N.Y. County Clerk Index No. 400475/07

New York Supreme Court
Appellate Division—First Department

In the Matter of the Application of
MADELINE ACOSTA,

Petitioner-Appellant,

for a Judgment pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION;
JOEL I. KLEIN as Chancellor of the New York City Department of Education;
LAWRENCE BECKER as Chief Executive of the Division of Human
Resources of New York City Department of Education, and
COOKE CENTER FOR LEARNING AND DEVELOPMENT,

Respondents-Respondents.

BRIEF AMICUS CURIAE

for MADELINE ACOSTA on behalf of
Community Service Society, The Bronx Defenders, Legal Action Center,
The Fortune Society, Osborne Association, and STRIVE

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September 18, 2008

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INTEREST OF AMICUS CURIAE

Madeline Acosta is one of hundreds, perhaps thousands, of New Yorkers who long ago left criminality behind but are still punished by their records. Some have more overwhelming evidence of rehabilitation than Ms. Acosta; many have less. All of them have fulfilled society's expectations, completing substance abuse, anti-violence, and vocational training, and they therefore have every right to expect the fair treatment state law guarantees when they search for employment.

The Community Service Society ("CSS"), The Bronx Defenders, and the Legal Action Center ("LAC") are nonprofit organizations that use litigation and policy approaches to stabilize people with criminal records by removing legal barriers to employment and housing. They have a vested interest in the correct application of State Correction Law Article 23-A and the State and City Human Rights Laws, which prevent unfair employment discrimination against people with criminal records. The Fortune Society, the Osborne Association, and STRIVE help the more than 100,000 people released from New York jails and the 28,000-plus people released from New York prisons each year successfully reenter into society through a variety of vocational, substance abuse, and counseling services. All six organizations work with many clients who, like Ms. Acosta, are illegally denied employment and licensure—and a second chance—because of stale criminal records and despite clear evidence of rehabilitation.

The **Community Service Society** has lead the fight against poverty in New York City for more than 160 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

spawned the Columbia University School of Social Work. CSS's primary focus is on the value of good-wage jobs and work supports to stimulate social and economic mobility among the working poor. Throughout its history, CSS has embraced the idea that policy solutions grounded in research and informed by real-life experiences inspire legislative remedies, volunteerism, and direct service to populations in need. Because mass imprisonment both highlights the stratification of society and perpetuates the existence of a permanently poor class, CSS enforces laws and promotes policies to speed the successful reentry of people with criminal records.

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. 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, making re-arrest almost inevitable. 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. 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.

The **Legal Action Center** 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 clean up 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.

Founded in 1967, **The Fortune Society, Inc.** works with and advocates for individuals involved in the criminal justice system to assist them in ending cycles of behavior destructive to themselves and their communities; in becoming constructive members of their families and communities; and in removing barriers that unjustifiably hamper their re-integration into society. Fortune serves more than 3,500 formerly incarcerated people each year, the racial and ethnic breakdowns of whom reflect the neighborhoods they come from: In 2007, 59% of Fortune's clients were African-American; 30% were Latino; and 94% of clients reporting their race were nonwhite. The average age of Fortune's clients is 34; 90% are male; and GLBT clients are served in all of its programs. A majority of clients in Fortune's Education unit read English below a sixth-

grade level; 4.6% report their primary language as Spanish. Fortune provides a holistic array of programs through a "one-stop shop" model of services—including housing, health, substance abuse treatment, counseling, education, and career development—and nearly all of its clients are involved in multiple program offerings. Finding effective ways to manage reentry into society and the workforce, including removing counterproductive barriers to reintegration, is critical to promoting public safety and curbing recidivism rates and the high costs of re-incarceration.

The **Osborne Association** is the oldest nonprofit organization in New York exclusively serving men and women affected by incarceration. Established in 1931 to continue the work of its founder, Thomas Mott Osborne, the Association offers employment, treatment, family, health, and supportive services to incarcerated and formerly incarcerated individuals and their children and families. Thomas Mott Osborne, an industrialist, prison warden, and pioneer of prison reform, began a Bureau of Vocational Placement nearly eighty years ago, with the purpose of assisting men and women find employment after their incarceration. Since that time, Osborne has provided job readiness, job placement, and job retention services to thousands of individuals, enabling them to support themselves and their families. Osborne has also worked with thousands of employers who believe in redemption and rehabilitation, having seen the benefits of employing and retaining staff who have transformed their lives and possess a strong desire to work and contribute to their communities.

STRIVE has served hard-to-employ individuals in New York State for more than two decades, combining soft-skills enrichment with hard-skills training. Its core clientele faces multiple barriers to employment, ranging from a criminal history to habitual drug usage. Typically, clients come to STRIVE for tangentially their own reasons, but, over time, they stick with the program

because of people who had no say in their actions—their children. During the orientation process, clients are asked about the names and ages of their kids; as they share this information, clients speak passionately about giving their children different and better choices than those that lead to their involvement with STRIVE. While experts can speak eloquently about the positive effects of employment on recidivism, STRIVE has twenty-four years of experience with how employment not only keeps people with criminal records from recidivating, it keeps their children out of the criminal justice system as well.

The above organizations submit this brief *amicus curiae* in support of Petitioner-Appellant Madeline Acosta to reverse the DOE's arbitrary and capricious application of Article 23-A and the lower court's denial of her Article 78 challenge to that decision. The correct application of State Correction Law Article 23-A not only affects our clients who want and deserve to work, but affects all taxpayers when publicly funded and government agencies fail to hire the most qualified individuals due to discrimination based solely on prior criminal record. In a fair society, there is no more fitting role for a government which deprives a person of liberty to later reintegrate that person into the community through meaningful, well-paid employment—and an opportunity for a second chance.

PRELIMINARY STATEMENT

Petitioner-Appellant Madeline Acosta is no longer the 17-year-old girl who, intimidated by her abusive boyfriend, committed robbery in 1993. In the fourteen years since, she has matured into a working professional woman, a wife of five years, and the mother to a 2-year-old son. State Corrections Law Article 23-A, which was enacted "to establish reasonable procedures to prevent the unfair discrimination against former criminal offenders in regard to licensure and employment . . . ,"[1] is designed to protect people like Ms. Acosta from being judged solely on their past criminal records. Unfortunately, the lower court allowed the Department of Education ("DOE") to decide that Ms. Acosta's single criminal conviction should prevent her from working as an administrative assistant in a school, even though she would have no contact with students and despite her voluminous evidence of rehabilitation. This appeal challenges the lower court's acceptance of that decision because it was arbitrary and capricious.

Ms. Acosta has worked or been in school continuously since her early release to parole in February 1997. While incarcerated, Ms. Acosta obtained her GED and completed numerous vocational and anger-management courses. She trained and facilitated conflict-resolution courses; tutored women to take the GED; and was later employed simultaneously as a law clerk, grievance representative, and pre-release aide with outside clearance. Within a week of early release to parole, she found a job; within months, she was offered a managerial position but rejected it to pursue a Bachelor of Science in Legal Assistant Studies from CUNY Technical College, which she earned in 2001. While at CUNY, she continued to volunteer as a facilitator in conflict resolution workshops and to give motivational speeches in prison, colleges, and conferences with Alternatives

[1] Statement of Gov. Hugh L. Carey, dated July 27, 1976, Bill Jacket, L.1976 ch. 931, at 2458.

to Violence, a group promoting nonviolent conflict resolution. From 2001 to 2003, Ms. Acosta worked as a paralegal and administrative assistant at an environmental law firm, N.W. Bernstein & Associates, helping collect millions of dollars from companies to clean up Superfund sites. She left that job to start a family but returned to legal work three years later at Jones, Jones, Larkin & O'Connell, a workers' compensation firm. After almost two years as a paralegal supervisor, she took an administrative assistant position at Cooke Center for Learning and Development ("Cooke"), which provides in-school special education under contract with the DOE. The position at Cooke provided a salary and benefits and, because it was part-time, allowed her to spend more time with her family.

Because of Cooke's contract with the DOE, however, Ms. Acosta needed DOE security clearance. After four months of working at Cooke—in an office without any individual contact with children—she went to an interview to evaluate her for such clearance. She provided proof of her volunteer, employment, and education history; plus letters of recommendation from numerous supervisors and mentors. During the five-minute interview, however, she only was asked about the job she was applying for and the circumstances of her conviction. After Ms. Acosta stated that she had a college degree and had been employed for years, the interviewer, rather than accepting Ms. Acosta's voluminous proof of rehabilitation, told her to summarize it. She e-mailed a statement to him that same afternoon. Two weeks later, Ms. Acosta received a notice denying her security clearance because the DOE stated that continued employment would pose an "unreasonable risk to the safety and welfare of the school community."

To say Ms. Acosta is less fit for employment than someone without a criminal record is to discriminate against her solely because of her conviction; to limit the evidence of rehabilitation she

could present is arbitrary and capricious; for the DOE to consider her an "unreasonable risk" is contrary to state law and public policy. For these reasons—and because "(p)roviding a former offender a fair opportunity for a job is a matter of basic human fairness . . . ."[2]—the lower court must be reversed.

ARGUMENT

A public agency cannot deny a license or find that an applicant lacks "good moral character" simply because of her criminal history. N.Y. CORRECT. LAW § 752 (McKinney 2008). A criminal conviction is only relevant if a direct relationship exists between the conviction and the prospective job or granting the license would pose an unreasonable risk to persons or property. *Id.* Before denying a license or a job upon either ground, however, the agency must consider the factors in § 753 of the Corrections Law:

a. New York's public policy to encourage employment of the formerly incarcerated;
b. The job's necessary duties and responsibilities and the conviction's bearing on the applicant's fitness and ability to fulfill them;
c. How long ago the offense occurred, how serious it was, and the applicant's age at that time;
d. Evidence from the applicant of rehabilitation and good conduct;
e. The legitimate interest of the employer in protecting people and property; and
f. A Certificate of Relief from Disabilities or Certificate of Good Conduct, which creates a presumption of rehabilitation.

An agency cannot simply presume an unreasonable risk exists; instead, it must evaluate the § 753 factors before reaching that conclusion. *Bonacorsa v. Van Lindt*, 71 N.Y.2d 605, 613–14 (N.Y. 1988). In doing so, agencies must consider each statutory factor and cannot ignore evidence favorable to the applicant. *Gallo v. N.Y. State Office of Mental Retardation and Developmental*

[2] Statement of Gov. Hugh L. Carey, *supra* note 1.

Disabilities ("OMRDD"), 830 N.Y.S.2d 796, 798 (3d App. Div. 2007). The Article 23-A factors reflect criminology research, discussed below, that discounts the relevancy of convictions more than seven years old, especially those that occurred during adolescence, and recognizes that employed people are much less likely to recidivate. By not considering this information—and by affirmatively rejecting applicants' evidence of rehabilitation—agencies, like the DOE here, act arbitrarily and capriciously outside the constraints of Article 23-A. N.Y. C.P.L.R. § 7803 (McKinney 2008).

I. THE DOE'S DECISION WAS ARBITRARY AND CAPRICIOUS BECAUSE THE AGENCY IGNORED FAVORABLE INFORMATION IT WAS LEGALLY REQUIRED TO CONSIDER UNDER ARTICLE 23-A.

As this Court wrote twenty-four years ago, Article 23-A was enacted "to create reasonable standards to be applied by potential employers, including public agencies, when considering applications by former offenders . . . ." *Stewart v. Civil Serv. Comm'n of City of N.Y.*, 84 A.D.2d 491, 494 (1st Dep't 1982). State agency decisions are therefore arbitrary and capricious under Article 23-A both when the Article 23-A factors are not rationally considered, *Boatwright v. OMRDD*, 100330/07 at 6 (Sup. Ct. N.Y. County Apr. 18, 2007); and when they ignore evidence favorable to the applicant, *Gallo*, 830 N.Y.S.2d at 798; or base their decision on information the applicant was not asked to provide. *Black v. OMRDD*, 858 N.Y.S.2d 859, 863 (Sup. Ct. N.Y. County 2008); *Hollingshed v. OMRDD*, 6848/07 at 6 (Sup. Ct. Bronx County Jan. 3, 2008). While the weight state agencies give to each Article 23-A factor is part of their discretion, *Arrocha v. Board of Educ. of City of N.Y.*, 93 N.Y.2d 361, 366-67 (N.Y. 1999); an agency must, to fulfill state public policy, consider all of an applicant's evidence of rehabilitation, evaluate it rationally, not ignore any of it, and not base their decision on information they failed to request.

Here, the DOE's decision was arbitrary and capricious for two reasons. First, the DOE refused to consider all of the evidence of rehabilitation Ms. Acosta presented—effectively ignoring it—when it gave her a five-minute interview, asked her two questions, and told her to summarize her voluminous achievements. Second, the DOE irrationally concluded that Ms. Acosta's sole conviction—fourteen years ago when she was 17—posed an unreasonable risk even though she is now a married, 31-year-old mother of a 2-year-old son and has a long professional work history and a risk of recidivism no greater than someone without a conviction record at all.

A. THE DOE IMPERMISSABLY NARROWED THE SCOPE OF MS. ACOSTA'S EVIDENCE OF REHABILITATION BY RESTRICING HOW MUCH OF IT SHE COULD PRESENT AND LIMITING HER INTERVIEW TO FIVE MINUTES.

When the DOE gave Ms. Acosta a five-minute interview and told her to summarize her evidence of rehabilitation because it would not consider all of it, the DOE ignored evidence favorable to her in violation of Article 23-A. An agency cannot disregard the applicant's positive evidence, *Gallo*, 830 N.Y.S.2d at 798; or base its decision on information the applicant was not asked to provide. *Hollingshed*, 6848/07 at 7. In addition, agencies must rationally and meaningfully consider applicants' evidence of rehabilitation. *Black*, 858 N.Y.S.2d 859, 863.

In *Gallo*, the agency's decision was arbitrary and capricious because it failed to consider New York's public policy in favor of employing people with criminal records; petitioner's certificate of relief from disabilities; and petitioner's light sentence for his nine-year-old conviction of second-degree assault. *Gallo*, 830 N.Y.S.2d at 798. In *Black*, the agency failed to properly address and consider the Article 23-A factors because it did not "articulate in any meaningful and specific way the positive factors which were submitted by petitioner," glossing over graduating from community college with distinction as "information concerning education." *Black*, 858 N.Y.S.2d

864. In *Hollingshed*, the agency was reversed when it did not consider petitioner's letters of reference, work history, and certificate of good conduct; and when it faulted petitioner for not providing documentation from the Board of Parole when it never requested such information. *Hollingshed*, 6848/07 at 7.

Here, the DOE based its decision on information Ms. Acosta was not asked to provide because it said she "did not provide references from any previous employers," but, in its hearing notice, the DOE stressed that it only wanted to see "current employment verification" (emphasis in original). This inconsistency harmed Ms. Acosta more than the petitioner in *Hollingshed* because the DOE claimed it could not trust someone with a felony conviction to deal with sensitive student information. Had the DOE considered Ms. Acosta's previous employment at two law firms, handling millions of dollars' worth of litigation and sensitive client information, it could not have rationally reached that conclusion. By restricting the employment history Ms. Acosta was allowed to submit, the DOE also ignored evidence favorable to her, just like the state agency in *Gallo*. The DOE also ignored favorable evidence by limiting her five-minute interview to two questions—the job she was applying for and the circumstances of her single conviction—and forcing her to summarize her evidence of rehabilitation instead of receiving and considering everything she tried—and had the right—to present in her favor. Finally, Ms. Acosta's employment, college diploma, training, and volunteer work were glossed over as "information," just like the petitioner in *Black*.

Because the DOE ignored and effectively refused to consider evidence favorable to Ms. Acosta and based its decision on information she was not asked to provide, its decision was arbitrary and capricious in violation of Article 23-A, so the lower court must be reversed.

B. THE DOE IGNORED MS. ACOSTA HERSELF: A MARRIED MOTHER WITH A LONG WORK HISTORY AND A COLLEGE EDUCATION WHO POSES NO GREATER RISK THAN SOMEONE WITHOUT A CRIMINAL RECORD.

While Article 23-A explicitly requires the DOE to consider, *inter alia*, how much time has passed since Ms. Acosta's conviction, how serious it was, and how old she was when it occurred, § 753(1)(d),(e),(f); clearly Ms. Acosta's personal character itself is additional evidence of rehabilitation. *See* § 753(1)(g). Broadly construing individuals' evidence of rehabilitation is not only consistent with the public policy in § 753(1)(a), it is supported by caselaw: In *Gallo*, the agency was reversed when it failed to consider petitioner's light sentence—an analysis not explicitly required in § 753—because the leniency indicated rehabilitation. *Gallo*, 830 N.Y.S.2d at 798.

The Article 23-A factors reflect criminology research discounting convictions more than seven years old, especially those that occurred during adolescence. Article 23-A recognizes that a majority of people who commit one crime "do not go on to lead lives of crime, but indeed age out of, or otherwise desist, from criminal activity." Kurlychek et al., *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, 53 CRIME & DELINQ. 64, 70 (2007). Among criminologists, there are many factors that predict "desistance"—the end of criminal activity and the reintegration into society. Chief among these is the passage of time, but other indicators include the transformation of personal identity that leads to adulthood: employment at an adequate income, a home, a spouse, children, and adult friends. John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 18 (2001). These factors are consistent across types of crime and age when the crime occurred; the only difference between men and women is that women are not only are less likely to commit crime, *but less likely to*

recidivate. *Id.* at 24-25; *see also* Christopher Uggen & Candace Kruttschnitt, *Crime in the Breaking: Gender Differences in Desistance*, 32 L. & SOC'Y REV. 401, 421 (1998).

i. People whose crimes occurred seven years ago, especially during adolescence, are no more likely to commit a crime than individuals with no record at all.

By their mid-20s, most individuals with juvenile and young adult convictions have a risk of recidivism that is *indistinguishable* from people with no criminal record, according to a 2007 study of 610 individuals from young adulthood through age 32. Kurlychek et al., *Enduring Risk?*, *supra* at 75. While recent criminal convictions are relevant for predicting recidivism, if a person with a criminal record remains crime-free for approximately seven years, her risk of committing a new offense is similar to a person without any record at all. *Id.* at 83; Shawn D. Bushway & Gary Sweeten, *Abolish Lifetime Bans for Ex-Felons*, 6 CRIMINOLOGY & PUB. POL'Y 697, 697 (2007). In fact, existing research shows most criminal careers are short—no more than five years for people who commit crimes in their youth. Laub & Sampson, *Understanding Desistence*, *supra* at 17.

As people with criminal records age, criminologists agree that they generally desist from criminal behavior. Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 AM. SOC. REV. 529, 542 (2000). Rates of recidivism decline as age increases, controlling for a criminal record and other factors typically linked to recidivism. Peter B. Hoffman & James L. Beck, *Burnout–Age at Release from Prison and Recidivism*, 12 J. CRIM. JUST. 617, 621 (1984). "(I)n most societies, crime rates rise in the early teen years, peak during the mid- to late teens, and decline thereafter." Uggen, *supra* at 530. A study following five hundred men from age 7 to age 70 found that desistence is the norm, but the age at which desistance occurs depends on when the person was first arrested and for what type of crime.

Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Deliquent Boys Followed to Age 70*, 41 CRIMINOLOGY 555, 567 (2003). The average person arrested for a property crime at age 17, like Ms. Acosta, desists from criminal activity at 26.2 years of age. *Id.* at 568; *see also generally* MICHAEL E. EZELL & LAWRENCE E. COHEN, DESISTING FROM CRIME (Oxford Univ. Press 2005) (finding declining arrests as serious youthful offenders reach their mid-20s). The effect of early arrest diminishes after age 30, making recent experiences—securing a job; starting a family—the best predictors of desistance. Laub & Sampson, *Understanding Desistence*, *supra* at 14.

Additionally, individuals are more likely to desist as their criminal activity drifts further into the past. Kurlycheck et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483, 489 (2006). Multiple studies have shown that the risk of recidivism after release from incarceration "peaks fairly quickly and then diminishes considerably with the passage of time."*Id.* at 488. Specifically, the peak occurs six to ten months after release; at twenty months, recidivism drops to half of the peak level; at forty months, the level is halved again. *Id.*; *see also, e.g.*, David F. Greenberg, *Recidivism as Radioactive Decay*, 15 J. RES. CRIME & DELINQ. 124 (1978); Pamela K. Lattimore & Joanna R. Baker, *The Impact of Recidivism and Capacity on Prison Populations*, 8 J. QUANTITATIVE CRIMINOLOGY 189 (1992); MICHAEL D. MALTZ, RECIDIVISM (Academic Press 2001) (1984); PETER SCHMIDT & ANN DRYDEN WITTE, PREDICTING RECIDIVISM USING SURVIVAL MODELS (Springer-Verlag 1988).

Even a consortium of background check companies admit "(a)s a society, we know very little about whether, and under what circumstances, criminal justice record information (and different kinds of criminal justice record information) is relevant to various determinations involving employment, licensing, access to credit, insurance, housing, or other valued statuses or

benefits." SEARCH, REPORT OF THE NATIONAL TASKFORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 75 (Nat'l Consortium for Justice Info. & Statistics 2005). Therefore, predicting the risk of future crime based simply on the existence of a criminal record is "quite inadequate." Kurlychek et al., *Enduring Risk?*, *supra* at 82.

ii. Especially for older people with criminal records, employment provides both legal means for survival and norm-reinforcing socialization.

Employment reduces recidivism "because workers are likely to experience close and frequent contact with conventional others and because the informal social controls of the workplace encourage conformity." Uggen, *supra* at 529. In extensive interviews with people who had many larceny convictions, desistence was found to be driven by age; becoming less risky and more rational; gaining a new personal identity; and changing aspirations and goals. "(S)uccessful creation of bonds with conventional others and lines of legitimate activity indisputably is the most important contingency" that causes desistance. NEAL SHOVER, GREAT PRETENDERS: PURSUITS AND CAREERS OF PERSISTENT THIEVES 129 (Westview Press 1996). "At all ages and potential turning points, those who fail to secure satisfying employment or create bonds with conventional others often return to their former lifestyles and the risk of criminal involvement that brings." *Id.*

Additionally, holding the same job for over a year is an excellent predictor of ultimate desistance because, as reentry literature consistently demonstrates, periods of unemployment lead to higher crime rates. Laub & Sampson, *Understanding Desistence*, *supra* at 18. In fact, people with criminal records experience more difficulty in obtaining steady employment than any other disadvantaged group—more than welfare recipients and the long-term unemployed. HARRY J. HOLZER ET AL., EMPLOYER DEMAND FOR EX-OFFENDERS: RECENT EVIDENCE FROM LOS ANGELES 2

(Urban Institute 2003), *available at* http://www.urban.org/UploadedPDF/410779_ExOffenders.pdf. For a Latino woman like Ms. Acosta, the problem is compounded by race: New York City employers offer jobs or second interviews to 17.2% of whites with criminal records, but only 15.4% of Latinos and 13.0% of blacks *with no criminal record at all*. DEVAH PAGER ET AL., RACE AT WORK: A FIELD EXPERIMENT OF DISCRIMINATION IN LOW-WAGE LABOR MARKETS 21 (Princeton U. 2008), *available at* http://faculty.chicagogsb.edu/workshops/orgs-markets/pdf/pager.race.pdf.

iii. Along with a steady job, supportive family and friends allow people with criminal records to forge an identity inconsistent with criminal activity.

"Whereas parents, peers, and neighborhoods are inarguably among the initial causes of crime, for example, work and family factors take precedence in explaining desistance." Uggen, *supra* at 543. "The routine activities of work and family life and the resulting informal social ties have two functions. One is to provide social support or emotional 'attachment.' The other function is monitoring and control by providing a set of activities and obligations that often are repeated each day." Laub & Samson, *Understanding Desistance*, *supra* at 50 (internal citations omitted). These, in turn, "advance a new sense of self and a new identity as a desister from crime or, more aptly, as a family (member), hard worker, good provider, and so forth." *Id.* Taking on these responsibilities is a mark of maturity inconsistent with continued deviance. Time spent on work, marriage, and other social institutions is invested, and individuals have more of that investment to lose the longer they desist from crime. This "reorders sort-term situational inducements to crime and, over time, redirects long-term commitments to conformity." *Id.* at 51. In particular, the longer a good-quality marriage lasts, the more likely it is to prevent recidivism,

until it reaches a point of inhibiting it. *Id.* at 20. This positive effect is explained by studies showing that trading deviant peers for responsible ones leads to desistence. *Id.* at 22.

> Simply put, people who are going straight—indicating desistence is a process, not an event—undergo a change in personality and self-concept. . . . (Such individuals) were more other-centered and found fulfillment in generative behaviors, felt a greater control over their destiny and took responsibility for shaping their future, and found a 'silver lining' in the negative situations resulting from crime and found meaning and purpose in life.

Id. at 27. "The key elements seem to be aging; a good marriage; securing legal, stable work; and deciding to 'go straight,' including a reorientation of the costs and benefits of crime." *Id.* at 3.

Here, the DOE irrationally found that Ms. Acosta presented an unreasonable risk because she has no more danger of committing a crime than someone with no record at all. Because women are more likely to desist than men; the following three factors therefore have more impact when applied to Ms. Acosta.

First, the demographics are in Ms. Acosta's favor: Her conviction occurred when she was 17 years old, fourteen years ago. As research clearly shows, a person who remains crime-free for seven years has no more risk of recidivism than someone with a criminal record; Ms. Acosta has been crime-free for twice as long. Most people who commit a property crime at age 17, like Ms. Acosta, desist from criminal activity at about 26 years old; Ms. Acosta is five years older than that.

Second, Ms. Acosta has been steadily employed or in school since her early release to parole. These experiences have helped her create bonds with conventional citizens, providing a pathway toward prosperity. Additionally, keeping the same job for one year is a sure predictor of desistance; Ms. Acosta worked for two years at one law firm and, after leaving to start a family, two years at another—twice as long in each instance.

Third, Ms. Acosta long ago severed the relationship with the person who led to her involvement with the criminal justice system. She has replaced that relationship with more fulfilling ones with her husband, son, fellow volunteers, and co-workers. In fact, she has come full circle, becoming a motivational speaker for Alternatives to Violence, a group whose mission is to empower people to lead nonviolent lives through affirmation, respect for all, community building, cooperation, and trust. These new relationships and responsibilities have turned Ms. Acosta into a person who has no more likelihood of recidivism than someone with no conviction history, giving her a new identity—one completely inconsistent with criminal activity.

Most tellingly, the Cooke Center had already hired Ms. Acosta, concluding independently and with full knowledge of her criminal record that she did not pose an unreasonable risk. Based upon her personal character, which the DOE failed to consider, Cooke had good reason for doing so. Ms. Acosta is 31-year-old married mother of a 2-year-old son who has over a decade of professional work experience, a college education, and a lifestyle far removed from crime. To say she is the same person she was fifteen years ago when she, at 17, acquired her sole criminal conviction unquestionably defies rationality. The lower court's decision upholding the DOE's conclusion must therefore be reversed.

II. THE DOE'S DETERMINATION THAT MS. ACOSTA POSED AN UNREASONABLE RISK CONTRADICTS CASELAW AND STATE PUBLIC POLICY.

Even though Article 23-A's direct relationship prong considers the nexus between a conviction and the desired position, courts also routinely explore the same question when evaluating whether an unreasonable risk exists. As this Court found in 2006, however, an employee in a position "performed under supervision [that] does not involve dealing with the

public" does not pose an unreasonable risk. *City of N.Y. v. N.Y. City Civil Service Com'n*, 30 A.D.3d 227, 229 (1st Dep't 2006) (reservoir and aqueduct maintainer with City Department of Environmental Protection). The administrative assistant position Ms. Acosta held at Cooke was supervised and involved no student contact; additionally, her sole conviction is unrelated to her position at Cooke and fourteen years old. Finally, the DOE's speculations about what Ms. Acosta *might* do were clearly refuted by the record, making its decision irrational.

Courts routinely find that petitioners do not pose an unreasonable risk when their convictions are old and unrelated to the position sought. *Ford v. Gildin*, 200 A.D.2d 224, 228 (1st Dep't 1994) (no unreasonable risk when public housing caretaker had 27-year-old manslaughter conviction); *Burnham v. State of N.Y. Ins. Dep't.*, 63 A.D.2d 627, 628 (1st Dep't 1978) (no unreasonable risk when insurance adjuster had disorderly conduct and third-degree sexual abuse convictions eight and four years old, respectively); *Meth v. Manhattan & Bronx Surface Transit Operating Auth.*, 521 N.Y.S.2d 54, 55 (2d Dep't 1988) (no unreasonable risk when City bus driver had four-year-old conviction for second-degree bribe receiving, for which he received certificate of relief from disabilities); *City of N.Y v. City Civil Serv. Comm'n*, 141 Misc.2d 276, 286 (Sup. Ct. N.Y. County 1988) (no unreasonable risk when eligibility specialist at City Human Resources Administration had nine prostitution convictions no later than 17 years old and a 6-year-old manslaughter conviction).

Speculations without a factual basis in the record about what petitioners might do because of their past convictions are arbitrary and capricious. *Marra v. City of White Plains*, 96 A.D.2d 17, 25 (2d Dep't 1983) (no unreasonable risk despite two D-Felony burglary convictions—ten and fourteen years old—plus disorderly conduct, attempted extortion and conspiracy, and other earlier

and less serious, crimes). In *Marra*, petitioner's application for a license to run a rooming house was denied because the agency determined he *might*—since he had a criminal record and was executive director of a program serving people with criminal records—rent rooms to other people with records, which would pose an "unreasonable risk" to the persons and property in the immediate neighborhood. *Id.* at 20. The Second Department reversed the lower court because "where, as here, the commissioner's determination is based upon 'speculative inferences unsupported by the record,' his determination should be annulled." *Id.* at 25 (citing *Sled Hill Cafe v Hostetter*, 22 N.Y.2d 607, 612-13 (N.Y. 1968); *Circus Disco v. N.Y. State Liquor Auth.*, 51 N.Y.2d 24, 36 (N.Y. 1980); *G.J. & S. Pizza v McLaughlin*, 78 A.D.2d 653, 655 (2d Dep't 1980); *Cojer Rest. v N.Y. State Liquor Auth.*, 47 A.D.2d 612, 612 (1st Dep't 1975); *Hayes v N.Y. State Liquor Auth.*, 39 A.D.2d 482, 484 (4th Dep't 1972)).

In contrast, petitioners are more likely to pose an unreasonable risk when their convictions are related to the position sought or when the record is recent or long and serious. *Arrocha v. Bd. of Educ. of the City of N.Y.*, 93 N.Y.2d 361 (N.Y. 1999) (teaching license properly denied when applicant's B-Felony drug sale conviction occurred nine years ago when he was "the mature age of 36"); *Glover v. Augustine*, 38 A.D.3d 364, 364 (1st Dep't 2007) (unreasonable risk was triable issue of fact in negligent hiring case when applicant for elevator operator position had long record, including first-degree sexual abuse); *T.W. v. City of N.Y.*, 286 A.D.2d 243, 246 (1st Dep't 2001) (person with over two decades of convictions—including armed robbery, assault, theft, burglary, and drug possession—posed an unreasonable risk when working in a youth center); *Fogel v. Dep't of State*, 209 A.D.2d 615, 616 (2nd Dep't 1994) ("sexual misconduct" conviction warranted denial of

real estate license); *Hughes v. Shaffer*, 154 A.D.2d 467, 468 (2d Dep't 1989) (private investigator license properly denied renewal when applicant convicted of criminal impersonation and carrying an unlicensed firearm); *Inc. Vill. of Valley Stream v. Local 342*, 454 N.Y.S.2d 461, 463 (2d Dep't 1982) (city employment properly denied when petitioner convicted of felony-level unlawful imprisonment, which resulted from arrest for sexual assault); *Bevacqua v. Sobol*, 176 A.D.2d 1, 4 (3d Dep't 1992) (applicant properly denied medical license when convicted of knowingly receiving hardcore child pornography one year prior); *see also Soto-Lopez v. N.Y. City Civil Serv. Comm'n*, 713 F.Supp. 677, 679 (S.D.N.Y. 1989) (no unreasonable risk when public housing caretaker had 16-year-old manslaughter conviction, but additional felony-level drug possession five years ago created unreasonable risk).

Here, it was arbitrary and capricious for the DOE to find that Ms. Acosta posed an unreasonable risk because her robbery conviction—the only one on her record—is fourteen years old, occurred when she was 17, and is unrelated to being an administrative assistant—with no student contact—just like petitioners in *Ford*, *Burnham*, *Meth*, and *City of N.Y.* Ms. Acosta's situation is exactly the opposite of the petitioner in *Arrocha*, whose drug sale conviction was less than ten years old, occurred when he was 36 years old, and barred him from a teaching license, which would have allowed direct and sustained contact with students. Also, just like *Marra*, nothing in the record supports DOE's "very serious concerns" about allowing Ms. Acosta access to student records. Instead, the record reveals that, not only has Ms. Acosta been rehabilitated, but she is a married mother of a 2-year-old son herself and has a solid employment history handling files for million-dollar lawsuits and sensitive client information. These facts absolutely refute the DOE's baseless speculations.

Additionally, New York public policy encouraging the employment of people with criminal records—as embodied in Article 23-A, the State and City Human Rights Laws, and the Penal Law—is clearly in Ms. Acosta's favor. The primary factor in an Article 23-A determination is "(t)he public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses." § 753(1)(a). Violating Article 23-A is an "unlawful discriminatory practice" under the State and City Human Rights Laws, where people with criminal and arrest records are a protected class in employment contexts. N.Y. EXEC. LAW § 296(15),(16) (McKinney 2008); N.Y.CITY ADMIN. CODE § 8-107(10),(11) (Westlaw through Local Law 52 of 2007). Finally, the "successful and productive reentry and reintegration into society" of people with conviction histories is an explicit purpose of the Penal Law. N.Y. PENAL LAW § 1.05(6) (McKinney 2008). This was added, along with the traditional goals of deterrence, rehabilitation, and confinement, to "insure the public safety by preventing the commission of offenses." *Id.*

Because speculations about Ms. Acosta are directly refuted by the record and her conviction is in the distant past and unrelated to the position sought, the DOE irrationally concluded that she posed an unreasonable risk, contrary to caselaw and state public policy. The lower court's decision, which upheld the DOE's determination, should therefore be reversed.

CONCLUSION

The idea that Madeline Acosta has any more likelihood of committing a crime than someone without a record simply defies rationality. Consider everything Ms. Acosta would risk by returning to crime: Her five-year marriage to her husband; raising her 2-year-old son; a prestigious, well-paying supervisory position at a law firm. Service providers that work daily with people with criminal records say it makes no sense. Experienced criminologists and social scientists say it makes no sense. The legislature, in enacting Article 23-A, could not have intended a 31-year-old married mother whose single conviction was at 17—fourteen years ago; the result of an abusive relationship—to encounter the barriers to employment erected by the DOE.

If someone like Ms. Acosta, not to mention the many others like her who have completed the rehabilitative goals set before them, can legally be denied a job because of her conviction—despite page after page of letters of recommendation, diplomas, certificates of merit, and other proof of rehabilitation—it undermines respect for the fair application of the law. Moreover, it makes a mockery of Article 23-A and the State and City Human Rights Laws, and it makes a mockery of *amici* and those within the criminal justice system who counsel clients daily, face-to-face, and say there is a way out. Your past is not your future. The law protects you. Your rap sheet is not the story of your life.

For the foregoing reasons, the lower court's decision upholding the DOE's denial of security clearance—and therefore employment—to Ms. Acosta must be reversed because the DOE acted arbitrarily and capriciously when it irrationally evaluated the § 753 factors and ignored evidence in Ms. Acosta's favor.

Dated: New York, New York
September 18, 2008

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PRINTING SPECIFICATIONS STATEMENT

This brief was prepared using Microsoft Word on a computer running Microsoft Windows XP. The text was set in 12-point Goudy Old Style. The total word count, including this statement, is 6,928 words.