U.S. Department of Justice

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Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
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Dear Members of the Council of the District of Columbia:

We are writing in response to the Council's consideration of the Second Chance Amendment Act of 2022 (B24-0063). We appreciate the Council's commitment to the expansion of opportunities for people who deserve a second chance, and to streamlining the current record sealing provisions to make them more accessible for the public and lawyers alike. As we expressed in our testimony at the public hearing on the Second Chance Amendment Act, we support the expansion of record sealing in significant ways, including the creation of certain automatic sealing mechanisms, and the removal of a person's subsequent criminal history as an *automatic* bar to eligibility for record sealing. We appreciate the Council's consideration of some of our concerns through the Amendment in Nature of a Substitute that accompanies today's vote. Even with that amendment, however, the Second Chance Amendment Act would represent a dramatic expansion of record sealing in the District that raises several key concerns.

The bill would allow virtually all convictions to be eligible for sealing, either by motion or automatically. The community has a significant interest in many types of convictions, including background checks on individuals looking to purchase guns, work with children, or become employed in a position involving public trust. Even where certain limited entities have access to these sealed convictions, the broader community has an interest in knowing about serious prior convictions as well. For example, many employers hire individuals whose job is to work with children, even where those employers are not a "licensed school, day care center, before or after school facility or other educational or child protection agency or facility" that would have access to the sealed records under the bill. When a religious institution, library, swim lesson facility, music facility, soccer program, gymnastics program, or similar organization is looking to hire a person to work directly with children, the employer—and the parents who will trust that employer to work directly with their children—have an interest in conducting a full background check on the individual who they are hiring to ascertain if they have any convictions that should render them unsuitable to work with children. While exempting a number of serious offenses, the bill would still allow many other convictions to be eligible for sealing, including:

aggravated assault while armed, voluntary manslaughter, armed robbery, carjacking, first degree burglary, assault with intent to kill, second degree child sexual abuse, and third degree sexual abuse. These offenses, and other similar offenses, should not be eligible for sealing. Further, as this bill is drafted, a victim will not have access to a sealed record, and the government will not be permitted to share information about the case with the victim in the case.

Convictions should be eligible for sealing only by motion, not automatically. Under this bill, the majority of misdemeanor convictions would be automatically sealed by the court 10 years after completion of the sentence, without regard to the nature of the conduct leading to the conviction, the views of the victim, the defendant's rehabilitation, or the defendant's subsequent criminal history (including subsequent arrests, convictions, or even pending cases). However, given the substantial interests of the community in access to information about convictions, and the interest of the victim in being heard on the sealing request, all convictions should be eligible for sealing *only* by motion, even where they are misdemeanors. Misdemeanor convictions that would be automatically sealed would include, for example, simple assault against a stranger, including when motivated by hate or bias or when committed against a child victim; voyeurism; and attempts to commit many felony offenses. Moreover, tying *automatic* relief to the "completion of the sentence" will present tremendous complications for implementation, as the date of completion of the sentence is calculated by several different local and federal agencies, depending on the type of sentence, and can change over time where, for example, good time credits are applied to reduce the sentence.

Automatic relief should apply prospectively, not retroactively. Although automatic retroactive sealing and expungement may be well-intentioned, there would be hundreds of thousands of arrests and other non-convictions to process, which would involve the coordination of multiple agencies and the courts to implement, presenting a tremendous logistical challenge to successful implementation of this provision. As it relates to sealing, there may be situations where the government—or a third party, including a victim—would object to sealing. Thus, the bill *must* contain a mechanism that would allow the government or the third party to file a motion to rebut the presumption of sealing by a preponderance of the evidence, which the bill does not currently contain. While automatic relief could be implemented prospectively, as new cases arise, it would, in practice, be incredibly difficult to implement automatic relief retroactively and for the government to filter through which cases would be appropriate to file these types of motions. Further, as it relates to expungement, the contours of a seemingly clear provision—such as whether an offense has "subsequently been decriminalized, legalized, or held to be unconstitutional"—would need to be ascertained, and the question of whether a particular conviction would qualify may not be readily apparent from either electronic court records or the judgment and commitment order. The parties will have to address these issues on a case-by-case basis.

The courts and prosecutors do not have the capacity to implement this bill. In a letter dated December 2, 2022, Chief Judges Anita Josey-Herring and Anna Blackburne-Rigsby expressed their concerns that this bill would be "effectively impossible" for the courts to implement. We not only have similar concerns about the Court's capacity, but we also have concerns about our own capacity, as we lack the prosecutors and support staff necessary to handle the numerous motions that will assuredly be filed in connection with this proposed

legislation were it to take effect in its current form. In addition to the resources that would be needed to litigate these motions, support staff resources would be needed to actually seal the records, regardless of whether the records were sealed by motion or automatically. And, of course, this burden would be compounded by the capacity demands created by the Council's previous expansions to post-conviction relief, additional post-conviction relief created by the Revised Criminal Code Act (RCCA), and other implementation burdens associated with the RCCA. There is no doubt that simultaneously changing this many aspects of the criminal justice system will necessarily require prosecutors to focus on implementing these changes, to the detriment of ongoing investigations and prosecutions. And the backward-looking nature of many of these proposals will result in prosecutors having to focus on the past rather than present threats. Finally, Senate confirmation of several Superior Court judges does not address our deeper concerns about Court constraints. The Court was built to administer the criminal justice system as it exists today. Even fully staffed—which the Court is not, and has not been in recent memory—the Court would lack the capacity to handle the new burdens that the legislation passed during this legislative session would impose, particularly given that many of these burdens would fall on administrative staff in the Court.

When our Office developed our remarks at the public hearing on record sealing, our Office deeply considered how to balance equities between the community's access to information and the desire to significantly expand opportunities for people to move past their criminal records and fully reengage with society, in a way that would also be more feasible for the system actors to implement. We strongly urge the Council to reconsider several provisions in this bill.

We look forward to continuing to work with the Council on this important issue.

Sincerely,

Matthew M. Graves
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