No. 21908 and SCPW-17-0000927

In the Supreme Court of the State of Hawai‘i

State of Hawai‘i, Plaintiff-Appellee, vs. **Jerome Rogan,** Defendant-Appellant.	Appeal from the Circuit Court of the First Circuit (1PC970001153) and Original Proceedings (1PC151001338) Supplemental Brief of the Office of the Public Defender as *Amicus Curiae*
Nick Grube, Petitioner, vs. **The Hon. Rom A. Trader,** Respondent Judge, and **State of Hawai‘i, Alan Ahn,** and **Tiffany Masunaga,** Respondents.	

SUPPLEMENTAL BRIEF OF THE OFFICE OF THE PUBLIC DEFENDER AS *AMICUS CURIAE*

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SUPPLEMENTAL BRIEF OF THE OFFICE OF THE PUBLIC DEFENDER AS *AMICUS CURIAE*

Supplemental briefing was ordered on the following issues:

> (1) whether sealing the entire case file under HRS § 831-3.2(f) violates the public's right of access under the first amendment of the U.S. Constitution and/or article I, section 4 of the Hawai'i Constitution; (2) whether narrower remedies are available, short of a total sealing, that would protect the interests advanced by HRS § 831-3.2(f), and if so, what are those remedies; and, (3) the extent, if any, HRS § 831-3.2(f) encroaches on the Judiciary's independence and power to administer its own records. *See generally* Haw. Const. art. VI, §§ 1, 7; HRS §§ 601-5 (2016), 602-5.5 (2016).

SCPW-17-0000927, Order, Docket No. 59 at 2.[1]

The Movants, Jerome Rogan and Alan Ahn, are both requesting case files to be sealed pursuant to HRS § 831-3.2(f).[2] *See* Case No. 21908, Dkt. No. 26; SCPW-17-0000927, Dkt. 33. The circuit court case files for both Rogan and Ahn appear to have already been sealed in cases

[1] The page numbers cited here refer to the page numbers as they appear in pdf format.

[2] HRS § 831-3.2(f) (2018 Suppl.) provides that,

> Any person for whom an expungement order has been entered may request in writing that the court seal or otherwise remove all judiciary files and other information pertaining to the applicable arrest or case from the judiciary's publicly accessible electronic databases. The court shall make good faith diligent efforts to seal or otherwise remove the applicable files and information within a reasonable time.

On July 1, 2025, an amendment to HRS § 831-3.2(f) will take effect and subsection (f) will read:

> The court shall seal or otherwise remove from the judiciary's publicly accessible electronic databases all judiciary files and other information pertaining to the applicable arrest or case of any person for whom an expungement order listing the court case number has been entered and transmitted to the court. The court shall make good faith diligent efforts to seal or otherwise remove the applicable files and information within a reasonable time.

2023 Haw. Sess. Laws Act 159, §§ 2, 4 at 478. This amendment removes the barrier of requiring a written request to the court to obtain sealing of court records. *See id*.

Cr. No. 97-1153 and Cr. No. 15-1-1338, respectively. [3]

Rogan is now requesting that the court records for his appellate court case file be sealed. Case No. 21908, Dkt. No. 26. He is also requesting that "the case be removed from websites of the State of Hawaii as well[,]" and that his name be "disassociated from judicial research as a reference" and "redacted from everything[.]" *Id*.

Ahn is now requesting sealing on an appellate court case, SCPW-17-0000927, collateral to his criminal case. SCPW-17-0000927, Dkt. No. 33. This collateral case arose from a petition filed by Nick Grube for writs of prohibition and mandamus to obtain access to judicial records and documents related to circuit court criminal proceedings in Cr. No. 15-1-1338. Published Opinion, SCPW-17-0000927, Dkt. No. 37 at 1-2.

I. SEALING THE ENTIRE CASE FILE IS NOT UNCONSTITUTIONAL

The first issue is whether sealing the entire case file under HRS § 831-3.2(f) violates the public's right of access under the first amendment of the U.S. Constitution and/or article I, section 4 of the Hawai'i Constitution. It does not. The sealing of appellate case files of non-conviction cases does not implicate the public's qualified right of access. Nor does the sealing of appellate case files on matters collateral to the non-conviction like Grube's petition related to Ahn's criminal case.

A. The United States Supreme Court set forth the experience and logic test to determine if a qualified right to public access attaches to different types of proceedings.

The first amendment of the U.S. Constitution guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

[3] The Office of the Public Defender cannot access either Cr. No. 97-1153 or Cr. No. 15-1-1338 on the judiciary's electronic database, presumably because they have been sealed. *See also* SCPW-17-0000927, Dkt. No. 35 at 4-5 (Grube describes the procedures related to sealing of Ahn's criminal case).

freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. "These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). Based on these concepts, the Supreme Court of the United States recognized a qualified right of public access to criminal trials, reasoning that "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Id.*

When there is a qualified right of public access, public access may only be denied if the closure serves a compelling interest; there is a substantial probability that, without a closure, the compelling interest would be harmed; and there are no alternatives to closure that would adequately protect the compelling interest. *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 14-15 (1986) (*Press-Enterprise II*). Also, the public must be given an opportunity to be heard on the matter prior to closure. *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 609 n.5 (1982). A high bar indeed.

But not every sealing is subject to this rigorous test. To determine if the public even has a qualified right of access, a two-step analysis is conducted utilizing experience and logic. *See Press–Enterprise II*, 478 U.S. at 8-9. The court must consider (1) "whether the place and process have historically been open to the press and general public"; and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Id*. at 8.

Utilizing that test, the Supreme Court of the United States recognized a qualified right of public access in criminal trials, *Richmond Newspapers,* 448 U.S. at 580, including criminal trials with minor complaining witnesses, *Globe Newspaper Co.*, 457 U.S. at 606-07. It also recognized

the qualified right of public access for jury selection, *Press-Enterprise Co. v. Superior Ct. of California, Riverside Cnty.*, 464 U.S. 501, 505-10 (1984) (*Press-Enterprise I*), and "elaborate" preliminary hearings as conducted in California, *Press-Enterprise II*, 478 U.S. at 13. The Supreme Court of the United States has not addressed access to court records, or the more specific question of entire case files of non-convictions after expungement.

B. Hawaii has applied the experience and logic test to determine whether there is a qualified right to public access to different types of proceedings but has not yet reviewed access to court records in non-convictions after expungement.

Similar to the United States Constitution, the Hawai'i Constitution guarantees that "[n]o law shall be enacted . . . abridging the freedom of speech or of the press[.]" Haw. Const. art. I, § 4. "[A]rticle I, section 4 of the Hawai'i Constitution encompasses at least as much protection of the right of the public to access criminal trials as has been found by the United States Supreme Court in the First Amendment to the United States Constitution." *Oahu Publications Inc. v. Ahn*[4], 133 Hawai'i 482, 494, 331 P.3d 460, 472 (2014). Article I, section 4 of the Hawai'i Constitution may also afford greater protections than the first amendment of the Unites States Constitution. *Id.* (citing *Crosby v. State Dep't of Budget & Fin.*, 76 Hawai'i 332, 340 n. 9, 876 P.2d 1300, 1307 n.9 (1994); *State v. Rodrigues*, 128 Hawai'i 200, 203 n.8, 286 P.3d 809, 812 n.8 (2012)).

The Hawai'i Supreme Court has also utilized the experience and logic test to determine if a qualified public right of access attaches. *See Ahn*, 133 Hawai'i at 499-504, 331 P.3d at 477-82; *see also Grube v. Trader*, 142 Hawai'i 412, 422 n.12, 420 P.3d 343, 353 n.12 (2018) (*Grube I*). The Hawai'i Supreme Court has held that article I, section 4 of the Hawai'i Constitution provides the public with a qualified right of access to observe court proceedings of criminal trials. *Ahn*, 133 Hawai'i at 508, 331 P.3d at 486. This Court gave the same protections to transcripts of those

[4] Not the same Ahn as the Movant in this case.

proceedings. *Id.* In *Grube I*, this Court made clear "the public has a constitutional right of access to criminal proceedings generally, as well as the records thereof." 142 Hawai'i at 422, 420 P.3d at 353.

Grube I is distinguishable from the Movants' cases because it did not involve records of non-convictions after an expungement order issued. At the time it was decided, *Grube I* implicated two criminal cases: Ahn's case, which had ended in a conviction[5], and his co-defendant's case, which was still pending. *See Grube I*, 142 Hawai'i at 418, 420 P.3d at 349. Other states have recognized this distinction and held that no qualified right to public access attaches for these types of non-convictions.

C. Other states have found no qualified right to public access for non-convictions in closed cases or have otherwise found denying access to these records constitutional.

Florida and Massachusetts have held that there is no first amendment presumption of public access to records of non-conviction criminal proceedings after the matters are completed. *See State v. D.H.W.*, 686 So. 2d 1331, 1335-36 (Fla. 1996); *Commonwealth v. Pon*, 14 N.E.3d 182, 196 (Mass. 2014).

In *State v. D.H.W.*, the Florida Supreme Court held that courts are not required to apply the three-prong test set forth in *Press-Enterprise II* prior to sealing judicial criminal history records for non-convictions. 686 So. 2d at 1336. That holding was made with the caveat that the court must appropriately address any constitutional issues specifically raised in that case. *Id.* In other words, no presumption of public access attaches to sealing of non-conviction court records. *See id.* The court reasoned:

> [W]e note that the policy of public access to hearings and trials is deeply rooted in a Fourteenth Amendment concern for due process and a First Amendment concern for public access to ensure the

[5] It appears that the court later reconsidered Ahn's request for deferral and dismissed the case. The case is now sealed. *See* footnote 3, *supra*.

> proper operation of courts. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). By contrast, the policy of public access to old records must be weighed against the long-standing public policy of providing a second chance to criminal defendants who have not been adjudicated guilty. *State v. P.D.A.*, 618 So.2d 282, 288 n.6 (Fla. 2d DCA 1993) (Altenbernd, J., dissenting) (citing *Johnson v. State*, 336 So.2d 93, 95 (Fla. 1976), stating that courts have used discretion to seal their records from public view "from time immemorial").

Id.

In *Commonwealth v. Pon*, the Supreme Judicial Court of Massachusetts held that the records of closed criminal proceedings that resulted in a dismissal or an entry of nolle prosequi are not subject to the first amendment presumption of access. 14 N.E.3d at 196. In *Pon*, the court concluded that "the records of closed cases resulting in certain non-convictions have not been open historically in the same sense as other, constitutionally cognizable elements of criminal proceedings." *Id.* at 195. The court also concluded that "[t]here is no indication that the availability of records of criminal cases that have been closed after non-conviction 'enhances ... the basic fairness of the criminal trial and the appearance of fairness,' as the openness of criminal trials does." *Id.* at 196. Accordingly, that court held that these records were not subject to a first amendment presumption of public access. *Id.*[6]

The Ohio Supreme Court has also addressed the issue. In *State ex rel. Cincinnati Enquirer v. Winkler*, it upheld as constitutional a statute that allowed for sealing of court records for non-convictions. 805 N.E.2d 1094, 1096-97 (Ohio 2004). The Ohio process allowed sealing of records after the court balanced the public's right of access with the defendant's constitutional right to privacy. The *Winkler* court reasoned:

[6] The *Pon* court did conclude that the records were subject to a common-law presumption of public access, which "enable[d] [the court] to depart from the exacting constitutional standard requiring narrowly tailored means toward achieving a compelling government interest." *Pon*, 14 N.E.3d at 197.

> The only function of this statute is to allow a court, after balancing the public and private interests, to limit the life of a particular record. The public's ability to attend a criminal trial is not hindered. The media's right to report on the court proceedings is not diminished. The statute does not restrict the media's right to publish truthful information relating to the criminal proceedings that have been sealed. In addition, the public had a right of access to any court record before, during, and for a period of time after the criminal trial. In fact, the public's access to the records is unrestricted until a decision is made to seal records. The statute ensures fairness by balancing the competing concerns of the public's right to know and the defendant's right to keep certain information private.

Id. at 1097-98. The court also recognized that "[t]he defendant's right to privacy takes into account the public policy of providing a second chance to criminal defendants who have been found not guilty." *Id.* at 1097 (citing *D.H.W.*, 686 So.2d at 1336).

D. Applying the experience prong, there is no qualified public right of access to court records of non-convictions after expungement.

The "experience" prong of the *Press-Enterprise II* analysis does not support a qualified right of public access to appellate case files of non-convictions. *See Press–Enterprise II,* 478 U.S. at 8 (the experience analysis concerns "whether the place and process have historically been open to the press and general public"). Nor does it generally support a qualified right of public access to appellate case files on matters collateral to the non-conviction.

1. Records of non-convictions have been restricted in some fashion for decades.

For over fifty years, the legislature has been trying to minimize the extra-judicial penalties confronting a person who interacted with the criminal legal system but was not convicted. In 1974, the legislature enacted Act 92:

> The purpose of this Act is to minimize or abolish extrajudicial penalties which may confront a person who has a record of arrest, even though such arrest did not lead to conviction. The expungement of such arrest record is necessary if the person is not to continue life under a cloud of doubt placed over him by prospective employers, fraternal organizations, and the public in

> general. At the same time, it is realized as a practical matter, that all records pertaining to an arrest are not separable from other court, police, and public records. Pending the day when technological advances in record-keeping are adopted by state and county agencies and permit a complete expungement of records pertaining to a person, this Act intends to accomplish at least a partial expungement coupled with a certificate issued to authorize declarations that as to a specific arrest, it did not occur.

1974 Haw. Sess. Laws Act 92, § 1 at 165.

Act 92 mandated expungement of non-convictions:

> (a) The attorney general, upon application from a person arrested for, but not convicted of, a crime, shall issue an expungement order annulling, canceling, and rescinding the record of arrest.
> (b) Upon the issuance of the expungement order, the person applying for the order shall be treated as not having been arrested in all respects no otherwise provided for in this section.
> (c) Upon the issuance of the expungement order, all records pertaining to the arrest which are in the custody or control of the State or any county government, and which are capable of being forwarded to thea ttorney general without affecting other records not pertaining to the arrest, shall be so forwarded for placement in a confidential file or if on magnetic tape or in a computer memory bank, shall be erased.
> (d) Records filed under subsection (c) shall not be divulged except upon inquiry by:
> (1) A court of law or an agency therof which is preparing a presentence investigation for the court; or
> (2) An agency of the federal government which is considering the subject person for a position immediately and directly affecting the national security.
> (e) The attorney general shall issue to the person for whom an expungement order has been entered, a certificate stating that the order has been issued and that its effect is to annul the record of a special arrest. The certificate shall authorize the person to state, in response to any question or inquiry, whether or not under oath, that he has no record regarding the specific arrest. Such a statement shall not make the person subject to any action for perjury, civil suit, discharge from employment, or any other adverse action.
> (f) Nothing in this section shall affect the compilation of crime statistics as provided as Part IV of Chapter 28.

1974 Haw. Sess. Laws Act 92, § 2 at 165-66. The Act applied to records of arrest made prior to its effective date, as well as to those made subsequent to its effective date. 1974 Haw. Sess. Laws Act 92, § 3 at 166. The statute was amended over the years, but the core purpose remained the same.

In 2016, the legislature finally added a provision for sealing of court records upon request in writing from the person for whom an expungement order had been entered. 2016 Haw. Sess. Laws Act 231, § 66 at 773.

In 2023, the legislature amended HRS § 831-3.2(f), effective July 1, 2025, to require automatic sealing of court records after expungement, so that the accused did not have to request the sealing in writing. *See* 2023 Haw. Sess. Laws Act 159, §§ 2, 4 at 478; *see also* Conf. Comm. Rep. No. 55, in 2023 Senate Journal, at 795 ("The purpose of this measure is to: . . . . Require the court to automatically seal or remove from the Judiciary's publicly accessible databases any information relevant to the arrest or case of a person for whom an expungement order has been entered and transmitted to the court."); Sen. Comm. Rep. No. 722, in 2023 Senate Journal, at 1212; House Comm. Rep. No. 1381, in 2023 House Journal, at 1141; House Comm. Rep. No. 1886, in 2023 House Journal, at 1296. The legislative history shows that, for decades, the legislature has been reducing barriers for people that qualify to have their records sealed. The most recent amendment is another step in that direction.

2. Courts have always been able to seal some records.

Courts have the inherent power to seal their own records. *See, e.g., City of Pepper Pike v. Doe*, 421 N.E.2d 1303, 1306 (Ohio 1981) (holding that there is a constitutional right to privacy to have court records sealed under some circumstances and recognizing the power of the court to grant that remedy); *see also Johnson*, 336 So. 2d at 95 ("We also recognize that from time immemorial courts have exercised their discretion, on their own initiative or upon motion of the parties, to seal their records from public view wherein the ends of justice may be served."). The legislature also enacted laws giving courts the power to go even further and destroy court records. *See* HRS § 602-5.5. There is a long history of entire classes of court records—like juvenile

logic analysis concerns "whether public access plays a significant positive role in the functioning of the particular process in question"). Nor does it generally support a qualified right of public access to appellate case files on matters collateral to the non-conviction.

Public access does not play a significant positive role in the functioning of the particular process in question. The concerns underlying the openness of criminal trials and their records are not present for sealing records of criminal proceedings from non-convictions after trial and the appellate process is completed (if a trial or appellate process were conducted at all). Here are some of the concerns raised by the U.S. Supreme Court:

> The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enterprise I, 464 U.S. at 508 (emphasis in original) (citing *Richmond Newspapers*, 448 U.S. at 569-71). "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572.

These are important concerns, but they are not raised here: The public may still attend trial. The media may still report on court proceedings. The public has access to the court record prior to trial, during trial, during appeal, and for some time after trial and appeal. In Rogan's case, the public had access to the appellate records during the appeals process and for some time after. In Ahn's collateral case, the public also had access during the appeals process and for some time after the criminal case was completed. Unlike some States, *see Pon*, 14 N.E.3d at 189 (discussing the

history of Massachusetts's criminal justice information system), the public has unfettered access to these records. *See Winkler*, 805 N.E.2d at 1097-98.

"The First Amendment presumption of openness stems in large part from the goal of making the operations of government institutions subject to effective public scrutiny, and the sealing of a small subset of criminal records after the cases have closed does not truly impede the functioning of this process." *Pon*, 469 Mass. 296 at 310, 14 N.E.3d at 196 (cleaned up) (citing *Winkler*, 805 N.E.2d 1094). As Grube acknowledges, the media reported about Mr. Ahn's case. Position Statement, Dkt. No. 35 at 3-4. Public and media access worked—it made the operations of the government institutions subject to effective public scrutiny.

The experience and logic test does not support a public right of access to court records in proceedings that have completed and resulted in non-convictions.[9]

F. Any public right to access is outweighed by defendants' right to privacy

A defendant's right to privacy encompasses the public policy of supporting a clean slate for defendants after a non-conviction. *See Winkler*, 805 N.E.2d at 1097 ("The defendant's right to privacy takes into account the public policy of providing a second chance to criminal defendants who have been found not guilty."); *D.H.W.*, 686 So. 2d at 1336 ("[T]he policy of public access to old records must be weighed against the long-standing public policy of providing a second chance to criminal defendants who have not been adjudicated guilty."). It is now easy for the public to obtain information and data about court proceedings of non-convictions through technology. So, technological changes must be taken into consideration when evaluating the right to privacy. *See*

[9] Ahn and Rogan's cases both resulted in non-convictions. Many of these arguments can similarly apply to closed cases generally that qualify for expungement. The studies cited in Section III. discuss other models for expungement and sealing that exist in other states that are more expansive, but not at issue here.

State v. Walton, 133 Hawai‘i 66, 91, 324 P.3d 876, 901 (2014) (holding that individuals may have a legitimate expectation of privacy when their information is disclosed to a third party because this is "a technological age where in the ordinary course of life, individuals will of necessity have disclosed a boundless amount of information to third parties"); *see also Carpenter v. United States*, 585 U.S. 296, 305 (2018) (discussing how "as technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes," the U.S. Supreme Court has sought to preserve a degree of privacy). The right to privacy weighs against finding a qualified public right to access court records of non-convictions after expungement.

II. THE PLAIN LANGUAGE OF THE STATUTE DOES NOT ALLOW NARROWER REMEDIES

The second issue is whether narrower remedies are available, short of a total sealing, that would protect the interests advanced by HRS § 831-3.2(f), and if so, what are those remedies. Absent a constitutional issue, the plain and unambiguous language of the statute controls. This plain and unambiguous language of this statute does not allow narrower remedies.

Statutory interpretation begins with "the language of the statute itself." *State v. Carlton*, 146 Hawai‘i 16, 22, 455 P.3d 356, 362 (2019). HRS § 831-3.2(f), effective until July 1, 2025, provides that,

> Any person for whom an expungement order has been entered may request in writing that the court seal or otherwise remove all judiciary files and other information pertaining to the applicable arrest or case from the judiciary's publicly accessible electronic databases. The court shall make good faith diligent efforts to seal or otherwise remove the applicable files and information within a reasonable time.

Starting July 1, 2025, HRS § 831-3.2(f), provides that,

> The court shall seal or otherwise remove from the judiciary's publicly accessible electronic databases all judiciary files and other information pertaining to the applicable arrest or case of any person for whom an expungement order listing the court case number has

> been entered and transmitted to the court. The court shall make good faith diligent efforts to seal or otherwise remove the applicable files and information within a reasonable time.

The plain language of HRS § 831-3.2(f) is that the case files must be sealed or otherwise removed from the judiciary's publicly accessible electronic databases. No other option is set forth in the statute. There is no ambiguity. If the language is plain and unambiguous, we must give effect to its plain and obvious meaning. *Carlton*, 146 Hawai'i at 22, 455 P.3d at 362. And the inquiry should end there. *See State v. Reis*, 115 Hawai'i 79, 90, 165 P.3d 980, 990 (2007) ("We resort to legislative history only when there is an ambiguity in the plain language of the statute.").[10]

Nevertheless, the legislative history supports this interpretation. From the first enactment of the expungement statute, the legislature's goal has been clear: "to minimize or abolish extrajudicial penalties which may confront a person who has a record of arrest, even though such arrest did not lead to conviction." 1974 Haw. Sess. Laws Act 92, § 1 at 165. The legislature did not want that person to "continue life under a cloud of doubt placed over him by prospective employers, fraternal organizations, and the public in general." *Id.* The most recent legislative history supports that intent, as the legislature's purpose was to require automatic sealing—one less barrier for a fresh start. *See* 2023 Haw. Sess. Laws Act 159, §§ 2, 4 at 478; *see also* Conf. Comm. Rep. No. 55, in 2023 Senate Journal, at 795 ("The purpose of this measure is to: . . . . Require the court to automatically seal or remove from the Judiciary's publicly accessible databases any information relevant to the arrest or case of a person for whom an expungement order has been entered and transmitted to the court."); Sen. Comm. Rep. No. 722, in 2023 Senate Journal, at 1212;

[10] HRS § 831-3.2(f) only requires that the cases be sealed or removed from "the judiciary's publicly accessible electronic databases[.]" So, the statute does not support Rogan's broad requests that "the case be removed from websites of the State of Hawaii as well[,]" and that his name be "disassociated from judicial research as a reference" and "redacted from everything[.]" Case No. 21908, Dkt. No. 26

House Comm. Rep. No. 1886, at 1296; House Comm. Rep. No. 1381, at 1141.[11]

Grube's suggestion of a less-restrictive alternative is misplaced. He suggests to "remove the public's ability to use the Judiciary's electronic databases to locate this proceeding by searching for Ahn's name." Dkt. No. 35 at 12. That remedy would allow anyone that reads the published opinion in Ahn's case to then look up the case number and access the court record. Ahn would still be "under a cloud of doubt." Court records should not play a part in the lasting stigma that stems from the criminal history associated with a non-conviction.[12]

III. THE STATUTE DOES NOT ENCROACH ON THE JUDICIARY

The third issue is the extent, if any, HRS § 831-3.2(f) encroaches on the Judiciary's independence and power to administer its own records. *See generally* Haw. Const. art. VI, §§ 1, 7; HRS §§ 601-5, 602-5.5. It does not.

The Hawai'i Constitution grants the legislature the power to enact substantive law. Haw. Const. art. III, § 1 (The legislative power of the State shall be vested in a legislature . . . . Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States."); *Bissen v. Fujii*, 51 Haw. 636, 638, 466 P.2d 429, 431 (1970) ("The legislative power has been defined as the power to enact laws and to declare what the law shall be."). The legislature has the power to enact a substantive law to prohibit the public from viewing judiciary records for cases ending in no conviction.

The Supreme Court in Florida answered a similar question in *Johnson v. State*, 336 So. 3d 93 (Fla. 1976). The Florida expungement statute at issue had some key differences from HRS

[11] The legislative history from the 2016 legislative session does not address sealing by the judiciary. *See* Conf. Comm. Rep. No. 138-16, in 2016 Senate Journal, at 824-25; Sen. Comm. Rep. No. 660-16, in 2016 Senate Journal, at 993-94; Senate Comm. Rep. No. 3349, in 2016 Senate Journal, at 1480-81; House Comm. Rep. No. 763-16, in 2016 House Journal, at 1023.

[12] Less restrictive alternatives also violate Ahn's right to privacy, discussed above in Section I. F.

§ 831-3.2(f), notably requiring destruction of court records rather than sealing. The Florida Supreme Court recognized the substantive rights embodied in the statute, namely that it protected the defendant from having his record left open for public inspection in the court. *Id.* at 95. The *Johnson* court did not, however, allow "an unconstitutional encroachment by the legislative branch on the procedural responsibilities granted exclusively" to the judiciary. *Id.* So, the Florida Supreme Court ordered: 1) the court records sealed rather than destroyed, and 2) the sealing be "subject to the power of the court for good cause shown to open it under conditions wherein the ends of justice might require it." *Id.*

HRS § 831-3.2(f) does not have the same issues that concerned the court in *Johnson*. It does not require destruction of the judiciary's records. The records remain available for review by the judiciary. It also does not dictate the procedure for sealing other than that the court make good faith diligent efforts to seal the records within a reasonable time. *See* HRS § 831-3.2(f).[13]

As a final matter, the most recent amendment to HRS § 831-3.2(f) makes clear the legislative intent to make the sealing process automatic and to reduce barriers to those persons that qualify for sealing. If the Court were to establish procedures that increased barriers to those persons, that would frustrate the substantive right created by the legislature.

Clean Slate laws are essential to removing the negative impacts people with criminal history records face. Records, even of non-convictions, impact employment, housing, and education. Automatic record sealing is essential for reducing barriers and democratizing access to

[13] Procedural dictates by the legislature to the courts do not necessarily violate the separation of powers. *See, e.g., State v. Fay*, 154 Hawai'i 305, 308, 550 P.3d 1163, 1166 (2024) (holding that while courts may enforce judgments, they are not empowered to hold restitution compliance hearings contrary to the procedure set forth in HRS § 706-644); *State v. Thompson*, 150 Hawai'i 262, 267, 500 P.3d 447, 452 (2021) (courts are required to give effect to statutory obligations for criminal complaint procedure).

record clearance. By removing these barriers, more people can move forward with their lives and have a positive impact on society. *See* Colleen Chien*, America's Paper Prisons: The Second Chance Gap*, 119 Mich. L. Rev. 519 (2020), available at https://repository.law.umich.edu/mlr/vol119/iss3/3 (last visited January 23, 2025); J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 Harv. L. Rev. 2460, available at https://harvardlawreview.org/print/vol-133/expungement-of-criminal-convictions-an-empirical-study/ (last visited January 23, 2025); *see also* Laura Chavez, The Clean Slate Initiative, *Automatic Record Clearance Removes Barriers and Delivers Improvements for People with Records*, available at https://static1.squarespace.com/static/62cd94419c528e34ea4093ef/t/6721339b9f214f08f5e3a018/1730229148852/Research+Brief_+The+Impacts+of+Clean+Slate+Laws+in+Pennsylvania%2C+Utah%2C+and+Michigan.pdf (last visited January 23, 2025).

IV. CONCLUSION

In conclusion, sealing the entire case file under HRS § 831-3.2(f) does not violate the public's right of access under the first amendment of the U.S. Constitution or article I, section 4 of the Hawai'i Constitution, because no qualified right to public access attaches. Second, narrower remedies are not available based on the plain and unambiguous language of the statute. Finally, the statute does not encroach on the judiciary's independence and power to administer its own records.

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