Nos. SCPW-17-0000927 and 21908

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

NICK GRUBE,

Petitioner,

vs.

THE HONORABLE ROM A. TRADER, Circuit Court Judge of the Circuit Court of the First Circuit,

Respondent.

ORIGINAL PROCEEDING
CR. NO. 15-1-1338

STATE OF HAWAI`I,

Plaintiff-Appellee,

vs.

JEROME ROGAN,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
CR. NO. 1PC970001153

SUR-POSITION STATEMENT REGARDING MOTION TO SEAL CASE

SUR-POSITION STATEMENT REGARDING MOTION TO SEAL CASE

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Amici Curiae Attorney General of the State of Hawai`i (AG) and Office of the Public Defender (Public Defender) (collectively *Amici*) both argue that HRS § 831-3.2(f) (Expungement Provision) is constitutional. Petitioner Nick Grube (Grube) never argued otherwise. The Expungement Provision certainly can be construed by this Court in a manner consistent with the constitutional rights of public access to court records.

The problem is that *Amici* are asking this Court to interpret the Expungement Provision to require mandatory sealing of court records without any case-by-case analysis of whether sealing is appropriate. Such an interpretation invites a facial challenge to the law in federal court that will set back the Legislature's efforts to address the collateral consequences of having a criminal record. A harmonizing statutory construction better achieves the legislative intent.

Moreover, the plain language of the Expungement Provision does not require the unconstitutional mandatory *sealing* sought by *Amici*. The Expungement Provision twice states that courts shall "seal *or otherwise remove*" records. HRS § 831-3.2(f) (emphasis added). *Amici*'s interpretation erroneously treats this language as superfluous and takes away the discretion given by the Legislature for a court to consider alternatives to sealing. And stripping courts of any discretion to apply common sense would lead to absurd results under the statute.

Courts can seal court records if they comply with the procedural and substantive standards that protect the public's constitutional right of access. But any *automatic* action—without any judicial discretion—must be limited to removing a "case from the judiciary's publicly accessible electronic databases" to preserve the public's right of access. Grube initially suggested making the case not searchable by the defendant's name on eCourt Kokua—which, compared to sealing, better achieves the Legislature's intent in protecting individuals from discriminatory practices. Another option would be removing the cases entirely from eCourt Kokua ("the judiciary's publicly accessible electronic databases"), but preserving public access at the courthouse.

Grube respectfully requests that the Court hold that the Expungement Provision does not require automatic sealing of criminal cases without case-by-case judicial review or discretion to consider alternatives.

I. PARSING THE EXPUNGEMENT PROVISION, THE LEGISLATURE DID NOT REQUIRE SEALING.

Contrary to the arguments of *Amici*, a plain reading of the Expungement Provision does not require *sealing* of any records. The subsection reads:

> 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.

HRS § 831-3.2(f).[1] Moreover, there are ambiguities in the Expungement Provision relevant to its application to the requests by Alan Ahn (Ahn) and Jerome Rogan (Rogan).

A. A Plain Reading of the Expungement Provision Gives Courts Discretion to Consider Alternatives to Sealing.

Before turning to the constitutional standards—which *require* a court to consider alternatives to sealing—it is worth clarifying that the Expungement Provision expressly allows a court to consider alternatives to sealing. Despite *Amici*'s claim that the Legislature intended to deny all public access to these court records, the plain language shows otherwise. There is no evidence that the Legislature intended to adopt the patently unconstitutional law presented by *Amici* that would require mandatory and indiscriminate sealing of criminal court records.

The Legislature provided courts with explicit discretion to consider alternatives to sealing. Public Defender acknowledges the "or otherwise remove" language, but then ignores it, treating sealing as the only option. Dkt. 77 at 17 ("the legislature's

[1] The Legislature amended the law effective July 2025 to no longer require a request from the individual. 2023 Haw. Sess. Laws Act 159. The relevant standards at issue here will not change. Thus, the same analysis would apply to the amended law.

purpose was to require automatic sealing").[2] The law could have been written as the *Amici* interpret it—to allow a "request in writing that the court seal all judiciary files and other information pertaining to the applicable arrest or case." But it was not. *Keliipuleole v. Wilson*, 85 Hawai`i 217, 221, 941 P.2d 300, 304 (1997) ("[C]ourts are bound to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute."). At a minimum, the Expungement Provision allows a court to consider alternatives to sealing.

That alternative to sealing only requires removal of records "from the judiciary's publicly accessible electronic databases."[3] *Amici* nevertheless insist that sealing or denial of all public access are the only options. Dkt. 77 at 17; Dkt. 82 at 36 (oddly analogizing expungement to a book banning hypothetical—also unconstitutional when required by the government). Again, the law could have been written to prohibit all public access; that is what the HCR 155 committee had recommended in its report to the Legislature.[4] But that is not the law. *See Levy v. Kimball*, 51 Haw. 540, 544-45, 465 P.2d 580, 583 (1970) (even in the absence of an explanation in legislative history, when adopted law deviates from a model law, "all changes in words and phraseology will be

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[2] Pinpoint citations to "Dkt." entries refer to the corresponding PDF page.

[3] The 2023 amendment rearranged the provision to make this clearer, but the intent was clear in the original Expungement Provision.

[4] The Penal Code Review Committee recommended the following language:

> Upon the issuance of the expungement order, 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 relating to the expunged offense, including from the judiciary's electronic databases, *from public access*. The Court shall make good faith diligent efforts to seal or otherwise remove said files and information within a reasonable time.

Report of the Committee to Review and Recommend Revisions to the Hawai`i Penal Code at 73 (Dec. 30, 2015) (emphasis added).

presumed to have been made deliberately and with a purpose to limit, qualify or enlarge the adopted law to the extent the changes in words and phrases imply").

Thus, the Judiciary can fully comply with the requirements of the Expungement Provision if it removes records of an expunged case from publicly accessible electronic databases, even if the records are not sealed and thus the public still has some form of access.

B. Certain Expungement Provision Terms Are Ambiguous in Context.

While it is clear that the Legislature did not require courts to *seal* expunged cases, it is less clear exactly what actions a court must take to comply with the Expungement Provision. The requests here highlight some of the ambiguities.

1. "Publicly Accessible Electronic Databases"

Rogan requests that the Court remove his case "from websites of the State of Hawaii as well. . . . I also want my name disassociated from future judicial research as a reference." No. 21908 Dkt. 26. In footnotes, *Amici* casually dismiss Rogan's request as unjustified. Dkt. 77 at 17 n.10; Dkt. 82 at 32 n.8. But Rogan's request is not frivolous on a plain reading because the Judiciary has "publicly accessible electronic databases" beyond case files, including its electronic database of slip opinions that includes *State v. Rogan* and other opinions that describe Rogan's conduct in varying degrees of detail. *See* http://oaoa.hawaii.gov/jud/21908.htm (*State v. Rogan*, 91 Hawai`i 405, 984 P.2d 1231 (1999)); *see also, e.g.*, https://www.courts.state.hi.us/wp-content/uploads/2017/10/SCWC-15-0000439.pdf (*State v. Bruce*, 141 Hawai`i 397, 411 P.3d 300 (2017)). Nevertheless, Rogan's request highlights the absurdity of erasing Hawai`i case law under an overly literal construction of the Expungement Provision.

Proper construction of the Expungement Provision thus requires resort to legislative history. *State v. Abella*, 145 Hawai`i 541, 552, 454 P.3d 482, 493 (2019) ("If a literal construction of statutory language would produce an absurd result, we presume that result was not intended and construe the statute in accord with its underlying legislative intent."). There was no discussion of the Expungement Provision when

adopted in 2016.[5] However, the 2023 Legislature provided some explanation when it amended the law.[6]

> The legislature finds that court records for an arrest or case that has been expunged from a person's record may still be accessed by prospective employers, landlords, lenders, educational institutions, and others. Though expunged, these records can be regarded negatively and have a significant and long-lasting impact on a person's future.

2023 Haw. Sess. Laws Act 159 § 1.[7]

The Legislature focused on entities using information for background checks in employment, housing, education, financial, and other decisions. The most obvious source of such information would be the Hawai`i Criminal Justice Data Center's Background Checks, https://ag.hawaii.gov/hcjdc/criminal-history-records-check/name-base-background-check/. But if someone plans to illegally consider non-conviction records in employment or housing[8] or otherwise seeks information not part of official criminal background checks, a name search on eCourt Kokua would identify any criminal cases irrespective of outcome.

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[5] The Penal Code Review Committee provided a comment summarizing its proposal, but as already noted, the Legislature rejected the broader scope of that recommendation when it adopted the Expungement Provision.

[6] This Court has been wary of interpreting legislative intent based on statements in subsequent legislative enactments. *Peer News LLC v. City & County of Honolulu*, 138 Hawai`i 53, 73, 376 P.3d 1, 21 (2016) ("[Legislative history for 2014 amendment] is not dispositive of the 1995 legislature's intent when it enacted Act 242.").

[7] Public Defender unnecessarily relies on the 1974 legislative history concerning expungement of *arrest records*. As the 1974 Legislature acknowledged, arrest records and court records have distinct issues. 1974 Haw. Sess. Laws Act 92 § 1 ("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."). And the later Legislatures treated arrest records differently from court records. *Compare* HRS § 831-3.2(b)-(d), *with* HRS § 831-3.2(f).

[8] *E.g.*, HRS §§ 378-2 & -2.5 (employment discrimination based on arrest and court records); U.S. Dep't of Hous. & Urban Dev., Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 4, 2016) (housing discrimination based on criminal records).

Amicus Public Defender also expressly identified eCourt Kokua as a relevant electronic database of concern in testimony to the Legislature. *E.g.*, Testimony on S.B. No. 410 to the House Committee on Judiciary & Hawaiian Affairs (Mar. 29, 2023), https://www.capitol.hawaii.gov/sessions/Session2023/Testimony/SB410_HD1_TESTIMONY_JHA_03-29-23_.PDF. Public Defender further referenced the Judiciary Information Management System (JIMS) and Judiciary Electronic Filing and Service System (JEFS). But those are not *publicly accessible* electronic databases. JIMS is a portal for Judiciary personnel, and JEFS is for attorneys and their staff. Judiciary, *What is JIMS, JEFS and electronic filing?* (June 6, 2019), *at* https://www.courts.state.hi.us/faq/1-what-is-jims-jefs-and-electronic-filing. Although each of JIMS, JEFS, and eCourt Kokua access the same court records, the scope of information available through each interface differs, and there are confidentiality restrictions on JIMS and JEFS users. *E.g.*, HCRR 10.4.

There is no indication that the Legislature intended the Expungement Provision to extend to databases of Hawai`i precedent. And as *Amici* seem to agree, extending the provision to require deleting the law of Hawai`i would be absurd. Thus, consistent with the legislative intent, the only relevant "publicly accessible electronic database" for purposes of the Expungement Provision is eCourt Kokua.

2. "Pertaining to the Applicable Arrest or Case"

Unlike Rogan, Ahn does not seek to seal a direct appeal of his criminal case. *Amici* summarily conclude that the petition for mandamus qualifies for expungement. *E.g.*, Dkt. 77 at 14-15 (referring to the petition as "Ahn's collateral case"); Dkt. 82 at 33 (describing the petition as unsealing documents filed in Ahn's "criminal case"). *Amici* are factually incorrect in describing the nature of the mandamus petition, and interpreting the causal nexus "pertaining to" as including the mandamus petition only leads to absurd results.

Grube does not contest the AG's definition of "pertain." Dkt. 82 at 33 ("relate directly to; to concern or have to do with"). But, as explained in Grube's statement, the mandamus petition did not concern Ahn's records; it concerned the plea records of his co-defendant, Tiffany Masunaga (Masunaga). Dkt. 35 at 1, 5 n.6. Masunaga's case has

not been expunged. *See State v. Masunaga*, No. 1PC151001338.[9] And the only references to Ahn in the mandamus petition were tangential to the State's claim that it had a pending investigation into other matters as a basis for sealing Masunaga's plea records. Dkt. 1 at 16-17. The mandamus petition did not directly concern Ahn.

It would be absurd if the Expungement Provision swept so broadly in its nexus as to include matters that barely mention, if at all, the defendant's conduct. For example, there is more discussion of Rogan's conduct in cases discussing *State v. Rogan* as precedent, than compared to the discussion of Ahn in the mandamus petition.

Again, the Legislature's focus on collateral consequences provides a guidepost in interpreting the Expungement Provision. "Pertain" should be only cases with an obvious direct relationship to the expunged criminal charges against the individual (*e.g.*, a direct appeal). No employer or landlord would look at a petition for writ labeled *Grube v. Trader* in eCourt Kokua and conclude that criminal charges had been filed against Ahn.[10] If a court must start evaluating whether documents within a particular matter discuss an expunged case, then the standard will quickly exceed any indicia of legislative intent and be impossible for courts to enforce. Because the Expungement Provision seeks to address the collateral consequences of criminal charges, those records "pertaining to the applicable arrest or case" should be criminal cases.

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[9] Public Defender erroneously states that Ahn's original action (No. 1PC151001338) is sealed. Dkt. 77 at 6 n.3. Also, as described in Grube's position statement, the circuit court severed Ahn's case from Masunaga's with a plan to effect the expungement of Ahn's criminal case. Dkt. 35 at 4-5. Current records, however, indicate that Ahn's case has not been expunged. *See State v. Ahn*, No. 1CPC-23-1166 (publicly identifying a criminal indictment for various drug offenses filed against Ahn and Masunaga on August 26, 2015, but the indictment is not publicly accessible in that case and no other docket entries exist).

[10] The nature of Rogan's appeal also is unclear in context on eCourt Kokua because it could concern one of his traffic offenses—which were not expunged. The docket does not provide any insight into the nature of the appeal, and records are only available on microfilm at the Chief Clerk's Office.

3. "Otherwise Remove"

Ahn, Rogan, and Grube have suggested different ways to "remove" records from the Judiciary's systems, but it is not entirely clear what is required by the Expungement Provision. "Remove" means "to change the location, position, station, or residence of." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/remove; *accord* Black's Law Dictionary (9th ed. 2009) (defining "removal" as the "transfer or moving of a person or thing from one location, position, or residence to another"). Again, legislative history provides guidance for how much existing systems must be changed to accomplish the intended objectives of the Expungement Provision.

First, the Legislature did not direct the Judiciary to destroy the records. *Amici* discuss the Judiciary's authority to "destroy" records as justifying denial of public access. Dkt. 77 at 13-14 (citing HRS § 602-5.5); Dkt. 82 at 28-29 (same). Authority to destroy records and rights of public access are not interdependent. As this Court has clarified in other contexts, the government is not required to keep records because it has a general obligation to release records to the public. *Molfino v. Yuen*, 134 Hawai`i 181, 186, 339 P.3d 679, 684 (2014). Similarly, the government's general authority to destroy records does not negate the public's right of access. If it did, no government information would be accessible to the public. Obviously, when records are in fact destroyed, no public right of access attaches to non-existent records. *Cf. Civil Beat Law Ctr. for the Pub. Interest v. Chang*, No. SCPW-21-511, 2022 Haw. LEXIS 73, at *2 n.1 (Haw. May 11, 2022) (noting that "expungement and purging of a court document is not general practice"). But when records exist, the public's right of access does not depend on whether the government hypothetically could destroy those records.

Second, the Legislature did not require removing all trace of a criminal case from the public domain. In fact, sealing does not do that. When a case is sealed, members of the general public still have the ability to search eCourt Kokua for an individual's name to identify criminal matters, but without the details. For example, a search for Jerome Rogan leads to the following results:

Party Name	Case	Case Type	Filing Date	Next Event	Party Type
Rogan, Jerome	21908 - *STATE OF HAWAI'I, Plaintiff-Appellee v. JEROME ROG*	Appeal	22-SEP-1998		Appellant
Rogan, Jerome, Tramaine	4596512MO - *State v. Jerome, Rogan*	Traffic Crime	13-APR-1998		Defendant
Rogan, Jerome, Tramaine	4596516MO - *State v. Jerome, Rogan*	Traffic Infraction	13-APR-1998		Defendant
Rogan, Jerome, Tramaine	4596515MO - *State v. Jerome, Rogan*	Traffic Crime	13-APR-1998		Defendant
Redacted	1PC970001153 - *Case Title Redacted*	Circuit Court Criminal	15-MAY-1997		Redacted

5 case(s) found, displaying 5 case(s), from 1 to 5. Page 1 / 1

Although Rogan's expunged criminal case is identified as "Case Title Redacted" and no details are available, it is apparent that Rogan had some form of non-traffic criminal charge.

To accomplish the Legislature's intent to stop employers and landlords from discriminating against individuals with a criminal record, the Judiciary could eliminate the ability to search for expunged cases by the defendant's name. If a criminal case is not searchable by the defendant's name, it effectively no longer exists on eCourt Kokua and certainly cannot be used by an employer intent on violating the law. At the same time, the record would be available to legal researchers, historians, data scientists, and others who have no discretion over an individual's employment, housing, financial, or other life choices.[11] In the end, while sealing records can provide defendants with a second chance, it also will tend to hide abuses of power within the criminal justice system that can be identified by entities who are not seeking to discriminate against individuals.[12] *E.g.*, Jonathan Abel, *Cop Tracing*, 107 Cornell L. Rev. 927, 996-98 (2022) ("where state law seals the criminal court files of anyone who has been exonerated, the sealing winds up benefiting the corrupt officer, not just the exoneree").

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[11] The AG claims that the Trump administration will use criminal court records, if publicly accessible, for immigration enforcement against DACA residents. Dkt. 82 at 30 n.7. Federal law enforcement does not need access to court records to target individuals because law enforcement has ready access to criminal arrest records—irrespective of expungement. HRS § 831-3.2(d)(3).

[12] Rogan's case illustrates this concern. Expunging his entire record also expunges the record of prosecutorial abuses that led to reversal of his conviction. Eliminating access to all cases of prosecutorial misconduct would create the impression of a perfect system of criminal justice that would not be accurate.

Public Defender argues that individuals will continue to be subject to some unspecified stigma because records will be electronically accessible by case number. Dkt. 77 at 18. Ultimately, for Ahn and Rogan, any such stigma exists as a consequence of the published opinions concerning their conduct, not from access to the court records in their cases. Even though *Amici* acknowledge the absurdity of eliminating the stigma of published opinions, they insist on an indiscriminate solution that does nothing to further the legislative intent of the Expungement Provision.

Nevertheless, responding to *Amici*'s criticism that disassociating the defendant will continue to provide some form of public access through eCourt Kokua—purportedly contrary to the Expungement Provision—removal may be accomplished by taking expunged cases completely offline, but maintaining public access at courthouses. *E.g.*, David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. Ill. L. Rev. 1385, 1389 (2017) ("as long as [courts] continue to provide physical access to their records, the First Amendment does not preclude courts from managing electronic access to retain some of the beneficial aspects of practical obscurity."). Transferring access to court records to the courthouse complies with both the Legislature's intent to remove records from "publicly accessible electronic databases" and the presumptions of public access.

Through its book banning hypothetical, the AG argues that simply moving records around does not comply with legislative intent. Dkt. 82 at 36. That hypothetical, however, ignores the fact that "remove" in the Expungement Provision cannot be read without its focus on the "publicly accessible electronic databases." If the owner of the bookstore told the employee to remove a book from the publicly accessible shelves, it certainly would be consistent with that directive for the employee to continue selling the book while storing it behind the counter.

Amici have no basis to insist on an interpretation of the Expungement Provision that exceeds the plain language. *Amici* may think that the Legislature would have preferred a more expansive expungement of court records, but that is not what it provided. *State v. Mainaaupo*, 117 Hawai`i 235, 251-52, 178 P.3d 1, 16-17 (2008) ("Even when the court is convinced in its own mind that the Legislature really meant and

intended something not expressed in the phraseology of the Act, it has no authority to depart from the plain meaning of the language used."). Perhaps the Legislature recognized the constitutional limitations on denying public access, preferred to give the Judiciary greater flexibility in this area, or only had a concern about easy Internet access to court records. Contrary to arguments by *Amici*, "otherwise remove" does not mean eliminating all public access.

Based on the foregoing, the Expungement Provision grants courts the discretion to consider alternatives to sealing.

II. THE CONSTITUTION PROTECTS PUBLIC ACCESS TO CATEGORIES OF PROCEEDINGS.

Recognizing that alternatives to sealing are possible under the Expungement Provision, the constitutional presumption of public access determines whether those alternatives are required. *Amici* incorrectly argue that the constitutional rights of access to court records do not apply to terminated court cases. In the end, *Amici* present no justification for this Court to interpret the Expungement Provision in a manner that squarely poses a constitutional problem when other options exist consistent with the Legislature's intent.

A. Experience and Logic Are Not Analyzed Differently for Terminated Cases.

Amici ask this Court to construe the "experience and logic" test to apply differently depending on whether a case is active or terminated.[13] Dkt. 77 at 9-15; Dkt. 82 at 21-30. As this Court explained in *Oahu Publications v. Ahn*, the U.S. Supreme Court uses experience and logic to determine whether the First Amendment presumption of public access applies to a particular court proceeding. 133 Hawai`i 482, 494, 331 P.3d 460, 472 (2014).

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[13] Although *Amici* attempt to limit this discussion in various ways to criminal cases implicated by the Expungement Provision and these specific cases, it is impossible to limit the constitutional analysis to terminated criminal cases that resulted in non-convictions or other special circumstances. If "experience and logic" apply differently for terminated cases, that analysis applies to all terminated cases regardless of disposition or whether civil or criminal. The expansive breadth of that position would gut the First Amendment presumption of public access without justification.

> Under the "experience" consideration, a right of the public to attend trials relies on "whether the place and process have historically been open to the press and general public" because a "'tradition of accessibility implies the favorable judgment of experience[.]'" Under the "logic" consideration, the right of the public to attend a criminal proceeding relies on whether "public access plays a significant positive role in the functioning of the particular process in question."

Id. (citation omitted). Thus, as summarized in this case, "[t]he constitutional right of access does not extend to particular documents and proceedings 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." *Grube v. Trader*, 142 Hawai`i 412, 422 n.12, 420 P.3d 343, 353 n.12 (2018).

The U.S. Supreme Court has been clear, however, that the prongs depend solely on the general nature of the proceeding. *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 605 n.13 (1982). Special variations in the proceeding do not change the analysis; if a State has concerns about specific variants (*e.g.*, proceedings in terminated cases), those concerns go to the substantive standards for sealing, not the experience and logic of whether the First Amendment applies as a threshold matter.

> Whether the First Amendment right of access to criminal trials can be restricted in the context of any particular criminal trial, such as a murder trial (the setting for the dispute in *Richmond Newspapers*) or a rape trial, depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction.

Id.

Sealing an entire case implicates public access to all the underlying proceedings and related records. As the Ninth Circuit recently observed:

> In the decades since the Supreme Court first articulated the experience and logic test, we have concluded that the presumptive First Amendment right of public access attaches broadly to criminal and civil proceedings. As both we and the Supreme Court have recognized, the First Amendment grants the public a presumptive right to access nearly every stage of post-indictment criminal proceedings, including pretrial proceedings, preliminary hearings, voir dire, trials, and post-conviction proceedings, as well as records filed in those criminal proceedings. "*These rights of access are categorical and do not depend on the circumstances of any particular case*."

Civil Beat Law Ctr. for the Pub. Interest, Inc. v. Maile, 117 F.4th 1200, 1208 (9th Cir. 2024) [*Civil Beat Law Ctr.*] (citations omitted) (emphasis added).

No matter how well-intentioned, States cannot create novel variants of traditionally open proceedings to bootstrap a claim that there is no experience and logic for public access to the novel variant. *E.g.*, *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150-51 (1993) (rejecting argument that local variation of preliminary hearing not subject to First Amendment because no tradition of access for local variation). If it were otherwise, States could override centuries of public access simply by adopting new standards.

Thus, under the experience and logic test, it does not matter whether a trial occurred in a case that is still active or now terminated because in either case a trial is a proceeding subject to the qualified constitutional right of public access.

B. Experience and Logic Are Met Even for Terminated Cases.

Even assuming the particular circumstance of whether a case is active or terminated would be material to the First Amendment analysis—it is not—the experience and logic prongs are met. The public's presumed right of access does not suddenly evaporate as soon as a case terminates.

As to experience, the same centuries-long tradition of public access that the U.S. Supreme Court relied on to find a constitutional right of access applies equally to terminated cases. In part, history knows that courts were traditionally open because public records of those cases still exist—even though the cases have been terminated for hundreds of years. *E.g.*, Digital Humanities Institute, *The Proceedings of the Old Bailey, 1674-1913*, *at* https://www.oldbaileyonline.org (searchable database of criminal court trial records); Univ. of Haw. at Mānoa Library, *Historical Judiciary Court Records*, *at* https://guides.library.manoa.hawaii.edu/c.php?g=105634&p=684063 (finding guide for court records from 1839-1970, starting with the creation of the Supreme Court by King Kamehameha III). Historically, termination of a case has not been a basis for

treating all proceedings in the case as "traditionally closed to the public"—in the same category, for example, as grand jury proceedings.[14]

As to logic, again, all the reasons for public access to active cases apply equally to terminated cases. *E.g.*, *Oahu Public'ns*, 133 Hawai`i at 502, 331 P.3d at 481 (identifying "six 'societal interests' that are advanced by open proceedings"); *accord Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (plurality opinion) ("[Openness] gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality."). "Because of our natural suspicion and traditional aversion as a people to secret proceedings, suggestions of unfairness, discrimination, undue leniency, favoritism, and incompetence are more easily entertained when access by the public to judicial proceedings are unduly restricted." *Gannett Pac. Corp. v. Richardson*, 59 Haw. 224, 230, 580 P.2d 49, 55 (1978); *accord Richmond Newspapers*, 448 U.S. at 571 ("A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted."). "[O]penness . . . serves to enhance public trust and confidence in the integrity of the judicial process." *Gannett*, 59 Haw. at 230, 580 P.2d at 55; *accord Grube*, 142 Hawai`i at 422, 420 P.3d at 353 ("The right

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[14] To the extent that *Amici* claim that courts' historical authority to seal court records generally demonstrates that there is no "experience" of public access, *e.g.*, Dkt. 77 at 13-14, Dkt. 82 at 27-28, that same general authority existed for sealing proceedings. Recognizing that courts have always had the ability to seal proceedings and records when justified in particular circumstances does not mean that such proceedings and records were not presumptively open to the public. *E.g.*, *Globe Newspaper*, 457 U.S. at 605 & n.13 (explaining that the tradition of accessibility does not depend on whether trials might historically have been sealed in certain instances—*e.g.*, testimony of minor sex victims); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 503 (1st Cir. 1989) ("the fact that access to records 'has never been unfettered' or that courts traditionally have claimed a supervisory power to refuse disclosure in certain cases does not answer the question whether the records of closed criminal proceedings have been 'presumptively open.'"); *cf. Civil Beat Law Ctr.*, 117 F.4th at 1209 (experience and logic analysis is not a narrow focus on particularly sensitive documents abstracted from the nature of proceedings).

of access thus functions not only to protect the public's ability to gain information—a requisite to the enjoyment of other First Amendment rights—but also as a safeguard of the integrity of the courts."); *see also Richmond Newspapers*, 448 U.S. at 572 (plurality opinion) ("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."). "The efficiency, competence, and fairness of our judicial system are matters of legitimate interest and concern to our citizenry, and free access to our courtrooms is essential to their proper understanding of the nature and quality of the judicial process." *Gannett*, 59 Haw. at 230, 580 P.2d at 55.

Concerns about secrecy, collusion, misconduct, bias, informed discussion, and judicial integrity do not disappear simply because a case ends. As stated in *Gannett* and reaffirmed in *Oahu Publications*, the record of the case continues to be relevant to the public after a case terminates: "a complete record of those parts of the proceedings closed to the public shall be kept and made available to the public for a legitimate and proper purpose following the completion of trial or disposition of the case without trial . . . ." *Gannett*, 59 Haw. at 235, 580 P.2d at 57 (footnote omitted); *accord Oahu Public'ns*, 133 Hawai`i at 506-07, 331 P.3d at 484-85 (holding that post-trial release of previously sealed records is required "once any competing interests that militate for closure of a hearing traditionally open to the public are no longer viable"). As this Court explained relevant to *Gannett*, such post-termination access in part would "satisfy the salutary objective of subjecting law enforcement policies to public scrutiny." *Gannett*, 59 Haw. at 235 n.9, 580 P.2d at 57 n.9; *accord Oahu Public'ns*, 133 Hawai`i at 506, 331 P.3d at 484 (recognizing the various logical interests served by post-trial release of records, including the "community therapeutic value of openness" and the "basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the criminal justice system").

Amici suggest that the constitutional values of openness are met if the public attends the proceedings while the case is active. Dkt. 77 at 14-15; Dkt. 82 at 24. The First Amendment presumption of access is not so ephemeral as to depend on whether members of the public actually attend a proceeding. As this Court has recognized,

"[t]he 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." *Oahu Public'ns*, 133 Hawai`i at 494, 331 P.3d at 472 (quoting *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984)). Thus, for example, this Court has not allowed parties to seal proceedings simply because no one is present in the courtroom. *Id.* at 497, 331 P.3d at 475 (describing requirements to notify the public of motions to seal proceedings); *accord, e.g.*, *United States v. Biagon*, 510 F.3d 844, 848 (9th Cir. 2007) (affirming that courts may not grant an oral motion to seal without prior public notice). There is no assurance "that deviations will become known" if all record of a case disappears as soon as the case ends.

Amici's proposed constitutional analysis opens the door to collusive abuse of judicial processes. For example, if parties stipulate to dismiss a case, the constitutional presumption of access would no longer apply to the terminated case, including requirements to provide public notice of sealing. Thus, within a matter of hours, an entire case could disappear on a stipulation to seal without any notice to the public. This is not a mere hypothetical. *Roy v. GEICO*, 152 Hawai`i 225, 230, 524 P.3d 1249, 1254 (App. 2023), *cert. denied*, 2023 Haw. LEXIS 135 (July 25, 2023) (case settled and sealed within a day without public notice). The same scenario in criminal cases would be no different, raising potential questions of undue leniency, bias, and favoritism.[15]

C. *Pokaski* Raises Serious Constitutional Concerns Irrespective of Erroneous Holdings, If Any, by Courts in Ohio, Florida, and Massachusetts.

Grube has never argued that the Expungement Provision is unconstitutional or that this Court must definitively resolve any constitutional questions in this case. Dkt. 35 at 5 (invoking the "doctrine of constitutional doubt"); Dkt. 43 at 3-4 (AG

[15] In an apparent effort to mitigate this concern, the AG argues that the Expungement Provision permits a "reasonable time" before sealing. Dkt. 82 at 31. Statutory provisions, however, are irrelevant to the constitutional analysis under "experience and logic." If the First Amendment right does not attach to terminated cases as *Amici* argue, then it does not attach, with all concomitant consequences; the AG cannot save the absurdity of its constitutional analysis by reference to limiting language in a statute.

acknowledging in its initial response that Grube did not claim that the Expungement Provision was facially unconstitutional). This Court need only recognize that the mandatory sealing interpretation presented by *Amici* raises serious constitutional questions that can be avoided under Grube's interpretation. *E.g.*, *Morita v. Gorak*, 145 Hawai`i 385, 391, 453 P.3d 205, 211 (2019) ("doctrine of 'constitutional doubt,' a well-settled canon of statutory construction, counsels that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is [to] adopt the latter.'"). Regardless, to the extent that any other courts have held that the First Amendment does not apply to terminated cases, that holding is clearly wrong and should not be adopted here.

It is not disputed that, in *Globe Newspaper Co. v. Pokaski*, the First Circuit held unconstitutional a Massachusetts statute that required mandatory sealing (without any case-by-case judicial review) of criminal cases that ended in acquittal, dismissal, nolle prosequi, or a finding of no probable cause—similar to how *Amici* would interpret the Expungement Provision. 868 F.2d at 510. The *Pokaski* court analyzed "experience and logic." *Id.* at 502-05. The Court of Appeals described the common law tradition of presumptively open judicial records. *Id.* at 503 ("it is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents," quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)). And the First Circuit identified the significant role that access to records plays in the criminal justice system, rejecting among other arguments that only contemporaneous access is required. *Id.* at 503-04 ("If the press is to fulfill its function of surrogate, it surely cannot be restricted to report on only those judicial proceedings that it has sufficient personnel to cover contemporaneously.").

Next, an issue arose in Florida regarding expungement rules. The rules required the filing of a petition and an opportunity for objections. *State v. D.H.W.*, 686 So. 2d 1331, 1334 n.3 (Fla. 1996). The Florida Supreme Court pointed out that public access must be weighed against "the long-standing public policy of providing a second chance to criminal defendants who have not been adjudicated guilty." *Id.* at 1336.

Acknowledging *Pokaski*, the court held that the notice, factual petition, and objection process in the statute would typically comply with the constitutional standards; nevertheless, it expressly required that "a court must examine the constitutionality of a requested sealing order if a specific constitutional issue is raised in a particular proceeding." *Id.* Contrary to *Amici*'s claims, the Florida Supreme Court did not hold that the constitutional presumption of public access did not apply to closed cases.

Next, Ohio courts addressed an expungement statute. The Ohio Court of Appeals recognized that "a facile construction of the statute would allow the court to order the records sealed without any consideration of the public's presumptive right of access embodied in the First Amendment, the Ohio Constitution, the common law, and the Ohio Public Records Act." *State ex rel. Cincinnati Enquirer v. Winkler*, 777 N.E.2d 320, 324 (Ohio App. 2002). The court held that "in the absence of a saving construction, R.C. 2953.52 facially impinges upon the public's constitutional right of access." *Id.* at 326. Based on the doctrine of constitutional doubt, the court concluded that the statute was "susceptible to a saving construction that makes it constitutionally acceptable" and remanded for the constitutionally required factual analysis. *Id.* at 326-27.

After the trial court's factual analysis, the court of appeals allowed the court records to be sealed. *State ex rel. Cincinnati Enquirer v. Cissell*, 782 N.E.2d 1247, 1249 (Ohio App. 2002). From that posture, the Ohio Supreme Court reviewed the case—as discussed at length by *Amici*—and affirmed the court of appeals. *State ex rel. Cincinnati Enquirer v. Winkler*, 805 N.E.2d 1094, 1098 (Ohio 2004). In analyzing constitutionality, the supreme court did not question—as *Amici* do in this case—that the First Amendment applied to the records; it merely held that the process, according to the court of appeals' saving construction, complied with the substantive standards required by the First Amendment. *Id.* at 1097-98. Contrary to *Amici*'s arguments, the Ohio courts did exactly as Grube requests here.

Next, the Washington courts considered the constitutionality of an expungement provision. The Washington Court of Appeals construed a court rule that required sealing of vacated criminal convictions. *State v. Waldon*, 202 P.3d 325, 329-30 (Wash. App. 2009). The court considered whether the rule must comply with Washington's

articulation of the First Amendment presumptions of public access (*Ishikawa*). *Id.* at 330-31. After concluding that the rule would not comply with the constitutional standards, the court of appeals interpreted it to "harmonize" the rule with the constitutional standards. *Id.* at 333.

Lastly, there are the cases in which the Massachusetts Supreme Judicial Court simply chose to disregard the First Circuit's declaration that the Massachusetts expungement statute was unconstitutional.[16] The court held that it was not bound by the First Circuit's declaration and engaged in an entirely novel "experience and logic" analysis—albeit incorrectly citing *Winkler* and *D.H.W.*—to hold that there is no constitutional right of access to court records in terminated cases. *J.F.*, 208 N.E.3d at 24-25; *Commonw. v. Pon*, 14 N.E.3d 182, 194-97 (Mass. 2014). Massachusetts is the *only* jurisdiction to adopt the constitutional analysis presented by *Amici*.[17] And, for all the reasons set forth above, that analysis is wrong.

As recognized by all courts except Massachusetts, there are constitutional concerns that must be considered when addressing expungement of criminal records. Because the constitutional standards apply, if the Expungement Provision required mandatory sealing (without any case-by-case judicial discretion)—as *Amici* argue—the statute would be unconstitutional. *Civil Beat Law Ctr.*, 117 F.4th at 1210-12. In light of those constitutional concerns, this Court has a duty to adopt Grube's interpretation of the Expungement Provision to avoid the potential that a federal court would declare the statute unconstitutional.

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[16] Although decades passed between *Pokaski* and the state court decisions, the Massachusetts statute had not substantively changed. *Compare Pokaski*, 868 F.2d at 500 n.5, *with Commonw. v. J.F*, 208 N.E.3d 13, 21(Mass. 2023).

[17] Massachusetts has not been the poster child for judicial integrity and accountability. *See* Boston Globe, *Inside the Secret Courts of Massachusetts* (starting Sept. 30, 2018), at https://apps.bostonglobe.com/metro/investigations/spotlight/secret-courts-in-massachusetts/.

III. THIS IS NOT A CONSTITUTIONAL RIGHT OF PRIVACY ISSUE.

Contrary to arguments by *Amici*, this case does not present a conflict between constitutional rights of public access and privacy. Dkt. 77 at 15-16; Dkt. 82 at 29-30. Not all privacy concerns are *constitutional* privacy issues. *SHOPO v. City & County of Honolulu*, 149 Hawai`i 492, 509-12, 494 P.3d 1225, 1242-45 (2021) ("The constitutional right of privacy is not coextensive with the privacy interests protected by the legislature."). Court records publicly filed for years—even if subsequently sealed—are not "highly personal and intimate information."

As this Court explained *in SHOPO v. City & County of Honolulu*:

> [T]he constitution "establishes a floor" upon which the legislature is free to impose additional privacy protections, and to extend those protections to different groups. We considered the legislature's authority to impose heightened privacy protections in Peer News. "[A]rticle I, section 6 establishes a floor for protection of privacy rights, but does not preclude the legislature from providing greater protection." Said differently, "the legislature is [not] powerless to amend the statutory right to privacy to provide protections beyond what was discussed in SHOPO v. SPJ." But those legislatively-created protections are, as we noted, statutory. We also went on to reject SHOPO's contention that "it is the [l]egislature's exclusive role to 'define' the constitutional privacy right." In short, while the content of what the constitutional privacy provision protects remains bedrock, the legislature is tasked with implementing those protections, and it may also heighten them as it deems appropriate.

Id. at 510-11, 494 P.3d at 1243-44 (citations omitted).

The constitutional right of privacy protects "highly personal and intimate information." *SHOPO v. Society of Prof'l Journalists – Univ. of Haw. Chapter*, 83 Hawai`i 378, 397-98, 927 P.2d 386, 405-06 (1996) [*SHOPO v. SPJ*]; *accord SHOPO v. City & County of Honolulu*, 149 Hawai`i at 511, 494 P.3d at 1244; *Civil Beat Law Ctr. for the Pub. Interest, Inc. v. City & County of Honolulu*, 144 Hawai`i 466, 480, 445 P.3d 47, 61 (2019) [*CBLC v. City & County of Honolulu*]. The right extends to reasonable expectations of privacy analogous to the interests protected by common law privacy torts. *SHOPO v. SPJ*, 83 Hawai`i at 398, 927 P.2d at 406 ("if the matter publicized is of a kind that (a) would be regarded as highly offensive to a reasonable person, and (b) is not of legitimate concern to the public," quoting Restatement (Second) of Torts § 652D at 383 (1977)); *accord*

SHOPO v. City & County of Honolulu, 149 Hawai`i at 511, 494 P.3d at 1245; *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 138 Hawai`i 14, 19, 375 P.3d 1252, 1257 (2016) ("the framers 'equated privacy in the informational sense' with the 'common law right of privacy'"). And the constitutional right of privacy is enforceable against both public and private persons. *Pac. Radiation*, 138 Hawai`i at 19, 375 P.3d at 1257 ("article I, section 6 provides Hawaii's people with powerful protection against any infringement of their right to privacy, by state and private actors").

These principles create several problems for *Amici*'s effort to hold that expungement of criminal records is protected by the constitutional right of privacy. First, this Court has held that "a person cannot claim a legitimate privacy interest in information that has already been made public." *CBLC v. City & County of Honolulu*, 144 Hawai`i at 482, 445 P.3d at 63. "[W]ithholding the information previously made public serves no legitimate purpose because [the government] cannot force the public to forget or pretend to forget that information." *Id.*; *cf. United States v. Doe*, 870 F.3d 991, 1002 (9th Cir. 2017) ("Secrecy is a one-way street: Once information is published, it cannot be made secret again."); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004) ("We simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again.").

Second, contrary to *Amici*'s indiscriminate and mandatory sealing interpretation of the Expungement Provision, this Court has emphasized that the constitutional right of privacy is not a one-size-fits-all principle.

> While general conceptions of privacy may provide a useful template for a person's reasonable expectations, these expectations will necessarily differ on a case-by-case basis, depending on the person and the topic of discussion. As Civil Beat correctly points out, "[p]rivacy is not an absolute concept[.]" Some circumstances may reduce or perhaps entirely defeat the legitimacy of a person's expectation of privacy in certain information.

CBLC v. City & County of Honolulu, 144 Hawai`i at 480-81, 445 P.3d at 61-62; *accord Civil Beat Law Ctr.*, 117 F.4th at 1210 ("But where, as here, the individual privacy interest implicated by a particular record may vary, the State of Hawai`i's general interest in protecting the privacy of its citizens cannot justify the categorical, mandatory sealing of

every such record."). The constitutional right of privacy is more nuanced than *Amici*'s interpretation of the Expungement Provision.

Third, if expungement of criminal records is *constitutionally* protected, the procedures and limitations of the Expungement Provision are irrelevant. Constitutional protections are "bedrock"—not subject to the potentially shifting whims of legislative action. *SHOPO v. City & County of Honolulu*, 149 Hawai`i at 510-11, 494 P.3d at 1243-44. Rogan and Ahn have asserted statutory rights; neither have claimed that the Judiciary violated their constitutional right of privacy by publishing court records. An action for a constitutional violation poses procedural and substantive issues that are not suitable to resolution here and should be presented in an original action, not as a procedural statutory motion.[18]

Lastly, constitutional privacy protection for expunged records would justify legal action against Grube, his employer, his counsel, and the Judiciary for actions that *Amici* claim should be allowed. If information in expunged records is constitutionally private, publication of that information on the Internet in any form would be a violation enforceable against both public and private parties. That would include published news articles by Grube and his employer. *E.g.*, Nick Grube, *An Ex-Cop Who Went to Jail on Felony Drug Charges Is Getting His Record Wiped Clean*, Honolulu Civil Beat (Sept. 25, 2023), *at* https://www.civilbeat.org/2023/09/an-ex-cop-who-went-to-jail-on-felony-drugs-charges-is-getting-his-record-wiped-clean/. It would include court records published by Grube's counsel. Public First Law Ctr., *Grube v. Trader* (last visited Feb. 24, 2025), *at* https://www.publicfirstlaw.org/case/masunaga/. And it would include the Judiciary's published opinions. *E.g.*, *Grube v. Trader*, No. SCPW-17-927, *at* https://www.courts.state.hi.us/wp-content/uploads/2018/06/SCPW-17-0000927.pdf. Nevertheless, *Amici* both claim that such publications are permissible. Dkt. 77 at 17

[18] Conceivably, if Rogan and Ahn were to file an invasion of privacy complaint against the State, the AG may take a different position regarding whether expunged records are protected by the constitutional right of privacy.

n.10; Dkt. 82 at 32.[19] The inconsistency of *Amici*'s claims concerning constitutional privacy cannot be reconciled.

Amici both defend the inconsistency by reference to the Expungement Provision's focus on the Judiciary's "publicly accessible electronic databases." Dkt. 77 at 17 n.10; Dkt. 82 at 32. The limitations of the Expungement Provision, however, only affect statutory rights. If the information is constitutionally protected, it is protected in all contexts; that is the "floor" of protection for such highly personal and intimate information that the framers intended.

Grube does not contest the important privacy concerns recognized by the Legislature through the Expungement Provision. But those concerns are not part of the constitutionally protected bedrock (and such *statutory* privacy concerns may be protected through alternatives to sealing—consistent with the constitutional right of public access and the judicial discretion provided by the Expungement Provision).

IV. NOTWITHSTANDING LEGISLATIVE ENACTMENTS, THE JUDICIARY RETAINS INDEPENDENT AUTHORITY OVER ITS OWN RECORDS.

Grube never claimed that the Expungement Provision violated separation of powers.[20] Dkt. 35 at 10-11. He instead observed that the Judiciary's inherent authority over its own records and procedures meant that it is not obligated to blindly follow a legislative mandate to expunge court records. In the end, however, it is the First

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[19] Public Defender only excludes the Judiciary publishing opinions and may believe that Rogan or Ahn could sue news media and others for violation of the constitutional right of privacy for publication of information from expunged records. As noted in Grube's position statement—and unaddressed by Public Defender—expungement of criminal records does not justify privacy claims. Dkt. 35 at 2 n.2; *see also Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) (en banc) ("a 'right to be forgotten' . . . is not recognized in the United States.").

[20] If the Court expected Grube to argue that the Judiciary has sole authority over court records as a matter of separation of powers, it may consider appointing an attorney to represent the Judiciary's interests. Grube references judicial independence to emphasize why a mandatory *sealing* interpretation is problematic. In the end, it is Grube's position that the Judiciary still must do one of the Legislature's two options (sealing or otherwise remove from publicly accessible electronic databases) to comply with the Expungement Provision.

Amendment analysis that determines whether *Amici*'s mandatory sealing interpretation of the Expungement Provision is permissible. *Id.* at 10 n.7 ("Here, the public's *constitutional* right of access provides the anchor that requires stricter separation of powers and adherence to the Judiciary's role in preserving its own records.").

The AG outlines in detail how the Judiciary and Legislature have exercised joint authority over court records. Dkt. 82 at 38-40. As the AG explains, the Legislature has passed laws that restrict access to certain court records, and the Judiciary has promulgated rules that recognize the restrictions in those statutes. Dkt. 38-39 (referencing, for example, the statutes making certain family court proceedings confidential and the court rules providing for sealing by reference to those statutes). Nothing about joint authority, however, means that the Legislature has unilateral authority to dictate how the Judiciary handles its records.

As an illustration, if the Legislature passed a law that prohibited the Judiciary from posting *any* of its records on the Internet, there may not be a compelling First Amendment issue. *See Courthouse News Serv. v. Smith*, 126 F.4th 899 (4th Cir. 2025). But the Judiciary certainly should have some say—as an independent branch of government—in the disposition of its own records.

Ultimately, the Expungement Provision does not encroach on the Judiciary's authority over its own records because the Legislature expressly acknowledged and provided for judicial discretion to consider alternatives to sealing, as explained above. Only *Amici*'s interpretation of the Expungement Provision—precluding the Judiciary from doing anything other than sealing for any reason—poses a potential encroachment on the Judiciary's independence.

V. RESPONSES TO THE COURT'S ISSUES.

1. Sealing an entire case file—the first option identified by the Legislature under the Expungement Provision—does not violate the constitutional rights of public access if the court complies with the procedural and substantive standards for sealing. However, *Amici*'s interpretation that the Expungement Provision requires automatic, indiscriminate, and mandatory sealing of expunged court records without following the

constitutional standards does violate the First Amendment of the U.S. Constitution and article I, section 4 of the Hawai`i Constitution.

2. Removing court records from publicly accessible electronic databases—the second option identified by the Legislature under the Expungement Provision—is a remedy short of total sealing that the Legislature expressly determined would protect the interests advanced by the Expungement Provision. Such removal may be accomplished, for example, by disassociating Rogan and Ahn from searches of the Judiciary's publicly accessible electronic databases or by removing the expunged cases entirely from eCourt Kokua.

3. Properly interpreted, the Expungement Provision does not encroach on the Judiciary's independence and power to administer its own records.

CONCLUSION

Petitioner respectfully requests that the Court interpret HRS § 831-3.2(f) to avoid infringing on the public's constitutional right of access and the Judiciary's authority to administer its own records and procedures.

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Respectfully submitted,

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