Case No. M2023-00788-COA-R3-CV

IN THE

Court of Appeals of Tennessee

AT NASHVILLE

CLATA RENEE BREWER, JAMES HAMMOND, THE TENNESSEE FIREARMS ASSOCIATION INC., MICHAEL P. LEAHY, STAR NEWS DIGITAL MEDIA INC., THE TENNESSEAN, RACHEL WEGNER, and TODD GARDENHIRE,

Petitioners-Appellants,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Respondent-Appellee,

and

PARENTS OF MINOR COVENANT STUDENTS JANE DOE AND JOHN DOE; THE COVENANT SCHOOL; and COVENANT PRESBYTERIAN CHURCH,

Intervenors-Appellees.

On appeal from the Circuit Court for the Twentieth Judicial District, Nos. 23-538-III, 23-542-III, 23-636-III, 23-640-III
Chancellor I'Ashea Myles

BRIEF OF APPELLANTS

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STATEMENT CONCERNING ORAL ARGUMENT

This case presents an important question of first impression concerning the procedures governing the Tennessee Public Records Act. Oral argument would ordinarily be appropriate in such a case and would likely help the Court assess the parties' arguments. While the Petitioner-Appellants have requested oral argument, the Court has also—at the Appellants' request—expedited this appeal. In the event the request for oral argument cannot be reconciled with expedition, the Appellants will waive the former in the interest of the latter.

STATEMENT OF ISSUES

1. The Tennessee Public Records Act creates a comprehensive system for the regulation of disputes over the disclosure of public records. Its terms and processes refer to and contemplate solely bilateral litigation between a record requester and a government custodian. Did the trial court err by concluding the TPRA authorized intervention?

2. Statutes that create causes of action in favor of discrete parties confine the trial courts' subject-matter jurisdiction. The TPRA creates a cause of action for disclosure of public records and confers standing on requesting parties. Did the trial court lack jurisdiction to permit intervention by parties without standing?

3. Permissive intervenors must show they have a claim or defense sharing a common legal or factual question with the main action. The Intervenors here have neither a claim nor defense assertable here. Did the trial court abuse its discretion by allowing them to intervene permissively?

4. The TPRA permits requesting petitioners to recover attorney's fees from government custodians who willfully fail to disclose records. Should the Petitioners recover the fees incurred in this appeal if they ultimately show entitlement to fees in the case below?

INTRODUCTION

This is a case about the rules of litigation. It is not a case about a school shooting. It is not a case about the sympathy owed, or suffering experienced by, innocent victims of horrifying crimes. The question here is far more mundane: does the TPRA permit third parties to intervene, and, if so, under what circumstances?

The answer must be "no." Neither the TPRA nor any other authority raised below provides for intervention in a TPRA case. Rather, the TPRA creates such a distinctive set of rules for proceedings under it that they leave no room for the intervention rules applicable to ordinary cases. The Intervenors, by contrast, say the answer to the first question is "yes." They contend that crime victims can intervene and co-litigate alongside the government to assert public-record exceptions that go well beyond the text of either the TPRA or other laws creating exceptions to it. The Intervenors claim these newly discovered exceptions comprehensively bar public disclosure in perpetuity. But neither the TPRA nor any other state law says that. In any event, though, the Intervenor's intervention arguments cannot be reconciled with the TPRA's text or precedent, which make clear that the TPRA creates an entirely unique, streamlined litigation process without room for additional parties.

* * *

The TPRA's plain text controls here. That text—by making a requesting petition the only plaintiff, and a government records custodian the only defendant in a sui generis proceeding—precludes intervention. But even if it did not wholly preclude any intervention, it makes the

result reached by the trial court here impossible. The trial court granted permissive intervention under Rule 24.02. But that requires the Intervenors have a claim or defense sharing a common legal or factual question with the main case. The Intervenors have no claim (they are not requesting records) and cannot have a defense (they do not have the records and so cannot refuse, on any basis, not to produce them) in a TPRA case. They cannot logically fall within the Rule's ambit. The trial court was wrong to conclude otherwise.

* * *

This may not be a case about a school shooting, but certainly it is one that came about because of one. And the fact that the TPRA does not authorize intervention in no way diminishes the purely human reaction to those events. The individual Intervenors are fellow Tennesseans, neighbors, perhaps even friends. There is no enmity between them and the Petitioners. Yet our system is built on rules, not on sympathy. And until the legislature sees fit to change the rules governing cases such as this, our sympathy must find outlets other than intervention.

Statement of Facts and of the Case

On March 27, 2023, a woman drove to the Covenant School in Nashville, shot out a glass door to gain entry, and murdered six people inside before being killed by Metro police. (*E.g.*, R1. at 75.) A significant public reaction followed. Crowds gathered in downtown Nashville demanding new gun-control measures. (R1. at 118.) Protesters disrupted proceedings in the Tennessee House of Representatives. *See* H.R. 63, 113th Gen. Assemb. (Tenn. 2023), *available at* http://www.capitol.tn.gov/Bills/113/Bill/HR0063.pdf.[1] Governor Lee issued an executive order to strengthen the State's firearms-background-check system, *see* Exec. Order 100 (April 11, 2023), and announced a special session of the General Assembly for August to take up measures directed at public safety.

* * *

Because of the event's potential public-policy ramifications, each of the Petitioners lodged a request with the Metropolitan Government of Nashville and Davidson County to inspect documents collected and created in the shooting's aftermath.[2] (R1. at 29–30, 93–95, 136, R2. at 178,

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[1] Executive promulgations are amenable to consideration under Rule of Appellate Procedure 13(c) because they are subject to judicial notice under Rule of Evidence 201 as unimpeachable public records.

[2] The Petitioners are the chairman of the Tennessee Senate Judiciary Committee, Todd Gardenhire (R1. at 117); Nashville's daily newspaper, *The Tennessean* (*id.*); one of its reporters, Rachel Wegner (*id.*); the former sheriff of Hamilton County, James Hammond (R2. at 108); a 501(c)(4) social-welfare entity, the Tennessee Firearms association (*id.*); a Tennessee citizen affiliated with the National Police Association, Clata Brewer

206–207.) Metro police and the Tennessee Bureau of Investigation promptly searched the shooter's car and home and announced that they had collected various writing and other materials. (*See, e.g.*, R2. at 214.) Metro, however, declined to produce these or any other records. (R1. at 58, 60, 83, 97–100, 105, 134, 138; R2. at 209, 229.)

So as the Tennessee Public Records Act permits, the Petitioners filed suit against Metro: between April 28 and May 17, four actions were filed seeking the shooter's writings from the Metropolitan government. (R1. at 21, 51, 116, 167, 200.) Between May 3 and May 23, those cases were all transferred to Davidson County Chancery Part III and consolidated with case number 23-538-III. (R1. at 114, 142, 165, 195.)

The Petitioners requested the writings, analysis and communications related to them, reports and visual media produced during the police response and investigation, internal administrative-investigation materials related to the shooting, interagency communications, and complaints received by Metro about the shooter. (R1. at 21, 51, 116, 167, 200.) A representative of the police department testified via declaration that some of those documents did not exist and that all the others—save nine emails—related to the ongoing criminal investigation and were thus exempt from disclosure under Rule of Criminal Procedure 16. (R2. at 286–287.)

In the midst of that consolidation process, three motions to intervene were filed in Case 23-538: one by the Covenant School, one by Covenant

(R2. at 200); the publisher of an online Tennessee news outlet, Star News Digital Media Inc. (R1. at 51); and its chief executive, Michael Leahy (*id.*).

Presbyterian Church, and one by a group of Covenant School parents. (R2. at 245, 255, 291.) The Church and School sought intervention as a matter of right under Rule 24.01 (R2. at 245–246, 255–256.) The Parents sought intervention as of right and permissively in the alternative. (R2. at 291–292.) The Petitioners opposed the motions for intervention, while Metro did not. (R2. at 252, 261; R2. at 259; R3. at 316, 334.)

The trial court heard the motions to intervene on May 22, 2023. (*See generally* R9. at 20–102.) It granted all the Intervenors intervention under Rule 24.02 via a pair of orders entered two days later, on May 24. (R3. at 376–379, 385–391.) The same day, the court ordered Metro to file a list of the TPRA exceptions it intended to invoke. (R3. at 374.) Metro complied the same day. (R3. at 382.)

The Petitioners filed notices of appeal pertaining to their respective cases from the intervention orders. (R4. at 505–507, 515–516, 520–523, 525–528.)

Summary of Argument

The trial court should not have permitted intervention. The TPRA does not permit it, and even if it could be allowed in some cases, the circumstances here do not warrant it.

TPRA actions are not normal civil lawsuits. They begin with a petition, only fileable against a government custodian of unproduced records. There are no other pleadings. There is only one issue (assuming the requested records exist at all): which, if any, of the records are subject to a TPRA exception? There is no discovery, because only the government entity has the documents and relevant knowledge about them, and the entire point of the case is whether they should be turned over. There is, in this context, simply no room for intervention.

Nor should such an outcome surprise: the General Assembly created the current TPRA action well after the Rules of Civil Procedure had gone into effect. So it was perfectly capable of either requiring TPRA actions to conform to the Rules' default model, or departing from it. It chose the latter. Indeed, its departure from the standard course of litigation was so significant that the trial court lacks subject-matter jurisdiction to admit intervenors. The motions to intervene below accordingly should have been denied and the orders granting them must be reversed.

But even if intervention were allowed in TPRA proceedings, the trial court erred granting it here. Rule 24.02, under which the trial court authorized intervention, requires intervenors have a claim or defense sharing a legal or factual question with the main action. But the Intervenors here have neither a claim nor a defense: there is nothing for them to share

with the main action, which presents solely the narrow question of whether the invoked TPRA exceptions apply to these documents. The trial court sidestepped this entire inquiry, simply asking whether the Intervenors have a "stake" in the litigation. But asked without reference to the applicable standard governing this claim—a TPRA action for disclosure of specific records—the question is unintelligible. And, regardless, questions about "stake" go to standing. Rule 24, though, does not make intervention turn on standing alone. To the extent standing matters, it is necessary but not sufficient: not every nonparty with standing may intervene in a lawsuit. Neither the text of Rule 24 nor the interpretive case law supports a contrary conclusion.

Nor do the Victims' Rights statutes dictate otherwise. These statutes confer no right of participation in civil litigation. They do not change the TPRA's procedural mechanisms. And to the extent they create an exception to the TPRA's disclosure requirement, they do nothing to change the TPRA's directive that the exception be invoked and litigated by the government custodian, not a third party.

Thus, the trial court erred when interpreting the TPRA and abused its discretion when authorizing permissive intervention. The intervention orders below should be reversed, the Intervenors dismissed, and this case remanded for further proceedings.

ARGUMENT

1. Standard of Review.

The questions of statutory interpretation, including whether the TPRA authorizes intervention at all and whether the trial court possesses subject-matter jurisdiction to entertain intervention, are ones purely of law. The Court reviews them de novo. *See, e.g.*, *Sanders v. Traver*, 109 S.W.3d 282, 284 (Tenn. 2003) ("Issues of statutory construction … are questions of law; thus our review is de novo without any presumption of correctness."); *Chapman v. DaVita Inc.*, 380 S.W.3d 710, 712–713 (Tenn. 2012) ("[D]etermination of whether subject matter jurisdiction exists is a question of law … review[ed] … de novo.").

Assuming intervention were permissible under the TPRA, the trial court's decision to permit intervention via Rule 24.02 entailed the exercise of discretion, which the Court reviews for an abuse. *See State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 191 (Tenn. 2000). A trial court exercising discretion must rest its decision on a sufficient factual basis, correctly apply the proper legal standard, and reach a result "within the range of acceptable alternative[s]." *Lee Med. Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). Where the appellate court must review the predicate factual and legal determinations underlying a discretionary ruling, it considers them as it otherwise would: under Rule 13(d) and de novo, respectively. *Id.* at 525.

2. The TPRA does not contemplate intervention.

In the TPRA, the Tennessee Legislature created a comprehensive scheme designed to ensure the public maximal access to governmental

records. *See Schneider v. City of Jackson*, 226 S.W.3d 332, 339–340 (Tenn. 2007). The Act imposes its own procedural regimen that dispenses with large swathes of the ordinary litigation process. Because the Act imposes a purely bilateral adversarial process incompatible with the introduction of third parties, intervention under Rule 24 has no place in an action under the Act. Indeed, the Intervenors effectively seek to prosecute a "reverse" TPRA action. While such actions may exist under the federal FOIA, they do not in Tennessee law.

2.1. TPRA actions are sui generis and bilateral, leaving no room for intervenors.

The TPRA does not permit intervention. The Act does not merely create a cause of action (as does, say, the Consumer Protection Act), but an entire procedural scheme. That scheme leaves no room for intervention. The Act's plain text, and the appellate courts' consistent application of that text, show as much.

Begin with the text. The "oft-repeated rules" of statutory interpretation require as much. *In re Neveah M.*, 614 S.W.3d 659, 676 (Tenn. 2020); *accord* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 16 (2012) ("[O]ne naturally must begin with the words of the statute when the very subject of the litigation is what the statute requires."). The TPRA mandates that "all [government] records shall, … be open for personal inspection …, and **those in charge of such records** shall not refuse such right of inspection **to any citizen**, unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(2)(A) (emphasis added). The obligation of compliance falls on the "government entity"

with custody of the records in question and its "official[s]" and "employee[s]." *Id.* § 10-7-503(a)(1)(C), -503(a)(1)(2)(B).

Along with the obligation, the TPRA creates a remedy for its transgression: "Any citizen … whose request has been … denied … shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access." Tenn. Code Ann. § 10-7-505(a). The only person who can file a TPRA petition is the Tennessee citizen who has had their records request denied, and the provided remedy is obtained through judicial review "of the actions taken" by the governmental entity lawfully responsible for the direct custody of the record. *Id.*

The resulting TPRA action departs from the typical procedure for civil actions. Rather, "the court shall, upon request," require "the defendant … to **immediately appear and show cause** … why the petition should not be granted." Tenn. Code Ann. § 10-7-505(b) (emphasis added). Here, the "defendant," of course, is the government custodian that previously denied the inspection request. *Cf. id.* §§ -505(a), -503. And because the statute requires the government defendant to appear immediately and show cause, it excises the rest of the ordinary litigation process. Thus the government custodian files no answer. *Id.* § -505(b) ("[F]ormal written response to the petition shall not be required"). Normal time limits do not apply. *Id.* ("[G]enerally applicable periods of filing such response shall not apply.") Nor does the statute permit trial in the ordinary sense: the court's ruling on the show-cause question "constitute[s] a final judgment on the merits." *Id.* At that hearing, the Rules of Evidence apply only

in part, for the court can receive affidavits instead of testimony. *See Moncier v. Harris*, No. E2016-0209, 2018 WL 1640072, at *11 (Tenn. Ct. App. April 5, 2018). And the statute upends the burden of proof familiar from ordinary litigation. It shifts it to the government custodian, rather than leaving it on the plaintiff. Tenn. Code Ann. § 10-7-505(c).

Discovery goes by the board as well. The statutory scheme neither contemplates discovery on its face nor leaves room for the discovery process, given that the action itself seeks the defendant's records. *See Moncier*, 2018 WL 1640072, at *11–12. Finally, attorney fees are available to a petitioner, but to no other party. Tenn. Code Ann. § 10-7-505(g) ("If the court finds that the governmental entity … refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity."). The fee-shifting clause makes manifest the import of the entire provision: only the requester and the government custodian are parties to such actions, with the government custodian being the only defendant and thus the only party subject to fee-shifting. If the statutory scheme contemplated opposition to disclosure being mounted by an outside party, it would not render the government custodian alone subject to fees for unreasonable conduct.

A TPRA case is far from Tennessee's only procedurally unique proceeding. Although the Rules of Civil Procedure ostensibly govern "all civil actions" in chancery courts unless they say otherwise, Tenn. R. Civ. P. 1, their scope has never been quite so encompassing. Probate actions, for example, deviate from the Rules' framework. *See Est. of Green v.*

Carthage Gen. Hosp. Inc., 246 S.W.3d 582, 584–85 (Tenn. Ct. App. 2007). *Coram nobis* proceedings operate according to their own system. *See Nunley v. State*, 552 S.W.3d 800, 826–27 (Tenn. 2018). So too pre-execution competency proceedings. *See Coe v. State*, 17 S.W.3d 193, 214–215 (Tenn 2000), *abrogated in other part by State v. Irick*, 320 S.W.3d 284, 294–295 (Tenn. 2010).

Indeed, while the Rules of Civil Procedure preempted the various statutes governing general civil procedure at the time they went into effect on July 1, 1971, they, can, in turn, be superseded or qualified. *State v. Hodges*, 815 S.W.2d 151, 155 (Tenn. 1991). The legislature, which knows the state of the law when it acts, *see Lee Med.*, 312 S.W.3d at 527, did precisely that when it enacted the current TPRA process. For, while the TPRA in its primordial form dates to 1957, the legislature created the judicial-review process in 1977. *See* 1977 Pub. Acts Ch. 929. As the later adoption, the TPRA's judicial-review provisions control where they conflict with the Rules. *See Hodges*, 815 S.W.2d at 155; *see also, e.g.*, *Steinhouse v. Neal*, 723 S.W.2d 625, 627 (Tenn. 1987) ("[T]he last enactment repeals the former by implication."). The courts strive to harmonize the laws, of course, *see Pagliara v. Moses*, No. M2020-0990, 2022 WL 4229930, at *2 (Tenn. Ct. App. Sept. 14, 2022), *no app.* But at some point the general rule must yield to the inconsistent requirements of a more specific one. Thus so here.

The Act contemplates only one type of petitioner: A Tennessee citizen who had a records request denied. Likewise, it contemplates only one type of respondent: a governmental entity responsible for denying the

public records request. There are no other parties qualified to bring or defend a TPRA claim. There is no room afforded to intervening parties. *See, e.g.*, *Tennessean v. Metro. Gov't of Nashville*, 485 S.W.3d 857, 864–65 (Tenn. 2016) (describing discrete roles of requester and governmental custodian in TPRA actions).

The TPRA process is an all-encompassing legislative attempt to handle public record disputes, it does not require pleadings, is expedited by statute, shifts the burden of proof to the governmental entity instead of the petitioner, requires the Court to construe the statute to give the fullest possible public access to public records, has strict limits on qualified parties, and provides that attorney's fees can be assessed only against the governmental entity that denied a public records request. The limited nature of this process, necessarily excludes intervenors, just like it excludes discovery.[3]

2.2. The trial court lacks subject-matter jurisdiction over the Intervenors' claims.

Even more fundamentally, the trial court not only lacked authorization to permit intervention, it lacked jurisdiction. Where the legislature "creates a cause of action and designates who may bring" it, the standing conferred by the statute becomes "interwoven with … subject matter jurisdiction" and thus "a jurisdictional prerequisite." *Osborn v.*

[3] Intervention under the TPRA is a question of first impression. Trial courts have authorized intervention at least twice before, but the decision went unquestioned, and thus unaddressed, on appeal. *See Griffin v. City of Knoxville*, 821 S.W.2d 921, 921 (Tenn. 1991); *Tennessean*, 485 S.W.3d at 859.

Marr, 127 S.W.3d 737, 740 (Tenn. 2004). The trial court thus lacked the power to expand the scope of the proceedings and introduce parties other than those expressly authorized by the TPRA itself. This is particularly true here, given that permissive intervenors must establish an independent basis for the trial court's jurisdiction. *See, e.g.*, *United States v. Union Elec. Co.*, 64 F.3d 1152, 1170 n.9 (8th Cir. 1995). Because the TPRA does not authorize their participation, the Intervenors cannot overcome this obstacle.[4]

2.3. The Intervenors seek a "reverse public records suit," a mechanism unknown under the TPRA.

The Intervenors aim to pursue what is commonly known as a "reverse public records" suit, in which a third party seeks to prevent the disclosure of public records. But Tennessee law does not recognize this type of action. The Intervenors' efforts merely interfere with the Petitioners' lawful claims and their timely adjudication.

The Supreme Court of the United States has held that the federal Freedom of Information Act ("FOIA") does not permit "reverse FOIAs"

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[4] Some cases suggest the federal courts observe this requirement because of Federal Rule of Civil Procedure 82, which clarifies that the Rules themselves neither "extend [n]or limit the jurisdiction of the district courts." *See EEOC v. Nevada Resort Ass'n*, 792 F.2d 882, 886 (9th Cir. 1986). But the logic holds here even without a pure analogue to Rule 82. A court derives subject-matter jurisdiction only from a statute or the constitution. *E.g.*, *Memphis Bonding Co. v. Criminal Ct.*, 490 S.W.3d 458, 462 (Tenn. Ct. App. 2015). Tennessee's court rules thus "cannot expand the scope of a trial court's jurisdiction." *Glassman, Edwards, Wyatt, Tuttle & Cox P.C. v. Wade*, 404 S.W.3d 464, 468 (Tenn. 2013). The absence of a Tennessee Rule 82 thus changes nothing in the analysis.

but that the federal Administrative Procedure Act permits administrative claims to review the decision of a federal agency's decision to disclose documents. *Chrysler Corp. v. Brown*, 441 U.S. 281, 294, 317 (1979). The Court found that "Section 10(a) of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action …, is entitled to judicial review thereof." *Id*. at 317 (quoting 5 U.S.C. § 702). In a reverse public records lawsuit, the party seeking to prevent disclosure bears the burden of justifying the nondisclosure of the information. *Trifid Corp. v. Nat'l Imagery & Mapping Agency*, 10 F. Supp. 2d 1087, 1097 (E.D. Mo. 1998). Thus, there is no federal cause of action that expressly permits a reverse public records request, but there is an APA claim that can be raised, and the party seeking to prevent the release of records bears the burden of proof.

"The [Tennessee] Public Records Act is not patterned upon FOIA. It provides specific statutory exceptions to disclosure, with more than a dozen such exceptions for the records of law enforcement agencies." *Schneider*, 226 S.W.3d at 343. Meanwhile, federal FOIA has "nine broad and general exceptions to disclosure that necessarily require substantial judicial interpretation." *Id*. Likewise, the TPRA is "distinct from FOIA and the open records law of other states." *Id*. Additionally, the Tennessee Administrative Procedure Act limits a "contested case" to "a proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party **are required by any statute or constitutional provision to be determined by an agency** after an opportunity for a hearing." Tenn. Code Ann. § 4-5-102(3) (emphasis added). Because no

agency seeks to determine the rights of the intervenors after a constitutional or statutory hearing, the TAPA is not implicated.

Federal FOIA, while requiring additional judicial interpretation to determine when exceptions apply, still does not permit this kind of reverse public records suit. There is no reason that the more streamlined TPRA should permit such a claim. Instead, the Supreme Court of the United States has found that the proper method of challenging the disclosure of the information under federal law is to bring an APA challenge. Intervenors have not even attempted that here, because it is obviously not permitted. This is so, in part, because Tennessee's APA provides even narrower review rights than its federal counterpart. Under the TPRA, by contrast, the Legislature has placed the burden of proof to oppose disclosure and apply exemptions on the governmental entity holding the public records, and no one else. Reverse public records suits are not permitted and do not allow the Intervenors to intervene here.

3. The trial court erred granting intervention in cases in which the Intervenors never sought intervention.

Here, the trial court ordered four cases consolidated. But the Intervenors filed their motions only in Case No. 23-538. And they did so before the last two cases, Nos. 23-636 and 23-640, were consolidated into it. (*Compare* R2. at 245, 255, 291 *with* R2. at 114, 165.) Yet the trial court's orders—including the intervention orders issued the day after the final two cases were consolidated—effectively make the Intervenors parties to all the cases. This is not how consolidation works.

Consolidation does not form one lawsuit where there were formerly multiple ones; it merely allows a court to hear multiple cases at once. *In*

re Bridgestone/Firestone, 495 S.W.3d 257, 267 (Tenn. Ct. App. 2015). The actions retain their distinct parties and are governed by their separate orders. *See Rainbow Ridge Resort LLC v. Branch Banking & Tr. Co.*, 525 S.W.3d 252, 258–59 (Tenn. Ct. App. 2016). Where the Intervenors never sought participation in two of the consolidated cases, the trial court abused its discretion by making them de facto parties.

4. Even if allowed under the TPRA, intervention should not have been permitted here.

4.1. The Intervenors do not qualify under the plain terms of Rule 24.02

Assume the TPRA allows intervention at all. The Intervenors here did not make the showings required by any portion of Rule 24, including those set forth in Rule 24.02.

4.1.1. The trial court applied the incorrect standard.

Even if the TPRA permits third-party intervention, the chancery court abused its discretion in granting the permissive intervention under Rule 24.02.[5] Here, the court relied on the wrong inquiry for permissive intervention, focusing on "interest" and "personal stake" rather than on whether movants' claims or defenses and the main action have a common question of law or fact. The trial court's application of the incorrect standard constituted an abuse of discretion, and the fact that the Intervenors do not qualify under the correct one requires reversal.

Permissive intervention is governed by 24.02:

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[5] The court limited intervention to only include "Parents of children *enrolled* and *present* at the Covenant School on the date of March 27, 2023." (R3. at 386.)

> Upon timely motion any person may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when a movant's claim or defense and the main action have a question of law or fact in common. In exercising discretion the court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Id. Timeliness is not at issue. The court never identified any statutory right to intervene in its rulings, and there is no reasonable argument to claim that one exists. Thus, the Intervenors needed to show, and the Court needed to find, that intervenors had "claim or defense" that shared a common question of law or fact with the "main action." Rule 24.02. Intervenors have neither claims nor defenses under Rule 24.02.[6]

As for the School and Church, the court ruled that certain "specific information, which may have been collected during the investigation," provided both with "sufficient personal stake in the outcome of this litigation to bestow upon them the requisite standing to intervene[.]" (R3. at 378.) With respect to the parents, the court identified two bases that provided movants "a sufficient personal stake in the outcome of this litigation[.]" (R3. at 390.) First, the court determined that the parents had a general interest "to preserve any rights [the child victims] may have." (R3. at 388.) Second, the court found their desire to protect unspecified "private information" created a personal stake in the litigation. (*Id.*) None of these findings by the court are claims or defenses.

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[6] Any participation in these proceedings should have been limited to amicus status under or by analogy to Rule of Appellate Procedure 31.

More significantly, the court employed the wrong inquiry for permissive intervention. Citing *Shelby Co. Deputy Sheriff's Association v. Gilless*, 972 S.W.2d 683, 686 (Tenn. App. 1997), the court focused on whether Intervenors had "sufficient personal stake in the outcome of this litigation." (R3. at 378, 390.) But a "personal stake" is different from a "claim or defense," which controls under Rule 24.02. In *Gilless*, this Court affirmed a trial court's denial of a public trade associations' intervention in a salary dispute. *Gilless,* 972 S.W.2d at 686. But *Gilless* only holds that standing is necessary for intervention, not that it is sufficient. Indeed, this Court has expressed as much elsewhere: "Intervention is concerned with something more than standing." *In re Estate of Lucy*, No. W2007-2803, 2008 WL 3861987, at *3 (Tenn. Ct. App. Aug. 20, 2008), *app. denied* (Tenn. Feb. 17, 2009). The federal courts agree. *See Flying J Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009) (collecting cases).[7] And even to the extent the "personal stake" inquiry is relevant—and even if it were sufficient—it goes to whether a movant has the required "interest" under Rule 24.01 for intervention by right. The text of Rules 24.01 and 24.02 set forth different standards.

[7] Some courts have taken the view that intervention requires a different, less burdensome standing inquiry. *See, e.g.*, *Atlas Noble LLC v. Krizman Enters.*, 692 F. App'x 256, 269 (6th Cir. 2017) ("[T]he intervenor '"need not have the same standing necessary to initiate a lawsuit."'). But *Atlas Noble* and the line of cases it invokes do not stand for the proposition that a putative intervenor need only establish intervention-standing to meet Rule 24's requirements.

4.1.2. The Intervenors do not have a claim or defense sharing a common question of law or fact with the main action.

The Intervenors, of course, do not have a claim or defense under either the TPRA or Rule 24.02. We know this for two reasons. First, Movants do not have any defenses, because they are not subject to the TPRA. The Petitioners could never have brought suit against the Intervenors and, even if they had, no court could grant relief against them. Their ability to articulate some species of interest in the outcome does not entitle them to intervene where it does not constitute a defense. *See, e.g.*, *Taco Bell Corp. v. Cont'l Cas. Co.*, No. 01-c-0438, 2003 WL 124454, at *7 (N.D. Ill. Jan. 13, 2003) (rejecting permissive intervention based on inchoate subrogation interest).

Second, Intervenors have no claims assertable here, no cause of action to bring against any of the existing parties. Thus they axiomatically lack a common legal or factual question between such a claim and the Petitioners' claims. *See Marriott v. Cty. of Montgomery*, 227 F.R.D. 159, 167 (N.D.N.Y. 2005). The Intervenors' noncompliance with Rule 24.03—they failed to file a proposed pleading—makes clear that they lack, or at least have not asserted, any such claim.

Certainly none of the Intervenors filed, either with their Rule 24 motions or otherwise, any document that would meet the requirements of Rule 24.03. Even the motions themselves refer only in the most perfunctory way, if at all, to the supposed legal basis for the Intervenors' claims of exceptions from the TPRA. (*See* R2. at 245–246 (referencing "information owned by Covenant Church, including … schematics … and

confidential information pertaining to … employees"), 255–256 (the same, plus "release … could cause security and safety issues for the school"), 291–292[8] (articulating no grounds but seeking "to discuss the Court's preferred procedure").)

In granting the motions for intervention, the trial court ruled that because Rule 24.03 did not require that the necessary pleading be a "complaint," the pleading requirement would be satisfied by allowing the Intervenors to file "brief[s] that sets forth their claims and/or defenses." (R3. at 378–379, 390.) In so doing, the lower court got the cart before the horse—allowing intervention before the filing of the pleading (or brief) by which the intervention could be evaluated. And a brief is not a pleading. *See* Tenn. R. Civ. P. 7.01 (narrowly defining pleadings and limiting their categorization to not include "briefs"); *see also Shockley v. Mental Health Coop. Inc.*, 429 S.W.3d 582, 592 (Tenn. Ct. App. 2013) ("[B]riefs … are court papers, not pleadings.").

On the one hand, Rule 24.03's requirement of a "pleading" shows the impossibility of defensive intervention in a TPRA case, which has no responsive pleadings as such. *See* Part 2.1, *supra*. But even if one analogizes, the trial court's treatment of the Intervenors contrasts markedly with its treatment of Metro. The trial court required Metro to file at least

[8] The Parents filed an accompanying memorandum that identified their interest as their "belie[f] that the release [of the requested documents] itself could endanger them and … cause them further pain and trauma." (R2. at 299.) The memorandum is not, of course, either a pleading or a motion, *see Finchum v. Ace USA*, 156 S.W.3d 536, 538 (Tenn. Ct. App. 2004), and if the TPRA provides an exception for beliefs, even beliefs about harm, Petitioners remain unaware of its source.

a pleading analog, in the form of a filing specifying which of TPRA exceptions it was relying on to deny access to the requested records. (R3. at 374.) Obviously, with over 700 possible exemptions, the court needs to know what is (and is not) at issue as it conducts its *in camera* review of documents. (*See* R3. at 385 (specifying five exemptions on which Metro was relying).) The Intervenors' evolving position on the basis for their involvement and the relevance of the Victims' Rights Acts demonstrates the necessity for Rule 24.03 and the prejudice that results from the trial court's disregard of it.

4.1.3. TPRA exceptions are not claims or defenses invocable by the Intervenors.

The Petitioners have all sought one key set of documents: the shooter's writings. (R1. at 52, 132, 169–170, R2. at 207.) These, by definition, were not created by Intervenors, were never possessed by Intervenors, and Intervenors have admitted they have never even seen those writings. (R9. at 84.) Despite not having any knowledge of the contents of those writings, the Intervenors assume that the records are subject to specific exceptions of the TPRA. But the Intervenors' argument relies on speculation. Any member of the public can speculate: only Metro can offer a non-speculative defense. This is why the TPRA requires Metro, and only Metro, to defend.

What reasons, then, did Metro advance for refusing to produce the requested materials. Metro articulated five grounds:

1. Rule of Criminal Procedure 16's exception for records related to open and ongoing criminal investigations. *See Tennessean*, 485 S.W.3d at 870–871 (Tenn. 2016).

2. Tenn. Code Ann. § 10-7-504(a)(29)(A)'s excepton for "personally identifying information."

3. Tenn. Code Ann. § 10-7-504(p)'s exception for information related to school security.

4. Tenn. Code Ann. §10-7-504(t)'s exception for personal information pertaining to underage crime victims.

5. Tenn. Code Ann. § 38-7-110(c)'s exception for "[m]edical records of deceased persons, law enforcement investigative reports, and photographs, video and other images of deceased persons."

(R3. at 382–383.)

The two specific reasons Intervenors rely on for intervention are school safety and victim rights. The first reason is a recognized TPRA exception, while the second is not. *See* Part 4.2, *infra*. Metro has thus asserted the first but not the second.

As shown above, Metro has already stated it will assert the school safety exception, and there is no reason to believe that Metro will not adequately protect all persons, including Intervenors, to the fullest extent § 504(p) allows. Indeed, Metro is in a far superior position to do so since it has the records and Intervenor have never even seen the records. This great disparity in the ability to evaluate the records points to the concept that intervention should not be allowed in TPRA cases.

Nor is it apparent how the shooter's own writings could implicate the school-safety exception found in Section 504(p). But even if they could, Metro is best situated to advocate for the exception's application. And, following Metro's advocacy and the trial court's in camera review, the appropriate response can be formulated and assessed at the merits stage. As it stands, however, neither the Petitioners nor the Intervenors

have any non-speculative basis for determining whether the requested documents fall within Section 504(p)'s scope. The most one can do at this juncture is observe that exceptions are narrowly construed, given that the TPRA itself "shall be broadly construed so as to give the fullest possible access." Tenn. Code Ann. § 10-7-505(d). Construing any criminal's papers as covered by Section 504(p) simply because the crime involved a school would violate that mandate.[9]

The Church suggested a recent enactment, Public Chapter 367, gives them support, but it failed to note that this law did not take effect until July 1, 2023. Moreover, the Church cannot point to any part of that law that would restrict access to the records Petitioners have requested.

Ultimately, the issue in this appeal is intervention. The governmental records custodian (Metro) will always be in a superior position to evaluate the applicability of any exception. To the extent any third party wishes to present arguments on positions to the trial court in a TPRA case, the appropriate means of doing so would be as an amicus curiae, as several entities have done here. This is especially true when the contents of the public records at issue are wholly unknown to the third party.

[9] There is no indication, certainly, that the shooter possessed schematics or plans created by the School. Whatever knowledge she possessed of the interior layout came from her own prior experience as a student, a characteristic sadly shared by many school shooters.

4.1.4. Metro adequately represents the Intervenors' interests, and the adequacy is undiminished by the threat of a collusive cross-claim.

Rule 24.02 does not expressly require an inadequate-representation showing as a prerequisite for permissive intervention. The adequacy of the existing parties' representation, however, "may still factor into the determination" for permissive intervention. *North Dakota v. Heydinger*, 288 F.R.D. 423, 431 (D. Minn. 2012). Just as the adequacy of the existing parties' representation renders intervention improper under Rule 24.01, it renders it unhelpful and unnecessary under Rule 24.02. *See id.* The law presumes that government entities adequately represent the public. Only a "strong showing of inadequate representation" will rebut the presumption. *See id.* The presumption is heightened, moreover, when the government entity is one "charged by law with protecting the interests of the proposed intervenors," such that inadequacy of representation requires "gross negligence or bad faith." *Planned Parenthood of Wis. Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019) (quoting *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007)); *see also Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)).

The Intervenors attempt to play both sides of the adequacy question: on the one hand, they have never asserted Metro does not adequately represent their interests in asserting the TPRA's exemptions, and they manifestly share Metro's interest in withholding the requested materials. On the other, they have claimed to be adverse to Metro and announced an intent to file claims of their own against it. (R9. at 32.) But it

is not at all apparent that any real adversity exists between the Intervenors and Metro; rather, their interests appear aligned.

"In order that a suit be bona fide, and not fictitious, there must be an actual controversy and adverse interests." *Ward v. Alsup*, 46 S.W. 573, 574 (Tenn. 1898) (quoting *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850)). "It is essential that the object of every action be to settle a real controversy existing between the parties. If it appear that such is not the object, the action will be regarded as fictitious, and will be dismissed by the court; and the bringing of a fictitious suit may be punished as a contempt of court." *Ward*, 46 S.W. at 574. Metro cannot, by coordination with parties assuming the role of cross-claimant but seeking no real relief different from Metro's own desires, diminish the rights of third parties through collusive litigation. *See Ward*, 46, S.W. at 574, ("When a suit is brought with the view of affecting the rights of third parties … the suit is not adversary, but collusive, and should be dismissed.").

4.2. The Victims' Right Acts do not confer a right to intervene.

When construing the TPRA and its enumerated exceptions, the Tennessee Court of Appeals has instructed that courts "should apply the plain meaning without complicating the task." *Campbell v. Tennessee Bureau of Investigation*, No. M2016-1683, 2017 WL 1178285, at *2 (Tenn. Ct. App. Mar. 29, 2017), *app. denied* (Tenn. March 29, 2017) (*citing Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004)). The Intervenors' "victims' rights" argument fails in this regard.

The Intervenors seek to rewrite the TPRA to include a victims' rights exception that does not exist. In so doing they rely on the Victim

Rights' legislation's supposed "spirit and purpose," factors that, even to the extent ascertainable, can neither add to nor subtract from the statutory text. They misread Article I, Section 35 of the Tennessee Constitution and the Tennessee Victims' Bill of Rights statutes to encompass rights well beyond these provisions' terms.

4.2.1. The Victims' Right Acts do not confer a right to intervene.

Tennesseans received the first judicial recognition of their right to access public records in 1903 in the Supreme Court decision of *Welford v. Williams*, 110 Tenn. 549 (1903), which arose from a mandamus petition. *Welford* remained the controlling authority for over one-half century. In 1957, Tennessee enacted the Public Records Act, which has since been codified as Tenn. Code Ann. §10-7-503, *et seq.* The Public Records Act, as enacted and to the present, does not contain an exemption from disclosure pertaining to victims' rights.

Tennessee maintains several statutes and one constitutional provision related to victims' rights. The provisions, confusingly, do not share a common name or a common set of definitions. Title 40, Chapter 38, Part 1 is Tennessee's "Victims' Bill of Rights." The General Assembly adopted it in 1990, thirty-three years after the TPRA. *See* 1990 Pub. Acts Ch. 957, *codified at* Tenn. Code. Ann. § 40-38-101–119 (the initial enactment contained only seven sections (101–107), with twelve sections added later (108–119)).

Almost a decade later, the people amended the Tennessee Constitution by inserting Article I, section 35, the Victims' Right Amendment. The amendment identifies eight basic rights that victims of crime are

entitled to in the criminal justice system. Following the Constitutional amendment, the Legislature adopted 2000 Public Chapter 577, declaring, "[i]t is the intent of the general assembly by enactment of this part to implement and make fully operational the provisions of Constitution of Tennessee, Article I, § 35, relative to the rights of victims of crime." Tenn. Code Ann. § 40-38-301(a). The implementing statutes are found in Chapter 38, Part 3, and have definitions that apply to themselves alone, not to the previously adopted Bill of Rights (which has no comprehensive definitions provision).[10] (Because of the many enactments, the Petitioners will refer collectively to the provisions of Title 40, Chapter 38, and the Victims' Right Amendment as the "Victims' Rights Acts.")

4.2.2. The Victims' Right Amendment has no bearing on the TPRA.

Article I, Section 35 enumerates rights only relevant to the criminal prosecution of an accused. The Section's provisions go no further than the criminal prosecution of an accused and have no bearing on TPRA requests. For example, this provision grants limited rights to a crime victim such as the right to be informed of the status of a criminal proceeding, to confer with the criminal prosecution, to a speedy conclusion of the criminal matter, and "to be heard" at "critical stages" of the criminal

[10] Provisions on victim-impact statements were adopted in 1993, *see* Tenn. Code Ann. §§ 40-38-201–208, victim-services training in 2008, *see id.* §§ 40-38-401–405, automated victim notifications in 2009, *see id.* §§ 40-38-501–507, and home-address confidentiality for certain victims in 2018, *see id.* §§ 40-38-601–613.

proceeding. The implementing legislation bears out the Amendment's limitation to the criminal process. *See* Tenn. Code Ann. § 40-38-302(2).

Even then, none of the enumerated rights establishes a basis for the crime victim to function as a party to, a litigant in, or to have independent legal counsel in the criminal proceeding in any context. None of the provisions establishes a basis for the crime victim to voice any opposition to or to argue against the state's prosecution of the criminal case. None allows a crime victim to negate any proposed plea bargain or other disposition, such as a *nolle prosecui*, or to file pleadings in a criminal prosecution. Nor do they refer to or establish any rights for the crime victim that exist independent of the actual criminal prosecution. None of the enumerated rights have any application in the event of a collateral or subsequent civil action such as a wrongful death claim against a tortfeasor or a negligent security claim against a property owner or manager.

Indeed, the only instance in which the Tennessee Supreme court has so much as mentioned the Victims' Rights laws and civil litigation together, it did so in the context of modifying a common-law rule of criminal procedure. *See State v. Al Mutory*, 581 S.W.3d 741, 748–50 (Tenn. 2019). The federal courts have expressly entertained and rejected claims that the federal Crime Victims' Rights Act modifies or creates rights assertable in civil litigation. *See In re McNulty*, 597 F.3d 344, 352 n.8 (6th Cir. 2010); *In re Siler*, 571 F.3d 604, 609–610 (6th Cir. 2009).

4.2.3. The Victims' Rights Acts do not create a TPRA exception here.

Two years following the ratification of the Victims' Rights Amendment, the General Assembly added two new sections to Title 40, Chapter

38, now codified under the heading "Constitutional Rights of Victims," Tenn. Code Ann. §40-38-301–302. The legislature expressed its intention in enacting this statute as follows:

> It is the intent of the general assembly by enactment of this part to implement and make fully operational the provisions of Constitution of Tennessee, Article I, § 35, relative to the rights of victims of crime.

Tenn. Code Ann. §40-38-301(a). Nothing in the statutory enactment suggests that it has any intent or function other than to provide definition and procedural context for the rights of crime victims during the court proceedings related to criminal prosecutions.

Nor are the pre-amendment provisions any different in this respect. The first substantive provision of the Victims' Bill of Rights requires that crime victims and prosecution witnesses have the right to "be treated with dignity and compassion" and to receive protection and support "in the case of intimidation or retaliation from the [criminal] defendant and the defendant's agents or friends." Tenn. Code Ann. § 40-38-102(a). Crime victims also have the right to collect any restitution that the criminal court may order. *Id.* § -102(c).

Like Article 1, Section 35, none of these provisions have any relevance outside the criminal proceedings. As for the right to be treated with dignity, the Legislature has provided no procedure nor mechanism to "define, implement, preserve and protect" that right outside the standards contained in the Victims' Bill of Rights statute itself regarding the participation of those individuals in the criminal proceedings. For example,

there is no private right of action[11] for "dignity and compassion" on behalf of a crime victim assertable outside the criminal proceedings themselves. *See Harvey v. LaDuke*, No. E2005-0533, 2006 WL 694640, at *11–12 (Tenn. Ct. App. March 20, 2006), *no app.*

The second substantive provision of the Victims' Bill of Rights is contained in Tennessee Code Section 40-38-103. This statute elaborates on the rights enumerated in the constitution. For example, all crime victims have the right to be notified of how the criminal prosecution functions, the potential for restitution and the potential for applying to the victim's compensation fund for compensation. Tenn. Code Ann. § 40-38-103(a)(1). The victims of certain serious crimes have the right to be advised of plea deals. Tenn. Code Ann. § 40-38-103(a)(2). The victim also has the right to speak at parole hearings, submit victim impact statements, and to give sentencing testimony—all related to the criminal proceedings and sentencing. *Id.* The victim has the right to notice when an inmate is to be released and to be compensated for expenses in attending the criminal proceedings. Tenn. Code Ann. § 40-38-103(a)–(b). Like Article I, Section 35 and the first substantive provision of the Victims' Bill of Rights, none of these rights exists outside of a criminal prosecution. Even in the criminal context, the Victims' Rights legislation does not create

[11] In 2021, Tennessee enacted a "lifetime" order of protection that allows a victim of a felony offense to petition for a court order to "[p]rohibit the respondent from coming about the petitioner for any purpose, from telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly." Tenn. Code Ann. § 36-3-627(f)(1). Even this lifetime protection order does not guarantee "dignity or compassion" to the crime victim.

new grounds for sentencing, merely a mechanism for presenting otherwise-relevant evidence. *See State v. Ring*, 56 S.W.3d 577, 583–84 (Tenn. Crim. App. 2001) ("A trial court may consider [victim impact] evidence … in determining an appropriate punishment. However … the trial court's consideration must be limited to a rational inquiry into the [defendant's] culpability …, not an emotional response to the evidence.").

Here, not only is there no ongoing actual criminal prosecution giving rise to rights under Article I, Section 35 or the Victims' Bill of Rights, but in the thirty-three years that the Victims' Bill of Rights has existed, no reported Tennessee decision has relied on those statutes (or the underlying constitutional provision) to create a new, additional exception to the TPRA. To the contrary, the Legislature has shown itself fully capable of expressly incorporating victim-protection mechanisms into the TPRA for itself. *See Tennessean*, 485 S.W.3d at 873–74 (discussing Tenn. Code Ann. § 10-7-504(q)(1)). And the mechanism it employed then—like the Victims' Rights Act itself—requires a criminal proceeding and conviction. *See id.* ("At the conclusion of the criminal proceedings …"). It also knows how to exempt crime-victim records from the TPRA in other ways. *See* Tenn. Code Ann. §§ 40-38-601–613 (imposing confidentiality on and creating unique process for access to residential information pertaining to certain crime victims).

The General Assembly, then, has made the policy decision to protect crime victim information only in some cases and only when certain conditions precedent are satisfied. Given that Article I, Section 35 expressly provides that only the legislature has the authority "to enact substantive and procedural laws to define, implement, preserve and protect

the rights guaranteed to victims by this section" and the General Assembly has chosen not to expressly enact any exceptions to the TPRA under this authority, none can nor should be inferred by this Court. *See* Part 4.2.4, *infra*.

Even the lone dissent in *Tennessean*, had it been adopted by the majority, would not prevent disclosure of the records the Intervenors seek to have withheld—the shooter's writings. Justice Wade asserted that "statements by or about the victim; written descriptions of photographs and videos of the victim; or most content of the victim's cell phones … qualify for protection under the victims' rights provisions." *Tennessean*, 485 S.W.3d at 882 (Wade, J., dissenting). Neither Metro nor the Parents have established that any such records either are at issue or are not potentially covered by an existing exception, such as those for deceased persons, minor victims of crimes, and personally identifying information. Petitioners do not seek photographs or videos of victims[12] or the contents of victims' cell phones, and there has been no claim that any of the shooter's writings contain any statements about any particular, identifiable victim, a proposition that seems extraordinarily unlikely under the circumstances—and this requires assuming that the dissenting opinion in *Tennessean* were law.

By contrast, four specific subsections of the Victims' Bill of Rights do mention confidentiality. Tenn. Code Ann. §§ 40-38-103(b), -111(i), -

[12] At least one of the Petitioners requested "photographs" generally, but it is undisputed that depictions of the victims would be exempt from disclosure. *See* Tenn. Code Ann. §§ 10-7-504(t), 38-7-110(c). (R5. at 710–711.)

114(b), -602(f). But not one of these provides confidentiality for a perpetrator's writings. The General Assembly has shown that it knows how to make a record confidential, but it has chosen not to do so for the records Petitioners seek. Moreover, the General Assembly has had seven years since *Tennessean* and its dissenting opinion to amend the Victims' Bill of Rights to provide the TPRA exception Intervenors seek, if it so wanted. Yet the policy of the state, as expressed by the General Assembly's unwillingness to create such an exception, is that such an exception does not exist.

The executive branch agrees. In 1990, with the adoption of the Victims' Bill of Rights, the legislature directed the State Treasurer, in consultation with the Executive Director of the District Attorneys General Conference, to prepare and distribute to each District Attorney General in Tennessee, a booklet, pamphlet, brochure, handout or other publication setting forth all of the provisions of the law that pertain to victims' rights together with a summary of any other provisions of law or regulation pertaining to victims or that would help victims. Tenn. Code Ann. § 40-38-107(a). In compliance with that legislative mandate, the Tennessee District Attorneys General Conference has created and published on their website the required document. *See* TENN. DISTRICT ATTORNEYS GENERAL CONFERENCE, *Victims Services*, https://www.tndagc.org/victim-services/. There is nothing there suggesting anything about the

confidentiality of criminal records or public records at all.[13] While not dispositive on a question of law, the "interpretations of statutes by administrative agencies are customarily given respect and accorded deference by courts." *Riggs v. Burson*, 941 S.W.2d 44, 50–51 (Tenn. 1997).

So too does the commentary from the Victims' Bill of Rights' and Victims' Rights Amendment's adoptions. The Senate sponsor of the Victims' Bill of Rights expressly noted that the statute grew out of legislative hearings that highlighted difficulties experienced by crime victims during the criminal-prosecution process, particularly related to compelled interaction with criminal defendants. *See Victims' Bill of Rights: Hearing on S.B. 1424 before the Sen. Jud. Comm.*, 96th Gen. Assembly, Feb. 13, 1990, at 19:36 (statement of Sen. Tommy Burks). The House sponsor of the Amendment similarly noted that the text only created duties on the part of government officials during the criminal-justice process. *See Victims' Rights Amendment: Hearing on H.J.R. 14 before the H. Jud. Comm.*, 99th Gen. Assembly, March 15, 1995, at 42:00 (statement of Rep. Roy Herron).

4.2.4. Appeals to the compassionate aims of the Victims' Rights Acts do not authorize the Court to create a TPRA exception or modify the process governing TPRA actions.

Neither the TPRA nor the Victims' Rights acts create a general exception to the TPRA in favor of crime victims or a process for their

[13] Certain victims qualify for the residential-address confidentiality program, *see* Tenn. Code Ann. §§ 40-38-601–613, but that program is not relevant in this case.

participation in TPRA actions related to crimes. The courts cannot employ the Victims' Rights Acts to fashion rights and remedies the statutes do not themselves contain.

The Victims' Rights Acts do not create a private right of action. *See* Tenn. Code Ann. § 40-38-108. Nor do they contemplate, much less require, the broad nondisclosure of material related to crimes. If the shooter had survived the police shootout, she would have been charged and tried for murder. At trial, her writings would likely have been significant exhibits. Once admitted, their public availability would be unquestionable. *See, e.g.*, *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 n.9 (1980) ("A trial is a public event. What transpires in the courtroom is public property."); *see also* Tenn. S. Ct. R. 34(1). There is a strong presumption that materials introduced into evidence at trial should be made accessible to the public. *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981); *Tennessee v. Drake*, 701 S.W.2d 604, 607–608 (Tenn. 1985) (relying on U.S. Supreme Court precedent, including *Richmond Newspapers*, to recognize the public nature of trials). Therefore, any suggestion that a crime victim has a right under the TPRA to deny access to documents conflicts with the language of the TPRA, the Victims' Rights Acts, and long-established practice at trial.

When the TPRA was first enacted in 1957 there were only two exceptions to provide confidentiality for certain records. *Tennessean*, 485 S.W.3d at 865; *see also* 1957 Pub. Acts Ch. 285. Since that time the General Assembly has been very active in creating new exceptions. The Tennessee Office of Open Records Counsel maintains a count of these exceptions and there are now 723 exceptions to the TPRA. *See* OPEN RECORDS

COUNSEL, *Public Records Exception Database*, https://comptroller.tn.gov/office-functions/open-records-counsel/open-meetings/exceptions-to-the-tennessee-public-records-act/public-records-exception-database.html (last visited July 14, 2023). Not one of the 723 exceptions provides the broad claim Intervenors suggest that would prohibit the release of the offender's writings.

The Tennessee Supreme Court, moreover, has expressly rejected the proposition that the TPRA leaves the courts free to adopt new public-policy exceptions. *See Schneider*, 226 S.W.3d at 343–344 (refusing to adopt a novel law-enforcement privilege and noting refusals to adopt public-policy exceptions in *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 685 (Tenn. 1994), and *Memphis Publ'g Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986)). Just so here. The court may not appeal to the Victims' Rights Acts to create either a substantive exception or a procedural participation right that the statute itself does not confer.

It is the prerogative of the legislature to state the policy of the state concerning general welfare and, where the legislature speaks on a particular subject, that utterance will stand as the public policy of the state upon that subject. *E.g.*, *City of Jackson v. Jackson Sun Inc.*, No. 39461, 1988 WL 11515, at *4 (Tenn. Ct. App. Feb. 16, 1988), *app. denied* (Tenn. May 2, 1988). The power to alter Tennessee's public policy in favor of the openness of public records and create new exceptions to the TPRA lies solely in the legislature. *See State v. Cawood*, 134 S.W.3d 159, 167 (Tenn. 2004); *Doe v. Sundquist*, 2 S.W.3d 919, 926 (Tenn. 1999); *Patterson v. Convention Ctr. Auth. of the Metro. Gov't*, 421 S.W.3d 597, 613–614 (Tenn. Ct. App. 2013). Because the TPRA constitutes a comprehensive

regulation of the subject, judicial expansion of its exceptions would entail an extension of the statutory text, an exercise that "is not the office of this Court … regardless of how we may perceive the equities of the case." *Memphis Pub. Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986) (quoting *Overman v. Overman*, 570 S.W.2d 857 (Tenn. 1978)).

Even within the narrow confines of the criminal-procedure context, the Tennessee Supreme Court has insisted on limiting the Victims' Rights Acts to their terms. In a homicide prosecution, the trial court heard from members of the decedent's family to oppose the State's request to take a *nolle prosequis*, on the premise that these were "critical stages of the criminal justice process" within the meaning of Tennessee Code Section 40-38-302(2). *State v. Layman*, 214 S.W.3d 442, 453 (Tenn. 2007). The Court overruled the Court of Appeals and held that the proceeding was not a "critical stage" of the criminal justice process because "*nolle prosequis* are notably absent from the list of proceedings at which victims have a right to be heard …. We therefore conclude that Tenn. Code Ann. § 40-38-302(2) provides victims no right to be heard at the pretrial hearings in this case." *Id.* at 453–54.

There is no criminal prosecution arising out of the events at Covenant School. There is no indication in the record that there is any intended prosecution arising out of that event. But the existence of a criminal prosecution would not change the outcome on intervention in any way, because nothing in Article I, Section 35 or any portion of Title 40, Chapter 38, confers any right of intervention or participation, or any other right assertable, in a TPRA case. Accordingly, no individual or

entity should have been permitted to intervene if that intervention is wholly or in part based upon the Victims' Rights Acts.

5. The Petitioners should recover their attorney's fees incurred on appeal if ultimately entitled to such an award.

Tennessee Code Section 10-7-505(g) entitles a petitioner to recover "all reasonable costs involved in obtaining [a] record, including reasonably attorneys' fees," from a government custodian who "willfully refuse[s] to disclose it." Absent language in the authorizing statute—which Section 505 does not have—to the contrary, an entitlement to fees at trial carries with it an entitlement to fees incurred on appeal. *See Killingsworth v. Ted Russell Ford Inc.*, 205 S.W.3d 406, 409 (Tenn. 2006). The party entitled to fees need not independently demonstrate entitlement to fees at the appellate stage by showing, e.g., that the opponent's position on appeal is unreasonable or unsupported; the grounds for awarding fees on appeal are the same as for those incurred below. *See Martin v. Franklin Cool Springs Corp.*, No. M2014-1804, 2015 WL 7062124, at *4 (Tenn. Ct. App. Nov. 10, 2015), *no app.* Accordingly, this Court should direct that upon rfemand the Petitioners recover their reasonable attorney's fees incurred on appeal if they become entitled to such fees in the action below. *See Killingsworth*, 205 S.W.3d at 409.

CONCLUSION

For these reasons, the Court should reverse the two intervention orders, dismiss the Intervenors as parties, and remand this case for further expeditious proceedings between the Petitioners in their cases and the Metropolitan Government. In addition, the Court should direct that any

subsequent recovery of attorney's fees by the Petitioners encompass their fees incurred in this appeal.

Respectfully submitted,

s/ Paul J. Krog
Paul J. Krog (No. 29263)
BULSO PLC
155 Franklin Rd., Ste. 400
Brentwood, TN 37027
615-913-5130
pkrog@bulso.com

and

Nicholas R. Barry (No. 31963)
AMERICA FIRST LEGAL FOUNDATION
611 Pennsylvania Ave SE #231
Washington, DC 20003
615-431-9303
nicholas.barry@aflegal.org
Counsel for Michael Patrick Leahy and Star News Digital Media Inc.

s/John I. Harris III (w. perm.)
John I. Harris III (No. 12099)
SCHULMAN, LEROY & BENNETT PC
3310 West End Avenue, Suite 460
Nashville, TN 37201
615-244-6670
jharris@slblawfirm.com
Counsel for James Hammond and Tennessee Firearms Association, Inc.

s/Richard L. Hollow (w. perm.)
Richard L. Hollow (No. 00593)
HOLLOW & HOLLOW LLC
9724 Kingston Pike, Suite 703
Knoxville, TN 37922
865-769-1709
rhollow@hollowlaw.com
Counsel for The Tennessean, Rachel Wegner, and Todd Gardenhire

s/ Douglas R. Pierce (w. perm.)
Douglas R. Pierce (No. 10084)
KING & BALLOW
315 Union Street, Suite 1100
Nashville, TN 37201
dpierce@kingballow.com
Counsel for Clata Renee Brewer

CERTIFICATE OF COMPLIANCE

This document complies with the requirements of Rule of Appellate Procedure 30(e) and Supreme Court Rule 46 § 3.02 because it is typed in fourteen-point Century Schoolbook font and consists, according to the word-count utility on the software with which it was produced, and exclusive of the elements exempted by those Rules, of 10,573 words.

s/ Paul J. Krog
Paul J. Krog

Tenn. Code Ann. § 10-7-505. Procedures for obtaining access to public records; penalty for willful refusal to disclose

(a) Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record as provided in § 10-7-503, and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official, shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.

(b) Such petition shall be filed in the chancery court or circuit court for the county in which the county or municipal records sought are situated, or in any other court of that county having equity jurisdiction. In the case of records in the custody and control of any state department, agency or instrumentality, such petition shall be filed in the chancery court or circuit court of Davidson County; or in the chancery court or circuit court for the county in which the state records are situated if different from Davidson County, or in any other court of that county having equity jurisdiction; or in the chancery court or circuit court in the county of the petitioner's residence, or in any other court of that county having equity jurisdiction. Upon filing of the petition, the court shall, upon request of the petitioning party, issue an order requiring the defendant or respondent party or parties to immediately appear and show cause, if they have any, why the petition should not be granted. A formal written response to the petition shall not be required, and the generally applicable periods of filing such response shall not apply in the interest of expeditious hearings. The court may direct that the records being sought be submitted under seal for review by the court and no other party. The decision of the court on the petition shall constitute a final judgment on the merits.

(c) The burden of proof for justification of nondisclosure of records sought shall be upon the official and/or designee of the official of those

records and the justification for the nondisclosure must be shown by a preponderance of the evidence.

(d) The court, in ruling upon the petition of any party proceeding hereunder, shall render written findings of fact and conclusions of law and shall be empowered to exercise full injunctive remedies and relief to secure the purposes and intentions of this section, and this section shall be broadly construed so as to give the fullest possible public access to public records.

(e) Upon a judgment in favor of the petitioner, the court shall order that the records be made available to the petitioner unless:

(1) There is a timely filing of a notice of appeal; and

(2) The court certifies that there exists a substantial legal issue with respect to the disclosure of the documents which ought to be resolved by the appellate courts.

(f) Any public official required to produce records pursuant to this part shall not be found criminally or civilly liable for the release of such records, nor shall a public official required to release records in such public official's custody or under such public official's control be found responsible for any damages caused, directly or indirectly, by the release of such information.

(g) If the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity. In determining whether the action was willful, the court may consider any guidance provided to the records custodian by the office of open records counsel as created in title 8, chapter 4.

Tenn. R. Civ. P. 24.02. Permissive Intervention

Upon timely motion any person may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or

(2) when a movant's claim or defense and the main action have a question of law or fact in common.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing is being filed by the Court's electronic-filing system, which is expected to deliver a copy to the following:

Eric G. Osborne
William L. Harbison
Christopher S. Sabis
C. Dewey Branstetter
Ryan T. Holt
Micah N. Bradley
Frances W. Perkins
Hunter C. Branstetter
William D. Pugh
SHERRARD ROE VOIGT & HARBISON PLC
150 Third Ave South, Suite 1100
Nashville, TN 37201
eosborne@srvhlaw.com
bharbison@srvhlaw.com
csabis@srvhlaw.com
dbranstetter@srvhlaw.com
rholt@srvhlaw.com
mbradley@srvhlaw.com
fperkins@srvhlaw.com
hbranstetter@srvhlaw.com
wpugh@srvhlaw.com

Edward M. Yarbrough
Sara D. Naylor
SPENCER FANE LLP
511 Union Street, Suite 1000
Nashville, Tennessee 37219
eyarbrough@spencerfane.com
snaylor@spencerfane.com

Hal Hardin
HARDIN LAW OFFICE
211 Union St., Ste. 200
615-369-3377
hal@hardinlawoffice.com
Counsel for The Covenant School Parents

Rocklan W. King III
F. Laurens Brock
ADAMS AND REESE LLP
1600 West End Avenue, Suite 1400
Nashville, TN 37203
rocky.king@arlaw.com
larry.brock@arlaw.com
Counsel for Covenant Presbyterian Church

Peter F. Klett
Autumn L. Gentry
DICKINSON WRIGHT PLLC
424 Church Street, Suite 800
Nashville, TN 37219
pklett@dickinsonwright.com
agentry@dickinsonwright.com

Nader Baydoun
BAYDOUN & KNIGHT PLLC
5141 Virginia Way, Suite 210
Brentwood, TN 37027
nbaydoun@baydoun.com
Counsel for The Covenant School

Wallace W. Dietz
Lora Fox
Cynthia Gross
Phylinda Ramsey
METROPOLITAN LAW DEPARTMENT
Metropolitan Courthouse
1 Public Square, Suite 108
Nashville, TN 37210
wally.dietz@nashville.gov
lora.fox@nashville.gov
cynthia.gross@nashville.gov
phylinda.ramsey@nashville.gov
Counsel for Respondent

on this day, July 20, 2023.

s/ Paul J. Krog
Paul J. Krog