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SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

CHARLES KRATOVIL, *Plaintiff-Appellant*, v. CITY OF NEW BRUNSWICK, and ANTHONY A. CAPUTO, in his capacity as Director of Police, *Defendants-Respondents*.	Docket No.: A-000216-23T1 CIVIL ACTION On Appeal from an Order of the Superior Court of New Jersey, Law Division, Middlesex County Docket No.: MID-L-003896-23 Sat Below: Hon. Joseph L. Rea, J.S.C.

BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT CHARLES KRATOVIL

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PRELIMINARY STATEMENT

In the wake of the tragic murder of Daniel Anderl, the son of United States District Judge Ester Salas, the New Jersey Legislature passed Daniel's Law, designed to protect some public servants by removing their home addresses from public access. This lawsuit challenges neither the importance of that effort nor the facial validity of the law.

Instead, this case asks whether the government may constitutionally criminalize a journalist's reporting on information he lawfully obtained from the government, which remains widely available and easily accessible on the Internet, about the residence of a high-ranking police official who lives more than two hours from the city in which he is employed. A long and consistent line of United States and New Jersey Supreme Court cases provides a definitive answer: it cannot. The New Jersey Supreme Court has adopted a principle articulated by the United States Supreme Court and, recently, by the Third Circuit Court of Appeals: if the media lawfully obtains truthful information about a matter of public significance, then despite an existing statute, "state officials may not constitutionally punish publication of that information, absent a need to further a state interest of the highest order."

The state laws challenged in those courts, like Daniel's Law, each had important statutory purposes: they were meant to protect the privacy and safety

of rape victims, classified national security information, child abuse investigations, and other important purposes. Yet the courts ruled that free speech and free press principles demand a heightened strict scrutiny test and that each of these statutes failed to show a "need of the highest order."

New Jersey's version of Daniel's Law—which allows for redaction of certain personal information such as home addresses from public records—is certainly another important statute, designed to protect public servants such as judges and law enforcement from the potential of bodily harm from criminal elements. But as applied to journalists who would report on an issue where the actual residency of a protected official is germane, the statute similarly punishes publication of lawfully obtained, truthful information about an important public issue and fails to show a need of the highest order.

Plaintiff Charles Kratovil, the editor of a local online publication called *New Brunswick Today*, sought protection under the *Daily Mail* line of cases. Mr. Kratovil learned that Anthony A. Caputo, New Brunswick's Director of Police, resided in and registered to vote in a municipality that is more than a two-hour drive from his employer. He confirmed his reporting through an Open Public Records Act ("OPRA") request.

At a City Council meeting, he mentioned the street name (but not the house number) of Director Caputo's residence in Cape May. Director Caputo

then served Mr. Kratovil with a cease-and-desist notice pursuant to Daniel's Law, which warned that that Mr. Kratovil faced criminal and civil penalties if he repeated the disclosure of such information.

What Mr. Kratovil engaged in—and what he hopes to advance by writing a news story about what he found—is at the core of what is protected by Article I, Paragraph 6 of the New Jersey Constitution: speech about the activities of local government. As the U.S. Supreme Court said in *Daily Mail*: "state action to punish the publication of truthful information seldom can satisfy constitutional standards." By threatening criminal and civil sanctions for reporting on truthful, legally obtained information, the City and its Director of Police have chilled, and are chilling, Mr. Kratovil's free speech and free press rights and unconstitutionally violated the *Daily Mail* principle protected by the New Jersey Constitution.

The *Daily Mail* principle and its rigorous test apply when a journalist (Point I, A) lawfully obtains (Point I, B) truthful information (Point I, C) on an issue of public concern (Point I, D). Because Plaintiff satisfies these conditions, to satisfy constitutional scrutiny, Defendants must show that the law is narrowly tailored (Point II, A) to achieve a need of the highest order (Point II, B). It can satisfy neither part of the test.

STATEMENT OF FACTS

Plaintiff Charles Kratovil "is a journalist who writes for an online publication known as New Brunswick Today[.]" 3T 52:24-25.[1] "Anthony Caputo is a retired New Brunswick Police Officer and is currently the Director of the New Brunswick Police Department . . . [he] also holds a high-level position in the New Brunswick Parking Authority." *Id.* at 52:25-53:4.

As part of an investigation into Director Caputo's place of residence, on March 14, 2023, Plaintiff asked Director Caputo via email if he still lived in New Brunswick and Deputy Director Miller responded on Director Caputo's behalf: "The public release of a law enforcement officer's place of residence is protected under Daniel's Law." PA 26 (Compl. at ¶18).

After learning that Director Caputo lived in Cape May, Plaintiff filed an Open Public Records Act request with the Cape May County Board of

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[1] 1T refers to the transcript from proceedings before Hon. Alberto Rivas, J.S.C., on August 23, 2023;
2T refers to the transcript from proceedings before Hon. Joseph L. Rea, J.S.C., on August 30, 2023;
3T refers to the transcript from proceedings before Hon. Jospeh L. Rea, J.S.C. on September 21, 2023;
Compl. Refers to Plaintiff's Amended Complaint;
PA refers to Plaintiff's Appendix;
Prbr refers to Plaintiff's reply brief before the trial court;
Dbr refers to Defendants' brief before the trial court;
ACOPbr refers to the *amicus* brief filed by the Association of Chiefs of Police;
FOPbr refers to the *amicus* brief filed by the New Jersey State Lodge of the Fraternal Order of Police.

Elections Records Custodian seeking Director Caputo's Voter Profile ("the Voter Profile"). PA 26 (Compl. at ¶15). On March 20, 2023, Plaintiff received a heavily redacted version of the Voter Profile after the Records Custodian claimed in an email that full disclosure would "interfere with his [Director Caputo's] reasonable expectation of privacy," under *Burnett v. County of Bergen*, 198 N.J. 408 (2009). *Id*.

On March 22, 2023, Plaintiff attended the NBPA Board of Commissioners meeting and asked Vice Chair Caputo (who participated via telephone) if he still resided in New Brunswick. PA 27 (Compl. at ¶19). Vice Chair Caputo responded: "Thank you for your comment." *Id.* Plaintiff then shared with the Board the heavily redacted Voter Profile he had obtained under OPRA, stated that it showed Director Caputo had registered to vote in a different county, and asked whether there was a residency requirement for New Brunswick Parking Authority ("NBPA") Commissioners. *Id*. The Commissioners responded collectively that they could not answer the question, but they promised a response in the future. *Id*.

In a subsequent email exchange with the Records Custodian, Mr. Kratovil contended that the New Jersey Supreme Court's decision in *Brennan v. Bergen County Prosecutor's Office*, 233 N.J. 330 (2018) overruled *Burnett* and the Court determined there was no expectation of privacy for home

addresses. PA 26 (Compl. at ¶16). Finally, on April 17, 2023, he received a far less redacted version of the Voter Profile, with only Director Caputo's date of birth redacted. *Id*. The trial court determined that Mr. Kratovil lawfully obtained "Mr. Caputo's home address through inquiry [via OPRA request] with the Cape May Board of Elections." 3T 53:4-25.

On May 3, 2023, Plaintiff again attended the New Brunswick City Council meeting, where he spoke briefly during the public portion of the meeting about Director Caputo's official change of residence, the fact that the residence was two hours or more from his duties in New Brunswick, and that Director Caputo continued to serve on the NBPA Board as a non-resident. PA 28 (Compl. at ¶22).

During his speaking time at that May 3 meeting, Plaintiff publicly stated the street where Director Caputo was registered to vote, but not the house number. *Id.* (Compl. at ¶23). Plaintiff did, however, provide Council members with copies of the less redacted Voter Profile he received through the later OPRA request, which contained the exact street address. *Id.* He also made a digital video recording of the meeting. *Id*.

When New Brunswick officials learned that Plaintiff sought to publish an article about Mr. Caputo residing in Cape May, including Mr. Caputo's home address, Mr. Caputo sent Plaintiff a cease-and-desist letter invoking

Daniel's Law (N.J.S.A. 56:8-166.1 and N.J.S.A. 2C:20-31.1). 3T 54:1-10. Daniel's Law ("the Law")—with criminal and civil provisions—prohibits disclosure of the residential addresses of certain persons covered by the law ("Covered Persons") on websites controlled by state, county, and local government agencies. Director Caputo is a Covered Person. 3T 26:9-10 (Defendant's counsel explaining "[t]here is no question in this case that Director Caputo is a covered person."); 3T 52:25-53:1 (trial court explaining that Director Caputo is a retired police officer). The Law provides that upon notice, a person shall not disclose the home address or telephone number of a covered person. N.J.S.A. 56:8-166.1(a)(1). The Law provides for significant civil damages including $1,000 per violation, punitive damages, and attorney's fees. N.J.S.A. 56:8-166.1(c). In addition to the significant civil liability, the Law sets forth almost identical statutory language making a violation punishable as a criminal sanction: a "reckless violation of [Daniel's Law] is a crime of the fourth degree. A purposeful violation of [the Law] is a crime of the third degree." N.J.S.A. 2C:20-31.1(d).

Plaintiff continued to prepare to write a story about the residency issue. PA 30 (Compl. At ¶29). He made an OPRA request of the City's Records Custodian, seeking the unedited and unredacted video recording of the May 3, 2023, City Council meeting. *Id.* On May 26, 2023, the Records Custodian

provided a link to a redacted video explaining that the "unedited version contained personal identifying information, such as a home address, of a covered person." PA 30 (Compl. at ¶30). And, therefore, the Custodian claimed that the redaction had been made in accordance with Daniel's Law. *Id.* The redaction went beyond mere mention of any address: although Plaintiff never mentioned Director Caputo's street number, the City redacted the *entirety* of the discussion about the Director living outside New Brunswick. PA 31 (Compl. at ¶32).

PROCEDURAL HISTORY

On July 12, 2023, Plaintiff, through counsel, filed an Order to Show Cause with Temporary Restraints and a Verified Complaint alleging that the Defendants' threat of criminal prosecution and civil punishment violated the State Constitution's free press and free speech protections. PA 1-19. Citing the *Daily Mail*[2] line of cases, Plaintiff sought preliminary and permanent injunctions preventing Defendants from seeking to impose criminal or civil sanctions of Plaintiff's publication of truthful, lawfully obtained information. *Id.* at 16. Plaintiff also sought a declaration that Daniel's Law was unconstitutional, as applied to the particular facts of his case. *Id.* Finally,

[2] *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979).

Plaintiff sought a declaration that the cease-and-desist letter he received was null and void as applied to him and attorneys' fees and costs under the New Jersey Civil Rights Act. *Id.* Plaintiff provided notice to the Attorney General pursuant to *R*. 4:28-4.

On July 14, 2023, Hon. Laurence J. Bravman, J.S.C. denied Plaintiff's Order to Show Cause without prejudice because "[t]he verification of the pleading [wa]s improper pursuant to *R*. 1:4-7." PA 43. On July 17, 2023, Plaintiff filed an Amended Complaint that was identical to the original complaint but contained a more specific verification. PA 20-38.

On July 18, 2023, Hon. Michael V. Cresitello, Jr., P.J.Cv., signed Plaintiff's Order to Show cause and set a briefing schedule, which culminated with oral argument before Hon. Alberto Rivas, J.S.C., on August 11, 2023. PA 44-48. Several entities filed motions to appear as *amicus curiae*, all of which were granted without opposition. PA 49-55.

On August 7, 2023, Judge Rivas adjourned the hearing until August 15, 2023. PA 56-57. Later, Judge Rivas again adjourned the hearing until August 23, 2023. PA 58-59. At that hearing, after inquiring whether Plaintiff had noticed the Attorney General (1T 5:15-6:6), Judge Rivas told the parties – for the first time – that he had a long-standing and continuing relationship with Judge Salas, the jurist whose son's tragic killing spurred the passage of

Daniel's Law. 1T 6:7-16. Plaintiff's counsel expressed surprise and frustration that the court had waited so long to disclose the conflict, given the urgency of Plaintiff's need for judicial intervention. 1T 7:24-8:9. Judge Rivas expressed his belief that the matter was not urgent because there was no allegation that Defendants were breaking the law. 1T 8:10-9:7. Plaintiff explained to the court that he has alleged a constitutional violation, for which emergent relief was appropriate. 1T 9:12-19. He also contended that the determination that the matter was not emergent was substantive in nature, and if Judge Rivas was encumbered by a conflict, he should not have been making a determination on the merits of the matter. 1T 10:5-11. Because of the urgency of the matter and his desire for a prompt adjudication, despite his frustration, Plaintiff did not seek Judge Rivas's recusal. 1T 10:13-11:10. Defendants did object to Judge Rivas's continued participation in the case. 1T 11:12-17. The case was reassigned to Hon. Joseph L. Rea, J.S.C.

On August 23, 2023, Judge Rea ordered the Office of the Attorney General to appear on August 30, 2023, to "explain that office's position on whether *R.* 4:28-4(d) allows the Court to grant interlocutory relief in this case prior to the expiration of the 60-day period within which the Attorney General may seek to intervene[.]" PA 60-61. The Attorney General provided a letter explaining that it had not yet determined whether it would intervene but

agreeing that *R.* 4:28-4 allowed the court to provide temporary relief prior to the expiration of the 60-day period within which the Attorney General had to decide whether to intervene. PA 62-63. Despite the position of the Attorney General and the urging of Plaintiff, the court declined to reach a substantive determination of whether to issue temporary relief because, the court reasoned, the temporary and final relief were substantially similar. 2T 35:14-18; PA 64-65. The court set a deadline of September 11, 2023, for the Attorney General to decide whether to intervene and scheduled a hearing for September 21, 2023, the soonest date at which both defense counsel and the court were available. 2T 44:3-19.

On September 11, 2023, the Attorney General declined to intervene in the case, explaining that although it had interest in defending Daniel's Law from a facial challenge, it did not have an interest in defending its application on the specific facts of this case: "Plaintiff's entire theory rests on his factual assertions that he obtained the underlying information lawfully, that the information is otherwise still available, and that he is a journalist who wishes to publish that information in a story relating to a high-level official's residency." PA 66-67 (citing Prbr 2-3, 9-10, 14 n.7, 16-19).

On September 21, 2023, counsel appeared before Judge Rea. After hearing arguments from counsel, Judge Rea found that Plaintiff was a

journalist (3T 52:23-24) who lawfully obtained Director Caputo's home address. 3T 53:24-25. The trial court held that although the distance between where the Director lived and worked was a matter of public concern, his exact address was not. 3T 61:12-22. Through that lens, the court determined that, Daniel's Law remained constitutional as applied to Plaintiff's case, holding that the law was narrowly tailored (3T 64:24-65:1) to achieve a government interest of the highest order. 3T 70:1-4. As a result, he denied Plaintiff relief and dismissed the Complaint. 3T 70:14-16; PA 68-69.

The same day, Plaintiff filed a notice of appeal and sought permission to file an emergent application. PA 70-76, PA 82-88. The Appellate Division (Hon. Avis Bishop-Thompson, J.A.D.) held that Plaintiff failed to show a risk of irreparable harm and that the State [sic] has not met the standard articulated in *Garden State Equal. v. Dow*, 216 N.J. 314, 320 (2013) to warrant emergent relief. PA 77-78. Later that day, Plaintiff sought emergent relief from the Supreme Court. PA 79. On September 27, 2023, the New Jersey Supreme Court, after consideration by the full Court, denied Plaintiff's request for emergent relief, but ordered that the appeal "should proceed expeditiously to the extent practicable." PA 80-81.

On August 2, 2023, Plaintiff filed a motion to accelerate the appeal, with a specific proposed briefing schedule. The Court granted the motion to

accelerate and set a briefing schedule. This brief follows.

ARGUMENT

I. The *Daily Mail* principle applies to the facts of this case. (Raised below at PA 22; PA 34 (Compl. ¶¶4, 40-43)).

For more than a half century, the United States Supreme Court has viewed government restraints on the publication of truthful information with great skepticism. In the famed Pentagon Papers case, *New York Times Co. v. United States*, the Court explained that: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The Government thus carries a heavy burden of showing justification for the imposition of such a restraint." 403 U.S. 713, 714 (1971) (plurality opinion) (internal quotations and citations omitted). In New Jersey, "[o]ur constitution and common law have traditionally offered scrupulous protection for speech on matters of public concern." *Sisler v. Gannett Co.*, 104 N.J. 256, 271 (1986). Decisions under the State Constitution "have stressed the vigor with which New Jersey fosters and nurtures speech on matters of public concern." *Id.* at 271–72.

In the fifty-two years since the Pentagon Papers case, the basic principle that the government may not prevent reporting on matters of public significance, using lawfully obtained material, absent extraordinary need, has

been developed and reaffirmed in a series of cases in what has come to be known as the *Daily Mail* principle.

The first case, *Cox Broadcasting Corp. v. Cohn*, addressed a Georgia law meant to protect the privacy of rape victims. 420 U.S. 469, 471–72 (1975). In that case, the reporter learned the name of the victim from indictments, which were public records. *Id.* The Court explained that because the indictments were public, any attempt to impose sanctions for their publication would be unconstitutional:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.
>
> [*Id.* at 495.]

Four years later in *Nebraska Press Association v. Stuart*, the Court similarly held unconstitutional an order prohibiting the press from publishing certain information they came to learn during an open public hearing,

declaring that the order "plainly violated settled principles." 427 U.S. 539, 568 (1976). The Nebraska Supreme Court had previously allowed, as modified, an order that precluded the news media from publishing certain details of a high-profile murder case—like the existence of a confession—in order to protect the accused's right to an impartial jury. *Id.* at 545. The United States Supreme Court agreed that the state courts had "acted responsibly, out of a legitimate concern, in an effort to protect the defendant's right to a fair trial." *Id.* at 555. The Court also agreed "that there would be intense and pervasive pretrial publicity concerning this case" that might impact the defendant's ability to have a fair trial. *Id.* at 562–63. Still, the Court held that the state court was not justified in imposing a restraint on reporting on what had been a hearing open to the public. *Id.* at 568. The Court reaffirmed that "the barriers to prior restraint remain high and the presumption against its use continues intact." *Id.* at 570.

The following year, in *Oklahoma Publishing Company v. District Court in & for Oklahoma County*, a newspaper challenged application of a state statute providing for closed juvenile proceedings unless specifically open to the public when the press had been allowed into a hearing without an order and had photographed a juvenile defendant. 430 U.S. 308, 308 (1977). The Court declared that a trial court's injunction against the press was unconstitutional,

because the state cannot prohibit the publication of widely disseminated information obtained at court proceedings, which were, in fact, open to the public. *Id*. at 310. Like *Cox Broadcasting*, the Court said, the name of the party protected by the statute "was placed in the public domain." *Id.* at 311.

In *Landmark Communications, Inc. v. Virginia*, the Court considered a state criminal statute protecting the confidentiality of complaints about a judge's disability or misconduct. 435 U.S. 829, 830 (1978). Like the cases before it, the Court found the interests protected by the law insufficient when balanced against the First Amendment. *Id.* at 838.

In *Smith v. Daily Mail Publishing Co.*, the Court confronted a statute designed to protect the anonymity of juvenile offenders by requiring written approval of the court before a juvenile offender's name could be published in a newspaper. 443 U.S. at 98-100. In its 1979 *Daily Mail* decision, the U.S. Supreme Court refused to declare a categorial approach on cases that address the publication of truthful information, but was no less definite about how the statute could not be enforced in view of the First Amendment considerations: "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at 103. In addition, while the Court said that the reasons for

protecting the anonymity of juvenile defendants was important, there was no evidence to demonstrate that the imposition of criminal penalties was necessary. *Id.* at 105.

Ten years later, in *Florida Star v. B.J.F.*, the Court was again faced with a statute making it unlawful to "print, publish, or broadcast . . . in any instrument of mass communication" the name of the victim of a sexual offense. 491 U.S. 524, 524 (1989). A Florida newspaper, *The Star,* copied the name of a rape victim from a police report and subsequently included it in a police blotter column. Ironically, the release was not only against police regulations but also against the newspaper's own internal policy, neither of which affected the Court's determination. *Id.* at 536.

Again, there was no dispute the newspaper had *lawfully* obtained the information and that the story as a whole was a matter of "paramount public import[,]" and the Court concluded once more that "[i]mposing liability on the Star does not serve 'a need to further a state interest of the highest order.'" *Id.* at 537, 525. Importantly, the statute at issue sought not only to protect victims' privacy, but also their safety. *Id.* at 530. The safety component of that concern was well founded: the perpetrator of the rape of B.J.F. was at large at the time of publication and B.J.F. received specific and targeted threats to her safety as

a result of the publication of her name, just one week after her attack. *Id.* at 542 (White, J., dissenting).

The Court explained that because "government retains ample means of safeguarding significant interests upon which publication may impinge, including protecting a rape victim's anonymity, . . . [w]here information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." *Id.* at 534. Additionally, the Court noted that punishing the press for its dissemination of information which is already publicly available "is relatively unlikely to advance the interests in the service of which the State seeks to act." *Id.* at 535. Thus, "where the government has made certain information publicly available," the Court said, "it is highly anomalous to sanction persons other than the source of its release." *Id.* The Court was clear that punishing this sort of reporting would result in exactly what the First Amendment abhors: "timidity and self-censorship." *Id.*

The final United States Supreme Court case in this series came 12 years later in *Bartnicki v. Vopper*, which involved a radio host broadcasting a recording of an illegally intercepted telephone conversation between a teachers' union president and a union negotiator, who were involved in

contentious negotiations with a school board in Pennsylvania. 532 U.S. 514, 518–19 (2001).

The Court acknowledged the government's arguments that the interests served by the statute—removing an incentive for parties to intercept private conversations, minimizing the harm to persons whose conversations have been illegally intercepted, and even the need to avoid chilling expression of those who fear their conversations may be intercepted—were adequate to justify the law. *Id.* at 529. But the Court quickly held that "it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends." *Id.*

In *G.D. v. Kenny*, the New Jersey Supreme Court tackled a similar issue. 205 N.J. 275 (2011). There, the plaintiff sought damages for a political campaign's revelation of his expunged criminal record. *Id.* at 282. The expungement statute prohibited disclosure of expunged records with some exceptions. *Id.* at 295-96. Plaintiff argued that because his criminal record had been expunged, his conviction—as a matter of law—was deemed not to have occurred and a campaign flyer's description of the conviction was a violation of his privacy rights. *Id.* at 283. The Court, in affirming dismissal, went right

to the heart of the high standard required to punish publication of truthful information:

> The publication of truthful information lawfully obtained is protected from criminal prosecution by the First Amendment except in the rarest of circumstances. *Florida Star v. B.J.F.*; *Near v. Minnesota* ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."). In *Smith v. Daily Mail Publishing Co.,* two newspapers published the names of juvenile offenders in violation of a state statute that prohibited the publication of such information. The United States Supreme Court held that, consistent with the First Amendment, a state could not "punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper." ("We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . .").
>
> [*Id.* at 299–300 (citations omitted).]

This passage reaffirms our State Supreme Court's commitment to the *Daily Mail* principle.

Recently, the Third Circuit published an opinion upholding an injunction against a Pennsylvania law that criminalized the publication of materials relating to child abuse investigations. *Schrader v. Dist. Att'y of York Cnty.*, 74 F.4th 120, 128 (3d Cir. 2023). There, the court applied the *Daily Mail* test to uphold a person's right to publish (on Facebook) certain documents she

obtained in criminal discovery related to her grandson's death. *Id.* at 123. The court walked through the *Daily Mail* analysis and found that 1) she obtained the documents lawfully; 2) the documents were authentic; and 3) the documents – materials related to the abuse of a child who ultimately died – relate to a matter of public concern. *Id.* at 128. The court held that although the Pennsylvania law dealt with a compelling public interest, it was not narrowly tailored because, among other reasons, the state failed to utilize protective orders before the information's *initial* release and it could have prevented release using only civil, not criminal, sanctions. *Id.* at 126-28.

Against that backdrop, this Court must first determine whether the *Daily Mail* principle applies to the facts of this case – which it does if a journalist seeks to publish lawfully obtained, truthful information about an issue of public interest – and then determine whether the government's means of prohibiting publication are narrowly tailored to a need "of the highest order." *Fla. Star*, 491 U.S. at 541.

As the Court examines the applicability of the *Daily Mail* principle, it must conduct an independent examination of the facts of the case. In *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), the Supreme Court explained "that in cases raising First Amendment issues [it has] repeatedly held that an appellate court has an obligation to 'make an

independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 499 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284–86 (1964)). *Accord Ward v. Zelikovsky*, 136 N.J. 516, 536-37 (1994); *S.B.B. v. L.B.B.*, __ N.J. Super. __, __ (App. Div. 2023) (slip op. at 19-20). Thus "Appellate judges in such a case must exercise independent judgment and determine whether the record establishes [the required legal standard] with convincing clarity." *Bose*, 466 U.S. at 514.

This rule is necessary "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 567 (1995) (citing *Bose*, 466 U.S. at 503). Moreover, "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Bose*, 466 U.S. at 501.

Although independent appellate review is not the same as de novo review, and an appellate court would still accept any credibility determinations

by the judge on any disputes of fact, the judge here made no credibility findings. *S.B.B.*, slip op. at 20.

A. Plaintiff is a journalist. (Raised below at PA 23 (Compl. ¶ 7)).

The trial court found that Plaintiff is a journalist and Defendants do not seriously contest that fact. The court explained that "Charles Kratovil is a journalist who writes for an online publication known as New Brunswick Today." 3T 52:23-24. Defendants acknowledge that "Plaintiff is the editor of *New Brunswick Today*, a local online media outlet. . . ." Dbr 5. Yet Defendants cast aspersions on Plaintiff, noting that in addition to his work as a journalist he also identifies as an activist and a politician. *Id. See also* Press Release, City of New Brunswick, Judge Upholds "Daniel's Law" in Case Filed by New Brunswick Activist (Sept. 21, 2023) (describing Plaintiff as "a local activist and former two-time political opponent of Mayor Jim Cahill."). But even those alleged additional roles do not change whether Plaintiff is a journalist. Under *Too Much Media, LLC v. Hale*, Plaintiff and *New Brunswick Today* easily have sufficient "similarities to traditional media" to qualify for protection under New Jersey's Shield Law, N.J.S.A. 2A:84A–21 to –21.8. 206 N.J. 209, 236-37 (2011).

B. Plaintiff lawfully obtained Director Caputo's home address. (Raised below at 3T 11:9-17; PA 26 (Compl. ¶15-17)).

The trial court properly determined that "[P]laintiff obtained Mr. Caputo's home address through inquiry with the Cape May Board of Elections." 3T 53:19-20. The court acknowledged that Defendants contend that Plaintiff bears responsibility for obtaining the information by subterfuge, but held that "there was no indication that the [P]laintiff did anything illegal in . . . in this regard." *Id.* at 53:21-25. For that reason, the court below rejected Defendants' suggestion, finding "it cannot be said that [Plaintiff] obtained the information unlawfully." *Id.* at 11:16-17.

That determination was correct. Defendants and some *amici* suggested that Plaintiff bears responsibility for the government's (possibly) erroneous disclosure of Director Caputo's home address via OPRA. *See* Dbr at 30-32 (describing Plaintiff's obtaining of the records through OPRA as improper); ACOPbr at 12 (contending that the document is not in the public domain because Plaintiff was not supposed to receive it under OPRA); FOPbr at 8-9 (suggesting that Plaintiff's claim fails because the document was not supposed to have been disclosed under OPRA). Defendants and their *amici* claim that Plaintiff misinformed the Cape May records custodian about that impact the Supreme Court's decision in *Brennan* had on the availability of home addresses under OPRA.

As a threshold matter, it is not clear that the Cape May County Board of Elections erred in providing Director Caputo's address. All parties agree that Director Caputo is eligible for protection of his home address under Daniel's Law. He asserted, via the cease-and-desist letter, that he is a protected person under Daniel's Law. The record does not reveal whether, at the time the Cape May Board disclosed the records to Plaintiff, Director Caputo had gone through the administrative steps necessary to obtain coverage under the Law. *See* N.J.S.A. 56:8-166.1(a)(1) (requiring registration with the Office of Information Privacy and receipt of approval). If he had not, the Board of Elections did not err. But, assuming both that Director Caputo timely sought protection under Daniel's Law and, for the purpose of this brief only, that Defendants and their *amici*'s reading of *Brennan* is correct, the facts do not change the reality that the government provided Director Caputo's home address to Plaintiff. Plaintiff is not an attorney. The OPRA Custodian for the Cape May Board of Elections, of course, has access to an attorney and if the Custodian chose to rely instead on the legal analysis provided by a requestor, the Board bears responsibility for that error. *See Gannett Satellite Info. Network, LLC v. Twp. of Neptune*, 254 N.J. 242, 264 (2023) (explaining that when faced with claims under the common law right of access to public information, custodians can seek the advice of counsel).

Whether the Cape May Board of Elections should have disclosed the address or not, whether Plaintiff accurately described the state of the law or not, the inescapable conclusion is that Plaintiff obtained the document from the government and did so lawfully. As the U.S. Supreme Court explained in *Florida Star*, the fact that a government agency failed to redact or withhold information does not make a journalist's "ensuing receipt of this information unlawful." 491 U.S. at 536. Indeed, whereas *Florida Star*, dealt with "the erroneous, if inadvertent, inclusion" of information, 491 U.S. at 538, in *Bartinicki*, information was actually *unlawfully* obtained by a third party and then transferred to a radio station that had not commissioned the original illegal seizure. 532 U.S. at 525. In *Bartinicki*, the Court held that the radio station and the intermediary obtained the recording lawfully, "even though the information itself was intercepted unlawfully by someone else." *Id.*

The court below properly held that Plaintiff obtained Director Caputo's address lawfully.

C. Plaintiff's information about Director Caputo's home address is truthful. (Raised below at 3T 12:8-13).

There appears to be no debate that the address Plaintiff obtained from the Cape May County Board of Elections is, actually, Director Caputo's address. Although Defendants contend that Plaintiff's investigation (as evidenced by a still unwritten article) "consists of untruths and factual

inaccuracies[,]" they acknowledge that Director Caputo lives in Cape May. *See* Dbr 8 (explaining that "Director Caputo had a vacation home in Cape May, New Jersey. He made this house his primary residence in 2022 and updated his driver's license and voting registration accordingly.").

Indeed, Plaintiff has contended that Director Caputo's home address remains widely available and easily accessible on the Internet. Prbr 14, n.7; 3T 50:6-17. Neither Defendants nor the trial court disputed the ready accessibility of Director Caputo's true home address. *See* 3T 38:8-10 (counsel for STFA explaining that he did not know what the results would be of a "Google search today performed on Director Caputo's home address"). Reporters covering this case confirmed Plaintiff's contention about the ease of finding the address using simple Internet queries. *See* Nikita Biryukov, *Judge declines to temporarily block Daniel's Law*, New Jersey Monitor, (Aug. 30, 2023) (explaining that "Caputo's address is readily available online and was obtained by the New Jersey Monitor after a cursory Google search."). There is, in short, no suggestion that the information Plaintiff obtained was either untruthful or otherwise unavailable[3] to the public.

[3] The ready availability of the information does not directly bear on the truthfulness of it, but it does reveal the absurdity of the restrictions placed on Plaintiff. As counsel explained to the trial court: "we have a situation right now where the whole world can learn where . . . Director Caputo lives --

D. Director Caputo's home address is a matter of public concern in this case. (Raised below at 3T 21:23-22:10).

The trial court held that although this case involves a "matter of public significance[,]" 3T 61:13, that is limited to "the fact that Mr. Caputo resides in Cape May which is, approximately . . . a two-and-a-half hour drive from the City of New Brunswick." *Id.* at 61:13-16. The court below specifically held that "[w]hat street [Director Caputo] lives on or his house number is logically immaterial to this particular story" *id.* at 17-18, and therefore the street name and house number are merely "private matter[s] and . . . add[] nothing of public significance." 3T 63:25-64:1.

This holding finds no support in precedent. The trial court appropriately cited *Snyder v. Phelps* as the Supreme Court's guiding case on whether speech addresses a matter of public concern but failed to appreciate the holding of the case. 3T 59:16-64:2 (*citing Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). The court also ignored the clear instructions of the *Daily Mail* line of cases, which explain at what level of granularity courts must evaluate questions of public concern.

Snyder dealt with protestors at the funeral of an American servicemember. 562 U.S. at 447. The protestors carried signs that spewed a

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except the one person who can't is the person who wants to write an article critical of him." 3T 51:1-4.

series of vile epithets which conveyed their belief that "the United States is overly tolerant of sin and that God kills American soldiers as punishment." *Id.* In considering whether the protestors could be held liable for intentional infliction of emotional distress, the Court explained that the case turned "largely on whether that speech is of public or private concern, as determined by all the circumstances of the case." *Id.* at 451. The inquiry matters because speech on public issues receives special protection because it "occupies the highest rung of the hierarchy of First Amendment values." *Id.* at 452 (internal quotation marks omitted) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). That special protection attaches because of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 452 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. at 270).

The *Snyder* Court then explained – as the trial court here appropriately noted (3T 60:20-61:11) – that when deciding whether speech is of public or private concern, courts must examine the "'content, form, and context'" of that speech, "'as revealed by the whole record.'" *Id.* at 453 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (in turn quoting *Connick*, 461 U.S. at 147–148)).

As to content, the Court set out a test and determined that the content of protests easily qualified as related to a matter of the public concern. *Id.* at 454. The Court examined, broadly, whether the issues highlighted on the signs were "matters of public import." *Id.* Notwithstanding the fact that some of the signs contained messages specifically related to the deceased serviceman and his family, the Court focused on "the overall thrust and dominant theme of" the signs. *Id.* The Court also considered whether the speech was "designed, unlike the private speech in *Dun & Bradstreet*, to reach as broad a public audience as possible." *Id.* Ultimately, on content, the Court concluded that "the 'content' of [the protestors'] signs plainly relate[d] to broad issues of interest to society at large, rather than matters of 'purely private concern.'" *Id.* (citing *Dun & Bradstreet*, 472 U.S. at 759).

On the question of context, the Court held that even the setting of a funeral could not transform the conclusion that the protestors spoke on issues "fairly characterized as constituting speech on a matter of public concern." *Id.* at 455 (quoting *Connick*, 461 U.S. at 146).

The court below did not ask whether Director Caputo's home address *related* to issues of public concern, but instead asked whether the specific address was "superfluous" or "logically immaterial to this particular story." 3T61:18-19. Both *Snyder* and *Florida Star* illustrate that the trial court used

too cramped a reading of what it means to relate to an issue of public concern. The Court in *Florida Star* examined whether "the news article concerned 'a matter of public significance,' in the sense in which the *Daily Mail* synthesis of prior cases used that term." 491 U.S. at 536 (citing several cases in the *Daily Mail* line of cases). It explained exactly what it meant, undercutting the trial court's cramped reading: Does "the article *generally*, as opposed to the specific identity contained within it, involve[] a matter of paramount public import[?]" *Id.* at 536-37 (emphasis added). Because "the commission, and investigation, of a violent crime which had been reported to authorities" was a matter of public importance, the Court did not ask whether the rape victim's name, specifically, was required to tell the story. *Id.* at 537. Here, too, the trial court should have simply asked whether the general location of Director Caputo's home was a matter of public concern.[4]

[4] The granularity of the court's analysis is particularly inappropriate where there exists so little clarity about what, exactly, Daniel's Law proscribes. Defendants contended that "[i]t is common knowledge what is meant by a home address." Dbr at 34. Indeed, they suggested that "no reasonable person" could believe that the mere listing of a street name and town would violate the statute and only disclosure of "the full number, street, town, state, and zip code" violates Daniel's Law. *Id*. But that appears inconsistent with at least some of the trial court's conclusions. *Compare* 3T 58:19-22 (defining "actual street address" as the street *and* house number) *with id.* at 61:17-18 (explaining that neither the street *nor* house number are matters of public concern). Indeed, both Defendants appeared to have a different understanding of what Daniel's Law proscribes.

And, unlike in *Snyder*, where the context of the speech, at a funeral, did not undermine the conclusion that the speech related to a matter of public concern, here, the context of the proposed speech—a news article intended to reach a wide audience—reinforces rather than undermines public concern finding.

At the Council meeting, Plaintiff only publicly announced the street name and town of Director Caputo's home. PA 28 (Compl. at ¶23). His only disclosure of the full address was to the councilmembers. *Id.* When Plaintiff requested the unredacted audio recording from the Council meeting via OPRA, the City of New Brunswick refused to provide it, citing Daniel's Law. PA 30-31 (Compl. at ¶¶30-33). If only disclosures that include the house number violate the law, why the redaction?

Director Caputo, too, seemed to have a different understanding of the definition of "home address." After Plaintiff asked Director Caputo via email if he still lived in New Brunswick, Deputy Director Miller responded on Director Caputo's behalf: "The public release of a law enforcement officer's *place of residence* is protected under Daniel's Law." PA 26 (Compl. at ¶18 and Exhibit A attached thereto) (emphasis added). And, of course, Director Caputo sent Plaintiff a cease-and-desist letter after Plaintiff publicly disclosed only the street name and municipality in which the Director lived.

Amici propose yet other definitions: The FOP chided Plaintiff for wanting to publish the "actual home address" rather than "the county, municipality, general area, and/or distance in miles or in time between Caputo's residence and the location of his office[,]" FOPbr at 2, suggesting that even publication of the street name might risk prosecution under their reading. The Association of Chiefs of Police offered to play editor for Plaintiff, contending that he could "state that Caputo lives in 'South Jersey' or 'Cape May County'" and convey the same message. ACOPbr at 10. Thus the ACOP contends that the Court could "interpret Daniel's Law narrowly to protect the covered person's precise home address, including the street name and house number, but nothing more. . . ." *Id.*

The *Snyder* Court summarized when speech could be characterized as dealing with matters of public concern: "when it can 'be fairly considered as *relating* to any matter of political, social, or other concern to the community[.]'" 562 U.S. at 453 (emphasis added) (quoting *Connick*, 461 U.S. at 146). Even by the trial court's own assessment, Plaintiff satisfies the test because the court found that the general location of Director Caputo's address *was* a matter of public significance. *See* 3T 61:12-16 (holding that the fact that Director Caputo lives far from New Brunswick is a "matter of public significance."). That effectively terminates the inquiry.

III. The *Daily Mail* principle renders Daniel's Law unconstitutional under the particular facts of this case. (Raised below at PA 34 (Compl. ¶¶40-43)).

A. Daniel's Law is not narrowly tailored to achieve its laudable goals. (Raised below at 3T 14:7-16:14).

Under *Daily Mail*, the government must both establish that the interest at stake is a need of the highest order (*see infra*, Point II, B) but also that the associated prohibitions and penalties are necessary to achieve that interest. 443 U.S. at 104. Thus, this Court must ask whether, as applied to the facts of this case, Daniel's Law is narrowly tailored to achieve its objective. The Court in *Florida Star* explained that "where the government itself provides information to the media, it is most appropriate to assume that the government had, but

failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech." 491 U.S. at 538.

Like with *Florida Star*, Plaintiff received the information because of "the erroneous, if inadvertent, inclusion" of the information in the Cape May County Board of Election's OPRA response. *Id.* New Jersey's policy objective, reflected in Daniel's Law:

> was undercut by [Cape May's] failure to abide by this policy. Where, as here, the government has failed to police itself in disseminating information, it is clear . . . that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding [the privacy interests underlying Daniel's Law].
>
> [*Id.*]

The Third Circuit recently explained that to "narrowly tailor, the state must choose 'the least restrictive means among available, effective alternatives.'" *Schrader*, 74 F.4th at 127 (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)). Despite Defendants' claim that only posting armed guards outside of public employees' homes would serve the State's interest (Dbr at 22), there are at least three workable alternatives: The government could prioritize policing itself (e.g., training and auditing its OPRA custodians) to prevent the initial disclosure of information. *See Fla. Star*, 491 U.S. at 538 (explaining that where "the government has failed to police itself in

disseminating information" "the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding" privacy). Daniel's Law does not provide for liability for the negligent disclosure of information by records custodians. *Compare* N.J.S.A. 2C:52–30, *and G.D.*, 205 N.J. at 299 (limiting statute's penalty for disclosing expunged convictions to "certain statutorily named government agencies that have custody of expunged records"), *with* N.J.S.A. 2C:20-31.1(d) (providing no limitation on those prohibited from disclosing address information). That would be one way – though certainly not the only way – that New Jersey could prevent the disclosure of information it wishes to keep private, without imposing the risk of self-censorship or criminal and civil liability on journalists who lawfully obtain the information.

Next, the Law could recognize – as the federal Daniel Anderl Judicial Security and Privacy Act of 2021 does – an exception for "the transfer of the covered information . . . if the information is relevant to and displayed as part of a news story, commentary, editorial, or other speech on a matter of public concern." S. 2340, 117th Cong. § 4 (2021). Other than a limited exception for the newspapers printed prior to the Law's effective date, N.J.S.A. 2C:20-31.1(f), New Jersey's version of Daniel's Law contains no exception for journalists, unlike its more narrowly tailored federal counterpart.

Finally, "there are civil penalties. The Law could, for instance, [exclusively] authorize fines." There is no evidence that "without criminal sanctions the objectives of [the Law] would be seriously undermined." *Schrader*, 74 F.4th at 127 (citing *Landmark Commc'ns*, 435 U.S. at 841). The analysis of New Jersey's version of Daniel's Law might be different if, like its federal counterpart, it focused exclusively on civil not criminal penalties.

B. Although Daniel's Law serves a laudable interest, it does not amount to a need of the highest order. (Raised below at 3T 16:15-18:8).

None of the cases that have established or reaffirmed the *Daily Mail* principle adopted a categorical rule. But all of the cases have made clear that the circumstances under which the government may prohibit the publication of truthful information on important topics are exceedingly rare. *See, e.g.*, *G.D. v. Kenny*, 205 N.J. at 299–300 (citing *Near v. Minnesota*, 283 U.S. 697, 716 (1931), for the proposition that "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.").

The publication of Director Caputo's address as part of reporting about areas of certain public significance, lies near the core of the State Constitution's protection of free speech and free press; and the State's

interests, however altruistic, are insufficient to justify the actual and potential encroachments on freedom of speech and the press that flow from Daniel's Law's prohibition on Plaintiff's truthful reporting. As described above, courts have previously found that protecting the names of rape victims (*Cox Broad.*, 420 U.S. at 496; *Fla. Star*, 491 U.S. at 541), juvenile offenders (*Okla. Publ'g Co.*, 430 U.S. at 311-12; *Daily Mail*, 443 U.S. at 106), or people who benefited from expungements (*G.D.*, 205 N.J. at 300), or preventing publication of classified national security information (*N.Y. Times Co.*, 403 U.S. at 714), wiretapped conversations (*Bartnicki*, 532 U.S. at 535), highly prejudicial pretrial publicity (*Neb. Press Ass'n*, 427 U.S. at 570), information about judicial discipline (*Landmark Commc'ns*, 435 U.S. at 845), or reports of child abuse (*Schrader*, 74 F.4th at 128) do not constitute a need "of the highest order."

This does not diminish the import of protecting public servants, it simply acknowledges the significant interests that courts have previously held do not satisfy the government's significant burden. Although the line of cases relied upon above utilize fact-intensive inquiries, even Defendants acknowledge that they have "without exception upheld the press' right to publish[.]" Dbr at 17 (citing *Fla. Star*, 491 U.S. at 530). And, even where Florida authorities argued to the Supreme Court that its law preventing the disclosure of rape victim

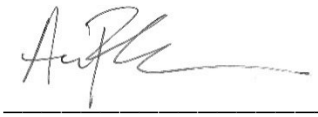
names was needed to protect the physical safety of those victims, who may be targeted for retaliation if their names become known to their assailants, the Court found the interest "highly significant" but not of the highest order. *Fla. Star*, 491 U.S. at 537.

Even if the Court concludes that the *general* purpose of Daniel's Law – protecting the home addresses of certain public servants – constitutes a need of the highest order, it does not follow that its application in this case does the same. Because Director Kratovil's home address was disclosed by the government and is widely and easily available on the Internet, (*see* Point I, C) to resolve this as applied challenge, the Court must additionally ask whether there exists a need of the highest order to prevent the redisclosure of an address that has already been turned over by the government and which any New Jerseyan can access with a simple Internet search. Put differently, the Court must ask whether the marginal benefit of punishing redisclosure, where the address has been disclosed and can be easily found, advances a "need of the highest order." In light of the important interests that courts have previously found insufficient to meet that exacting standard, Daniel's Law, too, fails the constitutional test.

CONCLUSION

For the reasons set forth above, Daniel's Law is unconstitutional as applied to Plaintiff, the order dismissing his complaint must be reversed, and Defendants must be enjoined from using the law to prevent Plaintiff's reporting on a truthful, lawfully obtained matter of public concern.

Respectfully submitted,



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DATED: October 31, 2023