



Committee on Criminal Justice and Public Safety

**TESTIMONY OF GLBTQ LEGAL ADVOCATES & DEFENDERS  
IN SUPPORT OF**

**LD 1916, *An Act to Automatically Seal Criminal History Record Information for Class D and Class E Crimes Relating to Marijuana Possession and Cultivation;***

**LD 1917, *An Act to Allow the Sealing of Criminal History Record Information Related to Convictions for Conduct That Is No Longer a Crime in the State; and***

**LD 1918, *An Act to Clarify the Criminal History Record Information Act with Respect to Criminal Charges Dismissed as the Result of a Plea Agreement***

January 12, 2026

Senator Beebe-Center, Representative Hasenfus, and Distinguished Members of the Committee on Criminal Justice and Public Safety,

GLBTQ Legal Advocates & Defenders (GLAD Law) is a nonprofit legal organization that works in Maine, New England, and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. Three of our attorneys reside in Maine, some for decades.

After thousands of inquiries and encounters with LGBTQ people from diverse communities for over 40 years, GLAD Law understands that preconceived notions can limit an individual's opportunity to support themselves and care for themselves and others. The same is true for those with a criminal record. We appreciate the opportunity to submit this testimony in support of LD 1916, *An Act to Automatically Seal Criminal History Record Information for Class D and Class E Crimes Relating to Marijuana Possession and Cultivation*; LD 1917, *An Act to Allow the Sealing of Criminal History Record Information Related to Convictions for Conduct That Is No Longer a Crime in the State*; and LD 1918, *An Act to Clarify the Criminal History Record Information Act with Respect to Criminal Charges Dismissed as the Result of a Plea Agreement*.

Many Maine residents who have been convicted of crimes still face discrimination and disadvantages based on their criminal records long after they have completed their sentences and paid their debt to society. As the American Bar Association has recognized, the collateral consequences of a criminal conviction adversely affect nearly every aspect of a person's life, including "adoptions, housing, welfare, immigration, employment, professional licensure, property rights, mobility, and other opportunities—the collective effect of which increases recidivism and undermines meaningful reentry of the convicted for a lifetime."<sup>1</sup> Collateral

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<sup>1</sup> American Bar Ass'n, *Collateral Consequences of Criminal Convictions Judicial Bench Book, The National Inventory of Collateral Consequences of Criminal Convictions* 4 (2018), <https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf>.

consequences “disproportionately affect minority and economically disadvantaged populations,” and defendants may not be warned of these consequences prior to accepting a plea bargain or upon conviction.<sup>2</sup> And collateral consequences even may flow from arrests or pending criminal charges, regardless of whether a conviction has occurred; for instance, “[e]ntire households may be evicted based on the arrest or pending criminal charge of one household member.”<sup>3</sup>

Without record relief, these collateral consequences may even continue to punish Maine residents for past conduct that we now recognize is *not* criminal. These bills, which would advance and facilitate an existing mechanism for sealing criminal records related to conduct that is no longer illegal under State law, therefore represent important steps forward in reducing barriers that some Maine individuals face in getting jobs, housing, education, and generally reintegrating into free society.<sup>4</sup>

**LD 1916** would replace the existing process of requiring an individual to petition a court to seal certain records, with the required costs and multiple court appearances, with a process to automatically seal or make confidential criminal records related to certain convictions for marijuana-related conduct that is no longer criminalized. This aligns with basic principles of justice, including that individuals should not face consequences for action that society no longer considers criminal. This is also the growing trend in New England and nationally, namely, to permit the automatic sealing or expungement of marijuana possession or cultivation offenses.<sup>5</sup> In the absence of automatic sealing, Maine individuals face numerous procedural barriers to record relief. They must affirmatively file a written motion to seal the records in the appropriate court, and a motion to seal cannot be granted without a court hearing.<sup>6</sup> If the State is aggrieved by the court’s determination on the motion to seal, it may appeal as of right.<sup>7</sup> There is no guarantee of legal assistance at any step of this process.<sup>8</sup> These barriers are especially burdensome for those who would pursue record relief, but are unable to do so due to limited financial resources, insufficient time, discomfort navigating legal systems, or a history of trauma.<sup>9</sup>

**LD 1917** would permit people to file post-judgment motions to seal criminal records related to convictions for conduct that is no longer illegal. The bill would also eliminate the

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 5.

<sup>4</sup> GLAD Law seeks to note also its support of LD 1911, *An Act to Automatically Seal Criminal History Record Information for Certain Crimes*, for which the Judiciary Committee held a public hearing on January 5, 2026. This support is consistent with our support for LD 1916, LD 1917, and LD 1918. GLAD Law also finds the extent of agreement on LD 1911 notable in updating a legal process Maine already has and aligning both labor force and economic imperatives with people’s ability to take steps to care for themselves and others by removing the cloud caused by certain past criminal offenses. Joining in that consensus are victim-focused groups such as TJP Advocacy, business groups like the Portland Regional Chamber of Commerce and Small Business Majority, recovery groups like Recovery Friendly Workplace Maine, employers of past offenders like MaineWorks, affected individuals and their families, and many others.

<sup>5</sup> See GLAD Law Written Comments for Criminal Records Review Committee Meeting of October 8, 2024, at 4-5, attached hereto and available online: <https://legislature.maine.gov/doc/11166>.

<sup>6</sup> 15 M.R.S. §§ 2263, 2264(5).

<sup>7</sup> *Id.* § 2267(2).

<sup>8</sup> *Id.* § 2264(2).

<sup>9</sup> See J. J. Prescott & Sonja B. Starr, *The Case for Expunging Criminal Records*, N.Y. Times (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/opinion/expunge-criminal-records.html>.

statutory waiting period to file post-judgment motions to seal for such conduct. Although certain convictions for decriminalized conduct are already eligible for sealing under Maine law, like those related to certain marijuana-related convictions, this bill would establish a record relief process for other conduct that we now recognize is not criminal. People should not be punished for doing things that, if done today, would not be penalized at all.

**LD 1918** clarifies the definition of “confidential criminal history record information” in the context of plea agreements that include both criminal charges and civil violations. If, as part of such a plea agreement, a defendant admits to and is adjudicated to have committed a civil violation or traffic infraction, *but does not plead guilty to and become convicted of a criminal charge*, then information disclosing the dismissal of the criminal charge is confidential criminal history record information. This would limit the potential for collateral consequences to flow from certain criminal charges that were never admitted to or proven.

**In sum**, LD 1916, LD 1917, and LD 1918 are criminal record reforms that would better allow people who have been charged or convicted of crimes to move forward to build a better life for themselves, their family, and their community, without jeopardizing public safety. GLAD Law respectfully urges members of this committee to vote “ought to pass.”

Sincerely,

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To: Janet Stocco & Sophia Paddon, Criminal Records Review Committee  
From: GLAD Attorneys Mary L. Bonauto, Sarah K. Austin  
Re: Written Comments of GLBTQ Legal Advocates & Defenders (GLAD) for CRRC  
Meeting on October 8, 2024  
Date: October 7, 2024

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GLAD is a nonprofit legal organization based in Boston with attorneys in Maine, New Hampshire, and Massachusetts that focuses on New England and litigates and engages in public policy nationally. Our mission is to promote justice under law, including by addressing discrimination against LGBTQ+ people based on sexual orientation, gender identity, and HIV status. Attorney Mary Bonauto is a licensed attorney and lobbyist in Maine and resident of Portland. Attorney Sarah K. Austin is a GLAD attorney and resident of Portland.

GLAD previously submitted testimony to the Criminal Records Review Committee on August 12, 2024, and GLAD attorney Lisa Rodriguez-Ross presented to the Committee on August 13, 2024. We appreciate the Committee for its continued work to address the rapidly developing area of “record relief” and to review other state policies and activities concerning sealing and otherwise limiting public access to criminal records.

State legislatures and courts are engaging on these issues in expanding options for sealing, expungement and preventing and addressing collateral consequences of “legal restrictions that burden people long after their criminal case is closed.”<sup>1</sup> The strongest policies are marked by accessibility, efficacy, coordination across jurisdictions, fairness, and administrability.<sup>2</sup>

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<sup>1</sup> Margaret C. Love, “The Many Roads from Reentry to Reintegration: A National Survey of Laws Restoring Rights and Opportunities after Arrest or Conviction,” Collateral Consequences Res. Ctr. (March 2022) at i, *available at* [https://ccresourcecenter.org/wp-content/uploads/2022/08/MRFRTR\\_8.24.22.pdf](https://ccresourcecenter.org/wp-content/uploads/2022/08/MRFRTR_8.24.22.pdf) (hereafter, “CCRC, Many Roads”).

<sup>2</sup> *Id.* at 3–5.

All these issues merit further research. As a starting point, we have identified a number of useful laws and secondary sources addressing how other states are providing record relief for survivors of human trafficking, for marijuana-related offenses, and for other offenses.

## **1. Record Relief for Survivors of Human Trafficking**

In addition to relief that is already available in the form of sealing, expungement, and pardons or commutations, at least 20 states provide a separate process for survivors of human trafficking to clear their records. Specifically, these states allow survivors to file a motion to vacate prior convictions that resulted from or were incident to having been a victim of human trafficking.<sup>3</sup>

The purpose of a motion to vacate is distinct from the purpose of a motion to seal or expunge records. While motions to seal or expunge records are intended to help people with sound convictions fully reintegrate into society, a motion to vacate is intended to cure problems with the original conviction (including but not limited to substantive errors, procedural errors, and wrongful convictions due to legal or actual innocence). In other words, while sealing and expungement allow people to move on from their past convictions, vacatur recognizes that the past convictions were themselves unjust.

Motions to vacate are especially appropriate for people who have been victimized by human trafficking schemes. This population represents some of the most vulnerable people in our society.<sup>4</sup> And it is well known that human trafficking schemes operate through force, threats, and other forms of coercion.<sup>5</sup>

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<sup>3</sup> New York Criminal Procedure Law § 440.10(1)(i); Florida Statute § 943.0583; Wisconsin Stat. Ann. § 973.015; Vermont Stat. Ann. tit. 13 § 2658; New Hampshire Rev. Stat. § 633:7(VI)(b)–(c); Maryland Code Ann., Crim. Proc. § 8-302; Mississippi Rev. Code § 97-3-54.6; Wyoming Stat. Ann. § 6-2-708; Connecticut Gen. Stat. § 54-95c; 11 Delaware Code § 787(j); West Virginia Code § 61-14-9; Arizona Rev. Stat. Ann. § 13-909; California Penal Code § 236.14; 725 Illinois Comp. Stat. § 5/116-2.1; Montana Code Ann. § 46-18-608; Nevada Rev. Stat. § 179.247; North Dakota Cent. Code § 12.1-41-14; Rhode Island Gen. Laws Ann. § 11-67.1-17(a); 18 Pennsylvania Cons. Stat. § 3019; Washington Rev. Code Ann. § 9.96.060.

<sup>4</sup> See generally Elizabeth Hopper & José Hidalgo, *Invisible Chains: Psychological Coercion of Human Trafficking Victims*, 1 Intercultural Human Rights L. Rev. 185 (2006).

<sup>5</sup> See generally *id.*

Given these realities, at least 20 states have determined that a victim of human trafficking is not blameworthy and should not be held criminally responsible for conduct that results from or is incident to their experience as a victim of human trafficking.

For example, Wyoming law provides that a person “is not criminally liable for any commercial sex act or other criminal acts committed as a direct result of, or incident to, being a victim of human trafficking.”<sup>6</sup> Thus, courts may “vacate [a] conviction if the defendant’s participation in the offense is found to have been the result of having been a victim” of human trafficking.<sup>7</sup>

Similarly, in Vermont, a court must grant a motion to vacate a conviction if (1) the conviction was for any offense other than specified serious, violent felonies and (2) it “was obtained as a result of the person having been a victim of human trafficking.”<sup>8</sup> The court must also order expungement of “all records and files related to the moving party’s arrest, citation, investigation, charge, adjudication of guilt, criminal proceedings, and probation for the offense.”<sup>9</sup> Delaware follows a similar approach.<sup>10</sup>

New York also requires courts to vacate judgments of conviction on the merits if “the defendant’s participation in the offense was a result of having been a victim” of sex trafficking, labor trafficking, or trafficking in persons.<sup>11</sup>

In addition to remedying the injustice to survivors of human trafficking, allowing past convictions to be vacated for cause is an especially powerful form of relief because of its potential to erase immigration consequences attendant to those convictions.<sup>12</sup> Other forms of conviction relief, including expungement and sealing, often do not have this effect.<sup>13</sup>

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<sup>6</sup> Wyoming Stat. Ann. § 6-2-708(a).

<sup>7</sup> *Id.* § 6-2-708(c).

<sup>8</sup> 13 Vermont Stat. Ann. § 2658(d)(1).

<sup>9</sup> *Id.* § 2658(d)(2).

<sup>10</sup> 11 Delaware Code § 787(j).

<sup>11</sup> N.Y. Crim. Proc. Law § 440.10(1)(i), (6).

<sup>12</sup> See Immigrant Legal Resource Center, Best Practices: Clean Slate and Immigrants 2, available at [https://www.ilrc.org/sites/default/files/resources/2020.06\\_clean\\_slate\\_and\\_immigrants\\_06.29.pdf](https://www.ilrc.org/sites/default/files/resources/2020.06_clean_slate_and_immigrants_06.29.pdf) (discussing potential impact of vacatur and suggested language).

<sup>13</sup> *Id.* at 1.

We encourage the Committee to consider whether other classes of convictions—for example, all convictions for decriminalized conduct—should be eligible for vacatur as well as sealing or expungement.<sup>14</sup>

And for all policy proposals under consideration, we hope the Committee will investigate all potential immigration consequences—including impact on individuals who may need access to their records while in immigration proceedings or applying for immigration benefits like citizenship. We encourage the Committee to invite stakeholders to participate and offer public comment on that topic.

## 2. Marijuana Offenses

Under current Maine law, certain marijuana offenses are eligible for sealing.<sup>15</sup> To get the benefit of this legislation, a person must affirmatively file a motion to seal in an appropriate court.<sup>16</sup> A motion to seal cannot be granted without a court hearing,<sup>17</sup> even though the eligibility criteria are objective and do not involve an exercise of judicial discretion.<sup>18</sup> There is no guarantee of legal assistance at any step of this process.<sup>19</sup>

The predictable effect of these procedural barriers is that many people will continue to be punished, by way of collateral consequences, for conduct that we now recognize is not criminal. The burden naturally falls most heavily on people with limited time, few resources, no ability to hire an attorney, discomfort navigating legal systems, or a history of trauma.<sup>20</sup> These populations undoubtedly stand to benefit from record relief but may not be able to access it.

To avoid these unjust outcomes, the growing trend in New England and nationally is to allow for automatic sealing or expungement of certain marijuana offenses. For example:

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<sup>14</sup> At least one state, New York, vacates convictions for marijuana offenses that have since been decriminalized. *See* New York Crim. Pro. Law § 440.46-a(1).

<sup>15</sup> 15 M.R.S. § 2261(6) (as amended in 2024 by LD 2236).

<sup>16</sup> *Id.* § 2263.

<sup>17</sup> *Id.* § 2264(5).

<sup>18</sup> *Id.* §§ 2262, 2264(5).

<sup>19</sup> *Id.* § 2264(2).

<sup>20</sup> J. J. Prescott & Sonja B. Starr, *The Case for Expunging Criminal Records*, N.Y. Times (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/opinion/expunge-criminal-records.html> (last visited Oct 3, 2024).

- In 2020, the Vermont Legislature passed legislation requiring the Criminal Division of the Superior Court to “order the expungement” of certain marijuana cultivation or possession convictions, and to “complete[]” the expungement process for all such convictions by January 1, 2022.<sup>21</sup>
- Similarly, in 2022, Connecticut passed legislation requiring automatic erasure of criminal records related to certain convictions for possession of marijuana.<sup>22</sup>
- Rhode Island also passed legislation in 2022 requiring automatic expungement of marijuana possession convictions, including felony convictions, by July 1, 2024.<sup>23</sup>

States outside New England have enacted similar reforms. For example, in 2024 Delaware began automatically expunging convictions for a broad range of offenses, including marijuana possession and related offenses.<sup>24</sup> Other jurisdictions requiring automatic relief for marijuana convictions include Minnesota, Missouri, California, the District of Columbia, New Jersey, New York, New Mexico, and possibly others.<sup>25</sup>

Adopting this growing trend in Maine for marijuana offenses—and for other decriminalized conduct, including prostitution—will ensure that no Mainers face ongoing punishment for conduct we no longer consider criminal. It will allow all Mainers to have equal access to the benefits of sealing. And it will likely enhance public safety and boost Maine’s economy more effectively than the existing statutory framework.<sup>26</sup>

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<sup>21</sup> Vermont P.L. 167 (S.234), § 31.

<sup>22</sup> Connecticut P.L. 21-1 (SB 1201), § 9.

<sup>23</sup> Rhode Island Gen. Laws § 12-1.3-5.

<sup>24</sup> See 11 Delaware Code § 4373(a) (establishing eligibility for mandatory expungement); *id.* § 4373A (requiring that all convictions eligible for mandatory expungement shall be automatically expunged by the State Bureau of Identification beginning August 1, 2024).

<sup>25</sup> Minnesota Stat. § 609A.055(1)(a)(2), (2)–(3); Missouri Constitution, Art. XIV § 2(10)(8); California Health & Safety Code §§ 11361.8–9; District of Columbia Act 24-284 § 16-802; New Jersey P.L. 2021, c.019 (A1897); New York Crim. Pro. Law § 440.46-a(1), (4)(g) (requiring automatic vacatur, dismissal, and expungement); New Mexico Stat. Ann. § 29-3A-8.

<sup>26</sup> See Mackenzie J. Yee, *Expungement Law: An Extraordinary Remedy for an Extraordinary Harm*, 25 Geo. J. Poverty Law & Pol'y 169, 179 (2017) (noting a recent study that found “average rates of recidivism were lower” and individual economic outcomes were better in states that allowed automatic juvenile expungement compared to states allowing expungement only by application).

We are sensitive to concerns about the fiscal impact of automatic sealing. We encourage the Committee to consider the relative fiscal impact and the administrative burden of requiring affirmative motions to seal to be filed and heard in court, especially in light of the historic backlogs currently facing Maine’s Judiciary.<sup>27</sup>

If automatic sealing is not feasible at this time, we hope the Committee will explore avenues for (1) increasing access to justice in the sealing context; and (2) reducing the fiscal impact and administrative burden on Maine’s Judiciary. One option for achieving these joint goals might involve removing the mandatory hearing requirement for motions to seal if they can be granted on the papers. Another option might include improving self-help resources for individuals proceeding without a lawyer. The court websites for Vermont<sup>28</sup> and Utah<sup>29</sup> are some examples of efforts to make self-help resources more accessible.

### **3. Other Offenses**

Existing Maine law makes sealing available only for certain classes of convictions, including convictions for certain marijuana offenses and for Class E crimes other than sexual assault.<sup>30</sup>

#### **a. Most states allow record relief for a broad range of offenses, and recent research supports this approach.**

Many states, including other states in New England, allow record relief for a much broader range of offenses. For example, Rhode Island allows expungement for any crime other than a “crime of violence.”<sup>31</sup> Vermont makes expungement and sealing available for most misdemeanors and many nonviolent felonies.<sup>32</sup> Connecticut allows automatic

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<sup>27</sup> See Johnny Maffei, ‘A constitutional crisis’: Maine courts need more staff to solve backlog, WGME (June 7, 2023), <https://wgme.com/news/local/a-constitutional-crisis-maine-courts-need-more-staff-to-solve-backlog-androscoggin-franklin-oxford-national-center-for-state-courts-judicial-officers-clerks>; Samantha Hogan, *Maine courts may take until 2028 to touch backlog of cases*, New Center Maine (Mar. 24, 2023), <https://www.newscentermaine.com/article/news/local/maine-courts-backlog-cases-2028-valerie-stanfill-chief-justice/97-08531fa3-8464-445b-b329-4fef03352bf1>.

<sup>28</sup> <https://www.vermontjudiciary.org/criminal/expungement>.

<sup>29</sup> <https://www.utcourts.gov/en/self-help/case-categories/criminal-justice/expunge.html>.

<sup>30</sup> 15 M.R.S. § 2261(6) (as amended by LD 2236).

<sup>31</sup> Rhode Island Gen. Laws § 12-1.3-2(a); *see also id.* § 12-1.3-1(1) (defining “crime of violence”).

<sup>32</sup> 13 Vermont Stat. Ann. §§ 7601, 7602(a)(1)(A).

expungement for most misdemeanor convictions and certain less serious felony convictions, with some exceptions including family violence and sex offenses.<sup>33</sup> New Hampshire makes annulment available for any offense other than certain specified “violent crime[s],” “felony obstruction of justice,” and “offense[s] for which the [individual] was sentenced to an extended term of imprisonment.”<sup>34</sup>

Nationally, the Collateral Consequences Resource Center reports that 38 states allow record relief for at least some felonies as well as misdemeanors.<sup>35</sup> Recent research validates policies that allow relief broadly rather than for only narrow classes of crimes: As a recent RAND report found, generally “a conviction for a certain type of crime does not reliably predict whether that person will commit the same type of crime—or any crime—in the future.”<sup>36</sup>

**b. Jurisdictions are divided on the proper role of judicial discretion in determining whether to seal or expunge past convictions.**

When evaluating whether to make sealing or expungement available for a broader class of convictions, the Committee will likely need to consider the appropriate criteria for granting relief for new categories of offenses. This may require the Committee to address the proper role of judicial discretion in the sealing or expungement decision.

Many states, including Maine and Connecticut, leave no role for judicial discretion.<sup>37</sup> In these states, record relief is mandatory if the individual meets certain objective criteria. These objective criteria might involve the type of conviction, the amount of time since last conviction, and possibly other elements like the number of past convictions.<sup>38</sup> Such mandatory schemes are consistent with research showing that the key

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<sup>33</sup> Connecticut Gen. Stat. §§ 54-142a(e), 54-142t(a).

<sup>34</sup> New Hampshire Rev. Stat. Ann. § 651:5(III), (V); *see also id.* § 651:5(XIII) (narrowly defining “violent crime”).

<sup>35</sup> Restoration of Rights Project, 50-State Comparison: Expungement, Sealing & Other Record Relief (“RRP, 50-State Comparison”), *available at* <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison/judicial-expungement-sealing-and-set-aside-2-2/>.

<sup>36</sup> Shawn D. Bushway, RAND Corp., Resetting the Record: The Facts on Hiring People with Criminal Histories 5 (2024), *available at* [https://www.rand.org/pubs/research\\_briefs/RBA2968-1.html#:~:text=Misperceptions%20can%20keep%20employers%20from,support%20better%2Dinform%20hiring%20decisions.](https://www.rand.org/pubs/research_briefs/RBA2968-1.html#:~:text=Misperceptions%20can%20keep%20employers%20from,support%20better%2Dinform%20hiring%20decisions.)

<sup>37</sup> *See* 15 M.R.S. §§ 2262, 2262-A, 2264(5); Connecticut Gen. Stat. §§ 54-142a(e).

<sup>38</sup> *See, e.g.*, 15 M.R.S. § 2262.

factors for predicting risk of re-offense are “a person’s time since last conviction, age, and number of convictions.”<sup>39</sup> Currently, at least 30 states require mandatory relief in at least some circumstances.<sup>40</sup>

Other states allow judges to exercise discretion in deciding whether to grant a motion for sealing or expungement. Allowing discretion can carry some benefits. For example, it allows “judges to consider individuals and their stories flexibly instead of forcing them to make categorical decisions.”<sup>41</sup> Thus, by incorporating discretion, criminal record relief statutes can expand the scope of convictions that may be eligible for relief, knowing that the ultimate determination will require a judicial finding of rehabilitation based on individual facts and circumstances.

Some states use a tiered system of decision-making, meaning some convictions are eligible for mandatory expungement or sealing, while relief for other more serious convictions depends on an exercise of judicial discretion.<sup>42</sup> If the Committee decides that judicial discretion may be appropriate in some circumstances, it should likely adopt this tiered approach because Maine’s existing sealing statutes contemplate only mandatory sealing.<sup>43</sup>

**c. If the Committee favors allowing judicial discretion in some cases, it should recommend statutory measures that will proactively manage and guard against the attendant risks of unfairness, arbitrary decision-making, and implicit bias.**

Judicial discretion comes with serious risks. At the most fundamental level, “discretion creates uncertainty and the possibility for unfair results and arbitrary

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<sup>39</sup> Bushway, *Resetting the Record* 3–4.

<sup>40</sup> RRP, 50-State Comparison.

<sup>41</sup> Yee, *Expungement Law*, at 183.

<sup>42</sup> See, e.g., 11 Delaware Code §§ 4372–73 (allowing for mandatory expungement, either automatically or by application, in some circumstances); *id.* § 4374 (allowing for discretionary expungement in other circumstances).

<sup>43</sup> See 15 M.R.S. §§ 2262, 2262-A (setting forth criteria for sealing); *id.* § 2264(5) (providing that, “if the court determines that the person who filed the motion has established by a preponderance of the evidence each of the statutory prerequisites specified in section 2262 or 2262-A, the court shall grant the motion” to seal).

decisions.”<sup>44</sup> Discretion is also a breeding ground for implicit bias, which has been shown to affect criminal court proceedings and produce racially disparate outcomes.<sup>45</sup>

If the Committee determines that an element of judicial discretion is necessary, there are ways to defend against implicit bias, disparate treatment, and arbitrary decision-making.

For example, developing a checklist of specific, relevant factors that judges must consider can “help cabin discretion in ways that increase overall accuracy” and decrease bias.<sup>46</sup> Several jurisdictions, including Minnesota and the District of Columbia, have developed such checklists to guide the exercise of judicial discretion in the record-relief context.<sup>47</sup> The more objective the factors on the checklist, the more successful the checklist will be in preventing unfair results.<sup>48</sup> Requiring judges to issue written decisions specifying the reasons for denial, as Maine does, can ensure strict adherence to a checklist and protect against undue disparities.<sup>49</sup>

The role of discretion, and the risk of bias, can also be limited by “shifting the burden of proof away from the petitioner [if] the petitioner meets all other statutory

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<sup>44</sup> Chris Skall, *Journey Out of Neverland: CORI Reform, Commonwealth v. Peter Pon, and Massachusetts’s Emergence as a National Exemplar for Criminal Record Sealing*, 57 B.C. L. Rev 337, 376 (2016).

<sup>45</sup> See, e.g., L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 Yale L. J. 864, 882–84 (2017); see generally Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012); Jerry Kang, *What Judges Can Do About Implicit Bias*, 57 Court Rev. 78 (2021); cf. Susan Nembhard & Lily Robin, *Racial and Ethnic Disparities throughout the Criminal Legal System*, Urban Institute (2021).

<sup>46</sup> Kang, *What Judges Can Do About Implicit Bias*, at 85. Such checklists also encourage careful deliberation and require judges to take their time in deciding whether to grant record relief, which further promotes fair decision-making. *Id.* at 84–85.

<sup>47</sup> See, e.g., Minnesota Stat. § 609A.03(5)(c) (specifying 12 factors judges must consider in deciding on an expungement petition); D.C. Code § 16-803(h) (similar); see also Yee, *Expungement Law*, at 184 (“Such factors should generally include the reasons proffered for retaining the record such as risk posed to society, the extent of the hardship imposed by the record, the time elapsed since the offense, the offender’s age at the time of the offense, the nature and seriousness of the offense, any aggravating or mitigating factors relating to the offense, post-offense conduct, and any other evidence of rehabilitation.”).

<sup>48</sup> Skall, *Journey Out of Neverland*, at 378.

<sup>49</sup> See 15 M.R.S. § 2264(5).

requirements,”<sup>50</sup> which creates a rebuttable presumption that any eligible individual is entitled to relief. Under this approach, a judge could only deny an eligible individual’s motion to seal upon an affirmative showing by the prosecutor that, based on the specific checklist factors, it would be against the public interest to seal the conviction record. Several jurisdictions have already adopted this protective measure in some circumstances.<sup>51</sup>

In addition, increasing judicial awareness of implicit bias may increase their motivation to make fair decisions.<sup>52</sup> Leading scholars in law and psychology have recommended implicit-bias training for judges as one strategy among many for reducing the influence of implicit bias in discretionary decision-making.<sup>53</sup>

We hope the Committee will consider these options for defending against implicit bias and will continue investigating to identify other protective strategies. Whatever path the Committee takes, we strongly encourage that it propose demographic data collection as part of the sealing process. Data collection will allow the Committee and the Legislature to (1) track any disparities based on race, sex, sexual orientation, gender identity, or other protected traits that may emerge as record-relief legislation is implemented, and (2) amend the law in future sessions to remedy such disparities.<sup>54</sup>

#### **4. Areas for Further Exploration**

As noted above, further research is needed regarding the effect of different forms criminal record relief in immigration proceedings; the fiscal impact of the current sealing

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<sup>50</sup> Yee, *Expungement Law*, at 184; see also Skall, *Journey Out of Neverland*, at 378 (suggesting that states “create a presumption in favor of sealing a record that can be rebutted by a prosecutor upon a showing that such a decision is contrary to the public interest”).

<sup>51</sup> See, e.g., Louisiana Code of Crim. Pro. Art. 980(E)–(F); Minnesota Stat. § 609A.03(5)(b) (providing that “the court shall grant the petition to seal the record unless the agency or jurisdiction whose records would be affected establishes by clear and convincing evidence that the interests of the public and public safety outweigh the disadvantages to the petitioner of not sealing the record”); D.C. Code § 16-803(I)(1) (providing that “the burden shall be on the prosecutor to establish by a preponderance of the evidence that it is not in the interests of justice to grant relief”).

<sup>52</sup> Kang et al., *Implicit Bias in the Courtroom*, at 1174–77.

<sup>53</sup> *Id.* at 1176–77.

<sup>54</sup> Kang, *What Judges Can Do About Implicit Bias*, at 88–89 (summarizing the need for data collection as a check on implicit bias).

statutes on Maine's backlogged judiciary; the options for increasing access to justice in the sealing context; and methods for demographic data collection in the sealing process.

In addition, we are aware that Maine has made strides in recent years to ensure that restitution obligations are only imposed after consideration of an individual's ability to pay.<sup>55</sup> We hope the Committee will consider applying these already stated legislative values in the sealing context to prohibit the denial of a motion to seal based solely on nonpayment of court debt if the individual has no ability to pay.

We thank the Criminal Records Review Committee members, staff and Chairs for their work on this important Committee.

Respectfully submitted,

GLBTQ Legal Advocates & Defenders

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October 7, 2024

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<sup>55</sup> 17-A M.R.S. § 2005(1)(C), (2)(D) (adult context); 15 M.R.S. § 3314-C(3)(A)(3), (3)(B)(5), (6) (juvenile context).