

**IN THE SUPREME OF TENNESSEE
AT NASHVILLE**

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

PRINCIPAL BRIEF OF PLAINTIFF-APPELLANT

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III. STATEMENT REGARDING CITATIONS

The Plaintiff's Brief uses the following designations:

1. Citations to the Technical Record are cited as "R. at [page number]."
2. The transcript of the hearing on the Defendants' Motion to Dismiss is cited as "Transcript at [page number], [line numbers]."

IV. ISSUE PRESENTED FOR REVIEW AND APPLICABLE STANDARDS OF REVIEW

The issue presented for review in this case 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?”¹ This question is answered by resolving the following issues of law:

1. Whether the TBI’s duties under Tennessee Code Annotated § 40-32-102(b) are ministerial—a question of law reviewed de novo. *See Pickard v. Tenn. Water Quality Control Bd.*, 424 S.W.3d 511, 518 (Tenn. 2013) (“Interpretations of statutes involve questions of law which the appellate courts review de novo without a presumption of correctness.”).

2 Whether the doctrine of res judicata applies to final expungement orders—a question of law that this Court reviews de novo. *See Regions Bank v. Prager*, 625 S.W.3d 842, 848 (Tenn. 2021) (“Tennessee law provides—and the parties agree in this Court—that a trial court’s decision that a claim is barred by the doctrine of res judicata involves a question of law, which appellate courts review de novo without a presumption of correctness.”).

3. Whether Tennessee Code Annotated § 40-39-207 authorizes the TBI to make expungement determinations separate and apart from final judicial expungement orders, and whether § 40-39-207(g)(1) contemplates a process by which expungement recipients may contest the TBI’s determinations regarding expungement eligibility—questions of law reviewed de novo, *see Pickard*, 424 S.W.3d at 518.

¹ R. at 413.

V. INTRODUCTION

This case concerns a final, unappealed, and unalterable expungement² order that was entered in McNairy County Circuit Court on February 19, 2019. The Defendants admit that the expungement order is authentic, is final, was not appealed, and was entered by agreement of the Plaintiff and the State of Tennessee. The Defendants also admit that they will not obey it. Accordingly, this Court granted review of the following question: “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?”³

The answer to this question is that the TBI may only refuse to comply with a final expungement order under the following three circumstances:

1. when the order was issued by a court that lacked jurisdiction;
2. when the order was timely appealed or reversed through this Court’s established Rules of Procedure; or
3. when the order was procured through fraud.

In all other circumstances, however, compliance with a final expungement order is not optional. Tennessee expects—and it is entitled to expect—other states to afford full faith and credit to its courts’

² This Court uses the “‘expungement’ and ‘expunction’ interchangeably.” *Butler v. Tenn. Bd. of Nursing*, No. M2016-00113-COA-R3-CV, 2016 WL 6248028, at *3, n.1 (Tenn. Ct. App. Oct. 25, 2016) (citing *Rodriguez v. State*, 437 S.W.3d 450, 452, 456 (Tenn. 2014) (using both terms); *State v. L.W.*, 350 S.W.3d 911, 917–18 (Tenn. 2011) (same)) *no app. filed*. For simplicity, this Brief generally uses the term “expungement.”

³ R. at 413.

judgments, *see New v. Dumitrache*, 604 S.W.3d 1, 18 (Tenn. 2020) (“The United States Constitution requires that each state give full faith and credit to the public acts, records, and judicial proceedings of every other state.” (citing U.S. Const. art. IV, § 1)), and Tennessee’s *own state agencies* are expected to do the same. That is also particularly true where, as here, the State of Tennessee itself—the TBI’s principal—is a party to the order at issue.

Thus, the TBI may not disobey final expungement orders issued by courts of this state simply because it believes they are wrong. *See, e.g., State v. Brown*, No. E2019-01462-CCA-R3-CD, 2020 WL 6041807, at *2 (Tenn. Crim. App. Oct. 13, 2020) (“[T]he remedy for an erroneous grant of an expunction is properly sought by direct appeal[.]” (citing Tenn. R. App. P. 3(b), (c))), *no app. filed*. Under such circumstances, the TBI’s non-compliance is not only impermissible—it 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). Because the trial court held otherwise, though, the trial court’s ruling should be vacated.

VI. STATEMENT OF FACTS

The Plaintiff is the recipient of a final and unappealed expungement order that was entered by the McNairy County Circuit Court in February 2019. As detailed below, the Plaintiff’s material allegations regarding the order—including the authenticity of the order,

how the order came to be approved and entered, the finality of the order, the TBI's knowledge of the order and its conversion of the Plaintiff's expungement fee regarding it, the Defendants' receipt of the Plaintiff's expungement order, and the Defendants' refusal to comply with the Plaintiff's expungement order even years after it became final and was processed locally—are all uncontested.

A. AUTHENTICITY OF THE PLAINTIFF'S EXPUNGEMENT ORDER

The Defendants “admit that the McNairy County Circuit Court entered an expunction order in McNairy County Circuit Court Case No. 3279 on February 19, 2019 and this case arises out of that order.”⁴ The Defendants further “admit that the order attached to Plaintiff's complaint as Exhibit A is a copy of that order.”⁵ The Defendants additionally admit that the “Plaintiff was the recipient of the expunction order.”⁶

Accordingly, the Parties agree that the Plaintiff is the recipient of an expungement order entered by the McNairy County Circuit Court in February 2019; that the Plaintiff's expungement order is attached to the Plaintiff's Complaint as Exhibit A; and that the Plaintiff's expungement order is authentic.⁷

⁴ R. at 99, ¶ 1.

⁵ *Id.* See also R. at 103–04, ¶ 35.

⁶ R. at 101, ¶ 12.

⁷ R. at 99, ¶ 1; R. at 103–04, ¶ 35; R. at 101, ¶ 12.

B. ORIGIN OF THE PLAINTIFF’S EXPUNGEMENT ORDER

With respect to how the Plaintiff’s expungement order came to be entered: The Defendants admit that “[o]n February 9, 2015, the Plaintiff entered into a diversionary plea agreement with the State of Tennessee in McNairy County Circuit Court Case No. 3279.”⁸ The Defendants also admit that “in February 2019, Plaintiff petitioned to expunge the records of McNairy County Circuit Court Case No. 3279[,]” and they “admit that Plaintiff’s sentence had concluded at the time Plaintiff petitioned to expunge the records.”⁹ The Defendants further “admit that an Assistant District Attorney General with the State of Tennessee signed the expunction order entered on February 19, 2019.”¹⁰

The Parties additionally agree that the Assistant District Attorney General who signed the Plaintiff’s expungement order did so deliberately. Specifically, the Defendants “admit that an Assistant District Attorney General for the State of Tennessee **consented to** the expunction of Plaintiff’s charges[,]”¹¹ and they “admit that an Assistant District Attorney General for the State of Tennessee **agreed to** a proposed expunction order for entry in McNairy County Circuit Court Case No. 3279.”¹² Thus, the Plaintiff’s expungement order was a product of a

⁸ R. at 6, ¶ 23; R. at 102, ¶ 23 (“ADMIT.”).

⁹ R. at 103, ¶ 28.

¹⁰ R. at 100, ¶ 2. *See also* R. at 106, ¶ 60 (“Defendants admit an Assistant District Attorney General with the State of Tennessee signed the February 19, 2019, expunction order.”)

¹¹ R. at 103, ¶ 30 (emphasis added).

¹² *Id.* at ¶ 31 (emphasis added).

consensual agreement between the Plaintiff and the State of Tennessee.¹³

C. ENTRY OF THE PLAINTIFF’S EXPUNGEMENT ORDER

The Defendants admit that “[t]he Parties’ proposed expunction order—submitted by agreement of both the Plaintiff and the State of Tennessee in McNairy County Circuit Court Case No. 3279—was thereafter approved and officially entered by McNairy County Criminal Circuit Court Judge J. Weber McGraw on February 19, 2019.”¹⁴ The Defendants further admit that “McNairy County Circuit Court Clerk Byron Maxedon filed Judge McGraw’s expunction order in McNairy County Circuit Court Case No. 3279 on February 19, 2019 at 10:55 a.m.”¹⁵ The Defendants also admit that the Plaintiff was assessed—and paid—a \$350.00 expungement fee at the time, and that the TBI used and converted the Plaintiff’s funds after receiving them.¹⁶

D. FINALITY OF THE PLAINTIFF’S EXPUNGEMENT ORDER

After the Plaintiff’s expungement order was entered, the Defendants admit that “[t]he expunction order entered in McNairy

¹³ *Id.*

¹⁴ R. at 7, ¶ 32; R. at 103, ¶ 32 (“ADMIT.”).

¹⁵ R. at 7–8, ¶ 33; R. at 103 ¶ 33 (“ADMIT.”).

¹⁶ R. at 7, ¶ 29 (“Under the statute in effect at the time, the Plaintiff was assessed a \$350.00 expungement fee, which was then ‘used by the Tennessee Bureau of Investigation for certain enumerated purposes.’ Tenn. Op. Att’y Gen. No. 12-89 (Sept. 20, 2012). The Plaintiff paid the \$350.00 expungement fee at issue, and upon receipt of it, the Appellee TBI converted the Plaintiff’s funds.”); R. at 103, ¶ 29 (“ADMIT.”).

County Circuit Court Case No. 3279 was not appealed.”¹⁷ The Defendants also admit that “[t]he expunction order entered in McNairy County Circuit Court Case No. 3279 was not reversed.”¹⁸ Thus, the Defendants admit that “[t]he expunction order entered in McNairy County Circuit Court Case No. 3279 is and has long been final.”¹⁹

E. THE TBI’S RECEIPT AND KNOWLEDGE OF THE PLAINTIFF’S EXPUNGEMENT ORDER

After the Plaintiff’s expungement order was entered, the Defendants admit that “a copy of th[e] order was transmitted to Defendant TBI.”²⁰ The Defendants do not claim to have overlooked the order after receiving it; instead, they admit that upon receiving the Plaintiff’s expungement order, they “complied with a portion of” it.²¹ The Defendants further admit that “they made no attempt to intervene, alter, amend, or appeal the order before it became final[,]”²² and that the “TBI did not make a timely attempt to alter the expunction order.”²³

¹⁷ R. at 10, ¶ 48; R. at 105, ¶ 48 (“ADMIT”).

¹⁸ R. at 10, ¶ 50; R. at 105, ¶ 50 (“ADMIT.”).

¹⁹ R. at 11, ¶ 53; R. at 105, ¶ 53 (“ADMIT.”).

²⁰ R. at 104, ¶ 38.

²¹ *Id.* at ¶ 43 (“Defendants admit that Defendant TBI complied with a portion of the McNairy County Court Order.”).

²² R. at 106, ¶ 63.

²³ R. at 104, ¶ 44 (“Defendants admit TBI did not make a timely attempt to alter the expunction order.”).

F. THE TBI'S NON-COMPLIANCE WITH THE UNAMBIGUOUS TERMS OF THE PLAINTIFF'S EXPUNGEMENT ORDER

The Defendants admit that “[t]he expunction order entered in McNairy County Circuit Court Case No. 3279 is clear, specific, and unambiguous.”²⁴ The Defendants further admit that the Plaintiff’s expungement order provides, in pertinent part, that:

It is ordered that all PUBLIC RECORDS relating to such offense above referenced be expunged and immediately destroyed upon payment of all costs to clerk and that no evidence of such records pertaining to such offense be retained by any municipal, county, or state agency, except non-public confidential information retained in accordance with T.C.A. § 10-7-504 and T.C.A. § 38-6-118.²⁵

The Defendants admit, too, that the “TBI is an agency of the State of Tennessee.”²⁶

The above notwithstanding, the “Defendants admit they have not fully complied with the [Plaintiff’s] February 2019 expunction order.”²⁷ Thus, the “Defendant TBI continues to report the existence of one of Plaintiff’s charges which has not been expunged [by the TBI].”²⁸

The Parties also agree that the statutory time period for complying

²⁴ R. at 15, ¶ 88; R. at 107, ¶ 88 (“ADMIT.”).

²⁵ R. at 1, ¶ 1 (emphases added); R. at 99, ¶ 1 (“Defendants admit that the expunction order attached to Plaintiff’s complaint as Exhibit A contains the language quoted in paragraph 1.”). *See also* R. at 21.

²⁶ R. at 105, ¶ 59.

²⁷ *Id.* at ¶ 46. *See also* R. at 106, ¶ 64 (“Defendants admit that Defendant TBI has not complied with portions of the expunction order”).

²⁸ R. at 101, ¶ 10.

with the Plaintiff's expungement order has long-since expired. Specifically, the Defendants "admit they did not remove all of Plaintiff's records from Plaintiff's criminal history within sixty days of receipt of the expunction order[,]"²⁹ despite conceding that the Plaintiff had quoted the provisions of Tennessee Code Annotated § 40-32-102(b) accurately.³⁰ 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.").

G. THE DEFENDANTS' AGREEMENT THAT THE MCNAIRY COUNTY CIRCUIT COURT HAD JURISDICTION TO ISSUE THE PLAINTIFF'S EXPUNGEMENT ORDER

During the proceedings below, the Defendants took the position that because the McNairy County Circuit Court was the only court with jurisdiction to issue the Plaintiff's expungement order, the McNairy County Circuit Court has "exclusive jurisdiction" over it.³¹ Defendants' counsel thus emphasized—repeatedly—the Defendants' position that the McNairy County Circuit Court "is the Court that had jurisdiction" over the Plaintiff's expungement order. See, e.g., Transcript at p. 4, line 21–p. 5, line 1 ("40-32-101(a) (1)(A) gives the McNairy County Circuit Court subject matter jurisdiction over expunction orders because the McNairy County Circuit Court is the Court that had jurisdiction in the previous action here, Plaintiff's criminal case."); *id.* at p. 6, lines 10–14

²⁹ R. at 104, ¶ 44.

³⁰ *Id.* at ¶ 39.

³¹ R. at 37.

(“Underpinning the subject matter jurisdiction framework are statutes declaring that circuit courts, including the McNairy County Circuit Court, have exclusive subject matter jurisdiction over criminal matters.”); *id.* at p. 8, line 22–p. 9, line 4 (“[S]ubject matter jurisdiction is given to the McNairy County Circuit Court because it is the Court with jurisdiction to enter the expunction order and the Court that oversaw the criminal case. It had jurisdiction in the previous action, which was a criminal matter, and circuit courts have exclusive jurisdiction over criminal matters.”).

Accordingly, the Defendants not only agreed but *insisted* that the McNairy County Circuit Court had jurisdiction to enter the Plaintiff’s expungement order, and the McNairy County Circuit Court’s jurisdiction to enter that order is undisputed.

H. THE PARTIES’ LEGAL DISPUTE OVER THE APPELLEES’ AUTHORITY TO DISREGARD FINAL COURT ORDERS

Despite the order’s finality, the “Defendants admit that Defendant TBI has not complied with portions of the [Plaintiff’s] expunction order[.]”³² The reason? “[T]he Tennessee Attorney General’s Office believes such non-compliance is permissible.”³³ Consequently, the Parties dispute turns on whether the Defendants may refuse to comply with the Plaintiff’s expungement order under the circumstances presented here, which involves a final order that all Parties agree:

1. was entered by a court that had jurisdiction to enter it;

³² R. at 106, ¶ 64.

³³ *Id.*

2. was neither appealed under Rule 3(c) of the Tennessee Rules of Appellate Procedure nor reversed under Rule 36.1 of the Tennessee Rules of Criminal Procedure; and

3. was not procured through fraud.

The Plaintiff maintains that “[t]he Defendant TBI is not empowered to disregard court orders, including court orders relating to expunction.”³⁴ Remarkably—and revealingly—the Defendants deny this allegation.³⁵ The Plaintiff also maintains that: “The Defendant TBI did not and does not have any discretion or authority to refuse to comply with a final expunction order.”³⁶ The Defendants deny this allegation, too.³⁷ As grounds, the Defendants insist that the TBI may willfully disobey final expungement orders that it thinks are wrong, and that under such circumstances, “the merits of the underlying expunction order must be revisited[.]”³⁸

VII. STATEMENT OF THE CASE

After initial efforts to convince the TBI that it lacked authority to violate court orders were unsuccessful,³⁹ the Plaintiff filed suit. The Defendants thereafter moved to dismiss the Plaintiff’s Complaint for lack

³⁴ R. at 5, ¶ 17.

³⁵ R. at 102, ¶ 17 (“DENY.”).

³⁶ R. at 9, ¶ 40.

³⁷ R. at 104, ¶ 40 (“DENY.”); *see also* R. at 105, ¶ 46.

³⁸ R. at 149.

³⁹ R. at 23–32.

of subject matter jurisdiction, insisting that because the McNairy County Circuit Court was the court that had jurisdiction to issue the Plaintiff's expungement order, the Plaintiff's claims should be heard there instead.⁴⁰ The trial court denied the Defendants' motion.⁴¹ The Defendants filed a joint Answer to the Plaintiff's Complaint thereafter.⁴²

Based on the admissions set forth in the Defendants' Answer, the Plaintiff moved for partial judgment on the pleadings, seeking a declaration that the Defendants were acting illegally and an injunction compelling the Defendants to comply with the McNairy County Circuit Court's expungement order.⁴³ As grounds, the Plaintiff asserted that:

1. the Plaintiff's expungement order is long-since final, agreed-upon, unappealable, and inalterable;⁴⁴
2. the Defendants lack authority to disregard final court orders;⁴⁵
3. the Defendants lack authority to adjudicate or independently determine the legality of expungement orders or to substitute their own conclusions for final judicial determinations;⁴⁶ and
4. the Defendants are precluded even from contesting the

⁴⁰ R. at 35–42.

⁴¹ R. at 87–91.

⁴² R. at 99–110.

⁴³ R. at 113–35.

⁴⁴ R. at 121–23.

⁴⁵ R. at 123–25.

⁴⁶ R. at 126–28.

propriety of the Plaintiff's expungement order, which is res judicata.⁴⁷

The Defendants raised several arguments in response.⁴⁸ Notably, none of them was that Tennessee Code Annotated § 40-39-207(g)(1)—a provision that governs “request[s] for termination of registration requirements” regarding the sex offender registry—had any bearing on this case.⁴⁹ The Defendants also did not claim to have pleaded—and they did not plead—any “affirmative defense” to the merits of the Plaintiff's claims.⁵⁰

Upon review, the trial court held that principles of finality and res judicata apply to final expungement orders, ruling—correctly—that:

After studying the statutes cited by Counsel for each side and the statutory scheme, the Court construes the statute cited by the Plaintiff, Tennessee Code Annotated section 40-32-102(b), and concludes as a matter of law that under this statute if the TBI does not intervene and object within sixty (60) days of receiving an expunction order, the TBI is required to comply with the expunction order and remove the expunged records from a person's criminal history. Following that sixty days, an expunction order is final, unappealable and is res judicata to the TBI, and it must comply with an expunction order and remove the records.⁵¹

However, the trial court additionally held—incorrectly, contrary to an earlier ruling, *see* Transcript at p. 44, lines 4–6 (“That is a final order.

⁴⁷ R. at 128–31.

⁴⁸ R. at 142–53.

⁴⁹ *Id.*

⁵⁰ *See id.*; *see also* R. at 108–09.

⁵¹ R. at 340.

It's not appealable at this point. There is res judicata that is accorded to it.”), and in contravention of longstanding, foundational, and exceptionless finality and res judicata principles—that “there is an exception to the TBI’s required compliance under section 40-32-102(b).”⁵² Specifically, the trial court held that:

[T]he carve out and exception is that with a section 40-32-101(a)(1)(D) sexual offense the TBI is required by Tennessee Code Annotated sections 40-39-207(a)(2) and 209 to determine under Tennessee Code Annotated section 40-32-101 whether the offense is eligible for expunction. If 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.⁵³

As detailed above, though, the Defendants themselves never advanced this argument. And significantly, they did not do so because it is unsupportable. Section 40-39-207(g)(1) exclusively governs circumstances in which an individual’s “request for termination of [sex offender] registration requirements is denied by a TBI official”, *see id.*—a totally separate matter, and one that has no application to this case.⁵⁴ Thus, § 40-39-207(g)(1) has nothing to do with expungement determinations; it does not permit the TBI to violate expungement orders; and given that expungement is entirely within the province of the judiciary, it does not provide for “due process” regarding expungement

⁵² *Id.*

⁵³ R. at 340–41.

⁵⁴ *See* Transcript at p. 20, line 24–p. 21, line 2 (noting that: “The plaintiff is not on the sex offender registry. There is no record to be removed from the sex offender registry. The statute is simply inapplicable.”).

determinations made by the TBI, which has no role in determining expungement eligibility whatsoever.

Based on this error, though, the trial court held that—in at least one circumstance—the TBI may violate a final and unappealed court order if the TBI believes that the court got it wrong. As a result, the trial court ruled that an “affirmative defense” was available to the Defendants that precluded partial judgment on the pleadings in the Plaintiff’s favor. Specifically, the trial court ruled:

The Defendants’ affirmative defense is that the offense in issue is a section 40-32-101(a)(1)(D) offense thereby triggering the sections 40-39-207(a)(2) and 209 carve out that allows the TBI not to comply with the Expunction Order and to not remove the records “from the SOR” on expunction.⁵⁵

The Plaintiff promptly moved the trial court to revise its order, or alternatively, for permission to take an interlocutory appeal regarding the following question of law: “Under what circumstances, if any, may the Tennessee Bureau of Investigation refuse to comply with a final and unappealed expungement order issued by a court of record?”⁵⁶ The trial court declined to revise its March 22, 2021 Order, but it granted the Plaintiff permission to take an interlocutory appeal on that question.⁵⁷ Thereafter, this Court granted review.⁵⁸

⁵⁵ R. at 346.

⁵⁶ R. at 353.

⁵⁷ R. at 409–12.

⁵⁸ R. at 413.

VIII. SUMMARY OF ARGUMENT

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)). For reasons that are foundational to the rule of law itself, a court must also “be able to maintain the integrity of its orders[.]” *See State v. Ramos*, No. M2007-01766-CCA-R3-CD, 2009 WL 890877, at *4 (Apr. 2, 2009) (cleaned up), *app. denied* (Tenn. Aug. 31, 2009). Accordingly, circumstances in which a litigant—*any* litigant—may refuse to comply with a final court order are exceedingly rare.

Expungement orders are not exempt from res judicata or finality principles—even if they are (as the Defendants maintain) erroneously issued. *See Brown*, 2020 WL 6041807, at *2 (“[T]he remedy for an erroneous grant of an expunction is properly sought by direct appeal[.]” (citing Tenn. R. App. P. 3(b), (c))). Neither is the TBI exempt from the obligation to comply with court orders. Thus, like other litigants, the TBI may only refuse to comply with a final expungement order under three narrow circumstances:

1. when the order was issued by a court that lacked jurisdiction;
2. when the order has been timely appealed or reversed through this Court’s established Rules of Procedure; or
3. when the order was procured through fraud.

Here, there is no dispute that none of these circumstances is

present. The Defendants themselves maintained that the McNairy County Circuit Court had jurisdiction to issue the Plaintiff's expungement order. *See supra*, pp. 21–22. They also admit that the Plaintiff's final expungement order was neither appealed nor reversed through established judicial processes. *See supra*, pp. 18–19. And they admit, further, that the Plaintiff's final expungement order was agreed to and jointly proposed by the State of Tennessee—which was a signatory to it—rather than having been procured through fraud. *See supra*, p. 17.

Given these circumstances, the trial court's judgment must be vacated. The trial court's ruling regarding the Defendants' "affirmative defense" to compliance—which the Defendants themselves did not even plead—is legally erroneous for myriad reasons. Similarly, the Defendants' position in this case—that the TBI need not comply with the Plaintiff's expungement order because the TBI believes it is erroneous—is foreclosed by clearly established law and contemptuous. Accordingly, the trial court's March 22, 2021 order should be vacated.

IX. ARGUMENT

A. THE DOCTRINE OF RES JUDICATA GOVERNS COURT ORDERS, INCLUDING EXPUNGEMENT ORDERS.

On several occasions, this Court has explained that 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.*, 620 S.W.3d at 324 (citing *Jackson*, 387 S.W.3d at 491). "The fundamental principle underlying the doctrine 'is that a party who once has had a chance to litigate a claim before an appropriate tribunal

usually ought not to have another chance to do so.” *Regions Bank*, 625 S.W.3d at 847 (citing Restatement (Second) of Judgments, ch. 1, at 6 (Am. L. Inst. 1982)). Further, as the TBI and its Director themselves have emphasized when it suited them, “res judicata bars not only issues that were actually decided but also those which ‘*could have been raised*’ in the former suit.” *State ex rel. Johnson v. Gwyn*, No. M2013-02640-COA-R3-CV, 2015 WL 7061327, at *7 (Tenn. Ct. App. Nov. 10, 2015) (quoting *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 178 (Tenn. Ct. App. 2000)), *no app. filed*. The doctrine also applies not only to parties, but also to “their privies.” *Rainbow Ridge Resort, LLC v. Branch Banking & Tr. Co.*, 525 S.W.3d 252, 259 (Tenn. Ct. App. 2016) (cleaned up).

Critically, “[t]he policy rationale in support 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). This Court is not the only court to reach that conclusion, either. Instead, given the importance of finality to the rule of law, other courts—including the United States Supreme Court—agree that final orders remain res judicata even when they are (or are asserted to be) wrong. *See, e.g., Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398–99 (1981) (“Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.” (collecting cases)); *Johnson v. Spencer*, 950 F.3d 680, 696 (10th Cir. 2020) (“The claim-preclusion consequences of a final judgment are, in other words, not ‘altered by the fact that the

judgment may have been wrong or rested on a legal principle subsequently overruled in another case.” (quoting *Federated Dep’t Stores*, 452 U.S. at 398)).

In the instant case, the Defendants have defended this action—and their admitted refusal to obey the McNairy County Circuit Court’s final and unappealed expungement order—on the expressly asserted basis that they believe the McNairy County Circuit Court got it wrong on the merits. *See, e.g.*, R. at 296 (“Plaintiff’s charged offense was not eligible for expunction”); R. at 339 n.1 (“Defendants have done nothing more during this litigation than attempt to explain, in defense of their position and in response to the claims made by Plaintiff, why, under all the pertinent statutes and notwithstanding the expunction order, the records relating to Plaintiff’s charged offense are not eligible for expunction.”); Transcript at p. 5, lines 2–4 (“McNairy County entered an expunction order despite a statutory prohibition against doing so.”). Thus, the Defendants have insisted that their refusal to comply with the McNairy County Circuit Court’s order “is permissible”⁵⁹ and that “the merits of the underlying expunction order must be revisited[.]”⁶⁰

Even if the Defendants were correct that the Plaintiff’s expungement order was erroneous, though, this Court’s res judicata and finality jurisprudence precludes the claim. *See Moulton*, 533 S.W.2d at 296 (“The policy rationale in support of Res judicata is not based upon any presumption that the final judgment was right or just.”). Litigants

⁵⁹ R. at 106, ¶ 64.

⁶⁰ R. at 149.

and their privies are afforded one full bite at the apple. *Regions Bank*, 625 S.W.3d at 847 (citing Restatement (Second) of Judgments, ch. 1, at 6 (Am. L. Inst. 1982)). Accordingly, litigants may not disregard court orders simply because they think they are wrong and want to “revisit” them, which is irrelevant to the rationale that supports the doctrine. See *Moulton*, 533 S.W.2d at 296.

Thus, a litigant’s claim that a court order—including an expungement order—is erroneous must be raised in the original case through established judicial processes. *Brown*, 2020 WL 6041807, at *2 (“[T]he remedy for an erroneous grant of an expunction is properly sought by direct appeal[.]” (citing Tenn. R. App. P. 3(b), (c))). Thereafter, finality brings an end to litigation, which prevents inconsistent or contradictory judgments, conserves resources, and prevents vexatious lawsuits. *Elvis Presley Enters.*, 620 S.W.3d at 324.

Of note, when the shoe has been on the other foot and *the Government* invokes res judicata, Tennessee’s judiciary has never hesitated to apply res judicata principles—even in, for instance, parental termination cases and criminal cases where equity might warrant it. See, e.g., *In re Dakota C.R.*, 404 S.W.3d 484, 498 (Tenn. Ct. App. 2012) (finding that termination of parental rights order was res judicata despite mother being acquitted of child abuse thereafter); *State v. Reid*, 620 S.W.3d 685, 690 (Tenn. 2021) (holding that “accepted fundamental rules of law relating to the finality of judgments” precluded relief for defendant sentenced under a statute that was subsequently declared unconstitutional (quoting *Taylor v. State*, 995 S.W.2d 78, 85 (Tenn. 1999))). As noted above, the TBI and its Director—the Defendants here—

have not hesitated to invoke the doctrine when it suits them, either. *See, e.g., Johnson*, 2015 WL 7061327, at *8.

This Court’s *res judicata* jurisprudence is not a one-way ratchet. Thus, it does not apply only against citizens, while empowering governmental litigants to disregard final court orders they deem erroneous in lieu of appealing them. *See Brown*, 2020 WL 6041807, at *2 (“[T]he remedy for an erroneous grant of an expunction is properly sought by direct appeal[.]” (citing Tenn. R. App. P. 3(b), (c))). As the Sixth Circuit recently explained:

Among the several requirements for the rule of law is that the law be reasonably certain. Certainty in the law is what allows citizens to plan their actions knowing that neither the state nor other individuals will interfere with them. That same certainty is what constrains government officials to exercise their coercive powers according to rules—rather than according to their own will, which is what the Founding generation called arbitrary action, or a “government . . . of men.” John Adams, “The Constitution of Massachusetts,” in *The Political Writings of John Adams* 98 (George A. Peek, Jr. ed. 1954). And when those rules take statutory form, the courts must apply them, regardless of whether a court likes the results of that application in a particular case. Otherwise all statutory law becomes discretionary, and the law itself is rendered uncertain.

In re Smith, 999 F.3d 452, 454 (6th Cir. 2021).

With these considerations in mind, when citizens invoke *res judicata* principles and seek to enforce a final order against the Government, the Government must comply. *See Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) (“If men must turn square corners when they deal with the government, it cannot be too much to expect the

government to turn square corners when it deals with them.”); *Op. of the Justices*, 624 So. 2d 107, 109 (Ala. 1993) (“[T]he order has the force of law unless modified by the trial court, until it is modified or reversed on appeal, and the Legislature, like other branches of government, must comply with it.”). That is also particularly true in the “hard to fathom” scenario presented here, where the Defendants *admit that they took and converted the Plaintiff’s expungement fee*, but then refused to process the Plaintiff’s expungement order thereafter.⁶¹ *Cf. Pierce v. Ocwen Loan Servicing, LLC*, 987 F.3d 577, 579 (6th Cir. 2021) (“Any attempt to quarrel with the point must account for a practical reality: the court’s decision to keep the cashier’s check. The Pierces put their money where their paper filing went. Included in the drop box were the notice of appeal and a cashier’s check to pay for the filing fee. That the clerk of court kept the check, but not the notice of appeal, is hard to fathom. Even Ayn Rand might pause at this manifestation of the limits of self (or institutional) interest.”).

In sum: Given that all of the elements of *res judicata* are indisputably present, the trial court got this case right the first time. *See* Transcript at p. 44, lines 4–6 (“That is a final order. It’s not appealable at this point. There is res judicata that is accorded to it.”). The Plaintiff’s expungement order is res judicata, and given the absence of any lawful authority to violate the McNairy County Circuit Court’s expungement order, the Defendants must obey it.

⁶¹ R. at 7, ¶ 29; R. at 103, ¶ 29 (“ADMIT.”).

B. WHEN A FINAL ORDER IS ISSUED BY A COURT WITH JURISDICTION TO ISSUE IT AND IS NOT PROCURED THROUGH FRAUD, THE ORDER IS LAWFUL AND MUST BE FOLLOWED UNLESS AND UNTIL IT HAS BEEN REVERSED IN COMPLIANCE WITH ESTABLISHED RULES OF PROCEDURE.

“A lawful order is one issued by a court with jurisdiction over both the subject matter of the case and the parties.” *Konvalinka*, 249 S.W.3d at 355 (citing *Vanvabry v. Staton*, 12 S.W. 786, 791 (Tenn. 1890)). An order also “is not rendered void or unlawful simply because it is erroneous or subject to reversal on appeal.” *Id.* (citing *Vanvabry*, 12 S.W. at 791; *Churchwell v. Callens*, 252 S.W.2d 131, 137 (Tenn. Ct. App. 1952)). Thus, when an order has been issued by a court with jurisdiction to issue it and is not procured through fraud, the order is lawful, and it must be followed unless modified in compliance with established rules of procedure.

Here, there is no dispute that the court that issued the Plaintiff’s expungement order had jurisdiction to do so. The Defendants also admit that the Plaintiff’s expungement order was neither appealed nor reversed in compliance with the only judicial procedures that would enable the order to be appealed or reversed. The Defendants further admit that the order was not procured through fraud. Accordingly, the Plaintiff’s unappealed expungement order is lawful, final, and inalterable, and the Defendants lack authority to disobey it.

1. The McNairy County Circuit Court had jurisdiction to issue the Plaintiff’s expungement order.

Tennessee’s expungement statute provides that expungement determinations are entrusted to the court that adjudicated the preceding criminal case. *See, e.g.*, Tenn. Code Ann. § 40-32-101(a)(1)(A)

(expungement petition to be directed “to the court having jurisdiction in the previous action”); § 40-32-101(f)(1) (same); § 40-32-101(j) (same); § 40-32-101(g)(3) (“A person seeking expunction shall petition the court in which the petitioner was convicted of the offense sought to be expunged is filed.”). *See also* Tenn. Code Ann. § 40-32-101(a)(3), (a)(5), (f)(3), (h)(1)(A), (k)(1)(D); § 40-35-313(b) (“Upon the dismissal of the person and discharge of the proceedings against the person under subsection (a), the person may apply to the court for an order to expunge from all official records”). This statutory framework respects and comports with a “trial court’s inherent supervisory authority over its own records and files[.]” *In re NHC–Nashville Fire Litig.*, 293 S.W.3d 547, 561 (Tenn. Ct. App. 2008). Thus, as the court that adjudicated the Plaintiff’s criminal proceeding, the McNairy County Circuit Court “had jurisdiction to consider and rule on the agreed petition for expunction.” *See Brown*, 2020 WL 6041807, at *2 (citing Tenn. Code Ann. § 40-32-101(g)(3)).

Here, the Parties agree that the McNairy County Circuit Court had jurisdiction to issue the Plaintiff’s expungement order. Indeed, the Defendants contended repeatedly that the McNairy County Circuit Court “is the Court that had jurisdiction” over both the Plaintiff’s expungement order and the underlying criminal case that was ordered expunged. *See, e.g.*, Transcript at p. 4, line 21–p. 5, line 1; *id.* at 6, lines 10–14; *id.* at 8, line 22–9, line 4.

Significantly, the Defendants’ agreement that expungement determinations are entrusted to criminal courts also powerfully undercuts their claim that the TBI has a substantive role in determining eligibility, because no “rule or precedent authoriz[es]” the TBI to

participate in criminal proceedings as a party. *See State v. Allen*, 593 S.W.3d 145, 154 n.13 (Tenn. 2020) (“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[.]”). The Defendants’ contention that the McNairy County Circuit Court’s order was wrong on the merits also does not affect the McNairy County Circuit Court’s jurisdiction. *See, e.g., State v. Cawood*, 134 S.W.3d 159, 162–63 (Tenn. 2004) (“In order to determine if a court has jurisdiction, we consider ‘whether or not it had the power to enter upon the inquiry; not whether its conclusion in the course of it was right or wrong.’” (citing *Stinson v. State*, 344 S.W.2d 369, 373 (Tenn. 1961))). Accordingly, given the McNairy County Circuit Court’s undisputed jurisdiction to issue the Plaintiff’s expungement order, the order is lawful, and it must be followed unless and until reversed. *See Konvalinka*, 249 S.W.3d at 355.

2. The Plaintiff’s expungement order was not reversed through the exclusive methods by which litigants may seek relief from court orders.

This Court has established specific judicial processes that provide the exclusive methods by which litigants may seek relief from final court orders. Specifically, through the exercise of its supervisory authority, and with the approval of the General Assembly, this Court has promulgated Rules of Procedure that enable assertedly aggrieved litigants to contest or seek relief from final court orders, including orders issued in criminal cases. Expungement orders are not exempt from these established judicial processes; indeed, to the contrary, they are expressly contemplated by them. *See Tenn. R. App. P. 3(c)*. Thus, when the

Government desires relief from an expungement order that it contends is erroneous, this Court’s Rules of Procedure reflect that Government may:

1. file a timely appeal under Rule 3(c) of the Tennessee Rules of Appellate Procedure (“In criminal actions an appeal as of right by the state lies . . . from a final order on a request for expunction.”); *see also Brown*, 2020 WL 6041807, at *2 (“[T]he remedy for an erroneous grant of an expunction is properly sought by direct appeal[.]” (citing Tenn. R. App. P. 3(b), (c))); or

2. under limited circumstances where, as here, a defendant’s expungement eligibility was made part of the defendant’s agreed sentence, “seek to correct an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered” by filing a timely motion under Rule 36.1(a) of the Tennessee Rules of Criminal Procedure.

This Court’s Rules—and this Court’s Rules alone—govern such procedure in Tennessee. They are not optional, and they are not recommendations. Accordingly, the Defendants have no authority to opt themselves out of this Court’s Rules of Procedure by outright disobeying a final court order in lieu of seeking judicial relief from it. As the Court of Criminal Appeals recently explained in *Brown*, 2020 WL 6041807, at *2—a case in which all involved agreed that an expungement order was issued erroneously by a court with jurisdiction to issue it:

[T]he remedy for an erroneous grant of an expunction is properly sought by direct appeal, *see* Tenn. R. App. P. 3(b), (c) (granting both parties an appeal as of right “from a final order on a request for expunction”). 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. Consequently, the trial court lacked jurisdiction to hear the State's motion to re-consider the order of expunction.

Here, the Defendants admit that they did not file an appeal after the McNairy County Circuit Court granted the Plaintiff's expungement order in February 2019.⁶² And in the absence of a timely appeal, the Plaintiff's expungement order "became final" 30 days later. *Brown*, 2020 WL 6041807, at *2. The Defendants conclusively admit as much.⁶³

The Defendants additionally admit that "[t]he expunction order entered in McNairy County Circuit Court Case No. 3279 was not reversed."⁶⁴ Neither Defendant denies the Plaintiff's allegation that "[n]o notice of appeal or post-judgment motion was ever filed following entry of the Parties' expunction order in McNairy County Circuit Court Case No. 3279 on February 19, 2019."⁶⁵ Accordingly, no timely motion to modify the Plaintiff's expungement order was ever filed—let alone granted—under the limited post-judgment authority conferred by Rule 36.1(a) of the Tennessee Rules of Criminal Procedure, either.

Nor *could* such a motion be filed at this juncture, given that the Plaintiff's sentence has been fully served and expired many years ago. *See State v. Brown*, 479 S.W.3d 200, 211 (Tenn. 2015) ("Rule 36.1 does not expand the scope of relief and does not authorize the correction of expired illegal sentences. Therefore, a Rule 36.1 motion may be

⁶² R. at 10, ¶ 48; R. at 105, ¶ 48 ("ADMIT").

⁶³ R. at 11, ¶ 53; R. at 105, ¶ 53 ("ADMIT.").

⁶⁴ R. at 10, ¶ 50; R. at 105, ¶ 50 ("ADMIT.").

⁶⁵ R. at 8, ¶ 34; R. at 103, ¶ 34.

summarily dismissed for failure to state a colorable claim if the alleged illegal sentence has expired.”). As this Court has previously warned, allowing the Government to complain about the legality of a sentence even after a criminal defendant has fully served it “could potentially produce absurd, and even arguably unconstitutional, results.” *Id.* Such an approach would also give rise to serious “constitutional objections[.]” *id.*, and “the ‘outcry’ would be unimaginable” were the State to begin taking it, *see id.* (quoting *Lee v. State*, No. W2014–00994–CCA–R3–CO, 2015 WL 2330063, at *5 (Tenn. Crim. App. May 13, 2015) (Williams, J., dissenting)), *app. denied* (Tenn. May 9, 2016).

Given this context, in lieu of seeking judicial relief that would have been “summarily dismissed” as meritless if requested, *see id.*, the TBI just disregarded the judicial process entirely. Accordingly, with the apparent blessing of the Tennessee Attorney General’s Office, the TBI has willfully refused to obey a final court order—lawless behavior that would land any other contemnor in jail and would subject any other attorney to professional discipline. The TBI has no conceivable authority to behave this way, of course—though that has not stopped it before. *See Allen*, 593 S.W.3d at 155 (“[T]he statutory provision the TBI relies upon as supporting these approaches and as giving it authority to make the initial determination of an out-of-state offender’s proper classification actually relates only to the review the TBI must conduct upon receipt of a request for termination of the registration requirements. Tenn. Code Ann. § 40-39-207(g)(2)(B). The TBI cites no statute authorizing it to make the initial classification determination.”). Given that the Plaintiff’s expungement order was neither appealed nor reversed through the

exclusive methods by which litigants may seek relief from court orders, though, the McNairy County Circuit Court's final and unreversed expungement order must be obeyed.

3. The Plaintiff's expungement order was not procured through fraud.

Where, as here, an order is lawful and has not been reversed through established judicial processes, this Court's precedent contemplates only one instance in which a litigant may lawfully refuse to comply with it: when the order was obtained through fraud. *See Oody v. Roane Iron Co.*, 53 S.W. 1002, 1003 (Tenn. Ch. App. 1899), *aff'd*, 58 S.W. 850 (Tenn. 1900) (“[A]ny decree or judgment by proper proceedings—that is, by an original bill containing proper averments—may be attacked for fraud. It seems this is the proper course where there has been an appearance entered for a person by an unauthorized attorney, and judgment thereupon entered against such party.” (internal citations omitted)). *Cf. Com. Bank of Manchester v. Buckner*, 61 U.S. 108, 109, (1858) (“Fraud vitiates everything into which it enters.”); *Boyce's Ex'rs v. Grundy*, 28 U.S. 210, 220 (1830) (“fraud . . . vitiates every thing.”). “An order obtained through fraud is voidable[.]” 60 C.J.S. *Motions & Orders* § 76 (August 2021 Update). The expungement order issued by the McNairy County Circuit Court, however, was not obtained through fraud—or anything resembling it.⁶⁶ Instead, the Plaintiff's expungement

⁶⁶ *See* R. at 100, ¶ 2. *See also* R. at 106, ¶ 60 (“Defendants admit an Assistant District Attorney General with the State of Tennessee signed the February 19, 2019, expunction order.”).

order was jointly proposed by the State of Tennessee, which consented to it,⁶⁷ and agreed to it⁶⁸ following the Plaintiff's compliance with the terms of an expired, plea-bargained sentence.

Significantly, the TBI acknowledged the legitimacy of the McNairy County Circuit Court's expungement order by "compl[ying] with [the] portion of" the order⁶⁹ that the TBI considered correct. By contrast, the TBI has disobeyed the remainder of the expungement order not because it believes the order is fraudulent, but because it believes it is *wrong*. As detailed below, this is contempt. It also seriously contravenes the Tennessee Constitution's separation of powers, which does not permit the executive branch to sit in review of—let alone disregard—final orders from the judiciary. *See Tenn. Envtl. Council v. Water Quality Control Bd.*, 250 S.W.3d 44, 53 (Tenn. Ct. App. 2007) ("[T]he Supreme Court of Tennessee has stated '[t]he legislative branch has the authority to make, alter, and repeal the law; the executive branch administers and enforces the law; and the judicial branch has the authority to interpret and apply the law.'" (cleaned up).

C. VIOLATING A COURT ORDER THAT HAS NOT BEEN REVERSED IS CONTEMPTUOUS.

Court orders are not recommendations. They must be followed—even if *erroneous*—unless and until they are reversed. *See Konvalinka*,

⁶⁷ R. at 103, ¶ 30 (emphasis added).

⁶⁸ *Id.* at ¶ 31 (emphasis added).

⁶⁹ R. at 104, ¶ 43 ("Defendants admit that Defendant TBI complied with a portion of the McNairy County Court Order.").

249 S.W.3d at 355 (“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.”) (citation omitted). Accordingly, disobeying court orders—even court orders that a litigant believes are wrong—is contemptuous. *See State v. Ramos*, No. M2007-01766-CCA-R3-CD, 2009 WL 890877, at *4 (Tenn. Crim. App. Apr. 2, 2009) (“The principle underlying the court’s contempt powers, i.e. the court must be able to maintain the integrity of its orders, is so strong that even erroneous orders must be obeyed at the risk of a contempt citation.” (quoting *State v. Jones*, 1985 WL 4229, at *8 (Tenn. Crim. App. Nov. 27, 1985) (Riley, J., concurring), *aff’d* 726 S.W.2d 515 (Tenn. 1987)), *app. denied* (Tenn. Aug. 31, 2009))).

Here, all Parties agree that the Plaintiff’s expungement order both “was not appealed”⁷⁰ and “was not reversed.”⁷¹ Accordingly, absent an issuing court’s lack of jurisdiction or fraud, neither the State of Tennessee nor its agents may refuse to comply with a genuine, final, unreversed court order in lieu of pursuing established judicial processes for modifying it. *Konvalinka*, 249 S.W.3d at 355; *Brown*, 2020 WL 6041807, at *2 (“[T]he remedy for an erroneous grant of an expunction is properly sought by direct appeal[.]” (citing Tenn. R. App. P. 3(b), (c))). Accordingly, the Defendants’ willful refusal to comply with the McNairy County Court’s final and unappealed expungement order can only be

⁷⁰ *See* R. at 10, ¶ 48; R. at 105, ¶ 48 (“ADMIT”).

⁷¹ R. at 10, ¶ 50 (“The expunction order entered in McNairy County Circuit Court Case No. 3279 was not reversed.”); R. at 105, ¶ 50 (“ADMIT.”).

characterized as contemptuous.

D. TENNESSEE CODE ANNOTATED § 40-32-102(b) TASKS THE TBI WITH A MINISTERIAL DUTY TO COMPLY WITH FINAL EXPUNGEMENT ORDERS.

Separate and apart from the fact that the Plaintiff's expungement order is a final court order that the TBI lacks authority to disobey, by statute, the TBI's expungement duties are purely ministerial. *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."). Tennessee Code Annotated § 40-32-102(b)'s text is not ambiguous. Accordingly, the text of § 40-32-102(b) being plain and clear, this Court's "simple and obvious" duty—and the TBI's—is just to "obey it." *See Hawks v. City of Westmoreland*, 960 S.W.2d 10, 16 (Tenn. 1997) ("Where the language contained within the four corners of a statute is plain, clear, and unambiguous, the duty of the courts is simple and obvious, 'to say sic lex scripta, and obey it.'" (citing *Carson Creek Vacation Resorts, Inc. v. State*, 865 S.W.2d 1, 2 (Tenn. 1993))).

Interpreting § 40-32-102 according to its text, the expungement process is as follows: Once a criminal court with jurisdiction determines that a charge is eligible to be expunged, enters an expungement order, and the order becomes final and unappealable, various governmental entities—including the TBI—are sent the order and "shall" comply with it. *See* § 40-32-102(a), (b). Indeed, the text of § 40-32-102(b) reflects that a defendant's records are already "expunged" under the law by the time the TBI receives the order. *Id.* Thus, the TBI's only role in the process

is to “remove” the already “expunged records” from a person’s reported criminal history. *Id.*

Consequently, the entities—including the TBI—that are ordered to implement the judiciary’s expungement orders play no role in determining expungement eligibility, either in the first instance or at any point thereafter. Instead, after a court has issued a final and unappealable expungement order, § 40-32-102(b) provides that the Defendant TBI’s duties are ministerial, and the TBI is required—without exception or discretion—to comply with the order within sixty days. *See id.* (“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.”). *See also State ex rel. Metro. Gov’t of Nashville & Davidson Cty. v. State*, 534 S.W.3d 928, 931 (Tenn. Ct. App. 2017) (“The difference between ministerial duties and discretionary duties is generally: where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial[.]”) (cleaned up). There is also no doubt that the TBI’s compliance is not optional. Indeed, failing to comply with § 40-32-102(b)’s statutory mandate is a criminal offense. *See* Tenn. Code Ann. § 40-32-104 (“Any person who violates this chapter commits a Class A misdemeanor and shall be fined not less than five hundred dollars (\$500) and not more than one thousand dollars (\$1,000) and imprisoned in the county jail or workhouse not less than thirty (30) days and not more than eleven (11) months and twenty-nine (29) days.”).

E. THE DEFENDANTS’ AND THE TRIAL COURT’S CONTRARY THEORIES ARE UNPERSUASIVE.

Arguing in support of a contrary conclusion, the Defendants and the trial court offered different (and competing) theories. Each is unpersuasive.

1. The Defendants’ theory that the merits of the Plaintiff’s expungement order may be relitigated is meritless.

During the proceedings below, the Defendants insisted that the McNairy County Circuit Court’s expungement order was wrong on the merits. *See, e.g.*, R. at 296; R. at 339 n.1; Transcript at p. 5, lines 2–4. Accordingly, despite the order’s finality, they argued that “the merits of the underlying expunction order must be revisited[.]”⁷²

As explained above, these assertions are not only wrong—they are legally frivolous; they contravene foundational res judicata principles; and they are contemptuous. *See Brown*, 2020 WL 6041807, at *2 (“[T]he remedy for an erroneous grant of an expunction is properly sought by direct appeal[.]” (citing Tenn. R. App. P. 3(b), (c))); *Regions Bank*, 625 S.W.3d at 847 (“The fundamental principle underlying the doctrine ‘is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so.’” (quoting Restatement (Second) of Judgments, ch. 1, at 6 (Am. L. Inst. 1982))); *Konvalinka*, 249 S.W.3d at 355 (“Erroneous orders must be followed until they are reversed.” (citing *Blair v. Nelson*, 67 Tenn. 1, 5 (1874))). Accordingly, the Defendants’ claim that the McNairy County

⁷² R. at 149.

Circuit Court’s final and unappealed expungement order may be subjected to relitigation anew because the Plaintiff filed suit to compel the TBI’s compliance with the order is meritless.

2. The trial court’s theory that the TBI may make independent expungement determinations that are subject to relitigation under Tennessee Code Annotated § 40-39- 207(g)(1) is meritless.

The trial court offered a separate theory: While expungement orders are *usually* “res judicata to the TBI” once they become final, *see* R. at 340 (“Following that sixty days, an expunction order is final, unappealable and is res judicata to the TBI, and it must comply with an expunction order and remove the records.”), “there is an exception to the TBI’s required compliance under section 40-32-102(b)[.]” *id.* Specifically, the trial court held that:

[T]he carve out and exception is that with a section 40-32-101(a)(1)(D) sexual offense the TBI is required by Tennessee Code Annotated sections 40-39-207(a)(2) and 209 to determine under Tennessee Code Annotated section 40-32-101 whether the offense is eligible for expunction. If 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.⁷³

There are several immediate problems with this ruling, which is similarly unsupportable.

First, the ruling is premised upon the trial court’s erroneous findings that: (a) the TBI has a role in determining expungement eligibility, and (b) there is a process for contesting the TBI’s

⁷³ R. at 340–41.

determinations under Tenn. Code Ann. § 40-39-207(g)(1) thereafter. *See* R. at 341 (“If 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.”). This is spectacularly wrong. Section 40-39-207(g)(1) deals exclusively with the “termination of registration requirements” from Tennessee’s sex offender registry. It has nothing to do with expungement determinations at all. *Id.*

Presumably, this accounts for why the Defendants themselves never raised the argument that § 40-39-207(g)(1) has any application to expungement determinations. Instead, that erroneous claim was raised unilaterally by the trial court in contravention of party presentation principles. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (“In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw v. United States*, 554 U.S. 237 (2008), ‘in both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.’” (quoting *Greenlaw*, 554 U.S. at 243)). And in stark contrast to the process that exists to review the TBI’s denial of a “request for termination of registration requirements[,]” Tenn. Code Ann. § 40-39-207(g)(1), there is no comparable statutory process for contesting the TBI’s conclusions regarding *expungement eligibility*, because expungement determinations are exclusively within the province of the judiciary, and the TBI’s duties resulting from the judiciary’s final expungement orders are ministerial. *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.”).

Put another way: It is not the case that expungement orders are sent to the TBI for processing and reviewed by the TBI for compliance, after which recipients may contest the TBI’s eligibility determinations under § 40-39-207(g)(1). Instead, expungement eligibility is fully and finally determined, *in the first instance*, by courts. Thus, whether an offense is eligible for expungement is a question that is presented to—and is necessarily adjudicated by—the relevant criminal court as an initial matter.

Thereafter, once an expungement order becomes final, the duties of the (many) entities that are statutorily required to process the order—local clerks, local law enforcement, the TBI, and others—are mandatory and ministerial. *See* Tenn. Code Ann. § 40-32-102(a)–(b). No agency—the TBI included—has discretion to refuse compliance with a final expungement order. Before reaching that point, if the State of Tennessee wishes to contest the propriety of an expungement order based on a claim that the order was erroneous, then “the 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)).

F. EXEMPTING EXPUNGEMENT ORDERS FROM FINALITY PRINCIPLES IS UNWARRANTED AND WOULD RESULT IN UNMANAGEABLE AND CATASTROPHIC CONSEQUENCES.

The trial court’s ruling that the TBI may sit in review of—and prompt a second round of merits litigation regarding—courts’ final expungement determinations would undermine Tennessee’s entire

framework for expungement. And beyond the fact that such a process is not plausibly contemplated by statute, the trial court's proposal is demonstrably unmanageable and turns judicial review on its head.

1. **Permitting the TBI—and that agency alone—to refuse compliance with final expungement orders and prompt a second round of merits litigation regarding them would be unmanageable and unconstitutional and is not plausibly contemplated by statute.**

Tennessee's expungement statute, Tenn. Code Ann. § 40-32-101, is famously confusing and poorly drafted. Due to years of inconsistent amendments, partial repeals, and other legislative tweaks, several of its provisions conflict with one another, and others are hopelessly ambiguous. For example, Tennessee's expungement statute provides that a petitioner is not eligible to expunge any conviction if the petitioner has more than two total convictions on their record. *See* Tenn. Code Ann. § 40-32-101(k)(1) ("an 'eligible petitioner' means a person who was convicted of no more than two (2) offenses"). At the same time, though, the statute expressly provides that "3rd offense" simple possession convictions *are* eligible to be expunged. *See* Tenn. Code Ann. § 40-32-101(g)(1)(A)(xxxv) (providing that "[s]imple possession or casual exchange (3rd offense)" convictions may be expunged). How can a person be barred from eligibility when they have more than two convictions, but also, simultaneously, be authorized to expunge convictions for a "3rd offense"? That question is not easily answered. The point, though, is that given the ambiguities that Tennessee's expungement statute presents, expungement petitions commonly result in contested litigation over a petitioner's underlying eligibility, *see, e.g.,* R. at 365–71—litigation

that eventually produces a final and unappealable order by which all parties become bound.

This is—and by necessity, it must be—the process involved. The judicial process—and the appellate review available within that process—produces a judicial determination of expungement eligibility. That process eventually results in a final and unappealable order by which all parties—including the State of Tennessee and its privies—are bound. Thus, if a petitioner succeeds in obtaining a final and unappealable expungement order through the judicial process, all relevant governmental agencies that receive the order have a ministerial duty to comply with it. *See* Tenn. Code Ann. § 40-32-102(a)–(b).

By contrast, if the TBI were permitted to disobey court orders based on its own independent determination about whether the myriad “carveouts/exceptions” contemplated by Tennessee’s expungement statute preclude a petitioner’s eligibility, then *the entire judicial process* that leads to obtaining an expungement order would become meaningless; the judicial function would be usurped; and expungements orders, as a judicial matter, would serve no function. Such a ruling would also have the immediate effect of undermining centuries-old, bedrock rule-of-law principles establishing that even “[e]rroneous orders must be followed until they are reversed.” *Konvalinka*, 249 S.W.3d at 355 (citing *Blair*, 67 Tenn. at 5).

It is unclear why, or on what basis, the TBI would be exempt from these foundational principles. The TBI has never suggested any, either. Instead—as the TBI has done both recently and previously—the TBI has just unlawfully exercised authority that it does not have, *see Allen*, 593

S.W.3d at 155, acting in willful contempt of a final court order in the process.

Put another way: Expungement determinations are made by trial courts. Thereafter, if a party believes that the trial court got it wrong, then the appellate process exists to correct assertedly erroneous expungement orders, and it is available to both parties. *See* Tenn. R. App. P. 3(b), (c). Thus, if the State of Tennessee—which signed on to and jointly proposed the order at issue—or its privies believed that the McNairy County Circuit Court’s expungement order was erroneous, then a well-known, well-established, and well-worn process existed within the judicial branch to provide a remedy and overturn it. *See* Tenn. R. App. P. 3(c). *See also Brown*, 2020 WL 6041807, at *2 (“[T]he remedy for an erroneous grant of an expunction is properly sought by direct appeal[.]” (citing Tenn. R. App. P. 3(b), (c))). Rather than follow that process, however, the Defendants simply opted to disobey the McNairy County Circuit Court’s expungement order even after it became final. The law does not permit such behavior, however, which can only be characterized as contemptuous.

a. Allowing the TBI to disobey final expungement orders would result in two different sets of official criminal history.

There are also important practical reasons why permitting the TBI—and that agency alone—to refuse compliance with final expungement orders and prompt a second round of merits litigation regarding eligibility determinations would be unmanageable. As the statutory scheme governing expungements makes clear, the TBI is not

the only entity that processes expungement orders. Instead, several other governmental entities—both state and local—do so as well. *See* Tenn. Code Ann. § 40-32-102(a) (“The chief administrative official of a municipal, county, or state agency and the clerk of each court where the records are recorded shall remove and destroy the records within sixty (60) days from the date of the expunction order issued under § 40-32-101.”). By allowing the TBI—and the TBI alone—to sit in review of judicial expungement orders and exercise discretion regarding whether or not to comply with them, though, the result is that—as here—governmental entities across Tennessee will maintain different official records and provide conflicting information regarding the same individual’s criminal history. *See* R. at 410 (noting that “state and local entities are reporting conflicting information about the Plaintiff’s criminal history because the Plaintiff’s expunction order from the court has been processed by local entities but not by the TBI”).

b. Allowing the TBI to prompt a second round of merits litigation over expungement eligibility would force litigants to disclose the existence of criminal charges that they have a clearly established right not to reveal.

If the TBI were permitted to prompt a second round of merits litigation that required plaintiffs to demonstrate their eligibility anew, the rights conferred by expungement would also be severely compromised. As this Court has long made clear, requiring an individual to disclose even the existence of an expunged charge is “forbidden[.]” *See State v. Sims*, 746 S.W.2d 191, 199 (Tenn. 1988) (“We hold that questions as to this particular arrest should be forbidden under the public policy of

the statute, which provides that the effect of dismissal of the case and expungement of the record is to restore of the person to the status he occupied before the arrest.”). And as the Court of Appeals has explained:

The effect of expunging the records of a criminal charge is to restore the person to the position he or she occupied prior to the arrest or charge. *State v. Sims*, 746 S.W.2d 191, 199 (Tenn. 1988). **Thus, persons whose records have been expunged may properly decline to reveal or acknowledge the existence of the charge.**

Pizzillo v. Pizzillo, 884 S.W.2d 749, 754 (Tenn. Ct. App. 1994) (emphasis added).

By forcing litigants to disclose the nature of their expunged charges in a second round of merits litigation with the TBI, the “exception/carveout” that the trial court blessed as an “affirmative defense” to compliance with a final expungement order seriously undermines these holdings. In particular, rather than being permitted to “decline to reveal or acknowledge the existence of the charge” after receiving an expungement order, *see id.*, under the trial court’s regime, a petitioner must instead come forward with evidence of what the charge was in order to overcome the TBI’s supposed authority “to determine, independent of the Expunction Order, that the offense is eligible under Tennessee Code Annotated section 40-32-101 for expunction”⁷⁴ In other words, for a plaintiff even to attempt to prevail regarding what the trial court characterized as the “necessary fact in dispute[,]”⁷⁵ the plaintiff would have to relinquish his clearly established right to

⁷⁴ R. at 339.

⁷⁵ R. at 345.

“properly decline to reveal or acknowledge the existence of the charge[.]” *see Pizzillo*, 884 S.W.2d at 754, notwithstanding the fact that requiring such disclosure is “forbidden[.]” *Sims*, 746 S.W.2d at 199.

c. What the trial court held was an “affirmative defense” is a crime.

The trial court’s ruling also authorizes *the TBI* to disclose the nature of an expunged charged in order to establish its supposed “affirmative defense” to compliance with a final expungement order. *See R.* at 350–51 (“[T]he Defendants’ affirmative defense opens the door and makes relevant to the affirmative defense the unredacted version of the criminal record in issue . . .”). But the legislature has criminalized such disclosure. *See* Tenn. Code Ann. § 40-32-101(c)(1) (“Release of confidential records or information contained therein other than to law enforcement agencies for law enforcement purposes shall be a Class A misdemeanor.”). Thus, far from providing a lawful basis for non-compliance, the “affirmative defense” that the trial court invented is a *crime*. *See id.* *Cf. Fann v. Brailey*, 841 S.W.2d 833, 834 (Tenn. Ct. App. 1992) (“[T]he arrest record was expunged by the General Sessions Court of Davidson County. How the defendants were able to obtain the information from the Metropolitan Police Department, which included a ‘mug shot’ of Ms. Fann, does not appear in the record. It is arguable that the release of the records violated the provisions of Tenn. Code Ann. § 40–32–101(c)(1).”). For similar reasons, such disclosure is also tortious. *See, e.g., Fann v. City of Fairview*, 905 S.W.2d 167, 174 (Tenn. Ct. App. 1994) (“[W]e hold that a genuine issue of material fact exists as to whether Appellee Brailey disclosed the information ordered expunged to

The Review Appeal, violating the expungement statute. We further hold that there is evidence from which a reasonable jury could find that Brailey disclosed this information and committed the ‘wrong of invasion of privacy’ as recognized in *Dunn*.”). Given this context, the “affirmative defense” that the trial court recognized in this case cannot plausibly be lawful.

In summary: The trial court’s ruling regarding the Defendants’ “affirmative defense” in this case—one that the Defendants themselves neither raised nor pleaded—(1) conflicts with unambiguous statutory provisions; (2) upends bedrock res judicata and finality principles; (3) blesses the Government’s contempt of final court orders; (4) flips the process of judicial review and the separation of powers on its head; (5) requires litigants to waive their substantive right not to disclose an expunged record in order to ensure compliance with a final expungement order; and (6) authorizes the Defendants (and their counsel) to do something that the legislature has criminalized. It also does so based on an erroneous reading of an inapplicable statute that even the Defendants did not assert applied here. Accordingly, the trial court’s ruling should be vacated.

2. Permitting the TBI to refuse compliance with final expungement orders would compromise the integrity of judgments in concluded criminal cases.

If permitted to stand, the trial court’s order also has disturbing potential to upend and compromise the integrity of judgments in criminal cases far more broadly. *Cf. Padilla v. Kentucky*, 559 U.S. 356, 385 (2010) (Alito, J., concurring) (“[I]ncompetent advice distorts the defendant’s

decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question.”). The reason why is straightforward: Many defendants make decisions—up to and including entering guilty pleas—based on their understanding that a particular disposition will be eligible for expungement. *See, e.g., Pizzillo*, 884 S.W.2d at 751 (“Mr. Pizzillo insisted that he was innocent; however, he followed his attorney's advice to accept pretrial diversion rather than standing trial.”). *Cf. State v. Hanners*, 235 S.W.3d 609, 613 (Tenn. Crim. App. 2007) (“[T]he legislative amendment denying expungement to an offender convicted of a lesser-included offense was approved on May 22, 2003, a date subsequent to the appellant’s conviction and sentencing. Even if the statute is remedial in nature and can therefore be retroactively applied, retrospective application of the amendment arguably impairs the appellant’s reasonable expectations based on the law at the time of his conviction and sentencing.”), *abrogated by State v. Pruitt*, 510 S.W.3d 398 (Tenn. 2016). Consequently, if the TBI—years after a defendant’s sentence has concluded, and even after a defendant has fully performed his or her obligations in accordance with the terms of a plea bargain—refuses to comply with a defendant’s final expungement order, the integrity of the defendant’s entire criminal proceeding risks being compromised. *Cf. Padilla*, 559 U.S. at 385; *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) (“As we held in *Hill v. Lockhart*, when a defendant claims that his counsel’s deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a ‘reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would

have insisted on going to trial.” (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985))).

Beyond the deleterious effects that such circumstances have on individual defendants, this result is also untenable on a broader scale for at least two reasons:

First, it contravenes established principles regarding assertedly illegal sentences. Tennessee Rule of Criminal Procedure Rule 36.1 provides the lone procedural vehicle for the State to challenge a component of a sentence that it asserts is illegal. The State never pursued such a claim here, though, and the Plaintiff’s sentence having been completed many years ago, the time to do so has long since passed. Accordingly, allowing the Government to raise such a belated claim here is properly characterized as “unimaginable[.]” *Brown*, 479 S.W.3d at 211.

Second, the TBI’s refusal to comply with the terms of a final order expunging a diverted charge can never be remedied by criminal courts when a defendant is afforded an expungement as part of a guilty plea. As this Court has held, “a guilty plea expunged after successful completion of judicial diversion is not a conviction subject to collateral review under the Post–Conviction Procedure Act.” *Rodriguez v. State*, 437 S.W.3d 450, 452 (Tenn. 2014). Accordingly, the Plaintiff having obtained the expungement of a diverted offense following an agreed plea; the criminal case at issue having concluded long ago; and the criminal court having expunged the Plaintiff’s criminal case years ago, the Plaintiff has no recourse to the TBI’s contempt in a criminal court. Put differently: No statute or previous judicial decision from this Court even contemplates the situation presented here—where the TBI just willfully

disobeys a final, unappealed expungement order—because there is no serious argument that the TBI has any authority to do so.

3. Permitting the TBI to refuse compliance with final expungement orders would compromise the finality of criminal judgments.

The Defendants’ contempt of a final, unappealed court order also seriously undermines the finality of criminal judgments, even though essential policy considerations militate in favor of protecting such judgments from collateral attack. As the United States Supreme Court has observed, failing to enforce the finality of court orders “would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert.” *Federated Dep’t Stores*, 452 U.S. at 398–99 (quoting *Reed v. Allen*, 286 U.S. 191, 201 (1932)).

Given the collateral consequences of criminal charges, abandoning such principles of finality with respect to expungement orders would produce grave public policy consequences resulting from contradictory official records. *Cf. Elvis Presley Enters.*, 620 S.W.3d at 324 (stating that the 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.” (citing *Jackson*, 387 S.W.3d at 491 (collecting cases))). These are more than theoretical concerns. As it stands today, state and local entities are reporting different official information about the Plaintiff’s criminal history because local entities have processed the Plaintiff’s expungement order

while the Defendants have not. *See* R. at 410 (holding that “state and local entities are reporting conflicting information about the Plaintiff’s criminal history because the Plaintiff’s expunction order from the court has been processed by local entities but not by the TBI”).

The practical consequences of such an inconsistency are immense, especially when an affected person has obtained an order to expunge a felony conviction that the TBI refuses to obey. For example, a person could reasonably believe that—having obtained a final expungement order—he may lawfully vote in this State or elsewhere. *Sims*, 746 S.W.2d at 199 (holding that the effect of “expungement of the record is to restore of the person to the status he occupied before the arrest”). By right, the voter may also “decline to reveal or acknowledge the existence of the charge” on a voter registration form. *See Pizzillo*, 884 S.W.2d at 754 (Tenn. Ct. App. 1994) (holding that the recipient of an expungement order may “decline to reveal or acknowledge the existence of the charge”). Once the TBI reports the voter’s unexpunged felony conviction, though, the voter may experience severe criminal consequences due to the TBI’s failure to expunge his conviction, and the voter’s vote may well be deemed illegal.

The same scenario may unfold when it comes to exercising any number of other rights—including constitutional rights—affected by the collateral consequences of a conviction, such as purchasing a firearm, *see* 18 U.S.C. § 922(g)(1), or serving as a juror, *see* Tenn. Code Ann. § 22-1-102. Indeed, the list of potential consequences numbers in the *tens of thousands*. *See United States v. Nesbeth*, 188 F. Supp. 3d 179, 183 (E.D.N.Y. 2016) (“The study—which was conducted by the American Bar

Association’s Criminal Justice Section—has catalogued tens of thousands of statutes and regulations that impose collateral consequences at both the federal and state levels.”). *See also* R. at 408 (noting “44,000” collateral consequences, “with 954 consequences specific to Tennessee”). These concerns are not trivial. As the trial court itself noted in its order granting the Plaintiff permission to take an interlocutory appeal:

[I]f the Plaintiff exercises the right upon expungement not to acknowledge his criminal charge, the TBI will nevertheless dispute that to any person who seeks to verify them—including employers, landlords, and anyone else who conducts a background check regarding the Plaintiff’s criminal history. These circumstances pose the risk of a severe injury to the Plaintiff.⁷⁶

The injury involved is not limited to expungement recipients themselves, either. For example, authorizing the TBI to disobey a final court order and report contradictory criminal history information about an expungement recipient risks compromising judicial proceedings. If a person whose expungement order has been disobeyed by the TBI is called as a witness in a criminal or civil proceeding, for instance, may that witness be impeached using the TBI’s reported records? *See* Tenn. R. Evid. 609(a)(1) (“[E]vidence that the witness has been convicted of a crime may be admitted if the following procedures and conditions are satisfied: (1) The witness must be asked about the conviction on cross-examination. If the witness denies having been convicted, the conviction may be established by public record.”). The question is unanswerable, because the situation cannot lawfully occur, and having two sets of

⁷⁶ R. at 410–411.

official public records—one maintained by the judicial branch and every state agency *other than* the TBI, and second maintained by the TBI—is self-evidently untenable. Instead, the judiciary is responsible for issuing expungement orders, and the TBI is responsible for complying with them.

4. **Permitting the TBI to refuse compliance with final expungement orders would undermine Tennessee public policy.**

On several occasions, this Court has emphasized the importance of expungement to Tennessee’s public policy and the rights that Tennessee’s expungement statute confers. “The effect of expunging the records of a criminal charge is to restore the person to the position he or she occupied prior to the arrest or charge.” *Pizzillo*, 884 S.W.2d at 754 (citing *Sims*, 746 S.W.2d at 199). “Thus, persons whose records have been expunged may properly decline to reveal or acknowledge the existence of the charge.” *Id.* Further, “[t]he expungement statute is ‘designed to prevent citizens from being unfairly stigmatized’ by criminal charges.” *State v. L.W.*, 350 S.W.3d 911, 916 (Tenn. 2011) (quoting *State v. Adler*, 92 S.W.3d 397, 401 (Tenn. 2002)).

Given this context, “[e]xpungements are often key to helping an individual obtain employment, housing, or college admission or loans.” *Help4TN Days to Provide Free Legal Services to Tennesseans Statewide*, tncourts.gov, (Apr. 5, 2019), <https://www.tncourts.gov/news/2019/04/05/help4tn-days-provide-free-legal-services-tennesseans-statewide>. See also R. at 408 (noting the “struggle[s]” of those with criminal history). As such, this Court has—among other things—developed substantial programming to make

expungements more accessible. *See, e.g., id.* *See also Leaders Join Forces to Help Make Expungements Accessible*, tncourts.gov, <https://www.tncourts.gov/node/4227243> (last visited May 28, 2021).

Given the importance of expungement to the public policy of this State, Tennessee’s judiciary has been appropriately wary of governmental attempts to interfere with a defendant’s expungement. *See, e.g., State v. Liddle*, 929 S.W.2d 415, 415 (Tenn. Crim. App. 1996) (rejecting a district attorney’s argument that dismissed counts of an indictment could not be expunged if a plea was entered as to one count, because “[t]o accept the State’s argument is to allow the district attorney general to control a defendant’s right to expungement by indicting on multiple charges by separate counts in a single indictment”). With this in mind, permitting the TBI—which has no known authority to participate in criminal litigation as a party, *Allen*, 593 S.W.3d at 154 n.13—to unilaterally undermine the effectiveness of an individual’s final expungement order *even after it was entered with the agreement of the State of Tennessee* would give rise to unacceptable and unmanageable consequences that undermine vital public policy considerations. Consequently, as an agent of its principal, the TBI is bound by the orders entered into by State of Tennessee, and it has no role in determining expungement eligibility at all.

5. Permitting the TBI to refuse compliance with final expungement orders would undermine the integrity of plea bargaining.

Maintaining the integrity of the plea-bargaining process is yet another vital public policy consideration that would be compromised by

the TBI's self-bestowed right to disobey final expungement orders. By entering a guilty plea, a defendant waives several constitutional rights. *See Garcia v. State*, 425 S.W.3d 248, 262 (Tenn. 2013) (quoting *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *State v. Mackey*, 553 S.W.2d 337, 339–40 (Tenn. 1977)). A plea bargain induced by “misrepresentation (including unfulfilled or unfulfillable promises),” however, contravenes due process, rendering an otherwise-voluntary waiver invalid. *Id.* (quoting *Brady v. United States*, 397 U.S. 742, 755 (1970)).

Given this context: Permitting the State of Tennessee to promise—and then agree to—the eventual expungement of a criminal case in order to secure a plea bargain, only to permit an agency of the State of Tennessee to refuse compliance with an expungement order thereafter, would imperil plea bargaining as a practice. For plea bargaining to be possible, the Government must be held to its bargain. Consequently, where—as here—defendants have already fully complied with their own obligations, the Government not only may but *must* do the same. *See, e.g., State v. Mellon*, 118 S.W.3d 340, 347 (Tenn. 2003) (“Tennessee courts have held that where the State breached a plea agreement, or some other infirmity occurred that was not caused by the defendant, but which invalidated the agreement, the remedy for breach was to allow the defendant to choose either specific performance or withdrawal of the plea.” (citing *Goosby v. State*, 917 S.W.2d 700, 707 (Tenn. Crim. App. 1995))). *See also id.* (“Because the provisions of any plea agreement are largely dictated by the State, and because of the substantial constitutional interests implicated by plea agreements, the State must bear the risk for any lack of clarity in the agreement, and ambiguities

should be resolved in favor of the defendant.” (citing *State v. Howington*, 907 S.W.2d 403, 410 (Tenn. 1995))).

F. INTERPRETING TENNESSEE’S EXPUNGEMENT STATUTE IN THE MANNER THE TRIAL COURT DID WOULD VIOLATE THE CONSTITUTION.

“It is well-settled in Tennessee that ‘courts do not decide constitutional questions unless resolution is absolutely necessary to determining the issues in the case and adjudicating the rights of the parties.’” *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009) (quoting *State v. Taylor*, 70 S.W.3d 717, 720 (Tenn. 2002) (in turn citing *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995))). Here, resolution of a constitutional question is not “absolutely necessary” to the determination of this action, because the text of Tennessee Code Annotated § 40-32-102(b) is not ambiguous, and it does not afford the TBI any discretion to disobey an expungement order upon receiving it. *See id.* (“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.”). In the event that the trial court’s reasoning—that there is an “affirmative defense” and “carve out that allows the TBI not to comply with [an] Expunction Order” *even after it is final*—were adopted though, the Plaintiff notes that a constitutional conflict—several, in fact—would be unavoidable.

The first is that an expungement order creates constitutionally protected liberty interests that are protected by the due process clause. “Liberty interests can be created by state rules or mutually explicit understandings as well as by statute.” *Bills v. Henderson*, 631 F.2d 1287,

1291 (6th Cir. 1980). *See also Meachum v. Fano*, 427 U.S. 215, 226 (1976). As relevant here, Tennessee law has long reflected that Tennessee’s expungement process protects a recipient’s legal “interests” and individual “rights.” *See, e.g., Canipe v. Memphis City Sch. Bd. of Educ.*, No. 02A01-9806-CH-00149, 1999 WL 20793, at *7 (Tenn. Ct. App. Jan. 20, 1999), *aff’d*, 27 S.W.3d 919 (Tenn. 2000). It also does so in one fell swoop, terminating all civil collateral consequences associated with a criminal charge by restoring the person “to the status he occupied before the arrest.” *Sims*, 746 S.W.2d at 199 (“[T]he effect of dismissal of the . . . expungement of the record is to restore of the person to the status he occupied before the arrest.”).

Given this context, authorizing the TBI to unilaterally deprive an expungement recipient of their constitutionally protected liberty interests even after a court has entered a final expungement order restoring them would run head-first into a constitutional conflict. Authorizing the TBI to do so without affording an expungement recipient either notice or a hearing only exacerbates the matter. Under these circumstances, Tennessee Code Annotated § 40-32-102(b)—which is unambiguous already—must necessarily be interpreted in a manner that prohibits the TBI from disobeying final expungement orders in order to avoid a constitutional violation. *See Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529 (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.”) (collecting cases).

The second is that where, as here, an expungement order is part of

a plea-bargained sentence, the trial court’s ruling unleashes a geyser of constitutional conflicts. Several of them—promoting convictions based on a distorted decision-making process, *see Padilla*, 559 U.S. at 385 (Alito, J., concurring), and securing plea bargains without holding up the State’s end of the bargain, *see Mellon*, 118 S.W.3d at 347, have already been addressed above.

These are not the only constitutional defects that would result, though. Instead, as this Court has previously indicated, allowing the State of Tennessee (or, in this case, an agent of it) to harshen—as a practical matter—a defendant’s sentence *even after the defendant has fully served it* “could potentially produce absurd, and even arguably unconstitutional, results.” *See Brown*, 479 S.W.3d at 211. Given their nature, expungement orders—which can only be entered in Tennessee after a criminal sentence has concluded—will necessarily qualify in all cases. The last time that this Court rejected the State’s invitation to permit such a practice, it also explained in detail why harshening a sentence that has already been fully served “has the potential to result in unconstitutional applications[,]” stating:

[U]nder this interpretation of Rule 36.1, the State would be entitled to correct an illegally lenient sentence, even after the sentence had been fully served. A defendant faced with the prospect of returning to prison after already serving his sentence would undoubtedly raise many objections to Mr. Brown’s and the State’s proposed interpretation of Rule 36.1, including constitutional objections. *See Commonwealth v. Selavka*, 469 Mass. 502, 14 N.E.3d 933, 941 (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.”). As Judge John Everett Williams has observed in dissent in another case involving this same issue, the “outcry” would be unimaginable were “the State [to] start using Rule 36.1 to jail untold numbers of citizens that by all indications have completely served their sentences and are now being told, some [twenty] years later, that a mistake was made.” *Lee*, 2015 WL 2330063, at *5 (Williams, J., dissenting). Rather than adopt an interpretation of Rule 36.1 that is not supported by the expressed purpose or language of Rule 36.1, that is not consistent with the jurisprudential context from which Rule 36.1 developed, and that has the potential to result in unconstitutional applications of Rule 36.1, we hold that Rule 36.1 does not expand the scope of relief and does not authorize the correction of expired illegal sentences.

Id.

The wisdom of this analysis has not changed since 2015. The Defendants’ claim that they may refuse compliance with an expungement order that results from a plea agreement accordingly “has the potential to result in unconstitutional applications[,]” and any construction of § 40-32-102(b) that enables the TBI to disobey final expungement orders must be avoided.

X. CONCLUSION

For the foregoing reasons, 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. Because the trial court held otherwise, its March 22, 2021 order should be vacated, and this case should be remanded for reconsideration.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief (Sections III-X) contains 14,576 words pursuant to § 3.02(a)(1)(a), 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 24th day of September, 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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