

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-000765-24**

CRAIG MOTT,

Plaintiff-Respondent,

v.

JANAEA SHEPHERD

Defendant-Appellant.

CIVIL ACTION, ON APPEAL FROM:

Superior Court of New Jersey
Law Division, Special Civil part,
Landlord-Tenant, Camden County
Docket No. CAM-LT-3103-21

SAT BELOW:

Honorable Richard F. Wells, J.S.C.
(retired and temporarily assigned on
recall)

**AMENDED BRIEF OF
APPELLANT JANAEA SHEPHERD**

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PRELIMINARY STATEMENT

Defendant-Appellant Janaea Shepherd is a mother to six children, one of whom has special needs, and she relies on a Section 8 Housing Choice Voucher to provide all of them with the attendant rights and benefits of housing. Having a record of eviction makes any search for housing more difficult for her, inviting commitment to undesirable or unsuitable housing rather than risk the loss of the Voucher. Her status as a woman, as a mother, and as member of the Black community make Defendant particularly vulnerable to discriminatory harms, even from well-meaning landlords, because of apparently neutral processes such as “blacklisting” practices that automatically deny housing to prospective tenants with records of eviction.

The relevant judgment for possession at interest in this case has been vacated. While it arguably never should have entered, the judgment is long-past serving its purpose as all payments have since been made to Plaintiff. The judgment has already led at least one landlord to reject Defendant as a candidate for housing. The continued public-facing presence for any record of eviction poses ongoing risk of harms in the form of future denial of housing, housing instability, prolonged homelessness, employment instability, loss of custody, and loss of Voucher benefits. It would be both a private and public good to seal, or otherwise make confidential, all records of Defendant’s eviction because

there are continuing risks of grave harm to both her and her household members, and because her interests in confidentiality so substantially outweigh any interest in public access.

PROCEDURAL HISTORY

Plaintiff-Respondent Craig Mott filed an eviction complaint on December 19, 2021, trial Docket Number CAM-LT-3103-21, seeking to evict Defendant-Appellant Janaea Shepherd for nonpayment of rent. The Parties settled the complaint by agreement, entering judgment for possession by consent on June 22, 2022. Defendant moved to vacate the judgment for possession and make the proceedings confidential through Rules 1:38-3(f)(11) and 4:50-1(e) on November 3, 2023. Defendant's motion under Rules 1:38-3(f)(11) and 4:50-1(e) was denied on November 30, 2024. Defendant filed a notice of appeal, docketed as A-001431-23, on January 12, 2024. While Defendant intended to appeal part of the trial court's decision, to the extent it denied her motion to vacate the judgment for possession, she ultimately withdrew the appeal prior to briefing on April 10, 2024. Defendant filed a motion to vacate the judgment for possession and seal the record under Rule 1:38-11 on October 11, 2024. At the hearing on October 31, 2024,¹ the motion to vacate was granted while the motion

¹ A transcript of the hearing, the only transcript in the record, is included on appeal and is referenced without numeric prefix (e.g. "T6-25" for citation to the transcript at page 6, line 25).

to seal under Rule 1:38-11 was denied. The notice of appeal for the instant appeal was then filed on November 13, 2024, and docketed as A-000765-24.

STATEMENT OF FACTS

Defendant-Appellant Janaea Shepherd relies on financial assistance, provided through a Section 8 Housing Choice Voucher (“Voucher”), to provide housing for herself and her family. See Da012, ¶¶ 1-2; and Da014, ¶¶ 11-13. Due to pregnancy-related loss of household income, Defendant properly reported the change in income for recertification, but there was a delay in payment. See Da012, ¶ 2. Plaintiff-Landlord Craig Mott filed an eviction complaint on December 19, 2021, trial Docket Number CAM-LT-3103-21, seeking to evict Defendant for nonpayment of rent. The Parties settled the complaint by agreement, entering judgment for possession to the docket by consent on June 22, 2022. See Da012, ¶ 3. The settlement agreement anticipated that Defendant would provide documents and payments to Plaintiff. See ibid. After all payments had been made, paragraph 5 of the settlement agreement stated “the judgment shall be vacated and the complaint shall be dismissed.” Da342; see also Da042 (reflecting consent of Parties on certain facts and relief). Defendant honored the agreement, and Plaintiff consented to an order vacating the judgment for possession. See Da042.

Separately, Defendant now seeks to seal her record of eviction; see Da015, ¶ 15 (paragraph carrying over from Da014); after becoming aware that she has a record of eviction when it cost her a desired housing opportunity. See Da013, ¶¶ 6-8. Defendant “[is] a Black woman, a single mother, a parent of a special needs child, and the head of a family of six children.” Da014, ¶ 11. Defendant has concerns that housing instability, caused by having had a judgment entered and the associated record of eviction, may cause both herself and her family to suffer from separation or homelessness; see Da014, ¶ 12; or to suffer from unsuitable living conditions due fears of risking her Voucher to seek proper housing. See Da014, ¶ 13.

STANDARDS OF REVIEW

The interpretation of New Jersey Court Rules is subject to *de novo* review. See State v. Dickerson, 232 N.J. 2, 17 (2018). Issues that are solely questions of law, as opposed to questions of fact or mixed questions of both law and fact, are also subject to *de novo* review. See State v. Hyland, 238 N.J. 135, 143 (2019). The standard of review for all arguments is *de novo* because the decision of the trial court below involved the interpretation of the Rules, and the motion — having been decided without opposition — involved no questions of fact.

ARGUMENT

I. THIS COURT SHOULD SEAL THE RECORD OF PROCEEDINGS UNDER RULE 1:38-11, MAKING ALL RECORDS OF EVICTION CONFIDENTIAL, BECAUSE THE FAILURE TO DO SO WILL LIKELY CAUSE SERIOUS HARM, DEFENDANT HAS AN OVERWHELMING INTEREST IN PRIVACY, AND NO ISSUE REQUIRES REMAND. (Raised Below; T4-20 to -21)

Sealing judicial records through Rule 1:38-11 requires that a petitioner satisfy a two-prong test for good cause, which “shall exist when: (1) Disclosure will likely cause a clearly defined and serious injury to any person or entity; and (2) The person's or entity's interest in privacy substantially outweighs the presumption [favoring public access].” R. 1:38-11(b). The Supreme Court set governing guidelines for deciding motions to seal; see generally Hammock by Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356 (1995); summarized by the Appellate Division as follows:

The burden of proof rests with the person who seeks to overcome the “strong presumption of access” to establish “by a preponderance of the evidence that the interest in secrecy outweighs the presumption.” That need for secrecy “must be demonstrated with specificity as to *each document*. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient.”

[Lederman v. Prudential Life Ins. Co. of Am., 385 N.J. Super. 307, 317 (App. Div. 2006) (citations omitted).]

Courts should be mindful that “there is a profound public interest [in access] when matters of health, safety and consumer fraud are involved.” Hammock,

142 N.J. at 379 (involving health and safety concerns of prescription drugs); see also Verni ex rel. Burstein v. Lanzaro, 404 N.J. Super. 16, 22-27 (App. Div. 2008) (observing motor vehicle safety and intoxication as “issues of significant public concern” while vacating overbroad seal); but see Matter of Tr. Created by Johnson, 299 N.J. Super. 415, 421-24 (App. Div. 1997) (preserving seal, despite nephew’s “attenuated and remote” inheritance rights, due to financial records being “private matter not infected with any meaningful degree of public interest”); and Matter of T.I.C.-C., 470 N.J. Super. 596, 613-15 (App. Div. 2022) (sealing name change of transgender man,² despite broadly cognizable concerns of fraud and criminality, for lack of evidence actually implicating core public concerns).

Courts should evaluate the record at interest in its particular context. See Hammock, 142 N.J. at 381 (quoting Atl. City Convention Ctr. Auth. v. S. Jersey Pub. Co., 135 N.J. 53 (1994), and stating “requirements of confidentiality are greater in some situations than others”). In the context of complaints for summary eviction, plaintiffs invoke courts of limited jurisdiction at their own election. See R. 6:1-2(a) (identifying matters cognizable in landlord-tenant court); see also Carr v. Johnson, 211 N.J. Super. 341, 347–49 (App. Div. 1986)

² Matter of T.I.C.-C. involved judgment decided prior to R. 1:38-3 amendment that excluded name changes from public access, necessitating motion to seal.

(agreeing “if proof of title is required, the [landlord-tenant] court loses jurisdiction of the action”); and C. F. Seabrook Co. v. Beck, 174 N.J. Super. 577, 590 (App. Div. 1980) (recognizing “[m]atters determined in summary dispossession actions are not res judicata in subsequent actions between landlord and tenant, even over the same subject matter”). Such austere strictures are fair because landlords choose litigation where their “sole remedy available in a summary dispossession proceeding is possession.” Hodges v. Sasil Corp., 189 N.J. 210, 226 (2007).

By contrast, defendants do not elect into the summary proceeding, the cognizable legal consequences for defendants extend beyond mere possession, and so they should not be as strictly limited as plaintiffs. See e.g. Sudersan v. Royal, 386 N.J. Super. 246, 251(App. Div. 2005) (finding “eviction carries residual legal consequences potentially adverse to defendant”). While leaving possession undisturbed, the Appellate Division “vacate[d] the judgment of possession and dismiss[ed] plaintiff’s summary dispossession action . . . [to] remove any adverse legal consequences to defendant attendant upon her earlier eviction.” Id. at 254. The Appellate Division recognizes that evictions may have an “adverse impact upon [a tenant’s] future opportunities to rent housing.” Da010 (Sangiuliano v. Walker, A-3074-10T3, 2011 WL 5299591, at *1 (N.J. Super. Ct. App. Div. Nov. 7, 2011)), para. 2. The Supreme Court recently issued

guidance, regarding adoption of Rule 1:38-3(f), which also recognizes these adverse consequences. See Da323 (Notice to the Bar, Landlord Tenant – Amendments to Rule 1:38(f) (Mar. 14, 2022)) (amending court rules because eviction records “should not create indefinite obstacles to rental housing”).

It would be appropriate for this Court to seal all documents that compose Defendant’s record of eviction because (A) public access will likely cause a clearly defined, serious injury to her; (B) her interests in confidentiality overwhelmingly outweigh interests in continued public access; and (C) solely sealing the judgment would frustrate the interest in confidentiality.

A. Disclosure Is Likely To Cause Relevant Harm Under Rule 1:38-11 Because Landlords Often Deny Tenancies Based On Factors Other Than Merit, And These Harms Are Likely To Happen To Defendant.

In order to satisfy the first prong, petitioners must show “[d]isclosure will likely cause a clearly defined and serious injury to [someone].” R. 1:38-11(b)(1).

In pleading such injury for their case, petitioners need only show evidence of *potential harm* through specific examples or articulated reasoning. In Hammock, the Supreme Court noted that “[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient [evidence].” 142 N.J. 356, 381–82 (1995). On the other hand, the Appellate Division recently elaborated on Hammock, finding the rule “does not require

[the relevant harm] be physical harm or the threat of physical harm[, n]or does the rule require that the movant have already suffered physical harm or the threat of physical harm” and, “[i]n fact, the language of Rule 1:38-11(b)(1) evidences an intent to prevent harm from occurring.” Matter of T.I.C.-C., 470 N.J. Super. at 611. In Matter of T.I.C.-C., the Appellate Division admonished the trial court, stating “[b]y requiring that appellant's name change application be publicly available, . . . the court . . . could heighten the risk of physical harm to appellant.” Id. at 613.

As a matter of public policy, New Jersey recognizes housing is unique “as the most costly and difficult to change necessity of life.” N.J.S.A. 2A:18-61.1a(d). In so recognizing, our State identifies displacement as harm *per se*, finding that “homelessness or other irreparable harm” are threats to public health, safety, and welfare. See id. at (e), (g); see also Da022 (Cert. Prof. Sabbeth), ¶¶ 9-11 and Da023, ¶¶ 12-13 (detailing direct, eviction-related harms such as unjust housing denials, cost increases, instability, prejudice, and exposure to other harms).

While evictions constitute harm *per se*, they generate records of eviction that invite consequential harms as recently recognized by the United States Department of Housing and Urban Development (“HUD”), subjecting otherwise worthy tenants to injustices such as “blacklisting” — the denial of housing

without regard to culpability or merit — and disparate impact discrimination. See Da075-77 (HUD, Office of Fair Hous. & Equal Opportunity, GUIDANCE ON APPLICATION OF THE FAIR HOUSING ACT TO THE SCREENING OF APPLICANTS FOR RENTAL HOUSING (Apr. 29, 2024)) (hereafter “HUD Tenant Screening Guidance”) (detailing hazards of using evictions as screening metric that include perverse outcomes for victims of domestic violence); see also Da023 (Cert. Prof. Sabbeth), ¶¶ 12-13 (explaining “screening on the basis of eviction records locks people out of housing opportunities” and “entrenches inequality along the lines of race, gender, and class . . . because . . . certain populations are disproportionately likely to face eviction”).

Consequential harms of eviction records (1) stem from blacklisting practices that unreasonably lock tenants out of future housing; and (2) pose significant risk to Defendant because such harms have already happened to her and nothing has foreclosed them from reoccurring.

1. A record of eviction constitutes clearly defined and serious injury because homelessness is harm *per se* and landlords regularly use blacklisting practices that improperly deny housing to individuals merely for having such a record.

In this context, blacklists are eviction records, used to form “registries collected and maintained by ‘tenant reporting services.’” Da236 (Paula Franzese, A Place To Call Home: Tenant Blacklisting and the Denial of Opportunity, 45 Fordham Urb. L.J. 661 (2018)), para. 2. “[A] candidate named

on a dreaded blacklist is apt to suffer swift rejection of her housing application.” Da237 (Franzese, A Place To Call Home), para. 1. The injustice of blacklisting practices is that mere “appearance on that list will all but assure denial of future rental, and particularly subsidized rental, applications.” Da245 (Franzese, A Place To Call Home), para. 1.

Records of evictions, including mere filings themselves, are frequently maintained as judicial records and collected by tenant screening services in a way that inhibits access to housing. See Da181 (Katelyn Polk, Screened Out of Housing: The Impact of Misleading Tenant Screening Reports and the Potential for Criminal Expungement as a Model for Effectively Sealing Evictions, 15 Nw. J. L. & Soc. Pol’y 338 (2020)), paras. 1-2 (recognizing such records “blacklist [tenants] from finding future housing”); see also Da320 (Notice to the Bar, Landlord/Tenant – Proposed Amendments to Rule 1:38-3(f), Sep. 16, 2020 (pub. Sep. 17, 2020)) (recognizing “widespread practice for landlords to consult publicly available court records”). As a consequence of blacklisting practices, “[e]viction records create a ‘Scarlet E’ that can haunt a tenant for years, making it difficult or impossible for families to access new housing.” Da022 (Cert. Prof. Sabbeth), ¶ 9.

In the experience of the ACLU, “it is rare that a landlord will consider mitigating circumstances,” and the “[r]esearch bears this out, as . . . landlords

assess harshly applications with any sort of eviction record.” Da049 (ACLU, Tenant Screening Request for Information, Docket No. FTC-2023-0024, (May 30, 2023)), para. 4; see also Da022 (Cert. Prof. Sabbeth), ¶ 10 (explaining “[w]ith many landlords, getting ‘dinged’ on the basis of eviction records will be a complete bar to a housing application” and “[l]arger corporate landlords, in particular, tend to conduct no review of the tenant’s individual circumstances . . . and will simply deny the applicant [housing]”).

Blacklisting is a path that leads directly from eviction records to unjust denials of housing, then branches off into a thicket of other harms forming a barrier and walling tenants off from the pursuits or benefits of broader society. Discrete examples of harm caused by records of eviction includes prolonged homelessness for those without secure housing, limitations on available housing stock, and housing instability. In turn, those harms invite secondary harms to legal rights and interests that flow from stable housing.

Prolonged homelessness, caused by unjust practices like blacklisting, is indistinguishable from the *per se* irreparable harm of homelessness, and thus constitutes a clearly defined and serious injury under the rule.

- 2. Harms from blacklisting are likely to happen to Defendant again because they have already happened, her circumstances are substantially the same, and nothing has foreclosed reoccurrence.**

In this case, Defendant was unable to pay rent under her lease due to temporary financial circumstances. See Da012 (Cert. Def.), ¶¶ 1-2 (noting “financial hardship as a result of complications related to pregnancy” and agency delay to adjusting Section 8 benefits). Under the lease contract, Plaintiff went forward with summary dispossession based on the private financial dispute. See id. at ¶ 2 (filing eviction for nonpayment of rent during Section 8 processing). The amounts owed in settlement have since been paid, and Defendant was not removed from her possession of the premises at any point. See Da013, ¶ 4 (noting compliance and uninterrupted possession). As a result, there is no apparent risk of harm to Plaintiff’s interests from sealing.

The settlement’s terms mean Defendant now has a record of eviction. See Da012, ¶ 3 (entering judgment for possession via settlement). However, “[Defendant] did not have legal representation at that time, and [she] did not understand the consequences from having [a judgment for possession].” Da013, ¶ 3 (carrying over from Da012). While procedural unfairness, of incurring the brand of eviction without understanding its significance at that time, is not a critical concern; it is nonetheless germane that there is both manifest unfairness and an ongoing risk of harm to Defendant where the record of eviction is now wholly void of any utility for its original purpose to Plaintiff.

The risk of harm here is further underscored by the fact that Defendant has already suffered harm, having been advised by a prospective landlord that a formal application would be denied due to her prior eviction. See id. at ¶ 7 (stating landlord “seemed willing to accept me as a tenant until he found out about the record of eviction” and “was not willing to rely on my explanation [but] might consider a letter from [the landlord]” to avoid rejection). Defendant’s Scarlet E “has already resulted in denial of housing, and it is likely to result in further denials in the future.” Da025 (Cert. Prof. Sabbeth), ¶ 28. Defendant requires the protection of confidentiality as nothing has transpired that would prevent future denials of housing or related harms.

Defendant has demonstrated that her record of eviction is likely to cause relevant harm because she has already been denied housing due to blacklisting practices, and these same harms may continue to occur in the future due to her eviction remaining public record for a period of seven years.

B. Defendant’s Interest In Privacy Substantially Outweighs The Presumption Of Public Access Because The Matter Is A Private Dispute Between Parties, Of Nominal Interest To Plaintiff and Utmost Concern To Defendant, With Broader Private And Public Interests That Favor Confidentiality.

In considering motions to seal, the second step is for our courts to determine whether the petitioner’s privacy interests substantially outweigh the presumption favoring public access. See R. 1:38-11(b)(2); see also Matter of

T.I.C.-C., 470 N.J. Super. at 613 (checking “the other side of the ledger” from tenant for countervailing public interests). Although Rule 1:38 addresses matters of public access to records, or confidentiality of the same, it reflects formal codification of a common law right so storied it “antedates the Constitution.” Littlejohn v. Bic Corp., 851 F.2d 673, 678 (3d Cir. 1988).

It has long been “clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978). However, “the right to inspect and copy judicial records is not absolute.” Id. at 598. Historically speaking, there have been compelling interests on both sides of the balance, with factors weighing in support of public access³ and others favoring confidentiality.⁴

³ See Littlejohn, 851 F.2d at 678 (observing public access “in civil cases promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court[.]” “diminishes possibilities for injustice, incompetence, perjury, and fraud,” and “provide[s] the public with a more complete understanding of the judicial system and a better perception of its fairness”); c.f. Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984) (noting “public access to civil trials . . . ‘fosters an appearance of fairness,’ . . . heightens ‘public respect for the judicial process’[and] ‘permits the public to . . . serve as a check upon the judicial process’”).

⁴ See Nixon, 435 U.S. at 598 (court records should not be “used to gratify private spite or promote public scandal,” “serve as reservoirs of libelous statements for press consumption,” “or as sources of business information that might harm a litigant's competitive standing”); United States v. Smith, 787 F.2d 111, 116 (3d Cir. 1986) (quoting United States v. Criden, 648 F.2d 814, 829 (3d Cir. 1981), and stating that

Presently speaking, the decision on whether to seal warrants consideration of the record within relevant context, as “the ‘requirements of confidentiality are greater in some situations than others.’” See Hammock, 142 N.J. at 381 (quoting Atl. City Convention Ctr. Auth. v. S. Jersey Pub. Co., 135 N.J. 53 (1994)).

Public access is favored under Hammock where core public interests of health, safety, and consumer fraud are involved; however, broad claims to public interest, such as where someone may be “seeking to avoid or obstruct criminal prosecution, avoid creditors, or perpetrate a criminal or civil fraud,” lack merit absent evidence those concerns actually apply to the matter at interest. Matter of T.I.C.-C., 470 N.J. Super. 596, 613 (App. Div. 2022). Purely private matters, such as private financial disputes acknowledged in Matter of Tr. Created by

“access to judicial records may be denied to prevent the infliction of “unnecessary and intensified pain on third parties who the court reasonably finds are entitled to such protection.”), Publicker, 733 F.2d at 1073–74 (recognizing confidentiality may be needed in “safeguarding a trade secret[,]” “to prevent . . . disclosing certain information arguably within the attorney-client privilege[,]” or preserve “right to enforce a legal obligation”); and Lederman v. Prudential Life Ins. Co. of Am., 385 N.J. Super. 307, 318–20 (App. Div. 2006) (finding enforcement of legal right as basis to seal, but not without requisite harm and that mere “harm to the parties’ reputations does not . . . justify sealing the record”); c.f. Cashen v. Spann, 66 N.J. 541, 552–54 (1975) (recognizing informer’s privilege applies in civil cases, “reflect[ing] the interest of society in effective law enforcement” that is limited by “balancing the public interest in protecting the flow of information against the individual’s right to prepare his defense”).

Johnson, disfavor public access as they have only the faintest concern to the greater public.

It would be appropriate for this Court to seal the record here because (1) the parties' dispute was fundamentally private in nature, offering at most a *de minimis* business interest to Plaintiff while risking grave harm to Defendant; (2) the interests of similarly situated litigants would only further amplify the imbalance between the Parties themselves, which then overwhelmingly favors the tenants' interests in confidentiality; and (3) there is no evidence implicating historic or core public interests to justify access despite cognizable risk of harm.

1. Balancing interests between the Parties greatly favors confidentiality because, although Plaintiff possesses minimal relevant business interests at most, Defendant has critical interests at stake.

While landlords have a legitimate business interest in vetting applicants, “[a] typical tenant-screening report includes a standard credit report (with information about missed or late payments to creditors, money judgments, and bankruptcies, among other things).” Da283 (Rudy Kleysteuber, Tenant Screening Thirty Years Later: A Statutory Proposal To Protect Public Records, 116 Yale L. J. 1344 (2007)), para. 2.

Superficial claims to legitimate business interests should not afford immunity from review. Rather, it is imperative such claims are scrutinized to ensure they have merit. See Da057, para. 2 (HUD Tenant Screening Guidance)

(stating facially legitimate business practices “may unjustifiably exclude people from housing opportunities in discriminatory ways” in violation of the Fair Housing Act); c.f. Maglies v. Estate of Guy, 193 N.J. 108, 125 (2007) (stating the “purposes [of the Anti-Eviction Act] must be sensibly advanced” in order to “avoid the imposition of personal dislocation so long as the tenancy’s financial and other responsibilities are met”), and Chase Manhattan Bank v. Josephson, 135 N.J. 209, 221–22 (1994) (recognizing legislative purpose of Anti-Eviction Act and amendments is to protect against “pretextual or illegal evictions”). As already detailed here above, eviction and continued displacement constitute harm *per se*, and puts tenants at risk of suffering consequential harms like improper denials of housing due to blacklisting practices.

Denials of housing frequently “lead to a dangerous cycle of homelessness, job loss, financial insecurity, and family instability”; Da177 (Polk, Screened Out of Housing), para. 1; and so it follows that “evictions result from poverty, but also cause poverty.” Ibid. Financial hardships compound the threat from increasing unaffordability of available housing. See Da224 (National Low Income Housing Coalition, The Gap: A Shortage of Affordable Homes (Mar. 2024)), para. 2 (lamenting “cost-burdened renters who must make impossible choices between paying rent and meeting their other basic needs”); see also Da229, (NLIHC, The Gap, Append A) (showing New Jersey is experiencing

greater shortage than national average at all measured income levels); and Da191 (Maurie Backman, New Jersey Housing Market Forecast, U.S. News (May 12, 2023)), para. 5 (indicating December 2022 rental vacancy rate of 3.1% for New Jersey relative to 5.8% national average). The New Jersey Housing Research Center acknowledges that, “[i]n recent years, housing costs in New Jersey have increased dramatically at rates that have outpaced rises in income.” Da197 (NJHRC, List Housing), para. 1. Section 8 benefits, intended to help make housing affordable for its beneficiaries, may be lost if improper denials of housing cause a voucher to expire. See 24 C.F.R. 982.303 (defining initial term and extensions of vouchers); see also Miller v. Mulligan, 900 N.Y.S.2d 381, 383 (App. Div. 2010) (involving beneficiary whose voucher expired due to delays in application).

Housing and family instability mean that parents may suffer harms related to custody; see e.g. N.J.S.A. 9:2-4 (identifying stability of home as best interest factor for custody determinations); impacting fundamental rights under state and federal constitutions. See e.g. Watkins v. Nelson, 163 N.J. 235, 245 (2000) (recognizing fundamental right set forth by Prince v. Massachusetts, 321 U.S. 158 (1944) and Matter of Baby M, 109 N.J. 396 (1988)). In fact, rights of parenthood are a critical concern here because research demonstrates “the single factor most highly correlated with eviction is the presence of children in a

household.” Da024 (Cert. Prof. Sabbeth), ¶¶ 18-19 (discussing research of Dr. Desmond et alia and noting gendered impact, as “women are more likely than men to be custodial parents”).

On balance, the interests of the Parties weigh overwhelmingly in favor of Defendant. The originating dispute stems from nonpayment of rent, a private financial matter related to Defendant’s past inability to pay, that has resolved without implicating any core public concerns. Going forward, the record has virtually no possible use for Plaintiff and poses dire risks to Defendant.

Plaintiff has already received the benefits of the litigation, settling the matter and securing financial relief. If the Court sealed Defendant’s record of eviction today, it is unclear how Plaintiff might conceivably be harmed. Even should Plaintiff demonstrate some harm absent access, he should need to demonstrate *legitimate* interest that cannot be readily satisfied otherwise. If Plaintiff’s interests can be satisfied through other means, without meaningful burden on him, then any harm demonstrated is illusory in nature. In this context, Plaintiff has ample, convenient means by which to evaluate Defendant’s financial stability as a tenant.

Prior nonpayment of rent is a hazy indicator of a tenant’s financial limitations at best, and it is unclear what other legitimate purpose a historical record of eviction for nonpayment of rent could serve. Given its inherently

historical nature, a record of eviction is an ever-vanishing proxy for financial circumstances. Meanwhile, landlords have easy access to tenant screening reports and may include reasonable requests for other financial information as part of the application and vetting process. The costs of applications are borne by the applicants, the information in them would be current, and thus better suited for evaluating a prospective tenant. Any legitimate business interest, then, would be readily and *better* satisfied through the application process otherwise. As a result, any broad claim to a business interest in the records for vetting purposes would be insubstantial standing alone.

On the other hand, should the Court not seal the record of eviction, Defendant would remain at risk. Defendant is head of a low-income household that is reliant on her Section 8 benefits to secure housing. See Da014 (Cert. Def.), ¶¶ 11-12. As already acknowledged, Section 8 vouchers may be lost due to delays caused by a record of eviction that are beyond the beneficiary's control. See 24 C.F.R. 982.303 (defining initial term and extensions of vouchers); see also Miller v. Mulligan, 900 N.Y.S.2d 381, 383 (App. Div. 2010) (involving beneficiary whose voucher expired due to delays in application).

Defendant is also “a Black woman, a single mother, a parent of a special needs child, and the head of a family of six children.” Id. at ¶ 11. As such, she and her family are vulnerable to consequential harms from eviction from unjust

bias. See Da023 (Cert. Prof. Sabbeth), ¶¶ 14-16 and Da024, ¶¶ 17-20 (discussing data on race, gender, and familial dimensions of eviction-related harms). The bias dimensions of such harm “means Black women with children are disproportionately likely to bear disproportionate social costs created by court records of evictions.” Da025 (Cert. Prof. Sabbeth), ¶ 21. “Ms. Shepherd is . . . particularly likely to carry the Scarlet E of eviction records”; id. at ¶ 26; and “public availability of the eviction record is constricting the supply of housing available to Ms. Shepherd and her family.” Id. at ¶ 29.

Housing instability, and delays in any search for housing, risks expiration of her voucher and corresponding loss of her Section 8 benefits. Defendant relies on those Section 8 benefits, and the loss of her voucher would mean homelessness for both her and her children. The loss of safe, suitable housing for her children would also place Defendant at risk of separation from them, if not the loss of her fundamental rights to custody outright.

Put simply, Plaintiff stands to lose virtually nothing while Defendant and her children stand to lose everything.

2. The broader interests of similarly situated landlords and tenants lends overwhelming support to Defendant’s request because the cognizable interests remain substantially the same as the Parties’ while the imbalance shifts heavily in favor of tenants.

Other landlords, not being in privity with Defendant as a tenant, would hypothetically possess at least marginally greater interest in access to her record of eviction for business purposes as they would not have originally had access. However, for the same reasons articulated above for Plaintiff, any legitimate business interest in vetting Defendant as a prospective tenant would be better satisfied by other means that are readily accessible to them as part of the tenant application process. As consequence, any interest held by other landlords would remain negligible in nature.

Without belaboring the point, the aggregate interests of similarly situated landlords, weighed against the sum total for similarly situated tenants, balances according to the same dynamic as the Parties themselves. Those to one side possess foreseeable but nebulous concern of access to records as part of questionably legitimate business practices, while the other side possesses concerns to be free from cognizable risks of grave harms to housing, health, financial, safety, and constitutional interests. It would be unreasonable and unjust to only aggregate the interests of one side, so the net outcome from aggregating interests overwhelmingly favors making such records confidential.

- 3. Although a cognizable good in general, public interest in access to judicial records is undercut by the unique context here, which is distinguishable from historic justifications for access, does not implicate core public interests, and would enable subversion of other public interests.**

In general, the law favors public access to judicial records. See Rs. 1:2-1, 1:38-11(b)(2). However, the context of eviction records differs meaningfully from historic common law interests that justify public access in a way that favors confidentiality. Sealing the record of eviction here would not frustrate public interests in observing judicial process or preserving the integrity of the court; namely, such interests are not implicated because this matter was resolved by settlement in lieu of judicial decision. Even assuming historic interests, such as maintaining the integrity of the judiciary, support continued access to these records, the lesser remedy of redacting any identifiers from the record would allow public scrutiny of process without inviting the cognizable harms to Defendant. Thus, historical justifications to support public access to court records do not apply, and confidentiality remains the appropriate outcome.

As there are no facts in the record to invoke the Hammock core public interests of health, safety, and fraud, there is no need to address this aspect further and their absence favors sealing.

Lastly, there are confounding public interests at stake here that justify confidentiality and warrant considerable elaboration. Seemingly legitimate conduct may in fact constitute impermissible blacklisting practices in violation of the Fair Housing Act (“FHA”). See Da057 (HUD Tenant Screening Guidance), para. 2 (addressing practices that “may unjustifiably exclude people

from housing opportunities in discriminatory ways” in violation of the FHA). Further, landlords need not possess malicious intent, as neutral business practices can impact individuals in a discriminatory manner regardless. See Da063 (HUD Tenant Screening Guidance), para. 2 (recognizing unjustified discriminatory effect may exist “[e]ven when there is no intent to discriminate”).

Discrimination in housing may likewise violate the New Jersey Law Against Discrimination (“LAD”), N.J.S.A. 10:5-1 et seq., given the nature of LAD protections and its applicability to housing. See N.J.S.A. 10:5-4 (recognizing civil right to housing free from discrimination); see also Cowher v. Carson & Roberts, 425 N.J. Super. 285, 295 (App. Div. 2012) (quoting and favorably discussing LAD housing discrimination case Poff v. Caro, 228 N.J. Super. 370 (Law. Div. 1987)). The Supreme Court recognizes that records of eviction, and related denials of housing, “create inappropriate hardships for disadvantaged populations.” Da319, para. 3 (Notice to the Bar, Landlord/Tenant – Proposed Amendments to Rule 1:38-3(f) (Sep. 16, 2020)); see also Da323 (Notice to the Bar, Landlord Tenant – Amendments to Rule 1:38(f) (Mar. 14, 2022)) (amending court rules because eviction records “should not create indefinite obstacles to rental housing”).

In this context, the Supreme Court used “disadvantaged populations” to signify racial minorities and other vulnerable populations. See Da319, para. 2

(Notice to the Bar (Sep. 16, 2020)) (explaining Supreme Court’s July 16, 2020 Action Plan was “building on [the Statement of the New Jersey Supreme Court of June 5, 2020]”); and Da316, paras. 3-4, 7 (Statement of the New Jersey Supreme Court (Jun. 5, 2020)) (aspiring for all “to be treated with fairness . . . regardless of their race or background,” seeking “to confront systemic racism and other forms of bias in our courts,” and finding “it is clear that racial disparities still exist in the justice system [for racial minorities]”).

In trying to capture how eviction filings lead to wide-ranging abuses against disadvantaged groups, the ACLU noted that:

The filing of an eviction action triggers a cascading sequence of harmful events. Multiple studies have shown that Black, Latino, and women renters are disproportionately exposed to the many documented negative consequences of eviction, from job loss, mental and physical health issues, material hardship, and even homelessness. The use of eviction record screening policies only exacerbate these harms, by making families more vulnerable to homelessness and to landlords who might take advantage of a desperate situation to charge more for rent, leave tenants in sub-standard housing conditions, or force tenants to endure sexual harassment or demands for sexual activity. For domestic violence survivors, eviction record screening policies heighten their insecurity, as it may be difficult for them to obtain housing independent of abusive partners. Low-income, single mothers and families are at particular risk of eviction and most likely to then be locked out of future housing, as well as the opportunities that accompany it, due to their eviction records.

[Da051 (ACLU, Tenant Screening Request for Information, Docket No. FTC-2023-0024, (May 30, 2023)), paras. 2, 4 (stating “eviction record screening policies contribute to growing racial, gender, income, and social inequality”) (citations omitted).]

Although study data show Black and women renters suffer disproportionate harms as separate groups, “Black women and women with children were more likely to have an eviction filing against them compared to other groups.” Da100 (HUD Office of Policy Development and Research, Report to Congress on the Feasibility of Creating a National Evictions Database (Oct. 2021)), para. 3; see also Da023 (Cert. Prof. Sabbeth), ¶¶ 13-14 (noting bias “along lines of race, gender, and class” and recognizing familial bias as “Black women with children are more likely than any other group to face eviction”).

The reality is that single Black mothers suffer greatly due to blacklist practices, and struggle “to find safe, decent, healthy, and affordable housing following an eviction” in a way that facilitates unjust discrimination. Da114 (HUD, Report to Congress), para. 2; see also Da023 (Cert. Prof. Sabbeth), ¶ 12 (explaining “dissemination of eviction records pushes already marginalized populations into substandard rental markets, where homes have dangerous conditions or require extra fees[, and] contributes to housing segregation and inequality”); Da024, ¶¶ 19-20 and Da025 at ¶¶ 21-25 (revealing means by which apparently neutral records facilitate disproportionate discrimination against Black mothers).

As discussed here above, the branches of government universally recognize the fundamental evil of discriminatory housing practices and the

crucial importance of housing. The data show that eviction records are facilitating apparently-neutral, but no less invidious, discrimination that denies housing. However, combatting this discrimination can be a fraught process and the judiciary is justified in maintaining a wary sensibility in seeking redress.

Although our courts must not create a “conscious” test for sealing records based on protected characteristics, such as race, sex, or parenthood, absent compelling state interest; c.f. State v. Senno, 79 N.J. 216, 225–27 (1979) (recognizing mandate of Equal Protection strictly scrutinizes “inherently suspect distinctions such as [protected characteristics] such as race, religion, or alienage”); the judiciary likewise cannot ignore clear statutory mandates to protect people from discrimination. See N.J.S.A. 1:1-1 (regarding general rules of statutory construction); N.J.S.A. 10:5-4 (recognizing civil right to housing free from discrimination); N.J.S.A. 10:5-12 (recognizing unlawful housing discrimination against protected characteristics); and N.J.S.A. 2A:18-61.1a(d) (finding eviction “is particularly severe for vulnerable seniors, the disabled, the frail, minorities, large families and single parents”); see also Marino v. Marino, 200 N.J. 315, 329 (2009) (declaring role of courts is to implement legislative intent by first looking to plain statutory language). Although the issue of redress for such prejudices may be fraught, there is a clear means by which the courts

might consider and address such discriminatory harms without resorting to an inherently suspect “conscious” test.

Discrimination is recognized as contrary to the law and against public policy. As noted here above, Defendant’s identity implicates a number of avenues for discriminatory bias against her. Weighing factors such as race explicitly, as part of a test for which records are sealed, would be inherently suspect and require a compelling state interest. However, courts may plainly consider invidious discrimination, as one part among many, in contemplating the overall balance of competing public interests. In other words: “Are the public interests in access to judicial records, which tend to favor access, undermined by the harms those records pose to protected classes of people, such as racial minorities, who the Legislature commands courts to protect?”

Balance in this context means weighing the broad interests in having public access to judicial records against the broad concerns in avoiding consequential harms and related discrimination from public access to records of eviction. Recognition that eviction records are misused toward discriminatory ends must, as the Supreme Court’s purpose in amending Rule 1:38 suggests, clearly weaken — if not vitiate — the presumption favoring access. Further, where there is no evidence that health, safety, or fraud are involved, there are no core public interests to offset those harms in support of public access.

In sum, without articulation of a *legitimate* purpose to public access, applicability of historical justifications, or the presence of a core public interest, confidentiality must be the favored public interest because records of eviction are known to facilitate violations against the civil right to housing.

Therefore, there is sufficient basis to seal Defendant's records of eviction because there is a clearly defined, serious risk of harm cognizable under the rule; there is minimal legitimate purpose to support public access; there is a lack of historical or core public interests to justify the ongoing risk of harm; and there are competing public interests to keep housing free from discrimination that must favor confidentiality.

C. The Court Should Seal Every Record Necessary To Make The Entire Docket Confidential Because Awareness Of The Docket Indicates A Filing For Eviction That Would Cause Relevant Harm And Frustrate Defendant's Interest In Vacating The Judgment And Sealing The Record Of Eviction.

Appellate remand of a matter may be appropriate or necessary in certain situations. See R.L. v. Voytac, 199 N.J. 285, 304 (2009) (remanding where development of record is needed to evaluate matter in light of appellate guidance); see also Rivelli v. MH & W Corp., 383 N.J. Super. 69, 75 (App. Div. 2006), and Kogene Bldg. & Dev. Corp. v. Edison Twp. Bd. of Adjustment, 249 N.J. Super. 445, 449–50 (App. Div. 1991) (remanding for further development of record and related argument).

Even though the trial court denied the motion based on misapprehension of the legal standard, a remand here would be unnecessary for several reasons. First, this Court would not be setting a new standard: the trial court simply ignored the plain language of the relevant rules, effectively inventing a standard where none had existed. Second, the facts are not disputed and this review is on a *de novo* basis, allowing ample authority for this Court to act. Third, the record requires no additional statements, arguments, or evidence in order for this Court to decide the matter in accordance with the correct standard set under Rule 1:38-11(b) and Hammock. Fourth, in light of the nature of defect in the trial court's decision, it is unclear how a remand would serve to either cure the problem or benefit any subsequent appellate litigation.

As such, rather than remand this matter, it would be wholly appropriate as a matter of law and judicial economy for this Court to decide the issue of whether to seal the relevant records outright.

In seeking to seal records, courts should use flexible decision-making “in recognition of the fact that confidentiality is more important in certain circumstances than others.” Matter of T.I.C.-C., 470 N.J. Super. at 608 (citing Hammock). Wherever appropriate, confidentiality shall stretch no further than is justified by the petitioner. See ibid; see also Hammock, 142 N.J. at 382 (explaining “[d]ocuments should be redacted when possible, editing out any

privileged or confidential subject matter, [to] have the least intrusive effect on the public's right-of-access”).

When relief is granted, “[t]he court must state with particularity the facts that ‘currently persuade the court to seal the document[s].’ The court must ‘examine each document individually and make factual findings’ with regard to why the interest in public access is outweighed by the interest in nondisclosure.” Greebel v. Lensak, 467 N.J. Super. 251, 259–60 (App. Div. 2021) (citations omitted).

As summarized by Lederman, petitioners need to identify each and every specific record to be made confidential. See 385 N.J. Super. at 317. When deciding an issue of confidentiality, courts must examine each record individually as recognized by Greebel. In this context, landlords commonly blacklist tenants based on *any* record reflecting eviction, regardless of substance.

Therefore, all public-facing records on Defendant’s docket necessarily serve as a record of eviction, prejudice her interests in relief, and must be sealed or redacted to afford the appropriate relief of confidentiality.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING RELIEF TO DEFENDANT BECAUSE THE DECISION’S FINDINGS AND CONCLUSIONS, BASED SOLELY ON RULE 1:38-3, IMPROPERLY PRECLUDE RELIEF TO TENANTS UNDER RULE 1:38-11. (Raised Below; T6-25 to T7-6)

Generally speaking, court proceedings “shall be conducted in open court unless otherwise provided by rule or statute.” Rule 1:2-1. Further, matters that must be heard in open court shall not be sealed, “except for good cause shown, as defined by R. 1:38-11(b).” Id. at (c). In addition to sealing, Rule 1:38-3(f)(11) provides another means by which records of eviction may be made confidential. Through Rule 1:38-3(f)(11), the Supreme Court established a horizon, beyond which all eviction records — no matter how crucial their value to public interest — now sunset into confidentiality after seven years.

When interpreting Court Rules, our courts “start with the plain language of the Rule.” State v. Dickerson, 232 N.J. 2, 17 (2018). Nothing in the plain language of Rule 1:38-3(f)(11), or even in the related proposal language, indicates it is meant to act as a sole or exclusive remedy for making eviction records confidential.⁵ Conversely, the changes to Rule 1:38 adopted in 2009 were the product of an effort to consolidate a broad constellation of rights and interests respecting public access to judicial records in uniform setting. See Da326, paras. 1-4. Given both the broad application of the language for Rule 1:38-11, and the absence of any limitations expressed in the recent changes

⁵ For reference, the judicial proposal and notice documents regarding Rule 1:38-3(f)(11) are included. See Da319-25.

adopting Rule 1:38-3(f)(11), the plain language of the Court Rules allows tenants to petition trial courts to seal records of eviction under Rule 1:38-11(b).

Under Rule 1:7-4(a), “[t]he court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon . . . on every motion decided by a written order that is appealable as of right.” See also R. 2:2-3(a)(1) (final judgments of Superior Court trial divisions are appealable as of right) and R. 1:6-2(f) (order shall indicate form and date for any findings and conclusions made).

The court’s “articulation of reasons is essential to the fair resolution of a case.” Italiano v. Rudkin, 294 N.J. Super. 502, 505 (App. Div. 1996). Judicial “[f]ailure to perform that duty ‘constitutes a disservice to the litigants, the attorneys and the appellate court.’” Curtis v. Finneran, 83 N.J. 563, 569–70 (1980) (quoting Kenwood Assocs. v. Bd. of Adj. Englewood, 141 N.J. Super. 1, 4 (App. Div. 1976)). Judges deciding landlord and tenant matters are not exempt. See Iuso v. Capehart, 140 N.J. Super. 209, 211 (App. Div. 1976); C. F. Seabrook Co. v. Beck, 174 N.J. Super. 577, 595 (App. Div. 1980); and Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 498 (App. Div. 2000). If necessary, trial courts are allowed to amplify their order and provide the parties a written opinion stating findings of fact and conclusions of law. R. 2:5-1(d).

In hearing Defendant's motion to seal under Rule 1:38-11, the trial court issued limited findings of fact before denying the motion. See T4-20 to T6-19. Critically, the trial court's denial was predicated on its belief that "the Court does not seal records and especially with regard to Rule 1:38-3(f)(11)." T6-16 to -17. Although the motion was heard on the papers, counsel was afforded an opportunity to speak by the trial court. See T6-23 to -24. At that time, due to the trial court's apparent misapprehension of the applicable law, counsel noted for the record that the decision had rested on an incorrect rule, that the motion was made under Rule 1:38-11(b), and that the two rules involve different legal standards. See T6-25 to T7-6.

When the trial court noted that Rule 1:38-3(f)(11) "addresses landlord-tenant cases specifically"; T7-9; counsel made sure to advise that, although Rule 1:38-3(f)(11) has a test for making records of eviction confidential, "nothing . . . states that it's meant to be an exclusive remedy." T7-12 to -13. Despite being made aware that the decision was based on an improper legal standard, the trial court denied the motion without issuing further findings specific to Rule 1:38-11(b). By necessary implication, the trial court improperly held that Rule 1:38-3(f)(11) precludes tenants from seeking relief under Rule 1:38-11(b).

Defendant asks this Court to hold that the trial court erred, and that relief by motion under Rule 1:38-11(b) is available to tenants.

CONCLUSION

For all the aforementioned, Defendant asks this Court to hold that Rule 1:38-11(b) applies to tenants and grant her relief, making all records for proceedings at the trial court and before this Court confidential.

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Date: 3/4/2025

BY: /s/ 

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