IN THE SUPREME OF TENNESSEE
AT NASHVILLE

RECIPIENT OF FINAL EXPUNCTION ORDER IN MCNAIRY COUNTY CIRCUIT COURT CASE NO. 3279,	§	
Plaintiff-Appellant,	§	
v.	§	Case No.: M2021-00438-SC-R11-CV
DAVID B. RAUSCH, DIRECTOR OF THE TENNESSEE BUREAU OF INVESTIGATION; and TENNESSEE BUREAU OF INVESTIGATION,	§	M2021-00438-COA-R9-CV Davidson County Chancery Court Case No.: 20-967-III
Defendants-Appellees.	§	

REPLY BRIEF OF PLAINTIFF-APPELLANT

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Date: November 8, 2021

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, & Court Rules

Additional Authorities

III. INTRODUCTION

All Parties agree that the McNairy County Circuit Court granted the Plaintiff a final expungement order in February 2019 that was never appealed. The Defendants admit that they have disobeyed the Plaintiff's final expungement order. The Defendants also insist that they may refuse to comply with the order because (they assert) it is erroneous.

As the Court of Criminal Appeals recently explained, though, "the remedy for an erroneous grant of an expunction is properly sought by direct appeal[.]" *See State v. Brown*, No. E2019-01462-CCA-R3-CD, 2020 WL 6041807, at *2 (Tenn. Crim. App. Oct. 13, 2020) (citing Tenn. R. App. P. 3(b), (c))), *no app. filed*. The *Brown* Court's unanimous opinion thus provides the answer to "[t]he single issue presented in this appeal[.]"[1] Specifically, when a court with subject matter jurisdiction enters a genuine expungement order, "the remedy for an erroneous grant of an expunction is properly sought" through this Court's established judicial processes. *Id.* By contrast, seeking *no* remedy—and disobeying an assertedly erroneous final court order instead—is contemptuous. *See Konvalinka v. Chattanooga-Hamilton Cty. Hosp. Authority*, 249 S.W.3d 346, 355 (Tenn. 2008) ("An order is not rendered void or unlawful simply because it is erroneous or subject to reversal on appeal. Erroneous orders must be followed until they are reversed.") (citations omitted). Accordingly, the Defendants' claim that the TBI may sit in review of final judicial rulings and disobey expungement orders that it considers erroneous contravenes clearly established law. *See id.*

[1] R. at 413.

Notably, the Defendants do not contest the Plaintiff's analysis of this Court's res judicata, finality, and contempt jurisprudence—all of which independently compel the conclusion that the Defendants lack authority to disobey final expungement orders. Instead, the Defendants maintain that "res judicata, finality, and contempt of [an] expungement order simply do not apply" under circumstances when the TBI considers an expungement order erroneous.[2] The Defendants cite no authority for this unprecedented claim, though,[3] and none exists.

Instead, the Defendants insist that this Court's longstanding and exceptionless res judicata, finality, and contempt jurisprudence should be ignored because the circumstances presented here are "narrow[.]"[4] It is fair to wonder, however, where the TBI's self-authorized contempt would actually end. In their Answer below, for example, the Defendants outright denied—without qualification—the Plaintiff's allegation that "[t]he Defendant TBI is not empowered to disregard court orders, including court orders relating to expunction."[5] The TBI has a disturbing and recent history of claiming other non-existent authority, too. *See State v. Allen*, 593 S.W.3d 145, 155 (Tenn. 2020) ("The TBI cites no statute authorizing it to make the initial classification determination."). And although the Defendants imagine themselves to be special litigants who may sit in final review of the judiciary and exercise supreme judicial

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[2] *See* Defendants' Brief at 26.

[3] *See id.*

[4] *Id.* at 34.

[5] R. at 5, ¶ 17; R. at 102, ¶ 17 ("DENY.").

authority by acting as a self-styled "failsafe" against assertedly erroneous court orders,[6] the Defendants are wrong in every conceivable respect.

The Defendants are not special at all. Indeed, *every* litigant who appeals a trial court's order believes that the trial court ruled erroneously, and that the law compelled some other result. The appellate process exists to correct such asserted errors, though. *See Ruby-Ruiz v. State*, No. M2019-00062-CCA-R3-PC, 2020 WL 7025139, at *3 (Tenn. Crim. App. Nov. 30, 2020) ("The Tennessee Court of Criminal Appeals is an intermediate, error-correction court."), *no app. filed*. Appellate review also extends to—and it is available as a matter of right regarding—assertedly erroneous expungement orders like the Plaintiff's. *See Brown*, 2020 WL 6041807, at *2 (citing Tenn. R. App. P. 3(b), (c)).

When a litigant forgoes appellate review of a trial court's expungement order, though, the order becomes final, and all issues that were or could have been raised regarding it—*including the underlying eligibility of an offense that was ordered expunged*—become res judicata. *See State ex rel. Johnson v. Gwyn*, No. M2013-02640-COA-R3-CV, 2015 WL 7061327, at *7 (Tenn. Ct. App. Nov. 10, 2015) ("[R]es judicata bars not only issues that were actually decided but also those which '*could have been raised*' in the former suit." (quoting *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 178 (Tenn. Ct. App. 2000))), *no app. filed*. At that point, the res judicata effect of a final expungement order also extends not only to the parties themselves, but to "their privies" as well. *Rainbow Ridge Resort, LLC v. Branch Banking & Tr. Co.*, 525 S.W.3d

[6] *See* Defendants' Brief at 22–23.

252, 259 (Tenn. Ct. App. 2016) (cleaned up). And once such a final and unappealable order has issued, all litigants—even TBI officials—are expected to respect the judiciary's final authority.

With the above context in mind, the trial court's order should be vacated. The Defendants do not even attempt to defend the order on the basis that the trial court advanced to support it, which was that "[i]f the TBI concludes the offense is not eligible for expunction, the party seeking expunction is given due process under section 40-39-207(g)(1) to contest the TBI's determination."[7] Contrary to the trial court's ruling, section 40-39-207(g)(1) exclusively concerns "termination of registration requirements," and it has no application to expungement determinations at all.

Instead, expungement determinations are made exclusively by criminal courts in criminal cases—litigation in which the TBI has no known authority to participate. *See Allen*, 593 S.W.3d at 154 n.13 ("We also are unaware of any rule or precedent authorizing the criminal court to allow the TBI to intervene in either an open or closed criminal case[.]"). As a result, the TBI's duties under Tennessee Code Annotated § 40-32-102(b) are not merely "general[,]" as the TBI insists.[8] Instead, they are comprehensive, mandatory, ministerial, and absolute, *see* Tenn. Code Ann. § 40-32-102(b) ("The Tennessee bureau of investigation shall remove expunged records from the person's criminal history within sixty (60) days from the date of receipt of the expunction order."), and the TBI's

[7] R. at 341.

[8] *See* Defendants' Brief at 27.

failure to comply with its ministerial duties under section 40-32-102(b) is a crime. *See* Tenn. Code Ann. § 40-32-104.

For all of these reasons, this Court should remand with instructions to reconsider the Plaintiff's motion for partial judgment on the pleadings by applying the rule that the TBI may only refuse to comply with a final expungement order when the order: (1) was issued by a court without jurisdiction, (2) was reversed through this Court's established judicial processes, or (3) was procured by fraud.

IV. ARGUMENT

A. THIS COURT MAY RESOLVE THE "SINGLE ISSUE" REGARDING WHICH IT GRANTED REVIEW.

On August 9, 2021, this Court entered an order—over the TBI's objection—stating that "[t]he single issue presented in this appeal is: 'Under what circumstances, if any, may the Tennessee Bureau of Investigation refuse to comply with a final expungement order issued by a court of record.'"[9] The Defendants apparently believe that this Court's August 9, 2021 order was erroneous. Accordingly, they have declined to comply with it in full. Thus, without seeking—let alone obtaining—permission to present an additional, unrelated question for review through this Court's established judicial processes, the Defendants instruct this Court that it must adjudicate the following issue as well: "Whether the chancery court lacked subject-matter jurisdiction over Count I of the complaint because Tenn. Code Ann. § 1-3-121, the statute on which Count I is based, does not waive the State's sovereign

[9] R. at 413.

immunity."[10]

To reiterate this recurring problem: The Defendants do not sit in review of the judiciary, and they may not disregard court orders that they believe are wrong. During the proceedings below, the Defendants belatedly advanced the meritless and oft-rejected claim[11] that sovereign immunity precludes affected litigants from maintaining even non-damages claims against government officials who act unlawfully. *But see* Tenn. Code Ann. § 1-3-121 ("Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages."); *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 852–53 (Tenn. 2008) (holding that "sovereign immunity simply does not apply" to non-damages declaratory judgment actions against government officials who act unconstitutionally, because "[a]ny such action is ultra vires—that is, beyond the authority granted by the State"). As the Defendants acknowledge, the trial court also ruled against them and determined that it had subject matter jurisdiction to adjudicate the Plaintiff's claims.[12]

The Defendants did not seek interlocutory review of the trial court's order thereafter, and they certainly did not obtain permission to appeal

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[10] *See* Defendants' Brief at 8, 15.

[11] *See generally* R. at 195–99.

[12] *See* Defendants' Brief at 10.

it. As a result, the trial court's (correct) determination that it had subject matter jurisdiction over the Plaintiff's claims controls at this juncture. Thus, the Defendants are expected to respect that order—even if they consider it erroneous—unless and until it is reversed. *See Konvalinka*, 249 S.W.3d at 355.

Given this context, this Court may resolve "the single issue" regarding which this Court granted review[13] without considering the additional issue the Defendants have improperly presented without permission. If the Defendants desire review of any other order, they must first comply with this Court's established judicial processes.

B. RES JUDICATA AND FINALITY PRINCIPLES APPLY TO EXPUNGEMENT ORDERS.

Unburdened by citations to authority, the Defendants maintain that "res judicata, finality, and contempt of [an] expungement order simply do not apply" when the TBI considers an expungement order erroneous.[14] In all respects, the Defendants are wrong.

1. The Plaintiff's expungement eligibility is res judicata.

The doctrine of res judicata "'promotes finality in litigation, prevents inconsistent or contradictory judgments, conserves judicial resources, and protects litigants from the cost and vexation of multiple lawsuits.'" *Elvis Presley Enters., Inc. v. City of Memphis*, 620 S.W.3d 318, 324 (Tenn. 2021) (citing *Jackson v. Smith*, 387 S.W.3d 486, 491 (Tenn. 2012) (collecting cases)). Consequently, all material facts or questions

[13] R. at 413.

[14] *See* Defendants' Brief at 26.

that were adjudicated by the Plaintiff's final and unappealed expungement order in McNairy County Circuit Court—*including whether the Plaintiff's charges were eligible to be expunged under Tennessee law*—"are conclusively settled by [that] judgment[.]" *See Davis v. Williams*, No. E2010-01139-COA-R3CV, 2011 WL 335069, at *3 (Tenn. Ct. App. Jan. 31, 2011) (cleaned up), *no app. filed*. As this Court explained long ago:

> It is a fundamental principle of jurisprudence that **material facts or questions, which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions becomes res judicata and may not again be litigated in a subsequent action between the same parties or their privies**, regardless of the form the issue may take in the subsequent action whether the subsequent action involves the same or a different form or proceedings, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief....

Id. (emphasis added) (citing *Gerber v. Holcomb*, 219 S.W.3d 914, 919 (Tenn. Ct. App. 2006) (in turn quoting *Cotton v. Underwood*, 442 S.W.2d 632, 635 (Tenn. 1969)).

Notably, courts' application of res judicata "is not based upon any presumption that the final judgment was right or just. Rather, it is justifiable on the broad grounds of public policy which requires an eventual end to litigation." *Moulton v. Ford Motor Co.*, 533 S.W.2d 295, 296 (Tenn. 1976). As a result, Tennessee's courts have correctly applied

the doctrine *even while observing that a previous merits judgment was erroneous*. For example, as the Court of Appeals has held:

> the prior suit need not adjudicate every issue that could have possibly been litigated on the merits, it need only "conclude the rights of the parties on the merits." *Goeke v. Woods*, 777 S.W.2d 347, 349 (Tenn. 1989). In this case, the Appellants asserted the issue of the merits of title as a defense to the detainer action. The trial court, after considering the issue, awarded possession to the Appellee. . . . **While that decision was erroneous**, *see Davis*, 2011 WL 335069, at *2–4, **it does not prevent this Court from concluding that the judgment awarding possession to Appellee was on the merits**. *See Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424, 2428, 69 L.Ed.2d 103 (1981) ("[T]he res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.").

Boyce v. LPP Mortg. Ltd., 435 S.W.3d 758, 769 (Tenn. Ct. App. 2013) (emphases added).

Accordingly, the Defendants' insistence that they may disobey the McNairy County Circuit Court's final and unappealed expungement order "because four separate statutes prohibit" the expungement of the Plaintiff's charge misapprehends elementary res judicata principles.[15] Even assuming that the Defendants had the better reading of the relevant statutes, the claim is irrelevant. As a matter of law, all material facts and questions—including whether the Plaintiff's charge was eligible to be expunged under Tennessee's expungement statutes—were "conclusively settled by" the final and unappealed expungement order

[15] *See id.* at 10.

entered by the McNairy County Circuit Court back in 2019. *See Davis*, 2011 WL 335069, at *3. And regardless of whether or not that order was erroneous, "it does not prevent this Court from concluding that the judgment . . . was on the merits[,]" which is all that matters for the doctrine of res judicata to apply. *See Boyce*, 435 S.W.3d at 769 (citing *Federated Dep't Stores, Inc.*, 452 U.S. 394).

Thus, the Defendants' insistence that "the merits of the underlying expunction order must be revisited"[16] because (they assert) the order is erroneous "misses the point." *See Lee v. Quince Nursing & Rehab., LLC*, No. W2019-00093-COA-R3-CV, 2019 WL 5837790, at *2 (Tenn. Ct. App. Nov. 7, 2019), *no app. filed*. The point is that State of Tennessee "could have asserted a claim" that the Plaintiff's charges were not eligible for expungement in McNairy County Circuit Court Case No. 3279. *Id*. It did not do so. Instead, the State of Tennessee agreed that the Plaintiff's charges were eligible for expungement,[17] and the McNairy County Circuit Court issued a merits order reflecting that same conclusion thereafter.[18] Once that order became final, it bound not only the State of Tennessee, but also its "privies[,]" *see Rainbow Ridge Resort, LLC.*, 525 S.W.3d at 259, including the TBI.[19] The Defendants also "made no attempt to intervene, alter, amend, or appeal the order before it became final"[20]—whether via certiorari or otherwise—thereafter; instead, they

[16] R. at 149.

[17] R. at 100, ¶ 2; R. at 106, ¶ 60.

[18] R. at 99, ¶ 1; R. at 103–04, ¶ 35.

[19] R. at 105, ¶ 59.

disobeyed the order while converting the Plaintiff's expungement fee.[21] Given these circumstances, the Plaintiff's expungement order is res judicata as to the State of Tennessee and its privies, and the TBI is not permitted to disobey it.

2. <u>The Plaintiff's expungement order is final.</u>

"[T]he remedy for an erroneous grant of an expunction is properly sought by direct appeal[.]" *Brown*, 2020 WL 6041807, at *2 (citing Tenn. R. App. P. 3(b), (c))). Either party may exercise the right to review an assertedly erroneous expungement order. *See id.* When neither party to McNairy County Circuit Court Case No. 3279 did so, however, the Plaintiff's expungement order became final and unappealable, and the trial court lost jurisdiction to modify it. *Cf. id.* ("In this case, the trial court's order of expunction became final on November 16, 2018, at which time the trial court lost jurisdiction of the case.").

The TBI should be familiar with this principle, given that this Court explained it to the TBI just last year. *See Allen*, 593 S.W.3d at 154 ("Once an order becomes final, a trial court loses jurisdiction and generally has no power to modify or amend the order." (collecting cases)). As such, the TBI's position that "finality . . . do[es] not bear on the issue" presented in this appeal is baffling.[22]

The Attorney General's Office should be familiar with such principles of finality, too, given the frequency with which that Office

[20] R. at 106, ¶ 63; R. at 104, ¶ 44.

[21] R. at 7, ¶ 29; R. at 102, ¶ 29 ("ADMIT.").

[22] *See* Defendants' Brief at 26.

batters defendants with claims that finality bars them from seeking relief. A recent example is particularly illuminating.

In *State v. Reid*, 620 S.W.3d 685 (Tenn. 2021), the State of Tennessee—represented by the Attorney General's Office—matched up against a *pro se* petitioner who sought relief from an undisputedly illegal sentence that had been enhanced under a statute that was later declared unconstitutional. Unmoved, though, "the State asserted that the Petitioner's case was 'final and not pending or under review when the *Bonds* decision was rendered.'" *Id.* at 688 (cleaned up). The State also maintained that, due to the petitioner's failure to seek timely review of his sentence, the petitioner alone was responsible for his plight, asserting in its briefing to this Court that:

> The defendant seems to suggest that he should be allowed to challenge his sentence through Tenn. R. Crim. P. 36.1 for equitable reasons, asserting he has "no plain, adequate or complete remedy at law to redress the wrongs described herein." [] But the defendant could have challenged his sentence through a petition for postconviction relief. Tenn. Code Ann. § 40-30-103. And he could have done so for up to a year after the Court of Criminal Appeals announced its decision in *State v. Bonds*, 502 S.W.3d 118, 158–60 (Tenn. Crim. App. 2016), which forms the basis of his claim for relief. Tenn. Code Ann. § 40-30-102(b)(1). **The defendant chose not to pursue that authorized and adequate avenue. He should not be allowed to side-step the legal avenue for relief** that the General Assembly has provided in the Post-Conviction Procedure Act **and later obtain redress for his**

own failure to act.[23]

Now that the rabbit has the gun, the Attorney General is suddenly unbothered by a litigant's "failure to act" or attempt "to side-step the legal avenue for relief" available to remedy a final-but-assertedly-erroneous court order. *See id.* But the doctrine of finality is not a game, and the rules underlying it do not apply only when finality benefits the Government. Expungement orders like the Plaintiff's are often fiercely contested[24] and carry enormous stakes for defendants.[25] In Tennessee, they represent the difference between being restored to the position a defendant occupied before an arrest, *see Pizzillo v. Pizzillo*, 884 S.W.2d 749, 754 (Tenn. Ct. App. 1994), and serving a virtual life sentence. Thus, the Government "should not be allowed to side-step the legal avenue for relief" that this Court has established "and later obtain redress for [its] own failure to act."[26]

C. THE DEFENDANTS' CONTRARY ARGUMENTS ARE MERITLESS.

The Defendants make several contrary arguments. As detailed

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[23] Attachment #1, p. 6 (emphases added). This Court may take judicial notice of its own records and records from other cases. *See City of Chattanooga v. Tenn. Regulatory Auth.*, No. M2008–01733–COA–R12–CV, 2010 WL 2867128, at *3 (Tenn. Ct. App. July 21, 2010) *no app. filed*.

[24] *See, e.g.*, R. at 365–71.

[25] *See generally* Brief of Cmty. Serv. Society of N.Y. et al. as Amici Curiae Supporting Petitioner, *Doe v. United States*, 198 L. Ed. 2d 232 (U.S. 2017), *cert. denied*, at 2–24, https://www.scotusblog.com/wp-content/uploads/2017/02/16-876-cert-amicus-CSS.pdf.

[26] Attachment #1, p. 6.

below, each is unpersuasive.

First, the Defendants maintain that the Plaintiff was not eligible for expungement because Tennessee's expungement statutes prohibit the expungement of the Plaintiff's charge.[27] Setting aside the Defendants' misleading misrepresentations regarding the relevance of the sex offender registry to this action,[28] as detailed above, the doctrine of res judicata bars relitigation of "all issues" related to the Plaintiff's underlying expungement eligibility. *Massengill v. Scott*, 738 S.W.2d 629, 631 (Tenn. 1987). Accordingly, all issues regarding the Plaintiff's expungement eligibility were "conclusively settled" by the McNairy County Circuit Court's merits judgment, *see Davis*, 2011 WL 335069, at *3, which determined that the Plaintiff's charges were eligible to be expunged. *See* R. at 21 ("The defendant named above is entitled to have all PUBLIC RECORDS relating to the offenses listed above expunged according to the Tennessee Code Annotated provision marked below[.]").[29] That final ruling on the merits settles the matter.

Second, the Defendants complain that the Plaintiff "does not even *cite*"—"except to quote the chancery court's ruling"—various statutes that the Defendants insist bear upon expungement eligibility.[30] There is

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[27] *See* Defendants' Brief at 19–25.

[28] As the Plaintiff explained below, "**the Plaintiff is not on the sex offender registry**" and "**[t]here is no record to be removed from the sex offender registry.**" Transcript at p. 20, line 24–p. 21, line 1 (emphases added).

[29] R. at 21.

[30] *See* Defendants' Brief at 25.

a reason. As noted above, the McNairy County Circuit Court's final and unappealed merits judgment serves as a "complete bar to relitigation" of the Plaintiff's expungement eligibility "regardless of the merits of the [Defendants'] claim" on the matter. *See Creech v. Addington*, 281 S.W.3d 363, 376 (Tenn. 2009).

Third, the Defendants maintain that Tennessee Code Annotated § 40-32-102—an unambiguous statute that establishes the Defendants' ministerial duties to "remove and destroy the records within sixty (60) days from the date of [an] expunction order[,]" *see id.*—"does not control."[31] As grounds for this claim, the Defendants assert that "the general-specific canon of construction rebuts Plaintiff's argument."[32]

Even on its own terms, though, the Defendants' argument fails. The Defendants insist that by virtue of a separate statute, two requirements—"a court order and eligibility for expunction—must be met before the TBI may remove the records."[33] The Plaintiff's expungement order—which the Defendants agree is authentic[34]—is unmistakably a court order, though. As noted above, that order also expressly determined—*on the merits*—that the Plaintiff "**is entitled to have all PUBLIC RECORDS relating to the offenses listed above expunged** . . . ."[35] Accordingly, both of the conditions that the

[31] *See id.* at 26.

[32] *Id.*

[33] *Id.* at 27.

[34] R. at 99, ¶ 1; R. at 103–04, ¶ 35; R. at 101, ¶ 12.

[35] R. at 21 (emphasis added).

Defendants insist must be met are satisfied.

The actual issue, then, is—once again—that the TBI believes that the McNairy County Circuit Court erroneously determined that the Plaintiff's charge was eligible for expungement. But as noted repeatedly and at length above, the McNairy County Circuit Court's determination on the matter is final, unappealable, and "conclusively settled" that issue whether it was erroneous or not. *See Davis*, 2011 WL 335069, at *3. The McNairy County Circuit Court's final and unappealed merits order also binds the TBI—a privy of the State of Tennessee—which has no authority of its own to adjudicate expungement petitions or to participate in criminal cases at all. *See Allen*, 593 S.W.3d at 154 n.13 ("We also are unaware of any rule or precedent authorizing the criminal court to allow the TBI to intervene in either an open or closed criminal case[.]"). Self-evidently, allowing the TBI—and that agency alone—to disobey a final expungement order and to maintain a conflicting set of official records even after every other state and local agency in Tennessee has complied with the order also is not plausibly what the statutory scheme contemplates.

Fourth, the Defendants maintain that "[t]he TBI's record retention complies with procedural-due-process requirements."[36] Of course, the TBI's "record retention" is not the issue. Instead, the issue is the Defendants' flagrant and unapologetic contempt of a final and unappealed court order with which the TBI—and that agency alone—refuses to comply, thereby harshening the Plaintiff's concluded, plea-

[36] *See* Defendants' Brief at 27–29.

bargained sentence; depriving the Plaintiff of critical civil rights; and subjecting the Plaintiff to tens of thousands of collateral consequences. Under these circumstances, the notion that the Defendants' astonishing misconduct "has the potential to result in unconstitutional applications" is also far from fanciful, as this Court itself has previously recognized. *See Brown*, 479 S.W.3d at 211. *Cf. id.* (citing *Commonwealth v. Selavka*, 14 N.E.3d 933, 941 (Mass. 2014) ("[W]e conclude that even an illegal sentence will, with the passage of time, acquire a finality that bars further punitive changes detrimental to the defendant. Accordingly, in the circumstances here, the delayed correction of the defendant's initial sentence, in which he by then had a legitimate expectation of finality, violated double jeopardy and cannot stand.")).

Fifth, the Defendants maintain that they may disobey and publicize an unredacted copy of the Plaintiff's expungement order without running afoul of either criminal or civil consequences. In support of this theory, though, the Defendants ignore Tennessee Code Annotated § 40-32-104, which criminalizes violations of Tennessee's expungement statutes. They also misconstrue section 40-32-101(c)(1), a provision that separately criminalizes not only the release of "confidential records" as described in section 40-32-101(b)(1), but also the release of any "information contained therein[,]" *see* Tenn. Code Ann. § 40-32-101(c)(1)—information that is necessarily revealed by publicizing an expungement order. The Defendants additionally insist that the litigation privilege affords them immunity from tort liability for

publicizing an expungement order.[37] Even assuming the Defendants are correct, though, the litigation privilege does not render an illicit publication of a confidential expungement order lawful, as any attorney who does what Defendants' counsel proposes to do should be aware. *See Unarco Material Handling, Inc. v. Liberato*, 317 S.W.3d 227, 240 (Tenn. Ct. App. 2010) ("[I]t must be emphasized that an attorney's immunity from civil liability does not preclude other consequences, such as sanctions from the Board of Professional Responsibility.").

Sixth, the Defendants maintain that "the TBI's actions do not infringe on judicial power."[38] But here, the TBI has unapologetically disobeyed a final court order; it has appointed itself to sit in review of that final court order without authority; and it has asserted independent and *supreme* judicial power to adjudicate expungement eligibility despite contrary judicial orders on the same matter. Such behavior cannot be construed as anything *other than* appropriating exclusive judicial authority in a manner that "strike[s] at the very heart of a court's exercise of judicial power[,]" *see State v. Mallard*, 40 S.W.3d 473, 483 (Tenn. 2001) (citation omitted), and "frustrate[s] or interfere[s] with the judicial function[,]" *see Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975). The Defendants' related claim that "the TBI is not disregarding an expungement order but *complying* with it" by violating it[39] is also sufficiently unserious that no response beyond referencing the

[37] *See id.* at 31–32.

[38] *See id.* at 32.

[39] *See id.* at 33.

Defendants' own admissions below is necessary. *See* R. at 106, ¶ 64 ("Defendants admit that Defendant TBI has not complied with portions of the expunction order"); R. at 105, ¶ 46 ("Defendants admit they have not fully complied with the February 2019 expunction order.").

Seventh and finally, the Defendants maintain that the Plaintiff's concerns about the public policy consequences of allowing the TBI—and that agency alone—to disobey expungement orders are overstated.[40] Notably, though, the Defendants do not actually contest the Plaintiff's observations that the TBI's refusal to comply with final expungement orders: (1) results in conflicting sets of official criminal records; (2) gives rise to serious consequences for affected defendants; and (3) creates unmanageable uncertainty regarding whether a defendant, courts of this state and other states, or the public generally may rely on the rights and benefits that a final expungement order confers. Instead, the Defendants insist that these consequences should be overlooked—and that "[t]he integrity of the criminal justice system is not at risk"—because "the scope of the ruling below" is "narrow[.]"[41]

To be clear: Permitting the Government to disobey final court orders compromises the integrity of the criminal justice system. So, too, does permitting the Government to enter into agreements with defendants and then fail to adhere to those agreements after extracting consideration. So, too, does permitting the Government to harshen sentences unilaterally after they have been fully served. So, too, does

[40] *See id.* at 33–34.

[41] See *id.* at 34.

allowing the Government to deprive defendants of fundamental and other civil rights after a court has reinstated them. And while the Defendants are correct that there will not be a literal "apocalyp[se]" if this Court blesses the Defendants' unapologetic contempt of the final and unappealed court order at issue here,[42] it is difficult to imagine a scenario that promotes more disrespect for the rule of law than this one.

As the Plaintiff has correctly observed, willfully disobeying a final court order at the urging of counsel is "lawless behavior that would land any other contemnor in jail and would subject any other attorney to professional discipline."[43] Accordingly, the fact that Tennessee's top law enforcement agency is disobeying a final court order at the behest of Tennessee's top judicial office is not a trivial matter. A forceful ruling from this Court that the TBI's contempt of final court orders is impermissible; that the Attorney General has no business advising litigants to disobey final court orders; and that "government officials [must] exercise their coercive powers according to rules—rather than according to their own will," *see In re Smith*, 999 F.3d 452, 454 (6th Cir. 2021)—is warranted as a result.

V. CONCLUSION

For the foregoing reasons, the trial court's March 22, 2021 order should be vacated.

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[42] *See id.* at 33.

[43] *See* Plaintiff's Principal Brief at 40.

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief (Sections III-V) contains 4,977 words pursuant to § 3.02(a)(1)(b), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2021, a copy of the foregoing was sent via the Court's electronic filing system and/or via email to the following parties:

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