SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
---X

R.C., J.J., and A.G., suing under pseudonyms, On behalf of themselves and all others similarly situated,	**Index No. 153739/2018** Alexander M. Tisch, J.
Plaintiffs,	
-against-	
THE CITY OF NEW YORK and JAMES P. O'NEILL, New York City Police Department Commissioner, in his Official capacity,	**ORAL ARGUMENT REQUESTED**
Defendants.	

---X

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

	Page(s)
PRELIMINARY STATEMENT	1
FACTUAL AND PROCEDURAL BACKGROUND	3
ARGUMENT	5
I. Defendants' Routine Disclosure of Sealed Records Violates CPL 160.50 and 160.55.	5
A. CPL 160.50(1)(c) and 160.55(1)(c) Prohibit the NYPD from Disclosing Sealed Arrest Information Throughout the Department.	6
B. CPL 160.50(1)(d) and CPL 160.55(1)(d) Permit Disclosure of Sealed Records for Investigative Purposes Only After the NYPD Has Obtained a Court-Issued Unsealing Order.	10
C. The NYPD's Maintenance of Sealed Arrest Records Creates a Risk of External Disclosure That Independently Violates the Sealing Statutes.	13
II. The Legislative Intent Behind the Sealing Statutes Is to Prevent Any Adverse Consequences to the Person Accused, and Defendants Violate That Protection.	14
III. Prohibiting Disclosure of Sealed Records Would Not Bar NYPD Access When Justice Requires Disclosure and Would Not Prevent Assessment of Officer Conduct, and Therefore Defendants' Hypotheticals Do Not Support Dismissal.	21
IV. Defendants' Deliberate Failure to Seal the Records of Thousands of People Violates Due Process	25
CONCLUSION	29

TABLE OF AUTHORITIES

Page(s)

Rules and Statutes

CPL 160.50 .... passim

CPL 160.55 .... 1, 6, 11

CPL 160.59 18

CPL 160.60 .... 2, 6, 20

C.P.L.R. Rule 3211(a)(7) 5

C.P.L.R. 7804(f) 5

Exec. L. 296.16 .... 19, 20

S.B. 5031, 231st Leg., Reg. Sess. (N.Y. 2009) 22

Cases

Alonzo M. v. New York City Dep't of Prob.,
72 N.Y.2d 662 (1988) 7, 8, 13, 18

Anderson v. City of New York,
611 F. Supp. 481 (S.D.N.Y. 1985) 27, 28

Avella v. City of New York,
29 N.Y.3d 425 (2017) 6

Brown v. Passidomo,
127 Misc. 2d 700 (Sup. Ct. Erie Cty. 1985) 9, 10

City of Elmira v. Doe,
11 N.Y.3d 799 (2008) 12

Coleman v. Dretke,
395 F.3d 216 (5th Cir. 2004) 28

Page(s)

Crosby v. City of New York,
269 F.R.D. 267 (S.D.N.Y. 2010) 23

D.S. v. City of Peekskill,
581 F. App'x 65 (2d Cir. 2014) 28, 30

D.S. v. City of Peekskill
No. 12-cv-4401, 2014 WL 774671 (S.D.N.Y. Feb. 27, 2014) 28, 29

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 25

Grandal v. City of New York,
966 F. Supp. 197 (S.D.N.Y. 1997) 28

Harper v. Angiolillo,
89 N.Y.2d 761 (1997) 13, 16

Hartford Park Tenants Ass'n v. R.I. Dep't of Envtl. Mgmt.,
No. C.A. 99-3748, 2005 WL 2436227 (R.I. Super. Ct. Oct. 3, 2005) 28

Haus v. City of New York,
No. 03 Civ. 4915, 2006 WL 1148680 (S.D.N.Y. Apr. 24, 2006) 23

Hearst Corp. v. Clyne,
50 N.Y.2d 707 (1980) 22

Hewitt v. Helms,
459 U.S. 460 (1983) 26

Hynes v. Karassik,
47 N.Y.2d 659 (1979) 12, 17

In re Dondi,
63 N.Y.2d 331 (1984) 27

In re State of N.Y. v. Ted B.,
132 A.D.3d 28 (2d Dep't 2015) 26

Kapps v. Wing,
404 F.3d 105 (2d Cir. 2005) 27

Page(s)

Katherine B. v. Cataldo,
5 N.Y.3d 196 (2005) 8, 11

LaRossa, Axenfeld & Mitchell v. Abrams,
62 N.Y.2d 583 (1984) 26

Leon v. Martinez,
84 N.Y.2d 83 (1994) 6

Linen v. County of Rensselaer,
274 A.D.2d 911 (2d Dep't 2000) 27

Lino v. City of New York,
101 A.D.3d 552 (1st Dep't 2012) 9, 14, 16

Lino v. City of New York,
No. 10/106579 (N.Y. Cty. Sup. Ct. Aug. 7, 2013) 24

Marisol A. ex rel. Forbes v. Giuliani,
929 F. Supp. 662 (S.D.N.Y. 1996) 26

Mathews v. Eldridge,
424 U.S. 319 (1976) 26

Mowczan v. Bacon,
92 N.Y.2d 281 (1998) 6

N.Y. State Comm'n on Judicial Conduct v. Rubenstein,
23 N.Y.3d 570 (2014) 11, 16

Palmer v. Spaulding,
87 N.E.2d 301 (1949) 12

Palmer v. Van Santvoord,
47 N.E. 915 (1897) 9

People v. Anthony R.,
651 N.Y.S. 2d 1009 (Nassau Cty Ct. 1996) 12

People v. Aviles,
28 N.Y.3d 497 (2016) 26, 29

Page(s)

People v. Bundy,
60 Misc. 3d 518 (Justice Ct. Monroe Cty 2018) 9

People v. F.B.,
155 A.D.3d 1 (1st Dep't 2017) 12

People v. Gallina,
110 A.D.2d 847 (2d Dep't 1985) 10

People v. McTiernan,
119 A.D.3d 465 (1st Dep't 2014) 12

People v. Patterson,
78 N.Y.2d 711 (1991) 27, 28, 29, 30

People v. Taylor,
9 N.Y.3d 129 (2007) 29

Pokoik v. Dep't of Health Servs.,
72 N.Y.2d 708 (1988) 13

Rodriguez v. McLoughlin,
214 F.3d 328 (2d Cir. 2000) 26, 29

Sandin v. Conner,
515 U.S. 472 (1995) 29

Segal v. City of New York,
459 F.3d 207 (2d Cir. 2005) 28

Sharrock v. Dell Buick-Cadillac Inc.,
45 N.Y.2d 152 (1978) 29

State Temporary Comm'n of Investigation,
590 N.Y.S.2d 169 (Westchester Cty. Ct. 1992) 12

United States v. Jakobetz,
955 F.2d 786 (2d Cir. 1992) 30

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 24

Page(s)

Other Authorities

83-78 N.Y. Op. Att'y Gen. (Inf.) 1176, (1983), 1983 WL 167436 .... 22, 23

Black's Law Dictionary (10th ed. 2014).. 10

Floyd v. City of New York,
Fifth Report of the Independent Monitor,
08-cv-1034 (AT) (S.D.N.Y.) ECF No. 554 24

L 2015, ch 449, § 1 18

Merriam-Webster, Web. 7 Sept. 2018 10

N.Y.C. Charter § 434(a).. 24

PRELIMINARY STATEMENT

In this putative class action, Plaintiffs R.C., J.J., and A.G. seek to enforce the plain terms of Sections 160.50 and 160.55 of the Criminal Procedure Law (collectively, the "Sealing Statutes") on behalf of themselves and thousands of others whose sealed arrest records Defendants have illegally disclosed. Plaintiffs challenge Defendants' policy and practice of, *inter alia*, directing the detectives of the New York City Police Department ("NYPD" or the "Department") to consult sealed records in connection with criminal investigations; retaining decades of sealed records in vast law enforcement databases that are routinely accessed throughout the Department; disclosing sealed records to prosecutors, the media, and others; and using sealed records against people who were not found guilty of any crime. Defendants narrowly move to dismiss only those allegations related to the NYPD's internal use and dissemination of sealed records. In their motion, Defendants advance an interpretation of the Sealing Statutes that is wholly at odds with the statutes' terms, the legislative history, and forty years of judicial decisions—all of which prohibit the NYPD from disclosing sealed arrest records to its personnel for investigatory purposes unless they have first obtained a court-issued unsealing order.

As Plaintiffs set forth herein, the Court of Appeals has repeatedly held that intra-agency access to sealed records is contrary to the Sealing Statutes' prohibition against disclosure to "any person." CPL 160.50(1)(c); CPL 160.55(1)(c). Agencies may only access sealed records in their files through one of the specifically enumerated mechanisms for unsealing set out in the Sealing Statutes, and those provisions require law enforcement agencies that are seeking access for investigatory purposes to obtain a court order by *ex parte* motion and upon a demonstration that justice requires unsealing. CPL 160.50(1)(d); CPL 160.55(1)(d). On this, too, the Court of Appeals has repeatedly spoken, holding time and again that agencies may not access sealed

records, except through the narrow mechanisms enumerated in the Sealing Statutes, and rejecting attempts by agencies to gain access in ways not specifically contemplated. Defendants suggest a new exception to the prohibition on access that the Legislature did not create.

Defendants' interpretation of the Sealing Statutes as permitting unfettered disclosure of sealed arrest records to NYPD officers and detectives would effectively require rewriting the statutes. It also ignores and would undermine the legislative intent behind the Sealing Statutes. The Legislature described CPL 160.50 in 1976 as being designed to prevent any adverse consequence from an arrest that did not result in criminal conviction. The Legislature intended to robustly protect the presumption of innocence by, among other things, significantly circumscribing police access to sealed records. Defendants suggest that the Legislature intended to protect against adverse consequences solely in the employment, licensing, and insurance contexts because of a separate and contemporaneously-enacted anti-discrimination statute, yet this would turn the legislative intent upside down: The Legislature intended the anti-discrimination law to supplement—not narrow—the protections in CPL 160.50.

Defendants' interpretation also ignores CPL 160.60, which was enacted along with CPL 160.50. Entitled "Effect of termination of criminal actions in favor of the accused," CPL 160.60 provides that an arrest or prosecution that results in favorable termination under CPL 160.50 "shall be deemed a nullity and the accused shall be restored . . . to the status he occupied before the arrest and prosecution." This broad and unequivocal pronouncement cannot be squared with Defendants' policy of using and disclosing sealed arrest records throughout the Department for investigations, since an arrest is not a nullity if each and every detective in the nation's largest police force can access and use it to pursue criminal charges. Because no reading of the Sealing Statutes or the legislative history can support the claim that the Legislature intended

to permit Defendants' routine disclosure of sealed records throughout the NYPD, the Court should deny Defendants' motion to dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs bring this putative class action on behalf of themselves and thousands of similarly situated individuals to challenge the NYPD's widespread policy and practice of maintaining, using, and disclosing sealed arrest records.[1] Defendants have a written policy that grants every detective in the NYPD access to sealed arrest records as a matter of course. Compl. ¶¶ 57-60. Defendants admitted to this policy in federal court. *See id.* ¶¶ 31-32.

While Defendants seek to minimize the factual allegations in the Complaint, those allegations are centrally relevant to the disposition of this motion. As explained in the Complaint, the NYPD stores information from sealed cases in databases from which officers regularly access the information for a variety of purposes without ever seeking court permission. *Id.* ¶¶ 30, 34-36. Some of these databases can be accessed from any location using the mobile devices that all officers carry. *Id.* ¶¶ 37, 40-41, 47. The NYPD even shares sealed arrest records with prosecutors and the media. *Id.* ¶¶ 70-77. Some of the people whose records the NYPD uses in this way were simply arrested by the NYPD on charges that were dropped, dismissed in court, or disproven. *See, e.g.*, *id.* ¶¶ 103-05; Compl. Ex. A (showing NYPD records disclosing sealed arrests of Plaintiff R.C., who had never been convicted of a crime). In one recent three-year period alone, the NYPD collected records for over 400,000 arrests that resulted in an outcome that requires sealing. *Id.* ¶ 15.

The NYPD's use and disclosure of sealed arrest information produces a stigma of criminality exposing individuals to additional police attention and other consequences. *See*

[1] All facts stated herein are drawn from Plaintiffs' Complaint.

id. ¶¶ 36-56. Once in the NYPD's systems, people whose records should have been sealed and whose arrest photos should have been destroyed instead find their photos used in suspect lineups. This happened to plaintiff R.C., who was prosecuted for a robbery that took place in the Bronx when he was not even in New York City because NYPD officers showed a witness a photo from a dismissed arrest that was subject to sealing. *Id.* ¶¶ 35, 88-97. The NYPD uses sealed arrests to label people with no criminal record as "recidivists"—as happened to Plaintiff J.J.—which can result in officers being required to make an arrest where they would have otherwise had discretion not to do so. *Id.* ¶¶ 53-56, 128-30. The NYPD also gives sealed records to prosecutors who make decisions relating to bail or plea terms, as happened to each named plaintiff, *id.* ¶¶ 70, 90, 118, 139, and it regularly discloses information about sealed arrest records to the press, *id.* ¶¶ 77-79. The NYPD has even provided reporters with information from the sealed arrest records of people killed by NYPD officers, continuing to stigmatize those individuals even in death. *Id.* ¶¶ 78-79.

Data on recent NYPD arrests suggest that the scale of violations of the Sealing Statutes is vast and that the violations disproportionately affect Black and Latino people. Over half of New York City arrest dispositions from 2014 to 2016 (the most recent period of data available from the Department of Criminal Justice Services at the time of the Complaint's filing) involved an outcome that requires sealing under the Sealing Statutes. *Id.* ¶ 14. The numbers reflect significant racial disparities: More than 330,000 of the arrests of Black and Latino people in that time resulted in an outcome that requires sealing, compared to around 50,000 arrests of white people requiring the same. *Id.* ¶ 16. By disregarding the Sealing Statutes, the NYPD entrenches patterns of racial discrimination by subjecting everyone arrested in the past to a cycle of greater police scrutiny on the basis of mere allegations. *Id.*

Plaintiffs allege that Defendants violate the Sealing Statutes in several distinct ways, and Defendants move to dismiss only "the claims concerning the NYPD's use of its own sealed records." Defs.' Mem. of Law in Support of Defs.' Motion to Dismiss the Complaint, ECF No. 38 ("MTD") at 2. Defendants expressly do "not challenge the legal sufficiency of the claims concerning the NYPD's alleged disclosure of sealed records to the District Attorney's offices." *Id.* Though Defendants downplay this claim as an allegation that "the NYPD has on occasion improperly shared sealed documents" with prosecutors, *id.* at 1, Plaintiffs claim far more than occasional violations: The Complaint alleges that the NYPD gave prosecutors sealed arrest records for all three named plaintiffs, Compl. ¶¶ 99-101, 118-20, 139-41, and "[t]he NYPD has a policy and/or practice of disclosing Sealed Arrest Information to prosecutors," *id.* ¶ 70. Defendants also do not mention—and therefore do not move to dismiss—the allegation that the NYPD routinely shares sealed information with the press and with other outside agencies. *See id.* ¶¶ 70-81. Nor do Defendants mention the allegations that the NYPD maintains, uses, and discloses fingerprints and photographs from sealed arrests, even though the Sealing Statutes require these records to be returned or destroyed. *See, e.g.*, *id.* ¶¶ 34, 90.[2]

ARGUMENT

I. Defendants' Routine Disclosure of Sealed Records Violates CPL 160.50 and 160.55.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction," and the Court must "accept the facts as alleged in the complaint as true, accord

[2] Defendants move to dismiss pursuant to C.P.L.R. Rule 3211(a)(7) and C.P.L.R. § 7804(f). *See* Notice of Motion to Dismiss at 1; MTD at 1. C.P.L.R. § 7804(f), however, only applies to Article 78 proceedings, and the Complaint is not brought as an Article 78 proceeding. Therefore, any motion pursuant to § 7804(f) is simply inapplicable.

plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). When deciding a question of statutory interpretation, "the proper judicial function is to discern and apply the will of the Legislature." *Mowczan v. Bacon*, 92 N.Y.2d 281, 285 (1998) (citation omitted). This analysis must begin with the statutory text. "The text of a statute is the clearest indicator of [ ] legislative intent and courts should construe unambiguous language to give effect to its plain meaning." *Avella v. City of New York*, 29 N.Y.3d 425, 434 (2017) (citation omitted). As explained below, the plain language of the Sealing Statutes and the legislative history each confirm that the NYPD must obtain a court unsealing order before disclosing sealed arrest records within the agency for law enforcement purposes, and Plaintiffs' allegations that Defendants have a policy and practice of ignoring that prohibition are sufficient to plead a violation of the statutes.

A. CPL 160.50(1)(c) and 160.55(1)(c) Prohibit the NYPD from Disclosing Sealed Arrest Information Throughout the Department.

Pursuant to the Sealing Statutes, when a criminal proceeding results in a favorable termination or a non-criminal conviction, all official records related to the arrest "on file with . . . any . . . police agency . . . shall be sealed and not made available to any person or public or private agency." CPL 160.50(1)(c); CPL 160.55(1)(c). CPL 160.60 further provides that, "[u]pon the termination of a criminal action or proceeding against a person in favor of such person, as defined in [CPL 160.50], the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution." While the plain language of the Sealing Statutes requires the NYPD to "seal" covered records in its files and "not [make them] available to any person," Defendants contend that disclosure and dissemination of Plaintiffs' sealed arrest records to thousands of police personnel is somehow permitted. MTD at 5. Defendants premise this contention on an argument that the statutes only

regulate disclosure to outside parties, yet the statutes clearly specify that the prohibition on disclosure runs to "any person." The Legislature could have said that records may not be made available to "outside parties" but chose instead to say records may not be made available to "any person or public or private entity."

Consistent with this plain language, the Court of Appeals has recognized that CPL 160.50 prohibits agencies from accessing or using sealed records in ways not enumerated in the statute. In *Alonzo M. v. New York City Department of Probation*, 72 N.Y.2d 662 (1988), for example, the Court of Appeals reviewed an agency's use of sealed records that the agency "maintained for itself" and ruled that CPL 160.50's sealing requirement "ensures that records and materials generated from an arrest and a favorably terminated proceeding are eliminated as facets of the accused's criminal pedigree." *Id.* at 664, 668. The court explained that the purpose of the law is "not merely to prohibit general 'public scrutiny'" but "to preclude access by those, especially in government and bureaucracy, who might otherwise prejudicially use rightfully protected information." *Id.* at 668. The court found that the agency's internal maintenance and use of records that were sealed—under both Section 160.50 and N.Y. Family Court Act § 375.1, a juvenile record sealing statute that was identical in all relevant respects—was an "audacious violation of . . . statutory rights." *Id.* at 669.[3] The court added that "[i]t is of no consequence that the source of the arrest and prosecution data . . . was [the agency]'s own indexed case record

[3] Because the relevant terms of the juvenile record sealing statute, N.Y. Family Court Act § 375.1, are the same as the terms in CPL 160.50(1)(c), and the Court's holding addressed both statutes, Defendants' attempt to distinguish *Alonzo M.* on the basis of its application of the juvenile statute is unavailing. *See* MTD at 13-14. The "thicker cocoon of protection" that Defendants claim the court found Family Court Act § 375.1 to provide concerned ancillary protective aspects, such as sealing records of probation agencies and not providing any statutory exceptions to the sealing requirement, not the fundamental requirement that internal use of sealed records is prohibited. *Alonzo M.*, 72 N.Y.2d at 666.

materials, cumulative case records, or administrative records"—such use was "disturbing because it unmasks a concededly regularized Big-Brother like evasion of the prophylactic law itself." *Id.*

More recently, in *Katherine B. v. Cataldo*, 5 N.Y.3d 196 (2005), the Court of Appeals held that Section 160.50 "limited" a prosecutor's access to records from sealed cases in the prosecutor's files, such that the prosecutor could only gain access to those files through the narrow mechanism set out in Section 160.50(1)(d)(i). *Id.* at 205. The prosecutor's internal access to the files was squarely at issue in *Katherine B.*, though the case also addressed outside disclosure. *See* MTD at 13. As the Court explained, the prosecutor in that case "conducted a computer search, which revealed numerous docket numbers for prior criminal cases," but could not access some of the underlying records because they were sealed. *Katherine B.*, 5 N.Y.3d at 200. The prosecutor's office then sought an unsealing order to access its records. *See* Affirmation of Jenn Rolnick Borchetta in Support of Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Borchetta Aff.") Ex. A (Edwards Affirmation in support of petitioner's appeal seeking an unsealing order in *Katherine B*., in which the petitioner centrally complained that "[t]he District Attorney's Office accessed its own files before any unsealing orders were ever obtained" and argued that access was improper). The Court of Appeals' decision to overrule the unsealing order in *Katherine B*. thus operated as a prohibition on the prosecutor's access to intra-agency files.

Likewise, in a case challenging disclosures very similar to ones at issue in this lawsuit, the First Department reversed the dismissal of a complaint challenging the NYPD's maintenance of stop-and-frisk reports from sealed arrests in an internal database. *See Lino v. City of New York*, 101 A.D.3d 552 (1st Dep't 2012). The court held that the plaintiffs sufficiently pleaded a statutory injury because "their records remain unsealed" solely by virtue of remaining in the NYPD's database, "which puts them at imminent *risk* that their records will be disclosed" and "may lead to

plaintiffs being targeted in future investigations." *Id.* at 556. *Lino* recognized that maintaining sealed records in a database accessible throughout the Department can violate CPL 160.50(1)(c) and 160.55(1)(c), regardless of whether the records are shared outside the NYPD. Other courts have recognized the same principle in other contexts. *See People v. Bundy*, 60 Misc. 3d 518, 521 (Justice Ct. Monroe Cty. 2018) (reasoning that prosecutors could not access sealed records in their files because "the sealing statute, once it takes effect, creates a virtual absolute bar to the use of the sealed papers for any purpose"); *Brown v. Passidomo*, 127 Misc. 2d 700, 705-06 (Sup. Ct. Erie Cty. 1985) (holding that the Department of Motor Vehicles could not retain records of a reversed conviction in its computer).

In arguing that the Sealing Statutes permit internal disclosures, Defendants appear to suggest that the phrase "not made available" merely qualifies the requirement to "seal" and that the directive to "seal" has no independent importance. *See* MTD at 8. Yet "[w]ords are not to be rejected as superfluous when it is practicable to give to each a distinct and consistent meaning," *Palmer v. Van Santvoord*, 153 N.Y. 612, 616 (1897), and the term "seal" should be construed as an additional directive.[4] Sealing affords greater protection than mere confidentiality. *Cf. People v. Gallina*, 110 A.D.2d 847, 849 (2d Dep't 1985) (comparing "confidential" in youthful offender statute with "seal" in Section 160.50 and noting "'[c]onfidential' implies a less sweeping prohibition than 'sealed'" and that "its use implies that the internal use of [the covered record] is not necessarily prohibited," as opposed to sealing, which restricts internal use). The plain terms

---

[4] The verb "seal" means "to make secure against access," *seal*, *Merriam-Webster*, Web. 7 Sept. 2018, or "[t]o prevent access to (a document, record, etc.)," *seal*, *Black's Law Dictionary* (10th ed. 2014). Notably, this definition matches the NYPD Patrol Guide's definition of how officer disciplinary records should be sealed. The Patrol Guide explains that sealing requires *deletion* of any mention of the sealed charges from generally-accessible files. Compl. ¶ 33.

of CPL 160.50(1)(c) and CPL 160.55(1)(c) thus prohibit the NYPD from permitting its personnel to access sealed records.[5]

Plaintiffs' allegations related to internal NYPD disclosures plead a violation of the Sealing Statutes' prohibition against access. Plaintiffs allege that Defendants have an express policy of disclosing sealed arrest records to all detectives for use in criminal investigations and that this disclosure reveals the accused person's entire sealed record, including the charges and the underlying allegations. Compl. ¶ 162. Plaintiffs further allege that Defendants have a policy and practice of retaining and disseminating sealed arrest records throughout the Department in order to target people for new charges. *Id.* ¶¶ 34-56. Defendants further retain and disclose decades-old sealed records, as in the case of Plaintiff A.G., whose records from the 1980s were disclosed to NYPD officers. *Id.* ¶¶ 138-50. These allegations should not be dismissed.

B. CPL 160.50(1)(d) and CPL 160.55(1)(d) Permit Disclosure of Sealed Records for Investigative Purposes Only After the NYPD Has Obtained a Court-Issued Unsealing Order.

Subsection (1)(c)'s general prohibition against disclosing sealed records is followed by subsection (1)(d), which enumerates specific, limited exceptions to the prohibition. With respect to "a law enforcement agency," subsection (1)(d) lists three situations in which sealed records "shall be made available." First, sealed records "shall be made available to . . . a law enforcement agency upon ex parte motion . . . if such agency demonstrated to the satisfaction of the court that justice requires that such records be made available to it." CPL 160.50(1)(d)(ii); 160.55(1)(d)(ii). Second, a law enforcement agency may access sealed records of prospective applicants for

[5] Moreover, Section 160.60 further underscores the legislative intent "to cover *retention and dissemination* of the [sealed] record," such that the individual whose records are sealed is "restored to the status he occupied before the arrest and prosecution." *Brown*, 127 Misc. 2d at 704 ("the legislative intent to cover *retention and dissemination* of the [sealed] record is clear" from the language of 160.60) (emphasis added).

employment. CPL 160.50(1)(d)(v). Third, law enforcement agencies may access certain records related to domestic violence violations. CPL 160.55(1)(d)(vi).

These "narrow exceptions" to the prohibition on access "are precisely drawn." *Katherine B.*, 5 N.Y.3d at 202-03 (citation omitted). "[A]bsent extraordinary circumstances, a specific grant of power, or the existence of a legal mandate the nature of which would be impossible to fulfill without unsealing criminal records, sealed criminal records may only be accessed by individuals and agencies specifically enumerated, and narrowly defined in CPL 160.50(1)(d)." *N.Y. State Comm'n on Judicial Conduct v. Rubenstein*, 23 N.Y.3d 570, 581 (2014) (citations omitted). Subsection 1(d)'s precise enumeration of exceptions "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." *Katherine B.*, 5 N.Y.3d at 203. The Legislature entrusted courts, not law enforcement officials, with deciding when records should be unsealed for the purpose of criminal investigations.

In applying these narrow exceptions, courts have denied prosecutors' unsealing motions, including where prosecutors sought to unseal records in their possession in order to make sentencing recommendations, *see, e.g.*, *id.* at 205 (denying District Attorney's request to unseal own records of prior indictments); to impose attorney discipline, *see Hynes v. Karassik*, 47 N.Y.2d 659, 664-65 (1979) (denying Special Prosecutor's unsealing motion on behalf of bar committee); to assist landlords in evicting tenants with arrest histories, *see People v. F.B.*, 155 A.D.3d 1, 7-9 (1st Dep't 2017) (denying District Attorney's motion to unseal own records of prior criminal action); and to investigate potential police misconduct where other avenues of investigation had not been exhausted, *see People v. Anthony R.*, 651 N.Y.S. 2d 1009, 1011-12 (Nassau Cty. Ct. 1996) (denying District Attorney's motion to unseal own records). *Cf. People v. McTiernan*, 119 A.D.3d

465, 470-71 (1st Dep't 2014) (finding grant of unsealing order was harmless error, but noting that trial court should have denied unsealing request). In line with these rulings, other police agencies across the state seek court orders before accessing sealed records in their files. *See, e.g.*, *City of Elmira v. Doe*, 11 N.Y.3d 799, 800 (2008) (municipality sought to unseal physical evidence in its own records generated during the course of criminal investigations); *In re N.Y. State Temporary Comm'n of Investigation*, 590 N.Y.S.2d 169, 170 (Westchester Cty. Ct. 1992) (municipality sought to unseal its own records for use in internal investigation).

Defendants argue that the term "a law enforcement agency" in subsection (1)(d) should be implicitly understood to exclude the agency that created the sealed files. That interpretation is wholly at odds with the statutory language, which mentions no caveats or limitations to that broad category. The Court should not "read into statutes words which are not there." *Palmer v. Spaulding*, 299 N.Y. 368, 372 (1949). Defendants' suggested interpretation would require the Court to effectively strike or modify language in CPL 160.50(1)(c) that says covered records include records "on file with . . . *any* . . . police agency." (emphasis added). The Court would also need to override the Legislature's choice to enumerate specific exceptions to the prohibition on law enforcement disclosure that do not include the exception that Defendants attempt to create. "Where a statute describes the particular situations in which it is to apply and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." *Alonzo M.*, 72 N.Y.2d at 665 (citation omitted). The presumption that statutory omissions are intentional "is even stronger where, as here, the precise exceptions that are claimed to be implicit are explicitly provided for elsewhere in the statute." *Pokoik v Dep't of Health Servs.*, 72 N.Y.2d 708, 712 (1988) (quoting McKinney's Cons. Laws of NY, Book 1, Statutes § 213 at 374). Subsection (1)(d) enumerates exceptions to the prohibition

on law enforcement access to sealed records, and routine disclosure throughout a police department is not one of them, while court-authorized unsealing is.[6]

In light of this precedent, Plaintiffs' allegations related to the NYPD's internal disclosures sufficiently plead that Defendants have violated the Sealing Statutes by failing to seek or obtain unsealing orders. Plaintiffs allege that Defendants disclose sealed arrest records to NYPD personnel through vast, interconnected databases, Compl. ¶¶ 34-56, and they have an express policy of permitting detectives to use sealed arrest records in conducting criminal investigations, all without first seeking or obtaining a court order. *Id.* at ¶¶ 57-60. Plaintiffs further allege that this widespread internal disclosure of sealed records throughout the Department causes the routine disclosure of sealed arrest records to prosecutors, the media, and other agencies without court permission. *See id.* at ¶¶ 70-79; *see also infra* at Part I.C. These allegations should not be dismissed.

C. The NYPD's Maintenance of Sealed Arrest Records Creates a Risk of External Disclosure That Independently Violates the Sealing Statutes.

Defendants do not seek to dismiss Plaintiffs' allegations that the NYPD frequently discloses sealed arrest records to prosecutors, the media, and other outside agencies. *See* MTD at 2. Defendants thus appear to concede that the NYPD is prohibited from making those disclosures absent a court order. Defendants seek to minimize the significance of external disclosures, but Plaintiffs' allegation that the NYPD "regularly discloses information from sealed arrest records

[6] Defendants' reliance on *Harper v. Angiolillo,* 89 N.Y.2d 761 (1997) is misplaced. MTD at 8. *Harper* decided whether a person whose criminal case had been dismissed was entitled to access all files related to his arrest and prosecution. The court noted that CPL 160.50(1)(d) listed "narrowly defined exceptions which authorize the disclosure of sealed materials, under certain circumstances, to a limited group of third parties." *Id.* at 766-67. It then explained that "such third parties includes certain categories of prosecutors *and law enforcement agencies*." *Id.* at 767 n.1 (emphasis added). Defendants isolate the phrase "third parties" and ignore the court's definition of that phrase.

outside of the Department" is central to the Complaint. Compl. ¶¶ 3, 57-81. The NYPD's admitted policy of unlimited internal access to sealed records exacerbates the risk of unlawful and stigmatizing external disclosures. *Id*.

The NYPD's routine disclosures to other agencies and the media have persisted despite written NYPD policies forbidding this practice. *See id.* at ¶¶ 57-69. The NYPD's maintenance of vast databases of sealed arrest records accessible to thousands of officers creates an ongoing risk for everyone whose records are disclosed in the database and this amounts to an independent violation of the Sealing Statutes. *See Lino,* 101 A.D.3d at 556 (ruling that maintenance of sealed records in an internal NYPD database would violate the Sealing Statutes by simply creating a *risk* of external disclosure)*; see also* Compl. ¶ 81 ("The NYPD's failure to . . . prohibit access to Sealed Arrest Information creates a substantial risk of unlawful disclosure of Sealed Arrest Information."). In addition, because discovery might reveal that the NYPD's policy and practice of disclosing sealed records across the Department *causes* widespread disclosures to other agencies and the public, Plaintiffs are entitled to discovery on those claims. The Court should therefore not dismiss allegations related to intra-agency use and disclosure.

II. The Legislative Intent Behind the Sealing Statutes Is to Prevent Any Adverse Consequences to the Person Accused, and Defendants Violate That Protection.

Not only do the plain terms in the Sealing Statutes prohibit internal police agency use of sealed arrests for investigative purposes, the legislative history confirms that the legislature intended this result. The Assembly and Senate members who introduced CPL 160.50 described the bill as seeking "to remove the punitive collateral consequences of an arrest where such person has been accorded treatment other than a conviction." Affirmation of Thomas B. Roberts in Support of Defendants' Motion to Dismiss, Ex. 3, ECF No. 34 ("Roberts Aff."), at 27 (Governor's

Program Bill Memorandum, Bill Jacket, L 1976, ch 877, Senate #9924-A). The Senate memorandum articulated the bill's justification as follows:

> The status of individuals who are arrested but not convicted should be preserved and not blemished or tainted just because such individuals are put to the task of compliance with legal machinery which is of necessity a matter of [public] record.

Id. Senator Joseph R. Pisani, who sponsored the legislation, wrote that it would "safeguard the good names of a countless number of our fellow men who have looked to our courts for justice [and] serve to protect them against unfair records which will serve only to blight their futures in many ways. . . ." *Id.* at 8 (Letter from Senator Joseph R. Pisani to Hon. Judah Gribetz, dated June 16, 1976, Bill Jacket, L 1976, ch 877). The bill would "protect the rights of individuals against whom criminal charges have been brought, but which did not ultimately result in a conviction." *Id.* at 56 (Governor's Approval Memorandum #31, L 1976, ch 877 (filed with Senate Bill Number 9924-A)). In approving CPL 160.50 and 160.60, the Governor characterized the bill as "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." *Id.*

In recognition of this history, courts have held that the purpose of the Sealing Statutes is to broadly and robustly protect against *any* adverse consequences from arrests that do not result in criminal convictions. *See Harper v. Angiolillo*, 89 N.Y.2d 761, 767 (1997) (explaining that the sealing requirement is intended to be "broad" to serve the "primary purpose of averting adverse consequences to the accused in unsuccessful criminal prosecutions"). As the Court of Appeals observed in 2014, the Sealing Statutes protect against *any* stigma that might result from access to sealed records:

> We have recognized the salutary and protective goals of section 160.50, explaining that "the Legislature's objective in enacting CPL 160.50 and the related statutes . .

> . was to ensure that the protections provided be consistent with the presumption of innocence . . . . Indeed, the over-all scheme of the enactments demonstrates that the legislative objective was to remove any stigma flowing from an accusation of criminal conduct terminated in favor of the accused."

Rubenstein, 23 N.Y.3d at 580-81 (quoting *People v. Patterson,* 78 N.Y.2d 711, 716 (1991)) (alterations in original)*; accord Katherine B.*, 5 N.Y.3d at 202 ("The sealing requirement was designed to lessen the adverse consequences of unsuccessful criminal prosecutions by limiting access to official records and papers in criminal proceedings which terminate in favor of the accused.") (quoting *Harper*, 89 N.Y.2d at 766); *Lino*, 101 A.D.3d at 556 ("[T]he Legislature enacted CPL 160.50 and 160.55 to remove any stigma related to *accusations* of criminal conduct.") (citing *Patterson*, 78 N.Y.2d at 716).

The legislative history further reflects a universal understanding among the bill's proponents that the Sealing Statutes would restrict a law enforcement agency's continued access to its own records after the records become sealed. *See* Roberts Aff., Ex. 3, ECF No. 37 at 10 (Budget Report on Bills, dated July 8, 1976, L 1976, ch 877) ("This bill would *eliminate the continued use* of arrest and prosecution information by the courts, the Division of Criminal Justice Services (DCJS), and other police agencies . . . . ") (emphasis added); *id.* (arrest and prosecution records "must be sealed by police agencies and the courts; [*s*]*uch records can only be made available to* . . . law enforcement agencies upon ex parte motion in superior court") (emphasis added). The legislative history also demonstrates that subsection (1)(d) was intended to dictate the sole circumstances under which a law enforcement agency can access sealed records for criminal investigation: The Senator who introduced the bill described these exceptions as "contain[ing] four provisions under which the sealed records *would continue to be available* for inspection." *Id.* at 8 (Letter from Senator Joseph R. Pisani to Hon. Judah Gribetz, dated June 16, 1976 at 55, Bill Jacket, L 1976, ch 877) (emphasis added). The Governor also explained that "the

records sealed would continue to be available to . . . a law enforcement agency *upon* ex parte *motion in a superior court, when the interests of justice so require*." *Id.* at 55 (L 1976, ch 877, Governor's Memorandum) (emphasis added).

While the Legislature intended the general prohibition on disclosure of sealed records to be "broad," it intended the enumerated statutory exceptions to be construed "narrowly." *See Hynes*, 47 N.Y.2d at 663, (observing, in upholding CPL 160.50's broad scope and "narrowly defined exceptions," that the legislature refused to expand the exceptions when it amended the statute despite criticism that the exceptions "may prove too narrow"); *Alonzo M.*, 72 N.Y.2d at 666-67 (construing the fact that "the legislature did not expand the scope of the exclusions from a sealing order when it amended the statute as evidence that the narrow exceptions to the statute should not be interpreted to pierce the statute's protective crust") (citation omitted). The Legislature has amended CPL 160.50 no fewer than seven times (in 1977, 1980, 1986, 1991, 1994, 2004, and 2015) and CPL 160.55 no fewer than six times (in 1991, 1994, 1996, 1998, 2009, and 2015). In none of these amendments did the Legislature ever add an exception that would permit a law enforcement agency routine access to sealed records, even as the Legislature on occasion expanded the exceptions. *See, e.g.*, L 2015, ch 449, § 1 (amending CPL 160.50(1)(d)(ii) to permit local courts to hear motions to unseal records that they themselves had sealed). For the most recent amendment to CPL 160.50, the legislature explicitly affirmed that exceptions are to be "strictly construed." Borchetta Aff., Ex. B (N.Y. Sponsors Memorandum, 2015 A.B. 7319, 238th Leg., 2015 Reg. Sess. (N.Y. 2015)). Last year, the Legislature again expanded the sealing statute's protections, this time to permit sealing of certain criminal *convictions*. CPL 160.59. This long and consistent history confirms that the Legislature intended to create robust protections and never intended to grant the NYPD the exception it now requests from this Court.

During the legislative debates, both proponents and opponents of the legislation agreed that the proposed legislation would restrict a law enforcement agency's access to records in its own files. Indeed, the NYPD itself joined in this debate, warning that the statute's language prohibits the very form of routine investigative access it now seeks. Prior to enactment, the NYPD argued that the Sealing Statutes would impede investigations, the precise consequence Defendants complain of now. Specifically, the NYPD objected that "requiring police officers to get court orders to look at records may hinder [ ] investigations." *See* Roberts Aff., Ex. 3, ECF No. 37 at 31 (Letter from Abraham D. Beame, Mayor of NYC, to Governor Carey, dated July 15, 1976, Bill Jacket, L 1976, ch 877). The Legislature overwhelmingly voted for passage despite those objections.[7] New York City's Mayor also objected that sealing would undermine suspect identification. *See* Borchetta Aff., Ex. C (Letter from Edward L. Koch, New York City Mayor, to Governor Carey dated May 2, 1980 at 2, Governor's Bill Jacket, L 1980, ch 192) ("Perhaps the most effective investigative technique our police department has today involves the use of photograph files to identify persons who commit crimes. This investigative source should not be narrowed except in cases where the accused has received a favorable disposition."). The Legislature determined that the need to guard the presumption of innocence—an essential pillar of

[7] Defendants suggest that when the NYPD objected that "requiring police officers to get court orders to look at records may hinder the investigations" the NYPD meant "requiring police officers from other agencies not including the NYPD" would have that result. *See* MTD at n.3. This argument strains credulity. To accept it, the Court would need to conclude that the NYPD's succinct objection to a major new state law, submitted through a formal letter from the Mayor, was limited to a factual scenario that the objection does not articulate and that would likely have arisen infrequently. It is far more likely that the NYPD believed at the time the statute was passed that the officers would be barred from accessing sealed records in NYPD files. Just as the Sealing Statutes never distinguish between disclosure to an outside law enforcement agency versus disclosure within the same agency, neither did the NYPD's objection prior to the statute's passage make this distinction.

our system of justice—outweighs the consequences the NYPD complained of in 1976 and complains of again now. The Court should not upturn that legislative balance.

Furthermore, the legislative history of a separate, contemporaneously enacted law does not support the narrowed statutory purpose that Defendants propose. *See* MTD at 5. At the same time that the Legislature enacted CPL 160.50, it enacted a separate anti-discrimination law prohibiting discrimination based on sealed records in the context of employment, licensing, and insurance. Executive Law 296.16 ("Exec. L."). This prohibition was understood as creating additional protection on top of the requirements in CPL 160.50 and 160.60. *See* Roberts Aff., Ex. 3, ECF No. 37 at 8 (Letter from Senator Joseph R. Pisani to Hon. Judah Gribetz, dated June 16, 1976, Bill Jacket, L 1976, ch 877) (describing the anti-discrimination provisions as "special sections" within the statutory scheme); *id.* at 56 (Governor's Approval Memorandum #31, L 1976, ch 877 (filed with Senate Bill Number 9924-A)) (setting out the sealing protections the CPL afforded and then explaining that, "*[i]n addition*," the Executive Law would prohibit the discriminatory use of sealed records) (emphasis added). Plaintiffs have not alleged any violations of Exec. L. 296.16, and Defendants' interpretation of that statute would turn the Legislature's intent on its head: An additional statutory provision that was intended to *expand* the protections of CPL 160.50 and 160.55 would instead winnow those protections.

CPL 160.60, which explains the "effect" of sealing, reinforces that Exec. L. 296.16 was intended to provide additional protection. The first sentence of CPL 160.60 describes the effect of sealing in broad terms: "[T]he arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution." The next two sentences then add that "[t]he arrest or prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity,

occupation, profession, or calling" and that, "[e]xcept where specifically required or permitted by statute or upon specific authorization of a superior court, no such person shall be required to divulge information pertaining to the arrest or prosecution." These protections were intended to supplement the baseline protection against adverse consequences.

The Complaint's allegations put in stark relief how Defendants' practices undermine the Legislature's intent of protecting the presumption of innocence and preventing any adverse consequences to the person accused. As a result of the NYPD's internal use of sealed records, people who have been arrested by the NYPD—including people who were never found guilty, people exonerated by a jury, and people whose charges were dropped by the prosecutors—are targeted for police scrutiny, Compl. ¶ 3; have personal information disseminated throughout the NYPD that remains accessible—in perpetuity—to officers, at the click of a button, *id.* ¶¶ 12, 34, 132; face interrogation about arrests that officers should not know about, *id.* ¶ 95; are labeled "recidivists," *id.* ¶¶ 53-56; and face new criminal charges, *see, e.g., id.* ¶¶ 85-116. Defendants' policy and practice of disclosing sealed records to its personnel also results in widespread public disclosure through the media, including situations in which the sealed records disclosed by the NYPD are used to publicly disparage people who were shot and killed by NYPD officers. *Id.* ¶¶ 62, 70-79. Through the NYPD's use of sealed records, Defendants mark anyone the NYPD has arrested as suspicious, forevermore—a mark that overwhelmingly falls on Black and Latino people. Defendants' policy and practice of internal disclosures of sealed records therefore defies the will of the Legislature.

III. Prohibiting Disclosure of Sealed Records Would Not Bar NYPD Access When Justice Requires Disclosure and Would Not Prevent Assessment of Officer Conduct, and Therefore Defendants' Hypotheticals Do Not Support Dismissal.

Defendants offer three hypotheticals to argue that, as a policy matter, the NYPD should be allowed to disclose sealed records to its personnel without ever obtaining court orders. MTD at 9-13. As a threshold matter, this reasoning can be quickly dismissed because it is founded on two fundamental flaws. First, Defendants fail to understand that the Legislature contemplated the exact kinds of situations presented in their hypotheticals and enacted exceptions in the statute in order to address them. Second, most of Defendants' hypotheticals concern the use of sealed records in the context of public safety or internal officer discipline matters that have nothing to do with the use of sealed records in the course of routine investigations at issue here. The issue on this motion is the internal use and disclosure of sealed records, which results in the stigmatization and further scrutiny of individuals whose records should be sealed. To the extent that Defendants are raising factual matters not presented by or ancillary to the resolution of this motion, the Court should not consider them. *Cf. Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 (1980) (explaining that courts should not entertain "academic, hypothetical, moot, or otherwise abstract questions.")

Even if this Court did address the hypothetical scenarios set out in Defendants' motion, MTD at 11-12, each has a very practical solution: The Sealing Statutes authorize the NYPD to seek an unsealing order through an *ex parte* motion.[8] Indeed, in Defendants' third hypothetical,

[8] There is also a statutory exception to sealing for charges related to domestic violence, providing that certain arrest records may be accessed for law enforcement purposes *after* a subsequent arrest. CPL 160.55(1)(d)(vi). That explicit limitation included in the language of the statute would be meaningless if, as the NYPD contends, the sealed records were freely available to the NYPD during an initial investigation. Furthermore, in 2009 the Legislature considered but rejected a proposed amendment that would have exempted from sealing all records pertaining to arrests that terminated in a plea of guilty to the civil violation of second degree harassment against a family member or household member. *See* Borchetta Aff., Ex. D (S.B. 5031, 231st Leg., Reg. Sess. (N.Y. 2009)).

the officers could likely seek the unsealing order at the same time that they obtained the search warrant. In addition, while it is true that law enforcement agencies will need to retain copies of sealed records for the purpose of accessing them when ordered to do so by a court, s*ee* MTD at 9, this need does not require routinely disclosing Plaintiffs' sealed arrest records to NYPD personnel across the Department without a court order.

An informal guidance letter from the New York Attorney General's office is instructive on the question of how police can maintain sealed records until the moment of unsealing. 83-78 N.Y. Op. Att'y Gen. (Inf.) 1176, (1983), 1983 WL 167436. In 1983, when Section 160.50 was not yet ten years old, police agencies asked the state Attorney General's office whether they could keep information about sealed records in their computer databases. In response, the Attorney General's office concluded that "a police agency may retain on computer the name and address of an exonerated defendant as a means of identifying and providing access to 'paper' records relating to the arrest and prosecution which have been sealed by court order," but with the condition that "such data is withheld from users of the system except where retrieval is authorized under [the circumstances described in] section 160.50(1)(d)." *Id.* at *1. This guidance from the Attorney General's office shows that it, too, considered the Sealing Statutes to prohibit a police department from accessing its own sealed records—otherwise the office's admonishment that sealed records must be "withheld from users of the system" would be pointless. Maintenance of an index for internal sealed records is distinguishable, both conceptually and practically, from unfettered access to the contents of all internal sealed records.

Denying Defendants' motion to dismiss would also not prohibit the NYPD from reviewing the lawfulness of officer conduct, *see* MTD at 10, or prevent "study[ing] patterns of arrests" or

"identify[ing] problems." MTD at 11. Again, the only internal use at issue in this case is the use of sealed arrest records for purposes of criminal investigations and use in the context of studying officer conduct is not at issue here. This distinction matters because there are other standards and legal questions a court would need to assess to determine the appropriateness of the use of sealed records in the context of reviewing officer behavior. For example, courts have recognized that the Sealing Statutes sometimes do not prohibit disclosure of records that have been de-identified when necessary to assess officer compliance with the Constitution.[9] Moreover, there might be legal and statutory schemes not applicable here that would guide a court's assessment of whether unsealing

---

[9] For example, federal courts regularly grant access to redacted sealed records when necessary to prosecute civil rights claims, and in the context of discovery. *Crosby v. City of New York*, 269 F.R.D. 267, 275 (S.D.N.Y. 2010) ("Federal courts commonly order production of documents sealed pursuant to [CPL] Sections 160.50 or 160.55 . . . ."). Such use has been deemed consistent with the Sealing Statutes. *Id.* at 275 ("The worthy goals of Sections 160.50 and 160.55 as well as a litigant's need for pertinent discovery can usually be honored simultaneously by redaction of information that identifies, directly or indirectly, persons entitled to protection under these statutes."); *Haus v. City of New York*, No. 03 Civ. 4915, 2006 WL 1148680, at *5 (S.D.N.Y. Apr. 24, 2006) (ordering disclosure of "redacted arrest and on-line booking documents" and opining that such disclosure "would not undermine the policies embodied in the cited Criminal Procedure Law provisions").

Reform efforts related to the NYPD's unlawful stop-and-frisk practice offer yet another example of how the NYPD has continued to assess trends and officer conduct after being forced to comply with the Sealing Statutes. Following the First Department's decision upholding the claims in *Lino*, the parties to that action effected a settlement pursuant to which the NYPD had to remove personal identifying information from the stop-and-frisk database. Stipulation and Order of Settlement and Discontinuance, *Lino v. City of New York*, No. 10/106579 (N.Y. Cty. Sup. Ct. Aug. 7, 2013), https://www.nyclu.org/sites/default/files/releases/Lino%20Settlement.pdf. The NYPD has instituted extensive auditing of stop practices and continues to assess stop patterns, based largely on anonymized stop-and-frisk reports that continue to be maintained in the database. *See, e.g.,* Monitor's Fifth Report Analysis of NYPD Stops Reported, 2013-2015, *Floyd v. City of New York*, Fifth Report of the Independent Monitor, 08-cv-1034 (AT) (S.D.N.Y. May 30, 2017), ECF No. 554 (report examining trends in the NYPD's use of the stop-and-frisk tactic between 2013 and 2015), http://nypdmonitor.org/wp-content/uploads/2017/06/2017-05-30-MonitorsFifthReport-AnalysisofNYPDStopsReported2013-2015-Asfiled.pdf.

is permitted in the context of ensuring that officers are engaging in lawful conduct, including, for example, the provision of the New York City Charter charging the Commissioner with "responsib[ility] for the execution of all laws and the rules and regulations of the department." *See* N.Y.C. Charter § 434(b). Given recognized mechanisms for reviewing redacted records in the context of assessing officer conduct, the idea that NYPD cannot study arrest patterns and identify problems unless it makes the full contents of all sealed arrest records available for unfettered department-wide access is unfounded.

Finally, Defendants cite *Whitman v. American Trucking Ass'ns.*, 531 U.S. 457 (2001), to argue that the legislature needed to use even clearer language to limit police access to sealed records already in their possession. Defendants' argument about *Whitman* is limited to seizing on the Court's observation that Congress "does not . . . hide elephants in mouseholes," *Whitman*, 531 U.S. at 468; MTD at 12. But the effect of the Sealing Statutes was not obscured or smuggled through any kind of "mousehole." This effect was made explicit in the statute's language and even recognized by officials who foresaw the specific implications for the NYPD. *See infra* at 18-19. Defendants' citation of *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), is similarly unavailing. Defendants pluck from that decision the observation that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." MTD at 12 (quoting *Brown & Williamson*, 529 U.S. at 160). Nothing about the Sealing Statute's requirements is cryptic or unexpected in the way *Brown & Williamson* addressed. There is no question here that the Sealing Statutes' requirements cover the NYPD.

Defendants' hypotheticals seek to obfuscate the issue presented by Plaintiffs' Complaint. Plaintiffs challenge Defendants' policy and practice of disclosing their sealed arrest records to thousands of NYPD officers and detectives without court orders for the purpose of routine criminal

investigations. It is the facts of that use and disclosure—and only those facts—that should guide the Court's assessment of the pleading on this motion. Moreover, the Sealing Statutes reflect the Legislature's determination of the best way to balance law enforcement needs with the public's fundamental interests in privacy and the presumption of innocence. In light of the Legislature's balance of interests, Defendants' policy arguments must fail.

IV. Defendants' Deliberate Failure to Seal the Records of Thousands of People Violates Due Process

In moving to dismiss Plaintiffs' due process claims, Defendants rely on criminal cases in which courts held that violations of CPL 160.50 did not warrant the remedy of suppressing evidence. MTD at 15. This argument is misplaced, first because the analysis for whether to suppress evidence is not applicable to this case and, second, because Plaintiffs allege a systemic violation of rights rather than an isolated occurrence. Plaintiffs allege that Defendants wholly disregard a longstanding and mandatory statute by routinely disclosing the sealed records of thousands of people without affording them any process at all. This is sufficient to plead a due process violation, and the cases Defendants cite do not support dismissal.

The Court of Appeals has explained that "due process is a flexible constitutional concept calling for such procedural protections as a particular situation may demand." *LaRossa, Axenfeld & Mitchell v. Abrams*, 62 N.Y.2d 583, 588 (1984) (citations omitted); *accord People v. Aviles*, 28 N.Y.3d 497, 505 (2016). "[A]t its core," due process "is concerned with 'fundamental fairness.'" *State v. Ted B.*, 132 A.D.3d 28, 34 (2d Dep't 2015) (quoting *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 24 (1981)). In determining whether due process has been denied, courts first identify the liberty or property interest at stake. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *LaRossa*, 62 N.Y.2d at 588-89; *Ted B.*, 132 A.D.3d at 34-35.

"A liberty interest may arise from either of 'two sources—the Due Process Clause itself [or] the laws of the States.'" *Rodriguez v. McLoughlin*, 214 F.3d 328, 337 (2d Cir. 2000) (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). With respect to the latter source, state law creates a protected due process interest in an entitlement when a statute or regulation mandates a particular outcome when specified substantive predicates are present. *Id.* at 338 (citing, *inter alia*, *Thompson*, 490 U.S. at 462-63; *Hewitt v. Helms*, 459 U.S. 460, 472 (1983)). For example, in *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996), the court determined that New York law created a protected property interest in the receipt of child protective services because of the state law's mandatory directives. *Id.* at 677-80. Once a constitutionally protected interest is created by statute or regulation in this way, deprivation of that interest without due process violates the Due Process Clause. *See Hewitt*, 459 U.S. at 472 (stating that because "the State has created a protected liberty interest," the Court "must then decide whether the process afforded respondent satisfied the minimum requirements of the Due Process Clause"); *Kapps v. Wing*, 404 F.3d 105, 113 (2d Cir. 2005) (stating that once state law creates an entitlement, due process protections ordinarily attach); *Linen v. County of Rensselaer*, 274 A.D.2d 911, 913 (3d Dep't 2000) (ruling that "where State law creates a protected liberty interest by placing substantive limitations on the discretion of governmental officials that are explicitly mandatory," a constitutional violation occurs "when a person is deprived of that protected liberty interest without due process").

The Court of Appeals long ago held that the Sealing Statutes create a protected liberty interest. *See In re Dondi*, 63 N.Y.2d 331, 339 (1984) ("There is no question that appellant suffered a violation of his right to due process by the improper access to [his] sealed records."). In *Anderson v. City of New York*, 611 F. Supp. 481 (S.D.N.Y. 1985), the federal district court for the Southern

District of New York likewise held that CPL 160.50 "creates a liberty interest in reputation or privacy" and denied defendants' motion for summary judgment on a due process claim predicated on improper access to sealed records*, id.* at 488. In *Patterson*, 78 N.Y.2d at 711, cited by Defendants, *see* MTD at 15, the Court of Appeals reaffirmed both these holdings, observing that "an individual's right to due process is violated by improper access to records sealed pursuant to CPLR 160.50" and supportively citing *Dondi*, 717,718 n.2, and *Anderson*, *id*. at 716. As the court in *Anderson* concluded, "the language of [CPL 160.50] is mandatory" and offers the government limited discretion, hallmarks of a state-created liberty interest. 611 F. Supp. at 489. These cases establish that Plaintiffs have a constitutionally protected liberty interest in their arrest records remaining sealed.

Defendants, moreover, have a policy and practice of unsealing these records with no process at all. "[N]o process cannot equal due process." *Hartford Park Tenants Ass'n v. R.I. Dep't of Envtl. Mgmt*., No. C.A. 99-3748, 2005 WL 2436227, at *55 (R.I. Super. Ct. Oct. 3, 2005); *accord Segal v. City of New York*, 459 F.3d 207, 218 (2d Cir. 2005) (explaining that the failure to provide any process in depriving a liberty interest is sufficient to demonstrate due process violation); *Coleman v. Dretke*, 395 F.3d 216, 221 (5th Cir. 2004) (observing that, if plaintiff has a liberty interest, plaintiff's right to due process is violated where state conceded it provided no process). Plaintiffs have therefore adequately stated a due process claim.

Notably, in assessing whether due process has been denied, there is a difference between an isolated statutory violation and a whole-cloth failure to abide by the terms of a mandatory statute with respect to potentially hundreds of thousands of people. *See, e.g.*, *Grandal v. City of New York*, 966 F. Supp. 197, 202 (S.D.N.Y. 1997) (dismissing individual due process claim but explaining that "a repeated pattern of misconduct" or "sufficient facts to give rise to an inference

of deliberate indifference, gross negligence or acquiescence in a prior pattern of misconduct" might support a claim brought under 42 U.S.C. § 1983); *D.S. v. City of Peekskill*, No. 12-cv-4401, 2014 WL 774671, at *7 (S.D.N.Y. Feb. 27, 2014) (dismissing individual due process claim but opining that "a deliberate pattern of indifference" could be significant in analyzing the claim).[10] Plaintiffs allege that Defendants are depriving thousands of people of a guaranteed entitlement with no process. Plaintiffs have sufficiently alleged that this intentional disregard of a longstanding, mandatory statute violates their due process rights.

Patterson does not compel a different conclusion. First, *Patterson* itself recognized that a violation of the CPL 160.50 constitutes a violation of due process. *Patterson*, 78 N.Y.2d at 717. Second, *Patterson* held that the Sealing Statutes were not designed to protect any previously extant constitutional right. The case did not address the separate question of whether a person must be afforded process prior to being denied the Sealing Statutes' protections. Specifically, in deciding that a violation of CPL 160.50 did not warrant application of the exclusionary rule, *id*. at 717-18, *Patterson* held that "[a] defendant has no inherent or constitutional right to the return of photographs, fingerprints or other indicia of arrest where charges are dismissed." *Id.* at 715

[10] To the extent federal district courts have suggested that *Patterson* abrogated *Anderson*, *see Peekskill*, 2014 WL 774671 at *5, this interpretation would be inconsistent with *Patterson* itself, which favorably cited *Anderson*. *Patterson*, 78 N.Y.2d at 716. Plaintiffs further respectfully submit that *Peekskill* was incorrect to suggest (*see* 2014 WL 774671 at *5) that a protected liberty interest could no longer be created by the mandatory nature of state laws alone following the U.S. Supreme Court's decision in *Sandin v. Conner*, 515 U.S. 472, 479-80 (1995), in which the Supreme Court limited when people in prison could establish protected liberty interests. The Second Circuit recognized that *Sandin* did not have that effect, *see Rodriguez*, 214 F.3d at 338, and the Second Circuit also declined to uphold the *Peekskill* trial court's due process analysis on appeal. *See D.S. v. City of Peekskill*, 581 F. App'x 65, 67 n.1 (2d Cir. 2014). Moreover, federal district court decisions are not binding on this Court, and Plaintiffs' claims are a matter of state law, which provides more robust due process protections than federal law. *See Aviles*, 28 N.Y.3d at 505, *People v. Taylor*, 9 N.Y.3d 129, 146-47, 147 n.10 (2007); *Sharrock v. Dell Buick-Cadillac Inc.*, 45 N.Y.2d 152, 159-60 (1978).

(citations omitted). That holding would hinder Plaintiffs' due process claim only if the alleged source of their liberty interest was a right such as a Fourth Amendment right to privacy. Plaintiffs, however, allege that the Defendants have a policy of denying a statutory entitlement without process, which implicates a protected liberty interest created by state law.

The other exclusionary rule cases that Defendants cite—*see* MTD at 15 (citing *Charles Q. v. Constantine*, 85 N.Y.2d 571, 575 (1995); *United States v. Jakobetz*, 955 F.2d 786, 802 (2d Cir. 1992))—are similarly inapposite. When a criminal defendant seeks suppression of evidence obtained in violation of a state statute, courts ask whether the statute implicates a constitutional right. *See Patterson*, 78 N.Y. at 717. An affirmative answer to that question will support suppression. *Id.* (distinguishing cases in which exclusionary rule applied to statutory violations because "[i]n each of [those] instances, the statutory imperative operates directly to protect and preserve a constitutionally guaranteed right of the citizen"). The exclusionary rule decisions merely support the proposition that CPL 160.50 was not designed to protect an interest that arises from the Fourth Amendment. Again, Plaintiffs are invoking a liberty interest that arises from state law, not the Fourth Amendment. Notably, in 2014, long after *Charles Q.* and *Jakobetz*, the Second Circuit affirmed that it had not decided the question of whether improper access to sealed records could support a due process claim. *See D.S. v. City of Peekskill*, 581 F. App'x 65, 67 n.1 (2d Cir. 2014) ("We do not decide whether Section 160.50 creates a liberty interest protected by the Due Process Clause . . . ."). Plaintiffs are not arguing for any application of the exclusionary rule, and statements from cases analyzing the exclusionary rule's scope do not bar Plaintiffs' claims.

CONCLUSION

Wherefore, for the reasons stated above, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss in its entirety.

Dated: New York, New York
September 17, 2018

BY:/s/ Jenn R. Borchetta

Jenn Rolnick Borchetta
Shakeer Rahman
Johanna B. Steinberg
THE BRONX DEFENDERS
360 E. 161st Street
Bronx, New York 10451
(718) 838-7878

Jonathan S. Kolodner
Martine B. Forneret
Alexandra K. Theobald
Eric Boettcher
Pekham Pal
Michael Cinnamon
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Counsel for Plaintiffs