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Judicial Branch testimony in favor of LD 1759, An Act Regarding the Electronic Data and Court Records Filed in the Electronic Case Management System of the Supreme Judicial Court:

Senator Carpenter, Representative Bailey, members of the Joint Standing Committee on Judiciary, my name is Julie Finn and I represent the Judicial Branch. I am here today in support of LD 1759.

This bill is intended to emphasize Judicial Branch authority over court records, whether physical or electronic. It places the responsibility for distinguishing public case records from confidential records, documents, and data, and for protecting those records that are confidential, with the Judicial Branch, where the Constitution places it.

Please note that, with respect, we are disappointed that the Revisor's Office declined to use the verbs that acknowledge the Judicial Branch's authority, and instead inserted words of Legislative authorization. Those references must be fixed, and I have provided Peggy with a new version of the bill with the correct language.

We also thank the sponsors for their assistance with this bill.

The intention of the bill is two-fold:

- it should clearly acknowledge the responsibility and authority of the Judicial Branch regarding court records, and
- it provides another opportunity for the transparency that the Court has insisted on throughout the process.

As the bill acknowledges, the Judicial Branch will develop and adopt rules regarding court records and documents retained by the courts in an electronic case management system. Reflecting the history of American courts, the bill acknowledges the presumption that case records are open to the public unless they have been declared by the court to be private, confidential, or otherwise closed to the public.

The Judicial Branch has already undertaken an extensive, transparent, and inclusive process in anticipation of the upcoming digitization of court records. In March 2017, over two years ago, the Chief Justice established the Task Force on Transparency and Privacy in Court Records. The task force included 20 people: the media, representatives of victims, attorneys, judges, and many others. The task force held 5 public meetings; published a report with recommendations; and accepted public comments thereon.

The Supreme Judicial Court ("SJC") received 26 comments and invited further comments in response to the comments previously filed and posted online. On June 7, 2018, the SJC held a public hearing and received oral comments on the issues of access to electronic court records.

After carefully reviewing all of the comments and public input received, the court created an initial outline of the anticipated records treatment. In early January, the SJC made the proposed draft public and invited public comment on the draft.

Shortly thereafter, on February 1, 2019, the pending legislation was submitted to the Revisor's office by the Judicial Branch. It is now before you as LD 1759.

To be clear, this bill is not necessary to establish Judicial Branch authority over Court records. It does, however, provide transparency of process, acknowledge the Legislature's role in determining that certain court proceedings are themselves closed to the public (for example, child protection proceedings and many juvenile matters are closed proceedings), and make the role of the Judicial Branch clear.

The next steps involve the very detailed process of creating the Court Rules. Drawing the lines between government action and personal privacy is a complex process, and the Court is acutely aware of the need to address the balance very carefully.

The Judicial Branch is already working with stakeholders regarding those rules and will assure yet another public and transparent process. When the full drafts of the proposed Rules are complete, the SJC will post the proposed rules and invite public comment.

Finally, also provided in the corrected version of the bill is a proposed amendment. This minor amendment clarifies the Criminal History Records Information Act ("CHRIA") with respect to the SJC's authority over its records.

Thank you very much for your time this afternoon.

An Act Regarding the Electronic Data and Court Records Filed in the Electronic Case Management System of the Supreme Judicial Court

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 4 MRSA §7 is amended to read:

§ 7.General jurisdiction; control of records

The Supreme Judicial Court may exercise its jurisdiction according to the common law not inconsistent with the Constitution or any statute, and may punish contempts against its authority by fine and imprisonment, or either, and administer oaths. It has general superintendence of all inferior courts for the prevention and correction of errors and abuses where the law does not expressly provide a remedy and has control of all records and documents in the custody of its clerks whether physical or electronic, including those stored in an electronic case management system. Whenever justice or the public good requires, it may order the expunging from the records and papers on file in any case which has gone to judgment of any name or other part thereof unnecessary to the purpose and effect of said judgment. It may issue all writs and processes, not within the exclusive jurisdiction of the Superior Court, necessary for the furtherance of justice or the execution of the laws in the name of the State under the seal of said court, attested by any justice not a party or interested in the suit and signed by the clerk.

Sec. 2. 4 MRSA §8-C, as enacted by PL 2015, c. 78, §1, is amended to read:

§ 8-C. Rules concerning electronic court records

1. Rules and orders; processes and procedures. Notwithstanding any other provision of law, the Supreme Judicial Court may adopt rules and issue orders to permit or require the use of electronic forms, filings, records, documents, e-mail and electronic signatures whenever paper forms, filings, records, written notice, postal mail and written signatures are required for judicial, legal or any other court-related process under the Maine Revised Statutes.

The Supreme Judicial Court, by rule, may determine any other processes or procedures appropriate to ensure adequate preservation, disposition, integrity, security, appropriate accessibility and confidentiality of the electronic court documents, data and court records described in this section and section 8-D.

2. Electronic signatures. An electronic signature may be accepted as a substitute for and, if accepted, has the same force and effect as the use of a manual signature. The Supreme Judicial Court shall determine the type of electronic signature required, the manner and format in which the signature is affixed to the electronic record and the criteria that must be met by a party, including attorneys, filing a document.

Sec. 3. 4 MRSA §8-D is enacted to read:

§ 8-D. Rules concerning electronic case management system

1. Rulemaking for electronic case management system. Pursuant to its authority, the Supreme Judicial Court will develop and adopt rules addressing any systems or procedures appropriate to ensure adequate preservation, disposition, integrity, security, accessibility, and confidentiality of electronic data and court records filed with or generated by the state courts and stored in an electronic case management system.

The tradition of open courts and public access to court records will be balanced against the need to protect private, personal, or confidential cases, information, data, and documents.

2. General policies regarding access to electronic court records. The following provisions will guide distinctions regarding access to electronic court records.

A. Access to electronic court records by the public is the presumption. Electronic court records that are not designated confidential, private, closed, sealed, or otherwise not public records by state or federal statute or by court rule or order will be publicly accessible except as otherwise provided in this subsection. Public access may be at the courthouse or through the internet or other programs. The presumption that electronic court records are public does not preclude the imposition of reasonable fees for access to records.

B. All parties to a case, and the attorneys for those parties, will be provided access to the electronic court records for that case, whether or not those records are publicly accessible, unless otherwise specifically ordered.

C. When an entire case type is closed to the public by statute, the electronic court records of a case of that case type are not publicly accessible. For case types that are generally open to the public, specific documents, data and information from those case types may be closed to the public by state or federal statute or by court rule or order.

D. Documents, data and information that are designated confidential, private, closed, sealed or otherwise not public by state or federal statute or by court rule or order that are contained in electronic court records are not publicly accessible.

Sec. 4. 16 MRSA §708(3) is further amended as follows:

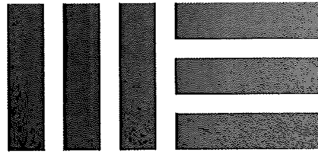
§708. Inapplicability of this chapter to criminal history record information contained in certain records

3. Records of public judicial proceedings. Notwithstanding the provisions of 16 MRS § 703, records of public judicial proceedings:

A. Retained at or by the District court, Superior Court or Supreme judicial Court. Public Access to and dissemination of such records for inspection and copying are as provided by rule or administrative order of the Supreme Judicial Court; and

SUMMARY

This bill recognizes the Supreme Judicial Court's authority to develop and adopt rules regarding court records and documents retained by the courts in an electronic case management system. The general presumption that court records are open to the public will be balanced against the need to protect private, personal, or confidential information, data, and documents. Records will not be available to the public when so designated by state or federal statute or by court rule or order. Digital records that are publicly available may be made available at the courthouses or through the internet or other programs. The presumption that court records are public does not preclude the imposition of reasonable fees for access to those records. The amendment also clarifies the Court's authority to regulate records addressed by the Criminal History Records Information Act.



Maine Equal Justice

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Testimony of Frank D'Alessandro, Maine Equal Justice, *in support of* LD 1759 "An Act Regarding the Electronic Data and Court Records Filed in the Electronic Case Management System of the Supreme Judicial Court"

Good afternoon Senator Carpenter, Representative Bailey, and members of the Committee on Judiciary. My name is Frank D'Alessandro and I am the Litigation and Policy Director of Maine Equal Justice. We are a civil legal services organization and we work with and for people with low income seeking solutions to poverty through policy, education and legal representation. Thank for the opportunity to offer testimony to you regarding LD 1759.

Maine Equal Justice recognizes the importance of developing legislation or rules concerning public access to electronically stored information stored by the Judicial Branch. We believe that any rules adopted by the Judiciary as a result of this bill should be designed to prevent the dissemination of information to which a litigant has a reasonable expectation of privacy. Maine Equal Justice also believes that the bill should include provisions that provide for penalties in the event the rules promulgated by the Judiciary are violated. Because LD 1759 does not specially provide for these concerns Maine Equal Justice is testifying neither in favor nor against LD 1759.

What LD 1759 Would Do

LD 1759 requires the Supreme Judicial Court to develop and adopt rules regarding court records and documents retained by the courts in an electronic case management system. The bill also requires that those rules must reflect the presumption that court records are open to the public except in certain circumstances when necessary to

protect private, personal or confidential information, data and documents or when designated confidential by state or federal statute or by court rule or order.

Concerns Regarding Access to Electronic Court Records

Routine access to electronically filed court documents will significantly alter the "practical obscurity" traditionally enjoyed by litigants in the State of Maine Court system. Any change to this practice should be implemented deliberately and with great care.

Litigants should not have to agree to give up their right to privacy in order to access the Judicial system. Maine Equal Justice is concerned that this may discourage individuals from filing court actions or penalize defendants who often have no choice in whether to participate in a judicial action.

Any rules adopted by the Maine Judicial System need to be designed to prevent the dissemination of information to which a litigant has a reasonable expectation of privacy. This is especially true, given that the limits on public access that have resulted from the tradition of practical obscurity has not violated the First Amendment. It is also unlikely that the additional access that will result from the maintenance of an electronic filing system will place additional limits on the public's First Amendment rights.

Indeed, this is not a First Amendment issue, this is an issue about data mining.

Litigant information that deserves protection includes, but are not limited to, medical records, financial information, school records, immigration documents, all information related to protection from abuse cases, information used to determine child support or parental rights determinations (including guardian ad litem reports), social security numbers and other personally identifiable information.

Any rules adopted as a result of this bill must also limit the way in which information gathered from electronically stored court records may be used. Protections similar to those provided by statutes such as the Fair Debt Collection Practices Act and the Fair Credit Reporting Act should be provided for litigants whose information is gathered from electronically stored court records and then disseminated to third parties.

This bill also needs to include a penalty provision for violations of the protections ultimately included in this bill or in any rules adopted by the Judicial Branch. Any such penalty provisions will require legislative action.

Dan Davis
Porter
LD1759

Senators and Representatives:

I have no affiliation and am not a paid lobbyist or lawyer, just opted to provide written considerations of the following bill(s):

LD 1759 An Act Regarding the Electronic Data and Court Records Filed in the Electronic Case Management System of the Supreme Judicial Court - This is a competent and reasonable bill proposal. 7 day 5.28 1p (5/21)

(YES) LD 1771 - An Act To Amend the Law Governing Name Changes - This is a competent and reasonable bill proposal that acknowledges a problematic and arbitrary one-size-fits-all time-based restriction. 5 day 5/28 2:30 p (5/23)

NOTE: It is construed that the scheduling of this specific bill has violated the Freedom of Access Act (MRSA 1 Chapter 13, Section 406), as well as the legal right of any state employee to testify at a public hearing (MRSA 5 Section 22), by not providing ample time for the public, the disabled/ADA (Joint Rule 305), or government employees (even legislators are to be provided 7 days per Joint Rule 305) to participate or be involved in influencing the outcome of bill proposals that affect their daily lives.

In numerous cases in the 129th, even lobbyists and clients were not provided an opportunity to review bills, and they even have the advantage of lurking around the State House on a daily basis.

The bill was printed on May 23, 2019 and scheduled for a public hearing on May 28, 2019 (and was not deemed an emergency), not affording ample notice for public hearing input.

Thank you.

May 28, 2019

Senator Michael Carpenter
Representative Donna Bailey
Committee on Judiciary
100 State House Station, Rm. 438
Augusta, ME 04333

Dear Senator Carpenter, Representative Bailey, and the Committee on Judiciary Members:

LD 1759: An Act Regarding the Electronic Data and Court Records Filed in the Electronic Case Management System of the Supreme Judicial Court

My name is Kristina Dougherty. I live in Portland, which is part of Senate District 27 and House District 42. I am a juvenile defense attorney and parents' attorney who practices in Portland, Biddeford, and Springvale. Here, I present testimony ***neither for nor against LD 1759*** on behalf of a practitioner work group[1] made up of both defense attorneys and prosecutors and housed the Maine Center for Juvenile Policy and Law.[2]

Over the last year, the work group has facilitated numerous discussions in conducting a comprehensive analysis of the records provisions of the Maine Juvenile Code. Several members of the work group testified before the Supreme Judicial Court on June 7, 2018 about the importance of protecting juvenile records in serving the purposes of the Maine Juvenile Code, and endorsed the Judicial Branch Task Force on Transparency and Privacy in Court Records (TAP) report's strong recommendation around juvenile record confidentiality. Members of the work group testified to the importance of protecting juvenile records from public electronic access and supported the TAP report's strong recommendations that no juvenile court records should be accessible through electronic/internet access.

With respect to LD 1759, we testify neither for nor against, but present several areas of concern that we would encourage this Committee to consider. These concerns are based on overarching truths about on-line access and should guide this Committee's work in determining what statutory changes may be required to ensure the transition to on-line access adequately protects juvenile information.

The Unassailable Facts

- Online access, via the Electronic Case Management System (ECMS), will magnify the accessibility of Maine's court records.
- Online access will exaggerate the persistence of the information contained in those records.
- As written, LD 1759 will make certain juvenile case records available to the public online.

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[1] Work group members include: Ned Chester, Esq.; Kristina Dougherty, Esq.; Christopher Northrop, Esq.; Tanya Pierson, ADA; Christine Thibeault, ADA; Jill Ward, Project Manager, Maine Center for Juvenile Policy and Law.
[2] The Maine Center for Juvenile Policy and Law works with Juvenile Justice Clinic students, faculty, practitioners, policymakers and other stakeholders, to broaden efforts that connect practice and policy reform. In part, the Center provides a platform for the work group. See more at: https://mainelaw.maine.edu/academics/clinics-and-centers/maine-center-juvenile-policy-law/.

- Public, online access of juvenile records is contrary to the express recommendation in the TAP report.[3]

Concerns About Online Access of Juvenile Case Records by the General Public

1. LD 1759 superimposes modern information-sharing technology on outdated statutes.
For example, the provision making certain juvenile case records "open to public inspection" was last amended 22 years ago.[4] It is a far cry between perusing documents in a file at the courthouse vs. clicking on a link (and potentially taking screenshots) on one's cell phone.

2. Juvenile cases may start as "open to the public", then ultimately be resolved as closed.
Cases where the original petition charges a juvenile with more serious offenses making the hearings and records open to the public, pursuant to 15 M.R.S. §§ 3307(2), 3308(2),(5), are frequently resolved with adjudication for less serious offenses (or even dismissal of the petition.) Online access during this brief period would make it easier to share what would ultimately become confidential information, making the protection largely moot.

3. The amplification of public scrutiny is adverse to the purposes of the Maine Juvenile Code.
Confidentiality is critical. The courts, attorneys, agencies, and service providers who work in the juvenile system are guiding juveniles who commit unlawful acts to lawful adult lives. However, juveniles are less likely to engage in these supports or to successfully rehabilitate when they cannot be provided privately. They don't want to go to school when their peers get details about their cases. Failed rehabilitation does not yield an adult who is a productive member of society, or serve the public interest. We were hopeful that the ECMS would reflect the value of confidentiality for juvenile case records that was emphatically supported in the TAP report,[5] and were disappointed that this is not what is happening.

4. It magnifies the stigma of contact with the juvenile system, where even intended consequences are exaggerated and distorted, and unintended consequences haunt the juveniles for a lifetime.
Even where the publicity of a case's information is meant to serve public safety, it is unlikely that the Code's authors code anticipated potential global dissemination of the information. Further, *Maine's children are handicapped* relative to kids in other states with more protective confidentiality laws. As adults, a report about their past juvenile system contact sabotages opportunities for school, employment, housing, and military service.[6]

5. It puts a chill on the practice of law.
District Attorneys may change the way they handle cases. For example, DAs may choose the charges based on controlling publicity rather than what the alleged facts may support. It could frighten juveniles from presenting their best defense, where they are hesitant to expose sensitive material that will, in turn, be broadcasted by anyone with internet service.

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[3] ". . . the Task Force agreed to recommend that juvenile case records not be made available to the public online." 9/30/17: REPORT OF THE MAINE JUDICIAL BRANCH TASK FORCE ON TRANSPARENCY AND PRIVACY IN COURT RECORDS. https://www.courts.maine.gov/maine_courts/committees/tap/mjb-task-force-tap-report.pdf
[4] 22 M.R.S. § 3308(2).
[5] *Supra*, n. 3.
[6] "Unsealed Fate: The Unintended Consequences of Inadequate Safeguarding of Juvenile Records in Maine." https://cpb-us-w2.wpmucdn.com/wpsites.maine.edu/dist/2/115/files/2018/05/UnsealedFate-w9c6fz.pdf.

6. Family members and victims are also exposed.
Even if names are redacted, the identities of persons involved in the cases could be deduced. Also, motivated third parties can dig for other information, not protected as a court record under the Code.

7. It renders moot any record sealing or expungement
Once information is "out there" in the world wide web, it can not be retrieved.

8. There is a lack of enforceability for violations
Unlike records in child protection cases or criminal cases, there is not a provision in the Code to declare the unauthorized dissemination of juvenile case records to be unlawful.

Other states with DCMSs do not support public, online access of juvenile records

Looking at the other New England states, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut all have DCMS, but none allow public online access of juvenile records.[7] Of particular note, New Hampshire has special exceptions to confidentiality for juveniles charged with class A crimes, similar to in Maine, yet still does not permit online access to the records in those cases.

Note: Emergency legislation is in the works to partially address some of these concerns.

We are supporting an emergency bill that will be sponsored by Representative Rachel Talbot Ross, where most juvenile cases would be confidential from the date of the filing of the petition until there is an adjudication or dismissal. Then, if there is an adjudication for a felony-level offense, that record would be public.

Thank you all for taking the time to address this important issue.

Respectfully submitted on behalf of the work group,

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(207) 772-7426

[7] *E.g.*,
https://secure.vermont.gov/vtcdas/user;jsessionid=DA93D87A8E8371D0E2BCC711F5876AA7?SUBMIT=FAQ&CURRSTATE=vt.court.docs.user.gui.Welcome

Testimony Against

LD 1759, An Act Regarding the Electronic Data and Court Records Filed in the Electronic Case Management System of the Supreme Judicial Court

May 28, 2019

Senator Carpenter, Representative Bailey and members of the Judiciary Committee:

My name is Peter Guffin. I am a member of the Maine Bar and a practicing attorney. In 2017 I served as a member of the Maine Judicial Branch Task Force on Transparency and Privacy in Court Records.

Because prior professional commitments will prevent me from attending the public hearing later today, I offer these written remarks in the hope that they will assist you in your work.

The views expressed by me are my own and do not reflect the views of my law firm Pierce Atwood LLP, where I am a partner and chair the firm's Privacy & Data Security practice, or the University of Maine School of Law, where I am a Visiting Professor of Practice and serve as the Co-Director of its Information Privacy Law Program.

I urge the Judiciary Committee to issue a report recommending that LD 1759 ought *not* to pass.

First, the bill oversteps the Legislature's power and authority under the Maine Constitution. **Second**, the bill not only intrudes on the Supreme Judicial Court's exclusive authority to exercise judicial power, it also impinges on the Court's ability to interpret the expansive concepts of privacy and transparency in the context of digital court records access over time and to carry out its core function of making judgments among competing interests and values. **Third**, the bill lacks important measures to protect the privacy rights of Maine citizens, measures which do fall *within* the prerogative of the Legislature.

Separation of Powers

The bill imposes on the Supreme Judicial Court certain rulemaking parameters in connection with its developing and adopting rules addressing the management of

and access to electronic data and court records filed with or generated by the state courts and stored in an electronic case management system. The bill also establishes general policies for the Supreme Judicial Court regarding access to electronic court records.

The management of court records – paper or digital - is at the core of the judicial power. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files.") The bill thus oversteps the Legislature's power and authority under the Maine Constitution.

The bill also directly conflicts with past precedent in which the Supreme Judicial Court has held that under the Maine Constitution it holds the exclusive authority to exercise judicial power.

In a strikingly analogous context, in the direct letter of address dated April 25, 1986 submitted by a unanimous Supreme Judicial Court to the Honorable Joseph E. Brennan, then Governor of Maine, the Honorable Charles P. Pray, then President of the Senate, and the Honorable John L. Martin, then Speaker of the House of Representatives, the Supreme Judicial Court declared that it was "compelled by the Maine Constitution <u>not</u> to follow the expressed mandate of the Legislature," stating in part as follows:

> *"With the enactment of P.L. 1985, ch. 515, which becomes effective July 16, 1986, the Legislature has directed this Court to promulgate rules governing photographic and electronic media coverage of proceedings in the trial courts of this State. Upon due consideration, this Court concludes that the governance of media access to courtrooms is within the judicial power committed to this Court by the Maine Constitution. Me. Const. art. VI, §1. Chapter 515 constitutes an exercise of judicial power by the Legislature in violation of the provisions of the Constitution allocating the powers of government among three distinct departments and forbidding any person belonging to one department from exercising any power properly belonging to another department. Me. Const. art. III, §§ 1, 2. Accordingly, we respectfully decline to promulgate rules as contemplated by the legislative act."*

Earlier this year the Supreme Judicial Court solicited public comments regarding its proposed draft Digital Court Records Access Rules. Those rules are still under consideration by the Court.

The bill is ill-conceived and unconstitutional and appears to be an attempt to do an end-run-around the Supreme Judicial Court's deliberative rulemaking process already underway.

Transparency and Privacy

The core function of the Supreme Judicial Court is to properly interpret the concepts of open access and privacy *in context over time* and to make judgments among competing interests and values.

As concepts, open access and privacy are broad and expansive ideas and values that require fresh thinking to be applied in specific circumstances. As Judge Coffin wrote,

> *"[t]he emphasis on fairness, the entitlement of each person to equal respect, the view of the great clauses in the Bill of Rights as concepts, susceptible of adjustment in each era rather than as fixed, specific conceptions, the recognition that the authoritative construction of these clauses in not the province of the majority, and the caution that the proper approach to individual rights is not simply a 'balancing' of the rights of individuals against those of society, but rather a tilt toward the individual – all these spell a different, individual-oriented jurisprudence.."*

Frank M. Coffin, *The Ways of a Judge: Reflections from the Federal Appellate Bench* (1980), at 240.

The bill lays out certain, particular rules concerning the electronic case management system, thus establishing "fixed, specific conceptions" or embodiments of the general concepts of privacy and transparency which are incomplete and subject to being applied reflexively without the necessary reevaluation and recalibration from time to time in response to advances in technology and changes in societal norms and citizens' reasonable expectations of privacy.

In doing so, the bill ignores the bigger picture and does a disservice to the broad and expansive interests and values reflected in those concepts. It also impinges on the Supreme Judicial Court's ability to interpret the concepts of privacy and transparency in the context of digital court records access over time and to carry out its core function of assessing these values and making determinations related to the proper functioning of the court systems and in the interests of justice.

As the Supreme Judicial Court itself has acknowledged, it is no easy task to interpret the concepts of privacy and transparency in the context of digital court records and to make judgments among competing priorities.

The difficulty and complexity of the issues at hand cannot be understated, and the need for resolving these issues correctly is of upmost importance to Maine citizens. The stakes are very high, not only for individuals but for society as a whole and the Maine state court system as an institution.

In 2017 the Supreme Judicial Court convened a task force to study the issues and to offer policy recommendations about digital court records access and management. Since then, on at least four separate occasions, the Supreme Judicial Court has solicited and received public comments about these issues.

The comments submitted by the public and various stakeholders, of which there were many, are very thoughtful and informative. To acquaint the Committee with some of the difficult and complex issues, I have attached to my testimony the comments that I submitted to the Supreme Judicial Court regarding its proposed Digital Court Records Access Rules.

Short of divine revelation, it is presumptuous to think that with a few short strokes of the pen this bill can resolve all of these issues.

Privacy Measures Lacking

The bill lacks important measures to protect the privacy rights of Maine citizens, measures which *do* fall within the prerogative of the Legislature.

It is well known that the personal data in court records can expose citizens to targeting by unscrupulous marketers and worse (e.g., stalkers, harassers, and

perpetrators of fraud). It also is well known that data brokers, an industry that is largely unregulated and often hidden from public view, have sold the following lists:

- Rape survivors
- Addresses of domestic violence shelters (which keep their locations secret under law)
- Police officers' and state troopers' home addresses
- Genetic disease sufferers
- Senior citizens suffering from dementia
- HIV/AIDS sufferers
- People with addictive behaviors and alcohol, gambling and drug addictions
- People with diseases and prescriptions taken (including cancer and mental illness)
- Consumers who might want payday loans, including targeted minority groups
- People with low consumer credit scores

World Privacy Forum, *Testimony of Pam Dixon, Executive Director, World Privacy Forum, Before the Senate Committee on Commerce, Science, and Transportation: What Information Do Data Brokers Have on Consumers, and How Do They Use It?*, Dec.18, 2013.

One of the most common sources of citizen data is public record information, including information in court records.

Despite all of this awareness and knowledge, the bill contains no measures whatsoever designed to protect citizens' privacy rights, mitigate harm, or provide citizens with measures to seek remedies. For example, the bill contains

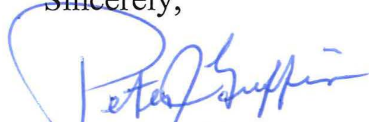
- no prohibition on the misuse of citizens' personal information
- no prohibition on the acquisition of personal information through fraudulent means or with the intent to commit wrongful acts
- no provision for individual remedies in the event of misuse of their personal information.

Conclusion

For all of the foregoing reasons, I urge the Committee to issue a report recommending that LD 1759 ought *not* to pass.

Thank you for your time and consideration.

Sincerely,



Peter J. Guffin., Esq.

Peter J. Guffin, Esq.

ME Bar No. 3522

Comments Regarding Proposed Digital Court Records Access Rules

March 27, 2019

Chief Justice Saufley, Senior Associate Justice Alexander, and Associate Justices Mead, Gorman, Jabar, Hjelm and Humphrey:

With privacy and transparency issues of such critical importance to the citizens of Maine, it is troubling that the SJC has provided to the public and members of the Bar only scant details regarding its new digital case management system and the SJC's plans with respect to implementation of the system.

The Rules in large part mirror many of the provisions of the now defunct Digital Court Records Access Act (the "Act") which had been proposed by the SJC earlier this year. Echoing the comments that I submitted to the SJC on January 25, 2019 regarding the Act, I believe the Rules likewise are anything but comprehensive and represent a proposed solution for only one small piece of a much larger problem. Just like the Act, the Rules fail to address a number of privacy, transparency, data security and access-to-justice issues and raise many more issues and questions than they answer.

Having now read the many other thoughtful comments that were submitted to the SJC earlier this year regarding the Act, I know that I am not alone in these sentiments.

The SJC has not provided members of the Bar or the public with any additional information about the new digital case management system or its plans for implementation of the system in response to the issues and questions that were raised in the comments submitted regarding the Act.

Apart from the Rules, which largely govern access to the court records once they are in the system, very little is known about the electronic system and how it will work, its functions and features, capabilities and limitations, and how easily users will be able to interact with it.

Also unknown (and unknowable) at this time is how the new system will work in actual practice once it is up and running.

There is no indication that either the SJC or the National Center for State Courts (or anyone else for that matter) has conducted any comprehensive study examining the impact of implementation of digital court records systems in other states on the privacy rights and interests of individuals, including whether permitting public remote online access to court records unduly interferes with or disproportionately harms the marginalized and most vulnerable persons in our society, including the unrepresented, the poor, minorities, children, and victims of domestic abuse, sexual assault and other crimes.

For example, I am not aware of any detailed studies examining the following:

Harms/Remedies

- the nature and number of cybersecurity incidents in state court systems
- the nature and efficacy of courts' incident response plans
- the types of privacy harms to individuals resulting from public remote online access to digital court records
- the types of privacy protections that have been put in place to mitigate the risk of security incidents and misuse of personal data
- the effectiveness of those privacy protections
- the types of remedies that have been made available for individuals to seek relief or redress for actual or potential privacy harms resulting from public disclosure or misuse of personal data

Unrepresented Litigants/Access-to-Justice/Protection of Non-Parties

- how filings by unrepresented litigants are being managed
- the resources being made available to assist unrepresented litigants
- how courts are educating the public about protection of personal information
- how courts are handling situations in which litigants and other individuals do not have a bank account or other electronic payment method
- how courts are facilitating the protection of information in court records
- how non-party sensitive personal information is being protected

If such studies exist, they may be useful in informing the SJC as to how to calibrate the balance between privacy and transparency. If such studies do not exist, I urge

the SJC to consider conducting (or requesting that the NCSC or some other organization conduct) one or more such studies.

Only after the system has been in operation for period of time will the SJC be able to assess its effect on the privacy rights and interests of individuals, including whether permitting public remote online access to court records will unduly interfere with or disproportionately harm the marginalized and most vulnerable persons in our society.

It is telling that the SJC has chosen to hit the pause button on establishing rules governing access to aggregate, bulk, and compiled data. From a transparency perspective, the latter data is the very kind of valuable information which the public needs to be able to keep a watchful eye on the workings of the Maine Judicial Branch.

In electing to punt and to reserve judgment on the effective date and content of Rule 4, the SJC explained:

> *The Judicial Branch will undertake a review of the operational capacity of the Odyssey case management system and the resources of the Judicial Branch eighteen months after the case management system has been fully operational at all court locations before promulgating rules relating to dissemination of aggregated, complied, or bulk data.*

The SJC's hitting the pause button on promulgating rules relating to dissemination of aggregated, compiled, or bulk data, raises the obvious question:

> *Why do the Rules treat transparency into the operations and performance of the SJC differently than it treats transparency into the private, personal information of Maine citizens?*

Facts and details matter. By creating public remote online access rules prematurely in the abstract and in a vacuum without having the benefit of seeing the full picture in terms of how the system works in actual practice, the SJC runs the significant risk of not getting it right in terms of balancing the competing interests of privacy and transparency.

It is imperative that the SJC get it right, as the stakes are quite high with regard to protection of the rights of affected individuals as well as the integrity of the SJC as an institution.

For these reasons, I urge the SJC likewise to hit the pause button on promulgating rules relating to public remote online access to the private, personal information of Maine citizens for at least eighteen months after the case management system has been fully operational at all court locations.

Carpenter v. United States

That digital is different, requiring us to recalibrate the rules for determining what is public vs. private, is one of the biggest takeaways from the Supreme Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

Noting the deeply revealing nature of cell-site location information ("CSLI"), its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the Court held that the Fourth Amendment applies to the government's search of CSLI.

Writing for the majority, Justice Roberts observed:

> *The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years. Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible. There is a world of difference between the limited types of personal information addressed in Smith and Miller and the exhaustive chronicle of location information casually collected by wireless carriers today.*

Id. at 2219.

Carpenter also reminds us that "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, 'what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'" *Id.* at 2217 (citing *Katz v. United States*, 389 U. S., at 351–352).

Based on this line of reasoning it follows that persons have a legitimate expectation of privacy in information revealed in court records, and that a person does not surrender all privacy rights by venturing into the courthouse.

Constitutional Right to Privacy

As a threshold matter, the SJC must answer the question whether the Rules impermissibly invade an individual's constitutionally protected zone of privacy.

In *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court, recognizing a constitutional right of privacy, articulated two different kinds of interests to be afforded protection. The first is "the individual interest in avoiding disclosure of personal matters," and the second is "the interest in independence in making certain kinds of important decisions."

Without question, both of these privacy interests are impaired by the Rules. Together these issues should be of paramount concern to the SJC. If individuals have to give up control over dissemination of their private, personal information, individuals may be discouraged from going to court and may decline to seek justice and relief through the courts.

The issue in *Whalen* was whether the State had satisfied its duty to protect from unwarranted disclosure the sensitive, personal information of individuals which was being collected and used by the State in the exercise of its broad police powers. Finding that the State's "*carefully designed program include[d] numerous safeguards intended to forestall the danger of indiscriminate disclosure*," the Court held that there was no impermissible invasion of privacy. However, it was careful to limit its holding to the specific facts presented.

> *A final word about issues we have not decided. We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure [429 U.S. 589, 606] of accumulated private data - whether intentional or*

unintentional - or by a system that did not contain comparable security provisions. We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.

429 U.S. at 605-606.

Justice Brennan's concurring opinion in *Whalen* also is instructive:

> *The New York statute under attack requires doctors to disclose to the State information about prescriptions for certain drugs with a high potential for abuse, and provides for the storage of that information in a central computer file. The Court recognizes that an individual's "interest in avoiding disclosure of personal matters" is an aspect of the right of privacy, ante, at 598-600, and nn. 24-25, but holds that in this case, any such interest has not been seriously enough invaded by the State to require a showing that its program was indispensable to the State's effort to control drug abuse.*
>
> *The information disclosed by the physician under this program is made available only to a small number of public health officials with a legitimate interest in the information. As the record makes clear, New York has long required doctors to make this information available to its officials on request, and that practice is not challenged here. Such limited reporting requirements in the medical field are familiar, ante, at 602 n. 29, and are not generally regarded as an invasion of privacy. Broad dissemination by state officials of such information, however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests. See, e. g., Roe v. Wade, 410 U.S. 113, 155 -156 (1973).*
>
> *What is more troubling about this scheme, however, is the central computer storage of the data thus collected. Obviously, as the State argues, collection and storage of data [429 U.S. 589, 607] by the State that is in itself legitimate is not rendered unconstitutional simply because new technology makes the State's operations more efficient. However, as the example of the Fourth Amendment shows, the Constitution puts limits not only on the type of information the State may gather, but also on the means it may use to gather it. The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.*

> *In this case, as the Court's opinion makes clear, the State's carefully designed program includes numerous safeguards intended to forestall the danger of indiscriminate disclosure. Given this serious and, so far as the record shows, successful effort to prevent abuse and limit access to the personal information at issue, I cannot say that the statute's provisions for computer storage, on their face, amount to a deprivation of constitutionally protected privacy interests, any more than the more traditional reporting provisions.*
>
> *In the absence of such a deprivation, the State was not required to prove that the challenged statute is absolutely necessary to its attempt to control drug abuse. Of course, a statute that did effect such a deprivation would only be consistent with the Constitution if it were necessary to promote a compelling state interest. Roe v. Wade, supra; Eisenstadt v. Baird, 405 U.S. 438, 464 (1972) (WHITE, J., concurring in result).*

429 U.S. at 606-607.

Many federal circuit courts have recognized the constitutional right to information privacy. See, e.g., *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577-80 (3d Cir. 1980); *Walls v. City of Petersburg*, 895 F.2d 188, 1292 (4th Cir. 1990); *Plante v. Gonzalez*, 575 F.2d 1119, 1132, 1134, (5th Cir. 1978); *Kimberlin v. United States Dep't of Justice*, 788 F.2d 434 (7th Cir. 1986); *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999).

One court has looked to the "reasonable expectations of privacy" test to determine whether information is entitled to protection under the constitutional right to information privacy. *See Fraternal Order of Police, Lodge No. 5, Philadelphia*, 812 F.2d 105, 112 (3d Cir. 1987).

The Third Circuit has developed the most well-known test for deciding constitutional right to information privacy cases. In *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 578 (3d Cir 1980), the court articulated seven factors that "should be considered in deciding whether an intrusion into an individual's privacy is justified": (1) "the type of record requested"; (2) "the information it does or might contain"; (3) "the potential for harm in any subsequent nonconsensual disclosure"; (4) "the injury from disclosure to the relationship in which the record was generated"; (5) "the adequacy of safeguards to prevent unauthorized disclosure"; (6) "the degree of need"; and (7) "whether there is an express statutory

mandate, articulated public policy, or other recognizable public interest militating toward access."

At least one court has observed that the constitutional right to information privacy "closely resembles – and may be identical to – the interest protected by the common law prohibition against unreasonable publicity given to one's private life." *Smith v. City of Artesia*, 772 P.2d 373, 376 (N.M. App. 1989).

Maine Constitution

Although the Maine Constitution contains no express provisions protecting an individual's right to privacy, the Natural Rights Clause, Article I, section 1, of the Maine Constitution arguably provides the basis for recognizing privacy as an independent and distinct constitutional right.

It provides as follows:

> *Natural Rights. All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.*

For the same reasons the Rules impair the privacy interests recognized in *Whalen*, they also impair affected individuals' "natural, inherent and unalienable rights" under the Natural Rights Clause of the Maine Constitution.

The broad language of the Natural Rights Clause has no federal analogue, and it could support an argument that Maine's Constitution provides broader privacy protections for individuals than does the U.S. Constitution. The Maine Constitution has an existence independent of the U.S. Constitution. While I haven't researched the issue, I am not aware of any jurisprudence on the right to privacy under the Maine Constitution. In other jurisdictions, some state courts have found that almost identically worded provisions form the basis of state privacy claims.

In other contexts, Maine's courts have held that the Maine Constitution provides additional guarantees beyond those contained in the U.S. Constitution, as have many other states' courts, such as New Hampshire, Vermont and Massachusetts. *See e.g., State v. Sklar*, 317 A.2d 160, 169 (Me. 1974) (noting that the state constitution, but

not the Federal Constitution, guarantees trial by jury for all criminal offenses and similar language of federal and state provisions is not dispositive); *Danforth v. State Dep't of Health and Welfare*, 303 A.2d 794, 800 (Me. 1973) (holding that the state constitution protects parent's right to custody of child and that parent has due process right under the state constitution to court-appointed counsel although the Federal Constitution may not guarantee that right); *State v. Ball*, 471 A.2d 347 (N.H. 1983) (analyzing state constitutional claim before turning to Federal Constitution, and concluding state constitution's limitations on search and seizure were stricter than federal limitations); *State v. Kirchoff*, 587 A.2d 988 (Vt. 1991) (stating that the Vermont Constitution provides more protection against government searches and seizures than does the Federal Constitution); and *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (interpreting the Massachusetts Constitution's free exercise of religion clause as broader than federal protections).

In 1905, the Georgia Supreme Court recognized privacy as an independent and distinct right under the Georgia Constitution. In *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905), the Georgia Supreme Court found the state's residents to have a "liberty of privacy" guaranteed by the Georgia constitutional provision: "no person shall be deprived of liberty except by due process of law." The court grounded the right to privacy in the doctrine of natural law:

> *The right of privacy has its foundations in the instincts of nature. It is recognized intuitively, consciousness being witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. Id.* At 69

At least ten state constitutions contain explicit right-to-privacy clauses, including Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina and Washington.

<u>*Conclusion*</u>

By creating public remote online access rules prematurely in the abstract and in a vacuum without knowing how the system will work in actual practice, the SJC runs the significant risk of not getting it right in terms of balancing the competing interests of privacy and transparency.

Particularly concerning is that it is unknown at this time how implementation of the system will affect the privacy rights and interests of individuals, including whether permitting public remote online access to court records will unduly interfere with or disproportionately harm the marginalized and most vulnerable persons in our society, including the unrepresented, the poor, minorities, children, and victims of domestic abuse, sexual assault, and other crimes.

It is imperative that the SJC get it right, as the stakes are quite high with regard to protection of the rights of affected individuals as well as the integrity of the Judicial Branch as an institution.

For all of the foregoing reasons, I urge the Supreme Judicial Court to hit the pause button on promulgating rules relating to public remote online access to the private, personal information of Maine citizens for at least eighteen months after the case management system has been fully operational at all court locations.

Respectfully,

Peter J. Guffin., Esq.

Mary Ann Lynch, Esq.
Cape Elizabeth, Maine
LD1759

My name is Mary Ann Lynch. I live in Cape Elizabeth. My testimony today, in opposition to LD 1759, is offered as a private citizen, but my opinion is informed by nearly a decade of work in the Maine Judicial Branch, where I have seen the breath and dept of personal information in court files.

Privacy matters.

Who owns, controls, and has access to our information is of increasing concern to all citizens in a democracy.

We know our smart phones compromise our privacy.

But we make a bargain to allow access for the convenience of on line shopping and using Google Maps.

I made a bargain, perhaps more a contract of adhesion, but a bargain nonetheless, when I installed the FB app, even though I know every â€œlikeâ€� is entered into data bases, often used for exploitive political purposes.

We trade our personal information all the time for the convenience of transactions on the internet, but there is a level of voluntary behavior. Not so with court. It will not be a voluntary bargain of convenience.

Todayâ€™s courts, with their troves of information will be one more area of data mining, and it will not be pretty for the vast majority of people who find themselves in court, the majority of whom, in the District Court, are not represented by counsel.

Credit card collection actions in small claims will identify the defendantâ€™s debts and income. Their credit card numbers, perhaps their birth date, address, and even social security numbers.

Foreclosure actions may disclose the illness and health reasons for non payment of a mortgage.

Divorce and parental rights and responsibilities cases will disclose the parties, and the childrenâ€™s most deeply held secrets.

And all this will be on line, presumptively â€œaccessibleâ€� as the bill says, to the general public, and to any stalker, or others who wish to do harm to unwitting litigants.

In the vast majority of civil cases, the poor and even the middle class are unable to afford lawyers, lawyers who will have some training or sense of what needs to be disclosed.

Who will look out for the unrepresented people? Who will protect their privacy?

Privacy should not be a luxury good, protected for those who can afford savvy lawyers.

More and more businesses choose arbitration instead of the civil courts, for many reasons. This bill will add yet another reason for savvy businesses to insist upon arbitration.

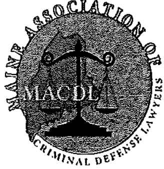
Today, parties are protected by practical obscurity from the data mining industry. In most cases court files need to be open and available for viewing at a courthouse. But to put vast amounts of information on line is to create opportunities for misuse. And once online, there is no putting the genie back in the bottle.

Court records need to be open, for the most part, but they do not need to be readily â€œaccessibleâ€ on line. Therein lies the problem with this bill.

Finally, I am mystified as to why this bill is before you. The court, under well established constitutional principles of separation of powers, does not need legislation to establish its rules. Because of separation of powers principles, there is no reason to hold this bill over to study or work it. It is fully with in the Courtâ€™s powers to study this and implement their own rules.

I urge you to give this bill an ONTP report.

Mary Ann Lynch, Esq.



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May 28, 2019

Senator Michael Carpenter
Representative Donna Bailey
Committee on Judiciary
100 State House Station, Rm. 438
Augusta, ME 04333

RE: LD 1759: An Act Regarding the Electronic Data and Court Records Filed in the Electronic Case Management System of the Supreme Judicial Court

Dear Senator Carpenter, Representative Bailey, and Honorable Members of the Committee on Judiciary,

The Maine Association of Criminal Defense Lawyers **neither supports nor opposes** LD 1684.

MACDL approves of, and in fact encouraged the Maine Supreme Judicial Court similarly, the bill's proposal that the Supreme Judicial Court develop rules around public access to its electronic court records, as rules can be changed more quickly and can be more responsive to the developing needs and issues that will no doubt come with such a system.

We take strong issue, however, with the language of this statute that presumes that court records will be open and available online. We cannot agree with that. Too much information will be available at a click of a button—and therefore for all time—even information that, depending on the resolution of the case, may be deemed confidential at that time. There is no "unringing" of the bell once things are available online for the world to see. This legislation should not endorse a presumption of public online access when the stakes are so dire. Just ask anyone whose mugshot is flashed around Facebook and on the nightly news, but who is ultimately exonerated, how impossible it is to reel in the public dissemination of that image and, with it, details of the alleged crimes. When the outcome of the litigation determines the accessibility of the information, letting the cat out of the bag too quickly can be disastrous. Google is forever.

MACDL, along with other advocates, has expressed to the Supreme Judicial Court on numerous occasions its sincere concern that the Court will not ensure that juvenile records are not available online. We are extremely concerned with public, digital access to *any* juvenile record whatsoever and would strongly urge this Committee to explicitly prohibit the dissemination of any juvenile information online to anyone apart from the litigants, the juvenile's parents or guardians, law enforcement, and alleged victims. *This legislation should declare that juvenile records are not public records and cannot be accessed electronically. Period.* As recommended by the TAP Report and by the ABA, "Juvenile records should not be public records. Access to and the use of juvenile records should be strictly controlled to limit the risk that disclosure will result in the misuse or misinterpretation of information [and] the unnecessary denial of opportunities and benefits to juveniles . . ." IJA-ABA JUVENILE JUSTICE STANDARDS, *Standards Related to Juvenile Records and Information Services: Part XV: Access to Juvenile Records* 192 (1996).

The ubiquity and permanence of information available on the internet makes this recommendation even more needed in 2019. Public digital access to any juvenile record surely undermines the main purpose of our juvenile code: rehabilitation. The missteps of

youth should not permanently stain juveniles through their lives. Allowing any juvenile record to be accessible digitally is highly problematic and this Committee should protect all such records from public, digital access.

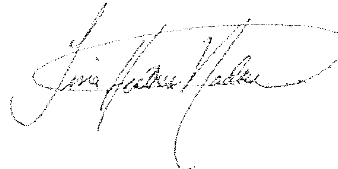
Legislation pending before this Committee, LD 1670, proposes that the vast majority of juvenile court records should be immediately, automatically, and irrevocably sealed upon completion of the juvenile's disposition. Additionally, legislation is being developed for next session that will establish procedures for adults convicted of crimes to petition courts to seal their court records after certain amounts of time have passed and other conditions are met. Sealing is terribly important for people who are trying to move past their criminal histories and move on with their lives—Maine currently only has a process for juveniles to petition to seal their records; there is really no process for adults to petition to seal their records at all (apart from those who were 18 to 20 years old at the time of their Class E convictions, a statutory scheme that is sunsetting in October 2019). The proposed legislation makes it clear that, once sealed, the court/criminal records are available to law enforcement, the judiciary, and certain specially limited entities.

This Committee may consider developing a remedy, available for people aggrieved by a party's filing or the court's uploading of non-redacted documents containing confidential or other sensitive information. Particularly in the criminal and juvenile contexts, there are valid concerns that sensitive, confidential information about our clients and other participants in the case—given the sheer volume of documents—will regularly be uploaded for digital access without appropriate redaction or labeling. This currently happens all the time in public court files: information that should be confidential is just there for the taking should it fall into the wrong hands without appropriate screening.

We will repeat previous comments we have made on this issue to the Supreme Judicial Court and others to this Committee for future consideration: *The Judicial Branch needs to hire and train clerks who will be tasked with ensuring that the redaction and confidentiality mandated by this proposal, as well as ensuring that certain types of records remain non-public, are actually followed to the letter.* This is too important a consideration for the Judicial Branch not to request appropriations for additional, specialized staff in each courthouse. We cannot do this on the cheap. We cannot skimp on having the necessary personnel if we are to ensure that privacy is protected and the law is followed: the federal system has funded such safeguards appropriately. The appropriate funding for the Judicial Branch for these endeavors is clearly in this Committee's hands going forward.

Thank you all for taking the time to address and consider thoughtfully this important issue. I am happy to take questions and provide this Committee with information as requested in anticipation of the work session.

With appreciation,



Tina Heather Nadeau, Esq.
MACDL Executive Director

TESTIMONY OF LAURA M. O'HANLON RE: LD 1759

May 27, 2019

VIA: https://www.mainelegislature.org/testimony

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

Re: L.D. 1759: An Act Regarding the Electronic Data and Court Records Filed in the Electronic Case Management System of the Supreme Judicial Court

Dear Senator Carpenter and Representative Bailey and other honorable members of the Judiciary Committee:

By way of (re)introduction, I am a member of the Maine Bar and a practicing attorney. In the past, I held various positions within the Maine state courts. During my last 15 years with the Judicial Branch, I studied and became very familiar with court record access issues and, even after moving on to a role outside the Judicial Branch, I remain actively involved in ongoing research and the policy discussions regarding digital court record access.

As prior professional commitments will prevent me from attending the public hearing, I offer these written remarks in hope that they will assist you in your work. Please note that I submit this testimony in my personal capacity not on behalf of my employer or any other organization.

As LD 1759 was submitted as a Department Bill and presented and co-sponsored by the Chairs and other members of this Committee, I realize that the Judicial Branch may have participated in developing the language of this bill and that the sponsors may be acting with good intentions to aid the Judicial Branch with its plan to promulgate rules during the court system's digital transformation. Particularly because of the constitutional implications, I am compelled to urge this Committee to retreat from this mechanism for policy setting, even if the Judicial Branch requested it.

First and foremost, due to its mandatory nature, this Committee should not recommend passage of the language proposed for 4 M.R.S. § 8-D that appears in Section 3 as the Legislature must not to intrude into powers that are within the exclusive purview of the Judicial Branch (namely, the right to control court records) in violation of constitutionally required separation of powers. Next, LD 1759 is unnecessary as current 4 M.R.S. § 8-C is effective and consistent with the language and framework established in other statutory provisions related to court records and court rules. Finally, this Committee should refrain from setting policy in such a multidimensional and complex area in the waning and very active days of the Legislative session without a more generous public comment period.

THE LEGISLATURE MUST NOT EXERCISE POWERS THAT ARE CONSITUTIONALLY VESTED IN THE JUDICIAL BRANCH

The Maine Constitution demands that governmental power "shall be divided into three distinct departments, the legislative, executive and judicial," Me. Const. art. III, § 1, and prohibits any person from one department from exercising "any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." Me. Const. art. III, § 2. "Each branch of government is 'severally supreme within [its] legitimate and appropriate sphere of action.'" *In re Dunleavy,* 2003 ME 124, ¶ 18, 838 A.2d 338 (quoting *Ex parte Davis,* 41 Me. 38, 53 (1856)).

"[A] constitutional grant of power to one branch of government effectively forbids the exercise of that power by any other of the three branches of government." 2003 ME ¶ 6. An intrusion by one branch of government into powers that are within the exclusive purview of another branch of government violates the constitutional separation of powers. Me. Const. art. III, § 2; *District Court for Dist. IX v. Williams,* 268 A.2d 812, 814 (Me. 1970).

With the exception of impeachment, the judicial power of Maine is "vested in a Supreme Judicial Court, and such other courts as the Legislature shall from time to time establish." Me. Const. art. VI, § 1. The "[e]xercise [of[its powers as a co-ordinate branch of the government" preserves "the independence of the judiciary." 268 A.2d at 814 (*quoting Gray,* 115 N.W.2d at 414). "[C]ourts cannot be hampered or limited in the discharge of their functions by either of the other [two] branches of government." *Id.* It is well established that the Supreme Judicial Court has the inherent authority to control court records and files. *See State v. Ireland*, 109 Me. 158, 159-60, 83 A. 453, 454 (1912); *accord Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files"); *see also* 4 M.R.S. § 7. Such control necessarily involves making decisions governing the "adequate preservation, disposition, integrity, security, accessibility and confidentiality of electronic data and court records filed with or generated by the state courts." L.D. 1759, § 3 (129th Legis. 2019)

Section 3 of LD 1759 "requires the Supreme Judicial Court to develop and adopt rules regarding court records and documents retained by the courts in an electronic case management system" reflecting "the presumption that court records are open to the public except in certain circumstances when necessary to protect private, personal or confidential information, data and documents or when designated confidential by state or federal statute or by court rule or order. The presumption that court records are public…." L.D. 1759, § 3 (129th Legis. 2019). In brief, Section 3 directs the Judicial Branch to promulgate rules and that embody particular policy determinations. L.D. 1759, Summary (129th Legis. 2019). Whether or not those are sound policy considerations, the Legislature should not regulate court functions or interfere with the Court' authority to control court records and files, especially those in an internal court case management system. *See* 109 Me. at 159-60, *accord* 435 U.S. 589, 598 (1978).

In an analogous situation, the Supreme Judicial Court expressly refused to enforce a statute regulating proceedings in Maine trial courts by opening them to the media, finding such regulation to be an unconstitutional intrusion upon the judicial power committed to the Supreme Judicial Court by the Maine Constitution.[1] *See* Direct Letter of Address to Joseph E. Brennan, Charles P. Pray and John L. Martin dated April 25, 1986, Me. Rptr., 498-509 A.2d CXXVI. Similarly, in various contexts, attempts by the executive branch to exercise other forms of judicial power have been found to violate the constitutional separation of powers. For example, the Law Court found the right to manage personnel[2] and authority to regulate judicial conduct are within the power granted to the judicial branch, and other branches of government must not exercise these powers. *See* 268 A.2d at 813-14 (executive branch may not review the discharge of a judicial branch employee without intruding upon the judicial power); 2003 ME 124, ¶ 6 (recognizing Judicial Branch's exclusive authority to regulate judicial conduct and finding statute that purported to authorize conduct by a judge that is prohibited by the Code of Judicial Conduct "usurp[ed] judicial authority and [was] therefore unconstitutional.").

CURRENT 4 M.R.S. 8-C IS EFFECTIVE AND CONSISTENT WITH THE LANGUAGE AND ESTABLISHED STATUTORY FRAMEWORK

In the very first Section of Title 4 of the Maine Revised Statutes, the Legislature acknowledged "[t]he Supreme Judicial Court has general administrative and supervisory authority over the Judicial Branch and shall make and promulgate rules, regulations and orders governing the administration of the Judicial Branch." 4 M.R.S. § 1. Furthermore, the Legislature has enacted a specific statutory provision that recognizes the Court's inherent authority to control court records. 4 M.R.S. § 7; 109 Me. at 159-60); *accord* 435 U.S. at 598. Title 4 Section 7 states, "[t]he Supreme Judicial Court . . . has control of all records and documents in the custody of its clerks. Whenever justice or the public good requires, it *may* order the expunging from the records and papers on file in any case which has gone to judgment of any name or other part thereof unnecessary to the purpose and effect of said judgment. . . ." 4 M.R.S. § 7.[3]

Because different branches govern them and they serve different purposes depending upon the context, specific statutory provisions recognize the distinction between other governmental records and court records.[4] Most notably, Maine's Freedom of Access laws ("FOAA") that ensure citizens

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[1] The Supreme Judicial Court must exercise similar restraint. While the Constitution requires the Justices of the Supreme Judicial Court "to give their opinion upon important questions of law, and *upon solemn occasions*, when required by the Governor, Senate or House of Representatives." Me. Const. art. VI, § 3 (emphasis added), before exercising their authority, the Justices must determine whether each Question presents a solemn occasion "that confers on [the Court] the constitutional authority to answer the questions propounded," *Opinion of the Justices*, 2015 ME 27, ¶ 17, 112 A.3d 926, and only answer questions that "concern a matter of live gravity," *Opinion of the Justices*, 2012 ME 49, ¶ 6, 40 A.3d 930 (quotation marks omitted) and are "sufficiently precise for the justices to be able to determine the exact nature of the inquiry," *Opinion of the Justices*, 2004 ME 54, ¶ 40, 850 A.2d 1145 (quotation marks omitted).

[2] This power is recognized in statute. *See 26* M.R.S. §§ 979-979-S & M.R.S. §§ 1281-1294 (separate labor relation acts for State and Judicial employees)

[3] I have added italicizing in statutory provisions.

[4] Several statutes apply specifically to Judicial Branch activities or court records. *See, e.g.,* 4 M.R.S. § 17(15)(C) (making court investigative complaints and security information confidential); 4 M.R.S. § 1701(7) (excepting Judicial Compensation Commission working papers in possession of legislative employee from definition of public records); 14 M.R.S. § 164-A (3) (making Maine Assistance Program for Lawyers records confidential);

have broad access to government documents, *see* 1 M.R.S. §§ 402, 408, do not apply to the courts. *See* 1 M.R.S. § 501 (defining state agency); *Asselin v. Super. Ct.*, Mem-15-3 (Jan. 22, 2015); *see also Pitoniak v. Bd. of Overseers of the Bar,* Mem-14-3 (Jan. 9, 2014) (the Board, as part of the Judicial Branch, is "not an 'agency or public official' of the State of Maine, and its records are not 'public records' subject to disclosure pursuant to FOAA."). Additionally, the Criminal History Record Information Act protects non-conviction data from disclosure by executive branch criminal justice agencies, but it does not apply to trial court records that must release such information to facilitate the administration of justice. *See* 16 M.R.S. § 613 (limiting dissemination of non-conviction data); 16 M.R.S. § 612(2)(C), (D) (excepting from the application of the Criminal History Record Information Act information contained in court records).

In a time-honored tradition of comity, the judicial and legislative branches have often cooperated to ensure proper access to and protection of information.[5] *See New Bedford Standard-Times Publ'g Co. v. Clerk of Third Dist. Ct.,* 387 N.E.2d 110, 117 (Mass. 1979) (Abrams, J. concurring).[6] Indeed, a review of the Judicial Branch's Administrative Order on *Public Information and Confidentiality* demonstrates that the Supreme Judicial Court considered and relied upon statutory provisions as a guide for many decisions regarding the accessibility or confidentiality of court information[7] and, notwithstanding the fact that FOAA does not apply to the judiciary, the courts have relied upon it for guidance.[8] *Public Information and Confidentiality*, Me. Admin. Order JB-05-20 (effective May 1, 2019) § II A-C, F-O (adopting definitions as codified in statute); § II H (1) (defining "Confidential information" to include "1. the information or a portion of the information is made confidential by statute, policy, Administrative Order or rule; …. "); *see also Asselin v. Super. Ct.*, Mem-15-3.

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14 M.R.S. §§ 1254-A, 1254-B (protecting some information about jurors); 15 M.R.S. § 3307 (keeping certain juvenile proceedings confidential); and 15 M.R.S, § 3308 (restricting the inspection of juvenile court records).

[5] Although the legislation establishing the Right to Know Advisory Committee does not require the Judicial Branch to appoint a member, it provides: "[t]he advisory committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the judicial branch to serve as a member of the committee" 1 M.R.S § 411 (broadly speaking, this committee is charged with providing guidance in ensuring access to public records and proceedings, advising governmental entities, and responding for requests for interpretation and clarification of laws). While the designation of a representative is not required, the Chief Justice has accepted the invitation and sent designees regularly.

[6] A concurring opinion in the *New Bedford* case noted that the court had often "defer[red] to the Legislature in that sometimes overlapping and undefinable area of power that exists between the two branches of government." *New Bedford Standard-Times Publ'g Co. v. Clerk of Third Dist. Ct.,* 387 N.E.2d 110, 117 (Mass. 1979) (Abrams, J., concurring). Justice Abrams explained "[i]n the absence of court rules, the Legislature has enacted legislation in aid of the judicial branch, but the fact that the Legislature has acted does not deprive the judicial branch of its power of decision in the area of judicial administration." *Id.*

[7] Similarly, other administrative orders confirm that the Supreme Judicial Court considers the policy decisions embedded in statutes and governmental regulations when creating court policy. *See, e.g., Confidentiality Of Courthouse Security System Footage*, Me. Admin. Order JB-15-1 (effective May 1, 2015) (*accord* 4 M.R.S. § 17(15)); *Limited Access to Juror Information,* Standing Order, (effective August 19, 2014) (*accord* 14 M.R.S.A. §§ 1254-A and 1254-B); *Impounding certain Private Images*, Standing Order, (effective October 16, 2015) (*accord* 17-A M.R.S. § 511-A); *Access to Social Security Numbers and Qualified Domestic Relations Orders ("Quadros"),* Me. Admin. Order JB-09-2 (effective September 19, 2011) (*accord* 19-A M.R.S. § 408).

[8] Similarly, the Freedom of Information Act, 5 U.S.C.A. § 552(a), (FOIA) and the Privacy Act, 5 U.S.C.A. § 552a, do not apply to the federal courts. 5 U.S.C.A. §§ 552 (f)(1), 552a (a)(1); *see also United States v. Frank*, 864 F.2d 992, 1013 (3d Cir. 1988), *cert. denied,* 497 U.S. 1010 (1990), but the federal courts use them as guides. *See Guide to Judiciary Policies and Procedures,* Vol. I, ch. X, § 1297.1.

The Supreme Judicial Court, in exercise of its exclusive judicial authority is authorized to promulgate rules,[9] and administrative and standing orders governing the possession, use, confidentiality, and accessibility of court records and information. Unless an irreconcilable conflict arises, it is probable that the Supreme Judicial Court would continue to look to legislative pronouncements for guidance and welcome input from other branches of government in determining whether court records, documents, data fields, or other information are accessible or confidential,[10] however, it is constitutionally impermissible for the Legislature to decide how and by what mechanism the judiciary will provide access or protect court records because these decisions are within judiciary's exclusive judicial power. *See Direct Letter of Address,* Me. Rptr. 498-509 A.2d CXXIX (Apr. 2, 1986) (rejecting an attempt by the Legislature to "overrule a considered decision of [the Supreme Judicial] Court made in the exercise of its judicial power"); *State v. Hunter,* 447 A.2d at 797, 800 (Me. 1982) ("has the power in issue been explicitly granted to one branch of state government, and to no other branch? If so, article III, section 2 forbids another branch to exercise that power.") The Supreme Judicial court is capable and constitutionally required to make decisions tailored to ensure that the vital functions of the courts are not impeded. *See Williams,* 268 A.2d at 814 ("The courts cannot be hampered or limited in the discharge of their functions by either of the other [two] branches of government." (quotation marks omitted))

THE JUDICIAL BRANCH IS IN THE BEST POSITION TO SET POLICY IN THIS MULTIDIMENSIONAL, COMPLEX, AND EVOLVING AREA

It is almost never optimal to engage in policy development in the final days of the legislative session when there is limited time for public input, and Committee research and consideration.
The Judicial Branch is in a far better position to understand the functions of the judiciary and manage its records; and to secure expert advice in assessing the legal landscape and making decisions about court record privacy, transparency, public safety, data security; and vital access to justice issues.

For years, court record access issues have been actively debated in federal courts across the United States. *See, e.g.,* David Ardia, *Court Transparency and the First Amendment*, 38 Cardozo L. Rev. 835, 875 (2017). That debate continues and has fostered a growing split of authority among the federal circuits courts about the right to access court records and judicial opinions where the reasoning for similar outcomes differs widely. *See, e.g., Id.* Eventually, the United States Supreme Court may be

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[9] Other statutory provisions highlight specific instances where the Court *may* wish to exert its rulemaking power. *See, e.g.,* 4 M.R.S. § 8 "Power to Prescribe Rules" (" Supreme Judicial Court *has the power* to prescribe, by general rules, for the Probate, District and Superior Courts of Maine"); 4 M.R.S. § 8-A "Rules on courts records and abandoned property" ("The Supreme Judicial Court *may* prescribe, repeal, add to, amend or modify rules or orders"); 4 M.R.S. § 8-B "Rules governing nondisclosure of certain identifying information" ("Supreme Judicial Court *may* prescribe, repeal, add to, amend or modify rules or orders providing for a procedure in all courts through which a party is given the right to request that certain identifying information not be disclosed…. *may* address the sealing, disclosure and redaction of evidence and records…"); 4 M.R.S. § 9 " Power to prescribe rules in criminal cases" ("Supreme Judicial Court *shall have the power and authority* to prescribe, repeal, add to, amend or modify rules of pleading, practice and procedure with respect to any and all proceedings through final judgment, review and post-conviction remedy in criminal cases before justices of the peace, District Courts, Superior Courts and the Supreme Judicial Court.")

[10] When there is a conflict between the Supreme Judicial Court's policies and statutory enactments, it is likely that the Judicial Branch will attempt to resolve the issue with the Legislative Branch. *See* Me. Rptr., 498- 509 A.2d at CXXVI-IX (explaining Court's reasons for declining to comply with legislative action).

called upon to resolve the issues. *See Id; Cf. Courthouse News Serv. v. Brown,* 908 F.3d 1063 (7th Cir 2018) (A March 2019 petition for certiorari asking the United States Supreme Court to determine "whether *Younger* and its progeny permit federal courts to abstain, on the basis of general principles of comity and federalism, from hearing First Amendment challenges that seek access to state court filings.").

In recent history, the Maine Judicial Branch has convened two major stakeholder groups (one in 2004 and one in 2017) to study the issues and offer policy recommendations about digital court record access and management.[11] At the end of 2017 the Judicial Branch hosted two public comment periods; in June 2018 the Court held a public hearing;[12] in January and March 2019 the Court solicited additional public comments about draft court rules;[13] and in May 2019 the court began soliciting comments regarding specific court forms. With each round of comments, new information was received and assessed. Continued information gathering and work with stakeholders and the technology vendor are necessary and are ongoing.

Given the many ways in which this policy will affect Maine citizens, particularly the most vulnerable among us; the potential benefits and harms of digital systems; and the evolving legal landscape, I ask the Committee to allow the Judicial Branch to take more time to sort out the issues and set the court policy as part of its constitutionally mandated role.

There will be plenty of time for more input and collaboration after the Legislature adjourns for this session, *and* when it returns.[14]

CLOSING

I respectfully request that the Judiciary Committee vote Ought Not to Pass. Alternatively, I urge the Committee to amend the bill to remove Section 3 related to 4 M.R.S. § 8-D.

Should you have any questions or desire additional information, I would be happy to respond upon request.

Sincerely,

Laura O'Hanlon

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[11] *See, e.g.,* Task Force on Electronic Court Record Access (TECRA), https://www.courts.maine.gov/reports_pubs/reports/pdf/TECRA091605-1.pdf; and the Task Force on Transparency and Privacy (TAP) https://www.courts.maine.gov/maine_courts/committees/tap/index.html

[12] The 2017 written comments and the June 2018 public hearing audio recordings can be found on the TAP website cited in footnote 11 above.

[13] As of this writing, Judicial Branch has not posted the January or March 2019 comments.

[14] In his 2017 report to the 128th Legislature, the State Court Administrator described the e-filing project as a 54-month project. *E-filing Court Case Management System Report to the 128th Legislature* (at page 2) found at https://www.courts.maine.gov/reports_pubs/reports/pdf/efiling-report-to-128th-legislature%20.pdf