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III. INTRODUCTION

In July 2021, Defendant Joshua Debity expressed concerns that the Vintage Village Homeowners Association—the Defendants’ HOA—was violating state and federal law by failing to accommodate the needs of the Defendants’ disabled child.¹ The Plaintiffs—members of the Defendants’ HOA—did not take kindly to Mr. Debity’s concerns. “Your citation to statute is grossly overstated and wholly unnecessary,” Plaintiff Christine Brooks—the HOA’s Vice President—retorted.² Brooks also warned that “[f]urther threats will not be sanctioned.”³

On October 7, 2021, Mr. Debity again requested an accommodation—a wooden safety fence—for his disabled son.⁴ In response—*seven days later*—the HOA followed through on its earlier threat not to “sanction[]” another such request.⁵ In particular, the Plaintiffs—along with Nick Black, the “Vintage Village HOA President”⁶ and Plaintiffs’ counsel below⁷—made good on their threat by suing the Defendants for a “restraining order.”⁸

The Plaintiffs also explicitly tied “proceed[ing]” with this action to a letter that the Defendants’ son’s pediatrician wrote to the HOA. Specifically, in an email with the subject “Richman v. Debity; Blount Co.

¹ R. at 18–21.

² *Id.* at 18.

³ *Id.* at 19.

⁴ *Id.* at 23.

⁵ *Id.* at 1; 19.

⁶ *Id.* at 20.

⁷ *Id.* at 1 (“Atty: Nick Black”).

⁸ *Id.*

General Sessions,” Plaintiffs’ counsel stated:

[T]he Debitys’ doctor’s office (Pediatric Choice) has informed the HOA that the PA that wrote the letter to the HOA is out on maternity leave until 1/5/2022. Said PA asked for an extension until after her return to respond to our last letter. **Can you ascertain from your clients whether they want us to wait until then to take any further action, or to proceed with the information we have?**⁹

Relying on the above evidence, the Defendants filed a Tennessee Public Participation Act (TPPA) Petition that made a prima facie case that the Plaintiffs had sued them for exercising their right to free speech.¹⁰ The Defendants also noted that the conduct that they were *ostensibly* sued for—photographing, “from [the] street[,]”¹¹ potential selective enforcement of HOA rules for purposes of a forthcoming lawsuit against their HOA—was protected by the First Amendment as well.¹²

The Plaintiffs filed a three-page response to the Defendants’ TPPA Petition.¹³ That response failed to introduce any countervailing evidence. The Plaintiffs’ response also made clear that they were not asserting any claim at all. Instead, the Plaintiffs represented that they were only seeking a *remedy*—a “restraining order”—that was unconnected to any substantive cause of action whatsoever.¹⁴

Free-floating remedies untethered to a cause of action are not a thing, though. Thus, the Defendants’ TPPA Petition—which the Trial

⁹ *Id.* at 26 (emphasis added).

¹⁰ *Id.* at 3–27.

¹¹ *Id.* at 1.

¹² *Id.* at 10–12.

¹³ *Id.* at 28–30.

¹⁴ *Id.* at 28 at ¶¶ 1–2.

Court agreed established a prima facie case that this action was filed in response to their protected speech¹⁵—should have been granted due to the Plaintiffs’ failure to timely introduce admissible evidence necessary to sustain a cause of action in response. *See Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 668 (Tenn. Ct. App. 2021) (holding that, when evidence was not timely introduced to support a cognizable claim in response to a TPPA petition, “Plaintiffs failed to meet their burden of proof under section 20-17-105(b), insofar as Plaintiffs essentially failed to respond to Defendant’s TPPA petition at all.”). Barring that, the Defendants’ TPPA Petition should have been granted because the Plaintiffs could not sustain any substantive claim as a matter of law, which the Plaintiffs repeatedly made clear they were not even *alleging*.¹⁶

Contending otherwise, the Plaintiffs make four contrary arguments on appeal. Each is unpersuasive. Most are also waived.

First, the Plaintiffs contend that the TPPA “cannot be applied” to civil warrant restraining orders.¹⁷ As grounds, the Plaintiffs insist that the Blount County General Sessions Court Clerk’s website states that “[a]nyone can file for any reason.”¹⁸ But this argument about reliance on the Blount County General Sessions Court Clerk’s website was never

¹⁵ Tr. of Mar. 4, 2022 Hearing at 11:3–9.

¹⁶ *Id.* at 155:17–19 (“the causes of action are not invasion of privacy and harassment. **The cause of action is a restraining order.**”) (emphasis added); *id.* at 157:21–24 (“I want to go back a little bit to this underlying claim and then what we’re here for because the [TPPA] petition concerns what we filed. **What we filed is a restraining order.**”) (emphasis added). *See also* R. at 28, ¶¶1–2; R. at 1.

¹⁷ Br. of Appellees at 14.

¹⁸ *Id.* at 15.

raised below, so it is waived. Regardless, a clerk's website does not determine the law in Tennessee. Instead, courts determine the law, and this Court's precedent is clear: injunctive relief "is available as a remedy only if an applicant prevails on the merits of a claim." *See City of Lebanon ex rel. Craighead v. Dodson*, No. M2016-01745-COA-R3-CV, 2018 WL 2027239, at *5 (Tenn. Ct. App. Apr. 30, 2018).

Second, the Plaintiffs contend that "Defendants' conduct is not protected under TPPA or the United States Constitution."¹⁹ As grounds, the Plaintiffs assert that the Defendants' conduct constituted "[u]nlawful photographing"—a crime prohibited by Tenn. Code Ann. § 39-13-605.²⁰ Again, this claim is waived, never having been raised below. That defect aside, the Plaintiffs overlook essential elements of Section 39-13-605 that are not even alleged here. So this argument fails, too.

Third, the Plaintiffs contend that the Trial Court erred by ruling that their legal action was filed in response to the Defendants' photography-based exercise of free speech.²¹ The Plaintiffs misconstrue what the Defendants asserted below and why the Trial Court ruled in the Defendants' favor, though. In reality, the Defendants asserted—with substantial supporting evidence—that this action was "filed in response to the Defendants' request for a legally-required accommodation for their disabled son[.]"²² Upon review, the Trial Court ruled in their favor.²³

¹⁹ *Id.* at 17.

²⁰ *Id.*

²¹ *Id.* at 18.

²² R. at 9 (citing R. at 17–27). *See also id.* at 6–7.

²³ Tr. of Mar. 4, 2022 Hearing at 11:3–9.

The central claim raised in the Defendants’ TPPA Petition—that this action was filed in response to the Defendants requesting a disability accommodation for their son—has not been challenged or even *mentioned* by the Plaintiffs on appeal, though. Instead, the Plaintiffs restrict their appeal to contesting a badly distorted claim about the scope of the First Amendment’s protection of photography. But failing to appeal all of the grounds upon which a trial court ruled results in waiver. *See, e.g., Lovelace v. Baptist Mem’l Hosp.-Memphis*, No. W2019-00453-COA-R3-CV, 2020 WL 260295, at *3 (Tenn. Ct. App. Jan. 16, 2020) (collecting cases for the proposition that a party “waive[s] its claim of error on appeal by appealing less than all of the grounds upon which the trial court issued its ruling.”). Thus, this claim is waived, too. This action also facially arises from the Defendants’ exercise of the First Amendment-protected right to take photographs, which the Defendants’ TPPA Petition similarly established.²⁴

Fourth, the Plaintiffs assert that they established “a [p]rima [f]acie [c]ase [f]or the [r]estraining [o]rder.”²⁵ But because the Plaintiffs introduced no pre-hearing evidence at all, they did not introduce evidence of anything. The Plaintiffs are also wrong—in myriad respects—about the TPPA’s procedures and this Court’s jurisprudence interpreting them. Further, because a restraining order *is not a cause of action*, the Plaintiffs did not and could not have established a prima facie case for one, whether before hearing or otherwise. The Plaintiffs’ various attempts to reframe

²⁴ R. at 11–12.

²⁵ Br. of Appellees at 20.

their claim as a private prosecution for the criminal offense of “stalking” or something “similar to an order of protection”²⁶ fail, too.

For all of these reasons, the Trial Court’s ruling that the Defendants met their prima facie burden under Tenn. Code Ann. § 20-17-105(a) should be affirmed. However, the Trial Court erred by failing to grant the Defendants’ TPPA petition due to the Plaintiffs’ failure to “establish[] a prima facie case for each essential element of the claim in the legal action” under Tenn. Code Ann. § 20-17-105(b) in response. Thus, the Trial Court’s July 6, 2022 Order denying the Defendants’ TPPA Petition should be reversed with instructions to grant it. The Plaintiffs’ claim (as cross-appellants) for attorney’s fees on appeal²⁷ should also be denied.

IV. ARGUMENT

A. THE TPPA APPLIES TO ALL LEGAL ACTIONS FILED IN RESPONSE TO A PARTY'S EXERCISE OF THE RIGHT OF FREE SPEECH.

The Plaintiffs maintain that “[t]he requirements and procedures for evaluation of a TPPA Petition cannot be applied directly to the nature of a Civil Warrant Restraining Order.”²⁸ As grounds, they assert that “[r]estraining orders are a mechanism for preventing a wrongful harm”²⁹ and that “[t]he Civil Warrant Restraining Order is a legal mechanism utilized to resolve disputes through the informal evidentiary process of the General Sessions Courts.”³⁰ The Plaintiffs also rely on an “FAQ”—

²⁶ *Id.* at 25.

²⁷ *Id.* at 25–26.

²⁸ *Id.* at 14.

²⁹ *Id.*

³⁰ *Id.*

which is not in the record—on the Blount County Circuit Court Clerk’s website, which apparently states that: “Anyone can file [a restraining order] for any reason.”³¹ As detailed below, these claims are meritless.

First, Plaintiffs’ arguments were not raised below. The Plaintiffs’ response to the Defendants’ TPPA Petition is set forth at R. 28–30. Nowhere did the Plaintiffs contend that the TPPA does not apply to restraining orders, and nowhere did the Plaintiffs contend that a clerk’s FAQ precludes application of the TPPA. *See id.* So those claims are waived. *See Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996) (“Under Tennessee law, issues raised for the first time on appeal are waived.”).

Second, the Plaintiffs are wrong about the purpose of a restraining order. A restraining order is not a free-standing “mechanism for preventing a wrongful harm,” whatever that means.³² Instead, used properly, a restraining order is a form of preliminary “[i]njunctive relief[,]” *see* Tenn. R. Civ. P. 65.01, the purpose of which is “to preserve the status quo pending a determination on the merits of their cause.” *Fannon v. City of LaFollette*, 329 S.W.3d 418, 430 (Tenn. 2010) (cleaned up). Further, as this Court has made clear, “[i]njunctive relief ... is a remedy, not an independent cause of action.” *See City of Lebanon ex rel. Craighead*, 2018 WL 2027239, at *5 (quoting *Henke v. ARCO Midcon, L.L.C.*, 750 F. Supp. 2d 1052, 1059–60 (E.D. Mo. 2010)). *See also Smith Mech. Contractors, Inc. v. Premier Hotel Dev. Grp.*, 210 S.W.3d 557, 565 (Tenn. Ct. App. Jul. 12, 2006).

³¹ *Id.* at 15.

³² *Id.* at 14.

Given this context, a legal action that seeks a restraining order is not exempt from the TPPA, which applies broadly to any action “filed in response to a party’s exercise of the right of free speech, right to petition, or right of association[.]” Tenn. Code Ann. § 20-17-104(a). A General Sessions civil warrant is such an “action.” *See, e.g., Davis v. Tennessee Rural Health Improvement Ass’n*, No. M2015-00573-COA-R3-CV, 2015 WL 7748636, at *1 (Tenn. Ct. App. Nov. 30, 2015); *Moore v. Correct Care Sols., LLC*, No. W2012-01387-COA-R3-CV, 2013 WL 1190821, at *5 (Tenn. Ct. App. Mar. 25, 2013). As such—and as this Court has already held—the TPPA applies to qualifying actions filed in General Sessions Court. *See Nandigam Neurology*, 639 S.W.3d at 654 (“[W]e affirm the decision of the general sessions court dismissing the plaintiffs’ legal action pursuant to the TPPA.”).

Nor does *Thomas v. Quintero*, 126 Cal. App. 4th 635, 642, 24 Cal. Rptr. 3d 619, 621 (2005), suggest otherwise. Indeed, that decision *applied* California’s anti-SLAPP statute in this context. *See id.* (“We reverse, holding that anti-SLAPP motions may be filed challenging petitions for injunctive relief . . .”).

Regarding restraining orders, *Thomas* held that “the anti-SLAPP statute does not apply to . . . **an interim temporary restraining order** (TRO),” *id.* at 642 (emphasis added), which the opinion explained “should be issued as a prelude to a hearing on the petition for injunctive relief.” *Id.* Thus, the *Thomas* court concluded that, although petitions for injunctive relief were within the ambit of the statute, *id.* at 621, seeking “temporary” relief “as a prelude to” such petitions was not. *Id.* at 642.

That is not the situation here. Here, the restraining order that the Plaintiffs seek is not a “temporary” one that serves “as a prelude to” final merits relief regarding a separate claim. *Id.* Instead, the restraining order that the Plaintiffs seek *is their entire claim*.³³ Thus, the permanent “restraining order” the Plaintiffs seek is indistinguishable from the *Thomas* petitioner’s petition for injunctive relief, which the *Thomas* court correctly held an anti-SLAPP petition may be used to challenge. *See id.* (“anti-SLAPP motions may be filed challenging petitions for injunctive relief”).

Third, the FAQ on the Clerk’s website—which is not in the record, but which apparently states that “[a]nyone can file [a restraining order] for any reason”³⁴—does not determine the law in Tennessee. “[I]t is the province and duty of the judiciary to interpret the law[.]” *State v. Crawford*, No. 02C01-9806-CR-00169, 1999 WL 309105, at *5, n.4 (Tenn. Crim. App. May 12, 1999). Thus, litigants who rely on a clerk’s website for legal advice—particularly when they are represented by counsel—do so at their own peril. *Cf. McElhaney v. State*, No. 03C01-9603-CR-00097, 1997 WL 214847, at *1, n.1 (Tenn. Crim. App. May 1, 1997) (affirming dismissal where *pro se* litigant’s error was attributable to District Attorney’s wrong advice, given that “it is the trial court’s responsibility to determine whether post-conviction petitions are filed in accordance with statutory requirements.”). Doubly so when a website makes a claim as obviously wrong as “[a]nyone can file [a restraining order] for any

³³ Tr. of Mar. 4, 2022 Hearing at 155:17–19; *id.* at 157:21–24; R. at 28, ¶¶1–2; R. at 1.

³⁴ Br. of Appellees at 15.

reason.”³⁵ That is perhaps why several of Tennessee’s standard notices advise that “the clerk cannot give you legal advice,” Tenn. Code Ann. § 26-2-404, *see also* Tenn. Code Ann. § 26-2-216 (same), and it is why several jurisdictions’ Local Rules provide that: “Court clerks and staff are not allowed to give legal advice[.]” *See* TN R 18 DIST PRAC Introduction. *See also* TN R 22 DIST PRAC Rule 33 (“The Clerk and Master’s office is not authorized to provide legal advice”).

Were the Plaintiffs acting *pro se*, perhaps this would present a different scenario. But they were not. They had counsel. No minimally competent attorney in Tennessee could believe that: “[a]nyone can file [a restraining order] for any reason[.]”³⁶ either. Accordingly, the Plaintiffs’ purported reliance on a clerk’s FAQ cannot save them.

B. THE DEFENDANTS’ CONDUCT WAS PROTECTED BY THE FIRST AMENDMENT.

The Plaintiffs alternatively contend that the “Defendants’ conduct is not protected under TPPA or the United States Constitution.”³⁷ In particular, the Plaintiffs claim that the Defendants’ conduct constituted “[u]nlawful photographing”—a crime prohibited by Tenn. Code Ann. § 39-13-605.³⁸ For several reasons, though, this claim fails, too.

First, once again, the argument is waived. The argument appears nowhere in the Plaintiffs’ response to the Defendants’ TPPA Petition.³⁹ Instead, the only mention of Tenn. Code Ann. § 39-13-605 below appears

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 17.

³⁸ *Id.*

³⁹ R. at 28–30.

in a single sentence in the Plaintiffs’ post-trial brief, where the Plaintiffs cited the statute for the proposition that “individuals in this State do not have the unfettered right to take photographs in every situation.”⁴⁰ No argument was ever raised that the Defendants’ photography violated Section 39-13-605. So the claim is waived. *See Black*, 938 S.W.2d at 403.

Second, the mere existence of a state statute prohibiting some conduct does not ipso facto deprive the conduct of First Amendment protection. *See* U.S. Const. art. VI, cl. 2.

Third, the Plaintiffs overlook essential elements of Tenn. Code Ann. § 39-13-605. Among them, a photograph must be “taken for the purpose of sexual arousal or gratification of the defendant” or “[i]nclude[] the unclothed intimate area of the individual[.]” *See* Tenn. Code Ann. § 39-13-605(a)(1)(B); Tenn. Code Ann. § 39-13-605(a)(2)(A). Neither of those things is even *alleged* here, including in the Plaintiffs’ newly-developed argument on appeal.

Fourth, the Plaintiffs overlook—indeed, they fail even to muster an argument regarding—the fact that this action was not really a response to photography. Instead, the Defendants demonstrated that this action was filed in response to the Defendants requesting an accommodation for their disabled son—speech that the Plaintiffs do not dispute was protected. Thus, Plaintiffs’ argument fails on several grounds.

C. THE TRIAL COURT CORRECTLY RULED THAT THE PLAINTIFFS’ LEGAL ACTION WAS FILED IN RESPONSE TO THE DEFENDANTS’ EXERCISE OF FREE SPEECH.

The Plaintiffs also contend that the Trial Court erred by ruling that

⁴⁰ *Id.* at 34.

the Defendants demonstrated that their legal action was filed in response to their exercise of the right of free speech.⁴¹ As grounds, the Plaintiffs assert that: “Defendants boldly allege their conduct in taking photographs of Plaintiffs’ minor daughter in a bikini along with repeatedly harassing Plaintiffs’ family is protected conduct under their First Amendment right to free speech.”⁴² The Defendants have alleged nothing of the sort, though.

Instead, the Defendants alleged—and they established with uncontested evidence—that this action was a response to their renewed request for an accommodation for their disabled son. They did so by demonstrating that:

(1) the Plaintiffs reacted with hostility to and warned that they would not “sanction[]” further requests for an accommodation for the Defendants’ disabled son;⁴³

(2) the Plaintiffs and the HOA’s President sued the Defendants—apparently without even having a cause of action in mind—within seven days of the Defendants renewing their request for a disability accommodation;⁴⁴ and

(3) in an email about this litigation, Plaintiffs’ counsel expressly tied “proceed[ing]” with this action to a letter that the Defendants’ son’s pediatrician wrote to the HOA.⁴⁵

⁴¹ Br. of Appellees at 18–19.

⁴² *Id.* at 19.

⁴³ R. at 19.

⁴⁴ *Id.* at 23; *id.* at 1.

⁴⁵ *Id.* at 26.

Upon review of this evidence, the Trial Court agreed that the Defendants met their prima facie burden under Tenn. Code Ann. § 20-17-105(a).⁴⁶ The central ground underlying the Defendants’ claim on the matter also has not been challenged by the Plaintiffs on appeal. Instead, the Plaintiffs’ only mention of it is a single citationless sentence asserting that this matter is “unrelated” to the HOA’s hostility to the Defendants’ request for a disability accommodation.⁴⁷ That unsupported, “skeletal” argument results in waiver. *See Sneed v. Bd. of Pro. Resp. of Supreme Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010); *Adams v. Hughes*, No. W2020-00450-COA-R3-CV, 2022 WL 1210520, at *1, n.5 (Tenn. Ct. App. Apr. 25, 2022).

Failing to appeal all of the grounds upon which a trial court issued a ruling results in waiver, too. *See Augustin v. Bradley Cnty. Sheriff’s Off.*, 598 S.W.3d 220, 226–27 (Tenn. Ct. App. Oct. 2, 2019). As this Court explained in *Lovelace*, 2020 WL 260295, at *3: “Generally, where a trial court provides more than one basis for its ruling, the appellant must appeal all the alternative grounds for the ruling.” *Id.* Otherwise, the claim is waived. *See id.* (collecting cases).

Here, too, the Plaintiffs’ Brief challenges “less than all of the grounds upon which the trial court issued its ruling.” *Id.* Thus, the Plaintiffs’ claim—as cross-appellant—that the Trial Court “erred in finding Plaintiffs’ Civil Warrant Restraining Order was based on, relating to, or was in response to Appellants’ right to free speech as

⁴⁶ Tr. of Mar. 4, 2022 Hearing at 11:3–9.

⁴⁷ Br. of Appellees at 19.

required by Tenn. Code Ann. § 20-17-105(a)”⁴⁸ is waived for failure to appeal each alternative ground for the ruling. *See id.* The Plaintiffs waived any such claim in the Trial Court by failing to contest the Defendants’ argument with evidence, too. *Compare* R. at 9 (advancing evidence-supported theory of retaliation), *with* R. at 28–30 (presenting no evidence contesting the retaliatory nature of this lawsuit).

Assuming that the only ground for the Trial Court’s ruling on the matter were the Defendants’ independent claim that photography is protected speech, though, the Defendants would still prevail. The TPPA makes explicit reference to protecting “audiovisual work[.]” *See* Tenn. Code Ann. § 20-17-103(6)(F). The act of creating audiovisual records—whether due to the protected acts of photography itself, or else, as a corollary First Amendment right—also receives First Amendment protection. *See, e.g., Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203-04 (9th Cir. 2018) (finding that creating an audiovisual recording is speech because “[t]he act of recording is itself an inherently expressive activity”); *Am. C.L. Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (“The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1207-08 (D. Utah 2017) (collecting cases and noting that “it appears the consensus among courts is that the act of recording is protectable First Amendment speech.”); *Knight v. Montgomery Cnty., Tennessee*, 470 F.

⁴⁸ *Id.* at 5.

Supp. 3d 760, 766 (M.D. Tenn. 2020) (“nationwide, there is a growing trend of courts adopting the view that video recording is indeed speech for First Amendment purposes.”). *Cf. Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 832 (1st Cir. 2020) (noting “the decisions of several of our sister circuits that similarly have held that such recording warrants some degree of First Amendment protection as a type of newsgathering.”); *Massachusetts v. Oakes*, 491 U.S. 576, 591 (1989) (J. Brennan dissenting) (noting that “photography” is an activity that “ordinarily qualif[ies] for First Amendment protection.”); *Kaplan v. California*, 413 U.S. 115, 119 (1973) (“The Court has applied similarly conceived First Amendment standards to moving pictures, to photographs, and to words in books.”).

The location of the photography over which the Defendants were sued—here, it was “from [the] street”⁴⁹—affects the inquiry and mandates application of the TPPA’s speech-based protections as well. “[S]treets” are “traditionally among the most public and accessible of fora.” *City of Maryville v. Langford*, No. E2011-01326-COA-R3-CV, 2012 WL 2309607, at *8, n.5 (Tenn. Ct. App. June 19, 2012). “Thus the nature of the forum in this case is public.” *Charlotte Ave. Med. Clinic, Inc. v. Freeman*, No. 88-270-II, 1989 WL 9521, at *3 (Tenn. Ct. App. Feb. 10, 1989).

For all of these reasons, even if this action were limited to its pretense, the Defendants still met their prima facie burden of establishing that this action was in response to the Plaintiffs’ exercise of

⁴⁹ R. at 1.

their First Amendment rights (photography) in a public forum (the street). *See* Tenn. Code Ann. § 20-17-105(a). As a result, the Trial Court correctly determined that the burden shifted to the Plaintiffs to establish a prima facie case for each essential element of their claim.

D. THE PLAINTIFFS FAILED TO ESTABLISH A PRIMA FACIE CASE FOR ANY CAUSE OF ACTION.

1. The Plaintiffs were required to introduce admissible evidence supporting their claim at least five days before hearing.

Because the Defendants met their initial burden under Tenn. Code Ann. § 20-17-105(a), the Plaintiffs were obligated to “establish[] a prima facie case for each essential element of the claim in the legal action” to avoid dismissal. Tenn. Code Ann. § 20-17-105(b). The Plaintiffs’ “response to the petition, including any opposing affidavits,” also had to “be served and filed by the opposing party no less than five (5) days before the hearing or, in the court’s discretion, at any earlier time that the court deems proper.” Tenn. Code Ann. § 20-17-104(c). The Plaintiffs did not introduce any admissible evidence five days before the hearing on the Defendants’ TPPA Petition, though, which their three-page, evidentiarily barren response confirms.⁵⁰ Thus, dismissal was mandatory.

Insisting otherwise, the Plaintiffs raise three arguments, all of which are meritless.

First, they assert that “Plaintiffs timely answered Defendants’ TPPA Petition.”⁵¹ Nobody has argued that the Plaintiffs’ response was untimely, though. Instead, the issue is that the Plaintiffs’ response

⁵⁰ R. at 28–30.

⁵¹ Br. of Appellees at 21.

contained no evidence establishing “a prima facie case for each essential element of the claim in the legal action,” see Tenn. Code Ann. § 20-17-105(b), which is what the Plaintiffs needed to do to avoid dismissal.

Second, the Plaintiffs insist that they “Proffered Admissible Evidence Supporting the Necessity of the Civil Warrant Restraining Order Application” and that they were allowed to do so with live testimony at the Parties’ TPPA hearing.⁵² As grounds, they contend that that is what happened in *Nandigam Neurology*, 639 S.W.3d 651, and they assert that it is “notabl[e]” that “the trial court heard testimony” in that case.⁵³

Because the author of this Brief was defense counsel in *Nandigam*, the undersigned can confidently report that that is not what happened there at all. No testimony was taken in the case. Instead—as here—the plaintiffs timely answered the defendant’s TPPA petition, see *Nandigam Neurology*, 639 S.W.3d at 655 (“Plaintiffs answered Defendant’s petition for dismissal”), but they failed to do so *with evidence*. Then, six days after the parties’ TPPA hearing, the plaintiffs attempted to supplement their response with the evidence that had been due at least five days before hearing. See *id.* at 655–56. By this point, though, it was too late, since the TPPA provided that such evidence was due “no less than five (5) days before the hearing or, in the court’s discretion, at any **earlier** time that the court deems proper.” See Tenn. Code Ann. § 20-17-104(c) (emphasis added). Thus, the trial court refused to consider the evidence. Upon

⁵² *Id.* at 22.

⁵³ *Id.*

review, this Court then affirmed the trial court’s ruling as “well-founded” because—by filing their evidence too late—the *Nandigam* plaintiffs “essentially failed to respond to Defendant’s TPPA petition at all.” *Nandigam Neurology*, 639 S.W.3d at 668.

Given this context, the Plaintiffs’ insistence that *Nandigam* permitted live testimony, but otherwise, that “[t]here is little comparison between the instant case” and *Nandigam*, is misplaced.⁵⁴ As to the dispositive issue presented here—whether a plaintiff’s failure to timely respond to a properly supported TPPA petition with pre-hearing evidence requires dismissal—the cases are identical. There, as here, the Plaintiffs timely responded to a TPPA Petition but failed to do so with evidence. There, as here, the Plaintiffs attempted to cure that failure by introducing evidence after the TPPA’s five-day pre-hearing deadline expired. There, as here, the Plaintiffs’ failure to meet a properly supported TPPA petition by introducing timely admissible evidence was tantamount to “fail[ing] to respond to [the petitioners’] TPPA petition at all.” *Nandigam Neurology*, 639 S.W.3d at 668. Thus, there, as here, dismissal was mandatory.

Offering another approach, the Plaintiffs contend that “[u]nder the TPPA statute, the trial court ‘may allow specified and limited discovery relevant to the petition upon a showing of good cause.’”⁵⁵ They also claim that that is what the Trial Court did when it admitted “evidence of live witness testimony offered at the hearing[.]”⁵⁶ That is not what the Trial

⁵⁴ *Id.*

⁵⁵ *Id.* at 23.

⁵⁶ *Id.*

Court did, though. Nor could it have done so, given that the Plaintiffs neither moved to take discovery nor attempted to demonstrate good cause to do so. The Plaintiffs also appear to know that Tenn. Code Ann. § 20-17-104(d)'s discovery stay was never *actually* lifted, given that—later in their Brief—the Plaintiffs complain that the Defendants' TPPA petition and this appeal have “required a stay in . . . discovery[.]”⁵⁷

For all of these reasons, the Plaintiffs' failure to introduce timely pre-hearing evidence supporting their claim was fatal. The Defendants' TPPA Petition must be granted accordingly.

2. The Plaintiffs did not establish a prima facie case establishing any element of any cognizable claim, which the Plaintiffs repudiated having asserted at all.

A restraining order is a form of injunctive relief. *See* Tenn. R. Civ. P. 65.01. Thus, it is “a remedy, not an independent cause of action.” *See City of Lebanon ex rel. Craighead*, 2018 WL 2027239, at *5 (cleaned up). *See also Smith Mech. Contractors, Inc.*, 210 S.W.3d at 565 (“when a party is seeking injunctive relief, that party should bring one action containing both the request for injunctive relief as well as the underlying cause of action.”). The Plaintiffs also repeatedly represented that they are *only* seeking injunctive relief here and are *not* asserting any cause of action to go with it.⁵⁸ Thus, it is impossible for the Plaintiffs to have “establishe[d] a prima facie case for each essential element of the claim in the legal action[.]” *see* Tenn. Code Ann. § 20-17-105(b), because the Plaintiffs repeatedly disclaimed bringing any substantive claim at all.

⁵⁷ *Id.* at 26.

⁵⁸ *See* n.16, *supra*.

Confronted with this fatal deficiency, the Plaintiffs now attempt to change horses, *contra Wells Fargo Bank, N.A. v. Dorris*, 556 S.W.3d 745, 759 (Tenn. Ct. App. Dec. 28, 2017) (“It is well-settled that an appellant is bound by the evidentiary theory set forth in the trial court, and may not change theories on appeal.”) (cleaned up). Specifically, the Plaintiffs now assert that they were bringing a “stalking” claim, and that “Plaintiffs’ evidence satisfies a *prima facie* case for stalking under Tenn. Code Ann. § 39-17-315.”⁵⁹ Pursuing hidden claims that were not disclosed before hearing is incompatible with the TPPA, though, which requires that petitioners be afforded an opportunity to raise “valid defense[s] to the claims in the legal action” using admissible pre-hearing evidence. *See* Tenn. Code Ann. § 20-17-105(c). Regardless, Plaintiffs’ argument is meritless.

First, Section 39-17-315 is a criminal—rather than civil—cause of action. As such, the Plaintiffs lack any authority to maintain such a claim. As this Court recently explained in *Tennesseans for Sensible Election Laws v. Slatery*, No. M2020-01292-COA-R3-CV, 2021 WL 4621249, at *5 (Tenn. Ct. App. Oct. 7, 2021), *appeal denied* (Mar. 24, 2022):

Plaintiff does not argue that the criminal statute provides a private right of action. Moreover, Tennessee courts “have refused to imply a private right of action in ... statutes enforced through governmental remedies.” *Brown v. Tennessee Title Loans, Inc.*, 328 S.W.3d 850, 860 (Tenn. 2010). Significantly, the enforcement mechanism outlined in § 2-19-142 is limited to criminal sanctions.

⁵⁹ Br. of Appellees at 23.

Id.

Thus, lacking a private right to enforce Section 39-17-315, the Plaintiffs could not have established their burden of demonstrating each element of a cognizable claim below. The Plaintiffs also failed to establish the *prima facie* elements of stalking regardless.⁶⁰

Perhaps recognizing these defects, the Plaintiffs alternatively contend that: “[a] person who believes they have been the victim of stalking can apply for an order of protection pursuant to Tenn. Code Ann. § 39-17-315.”⁶¹ The Plaintiffs did not seek an order of protection, though. Nor do they claim to have been seeking one. Instead, the Plaintiffs assert (for the first time on appeal, rendering it waived, *see Black*, 938 S.W.2d

⁶⁰ Tenn. Code Ann. § 39-17-315(a)(4) explicitly excludes “constitutionally protected activity or conduct that serves a legitimate purpose” from the definition of harassment, *see id.* at § 39-17-315(a)(3), which would encompass taking photographs from a public street to document potential selective enforcement of HOA violations for use in a forthcoming ADA lawsuit. The alleged conduct also does not fall within the statute’s definition of “course of conduct,” *see id.* at § 39-17-315(a)(1), given that Mr. Debity did not take the photo about which the Plaintiffs complain. *See* Tr. of Mar. 4, 2022 Hearing at 23:13–14. As to Mrs. Debity, the conduct complained of—“taking pictures” of the Plaintiffs’ home and lawn/driveway “from [the] street[.]” *see* R. at 1, in which Plaintiffs’ daughter incidentally appeared—(1) does not demonstrate a “willful course of conduct[.]” Tenn. Code Ann. § 39-17-315(a)(4); and (2) it does not amount to a “pattern of conduct . . . evidencing a continuity of purpose . . . in which [Mrs. Debity] . . . follow[ed], monitor[ed], observe[d], surveil[ed], threaten[ed], or communicate[d] to” any person, *id.* at § 39-17-315(a)(1). The Plaintiffs have also failed to allege that the supposed victim in all this—their daughter—suffered any sort of “emotional distress[.]” *see* Tenn. Code Ann. § 39-17-315(a)(3), and their daughter is not a plaintiff in this matter anyhow.

⁶¹ Br. of Appellees at 25.

at 403) that they sought something “substantially similar to an order of protection.”⁶²

Even through this appeal, though, Plaintiff David Richman does not claim that he was stalked, so this Court should waste no time granting the Defendants’ TPPA Petition as to him. Nor does either Plaintiff claim that Mrs. Debity ever stalked them, so her TPPA petition should be granted as to both Plaintiffs.

Regardless, what the Plaintiffs sought is not “substantially similar to an order of protection,” and there is no such thing as an order-of-protection-adjacent claim, anyway. An order of protection is a statutory cause of action under Tennessee law. *See* Tenn. Code Ann. § 36-3-601, *et seq.* It is also a serious claim that is not subject to the type of casual, retrospective reimagination that the Plaintiffs propose to have this Court embrace here, given that granting even a temporary order of protection results in—at minimum—the termination of a fundamental constitutional right. *See* Tenn. Code Ann. § 36-3-604(c)(1).

There are also several clues that the Plaintiffs’ civil warrant was not a petition for an order of protection, beginning with the fact that the contents of the “NOTICES TO DEFENDANT(S)” sheet attached to their civil warrant (addressing the consequences of a default judgment) is incompatible with such a petition.⁶³ Most simply: an order of protection may be sought only “by filing a sworn petition alleging domestic abuse, stalking, or sexual exploitation of a minor, sexual assault, or a human

⁶² *Id.*

⁶³ R. at 2.

trafficking offense by the respondent.” *See* Tenn. Code Ann. § 36-3-602(a). Here, though, the Plaintiffs’ civil warrant was not sworn by either Plaintiff, and it did not allege any of those things.⁶⁴

In summary: Even after the Trial Court improperly allowed the Plaintiffs to introduce live witness testimony during a TPPA hearing, the Plaintiffs did not establish a *prima facie* case establishing any element of any cognizable claim. Indeed, the Plaintiffs disavowed bringing any actual claim at all.⁶⁵ As such, the Defendants’ TPPA Petition should have been granted due to the Plaintiffs’ failure to meet their burden.

E. THE PLAINTIFFS ARE NOT ENTITLED TO ATTORNEY’S FEES.

The Plaintiffs also contend that they are entitled to an award of attorney’s fees because “Defendants filed this TPPA Petition frivolously”⁶⁶ within the meaning of Tenn. Code Ann. § 20-17-107(b). Given that the Defendants *met* their burden under Tenn. Code Ann. § 20-17-105(a), though⁶⁷—and given that the Plaintiffs have failed even to contest the central ground for that ruling on appeal—that is a tough sell.

Regardless, the Defendants’ petition was not frivolous. The Defendants demonstrated—with evidence—that Plaintiff Brooks reacted with hostility to the Defendants’ request for a disability accommodation and warned that “[f]urther threats will not be sanctioned.”⁶⁸ They also demonstrated that this lawsuit was filed a week after their request for a

⁶⁴ *Id.* at 1.

⁶⁵ Tr. of Mar. 4, 2022 Hearing at 155:17–19; *id.* at 157:21–24.

⁶⁶ Br. of Appellees at 26.

⁶⁷ Tr. of Mar. 4, 2022 Hearing at 11:3–9.

⁶⁸ R. at 19.

disability accommodation was renewed.⁶⁹ They further demonstrated that in an email regarding this lawsuit, Plaintiffs' counsel explicitly tied "proceed[ing]" with this action to a letter that the Defendants' son's pediatrician wrote to the HOA.⁷⁰ The Plaintiffs also failed to respond to the Defendants' TPPA with evidence and admitted that they sued the Defendants without a cause of action. Thus, the Defendants' TPPA Petition was not frivolous.

V. CONCLUSION

For the foregoing reasons, this Court should remand this case with instructions to:

1. Grant the Defendants' TPPA Petition; and
2. Award the Defendants their attorney's fees, costs, and expenses.

⁶⁹ *Id.* at 23; *id.* at 1.

⁷⁰ *Id.* at 26.

Respectfully submitted,

By: /s/ Daniel A. Horwitz

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to this Court's February 23, 2023 order, this Brief contains 6,000 words, as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

By: /s/ Daniel A. Horwitz
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CERTIFICATE OF SERVICE

I hereby certify that on this the 24th day of February, 2023, a copy of the foregoing was served via the Court's electronic filing system, via email, and/or via USPS mail, postage prepaid, to the following parties:

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