No. 21908 and SCPW-17-0000927

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I,

Plaintiff-Appellee,

v.

JEROME ROGAN,

Defendant-Appellant.

Appeal from the Circuit Court of the First Circuit

Case No. 1PC970001153

and

Original Proceeding

Case No. 1PC151001338

NICK GRUBE,

Petitioner,

v.

THE HONORABLE ROM A. TRADER, Judge of the Circuit Court of the First Circuit, State of Hawai‘i,

Respondent Judge,

and

STATE OF HAWAI‘I; ALAN AHN; and TIFFANY MASUNAGA,

Respondents.

SUPPLEMENTAL BRIEF OF
THE ATTORNEY GENERAL OF THE STATE OF HAWAIʻI

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SUPPLEMENTAL BRIEF OF
THE ATTORNEY GENERAL OF THE STATE OF HAWAIʻI

HRS § 831-3.2(f) is constitutional. The federal and state constitutions grant the public a qualified right of access to court proceedings and records. *Grube v. Trader*, 142 Hawaiʻi 412, 422, 420 P.3d 343, 353 (2018). But this right does not extend to the records of closed cases, which are the only kinds of records to which HRS § 831-3.2(f) applies. Other state supreme courts considering their own criminal record sealing statutes have reached the same conclusion in the face of constitutional challenges.

The Hawaiʻi Constitution also provides for an independent judiciary. But this independence is not threatened by a statute regulating court records. Such statutes have existed since Statehood and have never been held to interfere with a core or inherent judicial function. Nor does HRS § 831-3.2(f) impinge on the Judiciary's rulemaking power, as it provides a substantive, not a procedural, right to relief.

Having no constitutional infirmity, and imposing a mandatory obligation, HRS § 831-3.2(f) can and should be applied as written in these cases. Narrower relief is not available, nor would it be appropriate for this Court to write it into the statute. If, however, the Court determines that the statute must be interpreted as granting discretion, it should provide guidance to ensure that the law continues to serve its important rehabilitative purpose.

I. STATEMENT OF THE CASE

A. Legal Background

"Through expungement, sealing, vacatur, set-aside, or related records-rehabilitation remedy," "every state offers ways to 'expunge' or otherwise improve one's record of criminal convictions to avoid . . . 'collateral consequences,'" including "limitations on employment, housing, civic participation, and many other realms [that] continue to burden those with criminal records long after they have served their time." Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 Mich. L. Rev. 519, 524 & n.19 (2020); *see* Restoration of Rights Project, *50-State Comparison: Expungement, Sealing & Other Record Relief*, Collateral Consequences Resource Ctr. (July 2024), https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside-2-2/; *50 State Chart of Sealing and Expungement Statutes*, Prosecutors' Ctr. for Excellence (May 30, 2023), https://pceinc.org/50-state-chart-of-sealing-and-expungement-statutes/. "In the past decade, state statutes on the expungement and sealing of criminal history records have multiplied and expanded, thanks to

bipartisan legislative action." Patricia Riley et al., *The Evolving Landscape of Sealing and Expungement Statutes*, 38 Crim. Just., Winter 2024, at 36, 36. "In 2019–2022 alone, almost every state amended its statutes to enhance expungement and sealing by increasing the number of eligible offenses, decreasing waiting periods, or removing other restrictions on eligibility." *Id.*

In Hawai‘i, those convicted of certain offenses and meeting specific criteria are eligible to seek court orders expunging the records of their convictions. *See* HRS §§ 291E-64(e) (certain first-time drinking and driving offenses for those under the age of twenty-one), 706-622.5(4), (5) (certain first- and second-time drug offenses), 706-622.8 (same), 706-622.9(3) (certain first-time property offenses), 712-1256(1) (certain first-time drug offenses for those under the age of twenty-one). In addition, HRS § 831-3.2(a) provides that "a person arrested for, or charged with but not convicted of a crime, or found eligible for redress under [HRS] chapter 661B" may apply for "an expungement order annulling, canceling, and rescinding the record of arrest[,]" except in certain enumerated circumstances. Those who have charges dismissed following deferred acceptance of a guilty or no contest plea may also apply for expungement of their arrest record once a year has passed since the dismissal. HRS §§ 831-3.2(a)(5), 853-1(e).

In 2015, the Penal Code Review Committee—whose membership "included six full time judges and one justice"—proposed amending HRS § 831-3.2 "to permit an offender to request that the court remove from public access all judiciary files and other judiciary information relating to the expunged offense, including information available via the internet." Penal Code Review Comm., Report of the Committee to Review and Recommend Revisions to the Hawai‘i Penal Code 2, 73 (2015), https://www.courts.state.hi.us/docs/news_and_reports_docs/2015_PENAL_CODE_REVIEW_REPORT-FINAL-12-30-15.pdf (PCRC Report).[1] The following year, in an omnibus bill adopting many of the Review Committee's recommendations, the Legislature amended HRS § 831-3.2 to add a new subsection (f) with language similar to that suggested by the committee. *See id.* at 73; 2016 Haw. Sess. Laws Act 231, § 66 at 772–73. The bill passed with overwhelming support in the House and unanimous support in the Senate. *See* 2016 House Journal, at 700 ("41 ayes to 8 noes" with two members excused); 2016 Senate Journal, at 679 ("Ayes, 25. Noes, none."). HRS § 831-3.2(f) reads as follows:

[1] The one justice on the committee was Justice Richard Pollack, PCRC Report at 3, who had authored the seminal Hawai‘i case on the constitutional right of access to court proceedings and records, *Oahu Publications Inc. v. Ahn*, 133 Hawai‘i 482, 331 P.3d 460 (2014), the previous year.

> 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.

Even after the addition of subsection (f), the Legislature remained concerned that "prospective employers, landlords, lenders, educational institutions, and others" could still access court records relating to expunged arrests, that these records might be "regarded negatively" and have "significant and long-lasting impact[s,]" and that the process to seal or remove public access to the records "requires yet another petition." 2023 Haw. Sess. Laws Act 159, § 1 at 478. In 2023, it amended HRS § 831-3.2(f) "to require the court to automatically seal or remove . . . any information relevant to the arrest or case of a person for whom an expungement order has been entered and transmitted to the court." *Id.* That bill, focused solely on enhancing HRS § 831-3.2(f), received unanimous legislative support. *See* 2023 House Journal, at 598; 2023 Senate Journal, at 697–98. Beginning on July 1, 2025, subsection (f) will read as follows:

> 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.[2]

The Legislature's focus on expungement has not let up. Last year, the Legislature created a pilot project to automatically expunge certain marijuana possession arrest records in Hawai'i County, *see* 2024 Haw. Sess. Laws Act 62, expanded expungement eligibility under HRS §§ 291E-64 and 706-622.9, *see* 2024 Haw. Sess. Laws Act 168, and established the Clean Slate Expungement Task Force to make recommendations regarding a state-initiated record clearing program, *see* 2024 Haw. Sess. Laws Act 241.

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[2] Legislation has been introduced to further amend HRS § 831-3.2(f) to authorize the Attorney General to transmit arrest expungement orders to the Judiciary. *See* H.B. 145, 33rd Leg., Reg. Sess. (2025).

B. Factual Background

In 1998, Appellant Jerome Rogan was convicted in the Circuit Court of the First Circuit on four counts of sexual assault in the third degree. *State v. Rogan*, 91 Hawai‘i 405, 408, 984 P.2d 1231, 1234 (1999). The following year, this Court reversed Rogan's conviction in a published opinion, holding that the conviction was tainted by prosecutorial misconduct and that reprosecution was barred under the Double Jeopardy Clause of the Hawai‘i Constitution. *Id.* Rogan's arrest record was later expunged. Dkt. 71 at 3. In October 2020, Rogan sent a letter requesting that his court records be sealed, and identifying case number 21908—the appeal of his 1998 conviction—as the relevant case. Dkt. 26 in No. 21908 at 1 (Mot.). Rogan's letter was forwarded to this Court and is currently pending on its docket in case number 21908 as a motion. *Id.* at 1, 3.

In 2015, Respondents Alan Ahn and Tiffany Masunaga were indicted on multiple drug-related charges in the Circuit Court of the First Circuit. *Grube*, 142 Hawai‘i at 418, 420 P.3d at 349. During the course of their criminal case, the circuit court sealed certain records relating to a hearing and denied Petitioner Nick Grube's motion to unseal them. *Id.* at 418–21, 420 P.3d at 349–52. Grube filed a petition for writs of prohibition and mandamus, asking this Court to unseal the records. *Id.* at 417, 420 P.3d at 348. His petition was granted in a published opinion issued in 2018. *Id.* at 417–18, 420 P.3d at 348–49.

In the underlying criminal case, Ahn pleaded no contest and was sentenced in 2017. CC Dkts. 124, 152 in 1PC151001338 (Mins.). In 2019, the circuit court granted Ahn's motion to reconsider his sentencing and granted deferred acceptance of Ahn's no contest plea. CC Dkts. 189 (Mins.), 209 (Order) in 1PC151001338. In 2021, the circuit court discharged Ahn and dismissed the charges against him pursuant to HRS § 853-1. CC Dkt. 254 in 1PC151001338 (Order). Ahn's arrest record was then expunged in July 2023. Dkt. 33 at 2 (Mot.). In September 2023, Ahn sent a letter to this Court requesting that all of his court records be sealed, and identifying case number SCPW-17-0000927, the mandamus proceeding initiated by Grube, as the relevant case. *Id.* at 1. That letter is currently pending on this Court's docket for the *Grube* mandamus proceeding as a motion. *Id.*

After Ahn's motion was filed, Grube filed a "position statement" arguing that HRS § 831-3.2(f) "does not require sealing [the] entire proceeding[,]" and that doing so would "raise[] serious constitutional concerns." Dkt. 35 at 1 (Statement). Grube asked the Court to deny Ahn's motion or

"take other action short of" sealing, such as "disassociating Ahn from [the] proceeding in the Judiciary's publicly accessible database so that searching for his name [would] not identify [the] matter in a public search" while still leaving the public with the ability to "access . . . all of the information underlying [the] proceeding[,]" by, for example, "searching the case number based on the published decision[.]" *Id.* at 2, 12.

At the Court's invitation, the Attorney General submitted an amicus brief addressing Ahn's motion. Dkts. 37 at 3 (Order), 43 (Amicus Br.). The Attorney General is required to be notified if a party calls into question the constitutionality of any statute. *See* HRAP Rule 44; HRCP Rule 24(d). However, the Attorney General initially took no position on Ahn's motion, as it appeared that no party was asserting that HRS § 831-3.2(f) is facially unconstitutional, only that its application in one instance might raise constitutional concerns. Dkt. 43. The Court subsequently consolidated *Grube* with *Rogan*, Dkt. 55 at 2 (Am. Order), and ordered supplemental briefing on three questions, Dkt. 59 at 2 (Order). Because the answers to these questions could, at least at their extreme ends, facially invalidate HRS § 831-3.2(f), the Attorney General appreciates the opportunity to submit supplemental briefing in defense of the constitutionality of the statute. And because the Attorney General's answers to the Court's three questions necessarily lead to a conclusion about how the Court should address the pending motions, the Attorney General now takes the position that the motions should be granted.

II. QUESTIONS PRESENTED

The questions presented are "(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 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." Dkt. 59 at 2 (Order).

III. LEGAL STANDARD

HRS § 831-3.2(f) does not provide for any means by which a third party may object to a person's request to seal court records pertaining to that person's expunged arrest. However, as a general matter, "this court has consistently held that every enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt. The infraction should be plain, clear, manifest, and

unmistakable." *State v. Calaycay*, 145 Hawai'i at 186, 197, 449 P.3d 1184, 1195 (2019) (quoting *State v. Gaylord*, 78 Hawai'i 127, 137, 890 P.2d 1177 (1995)).

IV. ARGUMENT

A. Sealing a case file under HRS § 831-3.2(f) does not violate the First Amendment or Article I, Section 4 of the Hawai'i Constitution.

1. The federal and state constitutions guarantee a public right to access court proceedings and records.

"The First Amendment to the U.S. Constitution and article I, section 4 of the Hawai'i Constitution grant the public a right of access to court proceedings in criminal cases . . . as well as the records thereof." *Grube*, 142 Hawai'i at 422, 420 P.3d at 353.

"The First Amendment right of access to court documents can be traced back to *Richmond Newspapers, Inc. v. Virginia*, in which the Supreme Court held that the First Amendment protects access to criminal trials." *Courthouse News Serv. v. N.M. Admin. Office of Courts*, 53 F.4th 1245, 1263 (10th Cir. 2022) (citing 448 U.S. 555, 576–78 (1980) (plurality opinion)). "Thereafter, a full majority of the Supreme Court affirmed the First Amendment right of access to criminal trials in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603–04 (1982)." *Id.*

Then, "[i]n [*Press-Enterprise Company v. Superior Court of California*, 478 U.S. 1 (1986) (*Press-Enterprise II*)], the Supreme Court articulated a two-part test to determine whether a member of the public has a First Amendment right to access a particular place and process." *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 829 (9th Cir. 2020) (*Index Newspapers II*). "First, a court must ask 'whether the place and process has historically been open to the press and general public' and 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* (quoting *Press-Enterprise II*, 478 U.S. at 8). This is "commonly referred to as the 'experience and logic test.'" *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1084 (9th Cir. 2014). "If a qualified right of access exists, the government can overcome that right and bar the public by showing that it has 'an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Index Newspapers II*, 977 F.3d at 829 (quoting *Press-Enterprise II*, 478 U.S. at 9).

"As the Supreme Court originally conceptualized it, the First Amendment right of access to governmental proceedings refers to the right of the public to attend and observe those proceedings." *First Amendment Coal. of Ariz., Inc. v. Ryan*, 938 F.3d 1069, 1078 (9th Cir. 2019). However, many appellate courts, including this Court and the Ninth Circuit, have since held that

the First Amendment right extends "to judicial records related to [criminal] proceedings." *United States v. Ahsani*, 76 F.4th 441, 451 (5th Cir. 2023) ("[N]umerous other circuits have so extended the right[.]"); *First Amendment Coal.*, 938 F.3d at 1078 ("Our court has since extended the right of access to various documents filed in criminal proceedings."); *Grube*, 142 Hawai'i at 422, 420 P.3d at 353.

In *Ahn*, this Court held that "article 1, section 4 of the Hawai'i Constitution provides the public with a qualified right of access to observe court proceedings in criminal trials." 133 Hawai'i at 496, 331 P.3d at 474. This right derives from (1) the "[e]ffectively . . . identical" language of the State's "constitutional free speech provision[,]" *id.* at 494, 331 P.3d at 472 (quoting *Crosby v. Dep't of Budget & Fin.*, 76 Hawai'i 332, 339 n.9, 876 P.2d 1300, 1307 n.9 (1994)), which "encompasses as 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[,]" *id.*; (2) Hawaii's "firmly embedded" tradition of public trials dating back to at least the 1820s, *id.* at 494–95, 331 P.3d at 472–73 (quoting *Gannett Pac. Corp. v. Richardson*, 59 Haw. 224, 228, 580 P.2d 49, 54 (1978)); and (3) the benefits of public access that inform the "logic" prong of *Press-Enterprise II*'s experience and logic test, *id.* at 496, 331 P.3d at 474. In *Grube*, the Court made clear that the state constitutional right also extends to the records of criminal proceedings. 142 Hawai'i at 422, 420 P.3d at 353.[3]

Ahn also set forth the "procedural and substantive requirements [that] must be satisfied to overcome the right of public access" in Hawai'i courts. *Grube*, 142 Hawai'i at 423, 420 P.3d at 354. The "procedural prerequisites" are "(1) those excluded from the proceeding must be afforded a reasonable opportunity to state their objections; and (2) the reasons supporting closure must be

[3] The Attorney General recognizes that there is also a "nationwide consensus" among the federal courts of appeals that "the First Amendment right of access 'reaches civil judicial proceedings and records'" in addition to criminal ones. *Civil Beat Law Ctr. for Pub. Interest, Inc. v. Maile*, 117 F.4th 1200, 1208 (9th Cir. 2024) (quoting *Courthouse News Serv. v. Planet*, 947 F.3d 581, 590 (9th Cir. 2020)); *see Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1069 (7th Cir. 2018) ("Though the Supreme Court has not yet extended these principles from criminal proceedings, the federal courts of appeals have widely agreed that the First Amendment right of access extends to civil proceedings and associated records and documents."). While not directly presented with the question, this Court in *Ahn* strongly indicated that it would extend the federal and state constitutional rights to civil cases. 133 Hawai'i at 493 n.14, 496 n.18, 508 n.36, 331 P.3d at 471 n.14, 474 n.18, 486 n.36. Thus, although the *Grube* mandamus proceeding is not, strictly speaking, a criminal proceeding, and perhaps not even a civil proceeding, the Attorney General does not dispute that it is subject to the same constitutional analysis.

articulated in findings." *Id.* (quoting *Ahn*, 133 Hawai‘i at 497–98, 331 P.3d at 475–76). The "substantive factors" are "(1) [the] closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Id.* at 424, 420 P.3d at 355 (quoting *Ahn*, 133 Hawai‘i at 498, 331 P.3d at 476).

2. The constitutional right of access does not extend to the records of closed cases, the only type of records to which HRS § 831-3.2(f) applies.

HRS § 831-3.2(f) does not violate the First Amendment or Article I, Section 4 of the Hawai‘i Constitution because a constitutional right of public access does not attach to the records of closed cases.

Relief under HRS § 831-3.2(f) is available to three categories of people: (1) those who have been "charged with but not convicted of a crime," (2) those who have been "found eligible for redress under [HRS] chapter 661B," and (3) those who have had a charge dismissed following deferred acceptance of a guilty or no contest plea, HRS §§ 831-3.2(a)(5), 853-1(e).[4] Rogan is in the first category. Ahn is in the third.

For those in each of these three categories, HRS § 831-3.2(f) relief is not available until after their criminal case is over. Those in the first category must be "not convicted of a crime"—that is, they must prevail in their underlying criminal case or on appeal, and all proceedings, appeals, or other avenues that might result in their conviction must be exhausted. *See Barker v. Young*, 153 Hawai‘i 144, 148, 528 P.2d 217, 221 (2023) (defendant became a person "charged with but not convicted of a crime" when his harassment case concluded with his conviction for disorderly conduct, a violation); *Expungement Frequently Asked Questions*, Haw. Crim. Just. Data Ctr., https://ag.hawaii.gov/hcjdc/expungement-frequently-asked-questions/ (*Expungement FAQs*) ("Charges without final dispositions" "do[] not qualify for an expungement[.]"). Those in the second category must prevail in an HRS Chapter 661B proceeding, which is a separate civil proceeding, *Haw. Police Dep't v. Kubota*, 155 Hawai‘i 136, 148–50, 557 P.3d 865, 877–79 (2024), initiated only after a defendant is convicted, is sentenced, serves at least part of their sentence, and then has their conviction reversed or vacated in an order based on factual innocence, *Jardine v.*

[4] Those who are arrested but not charged with a crime are also eligible to get their arrest records expunged, HRS § 831-3.2(a), but they would not have associated court records subject to sealing under HRS § 831-3.2(f).

State, 155 Hawai‘i 60, 69, 71, 556 P.3d 406, 415, 417 (2024). Those in the third category must plead guilty or no contest, complete a term of probation, have their charge dismissed, and then wait a year before beginning the expungement process. HRS §§ 831-3.2(a)(5), 853-1.

And then there is the intermediary step of applying for and obtaining expungement of an arrest record, a process that itself takes time. *See Expungement FAQs* (stating that expungement of an arrest record "can take up to 120 days").

Thus, HRS § 831-3.2(f) relief is available only to those with closed criminal cases, and even then, relief will typically not be available until months or even years after the case is closed. In these particular cases, Rogan became a person "charged with but not convicted of a crime" in 1999, when this Court overturned his conviction and ruled out the possibility of reprosecution. He was eligible for relief as soon as HRS § 831-3.2(f) took effect, but did not actually request to seal his criminal appeal until 2020, four years after the statute was enacted and more than twenty years after his appeal concluded. Ahn became eligible in 2022, one year after the charges against him were dismissed pursuant to the deferred acceptance statute. Ahn sought both expungement of his arrest record and sealing of the *Grube* mandamus proceeding in 2023, which was five years after that proceeding ended with this Court's 2018 *Grube* opinion.

The question, then, is whether the records of closed (and sometime long-closed) cases are entitled to the same constitutional right of access as the hearings and records of ongoing proceedings. The answer is no.

Numerous state supreme courts have reached this conclusion when faced with similar constitutional challenges to their sealing statutes. A comparable case is *State ex rel. Cincinnati Enquirer v. Winkler*, 805 N.E.2d 1094 (Ohio 2004). Ohio law permitted "[a]ny person . . . found not guilty of an offense by a jury or a court or who is the defendant named in a dismissed complaint, indictment, or information" to "apply to the court for an order to seal his official records in the case." Ohio Rev. Code § 2953.52(A)(1) (1988). If the statutory requirements were met, the court would "issue an order directing that all official records pertaining to the case be sealed" and that "the proceedings in the case be deemed not to have occurred." *Id.* § 2953.52(B)(3).

In 2001, a former criminal defendant who had been acquitted of all charges moved to seal the official record of his case pursuant to the statute. *Winkler*, 805 N.E.2d at 1095. A municipal judge granted the motion almost six weeks later, and then refused a written request by the Cincinnati Enquirer to inspect the records of the sealed case. *Id.* at 1095–96. The Enquirer filed a

mandamus action in an Ohio Court of Appeals, which ordered the municipal judge to weigh the individual's privacy interests against the public's interest in accessing the records, as the statute required. *Id.* at 1096. The judge did so, and kept the records sealed. *Id.* The Court of Appeals accepted the municipal judge's findings and declined to issue a writ of mandamus, and the Enquirer appealed to the Ohio Supreme Court. *Id.* On appeal, the Enquirer argued in part that the statute was unconstitutional because it violated the public's right of access. *Id.* at 1096–97.

The Ohio Supreme Court rejected the constitutional argument. *Id.* at 1097. As this Court did in *Ahn*, it recognized "a qualified right of access to criminal proceedings . . . in both the federal and state Constitutions[,]" including a right to access "records and transcripts that document the proceedings." *Id.* It noted the "lofty goals" of this right, including the community interest in observing the administration of justice, and the promotion of respect for and understanding of the legal system. *Id.* But it acknowledged that the right is "not absolute[,]" and that the Ohio General Assembly had "balance[d]" the interest in openness against "the acquitted defendant's constitutional right to privacy" and "the public policy of providing a second chance to criminal defendants who have been found not guilty." *Id.* As it went on to explain, the statute did not restrict public access to the courts; it merely limited the time in which a court record was to remain available:

> 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. Therefore, on its face, R.C. 2953.52 is constitutional.

Id. at 1097–98.

The court also rejected an as-applied challenge, noting that there had been a "full public trial with widespread media attention" and that the court record had "remained open for more than five weeks after the trial had concluded," giving the Enquirer "ample opportunity to report on and to access and copy the trial record for a substantial period of time before its sealing." *Id.* at 1098.

Winkler's reasoning maps on perfectly to the pending motions. Like the Ohio General Assembly, Hawaii's Legislature has enacted a sealing statute to protect the privacy and rehabilitative interests of criminal defendants whose cases have ended in their non-conviction. If a former criminal defendant takes certain steps, the statute limits the time period during which a court will maintain the record of that defendant's closed case on the Judiciary's publicly accessible electronic databases. But the law does not prevent any person from attending a criminal trial, or from downloading, reading, saving, or publishing court documents created during the course of a criminal proceeding, or from reporting or commenting on a criminal case, either before or after it has been sealed. The public's right to access records is unrestrained until, after a case ends, records may be sealed if a former defendant is part of a class eligible for relief and takes specific affirmative measures to request sealing. This balances the public's interest in observing, understanding, and scrutinizing the legal system against a defendant's right to privacy and opportunity for a "second chance[.]" *Id.* at 1097.

Indeed, the facts underlying the two pending motions are even more compelling than those presented in *Winkler*. Here, sealing was requested more than twenty years after Rogan's conviction was reversed, and more than five years after the *Grube* mandamus proceeding concluded. This certainly gave the public and the press more than enough time to access whatever electronic court records were available in either case. As Grube notes in his own statement, Ahn's criminal case was closely followed by local media, and Grube's counsel has already uploaded the substantive filings from the mandamus proceeding to its own publicly accessible website. *See* Dkt. 35 at 2–4; *Grube v. Trader*, Pub. First L. Ctr., https://www.publicfirstlaw.org/case/masunaga/. It appears that Rogan's criminal case and appeal also received contemporaneous media attention. *See* Linda Hosek & Susan Kreifels, *Defendant says racist remark hurt chance of fair trial*, Honolulu Star-Bulletin, Aug. 27, 1998, https://archives.starbulletin.com/1998/08/27/news/story2.html; Editorial, *Misconduct hurts defendants, public*, Honolulu Star-Bulletin, July 4, 2003, https://archives.starbulletin.com/2003/07/04/editorial/editorials.html. The electronic docket of Rogan's appeal is available online today, as it presumably has been for the past twenty-seven years.

The Massachusetts Supreme Judicial Court followed Ohio's example in *Commonwealth v. Pon*, 14 N.E.3d 182 (Mass. 2014). The law at issue there provided in its second paragraph that, "[i]n any criminal case wherein a nolle prosequi has been entered, or a dismissal has been entered by the court, and it appears to the court that substantial justice would best be served, the court shall

direct the clerk to seal the records of the proceedings in his files." Mass. Gen. Laws ch. 276, § 100C (2012). The first paragraph of the same law provided for mandatory sealing in other situations resulting in a non-conviction: "In any criminal case wherein the defendant has been found not guilty by the court or jury, or a no bill has been returned by the grand jury, or a finding of no probable cause has been made by the court, the commissioner of probation shall seal said court appearance and disposition recorded in his files and the clerk and the probation officers of the courts in which the proceedings occurred or were initiated shall likewise seal the record of the proceedings in their files." *Id.* The law was part of a "statutory scheme . . . intended to enable [former criminal defendants] to overcome the inherent collateral consequences of a criminal record and achieve meaningful employment opportunities." *Pon*, 14 N.E.3d at 186.

Three years after a municipal court judge dismissed his OUI case following a continuance and rehabilitation program, pseudonymous former criminal defendant Peter Pon filed a petition to seal his criminal record due to its impact on his employment opportunities. *Id.* at 186–87. The petition was denied, but the record was administratively sealed during the appeal of the denial, mooting Pon's challenge to the denial. *Id.* at 187. Nonetheless, the Supreme Judicial Court exercised its discretion to address the proper standard for sealing under the statute. *Id.* at 188. As part of its analysis, the court considered whether there was a First Amendment presumption of access to the records at issue, applying the *Press-Enterprise II* experience and logic test to reach its answer. *Id.* at 194–95.

Massachusetts' highest court concluded that "the records of closed criminal cases resulting in these particular dispositions [dismissal or entry of nolle prosequi] are not subject to a First Amendment presumption of access[.]" *Id.* at 196. Beginning with the experience prong, it held that, while criminal trial proceedings had been open "since time immemorial," *id.* at 195 (citing *Richmond Newspapers*, 448 U.S. at 569 (plurality opinion)), to "ensur[e] the accountability of the judiciary to the public[,]" *id.* (citing *Globe Newspaper*, 457 U.S. at 604–06), and while court records had "also historically . . . been accessible to citizens of the Commonwealth, for the same reason[,]" there was no similar tradition of access to "completed" or "closed" criminal proceedings, *id.* Citing favorably to the above-quoted paragraph from *Winkler*, it held that "the elements of the criminal judicial process that we have historically recognized as open to the press and the general public are not affected by the sealing of criminal records that occurs by way of" the statute. *Id.*

Turning to logic, the court reasoned that "[t]here is no indication that the availability of records of criminal cases that have been closed after nonconviction 'enhances . . . the basic fairness of the criminal trial and the appearance of fairness,' as the openness of criminal trials does." *Id.* at 196 (quoting *Press-Enterprise II*, 478 U.S. at 9). "[T]he sealing of a small subset of criminal records after the cases have closed does not truly impede" "effective public scrutiny" of government operations, the court held. *Id.* (quoting *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89, 95 (D. Mass. 1993)). It also noted that there were statutory exemptions that allowed law enforcement, criminal justice agencies, licensing commissions, and other entities with "a particular need to know" to access sealed records, further ensuring the integrity of government processes. *Id.*

Because experience and logic did not call for a First Amendment right of public access to the narrow class of records at issue, the Massachusetts court concluded that its statute need not survive strict scrutiny. *Id.* In reaching this conclusion, the court expressly disagreed with the "only" federal appellate court opinion "pertain[ing] to the sealing of court records in closed criminal cases": *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989). *Pon*, 14 N.E.3d at 196 & n.22.

In *Pokaski*, the First Circuit had held that the same statute at issue in *Pon* implicated the First Amendment right of public access such that a defendant could only seal a record after making "a specific showing 'that sealing [is] necessary to effectuate a compelling governmental interest.'" *Id.* at 190 (quoting 868 F.2d at 511). This holding made sealing impossible except in "exceptional circumstances." *Id.* The *Pon* court declined to follow *Pokaski*, and overturned one of its own 1995 precedents applying *Pokaski*'s reasoning. *Id.* at 190, 194. It explained that the stringent test derived from *Pokaski* "serve[d] to frustrate rather than further" the Legislature's attempts to "minimize the adverse impact of criminal records" and "impos[ed] too high a burden of proof on the defendant[.]" *Id.* at 194. It also noted that no federal court had revisited *Pokaski* or "given great thought to the consequences of sealing" since 1993, notwithstanding "drastic[]" societal changes. *Id.* at 194 n.21; *cf. id.* at 193 ("what has been articulated widely in criminal justice research[from the 2000s and 2010s is] that gainful employment is crucial to preventing recidivism, and that criminal records have a deleterious effect on access to employment").[5]

[5] Grube's statement cites to *Pokaski* but does not mention *Pon* or grapple with its criticisms of *Pokaski*'s outdated and overly harsh treatment of former criminal defendants. Dkt. 35 at 8, 10.

Two years ago, the Supreme Judicial Court revisited, reaffirmed, and expanded *Pon* in *Commonwealth v. J.F.*, 208 N.E.3d 13 (Mass. 2023). There, it considered the first paragraph of the same statute, the one applying to "records of a criminal case wherein the defendant has been found not guilty, where a no bill has been returned by a grand jury, or where a finding of no probable cause has been made." *Id.* at 24. It concluded that *Pon*'s reasoning "applie[d] with equal force" to such records, and that there was "clear[ly] . . . no First Amendment presumption of access" to them. *Id.* It found the logic prong of the experience and logic test "[e]ven more" supportive of its conclusion because in *J.F.*, there was actually a trial, which "the public and the media were free to attend" and where they could "hear the evidence against the defendant[.]" *Id.* at 25. And once again, the court declined to follow *Pokaski*. *Id.* at 24.

If this Court follows the approach of the *Pon* and *J.F.* courts, applying the experience and logic test to the records covered by HRS § 831-3.2(f), it should reach the same conclusion. *See Grube*, 142 Hawai‘i at 422 n.12, 420 P.3d at 353 n.12. ("The constitutional right of access does not extend to particular documents . . . that have been traditionally closed to the public and for which public access would not logically have a positive effect on the functioning of the process at issue.").

While there can be no doubt that Hawai‘i has a long history of public access to court proceedings, *Ahn*, 133 Hawai‘i at 494–95, 331 P.3d at 472–73, and while this Court has more recently "indicated" that there is a "constitutional right of access" to the records in criminal proceedings, *Grube*, 142 Hawai‘i at 422, 420 P.3d at 353, the Attorney General is aware of no similar history of public access to the records of completed or closed cases. Indeed, there could not possibly be a longstanding historical tradition of access to the specific types of records covered by HRS § 831-3.2(f)—"files and other information" included in "the judiciary's publicly accessible electronic databases"—because those records generally did not become publicly available at all until the past decade, around the same time as the 2016 enactment of HRS § 831-3.2(f). *See Efiling*, Haw. St. Judiciary, https://www.courts.state.hi.us/legal_references/efiling (efiling became available for appellate court cases in 2010, district court criminal cases in 2012, and circuit and family court criminal cases in 2017). In fact, the statute giving this Court the

responsibility to determine the disposition of case records, which has been in effect since 1984, has always provided that one option is for the records to be "destroyed." HRS § 602-5.5(b).[6]

Likewise, there is no logical reason to believe that "the sealing of a small subset of criminal records" (those pertaining to an arrest eligible for expungement under HRS § 831-3.2(a)) has or will "truly impede the functioning" of Hawaii's criminal justice system, *Pon*, 14 N.E.3d at 196, particularly when all criminal proceedings and records remain presumptively open while cases are ongoing, *Grube*, 142 Hawai'i at 428, 420 P.3d at 359. "[E]xposing the judicial process to public scrutiny" checks misconduct, enhances the performance of judicial functions, and gives the public a better understanding of, and trust in, the legal system. *Ahn*, 133 Hawai'i at 502, 331 P.3d at 480. But it stands to reason that all of these benefits are significantly diminished after a case is over, particularly those that relate to the real-time conduct of judges, attorneys, parties, and witnesses. *See Pon*, 14 N.E.3d at 198 n.25 ("It is only logical that the standard for the closure of a court record from public view after the completion of the criminal proceeding be a lesser one than that for closure of the criminal proceeding itself. Yet the standard articulated in . . . *Pokaski* is essentially the same standard as articulated for closure of ongoing judicial proceedings in criminal cases.").

In another case cited in both *Winkler* and *Pon*—*State v. D.H.W.*—the Supreme Court of Florida considered whether a court could seal records consistent with a constitutional right of access. 686 So.2d 1331, 1335–36 (Fla. 1996). A District Court of Appeal had held that, notwithstanding a state statute permitting courts to seal criminal history records, court records were "not subject to the standards set forth by statute, but [were] subject to the constitutional scrutiny established in *Press-Enterprise* [*II*]." *State v. P.D.A.*, 618 So.2d 282, 285 (Fla. Dist. Ct. App. 1993). That lower court relied on *Pokaski*, agreeing with it that "access to court records, even future access to records of court proceedings long since terminated, implicates the First Amendment[.]" *Id.* at 284. Four dissenting judges saw "no tradition" of keeping closed criminal court files open and were "not convinced that public access to old criminal court records is necessary to assure the

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[6] Prior to the enactment of HRS § 602-5.5, the Judiciary would have been subject to the general statute on disposal of government records, which has been in effect since before Statehood and which likewise permits records to be "[d]estroyed" after a "retention period." HRS § 94-3(b)(3); *see* RLH § 7-8 (1955); *Wong v. Among*, 52 Haw. 420, 422–23, 477 P.2d 630, 632–33 (1970) (indicating that "[a] portion of the official record" of a 1953 criminal case "was destroyed in 1958 pursuant to a records disposition authorization under HRS [§] 94-3").

proper functioning of the criminal court system." *Id.* at 288 (Altenbernd, J., concurring and dissenting) (citing *Press-Enterprise II*).

In *D.H.W.*, the Florida Supreme Court held that a court was not required to apply the test described by the *P.D.A.* majority before ordering the sealing of records; it needed only to ensure that the petitioner had complied with the necessary statutory and regulatory requirements. 686 So.2d at 1335–36. As it explained, the test described in *P.D.A.* (i.e., the strict scrutiny requirement of *Press-Enterprise II*) "originally was provided in the context of the requested closure of a preliminary hearing in a criminal case rather than the requested sealing of court records relating to a closed, dismissed criminal case." *Id.* at 1336 and n.10. But when applied to the "old records" at issue under Florida's law, the "concern for public access to ensure the proper operation of the courts" had to be "weighed against the long-standing public policy of providing a second chance to criminal defendants who have not been adjudicated guilty." *Id.*

Furthermore, while the Hawai‘i Constitution "may . . . afford[] greater free speech protection than its federal counterpart[,]" *Ahn*, 133 Hawai‘i at 494, 331 P.3d at 472 (quoting *Crosby*, 76 Hawai‘i at 339 n.9, 876 P.2d at 1307 n.9), there is no reason to believe that Article I, Section 4 creates a constitutional right of access to the records of terminated cases not afforded by the First Amendment. The language of the two constitutional provisions is "[e]ffectively . . . identical[,]" *id.* (quoting *Crosby*, 76 Hawai‘i at 339 n.9, 876 P.2d at 1307 n.9), and, as already noted, there is no historical tradition of access to these kinds of records in Hawai‘i. Nor is there any indication that the delegates to the Hawai‘i Constitutional Convention of 1950, which added the relevant language decades before the U.S. Supreme Court even recognized a constitutional right of public access to attend court proceedings, intended to exceed the federal constitutional guarantee in this manner. *Cf. State v. Wilson*, 154 Hawai‘i 8, 18, 543 P.3d 440, 450 (2024) (state constitutional provision means what its federal counterpart "meant in 1950 when Hawai‘i copied the federal constitution's language[,] [a]nd in 1968 and 1978 when Hawai‘i's people kept those words").

Establishing a state constitutional right to access closed criminal cases would also fit uncomfortably with the State Constitution's express right to privacy. *See* Haw. Const. art. I, § 6; *Winkler*, 805 N.E.2d at 1097 (accounting for "the acquitted defendant's constitutional right to privacy"). Although this Court has not previously explored Article I, Section 6's relationship with criminal expungement or sealing statutes, it has described that section as "protect[ing] the right to

privacy in the 'informational' sense" and as being concerned with "possible abuses in the use of highly personal and intimate information in the hands of government or private parties[.]" *Civil Beat Law Ctr. for Pub. Interest, Inc. v. City & Cty. of Honolulu*, 144 Hawai'i 466, 480 n.10, 445 P.3d 47, 61 n.10 (2019) (quoting *Nakano v. Matayoshi*, 68 Haw. 140, 147, 706 P.2d 814, 818 (1985)); *cf.* 2023 Haw. Sess. Laws Act 159, § 1 at 478 (expressing concern that court records relating to an expunged arrest can be accessed by "prospective employers, landlords, lenders, educational institutions, and others" and create significant, long-lasting, and negative impacts). The Court has also analogized the information protected by the constitutional right to privacy to that protected by the invasion of privacy tort, which includes "some of [a person's] past history that he [or she] would rather forget." *State of Haw. Org. of Police Officers v. Soc'y of Prof'l Journalists–Univ. of Haw. Chapter*, 83 Hawai'i 378, 398, 927 P.2d 386, 406 (1996) (quoting *Restatement (Second) of Torts* § 652D cmt. b (1977)).

Finally, recognizing a constitutional right to access the records of closed cases—as the state supreme courts in *Winkler*, *Pon*, *J.F.*, and *D.H.W.* refused to do—would create significant administrative issues. Most glaringly, it would call into question the Judiciary's ability to deprive the public of access to any once-available court records in any format, paper or digital. This could impose substantial storage and archiving costs on the courts as accumulated files and documents are required to be kept available in perpetuity in case a member of the public may one day wish to access them. After all, a case that attracts minimal public attention today, or even one that attracts none at all, may do so in the future. Perhaps a run-of-the-mill criminal trial taking place in circuit court in 2025 will receive media attention forty years from now because the defendant has risen to a prominent position in the intervening years (assuming, of course, that the stigma of a permanently available criminal record does not prevent him from being rehabilitated and turning his life around). Such a constitutional rule would also potentially call into question numerous other expungement statutes designed to help those actually convicted of relatively low-level crimes. *See* HRS §§ 291E-64(e), 706-622.5(4), (5), 706-622.8, 706-622.9(3), 712-1256(1).[7]

[7] With the change in federal administration, this concern may be particularly acute because expunging criminal records can have effects on eligibility for immigration policies like Deferred Action for Childhood Arrivals (DACA). *See DACA and Crimes: What Expungements are Available Nationally*, Immigrant Legal Resource Ctr. (Feb. 18, 2021), https://www.ilrc.org/resources/daca-and-crimes-what-expungements-are-available-nationally

3. Statutory limits prevent the overextension of HRS § 831-3.2(f).

Further protections built into the statute should alleviate any remaining concerns the Court has about the impact of HRS § 831-3.2(f) on public access to court records.

First, as noted in the previous discussion, the relationship between subsections (a) and (f) of HRS § 831-3.2 ensures that no person can seek to have their records sealed until after their criminal case has concluded. To the extent there is any ambiguity about who qualifies as a person "charged with but not convicted of a crime[,]" a future case presenting different facts may give the Court the opportunity to address it. For example, the Attorney General would not consider a person eligible to have their arrest record expunged if their criminal case ended in a non-conviction, but was subject to an appeal by the State that could ultimately result in a conviction. *See* HRS § 641-13. Likewise, the Attorney General would not consider a person eligible for relief under HRS § 831-3.2(a) if their conviction was overturned on appeal by the ICA but a certiorari petition by the State was pending before this Court, likewise preserving the possibility of a conviction.

Second, HRS § 831-3.2(f) provides that a court must seal or remove records "within a reasonable time." The same sentence refers to "diligent" efforts, indicating that the Legislature's concern was with ensuring the speedy provision of statutory relief. But this Court could determine, in an appropriate future case, that the "reasonable time" limitation also requires that a court not grant HRS § 831-3.2(f) relief too hastily, as in a case where significant public interest remains even after it ends. Thus, for example, if there was a related civil case or mandamus proceeding ongoing after a former defendant became eligible to request sealing of a criminal case, the Court could make clear that sealing should wait until the related proceeding had also concluded. Interpretation of this term could also ensure that, where parts of a proceeding are appropriately closed in accordance with *Ahn*, there is sufficient time for the transcripts of any closed hearings to be made publicly available before the full proceeding can be sealed under HRS § 831-3.2(f). *See* 133 Hawai‘i at 506, 331 P.3d at 484.

Of course, no such facts are presented here. Both Rogan and Ahn requested sealing years after the relevant proceedings concluded. So while the Court could confirm the above

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("Certain criminal convictions are bars to eligibility for DACA. However, if these convictions can be 'expunged,' they will cease to be an absolute bar.").

interpretations of the statute, it need not consider circumstances beyond those presented to it in order to resolve the present motions. *See* Dkt. 43 at 4 (Amicus Br.).

Finally, Grube is absolutely correct when he says that sealing records under HRS § 831-3.2(f) does "not have any impact" on third-party sources of information about a case, including the press and the publishers of court opinions. Dkt. 35 at 2 (Statement). The statute does not purport to give any court the power to "suppress, edit, or censor" historical facts or any spoken, written, or recorded accounts of court proceedings. *Id.* at 2 n.2 (quoting *Eagle v. Morgan*, 88 F.3d 620, 626 (8th Cir. 1996)). Nor could it ever require that a media organization "excise from its archives a past story" or that published opinions be "razor[ed] from the bound volumes" (or deleted from Westlaw). *Id.* (quoting *G.D. v. Kenny*, 15 A.3d 300, 313 (N.J. 2011)). The statute at issue is limited to one source of information about cases: the Judiciary's publicly accessible electronic databases. It has no bearing on the local news sources from which most members of the public likely derive their knowledge of state court operations.[8]

B. Applying the plain language of the statute is possible, constitutional, and mandatory, so narrower remedies short of total sealing are neither necessary nor available to the Court.

Because the answer to the Court's first question is no—sealing case files under HRS § 831-3.2(f) does not violate the public's right of access under the U.S. or Hawai'i Constitutions—the Court need not address the second question: whether narrower remedies, short of total sealing, are available to protect the interests advanced by HRS § 831-3.2(f). The Court should apply the statute as written and grant the motions. However, if the Court concludes that there is a constitutional issue, it should not attempt to rewrite the statute, as Grube proposes.

1. By its plain language, application of the statute is required here.

"Statutory interpretation starts with the statute's words." *Alpha, Inc. v. Bd. of Water Supply*, 154 Hawai'i 486, 490, 555 P.3d 173, 177 (2024). It often ends there too. *See Dicks v. Office of Elections*, 155 Hawai'i 102, 105, 557 P.3d 831, 834 (2024) ("The rules of statutory interpretation require us to apply a plain language analysis when statutory language is clear.").

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[8] Because of this limitation, Rogan's motion must be denied to the extent it requests the removal of information about his case from anywhere other than the Judiciary's electronic databases. *See* Dkt. 26 at 21908 at 1 (referring generally to State websites, Google searches, judicial research references, and redacting "everything").

Under the plain language of this statute, the motions should be granted. HRS § 831-3.2(f) provides that, when a "person for whom an expungement order has been entered" so requests, a "court shall make good faith diligent efforts to seal or otherwise remove" "all judiciary files and other information pertaining to the applicable arrest or case from the judiciary's publicly accessible databases." Expungement orders have been entered for Rogan and Ahn. Dkts. 33 at 2, 71 at 3. This Court has superintendence of the electronic dockets and files for the *Rogan* appeal and the *Grube* mandamus proceeding. Those proceedings "pertain[] to" Rogan's expunged arrests for sexual assault and Ahn's expunged drug-related arrests. "Pertain" means "[t]o relate directly to; to concern or have to do with[.]" *Pertain*, Black's Law Dictionary (12th ed. 2024). The appeal of Rogan's sexual assault conviction clearly relates to his arrest on suspicion of the same offense, and the *Grube* mandamus proceeding was likewise concerned with Ahn's arrest because it was brought in an effort to unseal documents filed in his criminal case.

And the statute is mandatory on the Court, providing in one sentence that an eligible person "*may* request in writing that the court seal or otherwise remove" files and information, and in the next that the court "*shall* make good faith diligent efforts to seal or otherwise remove the applicable files and information[.]" HRS § 831-3.2(f) (emphases added); *see Asato v. Procurement Policy Bd.*, 132 Hawai'i 333, 347, 322 P.3d 228, 242 (2014) ("Where the word 'shall' is used in statutes, it is 'generally imperative or mandatory.'" (quoting *Leslie v. Bd. of Appeals of Cty. of Haw.*, 109 Hawai'i 384, 393, 126 P.3d 1071, 1081 (2006))); *Umberger v. Dep't of Land & Nat. Res.*, 140 Hawai'i 500, 526, 403 P.3d 277, 303 (2017) ("Where 'may' and 'shall' 'are used in the same statute, especially where they are used in close juxtaposition, we infer that the legislature realized the difference in meaning and intended that the verbs used should carry with them their ordinary meanings.'" (quoting *State v. Cornelio*, 84 Hawai'i 476, 493, 935 P.2d 1021, 1038 (1997))).[9]

[9] Grube may point out that the state court cases cited in the previous section involved the exercise of discretion by courts. But those cases are distinguishable in that regard because each involved a statute that granted discretion. In *Winkler*, the statute under consideration provided that courts were to "[w]eigh the interests of the person in having the official records pertaining to the case sealed against the legitimate needs, if any, of the government to maintain those records" before granting a motion to seal. Ohio Rev. Code § 2953.52(B)(2)(d), (B)(3) (1988); 805 N.E.2d at 1097 (acknowledging that the statute required courts to "balanc[e] the public and private interests"). Likewise, in *D.H.W.*, the Florida statute used discretionary language when referring to courts' power to seal: "Any court of competent jurisdiction *may* order a criminal justice agency to

There are no relevant ambiguities in the statute, nor is there anything in the statute's history that suggests any departure from its plain language. In fact, its wording closely tracks the recommendation of the Penal Code Review Committee, including as to the use of the mandatory "shall." PCRC Report at 73. And this Court has previously held that language in an earlier subsection of the statute is clear enough to apply a plain language analysis. *Barker*, 153 Hawai'i at 149, 528 P.3d at 222. As there is also no constitutional defect, the statute should operate exactly as the Legislature intended.

2. The Court should not implement an alternative remedy, including the one proposed by Grube.

In his statement, Grube argues that this Court "must consider alternatives to sealing . . . an entire case . . . from the public." Dkt. 35 at 7. His argument is based on the third substantive factor discussed in *Ahn* and *Grube*, but it is misguided for two reasons. First, those factors need only be met "to overcome the public's constitutional right of access to court proceedings and records[,]" which, as explained above, is not at issue here. *Grube*, 142 Hawai'i at 429, 420 P.3d at 360. And second, those factors derive from cases in which a court was exercising its inherent and discretionary power to seal proceedings or documents, not applying a statute, as in these cases.

In *Ahn*, the circuit court held five non-public court proceedings to address matters relating to the jury, and also sealed the portions of the transcript pertaining to those court sessions. 133 Hawai'i at 486, 331 P.3d at 464. There is no indication that it did so pursuant to any statute, and this Court discussed the procedural and substantive requirements as those that a court "contemplating whether closure of the courtroom is necessary" needed to consider, indicating an

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seal a criminal history record, provided that the person who is the subject of the record complies with the requirements of this section[.]" Fla. Stat. § 943.059 (1993) (emphasis added).

Pon and *J.F.* illustrate this point the clearest. *Pon* concerned the second paragraph of Mass. Gen. Laws ch. 276, § 100C (2012), which provided for "discretionary sealing" of a criminal record in a case resulting in entry of a nolle prosequi or a dismissal. 14 N.E.3d at 297. The Massachusetts Supreme Judicial Court interpreted the statute as requiring a former defendant to establish good cause for sealing, and thus set forth a multi-factor balancing test for courts to make a good faith determination. *Id.* at 312–19. In *J.F.*, by contrast, the same court acknowledged that the "plain language" of the first paragraph of the statute "evidence[d] the Legislature's clear intent to abrogate the common-law presumption of access to the nonconvictions explicitly referenced[,]" noting that its use of the word "shall" implied an "imperative obligation" and was "inconsistent with the idea of discretion[.]" 208 N.E.3d at 26 (quoting *Johnson v. Dist. Attorney for the N. Dist.*, 172 N.E.2d 703, 705 (Mass. 1961)).

exercise of discretion. *Id.* at 497, 331 P.3d at 475. The federal cases cited in support of the Court's holding also involved discretionary courtroom closing or document sealing decisions. *Id.* at 497–98, 331 P.3d at 475–76; *see Phoenix Newspapers, Inc. v. U.S. Dist. Court for Dist. of Ariz.*, 156 F.3d 940, 943–44 (9th Cir. 1998); *Oregonian Publ'g Co. v. U.S. Dist. Court for Dist. of Or.*, 920 F.2d 1462, 1463–64 (9th Cir. 1990); *United States v. Brooklier*, 685 F.2d 1162, 1166–67 (9th Cir. 1982). Likewise, *Grube* involved a circuit court holding a nonpublic hearing and sealing related documents, again without reference to any statute. 142 Hawai'i at 418, 420 P.3d at 349.

Here, though, the Court is being asked to grant relief made available by written law, not to exercise its discretion to seal records. Courts do not look for alternatives when interpreting and applying statutes. Instead, "when a statute's language is plain and unmistakable, the court is bound by the plain, clear, and unambiguous language of the statute." *State v. Mortenson-Young*, 152 Hawai'i 385, 396, 526 P.3d 362, 373 (2023) (internal quotation marks and brackets omitted) (quoting *State v. Thompson*, 150 Hawai'i 262, 267, 500 P.3d 447, 452 (2021)).

In countless cases, the Court has cautioned that its "role is to interpret the statutory scheme as enacted by the legislature[,]" *In re Kanahele*, 152 Hawai'i 501, 520, 526 P.3d 478, 497 (2023), and "not to indulge in judicial legislation in the guise of statutory construction[,]" *id.* (quoting *Territory v. Shinohara*, 42 Haw. 29, 34 (Haw. Terr. 1957)); *see also State of Haw. Org. of Police Officers v. City & Cty. of Honolulu*, 149 Hawai'i 492, 507, 494 P.3d 1225, 1240 (2021) (*SHOPO*) ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." (quoting *Reliable Collection Agency, Ltd. v. Cole*, 59 Haw. 503, 510, 584 P.2d 107, 111 (1978))); *State v. Mainaaupo*, 117 Hawai'i 235, 250, 178 P.3d 1, 16 (2008) ("We cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts. We do not legislate or make laws." (quoting *State v. Dudoit*, 90 Hawai'i 262, 271, 978 P.2d 700, 709 (1999))); *Washington v. Fireman's Fund Ins. Cos.*, 68 Haw. 192, 202, 708 P.2d 129, 136 (1985) ("[I]t is not for the judiciary to second-guess the legislature or substitute its judgment for that of the legislature." (quoting *State v. Cotton*, 55 Haw. 148, 151, 516 P.2d 715, 718 (1973))); *Pac. Ins. Co. v. Or. Auto. Ins. Co.*, 53 Haw. 208, 211, 490 P.2d 899, 901 (1971) ("The court should not substitute its judgment for what the legislature already has declared to be rational and consistent with public policy."); *Territory v. Makaaa*, 43 Haw. 237, 240 (Haw. Terr. 1959) ("[I]t is for the legislature to act and not for the courts to attempt to amend a legislative act by judicial decision.").

Even where a statute suffers from a "constitutional defect[,]" "[i]t is not the role of the courts to rewrite" it. *State v. Bloss*, 64 Haw. 148, 166, 637 P.2d 1117, 1130 (1981). Doing so would itself "be an unconstitutional exercise of legislative power." *Id.*

Thus, the Court should reject Grube's suggestion that it refuse to seal the *Grube* mandamus proceeding and instead "remove the public's ability to use the Judiciary's electronic databases to locate this proceeding by searching for Ahn's name." Dkt. 35 at 12. The relief Grube would have the Court award has no textual basis; in fact, it squarely contradicts HRS § 831-3.2(f) because it would leave the records of the proceeding available to the public via the Judiciary's electronic databases, so long as they searched for them by case number or using the name of a party, attorney, or judge associated with the proceeding other than Ahn (of whom there are now over two dozen). *See id.* Even assuming that adopting Grube's proposal is technologically possible and financially reasonable, the Court should not substitute his invented remedy for the one selected by the Legislature. *See SHOPO*, 149 Hawai'i at 507, 494 P.3d at 1240.

Grube pitches his proposal as a faithful interpretation of the statute. Dkt. 35 at 12. But the statute says that a court must "seal or otherwise remove" the applicable files, HRS § 831-3.2(f), while his proposal would not result in their removal at all. What he proposes is amendment of the statute, not interpretation. If the owner of a bookstore told her employee to "sell or otherwise remove" all works by a particular author, she could not claim insubordination if the employee had to resort to donating the books, or simply throwing them in the dumpster. But the employee would not be following her instructions if the books were instead moved to the wrong section of the store, leaving them fully available to customers, but slightly harder to find.

Grube says that Ahn will receive "no substantive benefit" from HRS § 831-3.2(f), that there is "little probability" he will be harmed if it is not applied as written, and that sealing the mandamus proceeding "does nothing to advance the apparent purpose of the expungement statute." Dkt. 35 at 11–12. He is entitled to his opinion on the impact of the statute. But the 41 representatives and 25 senators who voted for it are entitled to have its language enforced. *See Kanahele*, 152 Hawai'i at 520, 526 P.3d at 497 ("While the dissent appears to question the efficacy of the statutory scheme . . . , it is the legislature's role, not ours, to amend existing law.").

Finally, contrary to Grube's suggestion otherwise, there is nothing about a mandamus proceeding before this Court (or a criminal appeal, as in Rogan's case) that makes it less subject to sealing than any other case pertaining to a former defendant's expunged arrest. Grube suggests

that there might be a heightened public interest in his eponymous Supreme Court proceeding because its records could shed light on the arguments that were presented to the Court before it issued its published *Grube* opinion. Dkt. 35 at 2. But the statute makes no such distinction, and the records of any proceeding might be of some personal or intellectual interest to someone. Indeed, there might be people who have some professional or academic interest in the entire corpus of Hawai‘i criminal law. That does not exempt any case from the requirements of the statute. HRS § 831-3.2(f) uses the generic term "court[,]" which means all courts, including the courts of appeal. And besides, to the extent there might be enhanced public interest in certain appellate proceedings because they result in precedential opinions, any person is free to download, share, and comment on the filings from such cases while they are ongoing. In the case of *Grube*, the petitioner's counsel and his employer have done just that. Dkt. 35 at 2–3.

C. HRS § 831-3.2(f) does not encroach on the Judiciary's independence or its power to administer its own records.

1. The statute does not impose on the Judiciary's constitutional power to decide cases or make procedural rules, nor does it conflict with statutes on the Judiciary's independence and control of court records.

The "sovereign power" of the State is "divided and allocated among three co-equal branches." *Tax Found. of Haw. v. State*, 144 Hawai‘i 175, 190, 439 P.3d 127, 142 (2019) (quoting *Trs. of Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 171, 737 P.2d 446, 456 (1987)). The Legislature exercises "[t]he legislative power of the State," which "extend[s] to all rightful subjects of legislation not inconsistent with [the Hawai‘i] [C]onstitution or the Constitution of the United States." Haw. Const. art. III, § 1. "Thus, our constitution starts from the proposition that the power of the legislature is extremely broad[,] . . . constrained only if it is inconsistent with the state or federal constitutions." *State v. Mallan*, 86 Hawai‘i 440, 451, 950 P.2d 178, 189 (1998). "The judicial power of the State" is vested in the courts, and this Court has the power to "promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law." Haw. Const. art. VI, §§ 1, 7.

The separation of powers doctrine does not operate rigidly. *See Yamasaki*, 69 Haw. at 172, 737 P.2d at 456 ("[W]ithin the framework of the fundamental doctrine respecting the separation of powers of government, some flexibility must be infused." (quoting *Koike v. Bd. of Water Supply*, 44 Haw. 100, 114, 352 P.2d 835, 843 (1960))). "Thus, it is not a correct statement of the principle of the separation of powers to say that it prohibits absolutely the performance by one department

of acts which, by their essential nature, belong to another." *Biscoe v. Tanaka*, 76 Hawai‘i 380, 383, 878 P.2d 719, 722 (1994) (quoting *Koike*, 44 Haw. at 114, 352 P.2d at 843).

Given this somewhat flexible framework, and the general breadth of the legislative power, it should not be surprising that the Legislature and the Judiciary have jointly governed the administration of court records throughout Hawaii's history. "Nowhere in [the Hawai‘i Constitution] is the exact nature of the 'judicial power' defined[.]" *State v. Moriwake*, 65 Haw. 47, 55, 647 P.2d 705, 711–12 (1982). It clearly includes the power to adjudicate cases over which the courts have jurisdiction, Haw. Const. art. VI, § 1, as well as certain inherent powers that have been recognized as necessary in case law, *Moriwake*, 65 Haw. at 55, 947 P.3d at 712. This Court has more expansively said that the judicial power "includes the ability to advance justice." *Rivera v. Cataldo*, 153 Hawai‘i 320, 324, 537 P.3d 1167, 1171 (2023). But the Attorney General is not aware of any case in which the Court has held that the "judicial power" with which the courts are vested includes an inviolable authority over court records. In fact, just the opposite is true: for every year the Hawai‘i Constitution has been in effect, courts have been subject to statutes governing court records.

As noted above, a statute in effect from Statehood to 1984 governed how courts could dispose of records. *See* note 6, *supra*. Then the Legislature asserted its authority to transfer that power to the Judiciary by enacting a statute giving this Court the ability to "determine the care, custody, and disposition" of all judicial records, subject to certain statutory limitations and procedures. *See* HRS § 602-5.5. No court has expressed doubt about the constitutionality of HRS § 602-5.5. In fact, the Judiciary, likely recognizing a need for legislative action before it could take control of its own records, testified in support of the bill adding the new section. H. Stand. Comm. Rep. No. 38-84, in 1984 House Journal, at 816; S. Stand. Comm. Rep. No. 667-84, in 1984 Senate Journal, at 1348–49. And on one of the few occasions this Court has discussed that statute, it referred to it as "delegat[ing]" recordkeeping authority to the Supreme Court, not recognizing an already-existing constitutional or inherent power. *Hamilton ex rel. Lethem v. Lethem*, 119 Hawai‘i 1, 12, 193 P.3d 839, 850 (2008); *cf. Farmer v. Admin. Dir. of Court*, 94 Hawai‘i 232, 241, 11 P.3d 457, 466 (2000) (in contrast, HRS § 602-5 "codified" and "acknowledge[d]" some of the inherent powers of the Supreme Court).

Furthermore, the Legislature has mandated restrictions on access to certain types of court records for decades. *See, e.g.*, Section I.A, *supra* (discussing expungement statutes); HRS §§ 346-

45(a) (limiting those who may inspect family court records of adult protective proceedings); 571-84(a) (mandating that certain family court records be withheld from public inspection); 571-84.6(b) (same, and providing that other family court records be presumptively open for public inspection). Simply put, the openness of court proceedings and records is an area in which legislators and judges have always worked together, without one branch claiming invasion by the other of its fundamental constitutional powers. In fact, it was a committee chaired by a judge, with five other judges and one justice as members, that recommended that the Legislature enact HRS § 831-3.2(f) in the first place. PCRC Report at 2, 73.

Likewise, HRS § 831-3.2(f) does not conflict with this Court's power to promulgate court rules, because it does not relate to "process, practice, procedure, and appeals" before the courts. Haw. Const. art. VI, § 7. The ability to seek relief under HRS § 831-3.2 is a substantive right, not a procedural one, and court rules "may never 'abridge, enlarge, or modify'" substantive rights. *State v. Obrero*, 151 Hawai'i 472, 480, 517 P.3d 755, 763 (2022) (quoting HRS § 602-11); *see Mobile Press Register, Inc. v. Lackey*, 938 So.2d 398, 403 (Ala. 2006) ("Whether citizens should be entitled to have their criminal arrest records expunged is a substantive matter involving policy considerations within the purview of the legislature, not this Court."). The Court has adopted rules relating to court records, but those rules exist in parallel with, and expressly account for, statutes affecting the availability of court records. *See, e.g.*, HCRR Rules 3.1 ("[T]he Clerk of each court" shall maintain records "as required by *statute* or rule." (emphasis added)), 10.1 (court records to be accessible "[e]xcept as otherwise provided by *statute*, rule, or order" (emphasis added)), 10.4 (limited access to confidential records "[e]xcept as otherwise provided by *statute* or court rule or as ordered" (emphasis added)); HFCR Rules 7.2(b) (all documents in proceedings authorized by certain chapters of the HRS to be sealed), 79 ("Unless otherwise provided by *statute* or rule, all requests for information contained in a confidential record shall be made in writing and shall include the reason for the request." (emphasis added)).[10]

[10] Grube acknowledges "this Court's precedent that the Legislature may override court rules[,]" but suggests the precedent should be "questioned" because it is not entirely consistent with comments made in a book written by a New Jersey judge on which the draft judicial article of the State Constitution was based. Dkt. 35 at 10 n.10 (Statement). The Convention itself didn't directly discuss the comments Grube cites; it just used a proposal based on the book as the draft from which it worked. 1 Proceedings of the Constitutional Convention of Hawai'i of 1950, at 174. More than that is needed to overturn precedents of this Court. *Ho'omoana Found. v. Land Use Comm'n*, 152 Hawai'i 337, 346, 526 P.3d 314, 323 (2023). And even if court rules should prevail

Nor is there any conflict between HRS § 831-3.2(f) and the statutes identified in the Court's supplemental briefing order, HRS §§ 601-5 and 602-5.5. *See* Dkt. 59 at 2. As a general rule, statutes should be "interpreted harmoniously" to avoid conflict. *Office of Hawaiian Affairs v. Kondo*, 153 Hawai'i 170, 178, 528 P.3d 243, 251 (2023). Conflict should be found only where two laws "are explicitly contrary to, or inconsistent with, each other." *Id.* (quoting *Boyd v. State Ethics Comm'n*, 138 Hawai'i 218, 227, 378 P.3d 934, 943 (2016)).

That is not the case here. HRS § 601-5 provides that the Judiciary, its judges, and its officers "shall be independent of both the executive and legislative departments." This statute has been understood as a limitation on individuals holding offices in both the judicial and executive or legislative branch at once. *See In re Ferguson*, 74 Haw. 394, 401 n.4, 846 P.2d 894, 898 n.4 (1993); *State v. Gustafson*, 55 Haw. 65, 72 & n.1, 515 P.2d 1256, 1260 & n.1 (1973) (Levinson, J., concurring in part and dissenting in part). HRS § 831-3.2(f) does not affect officeholding and does not infringe on judicial independence for the reasons discussed above. And HRS § 602-5.5 does not conflict with HRS § 831-3.2(f) because the latter statute does not affect the "creat[ion], accept[ance], ret[ention], . . . stor[age,] . . . care, custody, [or] disposition" of court records. HRS § 602-5.5. It only affects the public availability of a few electronic records.

Even if there were a statutory conflict, "[i]t is the generally accepted rule of statutory construction that unless a legislative intention to the contrary clearly appears, special or particular provisions control over general provisions, terms or expressions." *Ho'omoana Found.*, 152 Hawai'i at 344, 526 P.3d at 321 (quoting *In re R Children*, 145 Hawai'i 477, 485, 454 P.3d 418, 426 (2019)). And a later statute repeals an earlier one "if the two laws are plainly irreconcilable[.]" *Obrero*, 151 Hawai'i at 480, 517 P.3d at 763. So HRS § 831-3.2(f), as the later and more specific statute, would prevail if there were a clear conflict between it and any older and more general statute, including HRS §§ 601-5 and 602-5.5.

Grube's sole Hawai'i authority relating to "separation of powers concerns" is *Goran Pleho, LLC v. Lacy*, 144 Hawai'i 224, 439 P.3d 176 (2019). Dkt. 35 at 10. *Goran Pleho* was a case in

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over conflicting statutes, as opposed to the other way around, Grube doesn't identify any actual conflict. His argument seems to be that the Court's rulemaking *authority* precludes the possibility of any statutory law governing records—an argument contrary to the State's history and which even Grube concedes must be "anchor[ed]" in his constitutional right of access argument. Dkt. 35 at 10.

which the Court *rejected* an argument that application of a statute (HRS § 480-2(a)) to attorneys "would invade [its] inherent authority to regulate the legal profession." *Id.* at 252, 439 P.3d at 204. There was a dissent on that point, and the Court did acknowledge that "concerns for the separation of powers *might* arise if the legislature attempted to directly interfere with this court's regulation of the practice of law by, for example, overriding the promulgated professional rules or depriving this court of its ultimate disciplinary authority for professional misconduct." *Id.* at 251, 439 P.3d at 203 (emphasis added). But notwithstanding the specifics of *Goran Pleho*, these cases are clearly distinguishable because, unlike the regulation of court records, this Court's authority to regulate the legal profession is supported by both explicit constitutional language and a lengthy, unrestricted history. Haw. Const. art. VI, § 7 ("The supreme court shall have power to promulgate rules and regulations . . . relating to . . . practice[.]"); *In re Trask*, 46 Haw. 404, 415, 380 P.2d 751, 758 (1963) ("The power to regulate the admission to practice and the disbarment or disciplining of attorneys is judicial in nature and is inherent in the courts."). HRS § 831-3.2(f) does not directly interfere with a power traditionally and exclusively exercised by the courts.

And as for Grube's citations to cases from other jurisdictions, there is less to them than meets the eye. In *Johnson v. State*, the Florida Supreme Court considered a statute permitting certain persons "acquitted or released without being adjudicated guilty" to move for "an order to expunge all official records relating to such arrest, indictment or information, trial, and dismissal or discharge." 336 So.2d 93, 94 (Fla. 1976) (quoting Fla. Stat. § 901.33 (1974)).

The Florida Supreme Court said its legislature "[c]learly" had "the power to enact substantive law," and that courts had a duty "to enforce such substantive law where constitutional[,]" while it had "the power of administration of the court system, including the establishment of judicial rules of practice and procedure[.]" *Id.* at 95. It directed trial judges to seal, rather than expunge, defendants' records, agreeing with the trial court that "expunge" meant "to destroy or obliterate, to annihilate physically, to strike out wholly." *Id.* at 94–95 (quoting *Expunge*, Black's Law Dictionary (4th ed. 1968)). And while it held that the legislature had the power to create the substantive statutory right, it held that it was "an encroachment upon the judicial function" to "attempt[] to establish procedure for the accomplishment of this new, substantive right[.]" *Id.* at 95. It therefore announced that it would consider adoption of a rule effectuating the legislative intent by providing a procedure to seal criminal court records. *Id.*; *see In re Fla. Rules of Criminal Procedure*, 343 So.2d 1247, 1262–63 (Fla. 1977) (adopting Fla. R.

Crim. P. 3.692 (1977)). A dissenting justice would have held that "the keeping of records is merely a ministerial function of the judicial system," upheld this "minor interference[] with a court's business" as constitutional, and applied the statute as written. *Johnson*, 336 So.2d at 96 (Adkins, J., dissenting).

Here, HRS § 831-3.2(f) already requires no more than sealing or removing documents from publicly available databases, not destroying them. And under Hawaii's comparatively more flexible separation of powers doctrine, it is not an "encroachment upon the judicial function" for the Legislature to direct courts to seal certain records. *Id.* at 95; *see also id.* (Under Florida law, "the inherent powers of the three branches must be free from encroachment or infringement by one upon the other." (quoting *State ex rel. Harrington v. Genung*, 300 So.2d 271, 272 (Fla. Dist. Ct. App. 1974))); *cf. Yamasaki*, 69 Haw. at 172, 737 P.2d at 456 (Under Hawai‘i law, separation of powers must be "infused" with "some flexibility" (quoting *Koike*, 44 Haw. at 114, 352 P.2d at 843)). As the dissenting justice said in *Johnson*, "[g]iven the fact that statutes are strongly presumed to be constitutional, minor interferences with a court's business . . . are clearly an insufficient basis upon which to invalidate" them. 336 So.2d at 96 (Adkins, J., dissenting).

Nonetheless, there would be no objection to the Court making rules specifying the procedure that must be followed to request relief under HRS § 831-3.2(f), so long as it does not reduce the substantive right to relief the statute establishes, like by reading judicial discretion into the statute, as Grube requests. *See* Dkt. 35 at 10–11. HRS § 831-3.2(f) does not provide for such discretion, *see* Section IV.B.1, *supra*, and even the *Johnson* court did not create discretion where none previously existed. *See* 336 So.2d at 94 (quoting statute), 95 (ordering sealing, and stating that "the Court will consider adoption of a rule . . . *requiring* the sealing of court records" (emphasis added)); *Fla. Rules of Criminal Procedure*, 343 So.2d at 1262–63 (adopting new rule).

As for *Hynes v. Karassik*, the New York Court of Appeals in that case did not even decide whether courts had the power to unseal records sealed pursuant to statute. 393 N.E.2d 1015, 1018 (N.Y. 1979). There, it was "suggested" by the appellant that in "rare[] and . . . extraordinary circumstances[,]" courts might be able to unseal statutorily-sealed records "in order to serve fairness and justice[.]" *Id.* The New York court concluded that it did not need to reach that argument because "the proceeding before it [did] not present such a situation[,]" and affirmed the reversal of an order unsealing records that "disregard[ed] the clear and unequivocal words of the statute." *Id.* Likewise, in *Times-Call Publ'g Co. v. Wingfield*, the Supreme Court of Colorado

merely expressed that interpreting a statute to prohibit anyone other than the parties to a case from examining its filings—a position that no parties in that case advanced—would raise separation of powers "questions[.]" 410 P.2d 511, 513 (Colo. 1966). This out-of-state dicta sheds no light on how Hawai'i has historically understood the division of its governmental power over court records.

2. If the Court concludes that HRS § 831-3.2(f) must be interpreted to afford courts discretion, it should take steps to ensure that the statute continues to provide relief to former criminal defendants.

As this brief has explained at length, there is no textual or constitutional basis supporting Grube's claim that "courts *must* exercise judicial discretion" "[w]hen a defendant seeks to seal a criminal case[.]" Dkt. 35 at 11 (Statement) (emphasis added). The statute suffers from no constitutional defect. *See* Sections IV.A.2, IV.C.1, *supra*. It therefore can and should be applied as written, and as written, it provides for no discretion. *See* Section IV.B.1, *supra*. If there is a constitutional issue, it falls to the Legislature, not this Court, to amend the statute. *See* Section IV.B.2, *supra*.

Nonetheless, if this Court ultimately concludes that it must interpret HRS § 831-3.2(f) as granting discretion to courts when they are asked to seal court records, it should provide guidance as to how that discretion must be exercised. In doing so, the Attorney General would respectfully request that the Court consider the following, to ensure that as many people as possible remain eligible for as much as possible of the relief the Legislature intended to provide.

First, the Court should reject out of hand any discretionary scheme that would completely frustrate the statute's purpose by providing less relief than what is in the statute. This includes Grube's proposal to change the search capabilities of the Judiciary's publicly accessible electronic databases while leaving all of the files and information completely open to public view. *See* Section IV.B.2, *supra*.

Second, if the Court requires the balancing of public and private interests before granting an HRS § 831-3.2(f) request, it should make clear that the rehabilitative interests that the statute protects are compelling ones that cannot be overcome other than by an equally or more compelling interest favoring the continuing availability of records. *See Pon*, 14 N.E.3d at 199 (recognizing "compelling governmental interests in reducing recidivism, facilitating reintegration, and ensuring self-sufficiency by promoting employment and housing opportunities for former criminal defendants"). Even Grube does not dispute the general principle "that there is a compelling government interest—expressed by the expungement statute—in rehabilitating certain individuals

who have been charged with crimes." Dkt. 35 at 11; *see also id.* at 9 (discussing the negative effects of having a criminal record on employment, education, housing, civic engagement, and public assistance). The Court should avoid the mistake the First Circuit made in *Pokaski*, only recognizing a compelling interest in public access, and thereby making it impossible for all but a "small" "pool of defendants" to obtain sealing of their records. *Pon*, 14 N.E.3d at 190.

And third, the Court should recognize that the right to seal a criminal record is a substantive right, and should thus leave room for further legislative adjustment and experimentation, rather than creating a rigid framework that future legislators cannot modify. Sealing and expungement are clearly topics about which the Legislature is concerned, and the clear policy preferences of this co-equal branch of government should be respected. *See id.* at 186 (disavowing its former "stringent standard" for sealing given "the demonstrable legislative concern . . . about the negative impact of criminal records on the ability of former criminal defendants to reintegrate into society and obtain gainful employment, particularly in an age of rapid informational access through the Internet and other new technologies"); 2024 Haw. Sess. Laws Act 241, § 2(b)(1)(D), (g) at 744–45 (tasking the Clean Slate Expungement Task Force with recommending legislation to "[s]treamline[] the procedures involved in the record clearance process" prior to the start of the 2027 legislative session).

V. CONCLUSION

Rogan and Ahn have submitted written requests for relief under HRS § 831-3.2(f), and Grube has not shown beyond a reasonable doubt that granting them would be unconstitutional. The Court should answer all three questions presented in the negative, and grant the motions.

DATED: Honolulu, Hawai‘i, January 27, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served electronically via JEFS or conventionally via U.S. Mail on the following parties:

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