

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

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No. SJC-13334

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COMMONWEALTH,

*Appellee,*

v.

J.F.,

*Petitioner-Appellant.*

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*On Appeal from an Order of the Plymouth County Superior Court*

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**BRIEF OF AMICUS CURIAE UPTURN IN SUPPORT OF PETITIONER-  
APPELLANT AND REVERSAL**

Dated: January 18, 2023

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 17(c)(1) of the Massachusetts Rules of Appellate Procedure, amicus curiae Upturn, Inc., states that it has no parent corporation. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

Dated: January 18, 2023

Respectfully Submitted,

/s/ Mason A. Kortz

Mason A. Kortz, BBO #691257

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## **STATEMENT OF INTEREST OF AMICI CURIAE**

Amicus curiae<sup>1</sup> Upturn, Inc., is a nonprofit organization based in Washington, D.C. that, via research and advocacy, seeks to advance equity and justice in the design, governance, and use of technology. Upturn frequently presents its work in the media, before Congress and regulatory agencies, and before the courts in briefs like this one. Upturn’s core mission is seeing that technology is not deployed in a way that perpetuates injustice.

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<sup>1</sup> Pursuant to Rule 17(c)(5) of the Massachusetts Rules of Appellate Procedure, amicus certifies that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than amicus or its counsel—contributed money that was intended to fund preparing or submitting this brief. Amicus and its counsel have not represented any party to the present appeal in another proceeding involving similar issues, or been a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

## **SUMMARY OF THE ARGUMENT**

In recent years, data brokers—businesses that collect, buy, and sell massive amounts of nearly all types of data—have made it easier than ever to gain access to people’s personal information. Pp. 12-13. This has led to an entire industry of background check companies and “people search” websites ready to provide potential employers, landlords, and others with the details of applicants’ life, including their criminal record information. Pp. 13-14. Moreover, while data brokers have increased access to criminal record information, they have not made efforts to ensure the accuracy or relevancy of such information. Pp. 18-21.

The Massachusetts Legislature has long tried to mitigate the harms that criminal records impose on people who have previously interacted with the criminal justice system. Pp. 24-26. Having a criminal record stigmatizes individuals, making it difficult for them to obtain housing and meaningful employment and move on with their lives. Pp. 23-24. Massachusetts has long recognized this and, beginning with the establishment of the Criminal Offender Record Information (“CORI”) laws in 1972 and the automatic record-sealing provision at issue here one year later, has sought to limit the harms caused by unrestricted access to criminal record information. P. 24. As technology has advanced, the Legislature has continued to regulate access to criminal records, all while keeping in place the automatic-sealing provision. Pp. 25-26.

Data brokers operate in blatant disregard of the Legislature’s clear intent to limit access to criminal record information. P. 29. Given the presence of data brokers in the criminal record space, it is more necessary than ever to abide by G.L. c. 276, §100C, which mandates automatic sealing after a finding of not guilty. P. 29. Automatic sealing after a finding of not guilty prevents data brokers from accessing and widely disseminating these records. Pp. 29-30. This would best effectuate the intent of the 1973, 2010, and 2018 Legislatures, all of which have recognized the harms posed by unrestricted access to criminal record information. P. 33. Accordingly, amicus respectfully urges the Court to grant Petitioner-Appellant’s appeal and remand with orders to seal the record of those counts on which he was acquitted.

### **ARGUMENT**

Fifty years ago, the Massachusetts Legislature, concerned by the barriers to reintegration that having a criminal record posed, established the Commonwealth’s CORI laws. One early addition to this comprehensive scheme was a provision requiring automatic sealing after a finding of not guilty. *See* G.L. c. 276, § 100C. This provision has endured even as the Legislature has revisited CORI. In 2010, and again in 2018, the Legislature revisited the CORI laws and enacted major reforms to limit criminal records’ collateral consequences. *Commonwealth v. K.W.*, 490 Mass. 619, 631-32 (2022); *Commonwealth v. Pon*, 469 Mass. 296, 306 (2014).

Both the 2010 and 2018 reforms left in place § 100C's automatic sealing provision, which was designed to limit the use of records that do not bear on a person's the likelihood of rearrest.

Today, the Legislature's goals still have not been fully realized—in part because modern data brokers make it easier than ever to discriminate against people with criminal records. By enabling access to criminal record information, data brokers act as a force multiplier for the debilitating and stigmatizing effects of having a criminal record. The role of data brokers in finding and providing easy access to criminal record data reinforces the need for automatic sealing of records ending in a finding of not guilty. The Legislature determined fifty years ago that such records posed an unacceptable risk of prejudicing potential employers, landlords, and others against people who have been in contact with the criminal justice system. Now, in the internet age, that risk of prejudice is higher than ever; thus, automatic sealing is necessary to carry out the design and purpose of the CORI laws.

**I. DATA BROKERS HAVE DRASTICALLY EXPANDED THE PUBLIC AVAILABILITY OF CRIMINAL RECORD INFORMATION AT THE COST OF RELEVANCE AND ACCURACY.**

Over the past few decades, data brokers have commodified all types of personal data, from internet browsing habits to real-time location and even health

information. *See Data Brokers*, Electronic Privacy Information Center.<sup>2</sup> Data brokers are for-profit businesses that scrape, purchase, and aggregate personal data. *Id.* They then package that data into reports and sell the reports to anyone who can pay. Among the many types of information that data brokers compile, criminal records are one of the most harmful. By lowering the barriers to access criminal record information—and simultaneously lowering the standards for accuracy and completeness—data brokers exacerbate harms from unfettered dissemination of criminal record information that the Massachusetts Legislature and judiciary have repeatedly recognized and sought to mitigate.

**A. Data brokers provide wide-spread access to criminal record information.**

Data brokers operate by collecting nearly any type of information and selling it to a wide variety of purchasers. Some data brokers compile background reports for clients like landlords and employers; these background check providers are classified as consumer reporting agencies (“CRAs”) under the federal Fair Credit Reporting Act (“FCRA”), 15 U.S.C. §1681a(f), and CORI regulations, 803 CMR 11.02. Other data brokers, such as “people search” websites, claim they are not subject to regulation as CRAs—but still offer “unofficial” background checks. *See Sarah Lageson, Transparency Laws Let Criminal Records Become Commodities,*

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<sup>2</sup> <https://epic.org/issues/consumer-privacy/data-brokers/> [<https://perma.cc/ME9W-8LGY>]

Wired (Dec. 23, 2021).<sup>3</sup> Others cater to marketers, allowing clients to target specific audiences with advertisements and solicitations. *See* Yael Grauer, *What Are ‘Data Brokers,’ and Why Are They Scooping Up Information About You?*, Vice (Mar. 27, 2018).<sup>4</sup> Some even sell information to government agencies for investigative purposes. *See* Sharon Bradford Franklin, Greg Nojeim & Dhanaraj Thakur, *Report – Legal Loopholes and Data for Dollars: How Law Enforcement and Intelligence Agencies Are Buying Your Data from Brokers*, Center for Democracy & Technology (Dec. 9, 2021).<sup>5</sup>

Particularly concerning is data brokers’ entry into the criminal record business. Data brokers routinely capture public records—including court dockets, public jail and prison rosters, and sex offender registries—and make them easily available for purchase. Lageson, *Transparency Laws, supra*. Data brokers aggressively market this information; an internet search for an individual’s name often turns up ads promising public records, including criminal history. *Id.* Perhaps most troubling, some data brokers continue to store and sell criminal history information long after its initial collection, disseminating outdated information that

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<sup>3</sup> <https://www.wired.com/story/criminal-justice-transparency-law-data-brokers/> [<https://perma.cc/M8JD-L4KB>]

<sup>4</sup> <https://www.vice.com/en/article/bjpx3w/what-are-data-brokers-and-how-to-stop-my-private-data-collection> [<https://perma.cc/Y5N5-3RAU>]

<sup>5</sup> <https://cdt.org/insights/report-legal-loopholes-and-data-for-dollars-how-law-enforcement-and-intelligence-agencies-are-buying-your-data-from-brokers/> [<https://perma.cc/53UF-SREY>]

has since been updated with a new disposition (e.g., dismissed), corrected, expunged, or sealed. *See* Joe Palazzolo & Gary Fields, *Fight Grows to Stop Expunged Criminal Records Living on in Background Checks*, *The Wall Street Journal* (May 7, 2015).<sup>6</sup>

This private market for criminal records marks a significant shift from the historic way in which employers and landlords obtained criminal records of prospective employees and tenants. In the past, employers and landlords directly obtained the criminal records of these individuals on a case-by-case basis from the appropriate public agency. Logan Danielle Wayne, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253, 262 (2012). When these records went digital, data brokers stepped in, creating a market for easily accessible but unreliable information.

Reducing reliance on these third parties for criminal record information and centralizing access in the government-run “iCORI” system was one of the express goals of the 2010 CORI reforms. *See Pon*, 469 Mass at 304 (explaining that the 2010 reforms were meant to “steer employers away from reliance on potentially inaccurate sources of criminal history information made possible since the initial passage of the CORI act”); *see also infra* Section II; G.L. c. 6, § 172 (establishing

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<sup>6</sup> <https://www.wsj.com/articles/fight-grows-to-stop-expunged-criminal-records-living-on-in-background-checks-1430991002> [<https://perma.cc/ZGY4-Z6UE>]

iCORI system); 803 CMR 2.01 *et seq.* (establishing rules for access to iCORI system); 803 CMR 11.01 *et seq.* (establishing rules for third-party CRA access to iCORI system). However, iCORI has not prevented data brokers from compiling their own criminal history reports.

Some background check companies operating in Massachusetts boast that they can provide information beyond what is available on the iCORI system. For example, A Good Employee offers manual, in-person searches of criminal records at the county level and advertises its “network of experienced criminal record researchers who know the local courthouses and court clerks.” *Massachusetts Criminal Records*, A Good Employee.<sup>7</sup> Another service, Checkr, tells users that “[i]CORI does not contain all of the records and complete case information housed in Massachusetts courts,” and promises to search “different databases and public court records to compile reports” upon request.<sup>8</sup> Yet another, iprospectcheck, vaguely asserts that it has “comprehensive access to databases” beyond iCORI. *Massachusetts Background Check for Employment: A Complete Guide [2023]*, iprospectcheck.<sup>9</sup>

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<sup>7</sup> <https://www.agoodemployee.com/massachusetts-criminal-records/>  
[<https://perma.cc/29PK-73A9>]

<sup>8</sup> <https://help.checkr.com/hc/en-us/articles/360011102633-How-does-Massachusetts-CORI-search-apply-to-background-checks->  
[<https://perma.cc/KK6Z-NWZJ>]

<sup>9</sup> <https://iprospectcheck.com/massachusetts-background-check/>  
[<https://perma.cc/W64D-EYR3>]



Worse, some data brokers recklessly disregard the governing law, or claim it does not apply to them. See Ariel Nelson, *Broken Records Redux: How Errors by Criminal Background Checking Companies Continue to Harm Consumers Seeking Jobs and Housing*, National Consumer Law Center at 29-30 (2019).<sup>10</sup> The data broker StateRecords.org claims that it is “not a consumer reporting agency” and requires the user to “expressly acknowledge that [they] are prohibited from using this service . . . to determine an individual’s eligibility for credit, insurance, [or] employment.” *Massachusetts Criminal Records*, StateRecords.org.<sup>11</sup> Another data broker, FreeBackgroundChecks.com, alerts the user that “[u]nofficial background checks . . . can provide background information on: Friends. Relatives. Neighbors. Enemies. Co-Workers. Romantic Interests.” *Background Check in Massachusetts*, FreeBackgroundChecks.com.<sup>12</sup> But these services have no way of confirming, and no clear incentive to confirm, whether requestors are obeying these strictures.

Data brokers have a strong incentive to disrupt the regulated access to criminal record information established by the 2010 CORI reforms. Criminal record information has rapidly become a “Big Data commodity,” Sarah Esther

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<sup>10</sup> <https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf> [<https://perma.cc/JY8U-GC5M>]

<sup>11</sup> <https://massachusetts.staterecords.org/criminal.php> [<https://perma.cc/UL6Z-BA3S>]

<sup>12</sup> <https://freebackgroundchecks.com/states/massachusetts/> [<https://perma.cc/8Z8J-38X3>]

Lageson, *Criminal Record Stigma and Surveillance in the Digital Age*, 5 ANN. REV. CRIMINOLOGY 67, 68 (2022), and the market for this data is massive: the background check services industry alone has an approximated market size of over \$4 billion and an upwards trajectory, *Background Check Services in the US*, IBISWorld (June 24, 2022),<sup>13</sup> and the entire data broker market was valued at \$240 billion in 2021, *Data Brokers Market*, Transparency Market Research (July 2022).<sup>14</sup>

**B. Criminal record information available from data brokers is often inaccurate, highly prejudicial, and used inappropriately to deny people access to basic needs like housing and employment.**

The background check industry does not just sell criminal records; it sells the idea that criminal records should be relied upon to make life-altering decisions about people, including whether they are worthy of employment or housing. In 2021, *amicus* studied the online job application processes of large hourly employers. Nearly every employer in the study used an “applicant tracking system” that can seamlessly integrate third-party background screening services into the process of evaluating an applicant, and roughly half of the employers required applicants to consent to a background check. Aaron Rieke et al., *Essential*

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<sup>13</sup> <https://www.ibisworld.com/industry-statistics/market-size/background-check-services-united-states/> [<https://perma.cc/FEM6-SKZ4>]

<sup>14</sup> <https://www.transparencymarketresearch.com/data-brokers-market.html> [<https://perma.cc/3Z78-GNHT>]

*Work: Analyzing the Hiring Technologies of Large Hourly Employers* at 21, 50-51, Upturn (2021).<sup>15</sup> Similarly, a 2020 survey sponsored by the Professional Background Screening Association found that 94% of employers sampled conducted at least one type of background screening search for potential employees. *Background Screening: Trends and Uses in Today's Global Economy*, HR.com (2020).<sup>16</sup> Another survey found that 90% of landlords run criminal background checks on prospective tenants. *TransUnion Independent Landlord Survey Insights*, TransUnion SmartMove (Aug. 17, 2017).<sup>17</sup>

The mere presence of criminal records in a background screening report can prejudice landlords and employers against an applicant, regardless of the details of the record. See Anna Reosti, “*We Go Totally Subjective*”: *Discretion, Discrimination, and Tenant Screening in a Landlord's Market*, 45 LAW & SOCIAL INQUIRY 618, 633 (2020) (“The notion that most independent landlords lack the expertise necessary to assess an applicant’s criminal history in a nuanced manner was also expressed by the executive of a commercial screening company.”). In some cases, background check services may not provide the decisionmaker with

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<sup>15</sup> <https://www.upturn.org/static/reports/2021/essential-work/files/upturn-essential-work.pdf> [<https://perma.cc/N86P-7NRP>]

<sup>16</sup> <https://pubs.thepbsa.org/pub.cfm?id=459B8AB7-0CEA-625E-0911-A4A089DE5118> [<https://perma.cc/Z7XV-M2S2>]

<sup>17</sup> <https://www.mysmartmove.com/SmartMove/blog/landlord-rental-market-survey-insights-infographic.page> [<https://perma.cc/WGC3-P3F5>]

the details necessary to distinguish between types of offenses, or between convictions and non-convictions. *See Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 478 F. Supp. 3d 259, 289 (D. Conn. 2020). Background check companies may reduce criminal records to an overall risk score or recommendation, making it even less likely that an employer or landlord will evaluate the relevance of the underlying records for themselves. *See CFPB Reports Highlight Problems with Tenant Background Checks*, Consumer Financial Protection Bureau (Nov. 15, 2022)<sup>18</sup>; Tinuola Dada & Natasha Duarte, *How to Seal Eviction Records: Guidance for Legislative Drafting* at 16–17, Upturn (July 2022) (describing tenant screening reports and scores). Moreover, even when the full details of a person’s criminal record are available, reviewers “tend[] to conflate the existence of the record with a negative outcome for the [applicant].” Wonyoung So, *Which Information Matters? Measuring Landlord Assessment of Tenant Screening Reports*, *Housing Policy Debate* at 15 (2022).

There are also cases where a person’s reported criminal record is simply incorrect. For instance, one former defendant was denied housing after a background check displayed not only three felony convictions from when he was a teenager that were subsequently expunged, but an additional twenty-six “felonies”

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<sup>18</sup> <https://www.consumerfinance.gov/about-us/newsroom/cfpb-reports-highlight-problems-with-tenant-background-checks/> [<https://perma.cc/TF2D-M55H>]

that were in fact just disciplinary infractions. Lauren Kirchner, *When Zombie Data Costs You a Home*, *The Markup* (Oct. 6, 2020).<sup>19</sup> This story is not unique. Dozens of lawsuits have been filed against background check companies for inaccurate reporting that has cost individuals their employment, Patrick Thibodeau & Makenzie Holland, *Employee Background Check Errors Harm Thousands of Workers*, *TechTarget* (Dec. 20, 2021),<sup>20</sup> and CFPB reports on the tenant background check industry found that “people are denied rental housing because . . . outdated information remains on reports; and inaccurate or misleading details about arrests, criminal records, and eviction records are not corrected nor removed from reports,” *CFPB Reports, supra*.

Once information—accurate or otherwise—has entered the data broker ecosystem, it is nearly impossible to rein it back in. Grauer, *What Are Data Brokers, supra*. The only ways to remove or correct brokers’ records are to contact each individual broker or pay for a service that does so on your behalf. Yael Grauer, *How to Delete Your Information from People-Search Sites*, *Consumer Reports* (Sept. 14, 2021).<sup>21</sup> Individuals taking the former approach must identify

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<sup>19</sup> <https://themarkup.org/locked-out/2020/10/06/zombie-criminal-records-housing-background-checks> [<https://perma.cc/C5RC-87YZ>]

<sup>20</sup> <https://www.techtarget.com/searchhrsoftware/feature/Employee-background-check-errors-harm-thousands-of-workers> [<https://perma.cc/LB2V-9K3Q>]

<sup>21</sup> <https://www.consumerreports.org/personal-information/how-to-delete-your-information-from-people-search-sites-a6926856917/> [<https://perma.cc/ME8H-DYFD>]

and contact dozens of data brokers and submit individual opt-out requests. David Nield, *How to Opt Out of the Sites That Sell Your Personal Data*, Wired (Nov. 7, 2019).<sup>22</sup> Troublingly (and ironically), the opt-out process often requires individuals to submit *more* personal information as part of their opt-out request. *Id.*

Alternatively, an individual could pay for a third-party service to remove their records. Grauer, *How to Delete Your Information*, *supra*. However, these services are expensive, putting them out of reach of many individuals, and none can guarantee complete removal from all databases. *Id.*

State and federal regulatory schemes provide some limitations on the data broker industry. See Nelson, *Broken Records Redux*, *supra*, at 27-28; see also 15 U.S.C § 1681 et seq.; G.L. c. 6, §§ 171A, 175. However, these rules are only partially effective, as compliance is difficult to enforce. The data broker industry is replete with examples of non-compliant actors. For example, in 2020, the Federal Trade Commission (FTC) settled with AppFolio over allegations that the company included criminal records in tenant screening reports without checking the records for basic inaccuracies. Complaint, *U.S. Dep't of Justice v. AppFolio*, 1:20-cv-03563 (D.D.C. 2020); see also Press Release, *Two Data Brokers Settle FTC Charges That They Sold Consumer Data Without Complying with Protections*

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<sup>22</sup> <https://www.wired.com/story/opt-out-data-broker-sites-privacy/>  
[<https://perma.cc/C343-FD66>]

*Required Under the Fair Credit Reporting Act*, Federal Trade Commission (Apr. 9, 2014)<sup>23</sup>; Press Release, *FTC Sues Kochava for Selling Data that Tracks People at Reproductive Health Clinics, Places of Worship, and Other Sensitive Locations*, Federal Trade Commission (Aug. 29, 2022)<sup>24</sup>; *LexisNexis Illegally Collected and Sold People's Personal Data, Lawsuit Alleges*, CBS News (Aug. 16, 2022).<sup>25</sup>

Reactive enforcement actions are important, but the steady drumbeat of such actions shows that they are insufficient to protect the public and private interests at stake in managing criminal record information access.

## **II. THE MASSACHUSETTS LEGISLATURE HAS LONG SOUGHT TO MITIGATE THE HARMS POSED BY UNFETTERED ACCESS TO CRIMINAL RECORD INFORMATION.**

It is well documented that people with criminal records have difficulty accessing employment, housing, and other necessities of life. “[W]idespread use of criminal background checks sets persons with criminal records up for future failure.” GABRIELLA PRIEST, JULIE FINN & LEN ENGEL, *THE CONTINUING CHALLENGE OF CORI REFORM: IMPLEMENTING THE GROUNDBREAKING 2010*

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<sup>23</sup> <https://www.ftc.gov/news-events/news/press-releases/2014/04/two-data-brokers-settle-ftc-charges-they-sold-consumer-data-without-complying-protections-required> [<https://perma.cc/RR9U-PF2Q>]

<sup>24</sup> <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-sues-kochava-selling-data-tracks-people-reproductive-health-clinics-places-worship-other> [<https://perma.cc/L33K-ZZGN>]

<sup>25</sup> <https://www.cbsnews.com/news/lexisnexis-lawsuit-collected-sold-personal-data-immigration-advocates-allege/> [<https://perma.cc/QLW8-Q6LN>]

MASSACHUSETTS LAW, (Mahoney & Hindley eds., 2012). An ample body of empirical evidence shows that limiting access to criminal records increases public safety and improves outcomes for people with records by allowing them to secure housing, employment, and other basic needs. *See, e.g.*, J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2467, 2514, 2520 (2020); Murat C. Mungan, *On the Optimality of Sealing Criminal Records and How It Relates to Adverse Selection, Productivity Reduction, and Stigma*, 26 SUP. CT. ECON. REV. 135, 139 (2018) (collecting citations). There are also significant harms associated with having a criminal record that are harder to quantify. Former criminal defendants may be judged by their community, from curious neighbors to potential spouses. *See* U.S. Department of Justice, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* at 21-22 (2005). Additionally, they “become[] subject to predatory businesses, such as reputational management and mug[ s]hot takedown services or high-interest loans, that target people who have been through the legal system.” Lageson, *Transparency Laws, supra*. By 2014, “the evidence of the long-term collateral consequences of criminal records” was so persuasive that this Court held that “judges may take judicial notice that the existence of a criminal record, regardless of what it contains, can present barriers to housing and employment opportunities.” *Pon*, 469 Mass. at 315-16.



These barriers serve to punish people and prevent them from moving on long after their case or period of incarceration has ended. *See generally* Nelson, *Broken Records Redux, supra*. This very fact motivated the Massachusetts Legislature to pass the original CORI laws. Pauline Quirion, *Sealing and Expungement After Massachusetts Criminal Justice Reform*, 100 MASS. L. REV. 100, 101 (2019) (citing *Globe Newspaper Co. v. Dist. Att’y for Middle Dist.*, 439 Mass. 374, 384 (2003)); Priest, Finn & Engel, *The Continuing Challenge of CORI Reform supra* (“CORI was established in 1972 to limit access to criminal record information and to create a system with guidelines enabling access to these records in limited circumstances.”). The Massachusetts Legislature added the automatic record-sealing provision at issue in this case one year later. Quirion, *supra*, at 101 (citing Acts 1973, c. 322). The plain text of G.L. c. 276, § 100C mandates the sealing of a criminal record at the time of acquittal. Brief for Petitioner-Appellant, *supra* at 28-29. Notably, paragraph 1 of § 100C lacks the “substantial justice” requirement of paragraph 2. *Id.* at 14. This strongly suggests that, in 1973, the Legislature concluded that cases ending in a finding of not guilty are particularly irrelevant to any rational decision-making and that sealing them always serves substantial justice; thus, no judicial involvement is wanted or needed. *Id.* at 15-16.

Over the next fifty years, the Massachusetts Legislature repeatedly updated the CORI laws to combat unfair use of criminal record information. The 1973,

2010, and 2018 CORI amendments reduced waiting times for sealing, created new pathways to sealing, and gave individuals with criminal records more freedom to state they had “no record” after sealing or expungement. *See* St. 1973, c. 322; St. 2010, c. 256; St. 2018, c. 69; *see also* Quirion, *Sealing and Expungement*, *supra*, at 100-05. Each of these reforms seeks to balance the public’s right to access information with the urgent need to curtail collateral harm flowing from the unfettered dissemination of criminal records and allow people to recover economically and socially from contact with the criminal legal system. *Id.*; *see also* *Pon*, 469 Mass. at 315; *Globe Newspaper Co. v. Dist. Att’y for Middle Dist.*, 439 Mass. 374, 384 (2003) (“The CORI statute is intended to protect privacy and to promote the rehabilitation of criminal defendants, recognizing that ready access to a defendant’s prior criminal record might frustrate a defendant’s access to employment, housing, and social contacts necessary to that rehabilitation.”). Notably, each wave of reform has made sealing and expungement more accessible to people with criminal records, demonstrating a slow but consistent shift towards limited access to unfairly prejudicial criminal records, especially non-conviction information. *See Pon*, 469 Mass. at 306 (observing that 2010 amendments “indicat[e] that the Legislature anticipated that more criminal records might be sealed following the reforms”).

In enacting these reforms, the Legislature took changing technology into account. The 2010 CORI reforms, in particular, reflected “legislative concern . . . about the negative impact of criminal records on the ability of former criminal defendants to reintegrate into society and obtain gainful employment, particularly in an age of rapid informational access through the Internet and other new technologies.” *Pon*, 469 Mass. at 297. The Legislature specifically tried to make employers and landlords “less likely to turn to third-party aggregators, who compile criminal records that [are] often inaccurate or outdated.” Kyle Cheney, *Record Access Debate Juxtaposes Needs of Ex-Prisoners, Employers*, State House News Service (July 27, 2009)<sup>26</sup>; *see also Pon*, 469 Mass. at 304. To this end, the 2010 reforms created the state-run iCORI database. *See* St. 2010, c. 256, § 8 (codified at G.L. c. 6, § 172).

That act, together with the regulations adopted by the Massachusetts Department of Criminal Justice Information Services (DCJIS), limits access to criminal record information based on the identity of the requester and the age, seriousness, and disposition of the charges. *See* 803 C.M.R. § 2.05 (creating a tiered system of iCORI access). Notably, non-conviction information is only available to specific entities required by law to have access to such records. *Id.*

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<sup>26</sup> <https://www-statehousenews-com.eresources.law.harvard.edu/news/2009650> [<https://perma.cc/8GKJ-JKZK>]

Other regulations promulgated by DCJIS added further safeguards, including specific provisions governing CRAs that access iCORI on behalf of clients, complete with registration, retention, destruction, and reporting requirements. *See* 803 C.M.R. § 11.01 *et seq.* This statutory and regulatory scheme reflects a clear understanding of the dangers of dissemination of criminal records in general, and records ending in non-conviction in particular.

### **III. AUTOMATIC SEALING OF CASES ENDING IN ACQUITTAL EFFECTUATES THE LEGISLATURE’S INTENT AND PREVENTS DATA BROKERS FROM UNDERMINING THE CORI REGULATIONS.**

Records subject to a common-law presumption of public access may be made unavailable upon a showing of “good cause.” *Pon*, 469 Mass. at 312 & n.23.<sup>27</sup> Where “the Legislature itself has identified factors that establish good cause for” record sealing, lesser “degrees of judicial discretion” are implied. *K.W.*, 490 Mass. at 631 (citing G.L. c. 276, § 100K). In passing the automatic-sealing provision of § 100C, the Legislature reserved no discretion to the judiciary. That provision does more than “identify factors.” It identifies three circumstances as

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<sup>27</sup> In *Pon*, this Court instructed the District Court that the “good cause” standard applies to petitions to seal records under the first paragraph of § 100C. 469 Mass. at 313 n.24. That instruction implies that such records are subject to the common-law presumption of public access, rather than a First Amendment presumption of public access. See *id.* at 312 (fact that “only a common-law presumption of public access applies enable[d Court] to depart from the exacting constitutional standard” of the First Amendment presumption).

categorically good cause for record sealing: the fact of a not guilty finding, a no-bill, or a finding of no probable cause. *Compare* G.L. c. 276, § 100K (permitting court to expunge record in enumerated circumstances) *with* G.L. c. 276, § 100C (requiring commissioner and clerk to seal record in enumerated circumstances). This makes practical sense; like records subject to expungement under § 100K, records of acquittals, no-bills, and findings of no probable cause have “virtually [no] bearing on whether the petitioner might commit a criminal act in the future,” *K.W.*, 490 Mass. at 631. Further, unlike expunged records, sealed records are not deleted and may still be accessed under certain circumstances, so any countervailing interest in access is lessened. *See Matter of Expungement*, 489 Mass. 67, 68 n.1 (2022); *see also* Greater Boston Legal Services CORI & Re-entry Project, *Know Your CORI Rights: Sealing and Expungement of Criminal Offender Record Information (CORI)* at 18–19 (2018).

The Legislature has never backed away from this policy decision, even after *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989). This must be taken as a continued legislative determination that records ending in a finding of not guilty serve so little public interest—and yet are so potentially prejudicial to defendants—that no judicial determination is required; the balance of interests will always favor sealing. Indeed, automatic sealing of records ending in acquittal is more important now than ever, and data brokers are one significant reason why.

The history of the 2010 CORI reforms reflects that the Legislature was specifically concerned about “third-party aggregators” supplying “inaccurate or outdated” information. Cheney, *Record Access Debate, supra*. The iCORI system and accompanying regulations are designed to limit the types of criminal information that CRAs can access and share with third parties, and they sharply restrict access to non-convictions. Because data brokers profit from unsanctioned uses of criminal records, they have incentives to bypass the iCORI system, collect non-conviction records from other sources, and continue to disseminate even sealed records.

Automatically sealing certain non-conviction records prevents the brokers from doing harm using records the Legislature never meant them to have. Under the CORI regulations, CRAs carrying out background checks may only access non-conviction information on behalf of specifically designated entities. *See* 803 CMR § 2.05(3). A CORI report used for a housing background check, and for the majority of employment background checks, must not include non-convictions. *Id.* However, background check companies can currently collect non-conviction information from sources other than iCORI, including from Masscourts and third-party data brokers. If a record is sealed at the time of acquittal, it would become wholly unavailable to companies, like A Good Employee and Checkr, that conduct on-demand background checks.

Compared to discretionary sealing, automatic sealing would greatly reduce the chances that data brokers could obtain information on criminal proceedings that ended in acquittal. Many people never get their eligible records sealed, due to the burden of having to petition the court for sealing. Researchers refer to this phenomenon as the “uptake gap”; a study in Michigan found that “among those legally eligible for [petition-based] expungement, just 6.5% obtain it within five years . . . .” Prescott & Starr, *Expungement of Criminal Convictions*, *supra* at 2489. Moreover, under a petition-based system, defendants must wait for the court to find good cause, giving data brokers additional time to locate and copy records. Even if the record were eventually sealed, it would be too late; the information would be nearly impossible to remove from the internet. *Pon*, 469 Mass. at 304 (“Where criminal records are increasingly available on the Internet and through third-party background service providers, criminal history information that is available only briefly to the public through official means can remain available indefinitely, despite subsequent sealing or impoundment.”); Sarah Esther Lageson, *There’s No Such Thing as Expunging a Criminal Record Anymore*, *Slate* (Jan. 7, 2019).<sup>28</sup>

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<sup>28</sup> <https://slate.com/technology/2019/01/criminal-record-expungement-internet-due-process.html> [<https://perma.cc/X8KF-6L6Z>]

This Court has recognized that “third-party providers who disregard sealing orders” undermine the positive effects of record sealing. *Pon*, 469 Mass. at 320 n.35. Similarly, leaving acquittals unsealed on court dockets is an invitation for data brokers to harvest and sell criminal records that are unavailable to most iCORI users. *See Bynes v. Sch. Comm. of Bos.*, 411 Mass. 264, 268-69 (1991) (holding that statutory limitations on employer’s obtaining CORI do not prevent employers from using CORI obtained through other means). Employers, landlords, and others can then use non-conviction records to discriminate against the former defendant—either because the data broker does not clearly indicate a finding of not guilty, or because the requester assumes fault or a stigma regardless of an acquittal. So, *Which Information Matters?*, *supra*, at 15; Wayne, *Data Broker Threat*, *supra*, at 260 (noting that “as soon as employers or landlords discover that a person has a criminal record, the damage is likely irreparable”); *see also* Colin Lecher & Alex Castro, *Automated Background Checks are Deciding Who’s Fit for a Home*, *The Verge* (Feb. 1, 2019) (noting that reviewers increasingly outsource decisions to background check services).<sup>29</sup> Automatic sealing reduces the risk of criminal records becoming a commodity that haunts people for years.

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<sup>29</sup> <https://www.theverge.com/2019/2/1/18205174/automation-background-check-criminal-records-corelogic> [<https://perma.cc/6DFQ-UV2Z>]



To the extent that records pertaining to cases ending in an acquittal, a no-bill, or a finding of no probable cause are nonetheless improperly obtained or disseminated, automatic record sealing also eases individuals' path to redress. Federal enforcement under the FCRA has made clear that CRAs are responsible for updating their files and removing records that have been sealed, yet they frequently fail to do so. *See* Collateral Consequences Resource Center, *May Background Screeners Lawfully Report Expunged Records?* (Feb. 6, 2018).<sup>30</sup> This is in part because many CRAs rely on consumers to review their own records and report improperly disclosed sealed records. *See* Sharon M. Dietrich, *Ants under the Refrigerator? Removing Expunged Cases from Commercial Background Checks*, American Bar Ass'n Section of Criminal Justice (2016). If all Massachusetts cases ending in acquittals, no-bills, or findings of no probable cause were automatically sealed, it would be easier for applicants, advocates, and regulators to spot and challenge FCRA violations—any record of such a case on a consumer report would be clear evidence of the CRA's failure to maintain proper accuracy procedures. It would also be easier for CRAs to comply with the FCRA, and harder for them to claim that they did not have "reasonable cause to believe" their database contained sealed records. *See* Federal Trade Commission, *Consumer*

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<sup>30</sup> <https://ccresourcecenter.org/2018/02/06/may-background-screeners-lawfully-report-expunged-records> [<https://perma.cc/A42K-QKZJ>]

*Reports: What Information Furnishers Need to Know* (Jan. 2021).<sup>31</sup> Automatic sealing would encourage data brokers to do a better job of checking that the criminal record information that they store and provide is up-to-date and accurate—or stop collecting such information entirely, if compliance proves to be too cumbersome.

Fifty years ago, the Massachusetts Legislature recognized that criminal records “wherein the defendant has been found not guilty by the court or jury, or a no bill has been returned by the grand jury, or a finding of no probable cause has been made by the court” must be sealed, G.L. c. 276, § 100C, because those records threaten former defendants more than they benefit society. Today, those records remain equally irrelevant—but the modern data broker industry has only amplified the danger to former defendants. Automatically sealing such records responds to modern realities of criminal record access and dissemination, honors the clear language of § 100C and is consistent with the Legislature’s overall purpose and design in the 1973, 2010, and 2018 CORI reforms.

### **CONCLUSION**

Massachusetts courts have long recognized that acquitted individuals continue to live under a “cloud of prosecution.” *See, e.g., Police Comm’r of Bos. v.*

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<sup>31</sup> <https://www.ftc.gov/business-guidance/resources/consumer-reports-what-information-furnishers-need-know> [<https://perma.cc/8F9F-FTXL>]

*Mun. Ct. of Dorchester Dist.*, 374 Mass. 640, 659 (1978) (quoting *United States v. Dooley*, 364 F. Supp. 75, 78-79 (E.D. Pa. 1973)); *Commonwealth v. S.M.F.*, 40 Mass. App. Ct. 42, 46 (1996). Consistent with this reality, the will of the 1973, 2010, and 2018 Legislatures, and the reasoning in *Pon*, this Court should revive the automatic sealing provision of §100C. *Amicus* respectfully requests that the Court grant Petitioner-Appellant’s appeal and remand with orders to seal the record of those counts on which he was acquitted.

Dated: January 18, 2023

Respectfully Submitted,

/s/ Mason A. Kortz

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<sup>32</sup> *Amicus curiae* thanks Fall 2022 Harvard Cyberlaw Clinic students Carli Sley, Amy Tong, and Teresa Chen for their invaluable contributions to this brief.

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17(c)(9) of the Massachusetts Rules of Civil Procedure, I, Mason A. Kortz, hereby certify that the foregoing **Brief of Amicus Curiae Upturn in Support of Petitioner-Appellant and Reversal** complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to:

Mass. R. A. P. 16(e) (references to the record);  
Mass. R. A. P. 17(c) (cover, length, and content);  
Mass. R. A. P. 20 (form and length of brief); and  
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14 points and contains 5,471 total non-excluded words as counted using the word count feature of Microsoft Word 365.

Dated: January 18, 2023

Respectfully Submitted,

/s/ Mason A. Kortz

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-13334

COMMONWEALTH,

*Appellee,*

v.

J.F.,

*Petitioner-Appellant.*

**CERTIFICATE OF SERVICE**

Pursuant to Mass. R. A. P. 13(e), I hereby certify, under the penalties of perjury, that on this date of January 18, 2023, I have made service of a copy of the foregoing **Brief of Amicus Curiae Upturn in Support of Petitioner-Appellant and Reversal** in the above captioned case upon all attorneys of record by electronic service through eFileMA.

Dated: January 18, 2023

Respectfully Submitted,

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