N.Y. County Clerk Index No. 10/106579

New York Supreme Court
Appellate Division—First Department

CLIVE LINO and DARYL KHAN,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

– v. –

The CITY OF NEW YORK; RAYMOND W. KELLY,
New York City Police Department Commissioner, in his individual and official capacities;
JANE DOE, New York City Police Lieutenant, in her individual and official capacities; and
JOHN DOES 1-3, New York City Police Officers, in their individual and official capacities,

Defendants-Respondents.

BRIEF AMICUS CURIAE

for CLIVE LINO and DARYL KHAN on behalf of
The Community Service Society of New York, The Bronx Defenders,
the Center for Community Alternatives, the Legal Action Center,
The Legal Aid Society, MFY Legal Services, Youth Represent,
the New York County Lawyers' Association, and the Fortune Society

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April 9, 2012

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The Community Service Society of New York, The Bronx Defenders, the Center for Community Alternatives, the Legal Action Center, The Legal Aid Society, MFY Legal Services, and Youth Represent are nonprofit organizations that use litigation and policy advocacy to stabilize people with criminal records by removing legal barriers to employment, housing, and family unification. They have a vested interest in the sealing laws—Criminal Procedure Laws 160.50 and 160.55—that, respectively, seal arrests that do not result in convictions and seal most non-criminal offenses. Sealing removes such records from view and consideration by employers, housing providers, and the general public. The New York County Lawyers' Association is a bar association, with many members who act as assigned counsel in criminal defense cases and whose clients are affected by the sealing laws. The Fortune Society is a nonprofit social service and advocacy organization serving people with criminal histories, many of whom depend on the sealing laws to acquire and keep employment and housing.

The **Community Service Society** of New York ("CSS") has led the fight against poverty in New York City for more than 168 years. Its legacy includes significant milestones, such as establishing the prototype for the national free school

lunch program; serving as the catalyst behind the New York City's first tenement housing laws; aiding victims of disaster, from the Titanic to the World Trade Center; creating the nation's largest senior volunteer program; and developing the curriculum that led to creation of the Columbia University School of Social Work. CSS's primary focus is on the value of living-wage jobs and work supports to stimulate social and economic mobility among the working poor. To that end, CSS utilizes retired senior volunteers to serve over 500 clients per year in its Record Repair program, which helps people request, understand, and correct their official criminal histories. In the program's nearly three years of existence, it has found that 45% of clients' New York State rap sheets contain at least one error, including cases that should be sealed but are not.

Since 1997, **The Bronx Defenders** has annually provided comprehensive legal and social services to nearly 13,000 poor families trapped in the criminal justice and child welfare systems in the Bronx; this year it will represent more than 28,000. The Bronx Defenders' clients are often the people social services have failed to reach: those without medical care, affordable housing, food stamps, access to employment, and education. The addiction, homelessness, unemployment, illness, and lack of social service support that drives clients into the criminal and family justice systems

is not solved—and is often exacerbated—by those systems, drastically increasing the risk of re-arrest. The Bronx Defenders seeks to break this cycle by offering holistic representation to overcome the statutory and societal barriers out of poverty. Under one roof, The Bronx Defenders unites interdisciplinary teams of criminal, family, and civil attorneys; social workers, investigators, parent advocates, and community organizers who work together to address the root causes and consequences of clients' involvement with the system. The office corrects hundreds of criminal record sealing errors for clients every year and fights the lost housing and employment opportunities that inevitably result from these errors. By taking their clients' needs as the starting point of their practice, they not only win better results for them in the courtroom, but also achieve positive change in their lives, often through employment, that lasts long after their court cases have ended.

Youth Represent is a non-profit law firm whose mission is to ensure that young people affected by the criminal or juvenile justice system are afforded every opportunity to reclaim lives of dignity, self-fulfillment, and engagement in their communities. To that end, it provides criminal and civil legal services to indigent youth aged 24 and under. Part of Youth Represent's work is assisting young people in obtaining their official criminal records and correcting the errors that consistently

appear, which are often due to an administrative failure to seal eligible records. Youth Represent also teaches youth about their rights and responsibilities, advising young people about how to handle stop-and-frisk encounters with police officers. Youth Represent hears about police encounters from young people who are targeted persistently, and they are distressed when police officers tell them that their names are in a computer, even if the young person is immediately released. Youth Represent's work helping young people move beyond criminal justice system involvement to lead lives of dignity and self-fulfillment depends on the effectuation of New York's sealing laws.

The **Center for Community Alternatives** ("CCA") is a non-profit community-based organization that promotes re-integrative justice and a reduced reliance in incarceration through direct services, policy development, and advocacy. For thirty years, CCA has assisted people caught up in the criminal justice system anywhere from the point of initial contact with law enforcement, to arrest, to incarceration, and to reentry. CCA's work has instilled in us a keen awareness of the stigma that arises—and all too often endures—from having any level of contact with the criminal justice system. Amongst the many services it provides, CCA assists individuals with past criminal justice involvement who are seeking jobs, occupational licensing, and

access to institutions of higher education. CCA helps people obtain official criminal history records and identify and correct mistakes on those records, which includes sealing arrests that did not lead to conviction. In the process, CCA has learned how common such mistakes are and how critical it is to be able to correct them. As a result, CCA has a strong interest in ensuring that avenues are available by which individuals can correct errors and seal information that should not be made available to the public.

The **Legal Action Center** ("LAC") is a private, not-for-profit law and policy organization whose sole mission is to fight discrimination against, and protect the privacy of, people living with criminal records, drug or alcohol histories, and/or HIV/AIDS. LAC's multi-faceted approach involves direct client legal services and impact litigation; technical assistance and training to agencies that serve its clientele; and policy advocacy to create systemic changes that will benefit its clients. Since its founding in 1972, LAC has helped tens of thousands of New Yorkers overcome legal barriers to accessing jobs, housing, health care, government benefits, and other services critical to their becoming productive members of society. It offers a comprehensive range of civil legal services, including assisting clients to obtain and seal eligible entries on their New York State rap sheets; seek and obtain certificates

of good conduct or relief from disabilities that are often essential to finding jobs or acquiring professional licenses; prepare and file employment discrimination complaints with the New York State Human Rights Division; and gather letters of reference and other evidence of rehabilitation.

Since 1876, **The Legal Aid Society** has provided free legal services to New York City residents who are unable to afford private counsel. By contract with the City, the Society serves as the primary defender of poor people prosecuted in the State court system. Each year the Society represents thousands of persons who are stopped, frisked, and arrested, but are not convicted of any crime and are therefore entitled to sealing of their Police records under the Criminal Procedure Law. Through its Criminal Defense Special Litigation Unit and also the Housing and Employment Law units of its Civil Practice, the Society assists clients who believe they have been subjected to unlawful discrimination because of past contacts with the criminal justice system. Legal Aid pursues this interdisciplinary work through negotiation, correspondence, legislative advocacy, and, when necessary, litigation. This effort has included prior cases to enforce and implement the sealing provisions of the Criminal Procedure Law, such as an *amicus* brief in *Katherine B. v. Cataldo*, the most recent Court of Appeals case addressing the issue. The Society has a strong

interest in ensuring that clients protected by these legal provisions have an effective means to ensure that their rights are respected.

MFY Legal Services, Inc. ("MFY") is a not-for-profit organization established in 1963 that provides free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform, and policy advocacy. MFY serves approximately 7,500 poor and low-income New Yorkers annually on housing, public benefits, consumer, foreclosure, family, and employment matters. MFY also serves individuals with criminal records by providing advice, counsel, advocacy, and representation in court and administrative proceedings to remove barriers to employment or occupational licensing. This work frequently involves obtaining, reviewing, and correcting criminal history records and ensuring that our clients are not discriminated against in employment based upon sealed arrests that do not lead to convictions. Because of the far-reaching implications of this matter for its clients, MFY has a substantial interest in the outcome of this Court's decision.

The **New York County Lawyers' Association** ("NYCLA") is a not-for-profit membership organization of 9,000 attorneys, judges, and law students committed to

applying its knowledge and experience in the field of law to the promotion of the public good and ensuring access to justice for all. Founded in 1908, NYCLA was the first major bar association in the country to admit members without regard to race, ethnicity, religion, or gender. Since its inception, NYCLA has pioneered some of the most far-reaching and tangible reforms in American jurisprudence, and has continuously played an active role in legal developments and public policy, including educating the public and the bar about the collateral consequences of criminal convictions. NYCLA commits resources to underserved populations by holding public forums on topics such as New York City summons practice; filing amicus briefs on civil rights and criminal justice issues; producing a Youth Law Manual to help young people understand their rights; and providing pro bono representation for people denied employment licenses because of prior criminal convictions.

Since its founding in 1967, **the Fortune Society** has served as a primary resource for New York City men and women released from jail and prison; it now serves more than 3,000 men and women with criminal justice histories annually. Fortune's mission is to support successful reentry from prison and promote alternatives to incarceration, thus strengthening our communities. Fortune does this by believing in the power of individuals to change; building lives through holistic

service programs shaped by the needs of our clients and delivered by culturally-competent, professional staff; and changing minds to promote the creation of a fair, humane, and truly rehabilitative correctional system. While Fortune has always engaged in advocacy and community education, in 2007 it launched the David Rothenberg Center for Public Policy to increase the organization's impact on local and national public policy and advocacy activities.

The above organizations submit this *amicus curiae* brief in support of Plaintiffs-Appellants Clive Lino and Daryl Kahn to reverse the decision below, which found that they lacked standing to enforce their rights—and those of a putative class—under Criminal Procedure Law sections 160.50 and 160.55 and, in dicta, that these laws do not provide a private right of action. The enforceability of sealing laws is vitally important to amici's clients, many of whom would be denied employment and housing for simply having been arrested without being convicted of any crime.

PRELMINARY STATEMENT

Plaintiffs-Appellants Clive Lino and Daryl Kahn are two of the nearly three million individuals who were stopped and questioned by the New York City Police Department ("NYPD") from 2003 until 2010, when this class action lawsuit was filed. (R. 25.) Every time an individual is stopped and questioned, the NYPD officer must complete a UF-250 form, which records information about the person stopped, what led to the stop, and what happened during the stop. (R. 24.) In March 2006, the NYPD began compiling the information from UF- 250s in a centralized computer database ("Stop and Frisk Database"). *Id.* The records in the Stop and Frisk Database, including those of Plaintiffs-Appellants, should be but are not sealed. (R. 25-26.) Instead, the NYPD refuses to follow statutory mandates to seal Plaintiffs-Appellants' records, retaining them indefinitely for future use, according to Police Commissioner Raymond Kelly. (R. 26-27; 37.)

Both Plaintiffs-Appellants were, on separate occasions, arrested and charged with violation-level offenses that were later sealed pursuant to Criminal Procedure Law sections 160.50 or 160.55. (R. 21, 23–24.) If a criminal accusation is terminated in favor of the accused or if a defendant is found guilty of most non-criminal offenses, the sealing provisions contained in sections 160.50 and 160.55 are

automatically triggered. Both of these sealing statutes require that all police records and papers, including copies, relating to the arrest "shall be sealed and not made available to any person or public or private agency," except under extremely limited conditions. N.Y. Crim. Proc. L. §§ 160.50(1)(c); 160.55(1)(c).

Even though Plaintiffs-Appellants' records should have been sealed, however, they remain in the Stop and Frisk Database and available for use by the NYPD. (R. 17.) This is so even though sealed records should only be available to the defendant; the defendant's attorney; and, in enumerated circumstances, certain law enforcement agencies. Under both of the sealing statutes, the police may only use sealed records "upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it." *Id.* at 160.50(1)(d)(ii); 160.55(1)(d)(2).

ARGUMENT

Plaintiffs-Appellants, upon behalf of a putative class, have standing to challenge the NYPD's failure to seal their records in the Stop and Frisk Database. Additionally, the NYPD is using the records without meeting one of the carefully circumscribed exceptions to the sealing statutes, and this improper, unauthorized use of unsealed arrest records can have a devastating impact on people's lives,

causing exclusions from employment, licensing, and housing. Individuals must be allowed to privately enforce their sealing rights *before* disclosure to reinforce statutory protections, including those prohibiting criminal records-based discrimination, and preserve an important tool to maintain employment and housing.

I. WITHOUT SEALING, INDIVIDUALS ARE HARMED THROUGH THE LOSS OF EMPLOYMENT AND HOUSING OPPORTUNITIES

"There is simply no erasing the stigma and detriment to one's reputation which frequently flow from merely having been subjected to criminal process." *Death of Manners*, 143 Misc.2d 945, 947; 542 N.Y.S.2d 485 (Suffolk Cty. Ct. 1989) (citations omitted). While an individual is presumed innocent until proven guilty and "(t)he mere fact that a (person) has been arrested has very little, if any, probative value in showing that he has engaged in misconduct," *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 241 (1957); popular sentiment often holds otherwise. *See Hynes v. Karassik*, 47 N.Y.2d 659, 662; 393 N.E.2d 1015, 1017 (1979) ("That detriment to one's reputation and employment prospects often flows from merely having been subjected to criminal process has long been recognized as a serious and unfortunate by-product of even unsuccessful criminal prosecutions"). This can lead to job and housing denials to people who were never found guilty of any crime, keeping them at the margins of society.

The sealing laws are "consistent with the presumption of innocence, which simply means that no individual should suffer adverse consequences merely on the basis of an accusation, unless the charges were ultimately sustained in a court of law." *Harper v. Angiolillo*, 89 N.Y.2d 761, 766; 690 N.E.2d 602 (1997) (citing Governor's Approval Mem., 1976 N.Y. Legis. Ann. at 408, 409).

Courts have denied access to sealed records in employment and housing proceedings, promoting the goal of reentry into society, which is codified in Penal Law § 1.05(6). In employment disciplinary proceedings, sealing has allowed people to maintain their jobs after criminal charges are dismissed. *See Joseph M. v. N.Y. City Bd. of Educ.*, 82 N.Y.2d 128, 134; 623 N.E.2d 1154, 1157 (1993); *Scott D. v. People*, 13 A.D.3d 622, 623; 787 N.Y.S.2d 378, 379 (2d Dep't App. Div. 2004); *Police Comm'r of the City of N.Y.*, 131 Misc. 2d 695, 700; 501 N.Y.S.2d 568, 571 (Sup. Ct. N.Y. Co. 1986). Once sealed, arrest records cannot be used in administrative licensing hearings, thereby preventing the loss of an occupational license simply because an individual was arrested. *Skyline Inn Corp. v. N.Y. State Liquor Auth.*, 44 N.Y.2d 695, 696-97; 376 N.E.2d 912, 913 (1978) (remanding for reconsideration of sanction without relying on dismissed criminal charges); *53rd St. Rest. Corp. v. N.Y State Liquor Auth.*, 220 A.D.2d 588, 588; 632 N.Y.S.2d 815, 815 (1995) (upholding

revocation only because substantial evidence existed "independent of the testimony which the detective admitted was the result of refreshing his recollection with (sealed) documents he should not have possessed.").

In the housing context, courts have denied district attorneys' applications to unseal records for use in summary eviction proceedings. *See People v Diaz*, 15 Misc.3d 410, 414; 833 N.Y.S.2d 372, 375 (Sup. Ct. N.Y. Co. 2007) ("[i]t seems a harsh, inappropriate result to default on a prosecution, have the records sealed and then seek eviction [using those sealed records]"); *M.S. Hous. Assocs v. Williams*, 13 Misc.3d 1233(A) at *1, 831 N.Y.S.2d 354 (Civ. Ct. N.Y. Co. 2006); *People v. Canales*, 174 Misc.2d 387, 392; 664 N.Y.S.2d 228, 231 (Sup. Ct. Bronx Co. 1997). Likewise, sealed records cannot be used by a housing authority wishing to "draft charges or to obtain other documents or information." *Manhattanville Houses*, T.C. 106; Feb. 27, 2008 (Pannell, H.O.); *Jane Doe, Richmond Terrace Houses I*, Case No. 3222/08; Sept. 10, 2008 (Pannell, H.O.).

When the sealing laws are disregarded, jobs are lost and housing disappears. The sealing laws ensure that people do not suffer adverse civil consequences if they are convicted of non-criminal violations or merely accused of crimes when those charges are never proven beyond a reasonable doubt. They preserve employment and

housing so that inconsequential contact with the criminal justice system does not result in a potentially devastating loss of employment and housing, which destabilizes the families and communities that amici serve.

II. PLAINTIFFS-APPELLANTS HAVE STANDING BECAUSE THE NYPD REFUSES TO SEAL RECORDS IN VIOLATION OF THE SEALING STATUTES.

Plaintiffs-Appellants have standing to protect their sealing rights because the NYPD refuses to follow the clear statutory mandate to seal their records. Additionally, their records—along with the records of thousands of other people—are instead used in ongoing investigations without the court process and justification required by Criminal Procedure Law § 160.50 and 160.55. *See Wilson v. City of N.Y.*, 240 A.D.2d 266, 267; 659 N.Y.S.2d 8, 10 (1st Dep't App. Div. 1997) (individual with sealed record is "party protected by the privilege"). Courts require plaintiffs to have standing to ensure that they are aggrieved parties with an actual controversy to decide. *See, e.g.*, David D. Siegel, N.Y. Practice § 136 (West Pub. Co. 2005). As relevant here, plaintiffs have standing if "the administrative action will in fact have a harmful effect on the [party] and that the interest asserted is arguably within the zone of interest to be protected by the statute." *Dairylea Coop. v. Walkley*, 38 N.Y.2d 6, 9; 377 N.Y.S.2d 451, 454 (1974).

"(Any) restriction on standing is largely of judicial creation, often used to avoid difficult issues or unpleasant results; generally standing should be expanded rather than contracted." *Burke v. Sugarman*, 35 N.Y.2d 39, 45; 315 N.E.2d 772, 775 (1974). In *Burke*, the Court of Appeals overturned two lower court decisions and found that petitioners, who had passed the civil service exam and been placed on an eligible list, had standing to challenge appointments that were illegal under the civil service rules. *Burke*, 35 N.Y.2d at 42; 315 N.E.2d at 716. Had the Court not found standing, "then appointments or designations which may be contrary to law (would) be effectively insulated from public scrutiny, judicial oversight, and perhaps any review whatsoever." *Id.* at 45; 775. Indeed, the Court of Appeals has held that a "fundamental tenet of our system of remedies is that when a government agency seeks to act in a manner adversely affecting a party, judicial review of that action may be had." *Dairylea*, 38 N.Y.2d at 10; 377 N.Y.S.2d at 455 (citations omitted). Only where a "clear legislative intent" negates review or no injury in fact exists should courts deny standing. *Id.*

Plaintiffs-Appellants have standing because they are aggrieved by the NYPD's illegal failure to seal and ongoing use of their records, and their interest in enforcing the sealing laws fall squarely within the "zone of interest" protected by New York's

comprehensive sealing regime. The NYPD's failure to seal Plaintiffs-Appellants' records clearly violates the law: the plain statutory language mandates sealing, and there is "no authorization" for the use of sealed records in law enforcement investigations. *People v. Patterson*, 78 N.Y.2d 711, 714; 587 N.E.2d 255, 256 (1991); N.Y. Crim. Proc. L.§§ 160.50(c), 160.55(c). The decision below ignores decades of case law describing the purpose of the sealing laws and the injury resulting from violations of the sealing laws. *See, e.g.*, *Prop. Clerk v. Taylor*, 237 A.D.2d 119; 654 N.Y.S.2d 745 (1st Dep't App. Div. 1997); *Brown v. Passidomo*, 127 Misc.2d 700; 486 N.Y.S.2d 986 (Sup. Ct. Erie Co. 1985). The improper failure to seal and use of records that should be sealed, along with the stigma that follows, results in an injury that the statutes specifically seek to avoid.

"(T)he 'general proscription against releasing sealed records and materials [is] subject only to a few narrow exceptions.'" *Katherine B. v. Cataldo*, 5 N.Y.3d 196, 202; 833 N.E.2d 698, 701 (2005) (quoting *Joseph M.*, 82 N.Y.2d at 134; 623 N.E.2d at 1157). "These six statutory exceptions are precisely drawn. This underscores the Legislature's commitment to prohibiting disclosure of sealed records—once initial sealing has not been forestalled by the court in the interests of justice—except where the statute explicitly provides otherwise." *Id.*, 5 N.Y.3d at 204; 833 N.E.2d at 702.

Only the exception for law enforcement agencies applies to the present case,[1] which allows disclosure of sealed records to "a law enforcement agency upon ex parte motion in any superior court, if . . . justice requires," N.Y. Crim. Proc. L. § 160.50(1)(d)(ii). This is a narrow exception, permitting law enforcement access only in the context of specific, ongoing criminal investigations, and then only with a court order. *See, e.g.*, *Katherine B.*, 5 N.Y.3d at 205; 833 N.E.2d at 703. Absent from the record, however, is any evidence that the NYPD obtained—or even sought—a court order allowing it to use sealed information in ongoing investigations. As in *Burke*, if Plaintiffs-Appellants lack standing to challenge the NYPD's failure to seal their records—along with the NYPD's unilateral use of such records without a court order—this practice will continue without effective public or judicial review.

Collectively, amici have represented hundreds of New Yorkers denied jobs or prevented from living in public housing because of the illegal use of a sealed criminal record. It stretches credulity to argue that the subject of a sealed record has no standing to challenge a government agency's refusal to follow the sealing laws, especially when that refusal is the root of the stigma the sealing statutes are designed

[1] A court may not use its inherent authority to unseal police department records because such authority "does not extend to the records of executive agencies not normally subject to its direction, particularly those of the police." *Dorothy D. v. N.Y. City Prob. Dept.*, 49 N.Y.2d 212, 215; 400 N.E.2d 1342 (1980).

to prevent. Because Plaintiffs-Appellants' records are stored in the Stop and Frisk Database, they have standing to challenge the NYPD's unlawful failure to seal and use of their records, and the decision of the lower court must be overturned.

III. A PRIVATE RIGHT OF ACTION TO ENFORCE THE SEALING LAWS EXISTS.

As the Court of Appeals wrote over twenty years ago, "the Legislature intended to provide a civil remedy for violation of the provisions of CPL 160.50." *Patterson*, 78 N.Y.2d at 716; 587 N.E.2d at 257. The lower court's conclusion to the contrary—in dicta—must be therefore reversed.

Whether a private right of action exists depends on a three-prong test set forth in *Sheehy v. Big Flats Cmty. Day, Inc.*, 73 N.Y.2d 629, 633; 541 N.E.2d 18, 20 (1989). First, the plaintiff must be among the class of persons the statute was intended to benefit. *Id.* Second, the Legislature's purpose in enacting the statute must be considered, and a private right of action must promote that purpose. *Uhr v. E. Greenbush Cent. Sch. Dist.*, 94 N.Y.2d 32, 38; 720 N.E.2d 886, 889 (1999). Finally, creation of a private right of action must be consistent with the overall statutory scheme. *Sheehy*, 73 N.Y.2d at 633; 541 N.E.2d at 20.

The lower court did not engage in this three-prong analysis, but instead erroneously relied on two Court of Claims decisions finding no private right of

action for a breach of the Youthful Offender Law's confidentiality provisions: *Anderson-Haider v. State*, 29 Misc.3d 816, 819; 907 N.Y.S.2d 817, 819 (Ct. Cl. 2010) and *Yanicki v. State*, 174 Misc. 2d 149, 150-51; 662 N.Y.S.2d 976, 978 (Ct. Cl. 1997). Just last year, however, that same court found a private right of action for violating Criminal Procedure Law § 160.50. *Romero v. State*, 33 Misc. 3d 599, 604; 930 N.Y.S.2d 775, 781 (Ct. Cl. 2011).

The Youthful Offender Law differs from the sealing laws because, unlike the sealing statutes, it does not require the destruction or return of such records, nor does it incorporate the additional civil benefits of Criminal Procedure Law § 160.60. Additionally, *Anderson-Haider* cited, without any independent analysis, *Yanicki*, which involved a suit against state police who disclosed to the media that David Yanicki had been adjudicated a Youthful Offender more than 30 years previously. *Yanicki* is distinguishable because it did not involve the disclosure of sealed records—the police revealed that Mr. Yanicki had been adjudicated a Youthful Offender without disclosing his underlying criminal charges—and it was done in response to a media inquiry, not an ongoing police investigation implicating Mr. Yanicki's liberty.

Here, Plaintiffs-Appellants meet the first *Sheehy* prong because their criminal cases were sealed pursuant to Criminal Procedure Law sections 160.50 or 160.55,

placing them among the class of persons the sealing laws were intended to benefit. *See Wilson*, 240 A.D.2d at 267, 659 N.Y.S.2d at 8. Because a private right of action promotes strict adherence to the carefully designed procedure for unsealing and is also consistent with the ability of Plaintiffs-Appellants to vindicate their rights—especially since the Legislature vested the Judiciary with exclusive oversight of sealed records—a private right of action exists under the final two prongs of the *Sheehy* test. *Sheehy*, 73 N.Y.2d at 633; 541 N.E.2d at 20.

A. A private right of action compels compliance with the carefully designed statutory procedure for unsealing records.

Police may only use sealed records if a superior court, upon ex parte application, finds that justice requires the motion be granted. N.Y. Crim. Proc. L. § 160.50(1)(d)(ii). This exception, like every other, has been carefully carved out by the Legislature, and that legislative intent has, in turn, been implemented by the courts. Any exception to the "general proscription against releasing sealed records and materials . . . , should be created by the Legislature, not by the courts." *Wilson*, 240 A.D.2d at 268; 659 N.Y.S.2d at 8.

The second *Sheehy* prong considers the legislative purpose behind the statute and whether a private cause of action promotes that purpose. *Sheehy*, 73 N.Y.2d at 633; 541 N.E.2d at 20. As the Court of Appeals recognized in *Joseph M.*, Criminal

Procedure Law § 160.50 was enacted in 1976 as part of the same package of legislation that added a provision to the State Human Rights Law preventing employment discrimination based upon sealed records. *Joseph M.*, 82 N.Y.2d at 131; 623 N.E.2d at 1155; *see* N.Y. Exec. L. § 296(16). "(T)he purpose of CPL 160.50 is to protect accused individuals from the unauthorized use of their records." *Green v. Montgomery*, 95 N.Y.2d 693, 701; 746 N.E.2d 1036, 1041 (2001); along with "any 'stigma' flowing from an accusation of criminal conduct terminated in favor of the accused, thereby affording protection (i.e., the presumption of innocence) to such accused in the pursuit of employment, education, professional licensing and insurance opportunities." *Patterson*, 78 N.Y.2d at 716; 587 N.E.2d at 257.

Police disregard of the sealing laws is a serious problem with state-wide implications. Aside from Plaintiffs-Appellants' allegations, for example, the Onondaga County Sheriff until recently sold "background checks" to employers and landlords, according to a report by the Center for Community Alternatives, an amicus.[2] The "background checks," however, were nothing but a list of arrests within the county, and a study of 70 "background checks" revealed that over 60% contained information that had been or should have been sealed. *Id.* Of those

[2] Center for Community Alternatives, *The Use of CHAIRS Reports as Criminal Background Checks* 11 (Mar. 2011), *available at* http://www.communityalternatives.org/pdf/CHAIRS-FullReport-FINAL-March2011-1.pdf.

reports that contained sealed information, 60% listed two or more sealed cases, making individuals' records look quite lengthy when, in actuality, they may have had no record of criminal convictions at all. *Id.* at 12. The illegal refusal to seal and the disclosure of sealed records are especially damaging when done under the imprimatur of the police department because, charged with enforcing the law, the police may reasonably be assumed to first understand it.

This Court found that a private right of action to enforce the regulation of prescriptions promoted the legislative purpose when it "reinforce(d) the Legislature's efforts to secure compliance with the statute" and complemented existing statutory penalties, including criminal charges and license revocation. *Izzo v. Manhattan Med. Group, P.C.*, 164 A.D.2d 13, 17; 560 N.Y.S.2d 644, 647 (1990). In *Izzo*, the estate of a person who was addicted to prescription drugs and overdosed sued a pharmacy after it sold him drugs with a prescription form that lacked a physician's stamp. *Id.* Another case involved a statute intended to help homeowners sell or refinance their homes by requiring mortgagees to adhere to certain deadlines and prohibiting fees for certain ministerial acts. *Negrin v. Norwest Mortg., Inc.*, 263 A.D.2d 39, 48; 700 N.Y.S.2d 184, 191 (2d Dep't App. Div. 1999) (cited favorably in *McLean v. City of N.Y.*, 12 N.Y.3d 194, 201; 905 N.E.2d 1167, 1172 (2009)). Even though the statue

provided for a private right of action in only one subsection, the court found a private right of action in another since additional enforcement was consistent with the overall purpose of the statute. *Id.*

Here, the court below failed to recognize that the purpose of the sealing laws was to prevent unauthorized disclosure and collateral civil consequences. As in *Izzo* and *Negrin*, a private right of action to challenge a failure to seal will promote adherence to the sealing laws and the legislative purpose of preventing unauthorized disclosure of sealed records. Therefore, this Court should find that individuals may enforce the sealing laws through a private right of action.

B. A private right of action is consonant with how sealing is treated in other areas of law and necessary to enforce the statutory limits on disclosure of sealed records.

A private right of action is consistent with the strong protection for sealed records under the State Human Rights Law and will prevent the wholesale disregard of the processes law enforcement must go through in order to obtain sealed records.

Central to the third *Sheehy* prong is whether a private right of action will interfere with or complement any existing remedies. The statutory scheme will not be harmed by a private right of action if "there is no regulatory agency to enforce compliance," *Negrin*, 263 A.D.2d at 48; 700 N.Y.S.2d at 191. Notably, a private right

of action may still be implied even if the statute already contains civil and criminal remedies. *Doe v. Roe*, 190 A.D.2d 463, 470; 599 N.Y.S.2d 350, 353 (4th Dep't App. Div. 1993). Cases to the contrary involve statutes with private rights of action in some sections and not others, *Carrier v. Salvation Army*, 88 N.Y.2d 298, 303; 667 N.E.2d 328, 330 (1996); *Sherman v. Robinson*, 80 N.Y.2d 483, 487; 606 N.E.2d 1365, 1368 (1992); or a statutory scheme that is so comprehensive that it leaves no room for a court to decide how it should be enforced. *McLean*, 12 N.Y.3d at 201; 905 N.E.2d at 1172.

In *Doe*, a private right of action for disclosure of HIV information in violation of Public Health Law § 2782 was consistent with the common law cause of action against a physician for breach of confidentiality. *Id.* at 471; 354. Similarly, the State Human Rights Law provides a private right of action against any public or private employer who uses sealed information in employment decisions. N.Y. Exec. L. § 297(9). As in *Negrin*, there is no executive agency charged with addressing or rectifying failures to comply with the sealing laws. In fact, the Legislature has given the *Judiciary* exclusive oversight of sealing and unsealing records. The NYPD's illegal failure to seal and its ongoing use of unsealed records will continue without the deterrent effect of a private right of action.

Sheehy itself considered whether Penal Law § 260.20(4), which criminalized the serving of alcohol to people under nineteen years old, contained a private right of action. *Sheehy*, 73 N.Y.2d at 633; 541 N.E.2d at 220. The Court found that it did not because a separate section of law allowed suit against those who provided alcohol to someone under the legal drinking age by anyone injured by the intoxicated minor, and the legislature could have rationally thought this provided enough deterrence, not wanting to allow intoxicated minors to profit from their bad behavior. *Id.* at 636; 22.

Here, unlike *Sheehy*, no separate section of law addresses the remedy for failure to seal, and the State Human Rights Law is the only other section of law that mentions sealing. Despite prohibiting the use of arrests that do not lead to criminal convictions, a literal reading of the State Human Rights Law *allows* employers and licensing agencies to act adversely against an individual based upon violation convictions when they have not been sealed. N.Y. Exec. L. § 296(16). Promised by counsel and the courts that their records will be sealed, individuals often find out the hard way that their records were *not* sealed: when they are denied employment, licensing, or housing based on records that authorities have erroneously failed to seal. The ability to seal the records afterwards upon motion, enumerated in both

Criminal Procedure Law sections 160.50 and 160.55, is therefore ineffective in enforcing the Legislature's goal in enacting the sealing statutes: to ensure eligible records will be sealed and to protect individuals from the unauthorized use of their arrest records and any related civil consequences. A private right of action is therefore necessary to enforce sealing rights before such harm occurs and to guard against law enforcement practices that prevent sealing.

A private right of action is consistent with the sealing laws and will allow the Judiciary to execute its legislatively designated oversight role. Thus, the lower court's finding to the contrary must be reversed.

CONCLUSION

The NYPD does not seal records that should be sealed in the Stop and Frisk Database, and Police Commissioner Raymond Kelly admits that the Stop and Frisk Database is used in ongoing investigations, even though such unauthorized use is prohibited by the sealing laws—except where, upon ex parte motion, a court finds in *each individual instance* that "justice requires" unsealing. Plaintiffs-Appellants, both of whom have records in the database, have standing to challenge this unauthorized use and failure to seal on behalf of a class of similarly situated people. Additionally, a private right of action to enforce Criminal Procedure Laws 160.50 and 160.55 exists

because it promotes the statutes' prohibition against unauthorized use and is consistent with the State Human Rights Law, which prevents employment discrimination based upon sealed arrests that do not lead to conviction. Such discrimination harms amici's clients in housing and employment, providing the need for a private right of action to effectively enforce the sealing laws. For these reasons, the lower court's decision must be overturned.

Dated: New York, New York
April 9, 2012

Respectfully submitted,

The Community Service Society of New York as
amicus and attorney for *amici curiae*
The Bronx Defenders, the Center for Community
Alternatives, the Legal Action Center,
The Legal Aid Society, MFY Legal Services,
Youth Represent, the New York County
Lawyers' Association, and the Fortune Society

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PRINTING SPECIFICATIONS STATEMENT

This brief was prepared using Microsoft Word on a Macintosh computer running Mac OS X. The text was set in 14-point Goudy Old Style. The total word count, including this statement, is 4,624 words.

UNPUBLISHED DECISIONS

Copies of the below unpublished decisions, which are cited in this brief, are included in the following tabs:

1. *Manhattanville Houses*, T.C. 106; Feb. 27, 2008 (Pannell, H.O.)
2. *Jane Doe, Richmond Terrace Houses I*, Case No. 3222/08; Sept. 10, 2008 (Pannell, H.O.)

TC. 106

CALENDAR: 3/12/2008

CASE NO.: [redacted]

NEW YORK CITY HOUSING AUTHORITY

IN THE MATTER OF

[redacted], APT. [redacted]
NEW YORK, NEW YORK 100[redacted]

MANHATTANVILLE HOUSES

BEFORE:

Joan Pannell, Hearing Officer

Mark Aronson
82 Wall Street, Suite 610
New York, New York 10005
Guardian Ad Litem

APPEARANCES:

Harley Diamond, Esq., for the Authority
[redacted] Tenant

Jim Provost
Manhattan Legal Services
90 John Street, Suite 301
New York, New York 10005
Tenant's Attorney

DATES OF HEARING:

August 23, 2007, January 9, 2008

DECISION:

NYCHA charges [redacted] ("Tenant") with non-desirability in that on 1/18/07 he and/or Lawrence [redacted] and/or Telfin [redacted] possessed marijuana, counterfeit videotapes and DVD's, and cartridges, recovered during execution of a search warrant; in that on 5/14/07 Tenant impersonated a criminal officer; in that on 6/18/07 Tenant trespassed and stole services; and in that on 9/10/07 Tenant peddled videos or DVD's without a license. Unauthorized occupancy is also alleged. Tenant denied the charges.

At the outset, Tenant moved to dismiss the charges pertaining to items recovered during execution of the search warrant as arising from documents now sealed (the matter was dismissed and sealed on 5/17/07, Exhibit A). NYCHA argued that while it had not known the matter was sealed, there was nevertheless evidence it would be lawful to present. The parties agreed to brief the matter post-hearing so as not to delay the hearing.

CASENO: [redacted]
TENANT: [redacted]

Police Officer Daniel Laperuta testified that he obtained a search warrant for the subject apartment after a confidential informant said there were drugs and a weapon in the apartment; the subject of the warrant was Telfin [redacted]. When the officer executed the warrant on 1/18/07 he found Tenant and one Lawrence [redacted] in the living room. There were two bags of marijuana on a table near [redacted] and a number of roaches, as well as counterfeit DVD's (without an industry seal). [redacted] said he was just visiting. One Telfin [redacted] was in the hall; he said he sometimes stays over with Tenant, sometimes with others. Tenant said his nephew Telfin [redacted] sometimes stays in the back room where marijuana roaches were also found. [redacted] pled guilty to criminal possession of marijuana, 5th degree; the documents show no address for him. (Exhibits 3, 4).

NYCHA also submitted into evidence documents showing that on 5/14/07 Tenant told an officer while he was arresting another prisoner that he was with the F.B.I., pled guilty to criminal impersonation, and was sentenced to one day of community service (Exhibits 5, 6), that on 6/18/07 he was arrested for turnstile jumping, pled guilty to theft of service and was sentenced to 5 days' community service (Exhibits 7, 8); and that on 9/10/07 he pled guilty to disorderly conduct (Exhibit 9).

[redacted] testified that she is Tenant's sister. Now 46, he has always lived in the building. He receives SSI because he has been diagnosed a paranoid schizophrenic and incompetent (Exhibit B). She manages his money and visits her brother once or twice each week to check on him and make sure he has necessities. Telfin [redacted], her nephew, lives upstate; he was visiting on 1/18/07. [redacted] is a lifelong friend who used to live in the building; he may be with his girlfriend now, since he has not been around for a while. On cross-examination, she asserted that she has never seen Tenant with marijuana. She did see Telfin subsequently; he said his case was also dismissed and sealed.

Tenant's post-hearing brief points out that the criminal proceeding against [redacted] was dismissed on 5/17/07 and the records sealed pursuant to CPL 160.50(1) which provides:

> (c) all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, and court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency.

(Emphasis added).

CASENO: [redacted]
TENANT: [redacted]

Tenant's brief also notes that the basis for charges 1 and 2 against Tenant, pertaining to items discovered during execution of a search warrant, was the sealed records released to NYCHA in 6/07 by the NYCPD in violation of CPL160.50 (c). The initial notice to Tenant that termination of his lease was being considered and inviting him to the management office to discuss the charges was dated June 15, 2007, almost a month after the records were sealed on May 17, 2007(Exhibit C). Tenant alleges that NYCHA must have possessed records from the sealed criminal case because NYCHA counsel provided his counsel with copies, including copies of the search warrant, the arrest reports, and property clerk's invoices, on 12/7/07, one of the previously scheduled hearing dates, and argues that NYCHA used the documents to draft charges long after the sealing order was in place. The purpose of CPL 160.50 is to protect accused individuals from the unauthorized use of their records. Green v. Montgomery, 95 NY2d 693 (2001). It was intended to place the defendant in the same position he would have been prior to his arrest where the defendant has been exonerated or the proceeding has been otherwise terminated in his favor. Thus sealed documents may not be used to draft charges or to obtain other documents or information.

Nor may sealed documents be used to prepare a witness's testimony. Tenant further points out that Officer Laperuta testified that in preparation for the hearing he reviewed his records for "Mr. [redacted] and those of others in the apartment" including the search warrant. Neither NYCHA nor Officer Laperuta should have seen the sealed records. Although the witness was free to testify from memory and NYCHA was free to adduce independent evidence of the conduct leading to the criminal charges, Restaurant Corp. v. New York State Liquor Authority, 220 AD2d 588, 632 NYS2d 815 (2d Dept. 1995), NYCHA introduced nothing to show that it possessed independent information, and the police officer, who testified he had made 50-60 arrests since 1/07, was unlikely to have independently remembered the details of the subject arrest, particularly when it led to discovery of a rather small amount of marijuana: 2.1 grains (Exhibit XB), and hence would not have been particularly memorable. (Tenant notes that this amount of marijuana could constitute only the offense of unlawful possession of marijuana (PL 221.05), a violation; we cannot know why [redacted] might have pled guilty to a greater offense). In any event, the officer's testimony was tainted by his improper review of sealed records prior to hearing.

NYCHA's post-hearing brief in response to Tenant's brief does not controvert Tenant's arguments that sealed documents cannot be used. NYCHA argues, rather, that the documents connected with Lawrence [redacted]'s arrest and conviction were not sealed. However, NYCHA also does not controvert Tenant's argument that it was only through use of sealed documents that NYCHA discovered the [redacted] documents, and does not controvert Tenant's argument, with many supporting citations, that this is impermissible. NYCHA offers no citations to support its implied theory that the instant matter somehow presents an exception to the requirements of the sealing statute. Nor does NYCHA controvert Tenant's demonstration that the police officer witness was instructed to review sealed documents in preparation for his testimony.

CASENO: [redacted]
TENANT: [redacted]

Accordingly, charges 1 and 2 must be dismissed.

Charge 3, pertaining to impersonation of a criminal officer, is sustained as is 4a, pertaining to theft of services. There is insufficient evidence to support trespass, unlicensed peddling of DVD's, or unauthorized occupancy.

The appropriate disposition is probation.

DISPOSITION

Probation for one year

Joan Pannell
Hearing Officer

February 27, 2008
Date

JP:nc

TC. III
CALENDAR 9/10/2008

CASE NO. 3222/08 NEW YORK CITY HOUSING AUTHORITY

IN THE MATTER OF DOE, JANE

RICHMOND TERRACE HOUSES I

BEFORE:

Joan Pannell, Hearing Officer

APPEARANCES:

Jane Doe, Tenant J

Marc Beck and Christopher Lamb The Legal Aid Society *60* Bay St.
Staten Island, N.Y. *10301* ~

DATES OF HEARING:

5/6,7/3,7/23,8/19/08

DECISION:

NYCHA charges Jane Doe ("Tenant") with non-desirability in that on *2/20/08* she and/or Jane Roe, unauthorized occupant, possessed and/or sold marijuana and crack cocaine, recovered during execution of a search warrant, and also possessed a crack pipe and other paraphernalia constituting property reflecting illegal activity in the apartment. A denial was entered on Tenant's behalf.

NYCHA called Detective Anthony Hernandez to testify. Upon voir dire, Det. Hernandez acknowledged that in preparation for his testimony he reviewed "all the arrest papers and related papers." Tenant moved to preclude his testimony as tainted by review of sealed records, and also moved to dismiss the charges in that the charges themselves were based upon sealed records. The matter was adjourned for the parties to brief the issues.

After both parties submitted memoranda of law, the parties agreed on 8/19/08 to rest upon the memoranda, and that no further argument was necessary.

Tenant demonstrated that the arrest records and related records are sealed pursuant to CPL 160.55(I)c, because the arrest resulted in a plea to disorderly conduct, a violation (Exhibit A to Tenant's brief). CPL 160.55 provides that when a criminal proceeding terminates in a conviction of a violation, all official records related to the arrest and prosecution, and all copies, shall be sealed (with exceptions not relevant). Thus, all the ' documents related to Tenant's arrest are sealed and may not be used, either to prepare charges, or as evidence or to prepare a witness. These records include the search warrant, any field or laboratory test report, any property clerk's invoice; and any deposition, as well as the arrest

records themselves. Although Det. Hernandez was free to testify from memory, his testimony would now be tainted by his improper review of sealed records; it would be impossible to determine what he might have recalled without the assistance of that review.

If Det. Hernandez' review of sealed records were the only problem, NYCHA might find a different witness who had not made such a review. However, CPL 160.55 instructs us that sealed records may not be used for any purpose: they may not be used to prepare charges. NYCHA was invited to explain how it brought charges without using sealed records (the records were sealed 6 days after the arrest; NYCHA did not bring charges for several weeks thereafter). NYCHA argued first, that the hearing officer should balance the deterrent effect of excluding evidence against tenant community welfare. However, any balancing test has already been performed by the legislature, which has decided that individuals convicted of violations shall be protected, by the sealing of records, from possible consequences such as loss of housing or employment. Moreover, the principle of a deterrent effect does not apply here: there is no reason to suspect any improper police action which might require a deterrent.

NYCHA also suggested that it learned of the execution of the search warrant and Tenant's arrest because of a newspaper article (Exhibit A to NYCHA's memorandum, undated) and hence can use the newspaper article as a basis upon which to bring charges. NYCHA did not state, however, that it actually did base the charges upon the newspaper article, and it seems an unlikely scenario: Charges are brought upon evidence; it is questionable whether a newspaper article, taken by itself, would suffice.

NYCHA next presented several citations to the effect that a decision upon a hearing wherein sealed evidence was unwittingly submitted may sometimes be upheld if, for example, other evidence supports the decision. However, none of these citations support the affirmative use of sealed documents. Here, all parties are quite witting that the evidence is sealed, and it would seem a bit disingenuous to argue that we may use it anyway.

There being no credible explanation how the charges were prepared without the use of sealed records, the charges must be dismissed.

DISPOSITION

The charges are dismissed