PretiFlaherty

Portland, ME
Augusta, ME
Concord, NH
Boston, MA
Washington, DC

Sigmund D. Schutz
sschutz@preti.com
207.791.3247

February 3, 2026

Joint Standing Committee on the Judiciary
c/o Legislative Information Office
100 State House Station
Augusta, ME 04333

RE: LD 1911 - An Act to Automatically Seal Criminal History Record Information for Certain Crimes
RESPONSE TO QUESTIONS ABOUT CONSTITUTIONAL AUTHORITY TO AUTOMATICALLY SEAL CRIMINAL JUDICIAL RECORDS

Dear Members of the Joint Standing Committee on the Judiciary:

I write on behalf of organizations interested in the free flow of government information in Maine[1] to alert you to grave constitutional problems with LD 1911 - *An Act to Automatically Seal Criminal History Record Information for Certain Crimes*. LD 1911 would automatically seal a wide swath of judicial records regardless of circumstances and after an arbitrary period of time. These features of LD 1911 violate the First Amendment as applied to the States through the Fourteenth Amendment to the United States Constitution.[2]

Analysis

As interpreted by the United States Supreme Court in a quartet of cases decided in the 1980s, the First Amendment guarantees public access to criminal judicial proceedings.[3] One of the core purposes of the First Amendment, the Supreme Court explained, is to assure "freedom of communication on matters relating to the functioning of government," and it would be difficult to identify any government function "of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

Applying Supreme Court authority, federal appellate courts have unanimously agreed that there is a First Amendment right of access to judicial records in criminal cases, including records of convictions and closed cases.[4] "The basis for this right is that without access to

[1] The organizations joining in this letter are the Maine Freedom of Information Coalition, the New England First Amendment Coalition, and the Maine Press Association.
[2] LD 1911 may also violate the Maine Constitution for the same reasons described below.
[3] *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"); *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1 (1986) ("*Press-Enterprise II*").
[4] *See, e.g., Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502-505 (1st Cir. 1989) (dismissed criminal case files); *Associated Press v. United States Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983) (documents filed in pretrial proceedings); *In re. Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) (documents

documents the public often would not have a 'full understanding' of the proceeding and therefore would not always be in a position to serve as an effective check on the system." *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989). "Courts have long recognized that public monitoring of the judicial system fosters the important values of quality, honesty and respect for our legal system." *In re Providence Journal*, 293 F.3d 1, 9 (1st Cir. 2002) (quotation marks omitted). Judge Coffin, writing for the First Circuit, rejected argument that because case files and proceedings "were previously open," past access was a sufficient opportunity for the public to obtain information. *Id*. "If the press is to fulfill its function of surrogate [for members of the public unable to observe criminal proceedings firsthand], it surely cannot be restricted to report on only those judicial proceedings that it has sufficient personnel to cover contemporaneously." *Id*. at 504; *see also State v. Rogan*, 156 Haw. 233, 242, 573 P.3d 616, 625 (2025) ("Time does not determine whether a right of public access exists. Whether a proceeding is ongoing, concluded yesterday, or ended eighty years ago, is not decisive. Societal interests can endure.")

The First Circuit held in *Pokaski* that a Massachusetts statute automatically sealing closed criminal cases violated the First Amendment. "We conclude that a blanket restriction on access to the records of cases ending in an acquittal, a dismissal, a *nolle prosequi*, or a finding of no probable cause, is unconstitutional, even if access is not denied permanently." *Id*. at 510. The First Circuit ruled that records of dismissed cases may be sealed only upon specific, on-the-record findings by a judge that sealing is necessary to effectuate a compelling governmental interest sufficient to overcome the public's First Amendment right of access to criminal proceedings. LD 1911 contains the same feature—automatic sealing of criminal judicial records—that was struck down as unconstitutional in *Pokaski*. Because the First Circuit has jurisdiction to hear appeals taken from federal trial courts in Maine, *Pokaski* is binding authority that would be applied if LD 1911 were enacted and a constitutional challenge to it were filed.

The ruling in *Pokaski* is consistent with consistent Supreme Court authority and federal cases over many years finding that statutes that require automatic sealing of criminal proceedings and records violate the First Amendment. In *Globe Newspaper Co. v. Superior Court*, for example, the Supreme Court struck down Massachusetts' mandatory closure rule for cases involving minor victims of certain sexual crimes in favor of a case-by-case determination. The Court found the state's interest "compelling" but nevertheless, the Constitution was held to make closure permissible only on a specific case-by-case showing that it was "necessary to protect the State's interest." 457 U.S. at 608–09. Similarly, in *Globe Newspaper Co. v. Fenton*, a federal court found that Mass.Gen.Laws ch. 6, § 172 of the Massachusetts Criminal Offender Records

---

filed in connection with plea and sentencing hearings); *Matter of the New York Times Co*., 828 F.2d 110, 114 (2d Cir. 1987) (documents filed in connection with pretrial suppression hearings); *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (trial exhibits); *United States v. Smith*, 76 F.2d 1104, 1111 (3d Cir. 1985) (bill of particulars); *United States v. Valenti*, 987 F.2d 708, 712 (11th Cir. 1993) (docket sheets); *Washington Post v. Robinson*, 935 F.2d 282, 287-88 (D.C.Cir. 1991) (stating that "first amendment guarantees the press and the public a general right of access to court proceedings and court documents unless there are compelling reasons demonstrating why it cannot be observed," and holding that the right of public access applies to plea agreements).

Information System ("CORI") violated the First Amendment "insofar as it denies the public access to court-maintained alphabetical indices of defendants in closed criminal cases without an individualized judicial determination on an adequate record that a particular defendant's name must be sealed or impounded to serve a compelling state interest[.]" 819 F. Supp. 89, 100–01 (D. Mass. 1993). Just last year, the Hawaii Supreme Court, recognizing this authority, summarized the principle as follows: "Where the right of public access attaches, automatic restrictions on that right are constitutionally unsound." *State v. Rogan*, 156 Haw. 233, 242, 573 P.3d 616, 625 (2025). LD 1911 is constitutionally flawed for that very same reason: it imposes automatic restrictions on public access to criminal convictions without any case-by-case determinations by a judicial officer.

The primary argument in favor of LD 1911 is that automatic sealing is necessary to promote rehabilitation and re-entry into society of defendants convicted of a crime.[5] But that interest can be served by requiring judges to make sealing decisions on a case-by-case basis, after weighing all competing considerations. The Supreme Court specifically endorsed the case-by-case approach to sealing as the narrowly tailored means of accommodating compelling state interests. *See Globe Newspaper*, 457 U.S. at 609. The considerations that may be taken into account on a case-by-case basis include, among other things, the number and type of convictions, the person's record and activities following conviction, the extent to which a showing has been made that a conviction will impede the person's rehabilitation, whether the person who has been convicted is a public figure or public officer, risks to public safety, the passage of time, public interests, and privacy interests. Indeed, a seal may not always be desired by a defendant, who might want to use public records to dispel rumors or set the record straight—something that can occur if a third-party background check service, for example, reports inaccurate information.

The interest in promoting rehabilitation and re-entry into society also can be advanced by "a set of prohibitions against discrimination on the basis of criminal history." *Globe Newspaper Co. v. Fenton,* 819 F. Supp. 89, 99 (D. Mass. 1993) ("to the degree that the Commonwealth seeks broader protections for the reintegration and rehabilitation of defendants who have been drawn into the criminal justice system than the individualized impoundment evaluation *Pokaski* prescribes, the Commonwealth is free to establish a set of prohibitions against discrimination on the basis of criminal history"). If existing protections against criminal history discrimination are insufficient, then they could be broadened or penalties for discrimination could be made more severe. This would be a better alternative than automatically sealing entire categories of public judicial records.

[5] The typical reasons to seal criminal case records are: (1) so as not to tip off a defendant before the defendant is apprehended, (2) to protect a juvenile defendant's privacy, or (3) to preserve the secrecy of an ongoing investigation or protect the defendant's safety if the defendant is a cooperator. Sealed Cased in Federal Courts (Federal Judicial Center, Oct. 23, 2009) at 31, available at https://www.uscourts.gov/file/sealed-casespdf

Conclusion

Because public access to judicial records is protected by the First Amendment, judicial records are unlike other types of Maine government records that the Legislature generally is free to regulate.[6] For the reasons explained above, LD 1911 conflicts with the First Amendment and if enacted would likely be challenged and struck down as unconstitutional on that basis. The Committee should not proceed with legislation that suffers from fatal constitutional defects, especially where it has not received an opinion from the Attorney General to the contrary.

I would be pleased to respond to any questions the Committee may have or provide further information or copies of any of the precedent referenced above.

Very truly yours,

Sigmund D. Schutz, Esq.
Maine Bar No. 8549

SDS:jp

cc: Maine Freedom of Information Coalition
New England First Amendment Coalition
Maine Press Association

[6] The Freedom of Access Act, 1 M.R.S. § 400 *et seq.*, for example, does not apply to judicial records. *See Asselin v. Superior Court*, Mem. 15-3 (Jan. 22, 2015). Some courts have also ruled that automatic sealing statutes present a separation of powers problem by infringing on the Judicial Branch's authority over its own records.