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

REPLY BRIEF OF APPELLANTS

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Introduction

The law requires that government officials disclose certain documents when asked and withhold others. Only the government officials with the documents can comply with either directive. When a dispute arises over those requirements between the official and a party seeking disclosure, the law provides a procedural mechanism for resolving it. Unlike statutes merely conferring a right to sue, this law delineates parties and process in detail.

This regimen nowhere contemplates the participation of third parties who wish the government would withhold, rather than disclose, certain documents. How could it? Such parties do not have the documents and they generally, as here, lack knowledge of their contents. The law sensibly requires the government itself to employ its superior position to protect those parties' interests in such matters.

* * *

Because of the way the legislature has designed the TPRA, the courts lack the power to permit such third parties to intervene in actions under it. The Intervenors and Amici vigorously attack this conclusion, but all while ignoring the foundational principle: a court must derive power to do a thing (such as permit intervention) from somewhere, and the source of the courts' power in TPRA cases (the TPRA itself) does not confer that power. The Appellees, unable to claim otherwise, endeavor to reframe the debate. The Intervenors direct other arguments at Rule 24 itself, but many of these rely on faulty premises, inapt legal doctrines, or mere policy advocacy. The judgment below should be reversed.

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Argument

1. The Intervenors have waived any issue under Rule 24.01.

Some Intervenors challenge, in their argument, the trial court's denial of their requests to intervene as of right under Rule 24.01. (Pars. Br. 13.) None of the Intervenors, however, identify this as an issue as required by Rule of Appellate Procedure 27(b). (Sch. Br. 9; Ch. Br. 6; Pars. Br. 8.) This issue is waived.

Rule 27(b) requires an appellee to frame as an issue any claim of legal error, even a solely conditionally relevant legal error, committed below and for which relief is sought on appeal. This is so even if the effect of the appellee's success on that issue would merely be to affirm the ultimate judgment below. *See Hodge v. Craig*, 382 S.W.3d 325, 336 (Tenn. 2012) (finding waiver by appellee in absence of issue challenging dismissal of fraud claim that sought identical relief to that provided in judgment); *C.W.H. v. L.A.S.*, 538 S.W.3d 488, 496–97 (Tenn. 2017) (finding by appellee waiver in absence of issue challenging change-in-circumstances ruling in appellant's favor); *Donovan v. Hastings*, 652 S.W.3d 1, 9 (Tenn. 2022) (finding waiver by appellee of challenge to attorney's fees on claim for which no issue framed). *Hodge*, *C.W.H.*, and *Donovan* establish that appellees who wish to pursue conditional claims for relief under Rule 13(a) must set forth appropriate issue statements to preserve their arguments. As the Intervenors have not done so, they have waived any challenge to the trial court's denial of their requests to intervene as of right, leaving permissive intervention as the sole issue in this appeal.

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2. The trial court's jurisdiction did not extend to the Intervenors, and the Intervenors do not show otherwise.

The Intervenors and Amici dispute that the TPRA precludes intervention, either as a jurisdictional or merely as a procedural matter. But Tennessee Code Section 10-7-505 "set[s] out the procedure for obtaining judicial review of a government agent's decision to deny access to records." *Memphis Publ'g. Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994). The TPRA does not merely authorize ordinary litigation: it creates its own process, a process to which it gives no role for intervention.

2.1. The TPRA contains no mechanism for intervention.

The TPRA creates a statutory right of action and sets forth who may prosecute it. The Supreme Court has directed that the courts possess jurisdiction in such statutory-claim cases only over claims and claimants authorized by the statute. The Intervenors have no fundamental answer for a fundamental question: where does the trial court derive the power to let them into this case?

We know the trial court has the power to hear the Petitioners' claims to inspect public records because the TPRA says in black and white that it does. Tenn. Code Ann. § 10-7-505(b). We know that the trial court has the power to summon Metro and subject it to the court's coercive direction for the same reason. *Id.* And we know that the TPRA, by creating that claim and specifying those who can bring it, defines not merely the predicate for relief on the merits in such actions but also the trial court's power to hear and adjudicate them at all. *See Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004) ("When a statute creates a cause of action and

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designates who may bring an action, the issue of standing is interwoven with that of subject matter jurisdiction and becomes a jurisdictional prerequisite.”).

But nothing in the statute authorizes the trial court to make the Intervenors parties or provides a mechanism for it to do so. Rule 24 cannot provide the authority, because the Rules merely govern the form of processes; they cannot confer jurisdiction. *Glassman, Edwards, Wyatt, Tuttle & Cox P.C. v. Wade*, 404 S.W.3d 464, 468 (Tenn. 2013). The TPRA itself cannot provide it, because it says nothing at all on the topic. There is no inherent common-law power generally permitting intervention. *E.g.*, *Garey v. Marcus*, 166 A.2d 220, 221 (R.I. 1960); *Rhinehart v. Victor Talking Mach. Co.*, 261 F. 646, 648 (D.N.J. 1917). The Intervenors do not have jurisdictional standing under the statute, they are not the defendants named in the petitions, and no other law invests the court with power to bring them into the case.

Thus, under *Osborn* and similar jurisdictional authority, the TPRA does simply prohibit intervention that would otherwise exist by omitting reference to the topic: reference to it would be necessary to create it at all. The Amici, arguing that no conclusion flows from the TPRA’s “silence” on intervention, get the jurisdictional argument precisely backwards. (Am. Br. 14.) If we understand the TPRA as a statute that creates a claim and defines the parameters of its adjudication, it becomes apparent those

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parameters only extend so far. The Intervenors and Amici, then, need to infer an unspoken rule from the act's silence, not the Petitioners.[1]

This brings us, effectively, to the independent-jurisdictional-basis rule by another route. *See, e.g.*, *Int'l Paper Co. v. Inhabitants of Town of Jay*, 887 F.2d 338, 346–347 (1st Cir. 1989). Despite the Intervenors' claim to the contrary, that rule is not a feature of the Federal Rules of Civil Procedure (which, like Tennessee's Rules, neither create nor limit jurisdiction), but rather of the underlying necessity of jurisdiction for judicial action.

The Intervenors' related argument invoking the *expressio unius est* canon fails for similar reasons. (Sch. Br. 22; Pars. Br. 44.) The TPRA does not catalogue Rules of Civil Procedure that do not apply and omit Rule 24 from that list; it imposes unique procedures that necessarily supplant the ordinary rules of civil litigation. The act thus lacks the textual premise on which the canon operates.

Moreover, no iteration of this argument addresses the problem posed by *Moncier v. Harris*, No. E2016-0209, 2018 WL 1640072 (Tenn. Ct. App. April 5, 2018), *app. denied* (Tenn Aug. 10, 2018). In *Moncier*, the

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[1] To be sure, the Petitioners have argued in the alternative that the TPRA's terms implicitly preclude intervention even if not in a jurisdictional manner. But the Amici's cases even on that point do not persuade. *State v. Collier*, 411 S.W.3d 886, 896–97 (Tenn. 2013), involved a decidedly different circumstance, in which a defendant argued the legislature had, sub silentio, codified one part of a common-law rule by statutorily modifying another part. And in *Northland Insurance Co. v. State*, 33 S.W.3d 727, 730–31 (Tenn. 2000), the court construed contribution claims as a separate class of claim, unenumerated in and thus beyond the Claims Commission's jurisdictional grant. Neither is like this case.

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Court broadly prohibited discovery in TPRA because the statute "[n]owhere … contemplate[s] it" and its "plain language … precludes" it. *Id.* at *11. Yet while it would render the TPRA ineffectual to permit a plaintiff to obtain via Rules 45 or 34 what he could not obtain under the statute itself, the "plain language" says nothing about discovery one way or the other. *Cf. Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 358 S.W.3d 213, 223 (Tenn. Ct. App. Oct. 28, 2010) (inferring that TPRA requires that all defenses be invoked in the first instance). And limited discovery consistent with the TPRA's general goals is conceivable: consider inquiry into whether the right defendant has been named, or on willfulness. (The sprawling concerns raised by the Intervenors would likewise seem appropriate topics for discovery.) Yet the Court went beyond merely preventing Moncier's end-run, relying on the comprehensive, limited, and expedited nature of the TPRA's process to preclude discovery generally.

Thus, the Court held that even without an express prohibition, the TPRA was self-contained enough, and expedition important enough to it, to preclude one of modern civil procedure's most important features. *Cf. Hickman v. Taylor*, 329 U.S. 495, 500 (1947) ("The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure."). Compare the result here: bloat, expense, delay, and complication flowing from intervention "nowhere … contemplated" by the TPRA.

Equally misplaced is the Amici's constitutional-avoidance argument. They suggest Petitioners creates a needless separation-of-powers conflict. But given the undisputable legislative power to create a cause of

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action, define the proper parties for its adjudication, and set the jurisdiction of the inferior courts, Tenn. Const. art. VI § 8, it by no means "strike[s] at the very heart of a court's exercise of judicial power," *State v. Mallard*, 40 S.W.3d 473, 483 (Tenn. 2001), for a statute to preclude intervention. Such hyperbolic[2] claims provide no assistance to the case's determination.

2.2. *Griffin* and *Tennessean* do not require a contrary result.

All the Intervenors rely on the Supreme Court's decisions in *Griffin* and *Tennessean*, cases in which—as the Petitioners noted—intervenors participated without objection. But cases that never addressed the propriety of intervention do not dictate intervention's propriety.[3]

First, of course, there is the simple point that the cases never discuss, much less rule on, whether intervention was appropriate under the

[2] This is putting it mildly. Intervention did not even exist at common law or in the original courts of equity. *Carroll v. Gould*, 952 N.W.2d 1, 21 (Neb. 2020); *Garey*, 166 A.2d at 221; *Doke v. Williams*, 34 So. 569, 570 (Fla. 1903). It appeared in Tennessee law via a statute limited to actions to recover property. *See* Tenn. Code Ann. § 20-1-115; Joseph Higgins & Arthur Crownover, *Tennessee Procedure in Law Cases* § 227 (1937) (citing, as the only entry for "intervention" in the index, the statute now codified at § 20-1-115). There is no index reference to intervention in *Caruthers' History of a Lawsuit* (7th ed. 1951) or the 1955 edition of *Gibson's*. And there are today approximately seventy distinct Tennessee statutes conferring specific rights to intervene in judicial or administrative proceedings.

[3] The Church invokes *Griffin* while claiming "Tennessee's common law permits intervention." (Sch. Br. 22.) But the *Griffin* court was interpreting a statute, not applying or developing the common law.

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TPRA. "[A] decision is authority for the point or points decided, and nothing more." *Shousha v. Matthews Drivurself Serv. Inc.*, 358 S.W.2d 471, 473 (Tenn. 1962). The School refers to Rule 13(b), proposing that the court implicitly rejected a jurisdictional bar to intervention by ruling on the merits. (Sch. Br. 30.) But Rule 13(b) requires no such conclusion.

First, even if those cases included theoretical holdings under Rule 13(b), the Supreme Court has "often said that drive-by jurisdictional rulings of this sort … have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Our own Supreme Court recognized long ago that it could hardly be treated as having created precedent on a topic it never considered, such as when it inadvertently omitted reference to authorities that ought to have controlled. *See McNairy v. City of Nashville*, 61 Tenn. 251, 264 (1872) ("This Court may make adjudications entirely overlooking statutes or decisions governing the case and … the decision may not be good authority in another case.").

Even theoretically, Rule 13(b) would not have prohibited the Supreme Court from hearing either *Griffin* or *Tennessean*. Both cases featured a perfectly justiciable TPRA dispute between a requester and a government entity that terminated in a final judgment. *See Tennessean v. Metro. Gov't of Nashville*, 485 S.W.3d 857, 862 (Tenn. 2016); *Griffin v. City of Knoxville*, 821 S.W.2d 921, 921–922 (Tenn. 1991). Neither the finality, validity, nor appealability of that judgment would have been impaired by the trial court's warrantless authorization of intervention;

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appellate jurisdiction thus existed in both cases.[4] Indeed, the Supreme Court denied the intervenor's Rule 11 application in *Griffin*, only accepting review because the original plaintiff—whose claim lay within the trial court's jurisdiction—sought it. *See Griffin*, 821 S.W.2d at 922.

Nor did the court adopt the arguments of the intervenors in either case: it ordered disclosure in *Griffin*, *see id.* at 924, and prohibited it under Rule of Criminal Procedure 16 in *Tennessean*, as the government defendants argued, *see Tennessean*, 485 S.W.3d at 870. The Tennessean court confined its ruling concerning victims' rights to observing that the TPRA includes certain specific exceptions applicable in the wake of specified sexual-offense convictions. *See id.* at 873.[5]

The Amici for their part cite *Gautreaux v. Internal Medicine Educational Foundation Inc.*, 336 S.W.3d 526 (Tenn. 2011). (Am. Br. 10.) But the intervenors took no part in the appeal of that case, the briefs betray no dispute over the intervention in the trial court, and the Supreme Court held the TPRA did not even apply. *Id.* at 527–528. Amici also refer to *Henderson v. City of Chattanooga*, 133 S.W.3d 192 (Tenn. Ct. App. 2003), but like *Griffin* and *Tennessean*, *Henderson* provides no discussion of the

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[4] The Church cites *Reliant Bank v. Bush*, 631 S.W.3d 1 (Tenn. Ct. App. 2021), for the principle that "issues relating to subject-matter jurisdiction are so fundamental that any court may raise [them] on its own." (Ch. Br. 25.) *Reliant Bank* does not claim a roving obligation to inquire into every jurisdictional hidey-hole; rather, it stands for the uncontroversial proposition that a court can and should inquire after its own jurisdiction. *See Reliant Bank*, 631 S.W.3d at 6.

[5] The Victims' Rights Acts create certain limited substantive exceptions to the TPRA. (*See* Pets.' Br. 43.) But those exceptions do not guide the outcome of the procedural question about intervention at issue here.

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propriety of the intervention. Despite the Amici and Intervenors' implicit assertion to the contrary, putting a citation and pejorative adjectives in a brief does not transform a case with no holding on a topic into a controlling authority.[6]

3. Even assuming jurisdiction, intervention was neither permitted nor warranted.

Other arguments the Intervenors advance do not justify the trial court's ruling.

3.1. The Intervenors' claims of ownership are misplaced.

The Intervenors do not own an interest in the shooter's writings. The Intervenors' efforts to buttress their position on the premise the Parents have acquired such a right is thus bootless, even assuming it were relevant.

Tennessee law governing the disposition of personal property following the owner's death has remained, in some respects, unchanged since the reign of George I. Unlike real property, which vests in heirs or devisees upon death, title personal property is suspended upon death, vesting in the personal representative "[u]pon qualifying." Tenn. Code Ann. § 31-2-103. The title relates back to the time of death and is exclusive of all other claims. 2 Jack. W. Robinson Sr. et al., *Pritchard on the law of Wills and Administration of Estates* § 693 (7th ed. 2015). And the law prohibits

[6] This makes equally short work of the Amici's argument that the legislature has condoned intervention in TPRA actions by failing to statutorily abrogate these cases. (Am. Br. 14.) That rule applies—as Amici's quote notes—to "judicial construction," and no appellate court has ever affirmatively construed the TPRA to permit intervention.

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administration without proper authorization. Tenn. Code Ann. § 30-1-101. The net effect has always been that neither an intestate's heirs nor a testate's beneficiaries acquire any interest in the decedent's personal property until the administrator transfers it. *See Brown v. Bibb*, 42 Tenn. (2 Cold.) 434, 439 (1865). Rather, the decedent's assets are first a fund for the satisfaction of creditors. *See* 2 Robinson et al., *supra*, § 630; Tenn. Code Ann. § 30-2-305.

Mr. and Mrs. Hale, then, having no title absent administration, cannot pass title to the Intervenors. *See, e.g.*, *In re Estate of Martin*, No. M2011-0901, 2013 WL 2325864, at *4 (Tenn. Ct. App. May 28, 2013), *app. denied* (Tenn. Oct., 16, 2013) ("It is axiomatic that a party cannot convey an interest in property greater than the interest he holds."). Nor can the Court even presume, as the Intervenors have, that Mr. and Mrs. Hale have even an equitable interest or expectancy in the shooter's papers. This is so for two reasons. First, Metro's collection and retention of her papers renders it impossible to determine whether the shooter had a will. Second, the shooter's estate is manifestly insolvent in light of the claims arising from her acts; even an administrator could not convey the estate's assets before resolution of claims or expiration of the time for bringing them. Tenn. Code Ann. § 30-2-317(d).

All of that assumes, moreover, that ownership is strictly relevant here in any event. It is not. The Supreme Court in *Griffin* rejected the claim that an owner's objection would prevent the TPRA's application to papers collected during a law-enforcement investigation. *See Griffin*, 821 S.W.2d at 923–924. (*See also* Pars.' App'x 3.) Such an interest, then, could

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not possibly justify intervention, when it would not justify a different result on the merits. In any event, the Petitioners merely seek copies of public records, not the original writings the Intervenors claim to own.

3.2. Requests to unseal court files are not analogous.

The Intervenors refer to third-party intervention in conventional suits seeking to modify protective orders or unseal filings. (Pars.' Br. 45 n.21, 46 n.23; Sch. Br. 27, 37.) But these cases have nothing to do with the present case, and the Intervenors' claim about the state of the law governing them is incorrect in any event.

First, the Intervenors cite no case suggesting that intervention to modify a protective order or lift a seal bears any analytical relevance to the question here: whether intervention is permitted in a TPRA case. Nor, even apart from the lack of any textual relevance on the statutory-interpretation question, is it apparent how a rule facilitating broad access to records suggests that parties should be allowed to intervene to prevent that access.

Second, the Intervenors here and the intervenors in those cases are not similarly situated: the intervenors in protective-order and seal-lifting cases seek to vindicate the public's interest in disclosure of court records. The present Intervenors, by contrast, seek the opposite, to prevent disclosure that might otherwise occur. The "relaxed" intervenor-standing standards the Intervenors cite, then, provide no insight here. Under the traditional approach, "the presumptive right of access to judicial documents … gives [parties denied such access] an interest in the underlying litigation" sufficient to confer standing. *See Doe v. Public Citizen*, 749

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F.3d 246, 261, 263–64 (4th Cir. 2014) (appellate standing); *accord, e.g.*, *Brown v. Advantage Eng'g Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992) ([A]ny member of the public has standing to view documents in the court file … and to move the court to unseal [it] in the event the record has been improperly sealed."). That standing permits intervention to challenge a seal or protective order, in turn, because the order's propriety is already before the court and the court retains the inherent power to modify it. *See Beckman Indus. Inc. v. Int'l Ins.,* 966 F.2d 470, 473 (9th Cir. 1992). Such intervenors do not even seek to become parties in the ordinary sense. *See id.*; *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994). And the importance of the right to seek access justifies a less rigorous approach to Rule 24's requirements. *See Beckman Indus.*, 966 F.2d at 474. The existence of the order under attack yields, in that circumstance, a sufficient common question of law or fact for Rule 24.02. *See, e.g.*, *Ballard v. Herzke*, 924 S.W.2d 652, 657 (Tenn. 1996).

But those cases resemble the Intervenors' arguments only by featuring some of the same words used in the briefing here. A rule that facilitates intervention to access judicial records does not suggest the propriety of intervention to prevent access to executive ones.

Third, it is not at all apparent that requests to access judicial files are identical to requests to access executive files. The Intervenors have repeatedly asserted that the right to access public records derives solely from statute. (*E.g.*, Pars.' Br. 27.) And while this Court has held the Tennessee Constitution confers no "right of access to public records," *Abernathy v. Whitley*, 838 S.W.2d 211, 214 (Tenn. Ct. App. 1992), *but see*

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Detroit Free Press v. Ashcroft, 303 F.3d 681, 695 (6th Cir. 2002) ("[T]here is a limited First Amendment right of access to certain aspects of the executive and legislative branches."); *Ballard*, 924 S.W.2d at 661 ("[I]t is beyond dispute that there exists in this country a general right to inspect and copy public records and documents."), there is a federal constitutional right to access at least some judicial records. *See Courthouse News Serv. v. Planet*, 947 F.3d 581, 589 (9th Cir. 2020) (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980)); *Doe*, 749 F.3d at 267; *Anderson v. Cryovac Inc.*, 805 F.2d 1, 10–11 (1st Cir. 1986); *Ballard*, 924 S.W.2d at 661 ("[T]he First Amendment … presumes that there is a right of access to [certain] proceedings and documents."). And even beyond that constitutional right, the common law itself imposes a presumption of openness on judicial records. *Anderson*, 805 F.2d at 13 (citing *Nixon v. Warner Commc'ns Inc.*, 435 U.S. 589 (1978)). Thus, assuming without conceding that the Intervenors are correct that no right to inspect executive materials exists beyond the TPRA's terms, the public's greater right of access to judicial documents distinguishes the line of cases about seals and protective orders.

Fourth, the uniformity of this broad intervention-standing-to-challenge-seals rule has passed away. The Sixth Circuit now holds that a party seeking to intervene to access a case file must show some particularized injury, beyond mere lack of access itself, in order to intervene. *See Grae v. Corrections Corp. of Am.*, 57 F.4th 567, 569–570 (6th Cir. 2023). *Grae* may be hard to reconcile with other case law on the public's right to inspect public records, *cf. Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S.

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440, 449 (1989) ("[T]hose requesting [public records] need show [no] more than that they sought and were denied specific agency records."), but that difficulty highlights the newfound lack of consensus.

3.3. The Intervenors improperly seek to pursue private enforcement of public laws.

The Intervenors effectively claim that Metro will not or is not adequately applying the TPRA, so they must do so. But the law does not authorize private citizens to take over the administration of public laws any time they claim an interest in, or have a complaint about, the government's administration of them. Quite the contrary.

The enforcement and implementation of public laws presumptively falls to the government itself. *See*, *e.g.*, *Glasgow v. Fox*, 383 S.W.2d 9, 10–13 (Tenn. 1964) (discussing diverse law-enforcement functions); *Broyles v. State*, 341 S.W.2d 724, 726 (Tenn. 1960) (addressing mandatory nature of public officials' duties). The legislature turns such tasks over to private litigants only when it does so expressly or adopts statutory terms that necessarily imply the right to pursue private enforcement. *See Brown v. Tenn. Title Loans Inc.*, 328 S.W.3d 850, 855–856 (Tenn. 2010). Absent such a right, even those benefitted by a public regulation may not seek its judicial enforcement. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 749–751 (1975) (refusing to permit securities-law enforcement by parties other than plaintiffs with standing under 1933 or 1934 Acts). And while the writ of mandamus will lie to enforce a public official to perform a purely ministerial function, ones containing an element of discretion will neither be compelled nor support liability. *See Helton v. Knox Cnty.*, 922 S.W.2d 877, 885 (Tenn. 1996).

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Thus the law strongly presumes the adequacy of a government litigant's representation. *See, e.g.*, *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). And while the Intervenors try to suggest inadequacy,[7] they never mention the applicable test. The presumption in favor of a government entity's adequate representation is hornbook law. *See* 59 Am. Jur. 2d Parties § 171. "In the absence of a 'very compelling showing to the contrary,' it will be presumed that a state adequately represents its citizens." *Arakaki*, 324 F.3d at 1086. Overcoming that presumption requires, even via the narrowest version of the test, that the government advocates a position potentially adverse to the intervenors' and that cannot subsume the latter.[8] *See Little Rock Sch. Dist. v. N. Little Rock Sch. Dist.*, 378 F.3d 774, 780–781 (8th Cir. 2004). *Cf., e.g.*, *Planned Parenthood of Wisc. Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019) ("[W]hen the representative party 'is a governmental body charged by law with protecting the interests of the proposed intervenors" … [it] is presumed to be an adequate representative 'unless there is a showing of gross negligence or bad faith.'"). Here, the most the Intervenors can show is that Metro initially did not advance all of exceptions it perhaps could have, and that Metro may not make all of the same arguments they would in favor of

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[7] The School and the Parents claim Metro's representation to be inadequate. (Pars.' Br. 47–50; Sch. Br. 28–29.) The Church claims any adequate-representation inquiry to be irrelevant. (Ch. Br. 19–20.)

[8] A classic example would be a case in which a government entity was required to protect both upstream and downstream users of a given waterway; it could thus not assert the distinct, more parochial, interests of one group or another. *See, e.g.*, *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003).

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some exemptions. (*E.g.*, Pars.' Br. 49.) A mere difference in litigation strategy, however, does not render a government defendant's representation inadequate. *Little Rock Sch. Dist.*, 378 F.3d at 780.

To be sure, those are federal authorities applying Federal Rule 24. But the TPRA obligates public officials to disclose certain documents and to retain others. Tennessee law presumes public officials will perform their duties and that all persons will follow the law. *See Louisville & Nashville R.R. v. Hobbs*, 190 S.W. 461, 462 (Tenn. 1916); *Jackson v. Aldridge*, 6 S.W.3d 501, 503 (Tenn. Ct. App. 1999). Because fundamentally the same rationale underlies the adequate-representation presumption, *see, e.g.*, *Curry v. Regents of Univ. of Minn.*, 167 F.3d 420, 423 (8th Cir. 1999), Tennessee government parties should enjoy the same presumption.

3.4. The Intervenors have alternative avenues.

Moreover, Metro itself highlights both why it has an active interest in vigorously advocating the TPRA exceptions of interest to the Intervenors and why intervention is not their only remedy. (Metro. Br. 14–15.) The privacy interests of private parties in at least some information contained in otherwise-public records can acquire a constitutional dimension. *See Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061–63 (6th Cir. 1998). As such, those parties may have grounds under 42 U.S.C. § 1983 to enjoin an improper disclosure or recover damages if one is made. *See id.* at 1067. Assuming the Intervenors possess the compelling interests in the underlying materials that they claim, they may well enjoy rights

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of this sort against Metro. The Intervenors' premise, then, that intervention is their only path to relief, is simply mistaken.

Indeed, as the Intervenors have apparently abandoned their original plan of suing Metro, all they fundamentally seek is the right to present arguments. But they could perform that function as *amici curiae*. Trial courts possess inherent authority to permit amici to argue to "supplement[] the efforts of counsel" or "draw[] the court's attention to broader legal or policy implications that might otherwise escape … consideration." *State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 758 (Tenn. Ct. App. 2001). The Petitioners have no objection to the Intervenors' participation as amici, their proper role in this context.[9]

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[9] The Amici, ignoring their own participation in this case, suggest the Petitioners' argument would "silence" parties such as the Intervenors, a result they propose as "absurd." (Am. Br. 15–16.) But even apart from the self-evident falsity of the underlying silencing claim, this is not how the absurdity rule works. "[T]he 'absurdity doctrine' … should be applied sparingly—only when a result is manifestly absurd, and not simply unpleasant or peculiar." *Seals v. H&F Inc.*, 301 S.W.3d 237, 251 (Tenn. 2010) (refusing to limit statutory immunity for undertakers who follow instructions from deceased's "heir" to those dealing with adult heirs). The construction rejected must be more akin to a scrivener's error. *See Anderson v. Sec. Mills*, 133 S.W.2d 478, 480 (Tenn. 1939) (declining to permit a tax-collection limitations period to commence before the tax could be assessed). Any broader application makes the doctrine a vehicle for the imposition of policy preferences. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 237–238 (2012). Placing in the government's hands the responsibility for defending actions seeking government records is no more absurd than placing in the government's hands any of the other tasks assigned to it that intersect with private

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3.5. The Intervenors' policy arguments do not change the meaning of either the TPRA or Rule 24.02.

At heart, the Intervenors argue that public policy should permit both their intervention and the withholding of the records at issue. And their arguments may very well appeal to the branch of government tasked with establishing Tennessee's public policy. But that branch is not this branch. The rules governing intervention are set down in Rule 24, not entrusted even to the judiciary's moderated common-law policy-making powers. And as noted in the Petitioners' leading brief, the Supreme Court has rejected the judicial development of new exceptions to the TPRA. *See Memphis Publ'g Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986).

So the question is merely one of interpretation, a realm in which the Intervenors' policy arguments carry no weight. The terms of a statute or a rule governs its application, and where those terms, enlightened if necessary by the established canons of construction, yields an intelligible mandate, the judiciary's duty lies in applying it. *E.g.*, *Bryant v. HCA Health Servs. of N. Tenn. Inc.*, 15 S.W.3d 804, 809 (Tenn. 2000). The courts are not at liberty "to alter or amend a statute, question [its] reasonableness, or substitute [their] own policy judgments for those of the legislature." *Griffin v. Shelter Mut. Ins.,* 18 S.W.3d 195, 200–201 (Tenn. 2000) (cleaned up). The Intervenors' policy arguments, however compelling they may be, must be directed to the General Assembly.[10]

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concerns, though one or another of us may think the results unpleasant, unwise, or even peculiar.

[10] Many of these arguments are inherently speculative in any event. The precise contents of the documents are unknown to Petitioners and

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The Intervenors reveal the policy-based nature of their arguments by paying almost no heed at all to the Petitioners' observation that they lack a claim or defense. Rule 24.02 does not require merely that a party wish to advance an argument bearing a legal or factual overlap with the main action: it requires a "claim or defense" having these qualities. The Parents call their arguments "claims" (Pars. Br. 26), but they are no such thing. A "claim" is an allegation of a basis for relief coupled with a demand for that relief. *See Harvey ex rel. Gladden v. Cumberland Tr. & Inv. Co.*, 532 S.W.3d 243, 261–262 (Tenn. 2017); *see also claim*, *Black's Law Dictionary* (8th ed. 2004) ("1. … operative facts giving rise to a right … 2. The assertion of an existing right … 3. A demand for … [a] remedy."). The TRPA only authorizes one "claim": the one to obtain records. None of the Intervenors propose that they intend to assert defenses. *Cf. Nat'l Union Fire Ins. v. City Sav. F.S.B.*, 28 F.3d 376, 393 (3d Cir. 1994) ("[A] defense or an affirmative … is neither an 'action' nor a 'claim,' but rather is a *response* to an action or a claim.").

The School goes back to the seal-challenging-intervention well on this point, *cf.* Part 4.2, *supra*, arguing that their arguments, like the requests to unseal in those cases, qualifies as a kind of "claim." (Sch. Br. 9.) But of course, none of the cases the School cites involve anything like the

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Intervenors alike. In places the data contradict the speculation. For instance, the "copycat" contagion from a shooting arises in its immediate wake, not from subsequent informational releases. (R7. at 986.) And far from being worthless, studies of previous school shooters' writings have helped avert or disrupt dozens of potential attacks. (R5. at 621, 666.) Regardless, all such discussion belongs before the legislature, not the courts.

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request the School makes here—they involve its opposite. And characterizing the Intervenors' request as an affirmative claim puts one back in the teeth of the jurisdictional problem. *See* Part 2.1, *supra*. The courts have inherent authority over their own records (at issue in the seal-lifting cases), but nothing gives them authority to hear an unprovided-for claim by an unprovided-for party in a statutory action.

CONCLUSION

For these reasons, and those set forth in the Petitioners' leading brief, 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.

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CERTIFICATE OF COMPLIANCE

This document will comply 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 5,740 words, provided the Court grants the Petitioners' pending, unopposed Motion to File Expanded Reply Brief.

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