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Katie Gradowski
Candidate for Juris Doctor, Roger Williams University School of Law

Articles

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Katie Gradowski*

INTRODUCTION

Between April 2020 and December 2021, tenants at Brooks Crossing in Atlanta, Georgia, received 427 eviction notices, or roughly 1.9 notices per unit.[1] Tenants had to go to court multiple times at the height of the pandemic to stave off losing their homes, and for each filing, they accrued a record which could later turn up on a tenant screening report.[2] "Very few of them actually end up in eviction," noted Tabitha Ingle, a doctoral candidate at Georgia State University, but "the damage is already done . . . . They have nowhere else to go after that."[3]

The situation at Brooks Crossing highlights how eviction filing—the first step in an eviction, when an action is initiated against a tenant—has the potential to wreak havoc on a tenant's ability to

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1. Yeganeh Torbati and Jonathan O'Connell, *Throughout the Pandemic, One Atlanta-Area Landlord has Bombarded Residents with Eviction Notices*, WASH. POST (Jan. 2, 2022, 7:00 AM), https://www.washingtonpost.com/business/2022/01/02/atlanta-apartment-evictions/ [https://perma.cc/4RJY-83YD].

2. *Id.*

3. *Id.*

secure housing, as landlords will often refuse to rent to a person with a court history, even in cases where no eviction has occurred. The dangers of tenant screening have been well-documented since the 1970s,[4] and these risks have only grown with the mass digitization of court records.[5] Increasingly, the easy availability of these records risks turning the court system into an affordable background checking service for landlords.[6] After five years of failed starts, Rhode Island has taken steps to address this by permitting parties to seal an eviction record by motion at the close of the case.[7]

This Comment explores the context around Rhode Island's recently passed eviction sealing legislation, highlighting how this framework can be used as a model for other states. Part I surveys the existing scholarship on tenant screening, highlighting the unique problems posed by filed records that are put into circulation before a final disposition has been made. Part II examines the history of H. 06323 / S. 0912 Sub A, which was passed into law in June 2023 and allows parties to seal an eviction record by motion when a case is closed. This history provides insights on two key issues: first, whether eviction records should be sealed automatically or by motion, and second, whether doing so is constitutional under the First Amendment. Part III includes a brief survey of First Amendment caselaw, looking at a recent series of circuit court decisions examining public access to newly filed civil complaints. Part IV considers the value of petition-based sealing as compared to automatic

4. *See* Robert W. Benson & Raymond A. Biering, *Tenant Reports as an Invasion of Privacy: A Legislative Proposal*, 12 LOY. L.A. L. REV. 301 (1979); Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records,* 116 YALE L.J. 1344 (2007); Katelyn Polk, *Screened Out of Housing: The Impact of Misleading Tenant Screening Reports and the Potential for Criminal Expungement as a Model for Effectively Sealing Evictions*, 15 NW J. L. & SOC. POL'Y. 338 (2020).

5. Rebecca Oyama, *Do Not (Re)enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 187 (2009) (noting that as of 2003, ninety-four percent of the criminal history records in state criminal history repositories had been digitized).

6. Esme Caramello & Annette Duke, *The Misuse of MassCourts as a Free Tenant Screening Device,* 59 BOS. BAR J. 15, 15 (2015).

7. *See* H.7892 and S.2375, 2022 Leg. Sess. (R.I. 2022); H.5391, H.6464, S.0420, and S.0528, 2021 Leg. Sess. (R.I. 2021); H.7596 and S.2264, 2020 Leg. Sess. (R.I. 2020); H.5075 and S.0322, 2019 Leg. Sess. (R.I. 2019); H.8085, 2018 Leg. Sess. (R.I. 2018); S. 0912, 2023 Leg. Sess. (R.I. 2023); S. 0627, 2023 Leg. Sess. (R.I. 2023), H. 6323 Sub A, 2023 Leg. Sess. (R.I. 2023); S. 0912 Sub A, 2023 Leg. Sess. (R.I. 2023).

sealing, arguing that the measures proposed by earlier bills are reasonable and in line with steps that many other states are taking to limit distribution of criminal and civil court records.

As drafted, this legislation will protect a subset of tenants from the worst abuses of tenant screening companies, improve the accuracy of public court records, and expedite the speedy settlement of eviction cases. To date, at least ten other states have recognized the dangers of tenant screening and have passed similar legislation to seal or expunge eviction records,[8] and nearly all fifty states have taken steps to limit access to certain types of criminal records.[9] Rhode Island thus joins a growing movement of states attempting to remedy one of the most insidious effects of the eviction process: tenant screening and exclusion from housing.

I. THE BUSINESS OF TENANT SCREENING: BUYING AND SELLING PUBLIC COURT RECORDS

A. *Tenant Screening Generally; How Landlords Use Records*

Tenant screening is a variant of background checking that offers landlords cheap, fast access to detailed information on potential tenants.[10] Screening reports typically include a residential history, a credit report, a criminal background check, and a civil court

8. LEGAL SERV. CORP., 2021, *Eviction Laws Database: Local Dataset*, https://www.lsc.gov/initiatives/effect-state-local-laws-evictions/lsc-eviction-laws-database#pt-35 [https://perma.cc/Z3YH-TR84] (last visited Jan. 1, 2023). As of 2021, access to eviction records is limited in Washington, Oregon, New York, Nevada, Minnesota, Maine, Illinois, Colorado, and California. *Id.*; *see* U.S. DEP'T OF HOUS. & URBAN DEV., OFF. OF POL'Y DEV. & RSCH., REPORT TO CONGRESS ON THE FEASIBILITY OF CREATING A NATIONAL EVICTIONS DATABASE 32 (2021), https://www.huduser.gov/portal/sites/default/files/pdf/Eviction-Database-Feasibility-Report-to-Congress-2021.pdf [https://perma.cc/B3BS-RMKG] (listing states with current and proposed legislation to seal eviction records); *see also* NAT'L LOW INCOME HOUS. COAL., *Eviction Record Sealing and Expungement Toolkit* 3 (2023), https://nlihc.org/sites/default/files/2023-04/eviction-record-sealing-and-expungement-toolkit.pdf (highlighting ongoing initiatives in Arizona, the District of Columbia, Indiana, and Utah).

9. *Restoration of Rights Project, 50-State Comparison: Expungement, Sealing, & Other Record Relief*, COLLATERAL CONSEQUENCES RES. CTR., https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside-2/ [https://perma.cc/8ENL-T28G] (last visited Jan. 1, 2023).

10. Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. FOR SOC. JUST. 319, 323 (2010).

record, including eviction history.[11] Companies consolidate information from public records, internet searches, and court records, often relying on predictive technology and artificial intelligence (AI) to gather data and make recommendations about whether a tenant is a good "fit" based on landlord preferences.[12]

Until recently, the practical necessity of having to go to a courthouse limited widespread distribution of these records, but as courts have moved to digitize their dockets, companies have responded by creating fast, affordable platforms using data that is either purchased or scraped from public databases.[13] Commercial screeners typically do not access court data directly, but purchase it from third party vendors who buy data in bulk from public sources (i.e., the courts) and republish it.[14] As of 2019, an industry analysis identified 1,954 background screening companies operating at a total revenue of $3.2 billion.[15] The industry is "virtually unmapped, and a potential employer [or landlord] could buy a background check on a job [or rental] applicant from any one of these companies."[16] This process has "revolutionized the [screening] processes by which rental housing providers choose tenants, supplementing or even replacing traditional tenant-screening tools like

11. *Id.*; *see* Valerie Schneider, *Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice*, 52 COLUM. HUM. RTS. L. REV. 251, 268 (2020).

12. Schneider, *supra* note 11, at 268 (noting that screening companies increasingly rely on complex algorithms rather than individualized review to make tenant recommendations).

13. Soutter v. Equifax Info. Servs, LLC, 307 F.R.D. 183, 193 (E.D. Va. 2015) (describing how LexisNexis used a "webscrape" program to evade efforts to limit access to eviction records).

14. Sharon Dietrich, *Ants Under the Refrigerator: Removing Expunged Cases from Commercial Background Checks*, CRIM. JUST., Winter 2016, at 26–27.

15. CONSUMER FIN. PROT. BUREAU, MARKET SNAPSHOT: BACKGROUND SCREENING REPORTS 4 (2019), https://files.consumerfinance.gov/f/documents/201909_cfpb_market-snapshot-background-screening_report.pdf [https://perma.cc/4BYM-CMMX].

16. ARIEL NELSON, NAT'L CONSUMER L. CTR., BROKEN RECORDS REDUX: HOW ERRORS BY CRIMINAL BACKGROUND CHECK COMPANIES CONTINUE TO HARM CONSUMERS SEEKING JOBS AND HOUSING 7 (2019), https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf [https://perma.cc/YY68-R854] (citing Dietrich, *supra* note 14, at 27).

written applications, personal interviews, or phone calls to past landlords."[17]

B. *Errors and Undisposed Records: Litigation Under the Fair Credit Reporting Act Shows How Incomplete Records Harm Innocent Tenants*

Eric Dunn and Marina Grabchuk note that even conventional credit screening reports have high error rates, citing a 2004 study which found errors in seventy-nine percent of respondents' "big three" consumer reports.[18] "One in four of those errors were significant enough to cause a consumer's wrongful denial of credit."[19] Common errors include false positives,[20] misattribution of records,[21] the inclusion of outdated records,[22] the inclusion of legal terms that are likely to be misconstrued,[23] and, most commonly, disposition errors.[24]

Disposition errors occur when the record captures that a case has been filed but fails to show how it resolves.[25] A staggering fifty-four percent of eviction filings do not end in a judgment for the landlord; in an average year, roughly 1.44 million eviction cases are filed in the United States, of which only 660,000 result in a completed

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17. Dunn & Grabchuk, *supra* note 10, at 320.

18. *Id.* at 327.

19. *Id.*

20. Meyer v. Nat'l Tenant Network, Inc., 10 F.Supp.3d 1096, 1098 (N.D. Cal. 2014) (alleging that tenant screening company mixed up applicant's records and misidentified tenant as a sex offender, resulting in denial of housing and employment); Patel v. Trans Union, LLC, 308 F.R.D. 292, 295–97 (N.D. Cal. 2015) (overinclusive "name-only" logic resulted in tenant being incorrectly identified as being on a terrorist watch list).

21. Henderson v. Corelogic Nat'l Background Data, LLC, 178 F.Supp.3d 320, 323 (E.D. Va. 2016) (plaintiff alleged they were denied employment based on misattributed criminal records in CoreLogic's multistate database).

22. Moran v. Screening Pros, LLC, 943 F.3d 1175, 1178 (9th Cir. 2019) (plaintiff alleged reporting of an outdated criminal record).

23. Wenning v. On-Site Manager, Inc., No. 14 Civ. 9693, 2016 WL 3538379, at *11 (S.D.N.Y. June 22, 2016) (plaintiffs alleged that they were denied housing based on inaccurate listings of "Forcible Entry / Detainer Records" which was not a term of art used in the New York Housing Court and could suggest that the landlord had to expel them by force and the court held that a reasonable jury could find the term to be misleading).

24. See CONSUMER FIN. PROT. BUREAU, *supra* note 15, at 14–15, for a broader discussion of common errors in tenant screening reports.

25. *See id.* at 15.

eviction.[26] This can have a major impact on tenants if a screening company fails to update its records in a timely fashion, as landlords rely on screening reports to make leasing decisions. If a landlord believes a tenant has been evicted, they will often choose to reduce their risk by denying housing and renting to someone else.

Disposition errors are problematic not only because they are widespread but because they specifically harm tenants who go on to win or settle their cases. In 2007, a New York court approved a class action settlement for $936,318 against First American Registry based on their practice of erroneously reporting filed records where the tenant had gone on to win their case.[27] "[D]efendants have seized upon the ready and cheap availability of electronic records to create and market a product that can be, and probably is, used to victimize blameless tenants."[28] In a pending lawsuit against RealPage, Inc., the United States District Court for the Eastern District of Pennsylvania certified a nationwide class action lawsuit based on allegations that of 43,821 eviction records acquired through LexisNexis, "over 50% . . . had to be corrected in whole or in part" based on inaccurate reporting of case disposition.[29] In March 2020, the United States Judicial Panel on Multidistrict Legislation consolidated six class-action lawsuits against TransUnion Rental Screening Solutions from tenants who were

26. Peter Hepburn, Renee Louis, & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649, 653 (2020).

27. White v. First American Registry, Inc., No. 04 Civ. 1611, 2007 WL 703926, at *1, *3 (S.D.N.Y. Mar. 7, 2007).

28. *Id.* at *1. Fourteen years later, First American Registry—now operating as CoreLogic—agreed to settle a second-class action lawsuit for $1.5 million in which plaintiffs alleged similar conduct: purchasing eviction data from the New York Housing Court, selling records to landlords indicating that a case had been filed, and failing to update or correct records when the case resolved in the tenant's favor. *See* Feliciano v. CoreLogic Rental Prop. Sol., LLC, 332 F.R.D. 98, 102–03 (S.D.N.Y. 2019); Memorandum of Law in Support of Plaintiff's Unopposed Motion for Final Approval of the Class Action Settlement and in Support of Award of Attorneys' Fees and Costs, and Incentive Award to Named Plaintiff at *1, Feliciano v. Corelogic Saferent LLC, No. 17-CV-05507, 2021 WL 3400962, at *1 (S.D.N.Y. Feb. 8, 2021); Complaint at *1, Feliciano v. Corelogic Saferent LLC, No. 1:17CV05507, 2017 WL 11562352, at *1 (S.D.N.Y. July 19, 2017).

29. McIntyre v. RealPage, Inc., 336 F.R.D. 422, 430, 440 (E.D. Pa. 2020).

denied housing based on wrongly attributed records.[30] Class action lawsuits under the Fair Credit Reporting Act have forced the three major credit reporting agencies—Equifax, Experian, and TransUnion—to reduce their involvement in tenant screening.[31] Yet thousands of others remain, and LexisNexis, the third-party vendor at issue in many of these cases, remains one of the largest providers of bulk records.[32]

C. *Irreparable Harm: Using Eviction Filings to Threaten Tenants, Collect Fees, and Disincentivize Tenants from Using the Court System*

As Esme Caramello notes, tenant blacklisting not only impedes access to housing; it also impedes access to justice.[33] There is a growing body of evidence that suggests that unsavory landlords use eviction filing to assess fees,[34] turn over units,[35] and pressure tenants into dropping valid claims.[36] While truly abusive conduct may not be common, the mere threat of an eviction filing can prevent a tenant from using the court system to pursue valid claims.

These impacts are not race-neutral. Rebecca Oyama has described the compounding effect of tenant screening on the criminal

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30. *In re* TransUnion Rental Screening Sols., Inc., Fair Credit Reporting Act (FCRA) Litig., 437 F.Supp.3d 1377, 1377–78 (U.S. Jud. Pan. Mult. Lit. 2020).

31. Megan Kimble, *The Blacklist*, TEX. OBSERVER (Dec. 9, 2020; 8:53 AM), https://www.texasobserver.org/evictions-texas-housing/ [https://perma.cc/7MA6-JYRC]; *see* Verdict, Agreement, and Settlement, Clark v. Trans Union, LLC, Nos. 3:15-cv-00391, 3:16-cv-00558, 2018 WL 5831178 (E.D.Va., March 14, 2018) (barring Trans Union from reporting certain classes of public records for a period of three years).

32. U.S. DEP'T OF HOUS. & URBAN DEV., OFF. OF POL'Y DEV. & RSCH., *supra* note 8, at 31. The report noted that the Princeton Eviction Lab, which has amassed the largest collection of eviction records to date, purchased 76.8% of their records from LexisNexis. *Id.* at 33.

33. Esme Caramello & Nora Mahlberg, *Combating Tenant Blacklisting Based on Housing Court Record: A Survey of Approaches*, 2017 CLEARINGHOUSE REV. 1, 2 (2017).

34. Torbati & O'Connell, *supra* note 1; *see* Philip ME Garboden & Eva Rosen, *Serial Filing: How Landlords use the Threat of Eviction*, 18 CITY & CMTY. 638, 655–56 (2019).

35. Nieborak v. W54-7 LLC, No. 157084/2014, 2016 WL 540692, at *2, *4 (N.Y. Sup. Ct. Jan. 22, 2016).

36. Paula A. Franzese, *A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity*, 45 FORDHAM URB. L.J. 661, 671 (2018).

justice side: because mass incarceration disproportionately impacts communities of color, the effects of a criminal record layer on top of other forms of housing discrimination and effectively lock people out of the housing market.[37] Matthew Desmond's groundbreaking work on eviction has revealed similar disparities on the civil side.[38] In a series of papers studying eviction in Milwaukee between 2012 and 2014, Desmond found that the number of women evicted from predominantly Black neighborhoods was almost three times higher than the number of women evicted from white neighborhoods.[39] Nationwide, one in three eviction filings are made against Black renters, and one in seven Black renters who are filed against reported multiple filings at the same address.[40] If women of color are evicted at higher rates generally, following Oyama's framework, they are likely to be disproportionately represented in screening reports.

In New York, courts have found that the threat of blacklisting is substantial enough to merit "irreparable harm" to enjoin an eviction where the tenant has a meritorious claim against a landlord.[41] As courts have noted, the harm attaches on filing:

> [A] tenant's identity is captured at the start when the case is filed in the clerk's office. If the Court seals the matter on its own motion or on petitioner's motion, the tenant's identity has already entered the stream of commerce with the

37. Oyama, *supra* note 5, at 185–87.

38. Matthew Desmond, *Eviction and the Reproduction of Urban Poverty,* 118 AM. J. OF SOCIO. 88, 97–99 (2012).

39. *Id.* at 98–99; *see* Matthew Desmond, *Poor Black Women are Evicted at Alarming Rates, Setting Off a Chain of Hardship*, MACARTHUR FOUNDATION (Mar. 2014), https://www.macfound.org/media/files/hhm_research_brief_-_poor_black_women_are_evicted_at_alarming_rates.pdf [https://perma.cc/YK5L-6G2U] (finding that women in Black neighborhoods in Milwaukee accounted for thirty percent of evictions, despite representing only 9.6 percent of the population).

40. Hepburn, Louis, & Desmond, *supra* note 26, at 656–57.

41. *See, e.g.*, Nieborak v. W54-7 LLC, No. 157084/2014, 2016 WL 540692, at *6 (N.Y. Sup. Ct. Jan. 22, 2016); Pultz v. Economakis, No. 114915/2004, 2005 WL 1845635, at *10 (N.Y. Sup. Ct. June 20, 2005). *But see* Hundtofte v. Encarnación, 280 P.3d 513, 522 (Wash. Ct. App. 2012) (tenant's interest in obtaining housing not sufficient to overcome public interest in open court records).

> consequent damage to their credit rating and ability to obtain housing.[42]

Eviction filings are also commonly used to collect rent and assess fees.[43] A 2021 House investigation revealed that corporate landlords and private equity firms filed to evict 75,000 renters at the height of the pandemic as a means of collecting rent, including tens of thousands of renters in majority-Black communities.[44] In Baltimore, where there are 130,000 total rental units, landlords filed for eviction 150,000 times in one year, routinely using serial filing as a "first step" to collect back rent and assess additional fees.[45]

Tenants who are screened out of housing report have feelings of hopelessness, resignation, weariness, and despair, as well as a sense of being caught by surprise at the lifelong impacts of being blacklisted from housing.[46] Robert Benson and Raymond Biering note the inherent cruelty of this system: "[E]ven if a tenant had once been the wrongdoer in an unlawful detainer case, it would be brutal to exclude him permanently from the housing market for that reason alone."[47] This injustice is particularly hard to stomach in cases where the tenant won or settled the case yet may be haunted for years by a filed court record.

II. THE CASE FOR RECORD RELIEF IN RHODE ISLAND

A. *Eviction Sealing Offers a Path Forward for Tenants*

S. 0912 Sub A and its companion bill, H. 6323, allow either party to seal an eviction record by motion at the close of the case.[48] These bills were passed into law in June 2023 and will take effect

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42. LNV Corp. v. Amin, No. 032975/19, 2020 WL 3581305, at *613 (N.Y. Civ. Ct. July 1, 2020).

43. Garboden & Rosen, *supra* note 34, at 656–57.

44. *Oversight of Pandemic Evictions: Assessing Abuses by Corp. Landlords and Fed. Efforts to Keep Americans in their Homes: Hearing Before the Select Subcomm. on the Coronavirus Crisis of the Comm. on Oversight and Reform*, 117th Cong. 7 (2021) (statement of Jim Baker, Executive Director, Private Equity Stakeholder Project), https://www.congress.gov/117/chrg/CHRG-117hhrg45372/CHRG-117hhrg45372.pdf [https://perma.cc/U622-8626].

45. Garboden & Rosen, *supra* note 34, at 645.

46. Franzese, *supra* note 36, at 673–90.

47. Benson & Biering, *supra* note 4, at 308.

48. H. 6323 Sub A, 2023 Leg. Sess. (R.I. 2023); S. 0912 Sub A, 2023 Leg. Sess. (R.I. 2023).

on January 1, 2024.[49] The 2022 legislative session preceding this legislation offers a snapshot into competing models for eviction sealing, as advocates put forward both automatic sealing bills and petition-based alternatives. These efforts coalesced into the 2023 bills and together represent a significant step forward in the effort to address housing exclusion in Rhode Island.

H. 7892, introduced in 2022, proposed to automatically seal eviction records on filing.[50] This bill, and its companion bill S. 2375, operated on the simple premise that records should be complete at the time of publication, and that when a record enters the stream of commerce (i.e. is picked up by a tenant screening company) it should reflect the final adjudication of the case, not simply the fact that an eviction action was filed.[51] The bill proposed to accomplish this in four ways: (1) by sealing the record automatically on filing; (2) by unsealing the record if the tenant won or settled their case; (3) by automatically unsealing the record if the landlord won; and (4) by permitting the record to be unsealed by motion if the tenant breached a settlement agreement.[52] This approach offered the strongest protections for the tenant, ensuring that the record could not be "scooped" prior to disposition.[53] It also posed administrative hurdles for the court staff, who would need to seal a high volume of records at the outset, as well as for legal advocates needing to access records during court proceedings.[54] H. 7892 / S. 2375 was also limited in scope; it would only have protected tenants who won or settled their case; if a tenant lost, the record was automatically unsealed.[55] This bill was held for further study.[56]

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49. *Id.*

50. H. 7892, 2022 Leg. Sess. (R.I. 2022).

51. *Id.*; S. 2375, 2022 Leg. Sess. (R.I. 2022).

52. H. 7892, 2022 Leg. Sess. (R.I. 2022).

53. Interview with Jordan Mickman, Supervising Attorney, Rhode Island Center for Justice, and Kristina Brown, Program Officer of Housing & Economic Policy, United Way of Rhode Island (Nov. 19, 2021).

54. Interview with Jennifer Wood, Executive Director, Rhode Island Center for Justice (Nov. 2022).

55. H. 7892, 2022 Leg. Sess. (R.I. 2022); S. 2375, 2022 Leg. Sess. (R.I. 2022).

56. *See Bill Status/History*, R.I. GEN. ASSEMBLY, https://status.rilegislature.gov/ (last visited Jan. 15, 2022).

Late in the 2022 legislative session, H. 7892 / S. 2375 Sub A was floated as an alternative to the original bill.[57] This version proposed sealing eviction records by petition at the close of the case.[58] While not formally introduced, it received support from important constituencies and would have been considered if the legislative session had not expired.[59] H. 7892 / S. 2375 Sub A permitted either party to petition the court to seal a record by motion.[60] The decision to seal was left to the discretion of the court, which could consider relevant factors such as whether the case had been dismissed, whether a settlement had been reached, and whether the terms had been honored.[61] This bill would have made sealing an option even if the tenant lost their case, thus making make sealing available to a larger class of tenants.

H. 6323 / S. 0912 Sub A, introduced and passed in 2023, represents a compromise between these prior bills. The bill goes a step further than the discretionary approach of the 2022 Sub A bills, requiring that eviction records to be sealed by motion thirty days after the close of the appeal period following (1) a dismissal; (2) a stipulation and paid judgment (or alternatively, lack of prosecution by the landlord); and (3) notice to the landlord.[62] The landlord's consent is not required to seal an eviction record, but it is only possible to seal if the debt is fully paid.[63] Parties are limited to one motion every five years. It does not go as far as H. 7892 / S. 2375, which provided for automatic sealing at the point of filing. However, as with the 2022 Sub A bills, it opens the possibility of sealing to a much wider pool of tenants, allowing anyone to move for sealing at the close of a case as long as the judgment is fully paid.

H. 6323 / S. 0912 Sub A is a significant step forward for tenants who have thus far been entirely unprotected. In particular, the decision to seal a case at the close of the appeals period is likely to promote settlement. As it stands right now, if a tenant believes they will be unable to secure housing going forward, they have a

57. Proposed text of H. 7892 / S. 2375 Sub A (on file with the author).
58. *Id.*
59. Interview with Jennifer Wood, *supra* note 54.
60. Proposed text of H. 7892 / S. 2375 Sub A, *supra* note 57.
61. *Id.*
62. R.I. H. 6323 Sub A; R.I. S. 0912 Sub A.
63. *Id.*

strong incentive to drag the case out for as long as possible for the obvious reason that they may have nowhere else to go.[64] This approach gives tenants a reason to settle early and to ensure that all debts are paid in full. It also offers the types of settlements most likely to make the landlord whole, encouraging tenants to repay past due rent, leave units undamaged, and vacate in a timely manner.[65] Finally, it prevents landlords from using the threat of blacklisting to extract fees or disincentivize a tenant from bringing valid claims or defenses regarding the condition of their unit.

Legislative action is necessary because eviction rates are high and going up.[66] A 2020 analysis showed that the eviction rates in minority neighborhoods in Providence—Wanskuck, Upper South Providence, Olneyville, and Valley—were among the highest in the city.[67] According to data from the Princeton Eviction Lab, the total number of evictions per year in Rhode Island increased by thirty-five percent from 2007 to 2018, while filings went up eighty-one percent.[68] In 2018 there were 7,037 filings to 4,744 completed evictions, meaning that in one year alone, over two thousand people now have a court record for a case that they likely won or settled.[69]

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64. Interview with Jordan Mickman & Kristina Brown, *supra* note 53.

65. *Id.*

66. Christine Dunn, *Eviction Rate in R.I. Lead Region*, PROVIDENCE J. (Apr. 15, 2018), https://www.providencejournal.com/story/special/real-estate-latest/2018/04/16/eviction-rate-in-ri-leads-region/12685584007/ [https://perma.cc/9Q8A-VU8V] (explaining that Rhode Island courts processed roughly fourteen evictions a day in 2016, nearly triple Boston's eviction rate); *see Eviction Tracking System: Version 2.0*, PRINCETON UNIV. EVICTION LAB (2020), https://evictionlab.org/map/?m=modeled&c=p&b=efr&s=all&r=states&y=2018&z=3.08&lat=35.72&lon=-112.31&lang=en&l=44_-71.49_41.58 (indicating that Rhode Island averaged 30.4 evictions per day in 2018).

67. Amelia Anthony et al., *Evictions in Providence*, HOUSING JUSTICE: PROVIDENCE (2020), https://drive.google.com/file/d/1xkN4m8ea2Z5zMYdKhpsm2IBN2jLgu8zx/view.

68. Ashley Gromis et al., *Estimating Eviction Prevalence Across the United State*s, PRINCETON UNIV. EVICTION LAB, https://data-downloads.evictionlab.org/#estimating-eviction-prevalance-across-us/ (uploaded May 13, 2022) (Rhode Island data on file with the author); *see* Peter Hepburn, et al., *Preliminary Analysis: Eviction Filing Patterns in 2021*, PRINCETON UNIV. EVICTION LAB (March 8, 2022), https://evictionlab.org/us-eviction-filing-patterns-2021/ [https://perma.cc/WZ59-KA6Y] (explaining that recent data shows that eviction rates fell precipitously nationwide during the pandemic as a result of the CDC moratorium and availability of emergency rental assistance and that many of these programs have since expired).

69. Gromis et al., *supra* note 68.

III. IS THERE A FIRST AMENDMENT RIGHT OF ACCESS TO PUBLIC COURT RECORDS?

A key point during earlier efforts to pass eviction sealing in Rhode Island was the concern by the Rhode Island Judiciary that automatic record relief would "contravene the Judiciary's historical commitment to ensuring the public nature of court records."[70] The First Amendment often looms large in eviction sealing debates, and although these concerns appear to have been addressed in the current framework, it is worth taking a moment to discuss how public access concerns arise in this sphere.

Opponents of automatic record relief argue that a defendant's right to privacy stops at the courthouse door: if a public record is true, any limitation on its use should be held to be unconstitutional.[71] Advocates have long argued in response that the purpose of making these records public is to ensure the integrity of the judicial system, not to provide a free service to landlords to screen potential tenants.[72] Neither argument is strictly advanced by existing caselaw, which continues to evolve in a relatively nuanced and case-specific way.

A. *Right of Access under the First Amendment: A Presumption of Access in Criminal Trials and a Growing Movement to Extend the Right to Civil Court Records*

It is only since the 1980s, with the trifecta of *Richmond Newspapers, Inc. v. Virginia*,[73] *Globe Newspaper Co. v. Superior Court for Norfolk County*,[74] and *Press-Enterprise Co. v. Superior Court of*

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70. *An Act Relating to Property—Residential Landlord and Tenant Act: Hearing on H.6464 before the H. Judiciary Comm.,* 2021 Leg. Sess. (R.I. 2021) (statement of Rhode Island Supreme Court Office of the General Counsel), https://www.rilegislature.gov/Special/comdoc/House%20Judiciary/06-29-2021-H6464-RI%20Judiciary.pdf [https://perma.cc/268U-XY4V].

71. *See* Cheryl M. Sheinkopf, *Balancing Free Speech, Privacy, and Open Government: Why Government Should Not Restrict the Truthful Reporting of Public Record Information*, 44 UCLA L. REV. 1567, 1568–1569 (1997).

72. *See* Benson & Biering, *supra* note 4, at 308; Caramello & Duke, *supra* note 6, at 15.

73. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

74. Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty., 457 U.S. 596 (1982).

California, Riverside County,[75] that the Supreme Court has extended a qualified First Amendment right of access to judicial records.[76] As Rudy Kleysteuber noted in his seminal article on tenant screening, the right primarily applies to criminal proceedings; the Supreme Court has not yet held that this right extends to civil court records.[77] In *Nixon v. Warner Communications*, the Court also recognized a qualified common law right to access judicial records, but as with constitutional access under the First Amendment, it is not an absolute right.[78] Even where access is presumed, "[e]very court has supervisory power of its own records and files, and access has been denied where court files might have become a vehicle for improper purposes."[79]

In *Richmond Newspapers*, the Supreme Court held that under the First Amendment, criminal trials must be open to the public and press unless there are overriding interests that merit closure, as "[t]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open."[80] The Court extended this principle in *Globe Newspaper Co. v. Superior Court*, stating that a prior court had been "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country."[81] In *Press-Enterprise Co. v. Superior Court of California, Riverside County*, the Court noted that "the roots of open trials reach back to the days

75. Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty., 478 U.S. 1 (1986).

76. Cap. Cities Media, Inc. v. Chester, 797 F.2d 1164, 1173 (3d Cir. 1986) ("Not until *Richmond Newspapers, Inc. v. Virginia* . . . did the Supreme Court recognize a First Amendment right of access to *some* government-controlled information.").

77. Kleysteuber, *supra* note 4, at 1382.

78. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598–99 (1978) ("It is uncontested . . . that the right to inspect and copy judicial records is not absolute.").

79. *Id.*

80. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (holding that it was unconstitutional to close the courtroom to reporters during a murder trial).

81. Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty., 457 U.S. 596, 605–07 (1982) (citing *In re* Oliver, 333 U.S. 257, 266 (1948)) (holding that it was unconstitutional to close the courtroom during the testimony of minor victims in a criminal sex offense trial).

before the Norman Conquest."[82] "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known."[83]

To make a case-by-case determination as to whether the First Amendment applies, the Court uses the "experience-and-logic" test established in *Press-Enterprise II*, which looks at the historical openness of a particular type of record and whether public access "plays a significant positive role in the functioning of the particular process in question."[84] If so, a qualified First Amendment right of public access attaches.[85] The Court held that the presumption could be overcome by a standard that is slightly less than strict scrutiny: the "presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[86] The defendant must show, in other words, that there is a "substantial probability" that the interest in the fair and orderly administration of justice would be immediately impaired and that no reasonable alternative exists to "adequately protect" the government interest.[87] These findings must be specific and on the record.[88] Although it was initially applied in the context of criminal trials, the *Press-Enterprise* test has been widely applied to civil records at the appellate level, as discussed below.

The Rhode Island Supreme Court relied on these precedents in *Providence Journal Company v. Rodgers*, in which the Providence Journal sought access to sealed court records involving child victims of sexual assault.[89] Notably, the Journal did not challenge the

82. Press-Enter. Co. v. Superior Ct. of Cal., Riverside Cnty., 464 U.S. 501, 505 (1984) ("Press-Enterprise I") (holding that it was unconstitutional to close voir dire for six weeks in a criminal trial); *see also* Press-Enter. Co. v. Superior Ct. of Cal. for Riverside Cnty., 478 U.S. 1, 7 (1986) ("Press-Enterprise II") (holding that it was unconstitutional to close pretrial hearings in a murder trial).

83. *Press-Enterprise I*, 464 U.S. at 508.

84. *Press-Enterprise II*, 478 U.S. at 8.

85. *Id.* at 9.

86. *Id.* at 9–10 (citing *Press-Enterprise I*, 464 U.S. at 510).

87. *Id* at 14.

88. *Id.* at 9–10 (citing *Press-Enterprise I*, 464 U.S. at 510).

89. Providence J. Co. v. Rodgers, 711 A.2d 1131, 1132–33 (R.I. 1998).

legislature's authority to seal these records, but merely requested access to redacted copies of nonconfidential case files.[90] The Court mandated that a dual filing system be implemented for child sexual molestation cases, with separate tracks for the "public" redacted files and "confidential" court files.[91] In *State v. Cianci*, the Rhode Island Supreme Court required that a balancing test be conducted before sealing pretrial discovery documents in a criminal case, noting that the inherent power of a court to control its own records must be weighed against the trend toward more expansive First Amendment access.[92] Finally, in *In re Access to Certain Records of Rhode Island Advisory Committee on Code of Judicial Conduct*, the Rhode Island Supreme Court held that where judges rely on opinions from the Rhode Island Advisory Committee on the Canons of Judicial Ethics, such opinions must be made public.[93] Here, the court emphasized that judges retain control over their own records, stating that "*the decision as to access is one best left to the sound discretion of the [court] . . . in light of the relevant facts and circumstances.*"[94] These cases illustrate that Rhode Island courts are rightly cautious about limiting public access to judicial records, but where the balance of interests warrants it, they are willing to impose significant administrative requirements to ensure that litigants' privacy is protected.

B. *Courthouse News Service v. Quinlan: Applying Press-Enterprise to Newly Filed Civil Complaints in the First Circuit*

A recent series of cases has extended the *Press-Enterprise* test to newly filed civil complaints. These cases, brought by Courthouse News Service, have challenged administrative delays due to e-filing and local processing rules in over fifteen district courts around the

90. *Id.*at 1134.

91. *Id.* at 1138.

92. State v. Cianci, 496 A.2d 139, 142–44 (R.I. 1985) (holding that *Press-Enterprise* requires a four-part balancing test to be applied before documents in a criminal trial may be sealed).

93. *In re* Access to Certain Recs. of R.I. Advisory Comm. on Code of Jud. Conduct, 637 A.2d 1063, 1067 (R.I. 1994) (holding that the common law right of access required that judicial advice from the Rhode Island Advisory Committee on the Canons of Judicial Ethics be made public going forward).

94. *Id.* (citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 599 (1978)).

country.[95] As a result, many circuit courts—including the Fourth Circuit, the Ninth Circuit, and the Tenth Circuit—have applied *Press-Enterprise* to "no access before process" policies and found that a timely right of access attaches to newly filed civil complaints under the First Amendment.[96]

This issue was litigated in a First Circuit District Court in 2021 in *Courthouse News Service v. Glessner*, which dealt with press access to recently filed civil court records available through Maine's public portal.[97] In 2020, Maine implemented a series of changes to its e-filing protocols and implemented new rules to balance "public access and the protection of privacy in court records in the context of electronic case management and filing."[98] Under the new Rule 4 of the Electronic Court System Rules, eviction cases were classified as public records but were only made accessible online after a judgment had been entered in favor of the landlord.[99] Rule 4 also included a provision that all other civil records would be made public after e-filing subject to a three-day window to give the clerks time to verify receipt and ensure that process had been served on the defendant.[100] Courthouse News Service challenged the three-day delay and sued to gain immediate access to "other" civil records, arguing that they had "a First Amendment right of access to civil

95. *See* Bill Girdner, *Tenth Circuit Rejects Bid by New Mexico Courts to Withhold Access*, COURTHOUSE NEWS SERV. (Nov. 23, 2022), https://www.courthousenews.com/tenth-circuit-rejects-bid-by-new-mexico-court-to-withhold-access/ [https://perma.cc/5FGX-RGJG]; Courthouse News Serv. v. O'Shaughnessy, No. 22-cv-2471, 2022 WL 17476835, at *1 (S.D. Ohio Dec. 6, 2022).

96. *See* Courthouse News Serv. v. Schaefer, 2 F.4th 318, 329 (4th Cir. 2021); Courthouse News Serv. v. Planet, 947 F.3d 581 (9th Cir. 2020); Courthouse News Serv. v. N.M. Admin. Off. of Cts., 53 F.4th 1245 (10th Cir. 2022). A qualified right of access under the First Amendment had previously been recognized in the Second, Third, Fourth, Sixth, and Seventh Circuits under other precedents. *See* Courthouse News Serv. v. Glessner, 549 F.Supp.3d 169, 185 (D. Me. 2021), *rev'd and remanded sub nom.* Courthouse News Serv. v. Quinlan, 32 F.4th 15 (1st Cir. 2022). The Courthouse News Service cases are significant because they seek to expand the right to apply to newly filed civil complaints.

97. *Glessner*, 549 F.Supp.3d at 173.

98. *Id.*

99. ME. R. ELEC. CT. SYST. 4(C) (adopted and effective Aug. 21, 2020, including amendments effective Mar. 15, 2021), https://www.courts.maine.gov/rules/text/mrecs_2020-12-14.pdf [https://perma.cc/64DH-T2D4] ("A case which has been settled, dismissed in favor of the tenant, or is pending, is only available by physically going to the courthouse to access the record in person.").

100. *Glessner*, 549 F.Supp.3d at 173.

complaints and other civil judicial records [that] attaches upon receipt."[101] The district court ruled in favor of the clerk on a motion to dismiss, stating that although a right of access attached, Rule 4 was a time-place-and-manner restriction and thus a "relaxed" level of scrutiny applied.[102]

The First Circuit reversed and remanded in April 2022, finding that Courthouse News had plausibly alleged that a qualified First Amendment right attaches on filing.[103] In *Courthouse News Service v. Quinlan*, the court noted that although neither the First Circuit nor the Supreme Court had spoken authoritatively as to civil complaints, both parties agreed that a qualified right attached—the dispute had to do with *when* the right attached (does it attach at the moment of filing or after processing?) and *to what* it attached (to all civil complaints, or only to those that have been vetted for errors?).[104] The First Circuit held that the state had a strong interest in protecting the privacy of litigants but did not decide whether *Press-Enterprise* or the lower "time place and manner" test should be applied, noting that even under intermediate scrutiny, any delay must "reasonably [serve] those interests and [be] narrowly tailored to do so."[105]

Courthouse News Service v. Glessner provides a useful lens into First Amendment law in the First Circuit, illustrating that while courts generally acknowledge that a qualified right of access exists, the scope of that right varies widely based on timing and type of record.[106] As noted above, the Supreme Court has held that the public has a constitutional right to attend criminal trials.[107] It is unconstitutional to ban republication of the names of crime victims and defendants obtained from public records.[108] It is also unconstitutional to sanction members of the media when they republish this

101. *Id.*
102. *Id.* at 191.
103. Courthouse News Serv. v. Quinlan, 32 F.4th 15, 21–22 (1st Cir. 2022).
104. *Id.* at 20.
105. *Id.* at 21.
106. *Glessner*, 549 F.Supp.3d at 182.
107. *Id.* (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980)).
108. *See* Fla. Star v. B.J.F., 491 U.S. 524, 539–41 (1983).

information.[109] The First Circuit has held that the public has a qualified right to access pretrial bail hearings and documents,[110] to access records of criminal trials that ended without conviction,[111] and to access certain legal memoranda that are filed with motions in criminal cases.[112] Conversely, the First Circuit has held that there is no First Amendment right to access pretrial subpoenas and documents filed under seal in a criminal case[113] or to access financial documents submitted in a criminal case to demonstrate the defendant's eligibility for Criminal Justice Act funds.[114] *Glessner* and *Quinlan* are the first cases to suggest that there is a qualified right of access to civil complaints in the First Circuit, but the scope of that right has yet to be decided.[115]

Courthouse News Service has been highly successful in expanding the scope of the First Amendment in other jurisdictions. To date, the organization has filed over twenty lawsuits, and "[n]early every court that has passed on the issue has found that the press and public enjoy a First Amendment right to access civil complaints that attaches upon filing."[116] In all but a handful of these cases, the court has held that a qualified right of access applies to newly filed nonconfidential complaints.[117] While the level

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109. *See* Smith v. Daily Mail Pub. Co., 443 U.S. 97, 104–06 (1979); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495–97 (1975).

110. *Glessner*, 549 F.Supp.3d at 183 (citing *In re* Globe Newspaper Co., 729 F2d 47, 59 (1st Cir. 1984)).

111. *Id.* (citing Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 510–11 (1st Cir. 1989)).

112. *Id.* (citing *In re* Providence J. Co., 293 F.3d 1, 12–13, 16 (1st Cir. 2002)).

113. *Id.* (citing United States v. Kravetz, 706 F.3d 47, 56 (1st Cir. 2013)).

114. *Id.* (citing *In re* Boston Herald, 321 F.3d 174, 189 (1st Cir. 2003)).

115. *See* Courthouse News Serv. v. Quinlan, 32 F.4th 15, 21–22 (1st Cir. 2022).

116. Courthouse News Serv. v. Forman, 606 F. Supp. 3d 1200, 1212 (N.D. Fla. 2022). *See, e.g.*, Courthouse News Serv. v. Planet, 947 F.3d 581 (9th Cir. 2020); Courthouse News Serv. v. Schaefer, 440 F. Supp. 3d 532 (E.D. Va. 2020); Courthouse News Serv. v. Omundson, 598 F. Supp. 3d 929 (D. Idaho 2022); Courthouse News Serv. v. Tingling, No. 16 CIV. 8742, 2016 WL 8505086 (S.D.N.Y. Dec. 16, 2016); Courthouse News Serv. v. Jackson, No. 09-CV-01844, 2010 WL 11546125 (S.D. Tex. Mar. 2, 2010); Courthouse News Serv. v. New Mexico Admin. Off. of the Cts., 566 F. Supp. 3d 1121 (D.N.M. 2021); *see also* Girdner, *supra* note 95.

117. *But see* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1075 (7th Cir. 2018) (holding that under *Younger* abstention, the federal court had no jurisdiction to hear the claim).

of scrutiny varies, courts most commonly apply *Press-Enterprise*, and all require at least intermediate scrutiny.[118] If applied to eviction records, these rulings would preclude the approach taken by H. 7892 / S. 2375, as they hold that a qualified right of access applies to the filed complaint regardless of the disposition of the case.[119]

Importantly, these rulings apply to *nonconfidential* court records.[120] Courthouse News Service has not sought or been granted access to newly filed records under seal, and as discussed below, nothing in this line of cases challenges the legislature's ability to seal or expunge records. Likewise, neither *Glessner* nor *Quinlan* discussed the right of access to eviction records—not because these records enjoyed special protection, but because Courthouse News did not consider them newsworthy. *Quinlan* left the eviction provisions of Rule 4 intact, and it remains legal in Maine to limit electronic access to eviction records to in-person viewing at the courthouse.[121] However, the swiftly evolving landscape shows why it is important for legislatures to be attentive to the issue and to consider sealing as of right where the balance of interests demands it.

C. *Even if a Right of Access Attaches, the Legislature is Free to Adjust the Scope of Access*

As many commentators have noted, the First Amendment is a negative right. It prevents the government from passing any law "abridging the freedom of speech," but it does not impose a positive right to disclose government records on demand.[122] Justice Stewart once wrote, "[t]he public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of

118. *See* Courthouse News Serv. v. Forman, 606 F. Supp. 3d 1200, 1217–19 (N.D. Fla. 2022) (detailing the various levels of scrutiny that appellate courts have applied).

119. *See* H. 7892, 2022 Leg. Sess. (R.I. 2022), S. 2375, 2022 Leg. Sess. (R.I. 2022).

120. *See* Courthouse News Serv. v. Planet, 947 F.3d 581, 585 (9th Cir. 2020) (concluding that "the press has a qualified right of timely access to newly filed civil nonconfidential complaints that attaches when the complaint is filed").

121. *See* Courthouse News Serv. v. Quinlan, 32 F.4th 15, 21–22 (1st Cir. 2022).

122. Cap. Cities Media, Inc. v. Chester, 797 F.2d 1164, 1168 (3d Cir. 1986).

Information Act nor an Official Secrets Act."[123] In cases like *Pell v. Procunier*, *Saxbe v. Washington Post Co.*, and *Houchins v. KQED*, the Supreme Court has upheld this principle in the context of press access to jails and prisons.[124]

Decisions about how much access to provide remain, first and foremost, with the legislature. In *Capital Cities Media, Inc. v. Chester*, the Third Circuit traced this authority to the Constitutional Convention, citing James Madison, who noted that "[t]here never was any legislative assembly without a discretionary power of concealing important transactions, the publication of which might be detrimental to the community."[125] The court explained, "[t]he founding fathers intended affirmative rights of access to government-held information, other than those expressly conferred by the Constitution, to depend upon political decisions made by the people and their elected officials."[126] This is true in Rhode Island, where the legislature has authorized sealing and expungement of certain criminal records by motion and the sealing of juvenile records by default.[127] Rhode Island currently utilizes a de facto form of automatic expungement for certain classes of misdemeanor records, allowing a judge to "file" a record at their discretion for first-time offenses and set it aside for one year on the express condition that the

123. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975) (cited in *Cap. Cities Media, Inc.*, 797 F.2d at 1173).

124. *See* Pell v. Procunier, 417 U.S. 817, 834 (1974); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (holding that there is no affirmative duty to make sources available to the press that are not already available to the general public); Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978) (holding that there is no guaranteed right to sources of information within government control).

125. *Cap. Cities Media, Inc.*, 797 F.2d at 1169.

126. *Id.* at 1167 ("The underlying issue . . . is not whether it is desirable to have an informed electorate, but rather, who is to decide which government-held information must be made available to the public and by what criteria such decisions will be made. If a right of access were implicit in the First Amendment, as Times Leader urges, this task would be assigned to the judiciary and the courts would be required to fashion a constitutional freedom of information act.").

127. R.I. GEN. LAWS § 12-1-12.1 (sealing of records of persons acquitted or otherwise exonerated by operation of law or by motion); R.I. Gen. Law § 14-1-64 (disposition of juvenile records). For a broader discussion, see Michael W. Field, Esq. & Rebecca Tedford Partington, Esq., *Public Body: Holdings and Decisions, in* A PRACTICAL GUIDE TO DISCOVERY & DEPOSITIONS IN RHODE ISLAND § 6.1.3 (Massachusetts Continuing Legal Education, Inc. ed., 2nd ed. 2019).

defendant "shall . . . at all times during the one year keep the peace and be of good behavior."[128] If there are no subsequent charges within one year, the complaint is automatically expunged.[129] In 2022, the Rhode Island state legislature authorized sweeping provisions to automatically expunge civil and criminal records for decriminalized marijuana records, as discussed below.[130] In 2022, the legislature also authorized automatic sealing for the first time in criminal cases ending in dismissal.[131]

In other states, the legislature's authority to seal has been expressly upheld under the First Amendment in the context of tenant screening companies. In *U.D. Registry Inc. v. State of California*, the California Court of Appeals struck down a law selectively banning sale and republication of public eviction records, holding that under *Cox Broadcasting v. Cohn* and other precedents it was unconstitutional to limit republication of judicial records once they had been made public.[132] Instead of restricting the expressive speech of tenant screening companies, the court noted the government could simply choose to make the record non-public, since "where information is entrusted to the government," a less restrictive means of limiting access always exists:

> If the state is concerned about the dissemination of this information, it has the power to control its initial release . . . [T]he government may classify the information, establish procedures for its redacted release, and extend a damages remedy against the government if the government's mishandling of sensitive information leads to its dissemination.[133]

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128. R.I. GEN. LAWS § 12-10-12 (filing of complaints); State v. Brown, 899 A.2d 517 (R.I. 2006).

129. R.I. GEN. LAWS § 12-10-12(c); *see also* R.I. Off. of the Atty Gen., Access to Pub. Rec. Act Advisory No. ADV 99-03, Captain Francis E. Tessina, Sr. (Sep. 28, 1999), 1999 WL 33312878 (explaining that expunged filed records are classified as "non-public records").

130. *See generally* R.I. GEN. LAWS § 21-28.11 (Rhode Island Cannabis Act); R.I. GEN. LAWS § 12-1.3-5(a) (Expungement of marijuana records).

131. R.I. GEN. LAWS § 12-1-12.1(a) (Sealing of records of persons acquitted or otherwise exonerated by operation of law or by motion).

132. U.D. Registry, Inc. v. State of California, 40 Cal. Rptr. 2d. 228, 230–33 (Cal. Ct. App. 1995); *see* Kleysteuber, *supra* note 4, at 1370.

133. *U.D. Registry, Inc.*, 40 Cal. Rptr 2d. at 232.

Taking a cue from the court, California amended its tenant screening statute in 1991 to delay public disclosure of all eviction cases for sixty days after filing of the complaint, at which point the cases would automatically become public unless the tenant prevailed at trial.[134] The legislature updated this in 2016, reversing the burden of proof and effectively converting it into an automatic sealing statute.[135] California's rule has withstood multiple challenges by tenant screening companies and remains one of the most robust eviction sealing laws in the nation.[136]

IV. PETITION-BASED V. AUTOMATIC SEALING: BALANCING PUBLIC ACCESS AGAINST THE NEED FOR FAIRNESS AND JUDICIAL EFFICIENCY

As written, H. 6323 / S. 0912 Sub A utilizes a method already used in Rhode Island for criminal court records: the statutory ability to make a record "non-public" by sealing it.[137] The key issue is not whether the legislature has power to authorize sealing, but whether they should, and if so, whether the legislature should pursue automatic or petition-based sealing. This is a policy decision, as we saw with the dueling bills under consideration in the 2022 legislative session. The Rhode Island legislature resolved this dispute in favor of petition-based sealing, likely in part to address First Amendment concerns regarding access to public records.

A. *In Some Cases, Courts Have Required Petition-Based Sealing for Criminal Cases to Ensure that Restrictions are Narrowly Tailored under the First Amendment*

As noted above, courts have discretionary power to control their own records and often cite the First Amendment in imposing their own standards for a motion to seal.[138] There are certainly cases in

134. *See* CAL. CIV. PROC. §§ 1161.2(c), 1161.2.5(a)(1)(A)–(D) (West 2021).

135. *Id.*

136. *See generally* U.D. Registry, Inc. v. Super. Ct., 46 Cal. Rptr. 2d 363 (Cal. Ct. App. 1995) (denying petitioner's challenge against § 1161.2(a)); U.D. Registry, Inc. v. N. Orange Cnty. Mun. Ct., 57 Cal. Rptr. 2d 788 (Cal. Ct. App. 1996) (rejecting appellant's interpretation of § 1161.2(a)).

137. *See* R.I. GEN. LAWS § 12-1-12.1(a) (Sealing of records of persons acquitted or otherwise exonerated by operation of law or by motion).

138. *See* Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 140–46 (2d Cir. 2016) (affirming the denial of a joint motion to seal in a whistleblower case involving a securities class action and holding that

the context of eviction records where state courts have imposed high standards for sealing or redacting housing court records under the First Amendment.[139] It is less common for a court to hold that a statute authorizing sealing is unconstitutional on its face, or that petition-based sealing is required under the First Amendment.

One of the few cases to reach this holding is *Globe Newspaper v. Pokaski*, a First Circuit case in which the court held that a statute requiring automatic sealing of certain criminal records was unconstitutional under the First Amendment.[140] In 1973, the Massachusetts legislature passed General Law 276 § 100C, which stated that criminal prosecutions ending with finding of not guilty or no finding of probable cause would be provisionally sealed at the conclusion of a case.[141] For cases ending in dismissal or nolle prosequi, the statute required that the record would be sealed where the court finds that "substantial justice would best be served."[142] The statute was enacted as part of Massachusetts's Criminal Offender Record Information (CORI) legislation.[143] The goal was to limit access to the defendant's criminal record to protect "access to employment, housing, and social contacts necessary to . . . rehabilitation."[144]

The First Circuit held that for these types of records, automatic sealing was unconstitutional as it did not constitute the "least restrictive means" of access but that a petition-based framework—in which defendants were permitted to "move for the permanent

"pleadings—even in settled cases—are Judicial records subject to a presumption of public access.").

139. *See* Hundtofte v. Encarnación, 280 P.3d 513, 522 (Wash. Ct. App. 2012) (overturning an order to redact the names of tenants in an unlawful detainer action and holding that even though they were not at fault, their inability to obtain housing did not outweigh the public's interest in the "open administration of justice."). The court noted that if the court authorized redaction in this instance, "[it] would be widely available to all such similarly situated litigants" and would impose an "automatic limitation" that was prohibited under the state constitution. *Id*. at 524, 526.

140. Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 510–11 (1st Cir. 1989).

141. *Id.* at 500 (citing MASS. GEN. LAWS ch. 276, § 100C (2018) ("the clerk shall . . . seal the records of the proceedings")).

142. *Id.* In practice, the treatment of acquittals and findings of no probable cause was similar to the proposed framework under H. 7892 / S. 2375: the record was presumptively sealed but could be unsealed by motion. *Id.* at 500. The Boston Globe opted not to file such a motion and instead challenged the constitutionality of the statute. *Id.*

143. Com. v. Pon, 14 N.E.3d 182, 186 (2014).

144. *Id.* at 189.

sealing of their records at the conclusion of probable cause hearings"—was permissible under the First Amendment.[145] Interpreting the "substantial justice" standard, the court held that a motion to seal must be supported with "specific, on the record findings that sealing was necessary to effectuate a compelling government interest."[146] The Massachusetts Supreme Court adopted this framework in *Commonwealth v. Doe*, holding that under *Pokaski* the court would follow a two-step process: the defendant must first make a prima facie case in favor of sealing, at which point the court would hold a more extensive hearing, with notice to the public, the press, the prosecutor, and any victim in the case.[147] Furthermore, to meet the "substantial justice" standard for a dismissal or nolle prosequi, a party must show a "specific application" of alleged harm.[148]

This exacting standard was abrogated in 2014 in *Commonwealth v. Pon*, when the Massachusetts Supreme Court held that a defendant only needed to show good cause.[149] Noting that the legislature had since shortened waiting periods and expanded discretionary sealing provisions elsewhere in the statute, the court held that the *Doe* standard "serves to frustrate rather than further the Legislature's purpose by imposing too high a burden of proof on the defendant and articulating unhelpful factors for the defendant to determine how to meet his or her burden."[150]

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145. *Pokaski*, 868 F.2d at 507.

146. *Id.* at 510. Such findings, the court stated, were likely to be exceedingly rare and could not be made on the basis of general reputation and privacy interests. *Id.* at 507, n.18.

147. *Id.*

148. Commonwealth v. Doe, 648 N.E. 2d 1255, 1260 (Mass. 1995) (holding that a Boston University student charged with rape and other sexual offenses could not seal the record, even though no action had been taken against him and the prosecutor did not oppose sealing the case).

149. *Pon*, 14 N.E.3d at 204.

150. *Id.* at 192–93. "[T]he legislative history unmistakably suggests that the Legislature's intent in enacting the 2010 reforms was to recalibrate the balance between protecting public safety and facilitating the reintegration of criminal defendants by removing barriers to housing and employment." *Id.* at 194. The Massachusetts Supreme Court distinguished *Pokaski* and held that under *Press-Enterprise*, the First Amendment did *not* apply to this limited class of criminal nonconviction records. *Id.* at 196. Instead, the court considered only the common law right of public access; under this more lenient standard, only good cause was required to seal a record. *Id.* at 196–98.

While the *Commonwealth v. Pon* test is not strictly analogous—it deals with criminal records that do not end in a conviction, rather than eviction records—it provides a framework for how a court might interpret and apply a statute requiring petition-based sealing for eviction records.[151] What might the *Commonwealth v. Pon* standard look like if it were applied in the context of eviction records? The court might begin by acknowledging that under *Nixon* and *Pokaski*, the public has a presumptive right to access judicial records to ensure government accountability and "the proper administration of justice."[152] The court might then consider the defendant's interest in keeping a record sealed, taking into account the likelihood that any public filing is likely to be utilized by tenant screening companies.[153] Finally, under the good cause standard, the court might consider a range of specific factors in determining whether the facts of the case warrant sealing, including any demonstrated evidence that the tenant has been unable to find housing (e.g., number of units applied for), the degree to which the tenant was at fault, any agreed-upon stipulation terms, and whether such terms had been honored.[154] This is similar to the framing laid out in the 2022 Sub A bills, which provided for factors a court may consider when deciding to seal the record.[155] Under this approach, sealing is by motion at the discretion of the reviewing judge. Alternatively, a state legislature could go further and follow the framework laid out in H. 6323 / S. 0912 Sub A (the 2023 bills) and decide

151. *See id.* at 196–98.

152. *Id.* at 199 ("Judges should begin by recognizing the public interests at stake. The public has a general right to know so that it may hold the government accountable for the proper administration of justice.").

153. *Id.* at 200 ("Given the evidence of the long-term collateral consequences of criminal records, judges may take judicial notice that the existence of a criminal record, regardless of what it contains, can present barriers to housing and employment opportunities.").

154. *Id.* ("At a minimum, judges should evaluate the particular disadvantages identified by the defendant arising from the availability of the criminal record; evidence of rehabilitation suggesting that the defendant could overcome these disadvantages if the record were sealed; any other evidence that sealing would alleviate the identified disadvantages; relevant circumstances of the defendant at the time of the offense that suggest a likelihood of recidivism or of success; the passage of time since the offense and since the dismissal or nolle prosequi; and the nature of and reasons for the particular disposition.").

155. *See* Proposed text of H. 7892 / S. 2375 Sub A, *supra* note 57.

that as a matter of public policy there is no need to weigh discretionary factors—indeed, no need to withhold judgment at all—when the debt is fully paid.

B. *Automatic Sealing is Currently Used in Rhode Island and Other States in the Context of Marijuana Reform to Improve Access to Housing and Employment*

Public access concerns notwithstanding, automatic sealing has gained traction as states have moved to limit the collateral consequences associated with criminal court records. Over the past ten years, the decriminalization of marijuana has resulted in a sea change of legislation to seal or expunge criminal records, as there are millions of records in circulation where the underlying offense is no longer a crime.[156] Rather than leaving these records on the books, a growing number of states have embraced sealing and expungement—including automatic record relief—as a way to give people a fresh start.[157]

As of 2021, seven states provide automatic relief for certain decriminalized marijuana offenses,[158] which has resulted in a staggering number of records being taken out of circulation. When New Jersey legalized marijuana with a provision to automatically expunge past records, courts vacated or dismissed an estimated 88,000 records within the first two weeks.[159] New Mexico authorized automatic clearance of decriminalized marijuana records two

156. *See generally* David Schlussel, *Marijuana Legalization and Expungement in Early 2021*, COLLATERAL CONSEQUENCES RES. CTR (March 3, 2022), http://dx.doi.org/10.2139/ssrn.3840263 [https://perma.cc/F2Z6-6QYD].

157. *Id.* at 2–3 (describing recently passed legislation in New York, New Mexico, Virginia, and New Jersey to automatically seal or expunge decriminalized marijuana records).

158. *50 State Comparison: Marijuana Legalization, Decriminalization, Expungement, and Clemency*, COLLATERAL CONSEQUENCES RES. CTR., https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-marijuana-legalization-expungement/ [https://perma.cc/VXC6-4WRN] (Jan. 2023); *see* Margaret Love, Jana Hrdinova & Dexter Ridgway, *Marijuana legalization and record clearing in 2022*, COLLATERAL CONSEQUENCES RES. CTR (Dec. 2022), https://ccresourcecenter.org/wp-content/uploads/2022/12/SSRN-id4307003.pdf [https://perma.cc/59HG-5HU5].

159. Amanda Hoover, *N.J. Automatically Expunged 360K Marijuana Cases This Summer. There Could be More to Come,* NJ.COM (Sept. 13, 2021), https://www.nj.com/marijuana/2021/09/nj-automatically-expunged-360k-marijuana-cases-this-summer-there-could-be-more-to-come.html [https://perma.cc/TN3N-56R3].

years after conviction or arrest, making over 150,000 residents eligible for automatic expungement.[160] In 2018, Pennsylvania passed the "Clean Slate Act," implementing automatic expungement for up to 32 million misdemeanor and non-conviction records.[161]

Rhode Island joined this effort in 2022, legalizing marijuana and passing legislation to automatically expunge a large number of civil violations, misdemeanors, and felony convictions for decriminalized marijuana offenses.[162] The Rhode Island Judiciary estimated that at least 27,000 records are eligible for expungement, and the law requires that all eligible records be expunged by July 1, 2024.[163] Rhode Island also passed legislation in 2022 authorizing automatic sealing for criminal cases ending in a dismissal.[164] These initiatives show that it is possible to make significant changes to how records are classified and that many states—including Rhode Island—have the capacity to seal large numbers of records where the legislature finds that the public interest leans in favor of nondisclosure.

C. *Petition-Based Sealing is Better than the Status Quo, but Automatic Sealing Better Serves the Interest of Fairness and Judicial Efficiency*

H. 6323 / S. 0912 Sub A represents a major step forward, but these efforts could be improved even further by making sealing automatic. Sealing the record automatically on filing—or

160. N.M. STAT. ANN. § 29-3A-9 (2021); *see* Schlussel, *supra* note 156; Jeff Proctor, *Walling Off: Big Lift Ahead for Officials Required to Expunge Thousands of Old Cannabis Convictions Under Newly Passed Law*, SANTA FE REP. (April 7, 2021), https://www.sfreporter.com/news/2021/04/07/walling-off/ [https://perma.cc/8NXE-KCGD].

161. 18 PA. STAT. AND CONS. STAT. ANN. § 9122.2 (West 2018); *see* MARGARET COLGATE LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., PATHWAYS TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2019 at 46 n.16. (2020), https://ssrn.com/abstract=3872864 [https://perma.cc/RD6L-44ME].

162. R.I. GEN. LAWS § 21-28.11 (Rhode Island Cannabis Act); R.I. GEN. LAWS § 12-1.3-5 (Expungement of marijuana records).

163. Tom Mooney, *With Legal Marijuana in RI, 'Tens of Thousands' of Past Convictions May Disappear*, PROVIDENCE J. (May 18, 2022), https://www.providencejournal.com/story/news/local/2022/05/18/rhode-island-marijuana-legalization-bill-expunge-weed-convictions/9822039002/ [https://perma.cc/2JMP-RMTQ].

164. R.I. GEN. LAWS § 12-1-12.1 (2022) (Sealing of records of persons acquitted or otherwise exonerated by operation of law or by motion).

alternatively, sealing it automatically at the end of a case—would significantly increase the number of tenants who would benefit from the intervention. It would also address one of the key problems raised at the outset of this comment: the practice of scraping eviction filings at the beginning of a case and placing them into the stream of commerce.

Research has shown that in the criminal system, petition-based relief creates significant barriers for individuals trying to clear their records. A 2020 study in Michigan showed that only 6.5% of individuals eligible for a criminal expungement received one within five years.[165] "[W]hen expungement is not automatic (and takes time, effort, and even money to apply), only a very small share of people eligible for relief actually apply for and receive and expungement."[166] Petition-based sealing is also a poor fit for cases where the tenant is not at fault. Within the criminal system, Rhode Island uses a petition-based process for sealing acquittals, requiring a hearing in every instance even where there is no finding of guilt.[167] The Office of the Rhode Island Public Defender notes that in some cases, it may take pro se litigants several months to complete this process.[168]

Our own experience with marijuana legalization shows that while petition-based sealing remains the norm, there are strong policy arguments for pursuing automated record relief.[169]

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165. J.J. Prescott and Sonja B. Starr*, Expungement of Criminal Convictions: An Empirical Study,* 133 HARV. L. REV. 2460, 2466 (2020), https://repository.law.umich.edu/articles/2165/ [https://perma.cc/VJ2N-DBSG].

166. *Id.* at 2467.

167. R.I. GEN. LAWS § 12-1-12.1.

168. *Expungement and Sealing of Criminal Records Resource Guide*: *How Do I Get My Record Expunged (or Sealed)?,* R.I.PUB. DEF., http://www.ripd.org/expungement-sealingcriminalrecords.html#undefined16 [https://perma.cc/7DJT-5V38] (last visited Jan. 2, 2023).

169. The Rhode Island Supreme Court has noted that "[t]he few statutes in Rhode Island which do allow for the sealing of court records do not apply automatically, but, rather, require the applicant to meet stringent criteria before relief may be granted." *An Act Relating to Property—Residential Landlord and Tenant Act: Hearing on H.6464 before the House Judiciary Committee,* 2021 Leg. Sess. (R.I. 2021) (Statement of Rhode Island Supreme Court Office of the General Counsel), https://www.rilegislature.gov/Special/comdoc/House%20Judiciary/06-29-2021-H6464-RI%20Judiciary.pdf [https://perma.cc/268U-XY4V]. However, as noted above, the Rhode Island Judiciary is currently processing tens of thousands of decriminalized marijuana records pursuant to the Rhode Island Cannabis Act.

Automatic sealing is favored by the American Bar Association, which issued new guidelines in March 2022 stating that "where permissible under state open court rules eviction cases should be filed under seal and remain sealed unless and until the landlord prevails in a final judgement."[170] Upturn, a national advocacy organization focused on design and technology, released legislative guidance in July 2022 arguing that automatic sealing of eviction records should be the default going forward.[171] This framework is in line with what landlords have repeatedly said that they want, which is to quickly regain possession of their units. A tenant with a filed case may be unable to vacate for the simple reason that no one will rent to them.[172] Sealing records at the outset allows the market to operate efficiently and provides tenants with a clear incentive to settle, pay, and move on.[173]

D. *A Movement for Change*

The passage of H. 6323 / S. 0912 Sub A represents a major victory for housing advocates and puts Rhode Island in line with dozens of other states that are updating their sealing and expungement regimes to increase access to housing.[174] Eviction sealing is currently legal in some capacity in California, Colorado, Illinois, Maine, Minnesota, Nevada, New York, Washington, and Oregon, and the District of Columbia[175] with at least seven states implementing some form of automatic sealing to prevent recirculation of filed court records.[176] In 2022, three other states—Arizona,

170. *Ten Guidelines for Residential Eviction Laws*, A.B.A. (Mar. 11, 2022), https://www.americanbar.org/groups/legal_aid_indigent_defense/sclaid-task-force-on-eviction—housing-stability—and-equity/guidelines-eviction/guideline-10/.

171. Tinuola Dada & Natasha Duarte, *How to Seal Eviction Records,* UPTURN (July 7, 2022), https://www.upturn.org/work/how-to-seal-eviction-records/ [https://perma.cc/KDA2-DMSZ].

172. Mickman & Brown, *supra* note 53.

173. *Id.*

174. *50-State Comparison: Expungement, Sealing, and Other Record Relief*, COLLATERAL CONSEQUENCES RES. CTR., https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside-2/ [https://perma.cc/G8S6-SG8J] (last visited Jan. 22, 2022).

175. LEGAL SERVICES CORP., *supra* note 8.

176. Colorado, for instance, passed new legislation in 2020 requiring that eviction records be sealed on filing. COLO. REV. STAT. § 13-40-110.5 (2020). Maine and California adopted the rules outlined above. ME R. ELEC. CT. SYST.

Indiana, and Utah—passed new legislation to seal eviction records.[177] While not all states have adopted the specific model proposed by H. 6323 / S. 0912 Sub A, they all share the goal of limiting access for the purpose of helping effectively rehouse tenants.

As this legislation begins to be implemented by the courts, it is sure to remain controversial. It's important to remember that eviction sealing is not only a just outcome, but an efficient one. Any administrative burden posed by this legislation is likely to be modest. As noted above, Rhode Island is currently working to expunge roughly 27,000 decriminalized marijuana records pursuant to the Rhode Island Cannabis Act, and Rhode Island courts additionally seal between 3,000 and 11,000 criminal records annually.[178] Adding civil court records to the mix will not pose a substantial burden, and for those people—many of whom were unlucky enough to have been taken to court regardless of fault—the benefits are enormous. It is a credit to the legislature that they chose to move forward with this legislation at this time.

CONCLUSION

Tenant screening poses a unique threat to individuals who have cases filed against them but whose case is settled or disposed in their favor. Eviction sealing plays a key role in ensuring that landlords are receiving current information while also curbing some of the worst instances of discrimination and abuse. While

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Rule 4(C); CAL. CIV. PROC. CODE § 1161.2-2.5 (West 2016). Minnesota and Illinois recently passed legislation to automatically seal evictions related to foreclosed properties. MINN. STAT. §§ 484.014, 504B.345 (2022); 735 ILL. COMP. STAT. ANN. 5/9-121 (West 2021). Nevada amended its existing statute to automatically seal COVID-era evictions. NEV. REV. STAT. ANN. § 40.2545 (West 2021). And New York, in addition to passing legislation to seal foreclosure-related evictions, passed broad-based legislation to prevent landlords from discriminating based on a tenant's eviction history. *See* N.Y. REAL PROP. ACTS § 757 (Consol. 2019); N.Y. REAL PROP. ACTS LAW § 227-f (Consol. 2019).

177. ARIZ. REV. STAT. ANN. § 33-1379 (2022); IND. CODE ANN. § 32-31-11-3 (West 2022); UTAH CODE ANN. § 78B-6-852 (West 2022).

178. Mooney, supra note 163; see Rhode Island Restoration of Rights, Pardon, Expungement & Sealing, "Frequency of Grants", Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/rhode-island-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/AWF3-35V3] (last visited Jan. 2, 2023) (noting that in 2014, the last year the numbers were publicly reported, Rhode Island sealed 11,598 criminal records).

automatic sealing is preferable to a petition-based system, an intervention is better than the status quo. Rhode Island's path to eviction sealing shows that these innovations are both technically feasible and politically actionable and it provides a clear roadmap for other states to follow.