IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

CLATA RENEE BREWER, JAMES HAMMOND, THE TENNESSEE FIREARMS ASSOCATION INC., MICAHAEL P. LEAHY, STAR NEWS DIGITAL MEDIA INC., THE TENNESSEEAN, RACHEL WEGNER, and TODD GARDENSHIRE,	)	Case No. M2023-00788-COA-3-CV
Petitioners-Appellants,	)	Appeal from Davidson County Circuit Court Nos. 23-538-III, 23-542-III, 23-636-III, 23-640-III
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.	)	

BRIEF OF INTERVENOR-APPELLEE THE COVENANT SCHOOL

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STATEMENT OF THE ISSUES

1. Did the trial court correctly conclude that there is nothing in the Tennessee Public Records Act ("TPRA") prohibiting intervention under the Tennessee Rules of Civil Procedure?

2. Did the trial court abuse its discretion by allowing intervention under Tenn. R. Civ. P. 24.02 by The Covenant School (the "School"), one of the parties most directly affected by the potential release of public records which Petitioners request?

STATEMENT OF THE CASE

On March 27, 2023, a person broke into the School and began shooting up the School, killing six three students, a teacher, a custodian and the Head of School. This attack was carried out as part of a documented plan against the School, its students and staff. The shooter apparently had maps, diagrams, locations of security cameras and other documents containing her plan of attack against the school. Thankfully, Covenant School staff sprang into action to protect their students, shielding students them with their own bodies and hiding them in safe corners.

Petitioners now seek, for their own personal agendas, to obtain the documents written and used by the shooter to carry out her deadly assault. In the aftermath, the School seeks nothing more than the ability to continue to act as it always has before, during, and after the horrific events of March 27: to protect the interests of its children. All it asks is the opportunity to come before the trial court and be heard. The trial court correctly exercised her discretion and properly found that the School had the right to intervene and be heard.

Petitioners posit that the laws of our state are too formalistic and rigid to permit an aggrieved party to be heard — that the same procedural rules which countless businesses, government entities, and private citizens use every day as a matter of right and as a matter of Court permission to intervene and be heard in litigation do not apply here, and that the Intervenor-Appellees are out of luck for byzantine, technical reasons. That is simply untrue.

Despite Petitioners' misleading characterizations, neither the Rules of Civil Procedure nor the Tennessee Public Records Act say any such thing. An absolute prohibition of any interested party to intervene at any time or under any circumstance is simply not found in the TPRA. To the contrary, intervention has been allowed in other TPRA cases. Such an absolute prohibition is not only contrary to law but it is completely illogical and draconian. Under the explicit text of the procedural rules, and under these facts, Intervenor-Appellees are entitled to intervene in this case, and certainly able to intervene by Court permission. The Chancery Court properly so found.

STATEMENT OF THE FACTS

Almost immediately after the shooting, the media descended upon the School, its staff and facilities. Others soon followed. They swarmed the school grounds, played video of the shooting on local and national television stations around the clock, and all too often, altogether ignored the statements and desires of the victims. One of the ways in which they ignored victims was in their public records requests related to the investigation of the shooting. It is this request that brings us here today.

The Petitioners all requested public records related to the investigation of the shooting from the Metropolitan Government of Nashville and Davidson County ("Nashville Metro" or "Metro"). [R. I, 114, 116; R. II, 167, 200.] Nashville Metro withheld some of the requested records, and various combinations of the Petitioners filed multiple separate suits against Metro in Davidson County Chancery Court seeking the release of the records, [R. I, 116; R. II, 167, 200], and all the cases were eventually consolidated into one lead case, No. 23-0538-III. [R I, 114; R. II, 165, 195.] The Intervenor-Appellees — the School, Covenant Presbyterian Church (the "Church"), and a group of specific parents of students enrolled and present at the Covenant School on March 27, 2023, known in this case as Parents of Minor Covenant Students Jane Doe and John Doe (the "Parents"), filed motions to intervene in the case. [R II, 245, 255, 291; *see also* R. III, 386 (defining the group of parents permitted to intervene).] The Church cited to Rule 24.01 [R. II, 245], while the Parents and the School cited to both Rule 24.01 and Rule 24.02 in requesting an order granting their motions to

intervene.[1] [R.II, 255, 291-292; R.III, 343-345.] In particular, the School sought to intervene in order to argue against the release of any material – particularly writings of the shooter – which would re-endanger the children. [R. III, 344-345.] Though the School has not seen these materials, there is every reason to believe that the writings of the shooter will include some or all of the shooter's plans and motivations for harming the School and its students, including particular plans and methods by which the shooter planned to carry out the attack. The merits of the Intervenor-Appellees' arguments is not at issue here, but their concerns include physical safety of their students against future attackers, who might be informed and motivated by the writings, as well as the mental, emotional, and psychological well-being of the student-victims if the writings are made public and the students are inevitably exposed to them. [*See*, *e.g.*, R. II, 295-300; R. III, 344-345.] The School also wishes to prevent the disclosure of these writings to prevent further attacks by a copy-cat shooter potentially motivated by these writings.

The interest which Intervenor-Appellees have in keeping these materials out of the public domain is thus unique both in kind and intensity. It is a truism that parents and teachers have a far greater interest in their childrens' well-being than the government ever could.

[1] While the School's Expedited Motion to Intervene cited to Rule 24.01, [R. II, 255] the School's later-filed Memorandum of Law in Further Support of Its Expedited Motion to Intervene specifically requested permissive intervention under Rule 24.02 in the alternative. [R.III, 343-345.]

This is no knock against Metro; it is simply true by nature of the relationships at issue — a fact that is recognized even by Metro in this case. So while Metro certainly has some interest in arguing against the disclosure of these records, the interests of Intervenor-Appellees in continuing to make every effort to protect their own children far exceeds that of the government.

A hearing was held on May 22, 2023, and on May 24, 2023, the trial court issued two orders ("Order Granting Intervention of the Covenant School and Covenant Presbyterian Church Pursuant to Tennessee Rule of Civil Procedure 24.02" and "Order Granting Intervention of the Parents of Minor Covenant Students Jane Doe and John Doe Pursuant to Tennessee Rule of Civil Procedure 24.02") granting the motions to intervene, specifically citing Tenn. R. Civ. P. 24.02, the permissive intervention rule, as the basis for intervention. [R. III, 376-379; 385-391.] Petitioners appealed to this Court pursuant to Tenn. R. Civ. P. 24.05. [R. IV, 505, 515, 520, 525.]

In sum, this appeal results from the efforts of requestors of public records to thwart the ability of those most directly affected by their potential release to be heard in court on the matter. The merits of the TPRA request, and those of Intervenor-Appellees' arguments regarding exclusions relevant to that request, are not at issue in this appeal, and are *not* properly before the Court. Rather, the sole issues before this Court concern whether the trial court correctly interpreted the law and whether it properly exercised its discretion in permitting victims to approach the courts of this state and be heard. As discussed below, the trial court was absolutely correct on both counts.

The problem is not that Petitioners requested the records. The problem is that Petitioners ask this Court to hold that while anyone can request the records, only Metro can respond and that all other interested parties, regardless of the validity of their positions, must remain silent. That is not only unjust, but contrary to law.

STANDARDS OF REVIEW

Whether intervention under the Tennessee Rules of Civil Procedure is absolutely precluded as a matter of law in a case brought under the TPRA is a question of statutory interpretation, and thus the trial court's conclusion on this point is a conclusion of law. A trial court's conclusions of law are reviewed "de novo with no presumption of correctness." *Wood v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M200802570COAR3CV, 2009 WL 2971052 at *2, (Tenn. Ct. App. Sept. 16, 2009), *perm. app. denied*, (Tenn. Mar. 15, 2010) (citing *Simonton v. Huff*, 60 S.W.3d 820, 825 (Tenn. Ct. App. 2000)).

By contrast, to intervene with permission, a party need merely show that there is a single "common question of law or fact between an intervenor's claims and the underlying action." *Ballard v. Herzke*, 924 S.W.2d 652, 658 (Tenn. 1996); *see also United States v. Michigan*, 424 F. 3d 438, 445 (6th Cir. 2005) (noting that under the analogous federal rule there must be just one common question or law or fact). Once a common question is established, the decision to allow intervention is entrusted to the trial court's discretion and should not be reversed unless there is a showing that the trial court abused its discretion. *Regions Bank v. Blumberg Tr.*, No. E202000051-COA-R-3CV, 2020 WL 4919783, at *2 (Tenn. Ct. App. Aug. 21 2020), *no perm. app. filed*.

Thus, when reviewing a trial court's order allowing permissive intervention under Rule 24.02, this Court applies the abuse of discretion standard. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 191 (Tenn. 2000). Under the abuse of discretion standard, this Court

should not overturn the trial court's order unless this Court is "firmly convinced that the lower court has made a mistake in that it affirmatively appears that the lower court's decision has no basis in law or in fact and is therefore arbitrary, illogical, or unconscionable." *Id.; see also Ballard,* 924 S.W.2d 652 at 661. "The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). Thus, "appellate courts should permit a discretionary decision to stand if reasonable minds can differ concerning its soundness." *Metro. Gov't of Davidson Cnty. v. Tatum*, No. M20070279-COA-R-3CV, 2008 WL 4853073, at *7 (Tenn. Ct. App. Nov. 7, 2008), *no perm. app. filed.*

ARGUMENT

I. The Trial Court Correctly Concluded that The TPRA Does Not Absolutely Prohibit Intervention.

The trial court correctly concluded the TPRA does not prohibit intervention. Petitioners cannot show otherwise. Prohibiting intervention is not only illogical but is inconsistent with established case law.

A. The TPRA Neither Forbids Intervention Nor Alters the Rules of Civil Procedure Relating to Intervention.

The TPRA absolutely does not state that intervention is disallowed in a TPRA case. The TPRA says nothing whatever about intervention. Lacking explicit statutory support for their argument, Petitioners try mightily to argue that the statute necessarily *implies* that intervention is impossible. They seek to construct a structural argument that omission of specific provisions for intervention in a TPRA case *implies*

exclusion of the possibility. This illogical and rickety argument runs counter to standard application of the Rules of Civil Procedure under the laws of this state, and ultimately cannot support Petitioners' conclusion.

The general rule is that the Rules of Civil Procedure apply in every civil case brought in the Chancery and Circuit courts of this state. Tenn. R. Civ. P. 1 provides:

> Subject to exceptions as are stated in particular rules, the Rules of Civil Procedure shall govern procedure in the circuit or chancery courts in all civil actions, whether at law or in equity, and in all other courts while exercising the civil jurisdiction of the circuit or chancery courts.

Tenn. R. Civ. P. 1. Hence, "[t]he Tennessee Rules of Civil Procedure, . . . are 'laws' of this state, in full force and effect, until such time as they are superseded by legislative enactment or inconsistent rules promulgated by this Court and adopted by the General Assembly." *State v. Hodges*, 815 S.W.2d 151, 155 (Tenn. 1991). Here, the Rules are not superseded by legislative enactment, and they are not superseded by inconsistent rules promulgated by the Supreme Court.

Indeed, in one of the seminal cases dealing with the TPRA, the Supreme Court of Tennessee affirmatively explained that the General Assembly did *not* intend the TPRA to act as an end run around the Rules of Civil Procedure:

> The [*Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004)] court noted that the General Assembly, in adopting the Public Records Act, did not intend to allow litigants to avoid the requirements and limitation of the Rules of Criminal Procedure and the Rules of Civil Procedure by invoking the Public Records Act to obtain information not otherwise

available to them through discovery.

Tennessean v. Metro. Gov't of Nashville, 485 S.W.3d 857, 870 (Tenn. 2016) (hereinafter, the "*Tennessean* case") (citing *Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004). In *Swift*, the Court of Appeals examined the question of "whether the courts of this state should allow the public records statute to be used to circumvent the rules of discovery governing civil and criminal judicial proceedings." *Swift*, 159 S.W.3d at 575. The Court answered that question with a resounding *no*: "[c]ircumventing existing discovery rules was not what the General Assembly had in mind when it enacted the public records statutes." *Id.* at 576.

Yet circumvention of the Rules of Civil Procedure is exactly what Petitioners argue the TPRA impliedly commands. They argue this is so because TPRA actions are "*sui generis*" and "bilateral". [Br. Pets. at 20.] But neither of these propositions is true.

B. TPRA actions are neither *sui generis* nor bilateral.

First, Petitioners are wrong that the TPRA is "bilateral", such that intervention in a TPRA case is impossible. Petitioners argue that the TPRA "imposes its own procedural regimen that dispenses with large swathes of the ordinary litigation process" and without any support argue that the TPRA "imposes a purely bilateral adversarial process incompatible with the introduction of third parties," so that "intervention under Rule 24 has no place in an action under the Act." [Br. Pets. at 20.] In fact, they argue that the TPRA "does not merely create a cause of action . . ., but an entire procedural scheme." *Id.* This is flatly incorrect.

Petitioners cite *In re Neveah M.*, 614 S.W.3d 659, 676 (Tenn. 2020), as providing the "oft-repeated rules" of statutory interpretation. [Br. Pets. at 20.] *In re Neveah M.* explains:

> In construing statutes, we are guided by the following oft-repeated rules.
>
> First, the most basic principle of statutory construction is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope. To fulfill this directive, we begin with the statute's plain language. When the statutory language is clear and unambiguous, we must apply its plain meaning in its normal and accepted use. A statute is ambiguous when the parties derive different interpretations from the statutory language. However, this proposition does not mean that an ambiguity exists merely because the parties proffer different interpretations of a statute. A party cannot create an ambiguity by presenting a nonsensical or clearly erroneous interpretation of a statute. In other words, both interpretations must be reasonable in order for an ambiguity to exist. If an ambiguity exists, however, we may reference the broader statutory scheme, the history of the legislation, or other sources to determine the statute's meaning. We avoid constructions that place one statute in conflict with another and endeavor to resolve any possible conflict between statutes to provide for a harmonious operation of the laws.

In re Neveah M., 614 S.W.3d 659, 676 (Tenn. 2020) (quoting *State v. Frazier*, 558 S.W.3d 145, 152–53 (Tenn. 2018)).

So Petitioners wisely start the analysis with the statutory text. [Br. Pets. at 20.] So far, so good. The TPRA provides for personal inspection of public records by any citizen, and further provides for judicial review of a denied request for inspection. Tenn. Code Ann. §§ 10-7-503(2), -505. It provides for an expedited hearing, explicitly states that a formal

written response to the petition is not required, and that generally applicable periods of filing any such response do not apply in the interest of expeditious hearings. Tenn. Code Ann. § 10-7-505(b). It further provides for submission of the documents to the court under seal for review, and shifts the burden of proof to the government withholding the records. *Id.* at -505(b). And crucially, having specifically modified the applicable rules of procedure in these specific matters, the TPRA leaves the remaining procedural rules intact and does nothing to modify the other procedural rules contained within the Tennessee Rules of Civil Procedure.

That should be enough to halt the inquiry in its tracks: TPRA simply does not prohibit intervention. There is no ambiguity in either the statute or the rules. There is thus no justification for reading the rules on intervention out of the law just because the case is a TPRA case. The TPRA certainly sets out expedited procedures to be followed in cases brought under the statute. And these procedures necessarily foreclose discovery, because they are totally inconsistent with a pre-hearing discovery process. *See Moncier v. Harris*, No. E201600209COAR3CV, 2018 WL 1640072, at *11 (Tenn. Ct. App. Apr. 5, 2018), *perm. app. denied* (Tenn. Aug. 10, 2018). But it does not follow that because the statute displaces *some* rules of civil procedure, it displaces all of them. Here, unlike the clash between standard pre-trial discovery procedures and an expedited hearing, intervention presents no conflict with the framework contemplated by the rest of the TPRA of a petition for judicial review from a government decision not to release records.

Petitioners seem to fear that anyone could intervene in a TPRA action. Of course, this argument completely ignores the role of the trial court who must consider the merits of any Motion to Intervene. Thus, only interested parties who the court allows to intervene pursuant to Tenn. R. Civ. P. 24 may in fact intervene in the action.

Petitioners frame their argument as being that the TPRA supersedes Rules of Civil Procedure 24.01 and 24.02. But their position is a total perversion of the principle that the specific controls the general. Here, there *is* no specific provision on intervention to control the general. When unveiled, Petitioners' argument is really that *omission* controls the general. That is exactly backwards: under the doctrine of "*expressio unius est exclusio alterius*," or "the expression of one thing implies the exclusion of others," the legislature's expression of specific exceptions shows that it did not intend others, because otherwise it would have "included specific language to that effect." *Rich v. Tennessee Bd. of Med. Examiners*, 350 S.W.3d 919, 927 (Tenn. 2011) Hence, the TPRA's expression of certain procedures which are replaced by statutory ones **exhausts** the category of procedural rules which are displaced.

Petitioners argue that the fee-shifting provision of the TPRA "makes manifest the import of the entire provision . . . [i]f 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." [Br. Pets. at 22] This is a non-sequitur. A petitioner under the TPRA is not subject to paying the government's fees for unreasonable conduct either. The fact that the

legislature chose to make only one party potentially liable in a fee-shifting scheme does not logically show that the legislature intended there to be only two parties.

Continuing on with the other rules of statutory interpretation from *In re Neveah M.* — which Petitioners do not examine — merely underscores the emptiness of Petitioners' arguments.

> If an ambiguity exists, however, we may reference the broader statutory scheme, the history of the legislation, or other sources to determine the statute's meaning. We avoid constructions that place one statute in conflict with another and endeavor to resolve any possible conflict between statutes to provide for a harmonious operation of the laws.

614 S.W.3d at 676.

Petitioners point to three supposedly unique procedural schemes as examples where the statute displaces the Rules of Civil Procedure: probate actions, *coram nobis* proceedings, and pre-execution competency proceedings. [Br. Pets. at 23.] None of their examples prove their point, but they do advance the arguments of Intervenor-Appellees.

Certainly some statues displace the procedures laid out in the Rules of Civil Procedure. For example, "[a] claim for payment of a debt due by a decedent is not a formal pleading and is not subject to the requirements of the Rules of Civil Procedure." *Est. of Green v. Carthage Gen. Hosp., Inc.*, 246 S.W.3d 582, 585 (Tenn. Ct. App. 2007). However, intervention under the Rules of Civil Procedure, including Rule 24.02, is allowed in a probate case. *See*, *e.g.*, *In re Est. of Thompson*, 636 S.W.3d 1, 9 (Tenn. Ct. App. 2021).

And the Tennessee Rules of Civil Procedure indeed do not apply to *coram nobis* proceedings – but that is because, unlike the TPRA, the statute "states explicitly that the Tennessee Rules of Civil Procedure do not apply to these writs." *Nunley v. State*, 552 S.W.3d 800, 824 (Tenn. 2018) (citing Tenn. Code Ann. § 27-7-101); Tenn. Code Ann. § 27-7-101 ("Any person aggrieved by the judgment of any court in a civil case **which is not governed by the Tennessee Rules of Civil Procedure** by reason of a material error in fact may reverse the judgment upon writ of error coram nobis as provided in this chapter.") (emphasis added).

Finally, pre-execution competency proceedings are rightly described as *sui generis*. But that does not advance Petitioners' argument; pre-execution competency proceedings bear no resemblance to a TPRA action. As the courts frequently instruct in capital cases, "death is different." *See, e.g.*, *State v. Hall*, 461 S.W.3d 469, 501 (Tenn. 2015) (citing to *State v. Harris*, 919 S.W.2d 323, 334 (Tenn. 1996) for its recognition of a "heightened regard for the imperatives of fundamental fairness and substantial justice" in capital case procedures because "death is different from all other penalties and ... is severe beyond rectification."). And in any event, "[t]he rules of civil and criminal procedure do not apply to competency proceedings **except to the extent** that *Van Tran* is silent on a procedure and the Rules offer an appropriate procedure that does not conflict with the purpose of the competency hearing." *Coe v. State*, 17 S.W.3d 193, 214–15 (Tenn. 2000) (emphasis added), *abrogated on other grounds by State v. Irick*, 320 S.W.3d 284 (Tenn. 2010).

Next, even assuming that there were an ambiguity to be interpreted here, courts are directed to "avoid constructions that place one statute in conflict with another and endeavor to resolve any possible conflict between statutes to provide for a harmonious operation of the laws." *Id.* Petitioners acknowledge that "[t]he courts strive to harmonize the laws," citing *Pagliara v. Moses,* No. M2020-0990, 2022 WL 4229930, at *2 (Tenn. Ct. App. Sept. 14, 2022), *no perm. app. filed.* [Br. Pets. at 23.] However, they immediately turn around and assert, with no support whatsoever, that the Court of Appeals should ignore the rule, arguing vaguely that "at some point the general rule must yield to the inconsistent requirements of a more specific one. Thus so here." *Id.* As noted, there are no inconsistent requirements of a more specific rule here, and the court should thus decline Petitioners' unsupported invitation to ignore the directive to harmonize the laws. The TPRA and the Rules of Civil Procedure are not in conflict here; rather, they can be easily harmonized by permitting intervention to be heard in the expedited hearing under the same procedures applicable to the main parties to a TPRA case.

C. Tennessee Precedent Demonstrates that TPRA Cases Do Not Prohibit Intervention.

Two Tennessee Supreme Court precedents affirmatively demonstrate that intervention is possible under the TPRA: *Griffin v. City of Knoxville*, 821 S.W.2d 921, 924 (Tenn. 1991) (briefly addressing intervening complainant in TPRA case), and the *Tennessean* case. Petitioners argue that this is "a question of first impression" because the trial courts' decision to authorize intervention were "unquestioned, and

thus unaddressed, on appeal." [Br. Pets., n. 3.] But the fact remains that there is Tennessee precedent for such intervention in these two cases, and no Tennessee precedent disallowing it.

Petitioners cite to the *Tennessean* case as support for the proposition that "[t]here is no room afforded to intervening parties in a TPRA case." [Br. Pets. at 24.] But while the *Tennessean* case does describe the roles of a petitioner and government respondent in a TPRA judicial review action, it does not state or imply that there is no room afforded to intervening parties in a TPRA case. Quite the opposite: rather than kick out the intervenor or refuse to acknowledge her arguments, the Supreme Court repeatedly acknowledged the intervention of the crime victim in that case, and specifically addressed her concerns in its ruling:

> Ms. Doe intervened in this action to prevent the release of the police investigative file and expressed a specific concern over the Petitioners' request to obtain the video of the alleged assault, a surveillance video that includes her image, and any photographs of her taken during and immediately after the alleged assault. Our ruling today protects Ms. Doe's privacy concerns by shielding all of the investigative records from disclosure during the pendency of the criminal proceedings and any collateral challenges to any convictions.

Tennessean, 485 S.W.3d at 873.

What is more, the reasoning of the *Tennessean* case applies with equal force to this case. The case instructs that "courts are to avoid a construction that leads to absurd results." *Tennessean*, 485 S.W.3d at 872 (citation omitted). The court's discussion of the *Ballard* case illustrates the absurdity of Petitioners' arguments. In *Ballard*, the

Tennessean and the Society of Professional Journalists intervened under Rule 24.02 in a civil suit between two private parties, requesting the trial court rescind a protective order that sealed documents on the ground that they were public records. *Ballard*, 924 S.W.2d at 657-58. In other words, the *Tennessean* gets to intervene into a completely private case between private parties to make public records arguments, but now wants to turn around and argue that no one is actually allowed to intervene and that victims cannot intervene in the case between the *Tennessean* and the government to make public records arguments. Madness.

The *Tennessean* case both shows that intervention by a victim is appropriate in a TPRA case, and explains why. In reaching its conclusion, the *Tennessean* Court explained that "[t]he ill-conceived result advocated by the dissent would have profound adverse consequences for the criminal justice system. It would potentially compromise criminal investigations, prevent defendants from having fair trials, and further victimize crime victims. The Court's decision, unlike the dissent, applies the law enacted by the Legislature and protects the integrity of the criminal justice system." *Tennessean*, 485 S.W.3d at 873. Here, as explained by District Attorney General Glenn R. Funk's Amicus Curiae Brief in Support of Defining Parents of Minor Covenant Students, The Covenant School and Covenant Presbyterian Church as Victims [R. VI, 885-887], as well as by the appellate brief filed by Metro in this case [Br. Metro at 5-6], the Intervenor-Appellees are victims under Tennessee law.

Yet Petitioners' argument would foreclose anyone from ever intervening in a TPRA case, meaning that, contrary to existing precedent, the government would be the only entity who could ever be heard in opposition to a request for release of public records, no matter what their interest. There would be no check on a governmental entity which refused or otherwise failed to assert appropriate exemptions to the release of public records. This is particularly dangerous in today's political climate which pressures governmental entities to be transparent regardless of the outcome upon private citizens. Likewise, this is particularly absurd when considering that "citizens or [a] media organization may still intervene in a *criminal* action to challenge the terms of a protective order blocking access to court records or proceedings." *Tennessean*, 485 S.W.3d at 863 (emphasis added) (citing *Knoxville News–Sentinel v. Huskey,* 982 S.W.2d 359, 362 (Tenn.Crim.App.1998). In other words, the Petitioners argue that the General Assembly intended that the media can intervene in a criminal case to challenge the terms of a protective order on public records grounds, but that a victim or someone representing a victim's rights cannot intervene in a civil case to challenge the release of documents on public records grounds, no matter how vital their interest.

In this case, it would be the very height of absurdity if the Tennessean, a third party journalist, along with the other Petitioners, were the only parties allowed to have their say in Court when asking for the release of documents that directly affect victims of violent crime. This is especially true where, as here, the government entity (here, Metro) does not have the same interests or arguments as those of the Intervenor-

Appellees. Metro's position, while partly aligned with those of the Intervenor-Appellees, is more limited. Specifically, its position is that the documents should not be released for now — not necessarily permanently — and that certain documents should be released in redacted form rather than being withheld entirely. Indeed, Metro itself recognizes and represents that Intervenor-Appellees, including the school, have a distinctly different set of interests in protecting their children and communities from further harm owing to release of the documents. [Br. Metro at 19-20.]

The laws of our state are not constructed to give fodder for muck-raking, while gagging the victims and forcing them to stand by silently, unable to even attempt to explain to the Court why tell the Court what pain it will cause them or why the release of the documents is illegal. Such an absurdity should not be countenanced by this Court. Such a result would effectively amount to a declaration that the government has just as much interest, and the same interest, in peoples' children as do parents and schools. This is a proposition unknown to the law. A bedrock, foundational principle of family law is that of parental and family reunification — the recognition that, regardless of how loving or materially wealthy a state-sponsored or foster home might be, the government fundamentally cannot and should not push willing and competent parents aside. *See*, *e.g.*, *In re Tiffany B.*, 228 S.W.3d 148, 157 (Tenn. Ct. App. 2007), *overruled on other grounds by In re Kaliyah S.*, 455 S.W.3d 533 (Tenn. 2015) ("the first priority should be to reunite the family if at all possible . . . . the statutes governing dependent and neglected children and Tennessee's foster care program reflect a

preference for preserving families by reuniting parents and children whenever possible." So too here.

D. The trial court had subject-matter jurisdiction over the case, and intervenors' requests to intervene did not alter that.

Petitioners argue that the trial court lacked subject-matter jurisdiction over the claims of the Intervenor-Appellees. [Br. Pets. at 24.] This assertion has no merit.

First and foremost, the Tennessee Supreme Court has implicitly found twice that it has subject-matter jurisdiction over the claims of an intervenor in a TPRA case, since as discussed above, intervention was permitted in *Griffin* and the *Tennessean* case. Subject-matter jurisdiction is always before the appellate court, regardless of whether the parties have presented the issue for review. Under Tenn. R. App. P. 13(b), "Consideration of Issues Not Presented for Review", though "[r]eview generally will extend only to those issues presented for review," "[t]he appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review." Tenn. R. App. P. 13(b). Hence, the fact that the Supreme Court did not reject the intervenors' claims as devoid of subject-matter jurisdiction proves conclusively that the trial court in each case did indeed have subject-matter jurisdiction over the claims of the intervenors.

Petitioners argue that "[w]here 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.'" [Br. Pets. at 24 (quoting *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004)).] *Osborn* is not helpful in this case, however, since it spoke to subject-matter jurisdiction over the claim brought in the first instance by a *petitioner*, not that of an intervenor.[2] 127 S.W.3d at 739.

Subject matter jurisdiction "involves a court's power to adjudicate a particular controversy brought before it." *First Am. Tr. Co. v. Franklin-Murray Dev. Co., L.P.*, 59 S.W.3d 135, 140 (Tenn. Ct. App. 2001). Contrary to Petitioners' argument, under Tennessee law, the question of whether the court may exercise its power on behalf of a party is *not* answered by the absence of express statutory authority. Instead, *Shelby Cnty. Deputy Sheriff's Ass'n v. Gilless*, 972 S.W.2d 683 (Tenn. Ct. App. 1997) explicitly states that "[i]n the absence of express statutory authority, determining whether a party is entitled to judicial relief requires the court to decide whether the party has a sufficiently personal stake in the outcome of the controversy to warrant the exercise of the court's power on its behalf."[3]

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[2] *Osborn* did involve an intervenor, however: the State, whose argument won the day. *See* 127 S.W.3d at 739.

[3] Petitioners assert that the "personal stake" inquiry goes to whether a movant has the required interest under Rule 24.01, not Rule 24.02. [Br. Pets. at 30.] As shown by *Gilless*, this is flatly wrong. *See Gilless*, 972 S.W.2d at 685 (citing Tenn. R. Civ. P. 24.02; and *Ballard*) ("When there is no basis for intervention as of right, the decision to allow intervention is a matter within the discretion of the trial court. This decision should not be reversed by an appellate court absent a showing of abuse of discretion.").

In *Gilless*, "[t]he intervenors-appellants concede[d] that the statutory scheme d[id] not provide for [their] involvement." *Gilless*, 972 S.W.2d at 685 (internal quotation marks and citation omitted). The statute under which the petition that initiated the case, Tenn. Code Ann. § 8–20–101, "vest[ed] standing to apply for salary solely in the sheriff." *Gilless*, 972 S.W.2d at 684. Nevertheless, that was *not* the end of the inquiry; rather, because there was no express statutory authority, the *Gilless* court conducted the "sufficiently personal stake" inquiry described above. *Id.* at 685-87. The Court further went on to analyze the three elements of standing: "(1) . . . a distinct and palpable injury, (2) that the injury was caused by the challenged conduct, and (3) that the injury is apt to be redressed by a remedy that the court is prepared to give." *Id.* Because these elements were not met, the Court found the would-be intervenors had no standing, and it was not an abuse of discretion for the trial court to deny permission to intervene. *Id.* at 687.

Petitioners argue elsewhere in their brief that standing is necessary, but not sufficient, in order for permissive intervention. [Br. Pets. at 30.] However, their argument all along has been that the subject-matter jurisdictional defect is a lack of standing, due to a lack of clear statutory authorization. And *Gilless* very clearly sets out the test for whether a party can intervene; i.e., whether it has standing to intervene, where the statute does not clearly authorize intervention.

In this case, the Court properly applied the test articulated in *Gilless*. Specifically, the trial court found that the School had a "sufficient personal stake in the outcome of" the case, and that it

> demonstrated during oral argument that the documents and materials collected by Metropolitan Nashville Police Department ("MNPD") during its purportedly ongoing criminal investigation contain materials created by the Church and the School that would normally be kept private. . . . the School [has] asserted that should those documents and materials be released to the Petitioners, they would sustain a palpable and distinct injury as a result of public access to their private documents, and that their interest and potential injury can be addressed by this Court in its final determination on which documents are to be ultimately released in this case.

[R. III, 378.] Petitioners point to no basis to dispute any of these findings.

Petitioners cite *United States v. Union Elec. Co.*, 64 F.3d 1152, 1170 n.9 (8th Cir. 1995) for the proposition the "permissive intervenors must establish an independent basis for the trial court's jurisdiction," and that the Intervenor-Appellees cannot do so in the case because the TPRA does not authorize their participation. [Br. Pets. at 25.] But there are several problems with this authority.

First, the holding of *Union Electric* is dicta, because the court held that the intervenors were entitled to intervene as of right. Second, the court was construing the Federal Rules of Civil Procedure, not the Tennessee Rules of Civil Procedure. As discussed above, Tennessee law does not follow the "independent basis" rule, but rather the rule articulated in *Gilless*. Third, "the circuits that recognize such a requirement [of an independent jurisdictional basis for permissive intervention under Fed. R. Civ. P. 24(b)] also recognize a narrow exception for parties seeking to intervene for the limited purpose of modifying a protective order." *In re Ethylene Propylene Diene Monomer*

(EPDM) Antitrust Litig., 255 F.R.D. 308, 315 (D. Conn. 2009) n.1 (citing 7C Charles A. Wright, Arthur R. Miller & Mary Kay Kane § 1917); *see also*, *e.g.*, Alia Lyerly Smith, Civil Procedure, 67 Geo. Wash. L. Rev. 852, 853 (1999) ("every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders."); *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045–46 (D.C. Cir. 1998); *Dwyer v. Sw. Airlines Co.*, No. 3:16-CV-03262, 2022 WL 1164227, at *4–5 (M.D. Tenn. Apr. 19, 2022).

Here, the Intervenor-Appellees do not attempt to bring their own independent claims. Rather, they seek to be heard on the issue of the trial court's order ruling on the release of documents in this case, which the trial court already has jurisdiction to hear. Thus, even if the independent-basis rule applied here, this situation is virtually identical to that in which the courts which apply that rule have found an exception to that rule. Either way, the trial court had jurisdiction over the entire case, including to hear the arguments of Intervenor-Appellees.

E. Petitioners' argument about a "reverse public records suit" is both illogical and irrelevant.

Petitioners argue at length that Intervenor-Appellees are attempting to bring an impermissible "reverse public records suit" (a suit in which a third party seeks to prevent disclosure of public records). [Br. Pets. at 25.] The logic of this argument is inaccessible to Intervenor-Appellees. First, Petitioners state that the federal Freedom of Information Act (FOIA) does not permit "reverse FOIAs", and that

instead an alternative procedure for such review is available under the federal Administrative Procedure Act. *Id.* Then, confusingly, they state that the TPRA is unlike the federal FOIA or the public records laws of other states, and that no such procedure is available to third parties under the Tennessee Administrative Procedure Act. [Br. Pets. at 26-27.] In any event, this wandering argument is irrelevant; as just discussed, Intervenor-appellees are not attempting to bring any suit of their own, but are properly seeking to intervene in a petition for judicial review under the TPRA, which permits intervention.

II. The Trial Court's Decision To Allow Permissive Intervention Was Within The Sound Discretion Of The Trial Court.

The trial court's decision to allow intervention under Rule 24.02 by the School, one of the parties most directly affected by the potential release of the requested public records, was within the sound discretion of the trial court. The Intervenor-Appellees meet the "common question of law or fact" requirement, of Rule 24.02. And the trial court's decision was not devoid of a legal or factual basis, meaning that it was not an abuse of the discretion entrusted to it.

A. The Intervenor-Appellees qualify under the plain terms of Rule 24.02.

Tenn. R. Civ. P. 24.02 provides:

> 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.

Tenn. R. Civ. P. 24.02.

Here, the trial court correctly found that the School's "claims regarding the application of the [TPRA] and the various exceptions to the documents, files and materials at issue in this matter have common questions of law and fact to the parties in the present action."[4] [R. III, 378.] This is true on its face, since the sole questions of law and fact in this case concern whether the documents should be released under the TPRA and whether exceptions to the TPRA apply.

Citing to a case out of the Northern District of New York, Petitioners argue that the Intervenor-Appellees have neither a defense (because they do not control the release of the documents), nor a claim (because as non-requesting parties, they cannot bring an independent cause of action under the TPRA). [Br. Pets. at 31 (citing *Marriott v. Cnty. of Montgomery*, 227 F.R.D. 159, 167 (N.D.N.Y. 2005).] In particular, they argue, tracking the logic of *Montgomery*, that Intervenor-Appellees have failed to file the requisite "a pleading setting forth the claim or defense

[4] Petitioners argue that the trial court did not apply this standard. [Br. Pets. at 28.] But as shown by the quoted language from the court's order ruling on the intervention motions brought by the Church and the School, it indisputably did apply this standard to their motions. Petitioners' argument misunderstands the trial court's order, which first held that the "common question of law or fact" requirement was met, and then went on to analyze the *Gilless* "personal stake" test and the standing requirements analyzed in that case.

for which intervention is sought" required by Rule 24.03, and that this proves that they have no "claim." [Br. Pets. at 31.] This argument ignores the trial court's reasoning that the TPRA does not contemplate a typical pleading and that briefing as ordered by the court would fulfill the pleading requirement of Rule 24.03 [R. III, 378-79, 390-391]. It also ignores Tennessee precedent involving some of the same parties.

Tennessee caselaw proves that the "claim or defense" required under Rule 24.02 is not the same as an independent cause of action. In *Ballard*, the *Tennessean* and the Society of Professional Journalists intervened in a civil suit between two private parties, requesting that the trial court rescind a blanket protective order that sealed discovery documents filed in the case because the documents were public records. In upholding the trial court's order permitting intervention under Rule 24.02, the Supreme Court held: "[h]ere, as in all such cases, by virtue of the fact that the media entities challenge the validity of the protective order entered in the main action, they meet the requirement of Rule 24.02, that their claim have 'a question of law or fact in common' with the main action." *Ballard*,924 S.W.2d at 657.

Similarly, in *Kocher v. Bearden*, 546 S.W.3d 78 (Tenn. Ct. App. 2017), the Court of Appeals reversed the trial court's denial of a party's motion to intervene, where the "case was already settled" and the party "sought to intervene only for the limited purpose of modifying the agreed order to gain access to the documents in the record." *Kocher v. Bearden*, 546 S.W.3d 78, 84–85 (Tenn. Ct. App. 2017). The *Kocher* court explained that "*Ballard* and other Tennessee cases have firmly establishe[d] the

right of the public, including the media, to intervene in court proceedings for the purpose of attending the proceedings, or for the purpose of petitioning the Court to unseal documents and allow public inspection of them." *Id.* at 84 (internal citation and quotation marks omitted). "Applying the reasoning of *Ballard*," the court found that the would-be intervenor's challenge to the validity of an order sealing the record met the "common question of law or fact" requirement of Rule 24.02. *Id.*

Here, similarly to the intervenors in *Ballard* and *Kocher*, Intervenor-Appellees seek to intervene in this case for the purpose of being heard by the Court on the issue of public release of the documents at issue. Under these cases, that is sufficient to establish a common question of law or fact.

B. The Trial Court's Decision Was Not Lacking a Basis in Law or Fact

Once a common question of law or fact is established, permissive intervention is entrusted to the trial court's discretion and should not be reversed unless the trial court abused its discretion. *Blumberg Tr.*, 2020 WL 4919783 at *2. Under the abuse of discretion standard, this Court should not overturn the trial court's order unless this Court is "firmly convinced that the lower court has made a mistake in that it affirmatively appears that the lower court's decision has no basis in law or in fact and is therefore arbitrary, illogical, or unconscionable." *Brown & Williamson Tobacco Corp.*, 18 S.W.3d at 191.

Here, for all the reasons thoroughly discussed herein, the trial court's decision was not devoid of a legal or factual basis. Abundant

precedent, along with the facts of this case, support the trial court's decision, even if it is not the decision this Court would make. Thus, its decision was not "arbitrary, illogical, or unconscionable," and this Court should not overturn it.

III. Victims' Rights.

As already noted, the merits of Intervenor-Appellees' arguments have not been fleshed out yet and are not at issue on this appeal. That includes those revolving around the victims'-rights-based exception that the Parents have raised. Nevertheless, to the extent this Court finds it appropriate to examine such issues, the School concurs with, and adopts, the arguments of the Parents on this point. Clearly, the School was a victim here. The building itself was attacked; its students, staff and teachers were attacked and some were killed including the School's Head of School. Certainly, the School has an interest in asserting the school safety exception found in the TPRA. The School is perhaps in the most vested and interested party when it comes to documents written about the School and specifically a criminal attack on the School including maps and diagrams to carry out and attack on the School. To say the School has no right to be heard is disingenuous, illogical and inconsistent with Tennessee law.

IV. Petitioners are Not Entitled to Attorney's Fees for This Appeal.

Petitioners argue that under Tenn. Code. Ann. § 10-7-505(g), they should recover their attorney's fees incurred on this appeal if they become

entitled to such fees in the trial court upon remand. This argument is not only premature, but without merit.

First, the only thing being appealed are the final orders permitting intervention. No attorney's fees have been awarded below, and no decision on the merits has been made below. Further, this provision is not a "prevailing-party" fee-shifting statute, and it should not be applied as such. Tenn. Code. Ann. § 10-7-505(g) provides:

> 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. Code. Ann. § 10-7-505(g). While the parties are litigating the propriety of releasing the records, Petitioners have provided no basis to find that the government has "willfully refused" disclosure within the meaning of this statute.

CONCLUSION

The Tennessee Public Records Act is not a "muckrakers-only" statute. The Tennessean and other Petitioners are apparently concerned that if victims and those who represent victims' interests are permitted to intervene in TPRA cases, it will be more work for them to obtain fodder for the news cycle. That is of no moment to the law. These victims (the School, the Church and the families) have rights and should be heard on

these vital issues. Nothing in the TPRA precludes their participation and the Chancery Court was correct in allowing it.

Intervenor-Appellees seek only the opportunity to be heard by the trial court and to present their arguments against the release of the public records in question. The TPRA and the Tennessee Rules of Civil Procedure permit this. The trial court properly exercised its discretion in so finding, and this Court should affirm the trial court's ruling.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO TENN. R. APP. P. 46 SECTION 3.02

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CERTIFICATE OF SERVICE

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