number attached to the district causes low or high turnout (it does not), and further accepting that abnormal turnout causes a cognizable harm (it does not), Hunt's injury would not be redressed by a favorable decision because there is no way of knowing whether Hunt's new district will be in an even or odd numbered district, which is what she believes causes the injury.

2. Setting aside vote dilution, Hunt's recitation of the history underpinning what she labels the "county-intactness" principle does not establish standing either. *See* Resp. Br. 11-13. That discussion illustrates that there may be sound political and policy reasons for the requirements that counties be kept whole (an issue not in dispute for the Senate map), numbered consecutively, and subject to staggered-term requirements. Yet that does nothing to show how Hunt suffers an individualized and concrete injury from living and voting in Senate District 17.

3. Accordingly, Hunt suffers no more than a generalized grievance, as both the facts and the law establish. *See* Appellee Br. 62-65.

Hunt tries to escape that conclusion by distinguishing *Lance v. Coffman*, 549 U.S. 437 (2007) (per curiam), on the basis that it involved a challenge to "the state's entire congressional map." Resp. Br. 19-20. But as the Eleventh Circuit explained, in an opinion joined by the judge who authored the lower court's opinion in *Lance*, the plaintiffs' "asserted interest was *as citizen voters in the district that they alleged should have been legislatively, rather than judicially, drawn.*" *Dillard v. Chilton Cnty.*

Comm., 495 F.3d 1324, 1332 (11th Cir. 2007) (per curiam) (emphasis in original). The voters in *Lance* thus made the same argument Hunt makes now: that, as voters in allegedly unconstitutional districts, they had standing to challenge their districts. Yet the Supreme Court held that the voters could not bring their challenge—neither to the map as a whole nor to their districts specifically—because they asserted merely a generalized grievance. *Lance*, 549 U.S. at 442. Thus, far from supporting Hunt's position, *Lance* reaffirms that voters in a district must suffer some individualized harm to bring their claims into court; merely living in the allegedly unlawful district simply is not enough.

That tees up the heart of the problem. Even though her response brief skates around saying as much, Hunt believes that everyone has standing to challenge redistricting plans. That is evident from the position she advocated below, *see* Appellee Br. 64 (quoting R. III, 412 n.5), and from the logical endpoint of the arguments she advances now. If a voter can challenge the number assigned to their district without showing how that causes concrete and particularized harm, that would result in the "profusion of lawsuits" and adjudication of "abstract questions of wide public significance" that the standing doctrine seeks to prevent, *id.* at 65 (quoting *ACLU*, 195 S.W.3d at 620), a concern Hunt does not address in her response. The Court should reject Hunt's efforts to transform "[t]he judicial power of this State." Tenn. Const. art. VI, § 1.

B. The chancery court's holding that Hunt suffered an injury disregards bedrock standing principles.

The State argued that the chancery court committed three legal errors that infected the decision below—first, the court (wrongly) dispensed with the individualized-injury requirement; second, it (wrongly) considered bare constitutional violations enough to confer standing; and third, it (wrongly) let the merits of Hunt's claim affect its analysis of standing. Appellee Br. 65-68. Hunt failed to rehabilitate the court's reasoning.

To begin, she has no response to the cases from this Court and the U.S. Supreme Court holding that bare constitutional violations are insufficient to confer standing. *See* Appellee Br. 63, 66-67 (citing *United States v. Richardson*, 418 U.S. 166, 178 (1974) and *ACLU v. Darnell*, 195 S.W.3d 612, 615, 619-27 (Tenn. 2006)); *see also Dominion Nat'l Bank v. Olsen*, 651 S.W.2d 215, 218 (Tenn. 1983) ("a challenge to [a] statute ... based upon constitutional grounds rather than upon some other does not obviate the requirements of standing"). It is blackletter law that a plaintiff seeking redress for a constitutional violation must demonstrate an "injury in fact" rather than merely an "injury in law." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 427 (2021). And Hunt's utter failure to show that injury in fact, along with the chancery court's failure to identify one, means that it was a legal error to enter judgment in Hunt's favor.

Nor does Hunt dispute that the chancery court erred by letting its opinion on the merits affect its standing analysis, *see* Appellee Br. at 67-

68, or otherwise distinguish this Court's decision in *City of Chattanooga v. Davis*, 54 S.W.3d 248, 280 (Tenn. 2001), where the Court dismissed a challenge for lack of standing even though the Court believed that the policy being challenged likely violated the Tennessee Constitution.

Finally, although Hunt disputes whether the chancery court dispensed with the individualized-injury requirement, *see* Resp. Br. 19 n.26, the court's reasoning speaks for itself:

> A voter's injury does not have to be individualized for that voter to have standing to bring a constitutional challenge to a legislative redistricting plan especially given the legislature arguably had knowledge to a substantial certainty that the Senate plan was unconstitutional and that it would affect a discrete subset of voters in a particular populous county.

R. XXII, 3490. That was an error. Appellee Br. 67-68. What's more, even accepting Hunt's characterization of the opinion below as finding that the constitutional violation itself was the injury, *see* Resp. Br. 19 n.26; R. XXII, 3490, that does not establish standing for reasons just explained.

The chancery court thus erred by finding that Hunt had standing.

C. Hunt's remaining arguments fail to prove standing.

The remaining scattershot arguments pressed by Hunt likewise fail to prove that she has standing.

1. Hunt asserts that Tennessee Code Annotated § 1-3-121 "confirms [her] standing to sue." Resp. Br. 15. But that argument conflates the existence of a cause of action with standing, which is the "'irreducible ... minimum' requiremen[t] that a party must meet in order to present a

justiciable controversy." *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

Section 1-3-121 provides "a cause of action ... for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action." That Hunt has a cause of action under § 1-3-121 does not mean she also has standing to bring her constitutional challenge. This Court regularly dismisses cases for lack of standing even when the parties do not dispute that the plaintiff had a cause of action, *see, e.g.*, *ACLU*, 195 S.W.3d at 618, 626, which confirms that the existence of a "cause of action does not affect the ... standing analysis," *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 544 (2020) (interpreting Article III of the U.S. Constitution).

Accordingly, the Court need not consider § 1-3-121 when assessing whether Hunt has standing. Even so, citing legislative history, Hunt argues that § 1-3-121 creates standing for all Tennesseans to "take [the] government to court" whenever it violates the law. Resp. Br. 16.

That argument fails for at least two independent reasons.

First, it misinterprets the statute. The relevant statutory text provides "a cause of action" and nothing more. Tenn. Code Ann. § 1-3-121. No matter what intentions some lawmakers expressed during the statute's legislative history, Resp. Br. 15-16,[3] the "plain language of [the] Act"

---

[3] Even if the court considers legislative history, *but see Keen v. State*, 398 S.W.3d 594, 610 (Tenn. 2012), the remarks Hunt relies on do

does not purport to dispose of the Tennessee Constitution's standing requirements, *D. Canale & Co. v. Celauro*, 765 S.W.2d 736, 738 (Tenn. 1989); *see Grant v. Anderson*, 2018 WL 2324359, at *9 (Tenn. Ct. App. 2018) (agreeing that § 1-3-121 "does not relax the particularized injury requirement for standing"). So the Court should not interpret § 1-3-121 as purporting to provide standing to everyone who falls within its scope.

Second, even assuming § 1-3-121 *does* seek to dispense with otherwise "indispensable" standing requirements, it cannot constitutionally do so. *ACLU*, 195 S.W.3d at 620. Standing limitations derive from the Tennessee Constitution's separation-of-powers principles. *See City of Memphis*, 414 S.W.3d at 98 (citing *Norma Faye Pyles Lynch Fam. Purpose LLC v. Putnam County*, 301 S.W.3d 196, 202-03 (Tenn. 2009)). Those principles require a litigant asserting a constitutional violation to establish some concrete and individualized harm before having their claim adjudicated. *See ACLU*, 195 S.W.3d at 620; *City of Chattanooga*, 54 S.W.3d

---

not reflect the legislature's collective intent because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates . . . others to enact it." *Am. Show Bar Series, Inc. v. Sullivan County*, 30 S.W.3d 324, 335 (Tenn. Ct. App. 2000) (citation omitted). Dozens of legislators voted for the Act, and the comments that Hunt cited (at 15-16) from a few lawmakers "are necessarily only an expression of [those] legislator[s'] opinion[s] of what an act expresses or accomplishes." *Austin v. Shelby County*, 640 S.W.2d 852, 854 (Tenn. Ct. App. 1982), *superseded on other grounds as recognized by Vandyke v. Cheek*, 2023 WL 3222701, at *3 (Tenn. Ct. App. 2023). The remarks thus offer "little assistance" when "construing legislative intent." *Id.* at 853-54.

at 280. The General Assembly cannot erase those requirements through legislative fiat. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016). Hunt thus cannot use § 1-3-121 to wish away her standing deficiencies.

At minimum, the serious constitutional concerns that would arise from interpreting § 1-3-121 to abrogate the Tennessee Constitution's standing requirements provide strong reason not to interpret the statute as doing so. *See Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529-30 (Tenn. 1993) (explaining that the court must "adopt a construction [of the statute] which will sustain [it] and avoid constitutional conflict if any reasonable construction exists").

The Supreme Court's decision in *TransUnion, LLC v. Ramirez*, 594 U.S. 413 (2021), does not cure those problems either. *Contra* Resp. Br. 17 n.25. To begin, Hunt waived any argument based on *TransUnion* by relegating it to a footnote. *See Charles v. McQueen*, --- S.W.3d ----, 2024 WL 3286527, at *6 (Tenn. 2024). In any event, in that decision, that Supreme Court held that only plaintiffs who are concretely harmed by a defendant's statutory violation have standing in federal court, even when the relevant statute provides a cause of action. *See TransUnion*, 594 U.S. at 417-18. It confirmed that legislatures may not bypass constitutional standing requirements by "simply enact[ing] an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *Id.* at 426. And although it recognized that legislatures may "elevate to the status of legally cognizable" certain

statutory violations, they may do so only when the harm from the statutory violation "bears a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* at 425, 432 (quoting *Spokeo, Inc.*, 578 U.S. at 340-41).

TransUnion thus confirms the State's position that "an injury in law is not an injury in fact." *Id.* at 427. And Hunt never even *tries* to show a "close relationship" between the harm caused by a misnumbered district and an injury recognized by history or common law. *Id.* at 417. The lack of a "historical or common-law analogue" showing that the misnumbering of a district amounts to an actionable harm supports what the State has argued all along—Hunt lacks standing. *Id.* at 424.

Hunt's argument otherwise misunderstands the nature of the *TransUnion* inquiry. The question under that decision is not (as Hunt seems to think) whether the relevant constitutional or statutory provision has existed for a long time. *See* Resp. Br. 17 (arguing that "history joins Section 1-3-121 in supporting Hunt's standing" because "the Tennessee Constitution has included county-intactness rights since its inception in 1796"). The proper inquiry asks whether the type of harm that the positive law protects against is analogous to an injury that would be actionable at common law or throughout history. *TransUnion*, 594 U.S. at 424-25. Hunt's response thus focuses on the wrong kind of "history and tradition," Resp. Br. 17, and provides no basis for concluding that she has standing under the principles articulated by *TransUnion*.

2. Next, Hunt (at 17-19) misunderstands *Hays* and *Gill*. Those cases do not hold that a voter in a district will *always* have standing to challenge their district. On the contrary, the Supreme Court in *Gill v. Whitford* refused to find that the plaintiffs automatically had standing to challenge the districts where they resided, and instead remanded the case to the district court so the plaintiffs would have an opportunity to "prove concrete and particularized injuries ... that would tend to demonstrate a burden on their individual votes." 585 U.S. 48, 73 (2018). Because Hunt shows no concrete harm that flows from the misnumbered district, she cannot rely on *Gill* and *Hays* to establish standing.

3. Hunt finally argues that the State's standing arguments would "shield all violations of Article II, Section 3 from judicial review." Resp. Br. 11. That is factually incorrect and legally irrelevant.

Factually, the State does not take the position that nobody has standing to challenge misnumbered districts. As Chancellor Maroney explained, that "is not necessarily" the case. R. XXII, 3473. Individuals or entities concretely and particularly affected by the misnumbering may be able to advance a plausible basis for challenging the misnumbered district. That Hunt lacks an injury does not mean everyone else does too.

Legally, it is beside the point whether anyone else has standing to sue. "Our system of government leaves many crucial decisions to the political process"—so the "assumption that if [Hunt] ha[s] no standing to sue, [that] no one would have standing, is not a reason to find standing."

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974); *accord Thole*, 590 U.S. at 544-45. Even without judicial intervention, Hunt has other avenues for vindicating her desire for lawmakers to follow "the Constitution as it is written." Trial Tr. 85:18-19; *see FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 396 (2024).

* * *

In short, "[s]tanding is 'not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated.'" *United States v. Texas*, 599 U.S. 670, 675 (2023) (citation omitted). Hunt did not show that she suffers from a concrete and particularized injury, as the Tennessee Constitution requires before adjudicating a dispute. *See ACLU*, 195 S.W.3d at 620. The Court should honor those bedrock standing principles here.

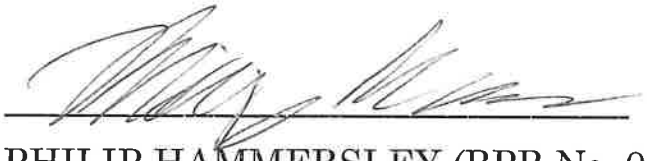
CONCLUSION

The judgment of the chancery court should reversed with respect to Hunt's claim.

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General & Reporter

J. MATTHEW RICE
Solicitor General



PHILIP HAMMERSLEY (BPR No. 041111)
Assistant Solicitor General

Office of the Attorney General
Post Office Box 20207
Nashville, Tennessee 37202
(615) 532-7874
Philip.Hammersley@ag.tn.gov

JACOB R. SWATLEY (BPR No. 037674)
Harris Shelton Hanover Walsh, PLLC
6060 Primacy Parkway
Suite 100
Memphis, TN 38119
(901) 525-1455
jswatley@harrisshelton.com

CERTIFICATE OF COMPLIANCE

In accordance with Tennessee Rule of Appellate Procedure 30(e), I certify that the number of words in this brief, excluding the portions of the brief exempted by the Rule, is 3,776. This word count is based on the Microsoft Word system used to prepare this brief.

PHILIP HAMMERSLEY (BPR No. 041111)
Assistant Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this brief was served via first class U.S. mail, postage prepaid, as well as by electronic mail, on the following counsel for the Appellants:

David W. Garrison (BPR # 024968)
Scott P. Tift (BPR # 027592)
Barrett Johnston Martin & Garrison, LLC
414 Union Street, Suite 900
Nashville, TN 37219
(615) 244-2202
(615) 252-3798
dgarrison@barrettjohnston.com
stift@barrettjohnston.com

John Spragens (BPR # 31445)
Spragens Law PLC
311 22nd Ave. N.
Nashville, TN 37203
T: (615) 983-8900
F: (615) 682-8533
john@spragenslaw.com

on this 5th day of July, 2024.

PHILIP HAMMERSLEY (BPR No. 041111)
Assistant Solicitor General