



IN THE SUPREME COURT OF THE STATE OF DELAWARE

OSAMA QAIYMAH,
ERIC FRITZ,

Petitioners-Below,
Appellants,

v.

STATE OF DELAWARE,

Respondent-Below,
Appellee.

No. 2, 2023

On Appeal from the
Superior Court of Delaware,
ID Nos. 21X-00109, 21X-00195

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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STATEMENT OF INTEREST

The American Civil Liberties Union Foundation of Delaware (“ACLU-DE”) is a private, nonprofit membership corporation founded in 1961 as the Delaware state affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization with over 500,000 members, dedicated to the-principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. The over 3,300 members of ACLU-DE have a common interest in preserving and protecting fundamental constitutional rights and promoting equity within the criminal legal system. In pursuit of such efforts, ACLU-DE, together with its partners in the Clean Slate DE coalition, seeks to promote access to second chances for people living with Delaware arrest, charge, or conviction records and reduce the collateral consequences associated with convictions. ACLU-DE is a leading advocate to expand eligibility for the State’s expungement process and to create and implement Delaware’s automatic expungement process, which will be in effect August 2024. The cases at bar raise an important issue that bears directly on the rights of individuals burdened by the collateral consequences of convictions.

On March 15, 2023, the Court granted ACLU-DE’s *Motion for Leave to File Brief as Amicus Curiae*.

BACKGROUND

The basic facts of these consolidated appeals are straightforward and undisputed. Without access to the expungement process—access that each of the Appellants were denied at the start and without any consideration of the merits of their respective petitions—Appellants are unable to clear their Delaware record and receive the second chance envisioned by the General Assembly in its recent reforms to Delaware’s expungement scheme.

A. Delaware’s Statutory Expungement Scheme

An estimated 400,000 Delawareans live with an arrest, charge, or conviction record.¹ For those convicted of a crime, “formal sentences are only part of the punishment.”² The collateral consequences of these records create enormous obstacles in obtaining access to employment, housing, and education.³ In recent years, over forty (40) states, including Delaware, have passed “second chance” laws that allow arrest, charge, and conviction records to be cleared by increasing the scope of sealing and expungement remedies.⁴ These “clean slate” laws are often designed

¹ See Paper Prisons Initiative of Santa Clara University, *Delaware Full Gap Sizing Report*, available at <https://www.paperprisons.org/states/DE.html>.

² Chien, Colleen, *America’s Paper Prisons: The Second Chance Gap*, 119 MICH. LAW REV. 519, 524 (hereinafter, “Paper Prisons”).

³ *Id.*

⁴ See Paper Prisons, *supra* n.2, at 531-32.

to remove structural barriers by also providing for automatic expungement in certain cases.

Consistent with these nationwide trends, Delaware’s General Assembly recently undertook a substantial overhaul of the state’s expungement scheme, 11 *Del. C.* §§ 4371 – 4378 (the “Expungement Statutes”), including the passage of the Adult Expungement Reform Act in 2019 that, among other things, made certain Delaware misdemeanor and felony convictions eligible for expungement for the first time. Previously, Delawareans “could only obtain an expungement for an arrest that never resulted in a conviction or a small number of convictions after” they received a pardon from the Governor.⁵ In 2021, the General Assembly enacted two (2) laws (together, the “Clean Slate Act”)⁶ that further expanded the category of Delaware records eligible for mandatory expungement and authorized automatic expungement of records in that category effective August 2024. Expungements are categorized as either mandatory or discretionary; Delaware’s State Bureau of Investigation (the “SBI”) is responsible for mandatory expungement upon request, while the Superior Court or the Family Court are responsible for acting on petitions for discretionary expungement.

⁵ See John Reynolds & Jon Offredo, “Delaware Governor Signs Automatic Record Clearing Law,” Collateral Consequences Resource Center (Nov. 10, 2021), available at <https://ccresourcecenter.org/2021/11/10/delaware-enacts-automatic-record-clearing-law/>.

⁶ 83 DEL. LAWS, c. 265-66.

Mandatory expungement applies to felonies, misdemeanors, or violations in Titles 4, 7, 11, 16 or 23 of the Delaware Code other than those listed in 11 *Del. C.* § 4373(b), as well as cases terminated in favor of the accused. The SBI shall expunge a misdemeanor conviction record when (i) a person is convicted of one (1) or more misdemeanors or violations relating to the same case; (ii) five (5) years have passed since the date of conviction; and (iii) a person has “no prior or subsequent convictions that bar eligibility for expungement under this subchapter.”⁷ The SBI shall also expunge felony conviction records if (i) a person was convicted of any of the felonies listed in 11 *Del. C.* § 4373(a)(2)(c); (ii) ten (10) years have passed since the later of the date of conviction or release; and (iii) a person has “no prior or subsequent convictions that bar eligibility for expungement under this subchapter.”⁸

Beginning in August 2024 and on a monthly basis thereafter, the SBI will automatically implement the mandatory expungement process of Delaware records envisioned under the Clean Slate Act by (i) identifying cases eligible for mandatory expungement under 11 *Del. C.* § 4373 and (ii) expunging all eligible Delaware records.⁹ Those eligible for mandatory expungement no longer will need to seek affirmative relief via the SBI or the judicial system.¹⁰ In connection with the

⁷ *See id.*, § 4373(a)(2)(a).

⁸ *See id.*, § 4373(a)(2).

⁹ *See id.*, § 4374A(b).

¹⁰ *See id.*, § 4374A(a).

legislature’s consideration of the Clean Slate Act, the Delaware Criminal Justice Information System (“DELJIS”) identified 290,980 people that would be eligible for the automatic expungement process.

Discretionary expungement is available for additional conviction records through petition to the Superior Court or Family Court (as applicable) where (i) a person was convicted of one (1) or more misdemeanors listed in 11 *Del. C.* § 4373(b) relating to the same case, at least seven (7) years have passed since conviction, and “the person has no prior or subsequent convictions,”¹¹ or (ii) seven (7) years have passed since the date of conviction of an applicable felony and the person “has no prior or subsequent convictions.”¹²

B. Appellant Qaiymah

Appellant Osama Qaiymah (“Qaiymah”) pled guilty in November 2015 to a misdemeanor under Delaware law (the “2015 Conviction”). Qaiymah was thereafter convicted of misdemeanors in Pennsylvania (2018) and Maryland (2020) (together, the “Subsequent Non-Delaware Convictions”). Qaiymah submitted an expungement application to the SBI in accordance with Delaware’s mandatory expungement statute (11 *Del. C.* § 4373). The SBI wrongfully rejected Qaiymah’s application, citing a review of his *Delaware* criminal history (which consists solely

¹¹ *See id.*, §4374(a)(2).

¹² *See id.*, § 4374(a)(3).

of the 2015 Conviction) and directed him to petition the Superior Court to determine his eligibility for expungement. The SBI did not indicate that it had reviewed any out-of-state records and did not provide Qaiymah with a copy of such records. On May 21, 2021, Qaiymah filed a petition for mandatory expungement of his Delaware record with the Superior Court. The State opposed Qaiymah's petition and asserted that he was ineligible due to the Subsequent Non-Delaware Convictions. On June 30, 2022, the Superior Court Commissioner issued an order denying Qaiymah's petition, which Qaiymah timely appealed.

C. Appellant Fritz

Appellant Eric Fritz ("Fritz" and together with Qaiymah, "Appellants") pled guilty in May 2010 to two (2) misdemeanors and one (1) felony under Delaware law (collectively, the "2010 Convictions"). Fritz was subsequently convicted in December 2011 in Pennsylvania on a misdemeanor charge (the "2011 Non-Delaware Conviction"). In 2021, the SBI informed Fritz of its determination that his Delaware record was not eligible for mandatory expungement, citing his 2010 felony conviction, and directed him to petition the Superior Court to determine his eligibility for expungement. As with Qaiymah, the SBI did not indicate that it had reviewed any of Fritz's out-of-state records in reaching its decision and did not provide Fritz with a copy of such records. On September 21, 2021, Fritz filed a petition in Superior Court for discretionary expungement of his Delaware criminal

record under 11 *Del. C.* § 4374(a). The State opposed Fritz’s petition with respect to the 2010 Convictions based on the existence of the 2011 Non-Delaware Conviction. On June 30, 2022, the Superior Court Commissioner entered an order denying expungement of the 2010 Convictions, which Fritz timely appealed.

D. Appellant Osgood (Case No. 1, 2023)

Alex Osgood (“Osgood”), the appellant in Case No. 1, 2023 (the “Osgood Appeal”),¹³ was convicted in 2007 of a misdemeanor in West Virginia (the “2007 Non-Delaware Conviction”) and thereafter pled guilty in January 2011 to a felony in Delaware (the “2011 Osgood Conviction”). On August 3, 2021, Osgood filed a petition for discretionary expungement under 11 *Del. C.* §4374(a) in the Superior Court. The State opposed Osgood’s petition with respect to the 2011 Osgood Conviction based on the existence of the 2007 Non-Delaware Conviction. On June 22, 2022, the Superior Court Commissioner issued an order denying Osgood’s petition.

E. The Superior Court’s Flawed Statutory Interpretation

All three (3) appeals from the Commissioner’s orders were consolidated before Superior Court Judge Calvin L. Scott, Jr. On December 6, 2022, Judge Scott

¹³ Given the intertwined nature of the Osgood Appeal and the instant consolidated appeals, ACLU-DE references the Osgood Appeal for the sake of completeness. *See* Order, at 2 (noting consolidated nature of decision on appeal of Commissioner’s orders denying expungement petitions for Fritz, Osgood, and Qaiymah).

issued an *Order* (the “Order”) affirming the Commissioner’s orders. Judge Scott found that “nothing in the definition of conviction indicates a conviction is only a conviction if it occurs in this State. In fact, is it [*sic.*] in the opinion of this Court that had the legislature intended for the requirement of no prior and subsequent convictions to only apply to convictions in this State, the legislature would have indicated such requirement in the plain language as it did when describing the applicability to the statute in 11 *Del. C.* § 4372(a).”¹⁴ Judge Scott further held that the phrase “in this state” found in 11 *Del. C.* § 4372(a) “pertains to the jurisdictional limitations of the Delaware Courts to consider expungement of only Delaware arrests and convictions.”¹⁵ Appellants timely filed the instant appeal of Judge Scott’s Order.

¹⁴ See Order, at 6-7

¹⁵ *Id.*, at 7.

SUMMARY OF ARGUMENT

Well-settled principles of statutory interpretation, coupled with the General Assembly's clear intent behind adopting recent expungement reforms, demonstrate that the Superior Court's decision should be reversed and remanded for consideration of Appellants' expungement petitions on the merits. Absent relief provided by this Court, the Superior Court's decision will lead to a wholesale bar on Delawareans' eligibility to seek expungement of their Delaware court records based solely on the existence of out-of-state convictions.

Delaware's expungement process involves the evaluation of an individual's arrests, charges, and convictions in Delaware using the criteria set by the legislature for the expungement of all or part of a person's Certified Delaware Criminal History. Delaware has no reliable way of accessing non-Delaware records or incorporating those records into Delaware's process for evaluating a person's eligibility to be considered for an expungement. Allowing the Superior Court's interpretation to stand would render automatic mandatory expungement inoperable, ineffective, and unconstitutionally inconsistent by violating the Equal Protection Clause. The outcome resulting from the Superior Court's Order is improper, inequitable, and incongruent with both legislative intent and public policy. The Court should reverse.

I. THE SUPERIOR COURT ERRONEOUSLY INTERPRETED THE “NO PRIOR OR SUBSEQUENT CONVICTIONS” PROVISIO OF 11 DEL. C. §§ 4373 – 4374 IN THE FACE OF COUNTERVAILING LEGISLATIVE INTENT AND PUBLIC POLICY.

The Superior Court erred by holding that the “no prior or subsequent convictions” proviso of Delaware’s Expungement Statutes requires the SBI and the Superior Court or Family Court, as applicable, to consider non-Delaware convictions in making an initial eligibility determination regarding a petitioner’s expungement request. By adding this extra-legislative gating requirement to the expungement process, the Superior Court wrongfully inserted a judicially created obstacle that will prevent countless Delawareans who are otherwise eligible for expungement of their Delaware record from taking advantage of the opportunity for a second chance, as envisioned by the General Assembly. To prevent the Superior Court’s decision from impacting the lives of untold numbers of Delawareans, this Court should reverse because (i) the Superior Court’s interpretation of the statutory language would lead to an absurd result and render other portions of the Expungement Statutes inoperable and (ii) ample evidence of legislative intent and public policy supports Appellants’ position.

This Court reviews statutory construction issues *de novo* to determine if the Superior Court erred as a matter of law in formulating or applying legal precepts.¹⁶

¹⁶ See *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998) (citations omitted).

The threshold question is “whether the provision in question is ambiguous.”¹⁷ A statute is unambiguous where “there is no reasonable doubt as to the meaning of the words used and the Court’s role is then limited to an application of the literal meaning of the words.”¹⁸ Conversely, a statute is ambiguous if it “is reasonably susceptible to different conclusions or interpretations.”¹⁹ In all instances, a court interpreting a statute “must ascertain and give effect to the intent of the legislature.”²⁰

If the Court does not accept Appellants’ argument that the plain language of 11 *Del. C.* § 4372(a) limits the evaluation of an individual’s eligibility for a Delaware expungement to their Delaware records,²¹ then for the reasons discussed below, the scope of the proviso “prior or subsequent convictions,” when considered in the context of the entire Delaware expungement scheme, should be considered ambiguous because there are multiple reasonable interpretations of the phrase. When practically applied in the context of implementing the Expungement Statutes,

¹⁷ *Dewey Beach Enters., Inc. v. Bd. of Adjustment of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010).

¹⁸ *See Zurich Am. Ins. Co. v. St. Paul Surplus Lines, Inc.*, 2009 Del. Ch. LEXIS 202, at *7 (Del. Ch. Dec. 10, 2009) (“[W]hen construing a statute, the Court must give a reasonable and sensible meaning to the words of the statute in light of their intent and purpose. Where the language is clear and unambiguous, the statute must be held to mean that which it plainly states, and no room is felt for construction.”) (internal quotations, alteration, and citation omitted).

¹⁹ *Snyder*, 708 A.2d at 241 (citation omitted)

²⁰ *In re Appraisal of Ancestry.com, Inc.*, 2015 Del. Ch. LEXIS 2, at *19 (Del. Ch. Jan. 5, 2015).

²¹ *See* Appellants’ Opening Brief, pp. 14-15 [Filing ID 69290741] (March 7, 2023) (arguing that “[t]his subchapter applies to all criminal cases brought and convictions entered in a court *in this State*” and that this Court has directed “that the General Assembly’s statutory language should be construed against surplusage when reasonably possible.”) (emphasis in original).

the Superior Court’s view would lead to unreasonable and absurd results not contemplated by the legislature. The Appellants’ view—that “prior or subsequent convictions” pertains only to Delaware convictions—is consistent with the letter and spirit of the Expungement Statutes.

A. The Absurd Result of Applying the Superior Court’s Interpretation of “Prior or Subsequent Conviction” to Delaware’s Expungement Scheme Compels Reversal.

A statute is ambiguous “if it is reasonably susceptible of different interpretations, or if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature.”²² When a statute is ambiguous because it is reasonably susceptible to multiple interpretations, “the Court must rely upon its methods of statutory interpretation and construction to arrive at what the legislature meant.”²³ This is because the rules of statutory construction “are designed to ascertain and give effect to the intent of the legislators, as expressed in the statute.”²⁴ Further, the Court must “presum[e] that the Legislature did not intend an unreasonable, absurd or unworkable result,” and thus, ambiguity may exist “where a literal interpretation of the words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature.”²⁵

²² *Id.*; see also *DiStefano v. Watson*, 566 A.2d 1, 4 (1989).

²³ *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (1985).

²⁴ *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1151 (Del. 2010); see also *Dambro v. Meyer*, 974 A.2d 121, 137 (Del. 2009) (“The goal of statutory construction is to determine and give effect to legislative intent.”) (internal quotation omitted).

²⁵ *In re Kent County Adequate Pub. Facilities Ordinances Litig.*, 2009 Del. Ch. LEXIS 22, *6 (Del. Ch. Feb. 11, 2009) (internal quotation and alteration omitted); see also *CML V, LLC v. Bax*, 6 A.3d 238, 241 (Del. Ch. 2010) (recognizing that the “Court may depart from the literal reading of a statute where such a reading is so inconsistent with the statutory purpose as to produce an absurd result . . .”); *In re Estate of Nelson*, 447 A.2d 438, 444 (Del. Ch. 1982) (“[I]t is a well

The Expungement Statutes are ambiguous because there are (at least) two competing, reasonable interpretations of the proviso “prior or subsequent provisions.” The proviso either (i) encompasses all convictions, including out-of-state convictions, as the Superior Court determined, or (ii) is limited to convictions obtained in Delaware, as Appellants argue. In determining which interpretation is correct, the Court must view the Expungement Statutes “as a whole, and literal or perceived interpretations which yield mischievous or absurd results are to be avoided.”²⁶

The General Assembly used the phrase “prior or subsequent convictions” eight (8) times throughout Delaware’s expungement scheme.²⁷ Not once did the legislature qualify the phrase “prior or subsequent convictions” to expressly include out-of-state convictions. Arguably, though, the legislature did expressly limit “prior or subsequent convictions” to in-state convictions.²⁸ As further demonstrated below, the Superior Court’s interpretation is also incorrect because it would undermine the

accepted principle of our law that unjust, absurd and mischievous consequences flowing from a literal interpretation of statutory language may create an ambiguity calling for construction.”).

²⁶ *State v. Thomas*, 2021 Del. Super. LEXIS 226, *8-9 (Del. Super. Mar. 19, 2021) (citation omitted).

²⁷ *See* 11 Del. C. §§ 4371 – 4378.

²⁸ *See generally* Appellants’ Opening Brief [Filing ID 69290741] (March 7, 2023).

entire expungement scheme and lead to a result clearly unintended by the General Assembly.²⁹

i. The Superior Court’s Interpretation Would Render the Automatic Expungement Process Inoperable.

This Court must reject the Superior Court’s interpretation of the “subsequent or prior conviction” proviso as unreasonable because it would yield absurd results. The “‘golden rule’ of statutory construction provides that the unreasonableness of the result produced by one among alternative interpretations of a statute is just cause for rejecting that interpretation in favor of the interpretation that would produce a reasonable result.”³⁰ Because adopting the Superior Court’s interpretation would make the automatic expungement scheme unworkable—a result clearly not intended by the legislature—the Court must reject that interpretation.

Adopting the Superior Court’s interpretation of the “prior or subsequent conviction” proviso so as to encompass out-of-state convictions would make it

²⁹ In its own publication titled *A Guide to Expungement of an Adult Record*, the Superior Court does not indicate whether “no prior or subsequent convictions” entails out-of-state convictions. However, in each instance the proviso appears, it is immediately followed by the following parenthetical: “(Prior or subsequent convictions for a Title 21 offense or offenses under Sections 904(e) or (f) of Title 4 (regarding underage possession or consumption of alcohol) or a conviction under Section 4764(c) of Title 16 (regarding underage possession of personal use quantity of marijuana) are excluded from the definition of “prior or subsequent convictions.”)” At the very least, this could reasonably be read to imply that the “convictions” that a person seeking expungement would need to be concerned about are only convictions under Delaware law. See Expungement Superior Court FAQ, *A Guide to Expungement of an Adult Record*, <https://courts.delaware.gov/forms/download.aspx?ID=118548>.

³⁰ *Daniels v. State*, 538 A.2d 1109-110 (Del. 1988)

practically impossible to implement the automatic expungement process contained in 11 *Del. C.* § 4374A. When the SBI begins identifying cases eligible for mandatory expungement on a monthly basis,³¹ the Superior Court's interpretation would require it to search all state, territorial, and federal databases (which are of questionable accuracy) to determine if a person could be rendered ineligible due to a prior or subsequent out-of-state conviction. Because there exists no single, comprehensive, and accurate national database of criminal records, this task is impossible. While 34 states (excluding, among others, border-state Pennsylvania) have ratified the Compact created by the National Crime Prevention and Privacy Compact Act of 1998, which established a reciprocal system of automated record exchange among the states for background checks,³² for those states not included, the Superior Court's interpretation would require the SBI to enter into agreements with each jurisdiction to obtain access to their records.

Even if such an *ad hoc* arrangement were possible, it would still not create a reliable method for evaluation of non-Delaware records. For example, such

³¹ 11 *Del. C.* § 4374A(b).

³² Pub. L. No. 105-251, 112 Stat. 1870 (codified as amended at 42 U.S.C. §§14601-16 (2000)); *see also* Compact Council States and Territories Map, <https://www.fbi.gov/file-repository/compact-council-states-territories-map/view>. The Compact only provides the legal framework for the *noncriminal justice* use of the Interstate Identification Index system. *See* NAT'L CRIME PREVENTION & PRIV. COMPACT COUNCIL, *Frequently Asked Questions Regarding the National Crime Prevention and Privacy Compact of 1998*, at 2 (2015), available at <https://ucr.fbi.gov/cc/library/compact-frequently-asked-questions>.

agreements could not resolve the varying standards and accuracy of other jurisdictions' databases. The SBI would risk denying a person the ability to receive an automatic mandatory expungement (or petition for any form of Delaware expungement) due to inaccuracies or out-of-date information contained within other jurisdiction's databases. This threat is realized when considering that even within Delaware, expungement petitions encounter inaccurate data that initially results in individuals being precluded from having their Delaware expungement considered. In those instances, however, the Court, SBI, and other state agencies have the ability and jurisdiction to review and correct those records. Because that option is not available when the inaccuracies are contained within another jurisdiction's database, it could not have been the General Assembly's intent to mandate such a process.

The complicated realities of record keeping and exchange between jurisdictions provide ample opportunities wherein the SBI could mistakenly prevent a person from having their record automatically expunged. For example, SBI may be aware of a prior out-of-state conviction due to its presence in a federal database but unaware and unable to consider that the out-of-state conviction was pardoned, expunged, or overturned for any variety of reasons by the appropriate jurisdiction. The SBI cannot give full faith and credit to these other jurisdiction's treatment of

these convictions.³³ Similarly, SBI's inability to conduct a comprehensively thorough and accurate review in its monthly searches of state and federal databases ensures that at least some people would be unjustly prevented from having their eligible Delaware records automatically expunged as the legislature intended. Appellants' interpretation of the "prior or subsequent conviction" proviso resolves the issue completely, as the SBI would only be required to conduct monthly reviews of Delaware's own database, DELJIS. Because this Court must reject an unreasonable interpretation in favor of an interpretation that would produce a reasonable result, the Court should adopt Appellants' position that only Delaware convictions determine if a Delaware record will be expunged.

ii. Consideration of the Expungement Statutes as a Whole Counsels in Favor of Appellants' Interpretation.

Other provisions of the Expungement Statutes provide clues as to how the legislature envisioned that Delaware's updated expungement scheme would operate. For instance, the legislature limited the applicability of the expungement scheme "to

³³ Inaccuracies in criminal databases are well documented. *See, e.g.*, Carrie Teegardin and Brad Schrade, *Key Information Missing from Georgia's Criminal Records Database*, ATLANTA JOURNAL-CONSTITUTION (Jan. 25, 2022) ("Georgia's database of criminal histories is filled with information gaps that make the records unreliable for the state's judges, employers and probation officers."); *see also* Wells, Martin, *et al.*, *Criminal Record Inaccuracies and the Impact of a Record Education Intervention on Employment-Related Outcomes*, available at https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/LRE_WellsFinalProjectReport_December2020.pdf ("Inaccuracies on criminal records often stem from mismatched identities, erroneous inclusion of minor offenses, and a lack of information about case dispositions.") (citations omitted).

all criminal cases brought and convictions entered in a court” in Delaware.³⁴ Convictions under certain *Delaware* statutes specifically are excluded from the ambit of “prior or subsequent convictions” (the “Specific Exclusions”) for purposes of the Expungement Statutes. For example, a prior or subsequent conviction of an offense under Title 21 of the Delaware Code (relating to motor vehicles) does not make a person ineligible for discretionary or mandatory expungement.³⁵ Nor do prior or subsequent convictions under 4 *Del. C.* § 904(e) - (f) (underage possession or consumption of alcohol), 16 *Del. C.* § 4764 (possession of a personal use quantity of marijuana) or 16 *Del. C.* § 4771 (possession of drug paraphernalia) count as a “prior or subsequent conviction.”³⁶ Under the Superior Court’s interpretation, a conviction in another jurisdiction equivalent to the Specific Exclusions would result in an individual being ineligible to petition for any form of Delaware expungement or benefit from the automatic expungement process.

iii. Adopting the Superior Court’s Interpretation Would Lead to Constitutional Violations.

The Superior Court’s ruling also is unreasonable because it would unnecessarily give rise to constitutional concerns.³⁷ Specifically, by treating those

³⁴ *See* 11 Del. C. § 4372(a).

³⁵ *See id.*, § 4372(h).

³⁶ *See id.*, § 4372(g).

³⁷ Although Appellants did not raise constitutional issues before the Superior Court, this Court has held that “[c]laims of error implicating basic constitutional rights of a defendant have been

with certain Delaware charges differently from those with the same out-of-state charges, the Expungement Statutes would run afoul of the equal protection clause, which prohibits the arbitrary classification of persons to whom a statute is directed.³⁸

For example, assume we have two, nearly identical expungement petitioners who have submitted their petitions for an expungement: Person A and Person B. Ten (10) years ago, both were convicted of misdemeanor theft under 11 *Del. C.* § 841, which is eligible for Delaware’s mandatory expungement process after five (5) years so long as the individual satisfies Delaware’s additional eligibility requirements. Assume Person A and Person B satisfy all other requirements, but they both also have a prior conviction for underage possession of alcohol. Person A’s conviction occurred in Delaware and Person B’s occurred in another jurisdiction. Although they performed the same actions and have effectively identical criminal histories, under the Superior Court’s interpretation, Person A would receive a mandatory expungement while Person B would be found ineligible to petition for any form of Delaware expungement relief because of a prior, non-Delaware conviction.

accorded review by this Court notwithstanding their nonassertion at trial.” *Stevens v. State*, 129 A.3d 206, 211 (Del. 2015). ACLU-DE submits that the Court should consider the constitutional arguments.

³⁸ *Helman v. State*, 784 A.2d 1058, 1074-75 (2001).

This precise absurd result is illustrated in the Osgood Appeal. Had Osgood been convicted of possession of marijuana in Delaware instead of West Virginia, he would be eligible for discretionary expungement because the Delaware possession of marijuana conviction would not count as a “prior or subsequent conviction.”³⁹ It strains any sense of credulity to argue that the legislature intended for the Expungement Statutes to reward those convicted of a certain crime in Delaware while punishing those convicted of the same crime in another state or territory.

The inverse situation in which an out-of-state conviction unrecognized in Delaware would result in the denial of an expungement is similarly alarming. For example, many states around the country are now criminalizing abortion. Applying the Superior Court’s interpretation, an individual convicted for abortion in another jurisdiction would be ineligible to petition for an expungement of their otherwise eligible Delaware record. Meanwhile, individuals with identical Delaware records that obtain their abortion and reproductive health care within Delaware would not face the same bar to expungement eligibility.

Leaving aside examples wherein the SBI is unable, or simply fails, to identify an out-of-state conviction (or resolution), there is no rational justification for the

³⁹ See 11 Del. C. § 4372(g)(2).

arbitrary and ambiguous enforcement of such classifications.⁴⁰ Even where no fundamental right or suspect class is implicated, a classification must be rationally related to a legitimate government interest.⁴¹ It is difficult to fathom exactly what legitimate government interest the legislature could have envisioned if its goal was to create such an unequal paradigm. This Court should reject that the General Assembly intended such unreasonably disparate treatment.

⁴⁰ *Hughes v. State*, 808 A.2d 1204 (Del. 2002) (citing *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 466, (1985) (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”)).

⁴¹ *Turnbull v. Fink*, 668 A.2d 1370, 1379 (1995).

B. Clear Legislative Intent and Public Policy Support Reversal.

When overhauling the expungement scheme, the legislature made clear the overarching policy behind its reforms:

The General Assembly finds that a criminal history is a hindrance to a person's present and future ability to obtain employment, housing, education, or credit. This subchapter is intended to protect persons from unwarranted damage which may occur when the existence of a criminal history continues indefinitely.⁴²

The Superior Court's decision below ignores, and attempts to supplant, this clear statement of legislative intent. By essentially inserting an extra step in the expungement process not envisioned by the legislature, the Superior Court bypassed the General Assembly's goal of increasing second-chance opportunities for Delawareans who have paid their debt to society, and absent reversal by this Court, the decision below will make it harder for Delawareans to access the restorative justice envisioned by the legislature in adopting recent expungement reforms.⁴³

⁴² See 11 Del. C. § 4371.

⁴³ See also, e.g., Bittle, Matt, *Senate Oks Clean Slate Act*, DELAWARE STATE NEWS (May 2, 2022) (quoting Delaware State Senator Darius Brown, sponsor of the Clean Slate Act: "The Clean Slate Act represents a major step forward in our advancement of restorative justice that will ensure these hurdles never again stand in the way of another Delawarean obtaining a second chance at life.").

CONCLUSION

This Court should reverse the Superior Court's holding that someone is barred *ab initio* from having the Superior Court hear the merits of their petition for mandatory or discretionary expungement due to the existence of prior or subsequent out-of-state convictions, and should remand to the Superior Court for proceedings to determine each of Appellants' petition for expungement on their respective merits.

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Respectfully submitted,

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