

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

**THE TENNESSEAN; ASSOCIATED)
PRESS; CHATTANOOGA TIMES FREE)
PRESS; KNOXVILLE NEWS SENTINEL;)
TENNESSEE COALITION FOR OPEN)
GOVERNMENT, INC.; TENNESSEE)
ASSOCIATED PRESS BROADCASTERS;)
WZTZ FOX 17; WBIR-TV Channel Ten;)
WTVF-TV Channel Five; and WSMV-TV)
Channel Four,)**

Petitioners/Appellants,

v.

METROPOLITAN GOVERNMENT,

Respondent/Appellee,

&

**DISTRICT ATTORNEY VICTOR S.
JOHNSON; STATE OF TENNESSEE;
AND JANE DOE,**

Intervenors/Appellees.

No. M2014-00524-SC-R11-CV

**ON APPEAL BY PERMISSION FROM THE JUDGMENT
OF THE COURT OF APPEALS**

**Brief of *Amici Curiae* Domestic and Sexual Violence Prevention Advocates in
Support of Intervenor Jane Doe and Partially in Support of Petitioners *The
Tennessean* et al.**

**DANIEL A. HORWITZ
BPR #032176
Attorney for *Amici Curiae*
1803 Broadway, #616
Nashville, TN 37203
(615) 739-2888
daniel.a.horwitz@gmail.com**

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES _____ ii

III. IDENTIFICATION AND INTEREST OF *AMICI CURIAE* _____ viii

IV. STATEMENT OF ISSUE PRESENTED FOR REVIEW _____ 1

V. SUMMARY OF ARGUMENT _____ 1

VI. ARGUMENT _____ 6

A. The statutory and constitutional protections that Tennessee law affords to victims of crime exempt records from disclosure under the Tennessee Public Records Act where disclosure would cause a victim to experience indignity, lack of compassion, intimidation, harassment, or abuse. _____ 8

1. Tenn. Code Ann. § 40-38-102(a)(1) affords crime victims a statutory right to “[b]e treated with dignity and compassion” in civil cases. _____ 8

2. Article I, § 35 of the Tennessee Constitution prevents records that are gathered pursuant to a criminal investigation from being disclosed in civil cases where disclosure would result in a victim’s “intimidation, harassment [or] abuse.” _____ 10

3. Tenn. Code Ann. § 10-7-504(q)(1) does not provide a comprehensive list of victims’ records that are exempt from disclosure. _____ 13

B. Unless victims affirmatively seek to have their private records made public, there should be a rebuttable presumption that publicly disclosing personally identifying information and other personal records concerning a victim’s sexual or domestic assault will cause victims to experience indignity, lack of compassion, intimidation, harassment, or abuse. _____ 16

1. Dignity _____ 18

2. Compassion _____ 19

3. Intimidation _____ 21

4. Harassment _____	24
5. Abuse _____	26
C. Applying a case-by-case balancing test to determine whether victims’ personally identifying information and other personal information is subject to disclosure is insufficient to protect victims of sexual and domestic violence. _____	31
VII. CONCLUSION _____	35
CERTIFICATE OF SERVICE _____	38
APPENDIX 1 _____	39

II. Table of Authorities

Cases

Appman v. Worthington,

746 S.W.2d 165 (Tenn. 1987) _____ 13

Braswell v. State,

Nos. A-2448, A-2529, 1991 WL 11650678 (Alaska Ct. App. Feb. 6, 1991) _____ 18

Brown v. State,

106 N.W. 536 (Wis. 1906) _____ 28

Davis-Kidd Booksellers, Inc. v. McWherter,

866 S.W.2d 520 (Tenn. 1993) _____ 14

Deborah S. v. Diorio,

583 N.Y.S.2d 872 (N.Y. Civ. Ct. 1992) _____ 18

<i>Doe v. Del Rio,</i>	
241 F.R.D. 154 (S.D.N.Y. 2006)	27
<i>Dunlap v. Dunlap,</i>	
996 S.W.2d 803 (Tenn. Ct. App. 1998)	11
<i>Gilbert v. California,</i>	
388 U.S. 263 (1967)	11
<i>Gleaves v. Checker Cab Transit Corp., Inc.,</i>	
15 S.W.3d 799 (Tenn. 2000)	9
<i>Kastigar v. United States,</i>	
406 U.S. 441 (1972)	12
<i>Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.,</i>	
87 S.W.3d 67 (Tenn. 2002)	6
<i>People v. Dohring,</i>	
59 N.Y. 374 (1874)	29
<i>People v. Luna,</i>	
204 Cal. App. 3d 726 (Cal. Ct. App. 1988)	18
<i>Scheibler v. Munding,</i>	
9 S.W. 33 (Tenn. 1888)	9
<i>State in Interest of K.P.,</i>	
709 A.2d 315 (N.J. Ch. 1997)	19

State v. Johnson,

No. W2011–01786–CCA–R3–CD, 2013 WL 501779 (Tenn. Crim. App. Feb. 7, 2013)_____18-19

Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs., Inc.,

418 S.W.3d 547 (Tenn. 2013)_____9

Swift v. Campbell,

159 S.W.3d 565 (Tenn. Ct. App. 2004) _____6, 9

Tennessean v. Metro. Gov’t of Nashville,

No. M2014–00524–COA–R3–CV, 2014 WL 4923162 (Tenn. Ct. App. Sept. 30, 2014)_____8, 17

Statutes

Tenn. Code Ann. § 10-7-503(2) (2012)_____6

Tenn. Code Ann. § 10-7-504(q)(1) (2014)_____passim

Tenn. Code Ann. § 10-7-504(q)(2) (2014)_____34-35

Tenn. Code Ann. § 10-7-505(d) (2008)_____6

Tenn. Code Ann. § 40-38-301(b) (2014) _____14

Tenn. Code Ann. § 40-38-102(a)(1) (2010)_____passim

Tenn. Code Ann. § 40-38-302(4)(A)(i) (2010)_____11, 16

Constitutional Provisions

Tenn. Const. art. I, § 35 _____passim

U.S. Const. amend. V _____12

Rules

Tenn. R. Crim. P. 16 _____	6–7, 12-13, 24
Tenn. R. Crim. P. 1(a) _____	13
Tenn. R. Evid. 412 _____	19

Additional Authorities

Andre Rouillard, <i>The girl that ratted: How one online thread brought out the worst in Vanderbilt</i> , <i>Vanderbilt Hustler</i> (Apr. 17, 2014), http://www.vanderbilthustler.com/opinion/article_ecb2248e-c52b-11e3-b7d6-0017a43b2370.html?mode=jqm _____	36
Anne M. Coughlin, <i>Sex and Guilt</i> , 84 <i>Va. L. Rev.</i> 1 (1998) _____	27
Associated Press, <i>Roethlisberger Accuser Receives “Over 100” Threats</i> , <i>The News Center</i> (Aug. 6, 2009), http://www.thenewscenter.tv/sports/headlines/52599607.html?device=phone&c=y _____	25
Daniel A. Horwitz, <i>Twelve Angry Hours: Improving Domestic Violence Holds in Tennessee Without Risk of Violating the Constitution</i> , __ <i>Tenn. J.L. & Pol’y</i> __ (2015) _____	23
Deborah Satyanathan & Anna Pollack, <i>Domestic Violence and Poverty</i> , Family Impact Seminars, http://www.familyimpactseminars.org/s_mifis04c05.pdf __	33
Gary Haugen, <i>Why the End of Poverty Requires the End of Violence</i> , <i>Huffington Post</i> (Jan. 28, 2014, 12:54 PM), http://www.huffingtonpost.com/gary-haugen/why-the-end-of-poverty-violence_b_4676932.html _____	33
<i>Info & Stats for Journalists: Talking with Survivors</i> , Nat’l Sexual Violence Res. Ctr., http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_talking-with-survivors_0.pdf _____	20

Jeff Benedict & Steve Henson, *The Case Against Kobe Bryant Unraveled in a Mock Trial*, L.A. Times (Nov. 6, 2004), <http://articles.latimes.com/2004/nov/06/sports/sp-bryant6>_____25

John Kaplan, Robert Weisberg & Guyora Binder, *Criminal Law: Cases and Materials* (6th ed. 2008)_____21, 24, 28

Kimberly Curth, *Prosecutor: Someone Trying to Intimidate Vanderbilt Rape Victim*, WSMV (Feb. 24, 2014, 8:33 PM), <http://www.wsmv.com/story/24810836/someone-trying-to-intimidate-alleged-vandy-rape-victim-prosecutor-says>_____25

Mark Memmott, *Two Steubenville Girls Arrested After Allegedly Threatening Rape Victim*, NPR (Mar. 19, 2013, 10:44 AM), <http://www.npr.org/blogs/thetwo-way/2013/03/19/174728448/two-steubenville-girls-arrested-after-allegedly-threatening-rape-victim> _____25

Mary Chastain, *Threats Made Against Sorority of Girl Who Accused Jameis Winston of Rape*, Breitbart (Nov. 27, 2013), <http://www.breitbart.com/sports/2013/11/27/threats-made-against-sorority-of-girl-who-accused-jameis-winston-of-rape/> _____26

Nat'l Crime Victim Law Inst., *Allowing Adult Sexual Assault Victims to Testify at Trial Via Live Video Technology*, Violence Against Women Bulletin (Sept. 2011)_____20

Nat'l Crime Victim Law Inst., *Protecting Victims' Privacy: Moving to Quash Pretrial Subpoenas Duces Tecum for Non-Privileged Information in Criminal Cases*, Violence Against Women Bulletin (Sept. 2014) _____2, 20-21, 23

Nat'l Victim Ctr., *Rape in America: A Report to the Nation* (1992)_____1, 23

Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice & Ctrs. of Disease Control & Prevention, *Extent, Nature and Consequences of Intimate Partner Violence*, Findings from the National Violence Against Women Survey (2000)_____21-22

Penn. Coalition Against Rape, *Poverty and Sexual Violence: Building Prevention and Intervention Responses* (2007)_____32-33

<i>Rape Trauma Syndrome, Rape, Abuse & Incest Nat'l Network, https://ohl.rainn.org/online/resources/how-long-to-recover.cfm</i>	20
<i>Reporting Rates, Rape, Abuse, & Incest Nat'l Network, https://rainn.org/get-information/statistics/reporting-rates</i>	15
Richard Felson & Paul-Philippe Paré, <i>The Reporting of Domestic Violence and Sexual Assault by Nonstrangers to the Police</i> (2005)	22
Simon I. Singer, <i>The Fear of Reprisal and the Failure of Victims to Report a Personal Crime</i> , 4 J. Quantitative Criminology 289 (1988)	22
U.S. Dep't of Justice, Bureau of Justice Statistics, <i>Criminal Victimization</i> (2003)	21
U.S. Dep't of Justice, Bureau of Justice Statistics, <i>Violence Against Women: Estimates from the Redesigned Survey</i> (1995)	21
Viktoria Kristiansson, <i>Walking a Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions (Part II)</i> , Strategies: The Prosecutor's Newsletter on Violence Against Women (May 2013)	2
World Health Org., <i>World Report on Violence and Health</i> (2002)	33

III. IDENTIFICATION AND INTEREST OF *AMICI CURIAE*

1. Advocates for Women’s and Kids’ Equality (“AWAKE”) is a statewide advocacy organization that is dedicated to advocating for the advancement of women and kids by effecting local and state policy change. AWAKE is guided by three principles: educate, advocate, and change, and its strategic approach to advocacy aims to ensure that the interests of women and children in Tennessee are heard and addressed.

2. The Avalon Center is a community resource center based in Crossville, Tennessee that provides comprehensive services to those affected by domestic and sexual violence. The Avalon Center was founded in 1984 as Battered Women, Inc., and it was the first organization in the community to provide a safe haven for victims of family violence. The Avalon Center’s mission is to provide comprehensive support to adult and child victims of domestic and sexual assault, to promote community awareness and prevention through education, and to build and support a community against violence.

3. Morning Star Sanctuary, Inc. (“Morning Star”) is a 501(c)(3) nonprofit organization that has been serving Middle Tennessee domestic violence victims and their children for more than twenty (20) years. Morning Star’s mission is to provide a safe haven and numerous other wrap-around services for victims of domestic violence and their children and to empower them to break the cycle of

violence that controls their lives. Support services include a 16-bed emergency shelter, transitional housing, court advocacy, mentoring, and professional counseling provided to assist victims who have fled domestic violence situations. Over the past 10 years, Morning Star has provided more than 50,000 nights of safe shelter for over 1,500 adults and children escaping domestic violence, more than 10,000 hours of counseling services, and more than 20,000 permanent and temporary orders of protection from its two offices in the Davidson County Criminal Justice Center.

4. You Have the Power (“YHTP”) is a Nashville-based nonprofit agency whose mission is to educate, advocate and empower individuals and communities that are impacted by violent crime. YHTP was founded in 1993 by former First Lady of Tennessee Andrea Conte to advocate for victims and educate the community to prevent violent crime. YHTP raises awareness about crime and justice issues through victim advocacy, community education programs, brochures, and documentaries.

5. Kate Waide is a resident of Nashville and a member of numerous Tennessee-based advocacy groups that focus on supporting survivors of domestic and sexual violence.

In this case, *amici curiae* (“*amici*”) have a strong professional interest in ensuring that victims’ statutory right to be treated with dignity and compassion in

all facets of the justice system is respected and preserved at all times. *Amici* are further interested in ensuring that victims of sexual and domestic violence remain empowered to come forward and report their victimization to law enforcement without fear of intimidation, harassment, or abuse. Because a finding in this case that Jane Doe’s private, personal information constitutes a public record will result in her and other victims experiencing indignity, lack of compassion, intimidation, harassment, or abuse—and because such a finding would also profoundly discourage victims from reporting their abuse while perpetuating psychological harm—*amici* respectfully request this Court’s permission to participate as *amici curiae* in support of Intervenor Jane Doe and partially in support of Petitioners *The Tennessean*, et al.

IV. STATEMENT OF ISSUE PRESENTED FOR REVIEW

- Whether—and to what extent—the constitutional and statutory rights afforded to victims in Tennessee exempt victims’ private and personally identifying information from disclosure under the Tennessee Public Records Act.

V. SUMMARY OF ARGUMENT

According to a report by the National Victim Center, fully “[h]alf of rape victims . . . state[] they would be *a lot more likely* to report rapes to police if there [were] a law prohibiting the news media from getting and disclosing their names and addresses”¹ Furthermore, an additional 16% of rape victims report that they would be “*somewhat more likely* to report” having been raped if such a law existed.² In total, “almost nine out of ten American women (86%) [believe that] victims would be *less likely* to report rapes if they felt their names would be disclosed by the news media.”³ Thus, when it comes to public disclosure of a victim’s private information, the message is clear: “The prospect of having to reveal [private] information . . . may cause a victim to feel re-victimized and make

¹ Nat’l Victim Ctr., *Rape in America: A Report to the Nation* 6 (1992), *available at* https://www.musc.edu/nvc/resources_prof/rape_in_america.pdf.

² *Id.*

³ *Id.*

it less likely that the victim will cooperate in the proceedings or choose to report the crime in the first instance.”⁴ Stated differently: “If domestic violence and sexual assault victims do not feel that their private information will remain so under confidentiality and privilege laws, victims may be hesitant to reveal their trauma”⁵

In light of reports like these and others, there is overwhelming evidence that releasing victims’ personally identifying information and other personal information to the public would profoundly chill reporting in cases of sexual and domestic violence. Consequently, a substantial number of rape victims and victims of domestic violence will be deterred from reporting their rapists and batterers to law enforcement if this Court holds that Tennessee law does not prevent victims’

⁴ Nat’l Crime Victim Law Inst., *Protecting Victims’ Privacy: Moving to Quash Pretrial Subpoenas Duces Tecum for Non-Privileged Information in Criminal Cases*, Violence Against Women Bulletin at 1 (Sept. 2014), available at <https://law.lclark.edu/live/files/18060-quashing-pretrial-subpeonasbulletinpdf>.

⁵ Viktoria Kristiansson, *Walking a Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions (Part II)*, Strategies: The Prosecutor’s Newsletter on Violence Against Women at 7 (May 2013), available at http://www.aequitasresource.org/Issue_10_Walking_A_Tightrope_Balancing_Victim_Privacy_and_Offender_Accountability_in_Domestic_Violence_and_Sexual_Assault_Prosecutions_Part_II_May_2013.pdf.

private information from public disclosure. It should also be self-evident why it is essential—from a public policy standpoint—for this Court to ensure that victims are *empowered* to report perpetrators of sexual and domestic violence to law enforcement, rather than discouraged from doing so. Thus, the central question in this case is whether these concerns actually matter.

In the instant case, it is both undisputed and indisputable that Tennessee law affords myriad broad-based constitutional and statutory protections to rape victims and others victims of crime. Included among those protections are “the right to . . . [b]e treated with dignity and compassion”⁶ and “[t]he right to be free from intimidation, harassment and abuse throughout the criminal justice system.”⁷ These explicit rights notwithstanding, however, Petitioners *The Tennessean* et al. insist that Tennessee law does not afford victims of sexual and domestic violence any right to insulate their personally identifying information and other highly personal information from public view in civil cases. *See* Rule 11 Application of Petitioners, at 4 n.4, *Tennessean v. Metro. Gov’t of Nashville*, No. M2014–00524–COA–R3–CV, 2014 WL 4923162 (Tenn. Ct. App. Sept. 30, 2014) (No. M2014–00524–SC–R11–CV) (“The alleged victim has identified no substantive rights applicable in a *civil* case under the Public Records Act to preclude the disclosure of

⁶ Tenn. Code Ann. § 40-38-102(a)(1) (2010).

⁷ Tenn. Const. art. I, § 35.

public records.”); Petitioners’ Response to Brief of Jane Doe, p. 2; *id.* at 10. In contrast, it is *amici*’s position that Tennessee law does afford victims such a right.

Additionally, and in contrast to *Amici Curiae* Victims’ Rights Groups, *amici* take the position that unless victims affirmatively seek to have their private records made public, Tennessee law should *presumptively* insulate victims’ personally identifying information and other personal information from public view. *Amici* advocate this alternative approach for three separate reasons.

First, “a balancing test . . . [that] consider[s] the victims’ rights laws and [] public policies according to the unique facts and circumstances of each case” would not provide victims sufficient assurance that their private information will not become public. Brief of *Amici Curiae* Victims’ Rights Groups at 20, *Tennessean v. Metro. Gov’t of Nashville*, No. M2014–00524–COA–R3–CV, 2014 WL 4923162 (Tenn. Ct. App. Sept. 30, 2014) (No. M2014-00524-SC-R11-CV). Consequently, because such a balancing test would be insufficient to ensure that victims of sexual and domestic violence feel comfortable reporting their abusers to law enforcement, such a balancing test is insufficient.

Second, a balancing test that depends on “the unique facts and circumstances of each case” would frequently require victims to retain private counsel in order to ensure that their rights are adequately protected. *Id.* Unfortunately, however, the vast majority of victims of sexual assault and domestic violence lack the means to

retain counsel to protect their rights in *any*—much less every—phase of Tennessee’s justice system. Consequently, a case-by-case balancing test would be insufficient to protect the interests of most victims of sexual assault and domestic violence, and a bright-line presumption in favor of non-disclosure should be adopted instead.

Third, adopting a presumption in favor of non-disclosure except under circumstances when victims affirmatively seek to have their private records made public would more effectively empower victims to come forward on their own terms, and would also closely mirror Tennessee’s pre-existing public policy concerning victims’ right to release their own personal records.

Consequently, this Court should hold that:

1. Tenn. Code Ann. § 40-38-102(a)(1) affords victims of crime a statutory right to “[b]e treated with dignity and compassion” in civil cases.
2. Article I, § 35 of the Tennessee Constitution prevents records that are gathered pursuant to a criminal investigation from being disclosed in civil cases where disclosure would result in a victim’s “intimidation, harassment [or] abuse.” And:
3. Unless victims affirmatively seek to have their private records made public, there is a rebuttable presumption that publicly disclosing personally

identifying information and other personal records concerning a victim's sexual or domestic assault will cause victims to experience indignity, lack of compassion, intimidation, harassment, or abuse.

VI. ARGUMENT

This case involves the public's right to review records related to criminal cases under the Tennessee Public Records Act. *See* Tenn. Code Ann. §§ 10-7-101–702 (2012). Under Tennessee law, it is undisputed that courts must “construe the Tennessee Public Records Act liberally in favor of ‘the fullest possible public access to public records’” *Memphis Publ’g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 79 (Tenn. 2002) (quoting Tenn. Code Ann. § 10-7-505(d) (1999)). However, it is similarly undisputed that records are not public at all if there is an exemption to disclosure that is “otherwise provided by state law.” Tenn. Code Ann. § 10-7-503(2)(A) (2012). Consequently, if there is any “explicit [or] implicit exception[] from disclosure found . . . in state law,” a record is not public, and it need not be disclosed. *Swift v. Campbell*, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004).

Petitioners, Respondents and *amici curiae* in support of Petitioners focus primarily on whether Rule 16 of the Tennessee Rules of Criminal Procedure exempts all of the records sought by Petitioners from disclosure. For the reasons

that have been advanced by Petitioners, it does not.⁸ However, largely overshadowed by these parties' dispute over Rule 16 is a far more important question: do the affirmative constitutional and statutory rights that Tennessee law guarantees to victims of crime qualify as "state law" exceptions to the Public Records Act?

The only Tennessee jurist who has squarely addressed this question has held unequivocally that "victim's rights under Article 1, § 35 of the Tennessee

⁸ *Amici* support the position of Petitioners *The Tennessean* et al. on this issue for two primary reasons:

First, as a threshold matter, the fact that Rule 16 would protect victims from indignity, lack of compassion, harassment, intimidation, and abuse only *before* trial does not afford victims any measure of comfort and would unacceptably continue to chill reporting in the first instance. Victims' concerns about indignity, lack of compassion, intimidation, harassment, and abuse remain every bit as real both before and after trial. Accordingly, the protections to which victims are statutorily and constitutionally entitled must not be limited temporally.

Second, under circumstances when law enforcement has failed to pursue a prosecution, or under circumstances when victims harbor concerns about official misconduct, it is foreseeable that situations will arise in which victims of crime will want their private investigative records made public and will oppose governmental efforts to withhold them from public view. Victims—rather than the Government—must be empowered to make this choice, and the Government should not be permitted to shield their records and investigative files from public scrutiny indefinitely under the cover of Rule 16.

Constitution and Tennessee Code Annotated sections 40-38-101 through 506. . . . constitute ‘state law’ exceptions to the Public Records Act.” *Tennessean v. Metro. Gov’t of Nashville*, No. M2014–00524–COA–R3–CV, 2014 WL 4923162, at *6 (Tenn. Ct. App. Sept. 30, 2014) (McBrayer, J., dissenting). Judge McBrayer’s conclusion in this regard—which is supported by the plain language of Tennessee law, by public policy, and by common sense—was correct. Accordingly, this Court should reverse the holding of the Court of Appeals and remand this case to the trial court to conduct an evidentiary hearing aimed at determining whether disclosing any of the records sought by Petitioners would cause Jane Doe to experience indignity, lack of compassion, intimidation, harassment, or abuse.

A. The statutory and constitutional protections that Tennessee law affords to victims of crime exempt records from disclosure under the Tennessee Public Records Act where disclosure would cause a victim to experience indignity, lack of compassion, intimidation, harassment, or abuse.

1. Tenn. Code Ann. § 40-38-102(a)(1) affords crime victims a statutory right to “[b]e treated with dignity and compassion” in civil cases.

Tennessee law is clear and unambiguous in declaring that: “All victims of crime and prosecution witnesses have the right to . . . [b]e treated with dignity and compassion. . . .” Tenn. Code Ann. § 40-38-102(a)(1) (2010). Additionally, in sharp contrast to Article I, § 35 of the Tennessee Constitution, Tenn. Code Ann. § 40-38-102(a)(1) does not contain any language indicating or even intimating that these rights are restricted to “the criminal justice system” alone. *Id.*

By rule, this conspicuous omission provides a strong indication that the legislature did not intend to restrict the scope of Tenn. Code Ann. § 40-38-102(a)(1) to criminal matters. *See, e.g., Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs., Inc.*, 418 S.W.3d 547, 560 (Tenn. 2013) (“Although legislative silence is not generally indicative of an intent not to act, legislative silence in . . . context offers a strong suggestion that the legislature intend[s] [laws] to function differently.” (citations omitted)). Moreover, by its own terms, Tenn. Code Ann. § 40-38-102(a)(1) is not so restricted, and for more than a century of Tennessee law, this fact alone has ended the inquiry. *See, e.g., Scheibler v. Munding*, 9 S.W. 33, 39 (Tenn. 1888) (“It is the duty of the court to enforce this law as it is found upon the statute book”); *see also Gleaves v. Checker Cab Transit Corp., Inc.*, 15 S.W.3d 799, 803 (Tenn. 2000) (“[C]ourts must presume that the legislature says in a statute what it means and means in a statute what it says there. Accordingly, courts must construe a statute as it is written.” (citations omitted) (internal quotation marks omitted)). Consequently, Tenn. Code Ann. § 40-38-102(a)(1) applies in civil cases, and under circumstances in which disclosing records sought under the Tennessee Public Records Act would be incompatible with treating victims with “dignity and compassion,” it provides an “explicit . . . exception[] from disclosure.” *Swift*, 159 S.W.3d at 571.

2. Article I, § 35 of the Tennessee Constitution prevents records that are gathered pursuant to a criminal investigation from being disclosed in civil cases where disclosure would result in a victim’s “intimidation, harassment or abuse.”

Article I, § 35 of the Tennessee Constitution provides that: “To preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to . . . [t]he right to be free from intimidation, harassment and abuse throughout the criminal justice system.” Petitioners insist that because Article I, § 35 includes the provision “throughout the criminal justice system,” the constitutional rights that it guarantees to victims of crime were intended to be valueless in civil cases. *See, e.g.,* Rule 11 Application of Petitioners for Permission to Appeal, at 4 n.4, *Tennessean*, 2014 WL 4923162 (No. M2014-00524-SC-R11-CV) (arguing that “[t]he alleged victim has identified no substantive rights applicable in a *civil* case under the Public Records Act to preclude the disclosure of public records.”). *See also* Petitioners’ Response to Brief of Jane Doe, p. 2 (arguing that the rights afforded to victims by the Tennessee Constitution and the Victims’ Bill of Rights “are limited to the criminal justice system and do not apply to Public Records Act requests.”); *id.* at p. 10. Petitioners’ assertion in this regard, however, is without merit for several reasons.

First, as a threshold matter, the record makes plain that the documents sought by Petitioners were gathered pursuant to a *criminal* investigation that resulted in multiple *criminal* prosecutions as well as a *criminal* trial that

culminated in *criminal* convictions for several violent *criminal* acts committed against Jane Doe—who indisputably qualifies as a victim of *crime*. See Tenn. Code Ann. § 40-38-302(4)(A)(i) (2010) (“‘Victim’ means . . . [a] natural person against whom a crime was committed”). Based on this record, to argue that Article I, § 35 does not apply in the instant case because the records sought by Petitioners fall outside the scope of “the criminal justice system” is farcical. The records sought in this case are inextricably intertwined with the criminal justice system, and pre-trial criminal investigation has long been considered part and parcel of—indeed, in some instances, a “critical stage” of—the criminal justice process. See, e.g., *Gilbert v. California*, 388 U.S. 263, 272 (1967) (“[A] post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution”). Consequently, to subject the scope of the rights afforded to victims of crime under Article I, § 35 to the superficiality of a case’s caption—rather than the consequences of the relief requested—would improperly elevate form over substance. Cf. *Dunlap v. Dunlap*, 996 S.W.2d 803, 812 (Tenn. Ct. App. 1998) (“The law is well-settled that . . . the courts of this state are required to consider the substance of [a] motion rather than its form or title.”). Accordingly, Petitioners’ argument in this regard is without merit.

Furthermore, even if Petitioners were *not* seeking records that were inextricably intertwined with the criminal justice system, in order to be of any value at all, the rights guaranteed to victims by Article I, § 35 must be held to extend to civil actions. Of note, such a holding would neither be unusual nor extraordinary. Indeed, the very same holding has previously been applied to any number of other provisions that are explicitly restricted in application to “the criminal justice system” as well.

For example, the Fifth Amendment to the United States Constitution expressly provides that: “No person shall be . . . compelled in any *criminal* case to be a witness against himself . . .” U.S. Const. amend. V (emphasis added). Even so, however, in order to ensure that the protections guaranteed by the Fifth Amendment are not rendered valueless, the U.S. Supreme Court has held unequivocally that the Fifth Amendment:

[C]an be asserted *in any proceeding, civil or criminal*, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.

Kastigar v. United States, 406 U.S. 441, 444–45 (1972) (emphasis added) (footnote omitted).

Additionally, in precisely the same vein, it should be noted that even though Tenn. R. Crim. P. 16 is unquestionably a rule of *criminal* procedure that “govern[s]

the procedure in all criminal proceedings conducted in all Tennessee courts of record,” *see* Tenn. R. Crim. P. 1(a) (emphasis added), Petitioners candidly admit that Rule 16 nonetheless prohibits records from being disclosed in *civil* cases brought under the Tennessee Public Records Act if: “(1) the records at issue fall within the scope of the Rule; and (2) they relate to an ongoing criminal action.” Rule 11 Application of Petitioners at 10, *Tennessean v. Metro. Gov’t of Nashville*, No. M2014–00524–COA–R3–CV, 2014 WL 4923162 (Tenn. Ct. App. Sept. 30, 2014) (No. M2014-00524-SC-R11-CV). *Cf. Appman v. Worthington*, 746 S.W.2d 165, 166 (Tenn. 1987) (holding that Tenn. R. Crim. P. 16 exempts certain records from disclosure in civil cases brought under the Tennessee Public Records Act). There is no logical reason—either express or implied—why the value of the rights guaranteed by Article I, § 35 of the Tennessee Constitution should not be protected by this Court in precisely the same way. Accordingly, the protections afforded to victims by Article I, § 35 of the Tennessee Constitution should—and do—apply in civil cases.

3. Tenn. Code Ann. § 10-7-504(q)(1) does not provide a comprehensive list of victims’ records that are exempt from disclosure.

As emphasized by several parties, Tennessee statutory law independently restricts a number of specific victims’ records from public disclosure following a defendant’s conviction. *See* Tenn. Code Ann. § 10-7-504(q)(1)(A)–(E) (2014)

(preventing post-conviction disclosure of a sexual assault victim’s name, home address, work address, e-mail address, telephone number, social security number, and photographic or video depictions). This recent amendment helpfully supplements the substantive victims’ rights protections guaranteed by both Tenn. Code Ann. § 40-38-102(a)(1) and Article I, § 35. *See* Tenn. Code Ann. § 40-38-301(b) (2014) (“If any other provision of law confers additional, enhanced or more expansive rights upon victims of crime than are set out in this part or Article I, § 35 of the Constitution of Tennessee, a victim shall also be entitled to the additional, enhanced or expansive statutory rights.”). However, for several reasons, the list of exemptions contained in Tenn. Code Ann. § 10-7-504(q)(1)(A)–(E) cannot reasonably be considered to be comprehensive.

First, if the list of victims’ records exempted from disclosure by Tenn. Code Ann. § 10-7-504(q)(1) really were intended to be comprehensive, then it would conflict with the far broader protections afforded to victims by the Tennessee Constitution. *See supra* Section VI(A)(2), pp. 10–13. Consequently, this Court is constrained to interpret Tenn. Code Ann. § 10-7-504(q)(1) in a way that avoids such a constitutional conflict, and it must find that the exemptions established by Tenn. Code Ann. § 10-7-504(q)(1) are non-exhaustive as a result. *See, e.g., Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529–30 (Tenn. 1993) (“In construing statutes, it is our duty to adopt a construction which will sustain a

statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution. When faced with a choice between two constructions, one of which will sustain the validity of the statute and avoid a conflict with the Constitution, and another which renders the statute unconstitutional, we must choose the former.” (citations omitted)).

Second, Tenn. Code Ann. § 10-7-504(q)(1) contains several glaring and unmistakable omissions concerning victims’ private information—such as applying only “[w]here a defendant has plead guilty to, or has been convicted of, and has been sentenced for a sexual offense or violent sexual offense” Tenn. Code Ann. § 10-7-504(q)(1) (2014). Consequently, because only about 2% of rapes result in a defendant either pleading guilty to or being convicted of a sexual offense, if Tenn. Code Ann. § 10-7-504(q)(1) were intended to serve as the sole, comprehensive list of exemptions protecting victims’ private records from public disclosure, then the approximately 98% of rape victims whose cases do *not* result in a conviction would be left without any right or ability to protect their private records from public view. *See, e.g., Reporting Rates, Rape, Abuse, & Incest Nat’l Network*, <https://rainn.org/get-information/statistics/reporting-rates> (last visited May 19, 2015) (noting that only 2% of rapes result in a felony conviction). In enacting Tenn. Code Ann. § 10-7-504(q)(1), the legislature could not realistically have intended to produce such a disturbing and unjustifiable result.

Third, the list of records exempted from disclosure by Tenn. Code Ann. § 10-7-504(q)(1) conspicuously omits myriad highly sensitive and deeply personal records—such as a victim’s diary, e-mails, phone calls, and text messages—that the legislature could not possibly have sought to make public following a defendant’s conviction or at any other point in time. Furthermore, the universe of victims protected by Tenn. Code Ann. § 10-7-504(q)(1) is far narrower than the much broader definition of “victim” set forth in the Victims’ Rights Act. *Compare* Tenn. Code Ann. § 10-7-504(q)(1) (protecting victims of sexual violence only) *with* Tenn. Code Ann. § 40-38-302(4)(A)(i) (“‘Victim’ means . . . [a] natural person against whom a crime was committed . . .”).

As a result, both constitutional law and common sense dictate that Tenn. Code Ann. § 10-7-504(q)(1) does not provide—and was never intended to provide—a comprehensive list of victims’ records that are exempt from disclosure.

B. Unless victims affirmatively seek to have their private records made public, there should be a rebuttable presumption that publicly disclosing personally identifying information and other personal records concerning a victim’s sexual or domestic assault will cause victims to experience indignity, lack of compassion, intimidation, harassment, or abuse.

As noted in Section VI(A)(1), Tenn. Code Ann. § 40-38-102(a)(1) affords victims of crime a statutory right to “[b]e treated with dignity and compassion” in civil cases. *See supra* pp. 8–9. Furthermore, as noted in Section VI(A)(2), Article I, § 35 of the Tennessee Constitution prevents records that are gathered pursuant to

a criminal investigation from being disclosed in civil cases where disclosure would result in a victim's "intimidation, harassment [or] abuse." *See supra* pp. 10–13.

The trial court did not conduct any independent fact-finding to determine whether some or all of the records sought by Petitioners fall within any of these exceptions to disclosure. Accordingly, this Court should reverse the holding of the Court of Appeals and remand this case to the trial court to conduct an evidentiary hearing aimed at determining whether disclosing any of the records that the Petitioners seek would cause Jane Doe to experience indignity, lack of compassion, intimidation, harassment, or abuse. *See Tennessean v. Metro. Gov't of Nashville*, No. M2014–00524–COA–R3–CV, 2014 WL 4923162, at *4, *7 (Tenn. Ct. App. Sept. 30, 2014) (McBrayer, J., dissenting) (“[T]he trial court should have considered the victim’s rights, [and] the place for application of these exceptions in the first instance is the trial court. Therefore, I would vacate the trial court’s ruling and remand for further proceedings.”). In making such a determination, however, this Court should provide lower courts with substantial guidance in future cases. Specifically, unless victims affirmatively seek to have their private records made public, this Court should hold that there is a rebuttable presumption that publicly disclosing personally identifying records and other highly personal records concerning a victim’s sexual or domestic assault will cause

victims to experience indignity, lack of compassion, intimidation, harassment, or abuse. Such a holding is supported by the following grim realities.

1. Dignity

In recent decades, courts across the United States have come to recognize the fact that sexual assaults represent a category of especially egregious crimes that can undermine the basic dignity of victims. *See, e.g., Braswell v. State*, Nos. A-2448, A-2529, 1991 WL 11650678, at *7 (Alaska Ct. App. Feb. 6, 1991) (noting that “sexual assault violates the victim’s personal sanctity and dignity”); *People v. Luna*, 204 Cal. App. 3d 726, 749 (Cal. Ct. App. 1988) (noting “the revolutionary change that has taken place in our society, including changes with respect to the credibility and dignity we extend to adult women and children who are the victims of sexual assault”); *Deborah S. v. Diorio*, 583 N.Y.S.2d 872, 881 (N.Y. Civ. Ct. 1992), *aff’d*, 612 N.Y.S.2d 542 (N.Y. App. Div. 1994) (“While more rape victims are choosing to ‘come out’ [publicly], . . . that choice of dignity must remain with the victim, who must cope with: post-rape trauma; nightmares; possible unwanted pregnancy; terrifying concern about infection with the HIV virus; and loss of a sense of personal security.”).

Commendably, Tennessee law is not blind to either the indignity of sexual assault or the public’s interest in preventing invasions of victims’ privacy. *See, e.g., State v. Johnson*, No. W2011–01786–CCA–R3–CD, 2013 WL 501779, at *12

(Tenn. Crim. App. Feb. 7, 2013) (“An assault charge, which would be the resulting conviction if there was no ‘sexual contact’ element, would not . . . protect the dignity of the victims of such egregious acts.”); Tenn. R. Evid. 412 cmts. (noting that Tenn. R. Evid. 412, an updated version of Tennessee’s rape shield law, endeavored to protect “the important interests of the sexual assault victim in avoiding an unnecessary, degrading, and embarrassing invasion of sexual privacy”). Considered from this perspective, in order to safeguard victims’ statutory right to be treated with dignity, all personally identifying records and other personal records of a victim’s assault should presumptively be considered exempt from disclosure under the Tennessee Public Records Act unless victims affirmatively seek to have such records made public.

2. Compassion

In order to protect and preserve victims’ statutory right to “[b]e treated with . . . compassion” in all facets of Tennessee’s justice system, it is essential that this Court “respect victims of crime and protect them from a second victimization by the judicial process” *State in Interest of K.P.*, 709 A.2d 315, 325 (N.J. Ch. 1997). Identifying a victim publicly and releasing records of a victim’s sexual assault to the public is likely to be incompatible with this obligation in most cases. Moreover, publicly broadcasting vivid depictions of a victim’s sexual assault may well lead to re-victimization and recurring trauma by exacerbating Rape Trauma

Syndrome. See, e.g., *Rape Trauma Syndrome*, available at <https://ohl.rainn.org/online/resources/how-long-to-recover.cfm> (last visited May 19, 2015) (identifying “[s]uppression” as a primary coping mechanism and “[f]lashbacks” and “[r]eluctance to . . . go places that remind the individual of the assault” as symptoms that rape victims can experience during the Outward Adjustment Phase of Rape Trauma Syndrome). See also Nat’l Crime Victim Law Inst., *Allowing Adult Sexual Assault Victims to Testify at Trial Via Live Video Technology*, Violence Against Women Bulletin at 1–2 (Sept. 2011), available at <https://law.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify> (“[R]ecalling horrifying and personal details of the rape forces the victims to relive the crime mentally and emotionally, leading some to feel as though the sexual assault is recurring and to re-experience a lack of control and terror.” (citations omitted) (internal quotation marks omitted)); *Info & Stats for Journalists: Talking with Survivors*, Nat’l Sexual Violence Res. Ctr., available at http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_talking-with-survivors_0.pdf (last visited May 19, 2015) (“Certain situations, photos, words, sounds and smells can trigger memories from a survivor’s assault, and this can be traumatizing. For example, a survivor could see a photo of the place where they were assaulted, and the photo becomes associated with the events that occurred there.”); Nat’l Crime Victim Law Inst., *supra* note 4,

at 1 (noting that “[t]he prospect of having to reveal [personal] information to anyone . . . may cause a victim to feel re-victimized . . .”).

Accordingly, the judiciary’s obligation to ensure that victims are treated with compassion militates in favor of a holding that personal records of a victim’s sexual assault should presumptively be considered exempt from disclosure.

3. Intimidation

Approximately “500,000 women per year are victims of some form of sexual assault,” and “as many as 15 million currently living women in America have been so victimized at least once in their lives” John Kaplan, Robert Weisberg & Guyora Binder, *Criminal Law: Cases and Materials* 865 (6th ed. 2008) (citing U.S. Dep’t of Justice, Bureau of Justice Statistics, *Violence Against Women: Estimates from the Redesigned Survey* 1 (1995)). Distressingly, however, and despite their alarming frequency, crimes involving sexual assault and domestic violence are among the most chronically underreported crimes in the United States. *See* U.S. Dep’t of Justice, Bureau of Justice Statistics, *Criminal Victimization* 11 (2003), available at <http://www.bjs.gov/content/pub/pdf/cv03.pdf>. In total, only an estimated one-quarter of all physical assaults, one-fifth of all rapes, and one-half of all stalking offenses perpetrated against females by intimate partners are reported to the police. Patricia Tjaden and Nancy Thoennes, Nat’l Inst. of Justice & Ctrs. of Disease Control & Prevention, *Extent, Nature and Consequences of Intimate*

Partner Violence, Findings from the National Violence Against Women Survey 51 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

Robust social science research indicates that multiple factors contribute to this disturbing reality, including:

- (1) the embarrassment and stigma associated with the crime;
- (2) perceptions by victims that they will not be believed or that the criminal justice system is ineffective;
- (3) perceptions that some incidents are not serious enough;
- (4) ambiguity about what constitutes illicit sexual conduct;
- (5) less fear of future attack since sexual assaults are less likely to be repeated; and
- [6] less third party reporting because sexual assaults are much more likely to occur in private.

Richard Felson & Paul-Philippe Paré, *The Reporting of Domestic Violence and Sexual Assault by Nonstrangers to the Police* 8 (2005) (citations omitted), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/209039.pdf>.

Crucially, however, another critical factor that contributes to chronic underreporting of domestic violence and sexual assaults is “fear of reprisal if [victims] report.” *Id.* (citing Simon I. Singer, *The Fear of Reprisal and the Failure of Victims to Report a Personal Crime*, 4 *J. of Quantitative Criminology* 289, 289–302 (1988)); *see also id.* at 4 (collecting scholarship concluding that “[w]omen’s reluctance to report assaults by their male partners [is] attribut[able] to fear of reprisal”). In legal terms, “fear of reprisal” in the event that a sexual assault is reported to law enforcement can properly be characterized as a “chilling effect.” *Id.*

With the above in mind, this Court must be exceedingly careful to avoid adopting any rule that would have the effect of intimidating victims by allowing perpetrators of sexual and domestic violence to obtain records indicating that victims have reported their crimes to law enforcement. *Id.*; *cf.* Daniel A. Horwitz, *Twelve Angry Hours: Improving Domestic Violence Holds in Tennessee Without Risk of Violating the Constitution*, __ Tenn. J.L. & Pol’y __ (2015) (noting that “the legal system is often used for retaliatory purposes by well-resourced batterers.”). Moreover, publicly releasing records that expose a victim’s personal information or potentially embarrassing information—such as her diary, e-mails, phone calls, or text messages—would undoubtedly result in the unacceptable consequence of chilling reporting of sexual and domestic assault even further. *See, e.g.,* Nat’l Victim Ctr., *supra* note 1, at 6 (“[A]lmost nine out of ten American women (86%) [believe that] victims would be *less likely* to report rapes if they felt their names would be disclosed by the news media.”); Nat’l Crime Victim Law Inst., *supra* note 4, at 1 (“The prospect of having to reveal [private] information . . . may cause a victim to feel re-victimized and make it less likely that the victim will cooperate in the proceedings or choose to report the crime in the first instance.”); Kristiansson, *supra* note 5, at 7 (“If domestic violence and sexual assault victims do not feel that their private information will remain so under confidentiality and privilege laws, victims may be hesitant to reveal their trauma . . .”).

For obvious reasons, society's interest is advanced—rather than undermined—by doing everything possible to encourage victims of sexual assault to report their abusers to law enforcement. And this is especially true in light of the fact that the “clearance rate” for even those rapes that are reported to police is only about 40 percent. *See* Kaplan et al., *supra* p. 21, at 865 (citing Fed. Bureau Investigation, *Crime in the United States* (2006)). Furthermore, it should go without saying that it still remains essential to protect victims from retaliation after an investigation has been completed or a trial has ended. Consequently, unlike Rule 16, the scope of victims' constitutional right to be free from intimidation should not be—and must not be—limited temporally, and the judiciary's obligation to ensure that victims are protected from intimidation demands a holding that records detailing a victim's sexual assault are presumptively exempt from disclosure.

4. Harassment

It's been one of the most publicized criminal cases in the city. One time Vanderbilt football players accused of raping a woman in a dorm room The Channel 4 I-Team has found the District Attorney's office [is] concerned that someone is trying to intimidate the victim in the Vanderbilt rape case.

Kimberly Curth, *Prosecutor: Someone Trying to Intimidate Vanderbilt Rape Victim*, WSMV (Feb. 24, 2014, 8:33 PM), <http://www.wsmv.com/story/24810836/someone-trying-to-intimidate-alleged-vandy-rape-victim-prosecutor-says>.

As Jane Doe has persuasively argued, there is little doubt that she will be subjected to further harassment if personally identifying records of her rape are made public. Such harassment, sadly, is typical of sexual assault cases—especially those involving prominent athletes. *See, e.g.*, Associated Press, *Roethlisberger Accuser Receives “Over 100” Threats*, The News Center (Aug. 6, 2009), <http://www.thenewscenter.tv/sports/headlines/52599607.html?device=phone&c=y> (“The woman who has accused Pittsburgh Steelers quarterback Ben Roethlisberger of raping her at a Lake Tahoe hotel-casino where she worked told authorities she has received dozens of threatening and harassing phone calls.”); Jeff Benedict & Steve Henson, *The Case Against Kobe Bryant Unraveled in a Mock Trial*, L.A. Times (Nov. 6, 2004), <http://articles.latimes.com/2004/nov/06/sports/sp-bryant6> (noting that “[t]he 20-year-old accuser had wavered for months about testifying, overwhelmed by death threats”); Mark Memmott, *Two Steubenville Girls Arrested After Allegedly Threatening Rape Victim*, NPR (Mar. 19, 2013, 10:44 AM), <http://www.npr.org/blogs/thetwo-way/2013/03/19/174728448/two-steubenville-girls-arrested-after-allegedly-threatening-rape-victim> (“The 16-year-old girl raped by two Ohio high school football players in a crime that has attracted wide attention has also been the victim of online harassment, the state’s top prosecutor said late Monday.”); Mary Chastain, *Threats Made Against Sorority of Girl Who Accused Jameis Winston of Rape*, Breitbart (Nov. 27, 2013),

<http://www.breitbart.com/sports/2013/11/27/threats-made-against-sorority-of-girl-who-accused-jameis-winston-of-rape/> (“Guards are reportedly being placed at the Florida State University sorority house of the woman who accused star quarterback Jameis Winston of rape. According to the Daily Mail, the sorority reportedly received a bomb threat This is not the only harassment sorority members are facing on campus.”).

Consequently, given the extensive history of harassment that has already transpired in this case and so many cases like it, victims’ constitutional right to be free from harassment compels a holding that personally identifying records and other personal records of a victim’s sexual assault be presumed exempt from disclosure unless victims affirmatively seek to have their private records made public.

5. Abuse

Tragically, the abusive concept of “victim blaming” remains frighteningly persistent in society, and it is particularly pervasive in the context of sexual assault cases. A federal District Court Judge in the Southern District of New York recently explained the phenomenon of “victim blaming” as follows:

Historically, an exaggerated concern for female chastity and a regrettable inclination to blame the victim for sexual assaults, along with society’s general respect for sexual privacy, have resulted in an atmosphere in which victims of sexual assault may experience shame or

damage to reputation. It would be callous to pretend that this atmosphere has entirely dissipated, or to insist that victims of such assault lack privacy interests because most people today understand that the attacker, not the victim, should be stigmatized and ashamed.

Doe v. Del Rio, 241 F.R.D. 154, 159 (S.D.N.Y. 2006).

Disturbingly, the genesis of victim blaming in sexual assault cases is probably the law itself.⁹ For example, historically, most jurisdictions had “special requirements for rape prosecutions” that included:

- (1) “[A] rule that no rape defendant c[ould] be convicted solely on the basis of a victim’s uncorroborated testimony”;
- (2) “[A] requirement that the complainant ma[k]e a ‘prompt complaint’ to the police”;
- (3) “[R]ules of evidence deeming the complainant’s past sexual conduct or reputation for chastity relevant to her credibility or her consent to sexual intercourse”;

⁹ The origin of “victim blaming” appears to be attributable to a historical belief that sex outside of marriage was presumptively criminal. As Professor Anne M. Coughlin has explained:

Since, under our ancestors’ system, the underlying sexual activity in which a rape complainant engaged (albeit, by her own testimony, unwillingly) was criminal misconduct, her complaint logically could be construed as a plea to be relieved of responsibility for committing that crime. A court would be receptive to such a plea only if the woman could establish that, although she had participated in a sexual transgression, she did so under circumstances that afforded her a defense to criminal liability.

Anne M. Coughlin, *Sex and Guilt*, 84 Va. L. Rev. 1, 8 (1998) (footnote omitted).

(4) “[T]he requirement of a cautionary instruction to all juries, alerting them that rape complaints are easy to fabricate.”

Kaplan et al., *supra* p. 21, at 867.

Furthermore, many jurisdictions previously enforced “the requirement of ‘utmost resistance’” against victims who were raped as a pre-requisite to obtaining a rape conviction. *Id.* at 869. The 1906 case *Brown v. State*, 106 N.W. 536 (Wis. 1906), provides a particularly pronounced example of the “utmost resistance” requirement being applied in practice. There, the Wisconsin Supreme Court overturned a defendant’s rape conviction on the basis that: “Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman’s power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.” *Id.* at 538.

Like the “special requirements for rape prosecutions,”¹⁰ the “utmost resistance” requirement was expressly grounded in societal skepticism that women who reported being raped had not *really* been raped. As the judges of New York’s high court once characterized this requirement:

Can the mind conceive of a woman, in the possession of her faculties and powers, revoltingly unwilling that this deed should be done upon her, who would not resist so

¹⁰ See Kaplan et al., *supra* p. 21, at 867.

hard and so long as she was able? And if a woman, aware that it will be done unless she does resist, does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant? If consent, though not express, enters into her conduct, there is no rape.

People v. Dohring, 59 N.Y. 374, 384 (1874).

Society as a whole, unfortunately, has yet to rid itself of these historical tendencies to doubt—and, in many cases, to fault—women who report having been sexually assaulted. And lest there be any doubt that this longstanding and highly abusive tradition of “victim blaming” is implicated here, one need only look to the multitude of horrifying online comments that have been posted publicly by *The Tennessean*’s readership in response to its own reporting on this very case. Such comments include, but certainly are not limited to, the following:

Jeffrey B.: “She [the victim] is just as much at fault for drinking until she passed out. [T]he guy’s [sic] lives are ruined now for something she doesn’t even remember. [A]ll parties are at fault including her but only the guy’s [sic] will have consequences. [S]he could have consented and don’t [sic] remember.”

James K.: “Alcohol consumption is illegal for those whose age is less than 21. Alcohol is known to lower inhibitions, resulting in sexual encounters that would not occur in sober individuals. What’s this woman doing drinking an illegal intoxicating substance, then? Why are women not accountable for their behavior when they drink and for their choice to be with others who are drinking?”

Nancy W.: “Well the way I see it is she invited all the boys/men into Herr [sic] apartment/dorm and they all got drunk, she knows when you invite ball players from a collage Toma [sic] party and they start to get pretty high that something is going to happen, I do not see it either that she says she don’t [sic] remember anything that happened then how can she blame this rape on someone or anyone if she can’t rememeber [sic], and if there were more than the four men/boys with her why is she naming just four of them, and while she ewas [sic] passed out how did she not know some more guys had entered her apt/dorm, anyone could have raped her, I think she wanted to get publicity bevcause [sic] where she was asked why so many guys were coming in and out her apt/dorm, irt [sic] would have never happened if she hadn’t invited so many guys to a party, I think she wanted to take them all on, just saying, my thoughts.

Marretha H.: “[S]he is saying that she does not remember however if they are found not guilty what will be their outcome and what happens to her if she is not being truthful. I’m just saying.”

Amanda R.: “I’m sad for all sides and the guys in this case will hopefully learn their lesson I just hope the girl also learned a lesson as well.”

Shannon W.: “[F]rom what I understand, the alleged victim is not as innocent as she’d like you to believe. Just ask the Vandy football players. God Bless America!”

See App’x 1(A-F) (screenshots of comments posted to *The Tennessean*’s website and Facebook page).

In light of comments like these and others, it would be foolish to assume that Jane Doe will not be subject to further and far more direct abuse if her personally identifying information and other personal information is made public.

Consequently, Jane Doe’s constitutional right to be free from abuse weighs heavily in favor of a holding that her personal records should presumptively be exempt from disclosure.

C. Applying a case-by-case balancing test to determine whether victims’ personally identifying information and other personal information is subject to disclosure is insufficient to protect victims of sexual and domestic violence.

For the reasons advanced in Section VI-B, *supra* pp. 16-31, *amici* urge this Court to hold that Tennessee law presumptively insulates victims’ personally identifying information and other personal information from public view unless victims affirmatively seek to have their private records made public. Additionally, although such a holding would provide more robust protection to victims than the rule advocated by *Amici Curiae* Victims’ Rights Groups, *amici* advocate this alternative approach for three main reasons.

First, *amici* harbor profound concerns that “a balancing test . . . [that] consider[s] the victims’ rights laws and [] public policies according to the unique facts and circumstances of each case” would not provide victims sufficient assurance that their private information will not become public. *See* Brief of *Amici Curiae* Victims’ Rights Groups at 20, *Tennessean v. Metro. Gov’t of Nashville*, No. M2014–00524–COA–R3–CV, 2014 WL 4923162 (Tenn. Ct. App. Sept. 30, 2014) (No. M2014-00524-SC-R11-CV). In *amici*’s professional experience, victims who are concerned about reporting in light of the potential that their private information

might become public will likely remain unwilling to come forward if a case-by-case balancing test is adopted by this Court. Simply put, such a balancing test would be insufficient to allay many victims' legitimate fears about intimidation, harassment, and abuse, and it would not afford victims sufficient protection to encourage the self-reporting necessary to bring their abusers to justice. Consequently, because such a balancing test would be insufficient to ensure that many victims of sexual and domestic violence feel comfortable reporting their abusers to law enforcement, such a balancing test is insufficient. A presumption in favor of non-disclosure should therefore be adopted instead.

Second, in contrast to a presumption in favor of non-disclosure, a case-by-case balancing test—the outcome of which turns on “the unique facts and circumstances of each case”—would likely require victims to retain private counsel in order to ensure that their rights are adequately protected. Unfortunately, however, unlike Jane Doe, the vast majority of victims of sexual and domestic violence lack the means to retain private counsel to protect their rights in *any*—much less *every*—phase of Tennessee's justice system. *See generally* Penn. Coalition Against Rape, *Poverty and Sexual Violence: Building Prevention and Intervention Responses* 1, 8 (2007), available at http://www.pcar.org/sites/default/files/pages-pdf/poverty_and_sexual_violence.pdf (“Poverty is among the root causes of sexual violence and has a daily presence in

the lives of many victims and survivors. Therefore, the thread of economic advocacy must be woven throughout the fabric of all intervention and prevention efforts. . . . Research shows an undeniable, complex, and often cyclical connection between poverty and sexual violence. People living in poverty and lacking economic power and resources are at greater risk for sexual violence.”); Deborah Satyanathan & Anna Pollack, *Domestic Violence and Poverty*, Family Impact Seminars at 17, http://www.familyimpactseminars.org/s_mifis04c05.pdf (“Families who experience domestic violence are often also victims of poverty.”); Gary Haugen, *Why the End of Poverty Requires the End of Violence*, Huffington Post (Jan. 28, 2014, 12:54 PM), http://www.huffingtonpost.com/gary-haugen/why-the-end-of-poverty-violence_b_4676932.html (“Sexual violence is a problem everywhere, but [the] poorest [women] are particularly vulnerable.”); World Health Org., *World Report on Violence and Health* 158 (2002), available at http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf (“Poor women and girls may be more at risk of rape in the course of their daily tasks than those who are better off”). Thus, from a practical standpoint, if this Court adopts a case-by-case balancing test, most victims of sexual and domestic violence will never receive the full measure of protection to which they are both statutorily and constitutionally entitled. As a result, a balancing test would be insufficient to protect the interests of most victims of sexual and

domestic violence, and a bright-line presumption in favor of non-disclosure should be adopted instead.

Third, adopting a presumption in favor of non-disclosure except under circumstances when victims affirmatively seek to have their private records made public would more effectively empower victims to come forward on their own terms, and would also closely mirror Tennessee's pre-existing public policy concerning victims' right to release their own personal records. For example, after a defendant has been convicted and sentenced for committing a sexual offense, Tenn. Code Ann. § 10-7-504(q)(1)(A)–(E) presumptively exempts certain “information regarding the victim” from public disclosure. *See* Tenn. Code Ann. § 10-7-504(q)(1)(A)–(E) (2014). However, if victims affirmatively seek to have their private records made public, then Tennessee law empowers victims to “execute[] a written waiver . . . to waive confidentiality,” thereby making their personally identifying information publicly available. *See* Tenn. Code Ann. § 10-7-504(q)(2)(C).

This framework has already proven to be both workable and beneficial in Tennessee, effectively protecting victims' interest in safeguarding their private information from public disclosure while simultaneously empowering victims to make their stories public on their own terms and at the time of their choosing. *See id.* Consequently, *amici* urge this Court to eschew a case-by-case balancing test to

determine whether victims' personal records are subject to disclosure. Instead, for the purpose of effectuating the substantive rights afforded to victims by Tenn. Code Ann. § 40-38-102(a)(1) and Article I, § 35, this Court should adopt the same basic framework established by Tenn. Code Ann. §§ 10-7-504(q)(1)–(2), and it should hold that unless victims affirmatively seek to have their private records made public, victims' personally identifying information and other personal information is presumed to be exempt from public disclosure.

VII. Conclusion

It is a painful reality that victims of sexual and domestic violence frequently experience indignity, lack of compassion, intimidation, harassment, or abuse as a consequence of coming forward. Moreover, in far too many cases, victims suffer all of these consequences. For example, as one student journalist described an online forum following another recent rape at Vanderbilt University:

[T]he original poster [] begins by asking the anonymous user base to post the name of the girl who “ratted” on AEPi and “got them on probation.”

....

Over the course of the thread's three pages, the victim is referred to as “crazy,” a “crazy bitch,” “manic depressive,” “psycho,” “NASTY AS SHIT” and “a no good CUNT,” among other things. Posters call into question her truthfulness, her mental stability and her sexual promiscuity[.] . . . A Vanderbilt student is named

in this thread, and these words and names target her. And to be clear, she is a target[.]

....

If this thread is any indication of the response that awaits a rape victim at Vanderbilt who comes forward, then it is easy to understand her keeping her painful secret locked up tight. To do otherwise is social suicide at best, and a living nightmare at worst. What incentive could she possibly ever have to make her story public? Come forward and your name will be posted, your secret revealed, and your sexual history put on display. You will be viciously ridiculed and discredited — and there is nothing you can do about it.

Andre Rouillard, *The girl that ratted: How one online thread brought out the worst in Vanderbilt*, *Vanderbilt Hustler* (Apr. 17, 2014), http://www.vanderbilthustler.com/opinion/article_ecb2248e-c52b-11e3-b7d6-0017a43b2370.html?mode=jqm.

For the foregoing reasons, *amici* urge this Court to adopt a rule that ensures that rape victims will never face such heinous retribution as a consequence of reporting their victimization to law enforcement. Accordingly, this Court should reverse the holding of the Court of Appeals and remand this case to the trial court to conduct an evidentiary hearing aimed at determining whether disclosing the records sought by Petitioners would cause Jane Doe to experience the indignity, lack of compassion, intimidation, harassment, or abuse that is so common in cases involving victims of sexual and domestic violence. Furthermore, in making such a determination, a rebuttable presumption that disclosing Jane Doe's personally identifying information and other personal information will cause her to experience

indignity, lack of compassion, intimidation, harassment, or abuse should apply unless Jane Doe affirmatively seeks to have her private records made public.

Respectfully submitted,



Daniel A. Horwitz, Esq.

BPR #032176

Attorney for *Amici Curiae*

1803 Broadway, #616

Nashville, TN 37203

(615) 739-2888

daniel.a.horwitz@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on this the 27th day of May, 2015, a true and exact copy of the foregoing has been served via UPS, postage prepaid, upon the following:

Lora Barkenbus Fox
Emily Herring Lamb
Jennifer Cavanaugh
Assistant Metropolitan Attorneys
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, TN 37219

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

Douglas R. Pierce
King and Ballow
1100 Union Street Plaza
315 Union Street
Nashville, TN 37203

Edmund S. Sauer
Bradley Arant Boult Cummings
1600 Division St., Suite 700
Nashville, TN 37203

Edward M. Yarbrough
J. Alex Little
Bone McAllester Norton
511 Union Street, Suite 1600
Nashville, TN 37219

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

Richard L. Hollow
Hollow & Hollow, LLC
P.O. Box 11166
Knoxville, TN 37939-1166

By: 
Daniel A. Horwitz, Esq.
Attorney for *Amici Curiae*

APPENDIX 1(A-F)

1-A. Comment of Jeffrey Bills—screenshot captured by Daniel A. Horwitz on March 27, 2015:

 **The Tennessean** ✓
January 26 · 🌐

Cory Batey takes stand, apologizes in Vandy rape trial. Alleged victim vomits during testimony



Cory Batey takes stand, apologizes in Vanderbilt rape trial

Cory Batey testified in his own defense Monday morning, apologizing to the woman he is accused of raping and saying he does not recall what...

TNNE.WS

Like · Comment · Share

👍 77 people like this. Most Relevant ▾

↪ 25 shares

 Write a comment... 

 **Jeffrey Bills** She is just as much at fault for drinking until she passed out...the guy's lives are ruined now for something she doesn't even remember...all parties are at fault including her but only the guy's will have consequences ..she could have consented and don't remember

Like · Reply · 👍 5 · January 26 at 1:45pm · Edited

1-B. Comment of James S. Kennedy—screenshot captured by Daniel A. Horwitz on March 27, 2015:

The screenshot shows the top portion of the website 'THE TENNESSEAN', a Gannett Company. The navigation bar includes links for HOME, NEWS, COUNTIES, SPORTS, BUSINESS, MUSIC, TRAVEL, LIFESTYLE, OPINION, OBITUARIES, and TPA PUBLIC NOTICES. The main content area features a Facebook comment thread titled 'JOIN THE CONVERSATION'. The article being commented on is titled 'Herbilt rape trial' and is dated January 24, 2015. The comment thread includes three comments:

- James S. Kennedy** (Top Commenter, President at CDIMD):
Alcohol consumption is illegal for those whose age is less than 21. Alcohol is known to lower inhibitions, resulting in sexual encounters that would not occur in sober individuals. What's this woman doing drinking an illegal intoxicating substance, then? Why are women not accountable for their behavior when they drink and for their choice to be with others who are drinking?
Reply · Like · 3 · Follow Post · January 25 at 9:19am
- Elise Stevens** (Top Commenter, George Peabody College):
"This woman" was 21 years old at the time. Do your homework before denigrating people. And why are you blaming the victim instead of the animals who raped her? Not every woman who drinks ends up unconscious and raped. Not every man who drinks ends up drunk and raping a woman.
Reply · Like · 15 · Edited · January 25 at 10:42am
- Ella Marsh** (Top Commenter):
I'm with Elise on this one. No normal human being would see a woman passed out and think "Sweet! Get her in a bed let's have some fun!" What happened to raising your children to respect others? To have empathy? Most men I know would be furious if such a thing had ever happened

On the right side of the page, there are advertisements for Xfinity Internet (Reliably Fast Speed) and Nashforward (Nashville's Premier Real Estate).

1-C. Comment of Nancy Whited—screenshot captured by Daniel A. Horwitz on March 27, 2015:

 **The Tennessean** ✓
January 28 · 🌐

Cory Batey takes stand, apologizes in Vandy rape trial. Alleged victim vomits during testimony



Cory Batey takes stand, apologizes in Vanderbilt rape trial

Cory Batey testified in his own defense Monday morning, apologizing to the woman he is accused of raping and saying he does not recall what...

TNNE.WS

Like · Comment · Share

77 people like this. Most Relevant

25 shares

 Write a comment... 

 **Nancy Whited** Well the way I see it is she invited all the boys/men into Herr apartment/dorm and they all got drunk, she knows when you invite ball players from a collage Toma party and they start to get pretty high that something is going to happen, I do not see it either that she says she don't remember anything that happened then how can she blame this rape on someone or anyone if she can't rememeber, and if there were more than the four men/boys with her why is she naming just four of them, and while she ewas passed out how did she not know some more guys had entered her apt/dorm, anyone could have raped her, I think she wanted to get publicity bevcause where she was asked why so many guys were coming in and out her apt/dorm, irt would have never happened if she hadn't invited so many guys to a party, I think she wanted to take them all on, just saying, my thoughts.

Like · Reply · 2 · January 28 at 6:45pm

1-D. Comment of Marretha Harris—screenshot captured by Daniel A. Horwitz on March 27, 2015:

The screenshot shows the top portion of the website 'THE TENNESSEAN', a Gannett Company. The navigation bar includes links for HOME, NEWS, COUNTIES, SPORTS, BUSINESS, MUSIC, TRAVEL, LIFESTYLE, OPINION, OBITUARIES, TPA PUBLIC NOTICES, and USA TODAY. A search bar is located in the top right corner. Below the navigation bar, there is a section titled 'JOIN THE CONVERSATION' with a sub-header 'To find out more about Facebook commenting please read the Conversation Guidelines and FAQs'. The main content area displays a Facebook comment thread. The comment by Marretha Harris, a Certified Addiction Drug Counselor at Comprehensive Behavioral Health Center, is highlighted. Her comment reads: 'I can understand but she is saying that she does not remember however if they are found not guilty what will be their outcome and what happens to her if she is not being truthful. I'm just saying.' The comment was posted on January 23 at 12:14am and has 2 replies. To the right of the comment, a video player is partially visible with the title 'm: 'That's me' in video' and a date of 'ST January 28, 2015'. An advertisement for Xfinity is also visible on the right side of the page.

1-E. Comment of Amanda Rambo—screenshot captured by Daniel A. Horwitz on March 27, 2015:

 **The Tennessean** ✓
January 27 · 🌐

The victim in the Vanderbilt rape case released a statement after Tuesday's guilty verdict: "I want to remind other victims of sexual violence: You are not alone. You are not to blame."



Vanderbilt rape victim speaks out after verdict
The woman raped in a Vanderbilt dorm offered a written statement Tuesday after her attackers were convicted.
TNNE.WS

Like · Comment · Share

👍 Bob Freeman and 1,014 others like this. Most Relevant ▾

↪ 81 shares

 Write a comment.. 

 **Amanda Rambo** I'm sad for all sides and the guys in this case will hopefully learn their lesson I just hope the girl also learned a lesson as well.
Like · Reply · 👍 9 · January 27 at 8:50pm

1-F. Comment of Shannon Weeks—screenshot captured by Daniel A. Horwitz on March 27, 2015:

 **The Tennessean** ✓
November 4, 2014 · 🌐

BREAKING NEWS: Vanderbilt rape case delayed until January



Vanderbilt rape case delayed until January
A judge this morning halted and delayed the trial of two former Vanderbilt University football players accused of rape. Jury selection for the trial began yesterday, but was delayed four hours because an attorney was injured. That...
WWW.TENNESSEAN.COM

Like · Comment · Share

👍 9 people like this. Most Relevant ▾

 Write a comment... 

 **Shannon Weeks** A continuance is only fair in America, and, the last time I checked, this IS America - Land of the Innocent UNTIL proven guilty. Also, from what I understand, the alleged victim is not as innocent as she'd like you to believe. Just ask the Vandy football players. God Bless America!
Like · Reply · 👍 1 · November 4, 2014 at 1:33pm