No. M2014-00524-SC-R11-CV

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

THE TENNESSEAN, ET AL.,
Petitioners—Appellants

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,
Respondent—Appellee

DISTRICT ATTORNEY VICTOR JOHNSON, ET AL.,
Intervenors—Appellees

ON APPEAL FROM THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE
CASE NO. M2-14-00524-COA-R3-CV

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, TENNESSEE ASSOCIATION OF BROADCASTERS, THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, AND THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW FIRST AMENDMENT CLINIC IN SUPPORT OF PETITIONERS-APPELLANTS

Douglas R. Pierce*,
No. 10084
KING & BALLOW
1100 Union Street Plaza
315 Union Street
Nashville, TN 37201
(615) 259-3456
*Counsel of record for *amici curiae*

Bruce D. Brown
Katie Townsend
Adam A. Marshall
The Reporters Committee for Freedom of the Press
1156 15th St. NW,
Suite 1250
Washington, DC 20037
(202) 795-9300

J. Joshua Wheeler
The Thomas Jefferson Center for the Protection of Free Expression & The University of Virginia School of Law First Amendment Clinic
400 Worrell Drive
Charlottesville, VA 22911
(434) 295-4784

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STATEMENT OF ISSUES

Pursuant to Rule 31 of the Tennessee Rules of Appellate Procedure, the Reporters Committee for Freedom of the Press, the Tennessee Association of Broadcasters, the Thomas Jefferson Center for the Protection of Free Expression, and the University of Virginia School of Law First Amendment Clinic (collectively, "*amici*"), by and through the undersigned counsel, respectfully submit the following brief in support of Petitioners-Appellants. *Amici* agree with the arguments presented by Petitioners-Appellants, and write separately to address the following issues:

1. Whether Tennessee Rule of Criminal Procedure 16(a)(2) exempts *all* records that are "relevant to a pending or contemplated criminal action" from disclosure under the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-503, *et seq.* ("TPRA").
2. The practical effect on the Tennessee news media and, accordingly, the public of exempting *all* records that are "relevant to a pending or contemplated criminal action" from disclosure under the TPRA.
3. Whether the Victim's Bill of Rights, Tenn. Code Ann. § 40-38-101 – 117, creates an exemption from disclosure under the TPRA.

STATEMENT OF FACTS

Amici adopt the statement of facts set forth by Petitioners-Appellants in their Brief. Additionally, by way of identification, *amici* consist of the following:

The Reporters Committee for Freedom of the Press ("RCFP" or the "Reporters Committee") is a voluntary, unincorporated association of reporters and editors with tax-exempt status under 26 U.S.C. § 501(c)(3). Founded in 1970, the Reporters Committee is dedicated to preserving the freedom of the press guaranteed by the First Amendment. In its more than 40-year history, RCFP has participated as both a member of the public and an advocate for the press in litigation presenting important issues that affect the public's right to be informed, through the media, of the activities of their government and elected representatives.

The Tennessee Association of Broadcasters ("TAB") is a voluntary association of radio and television broadcast stations located in Tennessee. TAB is organized and exists as a not-for-profit Tennessee corporation. Its purpose includes promoting a high standard of public service among Tennessee broadcast stations, fostering cooperation with governmental agencies in all matters pertaining to national defense and public welfare, and encouraging customs and practices in the best interest of the broadcasting industry and the public it serves.

The Thomas Jefferson Center for the Protection of Free Expression ("Thomas Jefferson Center" or "the Center") is a nonprofit, nonpartisan organization in Charlottesville, Virginia. Founded in 1990, the Thomas Jefferson Center has as its sole mission the protection of freedom of speech and press. The Center pursues that mission in several ways, notably by filing *amicus curiae* briefs in federal and state courts in cases that raise important issues that affect members of the press and free expression generally.

The University of Virginia School of Law First Amendment Clinic (the "UVA Clinic") is comprised of law students seeking to gain practical legal experience. The UVA Clinic is overseen by the legal staff of the Thomas Jefferson Center and the Reporters Committee. The UVA Clinic has filed *amicus curiae* briefs on issues concerning the First Amendment and freedom of the press, and has assisted in litigation under the federal Freedom of Information Act.

INTRODUCTION

The Tennessee Public Records Act, Tenn. Code Ann. § 10-7-503 *et seq.* (Supp. 2014) ("TPRA"), is a vital tool for this state's news media, who use it to gather information and keep Tennesseans informed of the workings of their government. *Amici*, as organizations and institutions dedicated to ensuring the media's ability to gather the news and report stories of public concern, are deeply troubled by the decision of the Court of Appeals in this case. The decision effectively creates a broad and unwarranted law enforcement exemption to the TPRA that is wholly unsupported by law and, if adopted by this Court, would have a dramatic, damaging effect on the ability of the press to keep the public informed on the activities of law enforcement and related agencies.

This Court has long recognized the importance of ensuring robust access to public records by the press and the public: "Facilitating access to governmental records promotes public awareness and knowledge of governmental actions and encourages governmental officials and agencies to remain accountable to the citizens of Tennessee." *Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007). Indeed, this fundamental principle has been the law of this state for well over a century. *See State ex rel. Wellford v. Williams*, 75 S.W. 948, 948 (Tenn. 1903). As set forth more fully below, the decision of the Court of Appeals threatens this state's long-standing tradition of openness. It fundamentally misconstrues the applicability of Tennessee Rule of Criminal Procedure 16(a)(2) to records that are not internally created by law enforcement and do not constitute work product. Under the Court of Appeals interpretation of that rule and the TPRA, vast swaths of records in the hands of law enforcement could now be exemp from disclosure. This expansion was not the result of deliberate action by the General Assembly—which this Court has consistently stressed is the appropriate venue for such decisions to be

made—but rather a misreading of the precedent that interprets the relationship between the TPRA and the Rules of Criminal Procedure.

The ramifications of this error are not limited to the records at issue in this case. As *amici* demonstrate, within the last few years alone the TPRA has proven invaluable in ensuring Tennesseans are aware of the actions of agencies that are tasked with protecting their safety. From addressing crime in schools, to examining the qualifications of police officers, to ensuring compliance with the law, the TPRA has enabled the news media to bring to light important issues that impact the daily lives of all Tennesseans. The public should not be deprived of this information.

For the reasons set forth herein, *amici* urge this Court to reverse the decision below and remand with instructions to provide access to the public records requested by Petitioners-Appellants.

ARGUMENT

I. The TPRA mandates maximum access to government records, which includes information created by third parties and received by law enforcement agencies.

This Court has long held that the TPRA creates a legislatively mandated presumption of openness for government records. *See, e.g., Tennessean v. Elec. Power Bd.,* 979 S.W.2d 297, 305 (Tenn. 1998). Indeed, disclosure of such records is required "even in the face of serious countervailing considerations." *Schneider*, 226 S.W.3d at 340 (citing *State v. Cawood*, 134 S.W.3d 159, 165 (Tenn. 2004)). And the General Assembly has made clear that the TPRA should be "be broadly construed so as to give the fullest possible public access to public records." Tenn. Code Ann. § 10-7-505(d).

The TPRA applies with equal force to records created by governmental agencies as it does to records received by them. Under the statute, "public record or records" is defined to

include virtually every conceivable type of information "made *or received* pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." Tenn. Code Ann. § 10-7-503(a)(1)(A). It is hard to overstate the breadth of the TPRA: it has been consistently described as "an all encompassing legislative attempt to cover all printed matter *created or received* by government in its official capacity and whether intended to be retained temporarily or retained and preserved permanently." *Griffin v. City of Knoxville*, 821 S.W.2d 921, 923 (Tenn. 1991) (emphasis added).

In *Griffin*, this Court expressly determined that documents created by a third party and subsequently collected by a law enforcement agency were public records subject to disclosure under the TPRA. 821 S.W.2d at 924. The materials at issue in that case were three suicide notes police officers found at the deceased's house, which they collected and retained as evidence. *Id.* at 922. In holding that the notes were public records, this Court rejected a narrow evidence-based approach, and instead adopted a broad totality of the circumstances test to find that the notes were, in fact, received pursuant to the police officer's official business. *See id.* at 923–24. In short, as *Griffin* makes clear, information created by a third party and received by a law enforcement agency pursuant to a criminal investigation, like the records in this case, are "public records subject to inspection." *Id.* at 922.

II. Tennessee Rule of Criminal Procedure 16(a)(2) does not exempt release of the public records sought by Petitioners-Appellants.

The primary issue presented by this appeal concerns the interplay between the TPRA and Tennessee Rule of Criminal Procedure 16(a)(2), specifically, whether the latter provides a blanket law enforcement exception for all records that are relevant to a pending or contemplated criminal proceeding. *Amici* submit that the Court of Appeals adopted an unduly expansive and unwarranted interpretation of Rule 16(a)(2), disregarding its clear language and this Court's

precedent in *Appman* v. *Worthington* 746 S.W.2d 165 (Tenn. 1987) and *Schneider*, 226 S.W.3d 332 . Properly applied, Rule 16(a)(2) does not bar the release of the records requested by Petitioners-Appellants.

A. The scope of Rule 16(a)(2) is strictly limited by statute and this Court's precedent.

Under Rule 16(a)(2), which governs discovery during criminal trials, the government need not turn over "reports, memoranda, or other internal state documents *made by the district attorney general or other state agents or law enforcement officers* in connection with investigating or prosecuting the case . . . [and] . . . statements made by state witnesses or prospective state witnesses." Tenn. R. Crim. P. 16(a)(2) (emphasis added). The rule "embodies the work product doctrine as it applies to criminal cases," *Swift v. Campbell*, 159 S.W.3d 565, 572 (Tenn. Ct. App. 2004), the purpose of which is to protect parties from "learning of the adversary's mental impressions, conclusions, and legal theories of the case," *Memphis Publ'g Co. v. City of Memphis,* 871 S.W.2d 681, 689 (Tenn. 1994).

Even though Rule 16(a)(2) has no relation to the TPRA on its face, in *Appman* this Court recognized it as a limited basis for exempting records in the context of criminal defendants who essentially sought to circumvent established discovery rules. 746 S.W.2d at167. In that case two inmates who had been charged with the death of a fellow inmate sought, along with their counsel, access to an internal investigation concerning the incident conducted by the Department of Corrections by invoking the TPRA. *See id.* at 165–66. This Court rejected the inmates' attorneys' attempt to use the TPRA to gain access to what amounted to work product created by the state that was relevant to their defense: "[U]nder Rule 16(a)(2) [] access to the materials in the possession of [a law enforcement officer] are not subject to inspection by appellees, who are counsel for the indicted petitioner-inmates." *Id.* at 167.

In *Schneider*, this Court again considered the relationship between law enforcement records, the TPRA, and Rule 16(a)(2). 226 S.W.3d 332. This time the TPRA request was made by members of the media who sought field interview cards from City of Jackson police officers. The interview cards contained a wealth of data created by officers in the course of their official duties. *Id.* at 337. This Court reversed the Court of Appeals, holding that not only were the interview cards public records, but also that they could not be shielded from the public under a general law enforcement privilege. *Id.* at 344. The Court remanded to the Court of Appeal to determine whether any of the cards could be exempt from disclosure as work product under Rule 16(a)(2), as interpreted in *Appman*. *Id.* at 345–46. While *Schneider* arguably expanded the scope of Rule 16(a)(2)'s application to TPRA requests made by the public, it did not alter the scope of records covered by the rule. To the contrary, the Court in *Schneider*, in accord with its prior decision in *Appman*, only found Rule 16(a)(2) to be *potentially* applicable because the field interview cards at issue were clearly "*internal* state documents *made by* . . . law enforcement officers" in connection with investigating a case. Tenn. R. Crim. P. 16(a)(2) (emphasis added).

B. The Court of Appeals created and applied an erroneous standard based on a misreading of this Court's precedent and the language of Rule 16(a)(2).

Despite the clear language of Rule 16(a)(2) and this Court's interpretation of that rule in *Appman* and *Schneider*, a majority of the Court of Appeals below held that the public records sought by Petitioners-Appellants were exempt from disclosure on the basis that such records are "relevant to pending or contemplated criminal action . . . ." *The Tennessean et al. v. Metropolitan Government of Nashville and Davidson County, et al.*, No. M2014-00524-COA-R3-CV, 2014 WL 4923162, at *4 (Tenn. Ct. App. Sept. 30, 2014) (quoting *Appman*, 746 S.W. 2d at 166) (hereinafter "Court of Appeals Decision"). While purporting to rely on *Appman* as the basis for its decision, the Court of Appeals plainly misconstrued that decision. The mere fact

that a public record may be "relevant to pending or contemplated criminal action," *id.*, does not alone make it exempt from disclosure under Rule 16(a)(2). Under this Court's precedent, that is but one necessary, but not sufficient, condition to invoke the rule. The full paragraph from *Appman*, from which the Court of Appeals quoted only one part of one sentence, reads as follows:

> Rule 16 provides for the disclosure and inspection of categories of evidence in the possession of the state or in the possession of the defendant. However, the disclosure and inspection granted by the rule "does not authorize the discovery or inspection of reports, memoranda, or other internal state documents *made by* . . . state agents or law enforcement officers in connection with the investigation or prosecution of the case, . . ." Rule 16(a)(2) of the Rules of Criminal Procedure. This exception to disclosure and inspection does not apply to investigative files in possession of state agents or law enforcement officers, where the files have been closed and are not relevant to any pending or contemplated criminal action, but does apply where the files are open and are relevant to pending or contemplated criminal action. [. . .]

746 S.W.2d at 166 (emphasis added). In erroneously relying solely on one element of the test established by this Court in *Appman*, the Court of Appeals effectively created and applied a brand new standard that ignores the other conditions identified by this Court as necessary to trigger application of Rule 16(a)(2), including, primarily, whether the records at issue are "internal state documents made by" the law enforcement agency. Tenn. R. Crim. P. 16(a)(2)

Both the trial court and the Judge McBrayer, who dissented from the majority opinion of the Court of Appeals, applied the correct standard by recognizing that Rule 16(a)(2) only applies to internal records of law enforcement agencies, not external records received by them. *See The Tennessean et al. v. Metropolitan Government of Nashville and Davidson County, et al.*, No. 14-0156-IV, at *13–14 (Chancery Court, Twentieth Judicial District Mar. 12, 2014); Court of Appeals Decision at 4–5 (McBrayer, J. dissenting).[1] This Court should, at a minimum, clarify

[1] *Amici* understand that the dissenting opinion agreed with the Trial Court in holding that the Court of Appeals' majority opinion, in adopting the Government Parties' arguments, created a blanket "law enforcement" exemption which previously had been rejected by this Court in Schneider. The dissent recognized that Tenn. R. Crim. P.

the proper scope of Rule 16(a)(2) by reversing the Court of Appeals and instructing it to apply the rule as previously interpreted by this Court, and in so doing, providing an interpretation of the TPRA that gives the "fullest possible public access to public records." Tenn. Code Ann. § 10-7-505(d).

C. The records sought by Petitioners-Appellants must be disclosed under the TPRA because they are not internal documents and do not constitute work product.

Properly applied, the TPRA and Rule 16(a)(2) mandate the release of records sought by Petitioners-Appellants in this case. The records at issue here differ considerably in their nature from those at issue in both *Appman* and *Schneider* because they are not the internal work product of the state. Moreover, to the extent any work product privilege existed, it has been waived. Therefore, as Rule 16(a)(2) does not allow the state to withhold these records, they must be released pursuant to the TPRA. *See* Tenn. Code Ann. § 10-7-503(a)(2)(A).

As stated above, the records sought in *Schneider* were cards memorializing field interviews conducted by City of Jackson police officers, *Schneider*, Id. at 335, and thus were records that could reflect the state's "mental impressions, conclusions, and legal theories." *See Memphis Publ'g Co.*, 871 S.W.2d at 689. In this case, however, the public records that the Chancery Court ordered be disclosed were text messages, email and reports created by third parties, access card information, and pano-scan data of the Vanderbilt premises. Court of Appeals Decision at 3. In stark contrast to the records in *Schneider*, these records were not

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16(a)(2) did not preclude the Petitioner's public records request. However, the dissent also pointed out that while the trial court in its opinion had addressed the fact that a limited protective order had been entered in the separate criminal case, the trial court had elected not to specifically address the Government Parties' assertion of constitutional "fair trial" rights or "victim's rights." *Amici* do not believe this difference is significant for the Court's ruling on this case. *Amici* believe, however, the limited protective order which previously had been entered in the separate criminal case subsumes the other two concerns. No protective order exists as an independent, stand-alone exemption for any particular TPRA request: The protective order in the separate criminal case was specific to that case. The very reason the criminal court judge entered the protective order was to address specific concerns such as "fair trial" and "victim's rights." Assuming specific facts were presented to it to satisfy the rigorous standards of *State v. Drake*, 701 S.W.2d 604 (Tenn. 1985), the protective order could be modified to address other specific concerns.

generated by the Nashville Police Department or its officers, but rather, by third parties. Given their nature, it is impossible that they could constitute work product of the Department or prosecutors, regardless of whether they were received by the State in connection with its investigation or prosecution of the defendants. Thus, the records sought by Petitioners-Appellants in this case, unlike in *Schneider*, fall outside the ambit of Rule 16(a)(2), as they were not developed internally or made by the Department, nor do they comprise the Department's work product.

Moreover, even assuming, *arguendo*, that some of the records sought in this case constitute work product, any such privilege has been waived by Respondent. The defense team long ago received the records requested by Petitioners-Appellants in this case. *See* Brief of the District Attorney and State, p. 36. Therefore, as any privilege that existed has been waived, the records cannot be withheld under Rule 16(a)(2). *See Arnold v. City of Chattanooga,* 19 S.W.3d 779, 786-87 (Tenn. Ct. App. 1999) (describing waiver as applied to the work product privilege in a TPRA case).

To be clear, the nature of the TPRA request by Petitioner-Appellants in this case differs considerably from in the request at issue in *Appman*. As discussed above, the request in *Appman* was made by criminal defendants and their counsel, who invoked the TPRA as an alternative method to gain access to material for their case. 746 S.W. 2d at 165–66. They were seeking to use the TPRA in order to obtain more information concerning the correctional facility's investigation than would otherwise have been available to them as criminal defendants under the general rules governing discovery rules. *See id.* In the present case, however, Petitioners-Appellants' request pursuant to the TPRA constitutes a lawful, legitimate activity on the part of

media organizations engaged in their normal business operations. As the Court of Appeals has recognized,

> There is a palpable difference between persons who seek governmental records to ensure governmental responsibility and public accountability and those who seek to avoid the requirements and limitations of the Tennessee Rules of Civil and Criminal Procedure by invoking the public records statutes to obtain information not otherwise available to them through discovery.

Swift, 159 S.W.3d at575–76. Petitioners-Appellants, as members of the news media, are engaging in exactly the type of activities that the TPRA was enacted to facilitate—ensuring that information on the workings of government is made available to the public. An expansion of the application of Rule 16(a)(2) in circumstances where members of the media are carrying on legitimate activities in the course of their normal operations is not called for by *Appman*, and, as set forth in more detail below, would have a remarkably detrimental impact on the ability of the press to gather the news and report on matters of public concern.

D. The Court of Appeal erred by effectively creating a new exemption to the TPRA when the General Assembly has not taken action.

If the decision of the Court of Appeals is not overturned, it would have the effect of creating a broad law enforcement exemption to the TPRA by allowing state agencies to withhold any record that is "relevant to pending *or contemplated* criminal action . . . . " Court of Appeals Decision at 4 (emphasis added). The decision to create or broaden exemptions to the TPRA, however, is expressly reserved for the General Assembly. *Schneider*, 226 S.W.3d at 344 (stating that the "General Assembly, not this Court, establishes the public policy of Tennessee."). In the absence of legislative action, this Court cannot and should not expand the scope of Rule 16(a)(2) as applied to records sought under the TPRA.

Although the TPRA was originally enacted with only two exemptions in 1957, over the last half-century that number has grown dramatically. *See Swift*, 159 S.W.3d at 571 (noting the

expansion of exemptions listed in Tenn. Code Ann. § 10-7-504). The General Assembly has been particularly deliberate in creating exemptions to the TPRA. Instead of creating a few broad exemptions for law enforcement records, it has instead enacted multiple exemptions, each having a carefully limited scope. *Compare* 5 U.S.C. § 552(b)(7) (the federal Freedom of Information Act's law enforcement exemption) *with Schneider*, 226 S.W.3d at 343 (noting that law enforcement exemptions to the TPRA include Tenn. Code Ann. §§ 10-7-503(e), -504(a)(2), (5), (8), (13), (14), (g), (h), 37-1-153, -154, -155, -409(a), -506, -612(a), 40-6-304, 40-12-209, 56-53-109(c), 62-27-124(c), and 62-35-131). The Court of Appeal's decision, below, upsets this carefully balanced statutory scheme. Whether or not to enact a general law enforcement exception to the TPRA "is a question for the General Assembly," not for the courts. *Schneider*, 226 S.W.3d at 344.

III. The Victims' Bill of Rights does not create an exemption to the TPRA.

Although not relied upon by the Court of Appeals, intervenor Jane Doe ("Doe") has repeatedly argued in this case that the Tennessee Victim's Bill of Rights, Tenn. Code Ann. §§ 40-38-101 – 117, should prevent disclosure of the requested records in this case. However, nothing in that law creates an exemption to the TPRA, and this Court has consistently declined to create exceptions to the TPRA when the General Assembly has failed to do so. *See Schneider*, 226 S.W.3d at 340. Furthermore, the General Assembly *has* acted in amending the TPRA to protect the privacy rights of victims of sexual assault, which clearly excludes the Victim's Bill of Rights as an additional source of exemptions. Therefore, the Victim's Bill of Rights has no bearing on the outcome of this case.

A. Nothing in the Victims' Bill of Rights creates an exemption to the TPRA.

The TPRA states that government officials "*shall not* refuse [the] right of inspection to any citizen, unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a)(2)(A) (emphasis added). In 1991 the source of exceptions was broadened, but not the requirement that exceptions be expressly stated. The prior language indicated that only in "state statute" could exceptions be found, but it now includes "state law." Tenn. Code Ann. § 10-7-503(a)(2)(A). The new language has been found to extend to other *legislatively approved* material such as the Rules of Criminal Procedure and Rules of Civil Procedure, but not common law exemptions. *See Schneider* 226 S.W.3d 332. Rather, this Court has continued to reject creating common law exceptions stating that "the confidentiality of records is a statutory matter that is best left to the legislature." *Cawood*, 134 S.W. 3d at 167; *see also Memphis Publ'g Co.*, 871 S.W.2d at 684 (the court "ha[s] been vigilant in upholding this clear legislative mandate."); *Schneider*, 226 S.W.3d at 340 ("the General Assembly has directed the courts to construe broadly the Public Records Act so as to give the fullest possible access to public records. Thus, unless an exception is established, we must require disclosure even in the face of serious countervailing considerations.") (citations and quotations omitted).

The Victim's Rights Bill is not an exception to the TPRA and nowhere claims to be. Rather, it is almost completely devoted to creating a list of disclosures and notices that *prosecutors* must give to crime victims. *See* Tenn. Code Ann. §§ 40-38-101 – 117. The clear intent of the statute is to provide victims with rights and notification of those rights, describe prosecutors' responsibilities in dealing with victims, limit the prosecutors' liability for failure to adhere to these responsibilities, and to list the victims' responsibility to notify prosecutors on how to reach them. *See id.* The only references in this statute to privacy regard the duty of

prosecutors to keep victims' contact information confidential, and the duty of the *victim* to keep certain case information confidential that is shared with them. These are provided in Tenn. Code Ann. §§ 40-38-110, 111, 114 and all refer *only* to the information that the victim provides to the prosecutor pursuant to those sections, and information that is provided to the victim. *See* Tenn. Code Ann. § 40-38-110(d)(1) ("Any identifying information concerning a crime victim received *pursuant to this section* shall be confidential.") (emphasis added); *id.* at 111(i)(1) ("Any identifying information concerning a crime victim *obtained pursuant to this section* shall be confidential.") (emphasis added); *id.* at 114(b) ("Any information *received by the victim* relating to the substance of the case shall be confidential . . . ."). The statue does not provide any other privacy right for the victims of crimes, or exempt any records from disclosure under the TPRA.

B. The Tennessee General Assembly has already created exemptions to the TPRA to protect the privacy of sexual assault victims.

Just last year legislation was considered, debated, amended, passed, and signed into law regarding the privacy of sexual assault victims under the TPRA. In the 108th Tennessee General Assembly, a bill was introduced in the House by Representative Littleton (HB 2361) and in the Senate by Senator Massey (SB 2254) which thoroughly expressed the will of the General Assembly.[2] This bill added to the long list of exceptions to TPRA by exempting personal information of sexual assault victims, including their name, home, work and electronic mail addresses, telephone numbers, social security number, and any photographic or video depiction of the victim. Tenn. Code Ann. § 10-7-504(p)(1).

[2] This bill was passed by a vote of 85-0 with one member present and not voting in the house and 31-0 in the Senate. HB 2361,Tennessee General Assembly, http://perma.cc/SZ2R-Q8JA (last accessed Feb. 25, 2015).

Testimony given by both sponsors illustrates the will of the legislature in passing this bill,[3] which carefully limits the newly confidential portions of the records to personally identifying information and photographic or video depictions of the victim in an effort to maintain the openness presumption of the law. Representative Littleton expressed the dual role of the bill stating "this bill attempts to make the . . . information of the victim private . . . and provide an opportunity to legitimate entities to retrieve information." HB 2361 enrolled as Public Chapter Number 804 Amends TCA Title 10, Chapter 7, Part 5 and Title 16, Chapter 3, Part 4. Hearing before House-State Government Sub Committee, 4/10/14 (statement of Rep. Littleton) at 2:02:38. http://perma.cc/R7ZN-ES2P. The Senate sponsor, Senator Massey, testified that in working on the bill they "tried to accommodate the major concerns from the different parties" and explained that the "intent of th[e] legislation" was to be "sensitive to [victims]" adding "this does not affect the open records [law] at all until there is a sentencing . . . the media will still be able to report (through adjudication) anything that they're able to report on now." SB 2254 enrolled as Public Chapter Number 804 Amends TCA Title 10, Chapter 7, Part 5 and Title 16, Chapter 3, Part 4: Hearing before Judiciary Committee, 4/2/14 (statement of Sen. Massey) at 41:46, http://perma.cc/R7ZN-ES2P. The Senator went on to state that "nothing in this bill can be used to deny access to the public part of this file as long as the personal information is redacted." *Id.* at 43:04. Additionally, the amendments to this bill included a right to waiver and notice of right to waiver so that victims could opt to leave their name un-redacted if they wished to speak to the press and tell their stories. Tenn. Code Ann. § 10-7-504(q)(2).

In light of the clearly expressed will of the General Assembly, it would be wholly inappropriate for this Court to assert that the Victim's Bill of Rights constitutes an exception to

[3] This testimony explicitly mentioned the underlying criminal prosecution in this case and it was noted that the press knew the identity of the victim and had responsibly refrained from disclosing it.

the TPRA, or to create additional common law exceptions to the public's right to access government records.

IV. Allowing law enforcement agencies to withhold broad categories of records will markedly impair the ability of the Tennessee press to inform the citizens of this State about the workings of their government.

If the decision of the Court of Appeals is allowed to stand, law enforcement and other agencies will be able to invoke Rule 16(a)(2) as a blanket exemption to immunize whole classes of records from disclosure whenever a criminal action is pending or even just *contemplated.* This will severely impede the effectiveness of the Tennessee news media in providing the public with important information that has a direct impact on their lives.

It should be noted that the particular governmental records at issue in this case are of the utmost importance to the people of Tennessee who, like the rest of the nation, are engaged in a robust discussion over the epidemic of sexual assault on college campuses. As President Obama has recognized, communities everywhere are pressing for a "fundamental shift" in the way women are treated and how sexual assault is handled. Michael Shear & Elena Schneider, Obama Unveils Push for Young People to Do More Against Campus Assaults, The New York Times (Sep. 19, 2014), http://perma.cc/B2VS-GGKV. Vanderbilt University, like the University of Virginia and many other schools, face significant and ongoing challenges in dealing with these issues. *See* U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations, U.S. Department of Education (May 1, 2014), http://perma.cc/L8S2-JY5B. It is clear to everyone that little progress can be made without access to information about what is happening, and what has already happened.

More broadly, the TPRA has proved itself to be an invaluable tool in enabling reporting on all manner of issues involving law enforcement that affect Tennesseans. Just last year in

Maryville, Tennessee, the Blount County Sherriff's Department refused to release information about an incident in which a new deputy shot and killed an innocent man because it was "under investigation." Deborah Fisher, Court Gives Police Secrecy Powers They Never Had, The Tennessean (Oct. 03, 2014), http://perma.cc/9BQA-TJKM. After several weeks of administrative leave the deputy returned to work in a limited capacity, and yet every inquiry into the incident continued to be rejected. Lessons are learned from officer-involved shooting of citizen, The Daily Times (Jul. 2, 2014), http://perma.cc/X4U9-KTBT. After several months, a reporter noticed that the deputy was fully back at work, at which point the media challenged the continued withholding of the records. *Id.* After some delay the file was turned over, revealing a sequence of events and missteps that led to the innocent man's death at the hands of the inexperienced officer. Wes Wade, Investigation tells story of deputy's fatal encounter with an armed property owner in the dark of night, The Daily Times (Jun. 29, 2014), http://perma.cc/LCY3-SM78. Release of the full record enabled public debate over the deputy's actions, as well as those of other deputies who took almost an hour to enter the building and find the victim. *Id.*

In another instance of providing public oversight of law enforcement activities, in 2012 News Channel 3 in Memphis utilized the TPRA to uncover information about a Covington police officer who was arrested for buying a gun from a convicted felon. Michele Reese, Hallucinations, Threats in Officer's Personnel File, WREG (Jul. 20, 2012), http://perma.cc/VZ4A-CBJW. After the station "filed an open records request", they learned that the arrested officer was fired from the Shelby County Sheriff's office in 2005 for threatening to kill a woman he was dating. *Id.* It was also discovered that the officer was hallucinating due to taking too much medication. *Id.* At the time of the story, the officer had just been released from

jail on bond. *Id.* Thus, the information that the public received was certainly relevant to a pending criminal case. But there can be no doubt that the public had a real and timely interest in obtaining information about a potentially dangerous individual who had yet to be released from a law enforcement agency.

The TPRA has also proven that it enables public oversight of systemic issues related to Tennessee law enforcement agencies. In September 2013, the city of Nashville released a 22 page report detailing its plan to improve how domestic violence is handled. Brian Hass, City draws flak over domestic violence, The Tennessean, Feb. 12, 2014, at A-1. But what wasn't released was a more detailed 185 page report containing critical information about how victims of sexual abuse were being treated by the city's law enforcement and other entities within the criminal justice system. *Id.* It was not until a TPRA request was filed by the news media that the full report came to light. *Id.* The released records detailed one police officer saying they "got more credit or 'points' from supervisors for making traffic stops than for domestic violence arrests." *Id.* It also described how victims had to wait up to four hours for the police to arrive, and how the police failed to photograph battered women's injuries. *Id.* A judge who was part of the team that produced the report expected it would spark a robust debate when it was released. Brian Hass, Metro's shortened domestic violence report draws flak, The Tennessean (Feb. 14, 2014), http://perma.cc/3QHP-HCA5. But because it was not released by the city, only through a TPRA request was the full report made available to the public. Hass, City draws flak, *supra.* The report's release sparked robust debate among citizens, domestic violence experts, the police department, and the city over how to appropriately address the issues presented in the report, *id.*, which is exactly what the TPRA is designed to do.

Ensuring access to law enforcement records is important not only to provide the public with information about law enforcement agencies, but also on other governmental bodies. In 2012, a man charged with murdering his mother but found not guilty by reason of insanity suddenly left a group home where he lived. Walter Roche, Police were called hours after man left group home, The Tennessean, Aug. 29, 2012. The owner of the group home reported the incident, but not until several hours after the man's disappearance. *Id.* By comparing phone records from the Metro Police and other records from the state Department of Mental Health, *The Tennessean* was able to show that the man was arrested for shoplifting hours before the group home reported his absence, and therefore that the home did not act promptly. *Id.* It was subsequently cited by the Mental Health Department for its tardiness. *Id.* This story shows how access to law enforcement records can enable citizens to question whether agencies apart from law enforcement are providing enough oversight to ensure public safety.

In November of last year, a local news station "used an open records request to find out which three schools in Shelby County had the most crime." Jerry Askin, Open Records Request Reveals Schools with Most Reported Crime, WMC Action News 5 (Nov. 26, 2014), http://perma.cc/J4W8-9RCB. The story came amidst long-running concerns over violent crime in Shelby County schools. *See* Lauren Squires, Shelby County Board member addresses safety concerns, WMC Action News 5 (Sep. 9, 2013), http://perma.cc/AB5B-ZE4K. The three schools that topped the list all had at least 125 incidents in the past two years. Askin, Open Records Request, *supra*. Many of the parents whose children attended these schools were not aware of the severity of the problem: following the release of the data, one concerned parent stated, "[i]t really frighten[s] me to know that my daughter goes here and it's a lot of sex offenses going on here, robberies, crimes." *Id.* As a result of knowing which schools have the most crime, parents

in the county can now petition their school boards and local government for more policing and additional safety measures.

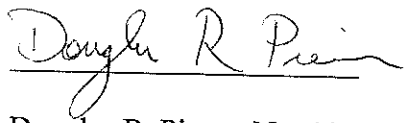
TPRA requests from the media have even prompted training to ensure law enforcement compliance with Tennessee's open records laws. A request submitted just this month by the *Knoxville News Sentinel* uncovered "several emails that indicate potential violations of the state Open Meetings Act by members of the E-911 Board of Directors . . . ." Knoxville mayor orders more training on sunshine laws, The Associated Press, Feb. 13, 2015. One of the city employees who met privately with citizens was the Knoxville Police Department Chief, who admitted to the newspaper that he "wasn't aware of the Sunshine Law. . . ." *Id.* But as a result of the newspaper's report, the mayor ordered additional training to ensure that persons appointed to city boards complied with the law. *Id.*

These stories are just a small fraction of those that have been made possible as a result of the TPRA over the last years. They show that the people of Tennessee rely on the press to gain access to government records on issues that affect their everyday lives so that they can take corrective action where it is needed. Allowing a broad law enforcement exemption to the TPRA could prevent these stories from being made public, thereby leading to a deprivation of crucial information, and preventing Tennesseans from engaging in their right to self-govern.

CONCLUSION

For the reasons stated herein, *amici* respectfully urge this Court to reverse the Court of Appeals and remand with instructions to provide access to the records sought by Petitioners-Appellants.

Respectfully submitted,



Douglas R. Pierce, No. 10084
KING & BALLOW
1100 Union Street Plaza
315 Union Street
Nashville, TN 37201
(615) 259-3456

Counsel of record for *amici*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded by U.S. Mail, postage prepaid, to:

Lora Barkenbus Fox
Emily Herring Lamb
Jennifer Cavannah
Assistant Metropolitan Attorneys
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, TN 3721

Edward M. Yarbough
J. Alex Little
Bone McAllester North, PLLC
511 Union Street, Suite 1600
Nashville, TN 37219

Janet Kleinfelter
Deputy Attorney General
Office of Attorney General
P.O. Box 20207
Nashville, TN 37202

Robb S. Harvey
Lauran M. Sturm
Waller Lansden Dortch & Davis, LLP
511 Union Street, Suite 2700
Nashville, TN 37219

Richard L. Hollow
Hollow & Hollow, LLC
P.O. Box 1116
Knoxville, TN 37939-1166

On this 26th day of February, 2015.

Douglas R. Pierce