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Testimony submitted to the Judiciary Committee
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In SUPPORT of the following bills:

S.B. 653	An Act Concerning Open File Disclosure in Criminal Cases
S.B. 691	An Act Concerning Erasure of Criminal Records
S.B. 761	An Act Promoting The Use of Honest Recommendations Between Employers And Prohibiting An Employer's Use Of A Nondisclosure Agreement Relating To Acts Of Discrimination Occurring In The Employer's Workplace
S.B. 792	An Act Creating an Advisory Committee to Study Discrimination on the Basis of Gender Identity or Expression that Occurs in Workplaces and Schools in the States

Senate Bill No. 653 – An Act Concerning Open File Disclosure in Criminal Cases

Prosecutors are public servants who uphold and enforce the laws that we as the legislature pass. They are entrusted with enormous power in our criminal justice system—a system in which every defendant is innocent until proven guilty. That adage is well known by Americans but not simple to uphold. In criminal procedure, a prosecutor needs to balance the goal of holding offenders accountable while ensuring an innocent person is not falsely convicted. This bill goes to the heart of balancing that responsibility.

The American Bar Association issues standards setting forth best practices for discovery in criminal matters. Prior to trial, it is not the job of a prosecutor to seek a plea or prepare for a guilty verdict, but rather to uncover the truth, which includes an attempt to find evidence that negates guilt, mitigate the offenses charged, impeaches the government's witnesses, and would reduce the punishment for the defendant.[1] As the representative for the state, the prosecutor should "diligently advise other governmental agencies in the case of their continuing duty to identity, preserve, and disclose" information.[2] Regardless if a prosecutor believes information is likely to change the result of the proceedings, the prosecutor should timely disclose all information to the defense.[3]

[1] Criminal Justice Standards for the Prosecution § 3-5.4 (Am. Bar Ass'n 4th ed. 2015)
[2] *Id.*
[3] *Id.*

In many State Attorney offices, and in many cases, there is proper disclosure and productive coordination between prosecutors and defense counsel. But no one believes the system cannot be improved. We have thirteen Judicial Districts in Connecticut, each with a State Attorney who can establish unique practices for discovery that can deviate from the principles set forth by the ABA. The variations make it difficult for defense counsel to know what documents they can expect and when. Criminal defendants are too often asked to accept plea deals before knowing what evidence the state has against them because in some cases the collection of evidence is put off until just before trial. Wrongful convictions resulting from a State Attorney failing to disclose evidence can have any number of grave consequences, including prison for the innocent. This bill can address each of these concerns.

Starting from the premise that discovery in criminal matters should be open, and that it is in the interest of all parties to determine the truth, this bill attempts to improve our criminal justice system in a few ways. The Judiciary Branch sets the rules for criminal procedure in the Practice Book, and for most part, Chapter 40 governs discovery. This bill will expand, beyond what the Practice Book requires, the types of documents that a prosecutor must provide within 45 days of request form defense. Second, within 35 days before trial, the prosecutor must disclose statements of expert witnesses, results of any scientific tests, recordings or transcripts of conversations with the defendant, codefendant or witness, and copies of physical or mental examinations of defendant. Third, both the state and defendant must disclosure witness lists within 10 days if requested by the other party at least 30 days before trial. These first few provisions are not absolute; the bill leaves with the courts the discretion necessary as justice requires to adjust dates or provide exemptions from requirements in the bill.[4] Fourth, the prosecutor must maintain a list of all disclosed materials, which the defense confirms receiving on the record.

Although these changes may seem technical, they have the potential to impact every case in the system, bring more procedural consistency across the state, and create the time necessary for defense counsel to properly fulfil each defendant's Sixth Amendment right to counsel in a criminal proceeding.

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Senate Bill No. 691 – An Act Concerning Erasure of Criminal Records

When a person is sentenced, the court imposes a punishment on behalf of the people of Connecticut. Judges consider multiple factors when deciding a prison sentence, and they do so on a case-by-case basis. When a defendant completes that time, he or she is thought to have paid a debt in full. Any additional punishment is essentially unfair. Yet, society as a whole continues to punish individuals upon completion of their sentence by treating them differently.

There is a strong correlation between a released inmate's ability to obtain housing and employment and whether he or she will reoffend. The sad truth is that a person's criminal record makes it unfairly more difficult to acquire housing and employment. Generally, conviction information is public in Connecticut. Technology, data collection, and the internet have made it easier than ever to access criminal records. The availability of records today has exacerbated the problem convicted individuals face with housing and employment.

[4] See e.g., lines 40, 61, 129, 174. S.B. 653, LCO no. 6345 (2019).

Removing public access to conviction records, also known as "Clean Slate" legislation, is gaining traction in other jurisdictions, and there is a grass roots effort to remove the stigma of criminal records, and promote rehabilitation, restoration, and redemption. Pennsylvania recently adopted Clean Slate legislation with support from Democrats, Republicans, and the business community,[5] which shows this can be a non-partisan issue.

I would like to thank the Committee for raising this bill and considering new proposals that could help thousands of Connecticut citizens who have served their time and want to be productive members of society.

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Senate Bill No. 761 – An Act Promoting The Use Of Honest Recommendations Between Employers And Prohibiting An Employer's Use Of A Nondisclosure Agreement Relating To Acts Of Discrimination Occurring In The Employer's Workplace

Section 1 of the Bill – Honest Recommendations in the Workplace

Most of us remember the incident that came to light one year ago in the Washington, D.C. office of former Congresswoman Elizabeth Esty. Her chief of staff and another employee engaged in a workplace romance that turned abusive. The victim alleges the chief of staff screamed at her repeatedly and hit her on the back of the head in the workplace, and that he threatened her career if she reported anything to the Office of Congressional Ethics. The victim left Esty's office, and the chief of staff continued to harass her with phone calls and a threatening voicemail. Esty ultimately decided to part ways with her chief of staff because of his offensive actions. But, she provided him a positive letter of recommendation and discussed his potential employment with a non-profit that then hired him. In providing the reference, Esty never revealed to the subsequent employer the chief's acts of sexual harassment and violence.

Under Connecticut common law, Esty had a duty not to lie, and had she explicitly lied then the non-profit organization could have brought a claim of fraud against her to recover any damages arising from its hiring of the employee.[6] The employees of the non-profit, who worked alongside Esty's former chief of staff, would not have had any claim against Esty. The bill before you today would impose a duty on employers, who want to provide a recommendation, to affirmatively disclose known instances of sexual harassment and assault. If the employer fails to provide this information and if the employee commits acts of sexual harassment or sexual assault in the new workplace, the past employer would be liable to the new employer and its employees for damages.

Honest employers have nothing to fear. Section 1 does not create a criminal or civil penalty imposed by government. It does not require employers to give recommendations. Section 1 only imposes a duty to disclose information *if* a recommendation is given by an individual who knows

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[5] Pa. Act 2018-56

[6] In Connecticut, a plaintiff has a claim for common law fraud if the plaintiff proves to a court or jury the following elements: (1) The defendant made a false statement of fact, which includes omitted information if the defendant owed a duty to disclose any relevant information, (2) The defendant knew the statement was false, (3) The defendant made the statement to induce the plaintiff to act upon it, and (4) The plaintiff did act upon the false statement to his or her injury. *Weisman v. Kasper*, 233 Conn. 531, 539 (1995). Fraud is sometimes referred to as fraudulent misrepresentation, or intentional misrepresentation.

about the sexual harassment or assault. If a company's HR department knows of an act of sexual harassment, but a supervisor in the company is unaware and gives a recommendation, then the company would not be liable.

Section 2 – Nondisclosure Agreements that address Workplace Discrimination

Section 2 of this bill would bar employers from requiring current or prospective employees to enter into nondisclosure agreements (NDAs) that would silence them from disclosing acts of discrimination, including sexual harassment or assault, in the employer's workplace. Employers are increasingly requiring employees to sign NDAs as a condition of employment. Employees are often told to sign "standard HR forms" that prohibit the employee from saying anything negative about the company, or disclosing any non-public information, and these clauses can be used to silence victims of discrimination. An employer cannot prohibit a person from reporting a crime to authorities, but a victim of harassment who speaks out to friends, family, or coworkers, finds himself or herself contractually prohibited from doing so. In practice, employer's use these agreements to instill fear and threaten employees with legal action.

This bill would prohibit employers from requiring employees, as a condition of employment, to sign any agreement with a nondisclosure clause that would prohibit the employee from discussing matters of workplace discrimination, including harassment. The Department of Labor has authority to fine employers up to $300 for a violation of many workplace labor laws.[7] That authority would be extended to enforce this law as well. Further, the bill creates a private right of action for an employee who is asked to sign, or does sign, an NDA prohibited by this bill.

To avoid some concerns, I want to clarify what this bill will not do. This bill would not prohibit a victim from signing an NDA as part of a settlement agreement with an employer or the person that discriminated or harassed him or her. Victims will remain free to decide whatever settlement agreement is right for them. This bill does not prohibit other NDAs in the workplace addressing other matters, such as trade secrets, marketing strategies, client lists, and other non-public information that employees are commonly expected to keep confidential. In fact, nothing in this bill imposes a mandate on employers to do anything.

In the #MeToo era, many victims are finding their voice and courage to come forward and tell their stories and no longer live in isolation. Measures such as Senate Bill 761 would help to reduce the chances of creating more victims and to hold enablers accountable.

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Senate Bill No. 792 – An Act Creating an Advisory Committee to Study Discrimination on the Basis of Gender Identity or Expression that Occurs in Workplaces and Schools in the States

Since 1980, we have witnessed in this country and around the world a transformation of social acceptance for LGBTQ individuals. I have real concerns that this progress has reversed direction for transgender individuals. According to a 2016 study, transgender youth are struggling

[7] C.G.S. § 31-69a (authorizing DOL to issue fines addressing any violations of Chapter 557 and 558, which includes workplace safety for children, wage and hour laws, reasonable accommodations for breastfeeding, equal pay protections, smoking, sexual harassment against interns, and other labor laws).

compared to other LGBTQ young people. "Half of transgender youth reported feeling hopeless and worthless most or all of the time, and 40 percent said they mostly or always felt depressed. 70 percent said that these and similar feelings have increased [following the 2016 election]. Thirty-six percent had been personally bullied or harassed, and 56 percent had changed their self-expression or future plans because of the election."[8]

Actions by the current administration in Washington exacerbate these concerns. President Trump banned transgender people from serving in the military without first consulting military leaders. The Department of Justice reversed policy that provided non-discrimination protections for transgender people in the workplace, pursuant to Title VII of the Civil Rights Act. The Department of Education now will not investigate or take action on any complaints filed by transgender students who are banned from restrooms that match their gender identity. Department of Housing and Urban Development removed transgender non-discrimination guidelines aimed to protect transgender people in homeless shelters. Staff at the Centers for Disease Control and Prevention were instructed not to use the term "transgender" in official documents.

At a time when most transgender youth struggle with being transgender and the federal government is intentionally exacerbating the struggle for many Americans, we should ensure Connecticut's laws are aligned with our principles of equality and fair opportunity. That starts with our schools and the workplace. Public Act 11-55 requires that children have the opportunity to participate in school activities without being discriminated on the basis of gender identity or expression.[9] The same Public Act created a new protected class of gender identity and expression under our workplace discrimination protections.[10] The advisory committee established by this bill will inform the General Assembly whether these laws have been successful, and whether there are any amendments or new laws that would be appropriate for our consideration.

Sincerely,

Martin M. Looney

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[8] Human Rights Campaign, *Post-Election Survey of Youth*, available at https://assets2.hrc.org/files/assets/resources/HRC_PostElectionSurveyofYouth.pdf?_ga=2.212486740.1161759612.1549498520-1611780185.1549498520&_gac=1.183617042.1549498520.EAIaIQobChMIgazI46uo4AIVAhgMCh1GuwyGEAAYASAAEgIMhvD_BwE

[9] Codified, in part, at C.G.S. § 10-15c.

[10] Codified, in part, at C.G. S. § 46a-60.