IN THE SUPREME OF TENNESSEE
AT NASHVILLE

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

PLAINTIFF'S APPLICATION FOR PERMISSION TO APPEAL FROM DENIAL OF RULE 9 APPLICATION

ON APPEAL BY PERMISSION OF THE DAVIDSON COUNTY CHANCERY COURT

DANIEL A. HORWITZ, BPR #032176
LINDSAY B. SMITH, BPR #035937
HORWITZ LAW, PLLC
4016 WESTLAWN DR.
NASHVILLE, TN 37209
daniel@horwitz.law
lindsay@horwitz.law

Counsel for Plaintiff-Appellant

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, & Court Rules

Additional Authorities

III. INTRODUCTION

This case concerns a final, unappealable, and unalterable expunction order that was entered by agreement of the Plaintiff and the State of Tennessee in McNairy County Circuit Court on February 19, 2019. In their Answer, the Defendants admitted that the Order was authentic, final, was not appealed, and was entered by agreement. They also admit that they will not comply with it. The Plaintiff thus moved for judgment on the pleadings, which the Trial Court denied. The Trial Court did, however, grant the Plaintiff's Rule 9 application to appeal by permission regarding the following question of law: 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]

The Court of Appeals denied the Plaintiff's Rule 9 application to appeal,[2] and this Application followed. For the reasons detailed below, review is warranted due to the need to secure uniformity of decision, because this case presents unusually important questions of law and public interest, and because the need to exercise this Court's supervisory authority compels review. As such, this Application should be granted.

---

[1] *See* Ex. 10, *Mem. and Order (1) Den. Pl.'s Mot. to Revise 3/22/21 Order But (2) Granting Pl.'s Alternative Mot. for Interlocutory Appeal*, at 3 ("It is therefore ORDERED that the Plaintiff is granted permission to take an interlocutory appeal of the March 22, 2021 Order of this Court to have the Court of Appeals determine under what circumstances, if any, the Tennessee Bureau of Investigation may refuse to comply with a final expungement order issued by a court of record.").

[2] *See Recipient of Final Expunction Order in McNairy County Circuit Court Case No. 3279 v. David B. Rausch, et al.,* No. M2021-00438-COA-R9-CV (Tenn. Ct. App. May 11, 2021).

IV. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(1) FILING STATEMENT

Pursuant to Tennessee Rule of Appellate Procedure 11(b), the Plaintiff states that the order of the Tennessee Court of Appeals denying the Plaintiff's Rule 9 application to appeal by permission of the Trial Court was entered on May 11, 2021. *See* Ex. 11, *Recipient of Final Expunction Order in McNairy County Circuit Court Case No. 3279 v. David B. Rausch, Director of the Tennessee Bureau of Investigation, et al.,* No. M2021-00438-COA-R9-CV (Tenn. Ct. App. May 11, 2021). No petition to rehear was filed thereafter. Accordingly, this Application having been filed within 30 days of the order of the Tennessee Court of Appeals denying the Plaintiff's Rule 9 application to appeal by permission of the Trial Court, the Plaintiff's Rule 11 application is timely filed. *See* Tenn. R. App. P. 9(c) ("An appeal from the denial of an application for interlocutory appeal by an intermediate appellate court is sought by filing an application in the Supreme Court as provided for in Rule 11, with the exception that the application shall be filed within 30 days of the filing date of the intermediate appellate court's order; the application shall be entitled 'Application for Permission to Appeal from Denial of Rule 9 Application.'").

V. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(2) STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

The Plaintiff presents the following question of law for the Court's review by permission of the Trial Court: 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]

[3] *See* Ex. 10*, Mem. and Order (1) Den. Pl.'s Mot. to Revise 3/22/21 Order But (2) Granting Pl.'s Alternative Mot. for Interlocutory Appeal*, at 3 ("It is therefore ORDERED that the Plaintiff is granted permission to take an interlocutory appeal of the March 22, 2021 Order of this Court to have the Court of Appeals determine under what circumstances, if any, the Tennessee Bureau of Investigation may refuse to comply with a final expungement order issued by a court of record.").

VI. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(3) STATEMENT OF THE FACTS RELEVANT TO THE QUESTION PRESENTED FOR REVIEW

The Plaintiff is the recipient of a final and unappealed expungement order that was entered by the McNairy County Circuit Court more than two years ago. As detailed below, the Plaintiff's material allegations regarding the Order—including the authenticity of the Plaintiff's expungement order; how the Plaintiff's expungement order came to be approved and entered; the finality of the Plaintiff's expungement order; the Tennessee Bureau of Investigation's knowledge of the Plaintiff's expungement order and its conversion of the Plaintiff's expungement fee regarding it; the Defendants' receipt of the Plaintiff's expungement order; and the Defendants' failure and ongoing 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 Expunction 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

[4] *See* Ex. 2, Defs.' Answer, ¶ 1.

[5] *Id*. *See also id*., ¶ 35 ("Defendants admit that Exhibit A contains a true and exact certified copy of the Plaintiff's expunction order.").

order."[6]

Accordingly, as an initial matter, the Parties agree that the Plaintiff is the recipient of an expunction order entered by the McNairy County Circuit Court; that the Plaintiff's expunction order is attached to the Plaintiff's Complaint as Exhibit A; and that the Plaintiff's expunction order is authentic.[7]

B. Origin of the Plaintiff's Expunction Order.

With respect to how the Plaintiff's expunction 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]

---

[6] *Id*. at ¶ 12.

[7] *See id*. at ¶¶ 1, 35, 12.

[8] *See* Ex. 1, Pl.'s Compl. ¶ 23; *see also* Ex. 2, Defs.' Answer ¶ 23 ("ADMIT.").

[9] *See* Ex. 2, Defs.' Answer ¶ 28.

[10] *Id*. at ¶ 2. *See also id*. at ¶ 60 ("Defendants admit an Assistant District Attorney General with the State of Tennessee signed the February 19, 2019, expunction order.")

The Parties also agree that the Assistant District Attorney General who signed the Plaintiff's expunction 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 authentic expunction order was a product of a consensual agreement between the Plaintiff and the State of Tennessee.[13]

C. Entry of the Plaintiff's Expunction 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 additionally admit that the Plaintiff was

---

[11] *Id*. at ¶ 30 (emphasis added).

[12] *Id*. at ¶ 31 (emphasis added).

[13] *See id.*

[14] *See* Ex. 1, Pl.'s Compl. ¶ 32; *see also* Ex. 2, Defs.' Answer ¶ 32 ("ADMIT.").

[15] Ex. 1, Pl.'s Compl. ¶ 33; *see also* Ex. 2, Defs.' Answer ¶ 33 ("ADMIT.").

assessed—and paid—a $350.00 expungement fee at the time, and that the Defendant Tennessee Bureau of Investigation used and converted the Plaintiff's funds after receiving them.[16]

D. Finality of Plaintiff's Expunction Order.

After the Plaintiff's expungement order was entered, the Defendants admit that "[t]he expunction order entered in McNairy 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 Expunction Order.

After the Plaintiff's expunction order was entered, the Defendants

---

[16] *See* Ex. 1, Pl.'s Compl. ¶ 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."); Ex. 2, Defs.' Answer ¶ 29 ("ADMIT.").

[17] *See* Ex. 1, Pl.'s Compl. ¶ 48; *see also* Ex. 2, Defs.' Answer ¶ 48 ("ADMIT").

[18] *See* Ex. 1, Pl.'s Compl. ¶ 50; Ex. 2, Defs.' Answer ¶ 50 ("ADMIT.").

[19] *See* Ex. 1, Pl.'s Compl. ¶ 53; *see also* Ex. 2, Defs.' Answer ¶ 53 ("ADMIT.").

admit that "a copy of th[e] order was transmitted to Defendant TBI."[20] The Defendants do not claim to have overlooked the order or its contents after receiving it; instead, the Defendants admit that upon receiving the Plaintiff's expunction 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," either.[22]

F. The Tennessee Bureau of Investigation's Non-Compliance with the Unambiguous Terms of the Plaintiff's Expunction Order.

The Defendants admit that "[t]he expunction order entered in McNairy County Circuit Court Case No. 3279 is clear, specific, and unambiguous."[23] The Defendants further admit that the Plaintiff's expunction 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 <u>state agency</u>**, except non-public confidential information retained in accordance with T.C.A. § 10-7-504 and T.C.A. § 38-6-118.[24]

---

[20] *See* Ex. 2, Defs.' Answer ¶ 38.

[21] *See* Ex. 2, Defs.' Answer ¶ 43 ("Defendants admit that Defendant TBI complied with a portion of the McNairy County Court Order.").

[22] *See* Ex. 2, Defs.' Answer ¶ 63. *See also id*. at ¶ 44 ("Defendants admit TBI did not make a timely attempt to alter the expunction order.").

[23] *See* Ex. 1, Pl.'s Compl. ¶ 88; *see also* Ex. 2, Defs.' Answer ¶ 88 ("ADMIT.").

The Defendant TBI admits, too, that it is a "state agency."[25]

Notwithstanding all of the above, though, the "Defendants admit they have not fully complied with the Plaintiff's February 2019 expunction order."[26] As a consequence, "Defendant TBI continues to report the existence of one of Plaintiff's charges which has not been expunged [by the TBI]."[27] There is also no dispute that the statutory time period for compliance with the Plaintiff's expunction 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,"[28] despite conceding that the Plaintiff had quoted the provisions of Tenn. Code Ann. § 40-32-102(b) accurately.[29] *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.").

---

[24] Ex. 1, Pl.'s Compl. ¶ 1 (emphases added); Ex. 2, Defs.' Answer ¶ 1 ("Defendants admit that the expunction order attached to Plaintiff's complaint as Exhibit A contains the language quoted in paragraph 1.").

[25] *See* Ex. 2, Defs.' Answer ¶ 59 ("Defendants admit that Defendant TBI is an agency of the State of Tennessee.").

[26] *Id*. at ¶ 46. *See also id*. at ¶ 64 ("Defendants admit that Defendant TBI has not complied with portions of the expunction order").

[27] *Id*. at ¶ 10.

[28] *Id*. at ¶ 44.

[29] *See id*. at ¶ 39 ("Defendants admit that Tenn. Code Ann. § 40-39-102(b) [sic] is accurately quoted.").

G. The Parties' Legal Dispute Over the Appellees' Authority to Disregard Final Court Orders

As noted above, the "Defendants admit that Defendant TBI has not complied with portions of the expunction order[.]"[30] The reason? "[T]he Tennessee Attorney General's Office believes such non-compliance is permissible."[31] The Parties' dispute thus centers upon a pure question of law: 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?[32]

The Plaintiff maintains that: "The Defendant TBI is not empowered to disregard court orders, including court orders relating to expunction."[33] The Defendants deny this allegation.[34] 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."[35] The Defendants deny this allegation, too.[36] Accordingly, the Parties dispute whether the Defendants may violate a final expunction order issued by a court with subject matter jurisdiction to issue it.

---

[30] *See* Ex. 2, Defs.' Answer ¶ 64.

[31] *Id*.

[32] *See* Ex. 10, Mem. and Order (1) Den. Pl.'s Mot. to Revise 3/22/21 Order But (2) Granting Pl.'s Alternative Mot. for Interlocutory Appeal, at 3.

[33] *See* Ex. 1, Pl.'s Compl. ¶ 17.

[34] *See* Ex. 2, Defs.' Answer ¶ 17 ("DENY.").

[35] *See* Ex. 1, Pl.'s Compl. ¶ 40.

[36] *See* Ex. 2, Defs.' Answer ¶ 40 ("DENY."); *see also id.* at ¶ 46.

H. The Plaintiff's Motion for Judgment on the Pleadings, the Trial Court's Order denying it, and the Plaintiff's interlocutory appeal by permission thereafter.

Because the Parties' dispute turns upon a straightforward issue of law, the Plaintiff moved for partial judgment on the pleadings—seeking compliance with the expungement order—on the overlapping bases that:

1. The Plaintiff's expunction order is long-since final, agreed-upon, unappealable, and inalterable, *see* Ex. 3, Memo. in Supp. of Mot. for J. on the Pleadings, at 9–11;

2. The Defendants lack authority to disregard final court orders, *id.* at 11–13;

3. The Defendants lack authority to adjudicate or independently determine the legality of expunction orders or to substitute their own conclusions for final judicial determinations, *id.* at 14–16; and

4. The Defendants are precluded even from contesting the propriety of the Plaintiff's expunction order, which is res judicata, *id.* at 16–19.

In response to the Plaintiff's Motion for Partial Judgment on the Pleadings, the Defendants raised several arguments.[37] Significantly, none of them was that Tenn. Code Ann. § 40-39-207(g)(1)—a provision that exclusively governs "request[s] for termination of registration requirements" regarding the sex offender registry, rather than having anything to do with expungement[38]—had any bearing on this case.[39] The

[37] *See generally* Ex. 4, Defs.' Resp. in Opp'n to Pl.'s Mot. for Partial J. on the Pleadings.

[38] *See id.*

Defendants also did not claim to have pleaded—and they unmistakably did not plead—any "affirmative defense" that concerned the merits of the Plaintiff's claim.[40]

Upon review, the Trial Court held that familiar principles of finality and res judicata apply to final expunction 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.[41]

However, the Trial Court additionally held—incorrectly, 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)." *Id*. Specifically, the Trial Court held that:

---

[39] *See generally* Ex. 4, Defs.' Resp. in Opp'n to Pl.'s Mot. for Partial J. on the Pleadings.

[40] *See generally* Ex. 4, Defs.' Resp. in Opp'n to Pl.'s Mot. for Partial J. on the Pleadings; *see also* Ex. 2, Defs.' Answer.

[41] Ex. 6, Mem. and Order: (1) Denying Pl.'s Mot. for Partial J. on the Pleadings; (2) Den. Defs.' Mot. for Partial J. on the Pleadings; and (3) Den. Defs.' Mot. to File Under Seal (*hereinafter*, the "March 22, 2021 Order"), at 3.

> [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.[42]

As detailed above, though, the Defendants themselves never advanced this argument.[43] And significantly, the Defendants did not do so because it is unsupportable. Simply stated: Tenn. Code Ann. § 40-39-207(g)(1) has nothing to do with expungement determinations; it does not permit the Defendants to violate final, judicial expungement orders; and given that expungement is entirely within the province of the judiciary, it does not provide for expungement-related "due process" of any kind. Instead, Tenn. Code Ann. § 40-39-207(g)(1) exclusively governs circumstances in which an individual's "request for termination of registration requirements is denied by a TBI official . . . ."[44]

Based on this error, though, the Trial Court concluded that—in at least one circumstance—the Defendants are authorized to violate final, unappealed court orders. And as a consequence, the Trial Court held that a potential "affirmative defense" is available to the Defendants in this case that precluded partial judgment on the pleadings in the Plaintiff's favor. Specifically, the Trial Court ruled:

---

[42] *Id.* at 3–4.

[43] *See* Ex. 4, Defs.' Resp. in Opp'n to Pl.'s Mot. for Partial J. on the Pleadings.

[44] *Id.*

> The Appellees' 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.[45]

Notably, though, even if such an affirmative defense to compliance with a final and unappealed court order were cognizable (and for myriad reasons, it both is not and *cannot* be[46]), the Defendants themselves never pleaded it.[47]

Thereafter, the Plaintiff moved the Trial Court to revise its March 22, 2021 Order, or alternatively, for permission to take an interlocutory appeal to the Court of Appeals 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?"[48] Upon review, the Trial Court declined to revise its March 22, 2021 Order, but it granted the Plaintiff permission to make the interlocutory appeal on that question. In an unsigned, two-sentence order, the Court of Appeals denied the Plaintiff's Rule 9 Application thereafter. This timely Rule 11 Application followed.

---

[45] *See* Ex. 6, March 22, 2021 Order, at 9.

[46] *See* Ex. 7, Pl.'s Mot. to Revise March 22, 2021 Order, or, Alternatively, for Permission to Appeal this Court's March 22, 2021 Interlocutory Order to the Court Of Appeals, at 3–9; *see also* Ex. 9, Pl.'s Reply to Defs.' Resp. to Pl.'s Mot. to Revise Order, or Alternatively, for Permission to Appeal this Court's March 22, 2021 Interlocutory Order, at 3–17

[47] *See* Ex. 2, Defs.' Answer.

[48] *See* Ex. 7, Pl.'s Mot. to Revise, at 2.

VII. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(4) STATEMENT OF THE REASONS SUPPORTING REVIEW

This Court should grant review of the Plaintiff's Application under Tennessee Rule of Appellate Procedure 11(a) or—at minimum—order the Court of Appeals to consider the question presented instead. In this unusual case, all four Rule 11 factors are met, and the narrow issue presented for review concerns a simple question of law that carries enormous significance. In particular, review is warranted given:

1. The need to secure uniformity of decision, *see infra* at 23–27;

2–3. The need to secure settlement of important questions of law and questions of public interest, *see infra* at 28–36; and

4. The need for the exercise of the Supreme Court's supervisory authority, *see infra* at 36–45.

1. THE NEED TO SECURE UNIFORMITY OF DECISION

A. Res judicata

This Court has held that the doctrine of res judicata "promote[s] finality in litigation, prevent[s] inconsistent or contradictory judgments, conserve[s] judicial resources, and protect[s] litigants from the cost and vexation of multiple lawsuits." *Elvis Presley Enterprises, 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)). This Court has also held that "[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). Given the importance of this foundational legal

principle, other courts, unsurprisingly, are in accord. *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."); *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.' *Federated Dep't Stores*, 452 U.S. at 398; *see also* Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 211–12 (2011) ('**A final judgment is no less final because it is wrong, whether it was always wrong or just newly wrong.** Although Rule 60 of the Federal Rules of Civil Procedure permits reopening of final judgments in certain circumstances, the mere incorrectness of a prior judgment in light of new legal developments is ordinarily not enough.'") (emphasis added).

The Trial Court's order denying the Plaintiff's Motion for Partial Judgment on the Pleadings contravenes these decisions. The Defendants have defended this action—and their refusal to comply with a final and unappealed court order—on the asserted basis that the Plaintiff's expunction order was erroneously granted, and thus, they contend that disregarding it "is permissible."[49] *Even if the Defendants were correct* that the order was erroneously granted, though, this Court's res judicata

[49] *See* Ex. 2, Defs.' Answer ¶ 64.

and finality jurisprudence—which it has never hesitated to apply against citizens even in, for instance, parental termination cases and criminal cases when the Government invokes the doctrine—renders that claim inapposite. *See id.* ("The policy rationale in support of Res judicata is not based upon any presumption that the final judgment was right or just."). *Cf. 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 statute subsequently declared unconstitutional) (quoting *Taylor v. State*, 995 S.W.2d 78, 85 (Tenn. 1999)).

This Court's *res judicata* jurisprudence is not—and it cannot be—a one-way ratchet. It does not and cannot apply only against citizens, while empowering governmental litigants to disregard court orders that they deem erroneous in lieu of appealing them or seeking to modify them through established judicial processes. Thus, when citizens seek to apply the doctrine against the Government, the Government should be treated the same way. *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."). That is also particularly true in the remarkable scenario presented here, where the Defendants accepted and then converted the Plaintiff's expungement fee, but then refused to process the Plaintiff's expungement order thereafter. *Compare 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."), *with* Pl.'s Compl. ¶ 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 Defendant TBI converted the Plaintiff's funds."); Defs.' Answer ¶ 29 ("ADMIT.").

B. Court orders must be followed until reversed.

As this Court has long made clear, orders issued by courts of this State must be followed—*even if erroneous*—unless and until they are reversed. *See Konvalinka v. Chattanooga-Hamilton Cnty. 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.") (internal citation omitted). *Cf. 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. Jesse Jones,* 1985 WL 4229, at *7-8 (Tenn. Crim. App., at Jackson, Nov. 27, 1985) (Riley, Sp. J., concurring), *aff'd by State v. Jones,* 726 S.W.2d 515, (Tenn. 1987)). And here, all Parties agree that the Plaintiff's expungement order both "was not appealed"[50] and "was not reversed."[51] Accordingly, straightforward precedent required the Trial Court to grant the Plaintiff's Motion for Partial Judgment on the Pleadings, because absent an issuing court's lack of subject matter jurisdiction—which is uncontested in this case—there is no circumstance—none—that permits a party to violate a final, unreversed court order in lieu of appealing it. *Konvalinka*, 249 S.W.3d at 355.

Given this context, by holding that a circumstance *other* than lack of subject matter jurisdiction permitted the Defendants to refuse compliance with an admittedly final, unappealed, and unreversed court order, the Trial Court contravened this Court's long-established precedent on an issue that implicates significant rule of law principles. *See id.* Review is warranted to ensure uniformity of decision as a consequence. *See id. See also State v. Brown*, No. E20190-1462-CCA-R3-CD, 2020 WL 6041807, at *2 (Tenn. Crim. App. Oct. 13, 2020) ("the remedy for an erroneous grant of an expunction is properly sought by direct appeal[.]").

---

[50] *See* Ex. 1, Pl.'s Compl. ¶ 48; *see also* Ex. 2, Defs.' Answer ¶ 48 ("ADMIT").

[51] *See* Ex. 1, Pl.'s Compl. ¶ 50 ("[t]he expunction order entered in McNairy County Circuit Court Case No. 3279 was not reversed."); *See also* Ex. 2, Defs.' Answer ¶ 50 ("ADMIT.").

2–3. THE NEED TO SECURE SETTLEMENT OF IMPORTANT QUESTIONS OF LAW AND QUESTIONS OF PUBLIC INTEREST.

A. Compromising the integrity of judgments in concluded criminal cases.

If permitted to stand, the Trial Court's order has disturbing potential to upend and compromise the integrity of judgments in criminal cases. *Cf. Padilla v. Kentucky*, 559 U.S. 356, 385 (2010) (Alito, J., concurring) ("incompetent 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 v. Pizzillo*, 884 S.W.2d 749, 751 (Tenn. Ct. App. 1994) ("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) ("the 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 final expungement order, the integrity of the defendant's entire criminal proceeding risks being compromised. *Cf. Padilla*, 559 U.S. at 385 (2010); *Lee v. United States*, 137 S. Ct. 1958, 1965, 198 L. Ed. 2d 476 (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.' 474 U.S., at 59, 106 S.Ct. 366)."). 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 long-settled principles regarding assertedly illegal sentences. Tennessee Rule of Criminal Procedure Rule 36.1 provides the procedural vehicle for the State to challenge a component of a sentence that it asserts is illegal. *See id*. The State never made such a claim, though, and the Plaintiff's sentence having been completed many years ago, the time to do so has long since passed. Further, as this Court has previously warned: The Defendants' behavior under precisely these circumstances "potentially produce[s] absurd, and even arguably unconstitutional, results." *State v. Brown*, 479 S.W.3d 200, 211 (Tenn. 2015). *See also id.* ("under 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. . . . 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. Therefore, **a Rule 36.1 motion may be summarily dismissed for failure to state a colorable claim if the alleged illegal sentence has expired.**") (emphasis added). It also gives rise to serious "constitutional objections," *id.*, and "the 'outcry' would be unimaginable" were the State to begin taking this approach. *See id.* (citing *Lee*, 2015 WL 2330063, at *5 (Williams, J., dissenting)). That presumably accounts for why—rather than seeking permission to take this approach through Rule 36.1—the TBI has instead just ignored the judicial process entirely and unilaterally refused to comply with the terms of a final court order that was a product of a plea agreement. The TBI has absolutely no authority to do so, of course, though the reality that it does not care about that fact is well-recognized. *See, e.g., State v. Allen*, 593 S.W.3d 145, 155 (Tenn. 2020) ("the 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.").

<u>*Second*</u>, the TBI's refusal to comply with the terms of a final order expunging a diverted charge can never be remedied by criminal courts under circumstances 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 expunction of a diverted offense following an agreed plea; the case at issue having concluded long ago; and the criminal court having expunged the entire case at issue 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 acts in contempt of a final, unappealed expunction order—because there is no serious argument that the TBI has any authority to do so.

B. Finality of criminal judgments, and the public policy consequences associated with inconsistent processing of expungement orders.

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, 52 S.Ct. 532, 534, 76 L.Ed. 1054 (1932)).

Abandoning such principles of finality would also carry particularly

grave public policy implications regarding the collateral consequences of criminal cases whenever expungements are involved. *See Elvis Presley Enterprises, Inc.*, 620 S.W.3d at 324 (stating that the res judicata "promote[s] finality in litigation, prevent[s] inconsistent or contradictory judgments, conserve[s] judicial resources, and protect[s] 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 Plaintiff's criminal record, because local entities have processed the Plaintiff's expungement order while the Defendants have not.

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 respect. For example, a person could reasonably believe that—having obtained a final expungement order—he may lawfully vote in this State or elsewhere. *State v. Sims*, 746 S.W.2d 191, 199 (Tenn. 1988) (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 the TBI's failure to expunge his conviction, and the voter's vote may be deemed illegal as a consequence.

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 is 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."). These concerns are not trivial. As the Trial Court itself observed in its order granting the Plaintiff permission to take an interlocutory appeal:

> if 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.

See Mem. and Order: (1) Den. Pl.'s Mot. to Revise 3/22/21 Order but (2) Granting Pl.'s Alternative Motion For Interlocutory Appeal, at 2. This concern is substantial, and interlocutory review of the narrow question of law that gives rise to that "risk of a severe injury" is warranted accordingly. *Id.*

C. Importance of expungement in Tennessee.

On several occasions, this Court has emphasized the importance of expungement to Tennessee's public policy. "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)).

As a member of this Court has recently noted: "Expungements are often key to helping an individual obtain employment, housing, or college admission or loans. The benefits of expungements are far-reaching, and there is often an inequity between higher income and lower income individuals being able to obtain legal assistance to process an expungement." *Help4TN Days to Provide Free Legal Services to Tennesseans Statewide*, tncourts.gov, (April 5, 2019), https://www.tncourts.gov/news/2019/04/05/help4tn-days-provide-free-legal-services-tennesseans-statewide. As such, this Court has—among other things—developed substantial programming to make expungements more accessible to Tennesseans. *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 the right, Tennessee courts have also 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 context in mind, permitting the Defendants 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 create unacceptable and unmanageable consequences that undermine important public policy considerations. Review of the question presented by this Application is warranted accordingly.

D. Maintaining the integrity of plea bargaining.

Maintaining the integrity of the plea-bargaining process is yet another vital public policy consideration affected by the TBI's self-bestowed right to refuse compliance with a final expungement order. By entering a guilty plea, a defendant waives several essential constitutional rights. *See Garcia v. State,* 425 S.W.3d 248, 262 (Tenn. 2013) (quoting *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (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)).

Put directly: Permitting the State of Tennessee to promise—and then agree to—the ultimate expungement of a criminal case in order to generate a plea bargain, and then permitting 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 State of Tennessee must be held to its bargain. Consequently, where—as here—a defendant has already fully complied with his own obligations, the State 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)).

4. THE NEED FOR EXERCISE OF THIS COURT'S SUPERVISORY AUTHORITY.

A. This Court has promulgated specific Rules of Procedure that provide the exclusive methods by which litigants may seek relief from court orders.

Through exercise of its supervisory authority—and with the approval of the General Assembly—this Court has established several specific and exclusive Rules of Procedure that enable assertedly aggrieved litigants to contest or seek relief from final judicial orders. For

example, litigants may timely appeal an order utilizing the provisions of the Tennessee Rules of Appellate Procedure. *See, e.g., Brown*, 2020 WL 6041807, at *2 ("the remedy for an erroneous grant of an expunction is properly sought by direct appeal[.]"). In criminal cases, litigants "may 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" utilizing the Tennessee Rules of Criminal Procedure. *See* Tenn. R. Crim. P. 36.1(a). And in civil cases, litigants may utilize the Tennessee Rules of Civil Procedure to seek relief from judgments. *See* Tenn. R. Civ. P. 60.02.

This Court's Rules—and this Court's Rules alone—govern such procedure in Tennessee. They are not optional, and they are not recommendations. Simply stated: The Defendants have no conceivable authority to opt out of this Court's established Rules of Procedure by outright *disregarding* a final court order in lieu of seeking relief from it. Exercise of this Court's supervisory authority is essential as a consequence, lest other litigants take it upon themselves to do the same and rely on the Defendants' willful contempt as precedent for doing so.

B. Courts have exclusive authority to interpret and apply the law and undertake judicial review.

As this Court has explained: "The 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." *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995). With this context in mind, the essential problem with the Defendants' unlawful conduct—

knowingly refusing to comply with a final, unappealed expunction order because the Defendants believe that the court that entered the order got it wrong—is not merely that it violates an unambiguous statute. *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."). Instead, the Defendants' conduct is also an unconstitutional usurpation of the judicial function itself.

With due respect to the Trial Court, its ruling that the TBI has any authority to refuse compliance with a final expungement order is egregiously wrong and contravenes fundamental processes of judicial review. The ruling is premised upon the Trial Court's belief that the TBI has a role to play in determining expungement eligibility under Tenn. Code Ann. § 40-39-207(g)(1), and that there is a judicial process for contesting the TBI's determinations thereafter.[52] Respectfully, this is wrong. Tenn. Code Ann. § 40-39-207(g)(1) deals exclusively with the "termination of registration requirements" from Tennessee's sex offender registry, and it has nothing at all to do with expungement determinations. *See id.* By contrast, there is no comparable statutory

[52] Ex. 6, March 22, 2021 Order, at 3–4 ("the 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.").

process for contesting the TBI's conclusions regarding expungement eligibility, because expungement determinations are exclusively within the province of the judiciary. Thus, the TBI's duties resulting from the judiciary's final and unappealed expungement orders are exclusively 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 then once received, the TBI reviews them to determine whether they call for the expungement of an ineligible offense. Instead, eligibility determinations are made, in the first instance, by courts. Thus, whether an offense is eligible for expungement is a question presented to—and then adjudicated by—the relevant criminal court, meaning: (1) that an expungement order itself necessarily reflects a judicial determination of eligibility; and (2) that whether an offense is ineligible for expungement is an issue that can be, is, and must be determined in the original litigation giving rise to an expungement order. 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).

Thus, the relevant process is twofold: ***First***, the judiciary determines expungement eligibility as an initial matter. ***Second***, once a court determines a petitioner's eligibility for expungement, enters an expungement order, and the expungement order becomes final and

unappealable, various governmental entities, including the TBI, are sent the order and "shall"—without exception or discretion—comply with it. *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 . . . .") (emphasis added); Tenn. Code Ann. § 40-32-102(b) ("The Tennessee bureau of investigation ***shall*** remove expunged records from the person's criminal history . . . .") (emphasis added). As such, the entities that are required to comply with expungement orders play no role in determining expungement eligibility at any point.

This is—and by necessity, it must be—the process involved. *See Brown*, 2020 WL 6041807, at *2 (holding that "the remedy for an erroneous grant of an expunction is properly sought by direct appeal[.]"). The judicial branch—and the appellate process available within the judicial branch, which exists to permit aggrieved parties to seek review of assertedly erroneous orders—makes the initial determination of expungement eligibility. That process eventually results in a final and unappealable order by which all parties are bound. Through that process, if a petitioner succeeds in obtaining a final and unappealable expungement order, all relevant governmental agencies have a ministerial duty to comply with it. *See* Tenn. Code Ann. § 40-32-102(a)-(b).

By contrast, if the TBI were instead permitted simply to disregard court orders based on that agency's own independent determinations about whether the myriad "carveouts/exceptions" contemplated by Tennessee's expungement statute were present, then the entire judicial

process that leads to obtaining an expungement order would become meaningless; the judicial function would be usurped; and the finality of expunction orders, as a judicial matter, would serve no real purpose. As noted above, 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 v. Nelson*, 67 Tenn. (8 Baxt.) 1, 5 (1874)). It is unclear why, or on what basis, the TBI would or could be exempt from this foundational principle.

Given the above context, while the "exception/carveout" identified in this Court's March 22, 2021 Order gives the appearance of being narrow, it is actually quite broad; it is not easily restricted to the circumstances of this case; and it will carry enormous consequences for judicial administration if permitted to stand. The Trial Court is correct that sexual offenses generally are not eligible for expungement in the first instance. But sexual offenses are not anywhere near the only types of offenses that are excluded from expungement eligibility. Thus, giving the TBI the authority to refuse to comply with final expunction orders based on the TBI's own independent determinations about whether an "exception/carveout" applies would enable the executive branch both to usurp and exercise the essential—and exclusive—judicial function of determining expungement eligibility in the first instance.

For all of these reasons, the appellate process alone exists to correct assertedly erroneous trial court orders. Thus, if the TBI or the State of Tennessee—which signed on to the order at issue—believed that the expunction order that the Plaintiff received was erroneous due to an

improper eligibility determination, then a well-known, well-established, well-worn, and *exclusive* appellate process existed within the judicial branch to provide a remedy and overturn it. *See Brown*, 2020 WL 6041807, at *2 ("the remedy for an erroneous grant of an expunction is properly sought by direct appeal[.]").

Rather than complying with the established judicial process, however, the TBI simply opted to refuse compliance with the underlying expungement order—even after it became final and unappealable. Further, even to the extent that such inaction could be attributed to mistake or excusable neglect, it is undisputed that the TBI also made no attempt to remedy the asserted error or seek relief from it within the year that followed it. *But see* Tenn. R. Civ. P. 60.02 ("The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken."). All of this has the effect of allowing the TBI to usurp the judicial function and disregard the judiciary's exclusive role in expungement determinations. This Court's review is warranted as a consequence.

C. The judiciary's supervisory power over judicial records.

There are also practical considerations of judicial administration involved in expungement orders. As both the United States Supreme Court and this Court have explained, "[e]very court has supervisory power over its own records and files . . . ." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306, 1312, 55 L. Ed. 2d 570 (1978). *See also In re NHC--Nashville Fire Litig.*, 293 S.W.3d 547, 561 (Tenn. Ct. App. 2008) (emphasizing a "trial court's inherent supervisory authority

over its own records and files"). Consequently, where, as here, the judicial branch has ordered a judicial record expunged, but the executive branch refuses to comply with the order, the judiciary's "inherent supervisory authority over its own records and files" is undermined as well. *Id.* Thus, with reason, this Court has exercised its supervisory authority in the recent past to ensure that expungement orders are actually processed by the officials and entities—like the Defendants—who have a ministerial duty to process them. *See, e.g.,* Yolanda Jones, *Shelby County expungement practices questioned by Tennessee Supreme Court*, DAILY MEMPHIAN, (Feb 18, 2019 10:03 AM), https://dailymemphian.com/article/3108/Shelby-County-expungement-practices-questioned-by-Tennessee-Supreme-Court.

D. The party presentation rule.

Last, the Trial Court's order denying the Plaintiff's Motion for Partial Judgment on the Pleadings contravened the principle of party presentation, which facilitates the process of judicial review in the first place. *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.'"); *Wood v. Milyard*, 566 U.S. 463, 472, 132 S. Ct. 1826, 1833, 182 L. Ed. 2d 733 (2012) ("a federal court does not have carte blanche to depart from the principle of party presentation basic to our adversary

system."). In particular, the Trial Court denied the Plaintiff's Motion for Partial Judgment on the Pleadings based on the following two grounds that the Defendants themselves never raised—grounds that were also erroneous as a matter of law:

First, the Trial Court relied on Tenn. Code Ann. § 40-39-207(g) as a basis for denying the Plaintiff's Motion.[53] The Defendants, for their part, never cited this provision, though—and with reason. In particular, the Defendants could not have relied on Tenn. Code Ann. § 40-39-207(g) in good faith, because Tenn. Code Ann. § 40-39-207(g)(1) deals exclusively with the "termination of registration requirements" from Tennessee's sex offender registry. *Id.* As such, it has nothing to do with expungement determinations at all. *See id.*

Second, the Trial Court held that the Defendants have a potential "affirmative defense" to compliance with the Plaintiff's final, unappealed expungement order.[54] The Defendants did not raise any merits-based affirmative defenses,[55] though, which the Trial Court's order itself acknowledged.[56] This failure not only presents party presentation issues, *Greenlaw*, 554 U.S. 237, 128 S.Ct. 2559, 171 L.Ed.2d 399; it also presents waiver issues. *See, e.g., Jackson v. Romine*, No. C 82-0471 L(A), 1984 WL 2786, at *1 (W.D. Ky. Mar. 19, 1984) ("The general rule holds that the defendant waives an affirmative defense which is not pleaded.") (quoting

---

[53] See Ex. 6, March 22, 2021 Order at 3–4.

[54] See Ex. 6, March 22, 2021 Order at 9.

[55] *See generally* Ex. 2, Defs.' Answer.

[56] *See* Ex. 6, March 22, 2021 Order at 9, n. 4.

2A Moore's Federal Practice, [2d Ed.], Para. 8.27[4]).

Regardless, though, the reality that the established adversarial process was muddled by the Trial Court's *sua sponte* introduction of erroneous arguments that neither Defendant actually raised is not contestable. Given this context, supervisory review is warranted to reestablish the principle that the Parties—not the Trial Court—are responsible for framing the issues presented in litigation. This Court's review is warranted as a consequence.

VIII. CONCLUSION

For the foregoing reasons, the Plaintiff's Rule 11 Application for permission to appeal should be **GRANTED**.

Respectfully submitted,

By: /s/ Daniel A. Horwitz
DANIEL A. HORWITZ, BPR #032176
LINDSAY B. SMITH, BPR #035937
HORWITZ LAW, PLLC
4016 WESTLAWN DR.
NASHVILLE, TN 37209
daniel@horwitz.law
lindsay@horwitz.law
(615) 739-2888

Counsel for Plaintiff-Appellant

IX. PLAINTIFF'S TENN. R. APP. P. 9(d) APPENDIX OF EXHIBITS SUPPORTING APPLICATION

For the Plaintiff's "appendix containing copies of: (1) the order appealed from, (2) the trial court's statement of reasons, and (3) the other parts of the record necessary for determination of the application for permission to appeal," *see* Tenn. R. App. P. 9(d), the Plaintiff has appended the following eleven (11) exhibits to the Plaintiff's Application:

1. Plaintiff's Complaint (**Exhibit #1**);

2. Defendants' Answer (**Exhibit #2**);

3. Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Partial Judgment on the Pleadings (**Exhibit #3**);

4. Defendants' Response in Opposition to Plaintiff's Motion for Partial Judgment on the Pleadings (**Exhibit #4**);

5. Plaintiff's Reply to Defendants' Response in Opposition to Plaintiff's Motion for Partial Judgment on the Pleadings (**Exhibit #5**)

6. The Trial Court's March 22, 2021 Mem. and Order: (1) Denying Pl.'s Mot. for Partial J. on the Pleadings; (2) Den. Defs.' Mot. for Partial J. on the Pleadings; and (3) Den. Defs.' Mot. to File Under Seal (**Exhibit #6**), which contains the order appealed from;

7. Plaintiff's Motion to Revise March 22, 2021 Order, or, Alternatively, for Permission to Appeal th[e Trial] Court's March 22, 2021 Interlocutory Order to the Court of Appeals (**Exhibit #7**);

8. Defendants' Response in Opposition to Plaintiff's Motion to Revise or, Alternatively, for Permission to Appeal the Court's March 22, 2021 Interlocutory Order (**Exhibit #8**);

9. Plaintiff's Reply to Defendants' Response to Plaintiff's Motion to Revise Order, or Alternatively, for Permission to Appeal th[e Trial] Court's March 22, 2021 Interlocutory Order (**Exhibit #9**);

10. The Trial Court's April 21, 2021 Memorandum and Order: (1) Denying Plaintiff's Motion to Revise 3/22/21 Order but (2) Granting Plaintiff's Alternative Motion for Interlocutory Appeal (**Exhibit #10**), which contains the trial court's statement of reasons.

11. The Court of Appeals' May 11, 2021 Order denying Plaintiff's Rule 9 Application in Case No. M2021-00438-COA-R9-CV (Tenn. Ct. App. May 11, 2021) (**Exhibit #11**).

X. CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2021, a copy of the foregoing was sent via the Court's electronic filing system and/or via email to the following parties:

MALLORY SCHILLER (36191)
MIRANDA JONES (36070)
ROB MITCHELL (32266)
Assistant Attorneys General, Law Enforcement
and Special Prosecutions Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 532-6023
mallory.schiller@ag.tn.gov
miranda.jones@ag.tn.gov
robert.mitchell@ag.tn.gov

Counsel for Defendants-Appellees

By: /s/ Daniel A. Horwitz
Daniel A. Horwitz, BPR #032176