IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

DAVID L. HUDSON *Petitioner,* v. MATTHEW BENDER & COMPANY, INC. *and* THE TENNESSEE CODE COMMISSION, *Respondents.*	))))))))))))	 TNSCt No. M2022-01260-SC-R11-CV COA No. M2022-01260-COA-R3-CV Davidson County Chancery Court No. 22-1025-III

RESPONDENT MATTHEW BENDER & COMPANY INC.'S RESPONSE TO APPLICATION FOR PERMISSION TO APPEAL

January 22, 2024

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I. INTRODUCTORY STATEMENT

Petitioner, David L. Hudson ("Hudson"), seeks to compel Respondent, Matthew Bender & Company, Inc. ("Lexis"), a private corporation, to provide reproductions of documents, pursuant to the Tennessee Public Records Act ("TPRA"), *codified at* Tenn. Code Ann. § 10-7-503. The TPRA, however, applies only to records maintained by government agencies, not private entities like Lexis, unless the private entity operates as a functional equivalent of a governmental agency. *Memphis Publ'g Co. v. Cherokee Children & Familv Servs., Inc.,* 87 S.W.3d 67, 79 (Tenn. 2002) (setting out the general framework for determining functional equivalence). This Court has cautioned that the TPRA and the Court's analytical framework are "not intended to allow public access to the records of every private entity which provides any specific, contracted-for services to governmental agencies." *See Memphis Publ'g Co. v. City of Memphis*, No. W2016-01680-COA-R3-CV, 2017 WL 3175652, at *5 (Tenn. Ct. App. July 26, 2017). Indeed, "[a] private business does not open its records to public scrutiny merely by doing business with, or performing services on behalf of, state or municipal government." *Id.*

The question on which Petitioner seeks review is one the Court of Appeals already has decided—that is, whether Lexis's ordinary contract with the Tennessee Code Commission renders Lexis—under the *Cherokee* line of cases analyzed by the Court of Appeals—the functional equivalent of the Commission. The Court of Appeals held Lexis was not the functional equivalent of the Commission. This decision is not only consistent with the established precedent set by *Cherokee* and its progeny, but it is also well-reasoned and firmly grounded in Tennessee law. The *Cherokee* line of cases delineates a range of activities that bring a private entity both within and outside the scope of the TPRA. The Court of Appeals' decision aligns with this established

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authority, reflecting a thoughtful and judicious interpretation of Tennessee law. Given this consistency with precedent, the issue does not present a compelling case for review.

Hudson's application should be denied.

II. THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT LEXIS WAS NOT THE FUNCTIONAL EQUIVALENT OF A GOVERNMENT AGENCY UNDER THE *CHEROKEE* LINE OF DECISIONS.

The Court of Appeals' opinion clearly sets out the relevant factual background. *See Petitioner's Application for Permission to Appeal,* Appendix (hereinafter, "App'x") 3–4. The Tennessee Code Annotated ("TCA") "includes the Tennessee Code but also, among other things, annotations and references to caselaw interpreting the code." *Id.* at 2. The Tennessee Code Commission "produces and publishes the TCA" under the specific statutory authority granted to the Commission. *Id.* at 2–4. The Commission contracts with Lexis to edit the TCA and support the distribution process; the Commission sets the price at which Lexis sells the TCA. *Id.* at 4. As compensation under the contract, Lexis retains the proceeds from its sale of the TCA. *Id.* at 4.

The Court of Appeals held that Lexis "is a private company performing specific services for the state on a contractual basis. It has not assumed responsibility for public functions to such an extent as to become the functional equivalent of a governmental entity." App'x 2. In so doing, the Court of Appeals firmly rooted its decision in this Court's seminal decision *Memphis Publ'g Co. v. Cherokee Children & Familv Servs., Inc.,* 87 S.W.3d 67 (Tenn. 2002), which provides a list of factors for courts to review in determining whether a private entity is subject to disclosure under the TPRA. *See Cherokee,* 87 S.W.3d at 79; *see also* App'x 9. The primary consideration under *Cherokee* is whether the government is circumventing the disclosure of otherwise public records through a contractual relationship with a private party.

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The Court of Appeals determined that *none* of the *Cherokee* factors support the conclusion that Lexis is functionally equivalent to a governmental entity; therefore, as a private entity, it was not required to produce documents under the TPRA. App'x 9–10. In making its findings, the Court of Appeals considered not only *Cherokee*, but other cases applying *Cherokee* cited by Petitioner. *Id.* at 9. For example, in *Allen v. Day,* 213 S.W.3d 244 (Tenn. Ct. App. 2006), the court found that a private entity managing operations for a public arena was the functional equivalent of a governmental entity because it was a participant in decision-making that would bind the government. *Id.* at 246, 261. Lexis has no such authority; rather, "the Commission has the final say on the TCA's contents. Lexis just helps implement the process." App'x 9.

The cases applying *Cherokee* establish a spectrum of activities that may or may not compel a private entity to disclose documents as if it were a government entity. Hudson cites to those cases where Tennessee courts have determined that private entities are performing manifestly public functions. *See, e.g., Memphis*, 87 S.W.3d at 79 ("providing childcare services for indigent families and supervising childcare placements under [state] guidelines"); *Friedmann v. Corrections Corp. of Am.*, 310 S.W.3d 366, 375 (Tenn. Ct. App. 2009) (operating a state prison); *City Press Comm., LLC v. Tennessee Secondary School Athletic Ass'n.*, 447 S.W.3d 230 (Tenn. Ct. App. 2014) (overseeing Tennessee state high school athletics); *Wood v. Jefferson County Eco. Dev. Oversight Comm., Inc.*, No. E2016-01452-COA-R3-CV, 2017 WL 4277711 (Tenn. Ct. App. Apr. 18, 2017) (commission created by county resolution to boost economic development). These cases are outliers. Tennessee courts consistently have held that a mere contractual relationship with the State does not create a functional equivalence such that it "outweighs [the company's] private identity for the purposes of the [TPRA]." *Friedmann*, 310 S.W.3d at 373 (Tenn. Ct. App. 2009). For example, in *Gautreaux v. Internal Med. Educ. Found., Inc.*, 336 S.W.3d 526, 531 (Tenn. 2011),

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this Court held that, "as we stated in *Cherokee,* merely providing services for, or doing business with, a government agency does not render a private entity the functional equivalent of a government agency." *Id.* at 531.

In this case, Lexis's role is the administrative role found in *Gautreaux*. The Court of Appeals agreed: "While the state certainly has always been in the law-making business, it has not traditionally been in the self-publishing business." App'x 9. The decision lists the court's rationale, stating that Lexis "is not controlled by the state," that it "simply adheres to stringent specifications in performing a contracted-for service to the state," that it is "not funded by the state," and that it "was not created by the General Assembly." *Id.*

Indeed, as the Court of Appeals found and as Hudson sets out in his own brief: (1) the printing and publishing a Tennessee code was a private enterprise for nearly 100 years and is still not performed by the government, (2) the only control exercised by the Commission is over the deliverables created by the Lexis in the Contract, which is not equivalent to the control required over Lexis itself, (3) Lexis receives no funding from the Commission or State of Tennessee under the Contract, and (4) Lexis is a 100-year-old company incorporated before the Commission was even created. Through careful and comprehensive examination of each factor, the Court of Appeals held that Lexis is not the functional equivalent of a governmental agency under settled Tennessee law and, therefore, Lexis is not subject to the TPRA.

For this reason alone, Hudson's application should be denied.

III. THE APPLICATION SHOULD NOT BE GRANTED BECAUSE THIS MATTER DOES NOT PRESENT INCONSISTENCIES WITH PRIOR DECISIONS OR A SPLIT IN AUTHORITY.

This Court's review of a Court of Appeals decision is discretionary under Rule 11 of the Tennessee Rules of Appellate Procedure. *See* Tenn. R. App. P. 11(a). Rule 11 was created for the

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purposes of "promoting expediency and simplicity" in the judicial system. *Fletcher v. State*, 951 S.W.2d 378, 382 (Tenn. 1997). Permission to appeal pursuant to Rule 11 is not automatically granted. Instead, the applicant must persuade this Court that a compelling reason justifies granting further review and expenditure of judicial resources. Thus, to gain review under Rule 11, an appealing party must meet a "high standard." *Id.*

Hudson argues that this matter necessitates securing a uniformity of decision. But there is no lack of uniformity in Tennessee decisions. Hudson, instead, complains of asserted error in the application of settled law that he believes needs correction. This is not what Rule 11 contemplates.

This Court has previously granted review to ensure uniformity of decision where there is a genuine split in the legal standards of the lower courts. For example, in *State v. Menke*, 590 S.W.3d 455 (Tenn. 2019), this Court took "the opportunity to resolve the issue" where there was a "split of authority between the different panels of the Court of Criminal Appeals." *Id.* at 468. In that case, the disagreement was about whether the Criminal Savings Statute applied to the amended theft grading statute. *Id.* Some courts applied the statute; others did not. Likewise, in *Bryant v. State*, 460 S.W.3d 513, (Tenn. 2015), this Court granted review to resolve a "disagreement among some members of the Court of Criminal Appeals on the effect of a trial judge's failure to give lesser-included offense instructions or a trial counsel's failure to request such an instruction when a defendant has been convicted of a greater offense." *Id.* at 527, fn. 9. In other words, review was appropriate to address substantive splits in legal authority. Here, there is no such split.

All parties agree the *Cherokee* standard applies. The Court of Appeals did not deviate from the *Cherokee* line of cases. Rather, it applied the *Cherokee* test to the facts in the record. *See* App'x 9–10 (citing this Court's holding and analytical framework from *Cherokee* in full). As explained above, the Court of Appeals correctly held that, under the *Cherokee* standard, Lexis was not acting

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as the functional equivalent of a governmental entity. There is no dispute about whether *Cherokee* applies or whether its holding should be limited or recast. In essence, Hudson's request presents no inconsistency to resolve. Hudson simply disagrees with the Court of Appeals' decision. That is understandable—but it does not suffice under Tenn. R. App. P. 11.

IV. THE APPLICATION SHOULD NOT BE GRANTED BECAUSE THIS MATTER DOES NOT PRESENT A QUESTION OF GREAT PUBLIC INTEREST OR THE NEED TO SECURE SETTLEMENT OF AN IMPORTANT QUESTION OF LAW.

The Court of Appeals also held that Lexis is not required under the TPRA to provide an electronic copy of the TPRA because Hudson's request for free access through a public records request "would circumvent the statutory scheme in place for producing and publishing the TCA." *Id.* at 12. That is, the disclosure would undermine the creation and distribution of the TCA. Because "Tennessee law 'otherwise provides' the exclusive avenue for obtaining the TCA, the document is exempt from disclosure under the TPRA." *Id.*

Hudson contends that the TCA is subject to disclosure and that the issue merits review because it is an important question of law and one of public interest. Hudson's sole reasoning is based on unsupported speculation that the Court of Appeals decision would allow the government to evade disclosure by co-opting other state laws that provide some lesser level of access. Hudson's speculation provides no examples of the potential misuse that could arise or similar situations that have occurred.

Moreover, Hudson's speculation fails to acknowledge the clear analysis provided in the Court of Appeals' decision. Disclosure of a public record is not required when it is "excepted either explicitly by the Act or implicitly by application of another state law." *Patterson v. Convention Ctr. Auth. of Metro. Gov't of Nashville & Davidson Cnty.,* 421 S.W.3d 597, 611 (Tenn. Ct. App. 2013). The appellate decision does not announce any new rule or exemption. Rather, the Court of

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Appeals, citing *Patterson*, examined the "overall statutory mechanism for the production to determine whether title 1, chapter 1 of the TCA and other law serve as an exception to . . . disclosure." App'x 13. The record indicates that "the General Assembly intended to contract with a publisher to produce and publish the TCA and then allow it to be sold by the publisher—not given away for free upon request." *Id.*

The Court of Appeals' ruling is not a general exception as alleged by Hudson but is, instead, specific to the unique facts of the case, the statutory text, and cases interpreting the statute. The decision does not introduce any new rationale for exempting documents from disclosure; instead, it adheres to the established *Patterson* precedent—which Hudson agrees applies. Hudson's asserted downstream effects are speculative. They do not meet the high standard required by Rule 11 for review by this Court.

V. CONCLUSION

The Court of Appeals' decision is in line with the established precedent in *Cherokee*. The decision to deny Hudson's request to compel disclosure is legally sound in its application of *Cherokee* and its progeny, consistent with the intent and purpose of the TPRA, and factually supported in a comprehensive analysis. Moreover, the issues raised in this matter do not meet the high bar for further review because they neither present a split in authority or a question of demonstrable significance. Rather, Hudson simply seeks a different outcome. The application for appeal should be denied.

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CERTIFICATE OF COMPLIANCE

This brief contains 2,197 words and, therefore, complies with the word limitation set forth in Tennessee Rule of Appellate Procedure 30(e).

This 22nd day of January 2024.

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I certify that I have delivered this application by email and first-class mail to counsel for the petitioner at the following addresses:

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This 22nd day of January 2024.

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