CHARLES KRATOVIL,

Plaintiff-Petitioner,

v.

CITY OF NEW BRUNSWICK, and ANTHONY A. CAPUTO, in his capacity as Director of Police,

Defendants-Respondents.

Supreme Court Docket No. 089427

CIVIL ACTION

On Petition for Certification from a Final Order of the Superior Court Appellate Division

Docket No.: A-000216-23T1

Sat Below:
Hon. Robert J. Gilson, P.J.A.D.
Hon. Patrick DeAlmeida, J.A.D. and
Hon. Avis Bishop-Thompson, J.A.D.

PETITION FOR CERTIFICATION BRIEF AND APPENDIX

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STATEMENT OF THE MATTER INVOLVED

After the tragic murder of Daniel Anderl, the son of United States District Judge Esther 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 the law only as applied to Kratovil.

This case simply asks whether the government may constitutionally criminalize a journalist's reporting on information he lawfully obtained from the government 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 Appellate Division's contrary conclusion ignores well-established law and allows courts and law enforcement agencies to assume the role of editor in ways that the free press protections of the New Jersey Constitution forbid.

The critical facts of the case are not disputed. PCa 4.[1] Charles Kratovil is a journalist who writes for and edits *New Brunswick Today*, an online

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[1] PCa refers to Plaintiff-Petitioner's Appendix to the Petition for Certification;
Pa refers to Plaintiff-Appellant's Appellate Division Appendix;
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. Joseph L. Rea, J.S.C. on September 21, 2023.

publication. *Id.* Anthony Caputo is a retired police officer who became Director of New Brunswick's Police Department; he was also a Commissioner of the City's Parking Authority. *Id.*

Kratovil learned that Caputo was living in Cape May. *Id.* at 5. To confirm that suspicion, he filed an Open Public Records Act request for Caputo's voter profile with the Cape May County Board of Elections. The Board provided a redacted version of Caputo's voting profile, but after follow-up communications from Kratovil, it provided Kratovil with a voter profile that included Caputo's full home address. *Id.*

On May 3, 2023, Kratovil attended a New Brunswick City Council meeting. During public comment, he noted that Caputo's residence in Cape May – where he lived and was registered to vote – was approximately a two-hour drive from New Brunswick, and that Caputo was serving on the City's Parking Authority even though he did not live there. *Id.* During that discussion, Kratovil stated the name of the street in Cape May where Caputo lived. *Id.* He also provided City Council members with copies of Caputo's voter profile, which included Caputo's complete home address. *Id.* at 5-6.

On May 15, 2023, Kratovil received a cease-and-desist letter invoking Daniel's Law (N.J.S.A. 56:166.1 and N.J.S.A. 2C:20-31.1), which prohibits

disclosure of the residential addresses of certain persons covered by the law. *Id.* at 6. Kratovil does not contest that Director Caputo is a covered person.

Daniel's 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). It 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 civil liability, the law makes 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).

Kratovil continued to prepare a story about the residency issue. But, chilled by the threat of civil and criminal prosecution, he did not publish anything containing Caputo's home address. Instead, on July 12, 2023, through counsel, Kratovil 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. *Id.* at 6. Citing *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979), and its progeny, Kratovil sought preliminary and permanent injunctions preventing Defendants from seeking to impose criminal or civil sanctions based on his publication of truthful, lawfully obtained information.

Id. He also sought a declaration that Daniel's Law was unconstitutional as applied to the particular facts of his case. *Id.* Several law enforcement groups sought and received leave to appear as amicus curiae. Pa 49-55.

On September 21, 2023, Kratovil argued his order to show cause before Hon. Joseph L. Rea, J.S.C. 3T 4:1-72:1. Although the Attorney General's Office received notice of the case, it declined to intervene, explaining that although it had an interest in defending Daniel's Law from a facial challenge, it did not have an interest in defending its application on these specific facts: "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.

Judge Rea denied Plaintiff relief and dismissed the Complaint. 3T 70:14-16; Pa 68-69. Plaintiff sought emergent relief, which both the Appellate Division and this Court denied. Pa 77-78; Pa 80-81. The Appellate Division agreed to hear the appeal on an accelerated basis. PCa 19-20. The Reporters' Committee for Freedom of the Press and other media organizations were granted leave to appear as amicus curiae. PCa 21. After oral argument on January 29, 2024, the Appellate Division affirmed the trial court's dismissal of Kratovil's Complaint in an unpublished, *per curiam* decision, dated April 26,

2024. PCa 1-18.

As did the trial court, the appellate panel held that Caputo's living in Cape May while serving as the New Brunswick's Police Director and a Commissioner of the City's Parking Authority was a matter of public concern. PCa 16. But without analysis, the panel also held that the "trial court's conclusion that Caputo's exact street address is not a matter of public concern is supported by the record and consistent with the law." *Id.* The panel further agreed with the trial court "that protecting public officials from violent attacks and harassment is a compelling State interest of the highest order." *Id.* The panel did not analyze – or even discuss – whether the Law was both necessary and narrowly tailored to achieve that interest.

QUESTIONS PRESENTED

1. Whether, after finding that the topic of a proposed publication relates to an issue of public concern, a court may find that a specific pertinent fact relates to only private concerns and forbid its publication?
2. Whether, to prohibit publication of truthful, lawfully obtained information, courts must both find a need of the highest order and determine that the prohibition is narrowly tailored to advance that need?

ERRORS COMPLAINED OF AND COMMENTS CONCERNING THE OPINION

I. The Appellate Division incorrectly asked whether particular facts were issues of public concern, rather than asking whether the topic of the proposed article, generally, related to issues of public concern.

The *Daily Mail* test is straightforward: If a person "lawfully obtains truthful information about a matter of public significance[,] then state officials may not constitutionally punish publication of the information," unless they can show that the restriction is "necessary to further" "a state interest of the highest order." *Daily Mail,* 443 U.S. at 102-103.

A critical question, therefore, is whether the information is about a matter of public significance. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Speech on public issues receives special protection because it "occupies the highest rung of the hierarchy of First Amendment values." *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted)). 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.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).[2]

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[2] New Jersey also recognizes this core principle. "Our 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

Supreme Court precedent makes clear that this case involves a matter of public concern.

In *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), which addressed 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 (*id.* at 526), the Court 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). The Court explained exactly what it meant, undercutting the Appellate Division's – and 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.

Snyder v. Phelps, *supra*, further undermines the reasoning of the courts below. *Snyder* involved protestors at the funeral of an American service

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New Jersey fosters and nurtures speech on matters of public concern." *Id.* at 271–72.

member. *Id.* at 447. The protestors carried signs with a series of vile epithets that 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.

Under *Snyder*, speech involves a matter 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). The focus of the inquiry is whether the speech "relates to" the public issue.

This Court recently explained that "the ordinary meaning of [the phrase 'relating to'] is a broad one – to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Savage v. Twp. of Neptune*, ___ N.J. ___, ___ (2024) (slip op. at 8), (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)) (alteration in *Savage* and quotation marks omitted in *Savage*).

The *Snyder* Court examined, broadly, whether the issues highlighted on the signs were "matters of public import." 562 U.S. at 454. Although some of

the signs contained messages specifically related to the deceased serviceman and his family – for example, "You're going to hell" and "God hates you" (*id.*) – the Court focused on "the overall thrust and dominant theme of" the signs. *Id.*

The Court's analysis of the signs illustrates how courts must determine whether speech relates to issues of public concern. Notwithstanding the personal/private nature of the two signs described above, the Court determined that the overall thrust of the protestors' speech was political/public. The *Snyder* Court did not separately analyze each sign; it looked instead to the overall thrust of the protest. 562 U.S. at 454.

Similarly, this Court must evaluate the overall topic of the proposed article, which the Appellate Division agreed was a matter of public concern (PCa 15), rather than parse each fact the article would contain. After the Appellate Division and the trial court determined that the fact "that Caputo, then a high-ranking City official, lived in Cape May, a substantial distance from the City" (PCa 16) was a matter of public concern, its inquiry should have ended. Any facts that relate to that determination necessarily concern matters of public significance, even if a court believes they are not required to tell the story.

In other words, speech "relates to" a matter of public concern if it has any reasonable relationship to, or bearing upon, that public issue. Once that relationship is established, the constitutional inquiry must end. Absent a compelling need of the highest order, a court may not further parse or assess the speech to determine whether it is "necessary" for the speaker to include a particular fact or piece of information in his communication. The Constitution leaves that choice to the speaker.

Accordingly, even by the lower courts' assessment, Kratovil satisfies the *Daily Mail* test because the courts found that the general location of Caputo's home *was* a matter of public significance. PCa 15. The specific address is necessarily "related to" the general location of the home. That should have effectively terminated the inquiry.

In other contexts, too, courts look merely at the relationship between particular facts and matters of public concern. *Klentzman v. Brady*, 456 S.W.3d 239, 261 (Tex. App. 2014), *aff'd*, 515 S.W.3d 878 (Tex. 2017) (describing, in a defamation suit, how to identify a matter of public concern). For example, in *Lowe v. Hearst Communications, Inc.*, the Fifth Circuit determined that a story was newsworthy and therefore "declined to get involved in deciding the newsworthiness of specific details in" it, where the "details were 'substantially related' to the story." 487 F.3d 246, 251 (5th Cir. 2007) (quoting *Cinel v.*

Connick, 15 F.3d 1338, 1346 (5th Cir. 1994)). There is good reason for that restraint. "Exuberant judicial blue-pencilling after-the-fact would blunt the quills of even the most honorable journalists." *Ross v. Midwest Commc'ns, Inc.*, 870 F.2d 271, 275 (5th Cir. 1989). Put differently, when courts take on the role of editors, they inevitably produce the very chilling effect that constitutional free press protections are designed to prevent.

II. The Appellate Division failed to analyze whether Daniel's Law was narrowly tailored to achieve a need of the highest order.

The panel also failed to meaningfully apply the narrow tailoring analysis required by the *Daily Mail* line of cases. It simply noted that it "agree[d] with the trial court that protecting public officials from violent attacks and harassment is a compelling State interest of the highest order." PCa 16. But that is merely one part of the required inquiry. Under *Daily Mail*, the government must establish both that the interest at stake is a need of the highest order *and also* that the associated prohibitions and penalties are necessary to achieve that interest. 443 U.S. at 104; *see also G.D. v. Kenny*, 205 N.J. 275, 300 (2011) (New Jersey Supreme Court acknowledging the need for narrow tailoring to satisfy the *Daily Mail* test).

Thus, this Court must ask whether, as applied to the facts of this case, Daniel's Law is narrowly tailored to achieve its objective. To "narrowly tailor [a restriction on speech], the state must choose 'the least restrictive means

among available, effective alternatives.'" *Schrader v. Dist. Att'y of York Cnty.*, 74 F.4th 120, 127 (3d Cir. 2023) (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

Here, had the Appellate Division engaged in the constitutionally required inquiry, at least three workable alternatives exist, each of which would defeat a claim of narrow tailoring.

First, 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). Put differently, "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." *Id.*

Daniel's Law does not provide 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 (providing a penalty for disclosing expunged convictions by "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). Nor does it provide training for records custodians to ensure they do not provide records protected by the Law. Those are two ways – though certainly not the only ways – 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.

Second, the Law could recognize – as does the federal Daniel Anderl Judicial Security and Privacy Act of 2021 – 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. (2021). Other than a limited exception for 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. That the federal law is able to protect federal judges without similarly chilling journalists is powerful evidence that Daniel's Law is not narrowly tailored to achieve the asserted government interests.

Finally, "there are civil penalties. [Daniel's] Law could, for instance, [exclusively] authorize fines." *Schrader*, 74 F.4th at 127. No evidence exists

that "without criminal sanctions the objectives of [the Law] would be seriously undermined." *Id.* (citing *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 841 (1978)). 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.

REASONS WHY CERTIFICATION SHOULD BE GRANTED

This petition meets multiple criteria for the granting of Certification under *R.* 2:12-4:

A. Certification should be granted to address a question of general public importance which has not been but should be settled by the Supreme Court.

This is the first case to test the limits of Daniel's Law. The law and its scope have garnered significant attention. *See, e.g.*, Press Release, Office of the Governor, Governor Murphy Signs "Daniel's Law" (Nov. 20, 2020)[3] (including quotes from United States Senators, state and federal judges and justices, the Attorney General, and state legislators); Matt Friedman, *How a law meant to protect public workers may have created a lawsuit gold mine*, Politico (Apr. 24, 2024)[4] (discussing spate of lawsuits recently filed under Daniel's Law).

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[3] https://www.nj.gov/governor/news/news/562020/20201120b.shtml.
[4] https://www.politico.com/news/2024/04/24/public-workers-lawsuit-new-jersey-00153715.

Although the case does not present a facial challenge, it has also captured public attention because it concerns the Law's application to a journalist. *See, e.g.*, Eugene Volokh, *Journalist Has No First Amendment Right to Publish Police Chief's Home Address*, The Volokh Conspiracy (Apr. 29, 2024)[5] (pointing out contradiction in New Jersey not prohibiting residential picketing but forbidding publication of certain home addresses); Caitlin Vogus, *NJ court to journalist on publication of official's address: Do you feel lucky, punk?*, Freedom of the Press Foundation (Apr. 30, 2024)[6] (explaining harm to journalists and members of the public seeking accountability if the Appellate Division decision stands); Terrence T. McDonald, *Judges and lawyers spar in case that could threaten press freedom in New Jersey*, N.J. Monitor (Jan. 31, 2024)[7] (commentary expressing concern that although Plaintiff seeks only as-applied relief, "a ruling against Kratovil would embolden officials who already do their damn[e]dest to keep public information out of the hands of the pesky public.").

[5] https://reason.com/volokh/2024/04/29/journalist-has-no-first-amendment-right-to-publish-police-chiefs-home-address/.
[6] https://freedom.press/news/nj-court-to-journalist-on-publication-of-officials-address-do-you-feel-lucky-punk/.
[7] https://newjerseymonitor.com/2024/01/31/judges-and-lawyers-spar-in-case-that-could-chill-free-speech-in-new-jersey/.

Although a ruling in Kratovil's favor does not require striking down Daniel's Law, affirmance of the Appellate Division's reasoning effectively means that Daniel's Law has no limitations, even those imposed by the United States Constitution. Thus, while the Court can rule narrowly in Kratovil's favor, an affirmance of the panel's decision – or a denial of the Petition for Certification – creates concerns of tremendous public importance.

Given the significant attention New Jerseyans have paid to both Daniel's Law generally and this challenge in particular, the public expects to hear from the state's highest Court on this matter. If the Court wishes to bless the application of Daniel's Law to the particular and peculiar facts of this case, it should do so explicitly. An unpublished, *per curiam* Appellate Division decision should provide neither the first judicial response to this widely-discussed statute nor the last word on this important constitutional issue.

B. Certification should be granted because the decision below is in direct conflict with United States Supreme Court precedent.

The murder of Daniel Anderl appropriately elicits strong feelings. Questions of how to protect judges and other public officials from violence and harassment raise important policy considerations, about which reasonable people may disagree. But however one thinks government should address this critical issue, this case presents unique factual circumstances that demand a

result consistent with a long and uninterrupted line of United States Supreme Court cases. The Appellate Division's decision affirming the trial court's dismissal of the complaint stands in direct conflict to that line of cases.

The basic principle that the government may not prevent reporting on matters of public significance, based on lawfully obtained material, absent extraordinary need has been developed and reaffirmed in a series of cases over the last half century. *See, e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471–72 (1975) (holding that despite Georgia law meant to protect the privacy of rape victims, where the government places information in the public domain, journalists cannot be punished for reporting on it); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 568 (1976) (explaining that an order prohibiting the press from publishing certain information they came to learn during an open public hearing "plainly violated settled principles."); *Okla. Publ'g Co. v. Dist. Ct. in and for Okla. Cnty.*, 430 U.S. 308, 308–09 (1977) (siding with newspaper that 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); *Daily Mail*, 443 U.S. at 102-103 (setting forth the test for when government can punish publication of lawfully obtained, truthful information about a matter of public significance, in a case about the identity of juvenile

offenders); *Fla. Star*, 491 U.S. at 534 (finding that government has other ways to protect the privacy and safety of rape victims, without punishing the publication of information provided by the government); *Bartnicki v. Vopper*, 532 U.S. 514, 529–30 (2001) (determining that even the government's important interest in preventing surreptitious recording of conversations could not justify punishing people for republishing illegally recorded conversations where they were not responsible for the illegal recordation). The restrictions in the *Daily Mail* line of cases were all alleged to be compelling interests "of the highest order," yet the Supreme Court did not recognize any of the interests as "of the highest order," and found none was narrowly tailored. The bar for recognizing compelling interest in this context remains exceedingly high.

But one need not delve deeply into the entire line of cases to see the ways in which the decision below conflicts directly with them. As discussed above, the Appellate Division's analysis of issues of public concern versus issues of private concern (PCa 15-16) overlooks the teachings of *Florida Star*, 491 U.S. at 536-37, and *Snyder*, 562 U.S. at 454, both of which focus on the overall thrust of the speech rather than each fact. And the panel's analysis of the important purposes served by Daniel's Law (PCa 16), which fails to even ask whether the statute is narrowly tailored to achieve those purposes, fails to apply the test required by *Daily Mail*, 443 U.S. at 102, which mandates narrow

tailoring. Those conflicts with United States Supreme Court cases justify granting certification.

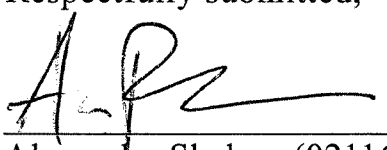
C. The interest of justice requires certification.

The interest of justice warrants certification where a decision is "palpably wrong, unfair or unjust" and involves the interests of more than just the parties to the dispute. *Mahony v. Danis*, 95 N.J. 50, 52 (1983). Although this is an as-applied rather than a facial challenge, the sweeping reasoning of the Appellate Division eviscerates the *Daily Mail* principle and threatens to chill journalists throughout the state. This Court's intervention is therefore necessary.

CONCLUSION

For the reasons set forth above, the Court should grant certification.

Respectfully submitted,



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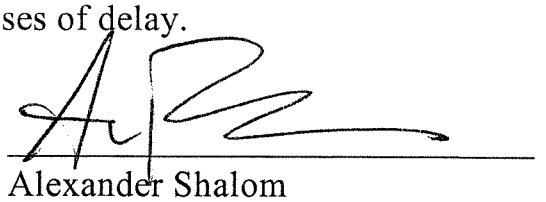
CERTIFICATION

I hereby certify that this petition presents a substantial question and is filed in good faith and not for purposes of delay.



Alexander Shalom

Dated: May 22, 2024