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SUPREME COURT OF NEW JERSEY  
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SUPREME COURT  
OF NEW JERSEY

ATLAS DATA PRIVACY CORP., : ON CERTIFIED QUESTION OF LAW  
JANE DOE 1; JANE DOE 2; : FROM THE UNITED STATES COURT  
EDWIN MALDONADO; POLICE : OF APPEALS FOR THE THIRD  
OFFICER SCOTT MALONEY; : CIRCUIT  
JUSTYNA MALONEY; PATRICK :  
COLLIGAN; PETER ANDREYEV; : Docket Nos. 25-1555 through -1578,  
and WILLIAM SULLIVAN, : 25-1580 through -1593, 25-1676,  
: 25-1677

Plaintiffs-Respondents, :

: Third Circuit Panel:

ATTORNEY GENERAL OF :  
NEW JERSEY, :

Hon. Stephanos Bibas  
Hon. Arianna J. Freeman  
Hon. Cindy K. Chung

Intervenor-Respondent, :

v. :

WE INFORM, LLC; :  
INFOMATICS, LLC; THE :  
PEOPLE SEARCHERS, LLC; DM :  
GROUP, INC.; DELUXE CORP.; :  
QUANTARIUM ALLIANCE, LLC; :  
QUANTARIUM GROUP, LLC; :  
YARDI SYSTEMS, INC.; DIGITAL :  
SAFETY PRODUCTS, LLC; CIVIL :  
DATA RESEARCH, LLC; :  
SCALABLE COMMERCE, LLC; :  
NATIONAL DATA ANALYTICS, :  
LLC; LABELS & LISTS, INC.; :

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HOLDINGS, INC.; THOMSON :  
REUTERS CANADA LIMITED; :  
THOMSON REUTERS :  
APPLICATIONS, INC.; :  
THOMSON REUTERS :  
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WEST PUBLISHING CORP.; :  
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RESTORATION OF AMERICA; :  
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LLC; E-MERGES.COM, :  
INC.; NUWBER, INC.; :  
ROCKETREACH, LLC; :  
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COMMUNICATIONS, INC.; :  
PROPERTYRADAR, INC.; THE :  
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In accordance with the Court's Order filed on October 21, 2025, review is limited to the following question: What mental state, if any, is required to establish liability under Daniel's Law, N.J.S.A. 56:8-166.1?

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## **PRELIMINARY STATEMENT**

The original Daniel's Law was enacted by the New Jersey Legislature in 2020 to protect judges, law enforcement officials, and their families. The certified question before this Court is not about the original version of the Law or the compelling purpose motivating it. Nor does the question concern covered persons' rights to demand nondisclosure of their home addresses and unpublished phone numbers or to seek an injunction if entities fail to comply. The question presented is only what mens rea standard, if any, is required to impose financial penalties under the amended version of the Law that took effect in 2023. The text is plain and unambiguous: No mens rea is required. Indeed, the Legislature amended the Law to remove that requirement.

This litigation is the brainchild of Atlas Data Privacy Corporation. Atlas was created shortly after the original Daniel's Law was passed. Its lawyers in this litigation lobbied the Legislature to amend the statute in ways that allowed Atlas to construct the claims asserted in these cases. Atlas amassed thousands of nondisclosure notices from covered persons over many months, triggered the sending of those notices simultaneously through spam-style emails over the 2023 winter holidays, and then brought hundreds of carbon-copy lawsuits alleging that companies failed to timely comply, seeking tens of millions of dollars in each case.

The Defendants now before this Court that use home addresses and phone numbers employ them for a range of purposes central to a functioning society, from assisting law enforcement with criminal investigations to providing consumer information to prevent fraud. Every Defendant is committed to protecting the safety of covered persons and has sought to comply with Daniel's Law. Tellingly, during the nearly two years that these forty cases have been pending, neither Atlas nor any individual plaintiff has sought to enjoin the disclosure of a covered person's information. Rather, these cases and the more than 110 similar ones pending in state court are proceeding so that Atlas can try to reap billions of dollars in liquidated damages, as well as millions more in fees for its attorneys, for alleged technical violations prompted by Atlas's mass-email strategy.

The possibility of this windfall is the result of a series of amendments enacted after lobbying by Atlas and its lawyers. Those amendments removed the Law's previous mens rea requirement, made the award of damages mandatory, and allowed assignees to aggregate claims to pursue damages en masse. The current version of the Law thus bears little resemblance to the one passed in 2020. It also bears little resemblance to similar laws enacted across the country, which contain exceptions New Jersey eschewed. Perhaps most

remarkably, the amended Law is the only one of its kind to impose severe financial penalties on a strict liability basis.

No legislative history exists to explain why the New Jersey Legislature abandoned the Law's guardrails -- including its mens rea requirement -- and enacted this uniquely punitive regime. There was no legislative finding, for example, that people and entities were not complying with nondisclosure notices or that remedies adopted elsewhere would be ineffective here.

The Law's lack of an explicit mens rea requirement poses serious First Amendment concerns not considered by the Legislature. By performing a judicial transplant to insert a "negligence" standard that the Legislature intentionally removed when amending the Law, the federal district court presiding over these cases usurped the Legislature's role and ignored its intent. Moreover, rather than saving the Law's civil cause of action, that judicially imposed standard is insufficient to protect the speech interests at stake. To ensure the constitutionality of the Law's liability provisions, a more robust statutory revision needs to be enacted by the Legislature.

For the reasons discussed in the sections that follow, the answer to the certified question is no; the current Law requires no mens rea to impose financial liability. A legislative fix is required.

## FACTS AND PROCEDURAL HISTORY

### **I. The Vital Role of Home Addresses and Phone Numbers**

Home addresses and telephone numbers have been considered public information for centuries. Since before this country's founding, home addresses have been publicly recorded. See Dean Arthur R. Gaudio, *Electronic Real Estate Records: A Model for Action*, 24 W. NEW ENG. L. REV. 271, 272, 314 n.4 (2002) (first colonial recording law in early 1600s). "By the Revolution, every English colony had adopted statutes requiring that parties to a mortgage record their names and a description of the property in [a] public office designed for that purpose." Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1364 (2010). Since then, the public availability of title information has been "nearly universal and uninterrupted." *Ibid.*; see *Higg-A-Rella, Inc. v. Cnty. of Essex*, 141 N.J. 35, 49 (1995) (addresses "have historically been available to the public"); *State v. Brown*, 216 N.J. 508, 533 (2014) (property records are "readily available"). Just as addresses have long been a matter of public record, so too have telephone numbers, with telephone directories becoming "a ubiquitous part of American life, found in virtually every household and office." *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 953 (9th Cir. 2012).

Throughout history, this information has served important purposes: permitting transfers of property, facilitating the exchange of goods and services, and enabling people to communicate with each other. Today, as the federal district court recognized, this information continues to serve myriad purposes “necessary” for “society to function.” Atlas Data Priv. Corp. v. We Inform, LLC, 758 F. Supp. 3d 322, 338 (D.N.J. 2024). For instance, it allows financial institutions to detect fraud, businesses to conduct credit checks, advocacy groups to canvass for causes, and law enforcement agencies to investigate crimes. See infra at 13-14. Accordingly, New Jersey law has long required this information to be publicly available. It is against this historical backdrop that this appeal proceeds.

## **II. New Jersey’s Daniel’s Law**

In July 2020, Judge Esther Salas’s son Daniel was murdered at the family’s home. In response to that horrific tragedy, the Legislature enacted Daniel’s Law to “enhance the safety and security” of judges, law enforcement officers, and other government officials. L. 2020, c. 125; Kratovil v. City of New Brunswick, 261 N.J. 1, 12-13 (2025). Daniel’s Law sought to achieve this laudable objective by carving out an exemption to the historically free exchange of addresses and phone numbers. Specifically, the State enacted a mechanism for covered officials and certain family members to restrict

disclosure of their contact information. By doing so, the State imposed a content-based restriction on constitutionally protected truthful speech. Id. at 16-17; Atlas Data, 758 F. Supp. 3d at 333-34; Jackson v. Whitepages, Inc., --- F. Supp. 3d ----, 2025 WL 2407201, at \*7 (N.D. W. Va. Aug. 19, 2025) (Da005-06) (discussing West Virginia’s Daniel’s Law), appeal filed, No. 25-2122 (4th Cir. Sept. 19, 2025).<sup>1</sup>

Although the Law applies to disclosures by both private and government entities, it imposes greater restrictions on private entities’ speech. Subsequent amendments to the Law have exacerbated those differences.

**A. The Rigid Restrictions on Disclosures by Private Entities**

Daniel’s Law allows “any covered person” -- defined to include current and former judges, law enforcement officers, and certain other public officials, as well as immediate family members residing in the same household -- to “prohibit the disclosure of the[ir] home address or unpublished home telephone number” by any “person, business, or association.” N.J.S.A. 56:8-166.1(a)(2), (d). The Law provides that, upon receipt of “written notice” that a covered person “is seeking nondisclosure,” the recipient “shall not disclose or re-disclose on the Internet or otherwise make available” the covered person’s information. N.J.S.A. 56:8-166.1(a)(1), (2).

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<sup>1</sup> “Da” refers to the Appendix of Defendants-Appellants filed herewith.

The Law broadly defines “disclose” as “to solicit, sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, post, publish, distribute, circulate, disseminate, present, exhibit, advertise, or offer.” N.J.S.A. 56:8-166.1(d). The definition also extends to making information “available or viewable within a searchable list or database, regardless of whether a search of such list or database is actually performed.” Ibid. The Law’s restrictions are not limited to information publicly posted on the Internet; they apply to any disclosure for any reason, without exception. N.J.S.A. 56:8-166.1(a)(2).

Daniel’s Law does not specify how a nondisclosure notice is to be made, other than that it must be “written” and provided by someone “authorized” to do so. N.J.S.A. 56:8-166.1(a)(2); see Kratovil, 261 N.J. at 13-14. The Law does not require, or provide any mechanism for, verification that the person seeking nondisclosure is actually a “covered person.” And it demands compliance “not later than 10 business days following receipt” of a notice, without exception. N.J.S.A. 56:8-166.1(a)(1).

If the ten-day deadline is not met, the recipient of the notice “shall be liable” in a “civil action,” which can be brought by either “the covered person or the covered person’s assignee.” N.J.S.A. 56:8-166.1(b); Kratovil, 261 N.J. at 14-15. The Law provides that a “court shall award” “actual”

damages “not less than” “\$1,000 for each violation,” which it calls “liquidated damages.” N.J.S.A. 56:8-166.1(c). The Law also provides mandatory awards for attorney’s fees and litigation costs. Ibid. And it allows for “punitive damages upon proof of willful or reckless disregard of the law.” Ibid.

The provisions authorizing civil actions reached their current form in several steps. The original version of Daniel’s Law provided two kinds of claims. One applied where recipients of nondisclosure notices did not comply, similar to the current Law. Covered persons could seek an injunction requiring compliance and recover fees and costs if successful. L. 2020, c. 125, § 7. The other claim allowed recovery of money damages, but only if “a reasonable person would believe that providing that information would expose another to harassment or risk of harm to life or property.” Id. § 6.

In 2021, the Legislature changed the Law to remove the “reasonable person” fault standard and create a single notification-based claim that allowed a covered person to seek injunctive relief and gave courts discretion to award damages, providing courts “may award” \$1,000 in “liquidated damages” for violations. L. 2021, c. 371, § 8. The Legislature also added a requirement that a covered person obtain “approval from the Office of Information Privacy”

before submitting a notice, thereby protecting against abusive requests and enabling recipients to verify a person’s eligibility for coverage. Ibid.

Then, in August 2023, the Legislature again amended the provisions governing civil actions in three ways, each of which paved the path for the present litigation, filed some six months later:

- First, the Legislature removed the discretionary element of the damages provision, changing “may award” to “shall award.”
- Second, it eliminated the requirement that a covered person obtain approval from the State before submitting a nondisclosure notice.
- Third, it permitted covered persons to assign their claims for money damages.

L. 2023, c. 113, § 6. The Legislature did not explain its rationale for broadening the Law in any of these amendments.

### **B. The Permissive Regulation of Disclosures by Public Entities**

The stringent and punitive mandates imposed on private entities under the Law stand in stark contrast to the relaxed treatment of information held by government agencies. Covered persons who seek redaction of their addresses from specified public records must make a request to the Office of Information Privacy, which has no deadline to review and approve the requests. N.J.S.A. 47:1B-2. If approved, public agencies have thirty days to comply. Ibid. If the

agencies do not comply, covered persons have no recourse to require compliance, and there is no civil remedy. Ibid. The Law also contains many exceptions that allow government agencies to disclose covered persons' information to other agencies, to private actors, and in public records on the Internet, even after requests for redaction are approved. N.J.S.A. 47:1B-3.

Notably, Daniel's Law does not require covered persons to make a nondisclosure request to public agencies before, or after, sending a notice to private entities, or even to cease their own public disclosures of their contact information on the Internet. Thus, covered persons can pursue civil actions against private entities, even if the same information remains publicly available online through governmental sources or their own online posts.

### **III. Other Daniel's Laws Take More Narrowly Tailored Approaches**

While laws similar to Daniel's Law have been enacted across the country, those laws take much different approaches than New Jersey's. The laws in other jurisdictions, for example, facilitate verification that a person is covered;<sup>2</sup> require more robust notice;<sup>3</sup> define restricted disclosures more

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<sup>2</sup> See, e.g., Md. Code Ann., Cts. & Jud. Proc. § 3-2303 (request must be made through government office or with "sufficient information to confirm that the requester is a protected individual"); N.Y. Judiciary Law § 859 (requiring government employer to submit notice to private entities).

<sup>3</sup> See, e.g., Wis. Stat. Ann. § 757.07 (requiring notarized notice).

narrowly;<sup>4</sup> impose liability only when disclosures pose an imminent and serious threat;<sup>5</sup> or exempt information made publicly available by the government or covered persons themselves.<sup>6</sup> New Jersey's is the only law allowing covered persons to assign their claims; to the extent other laws permit enforcement by someone other than a covered person, that ability lies solely with the government.<sup>7</sup> And, it is the only law allowing assignees to collect money damages on a strict liability basis.<sup>8</sup> Only two other laws permit damages awards in the absence of an injunction or declaratory judgment barring a specific disclosure, but in neither case is the monetary award mandatory, and one of those laws was struck down earlier this year as facially

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<sup>4</sup> See, e.g., Daniel Anderl Judicial Security and Privacy Act of 2022 (“Federal Daniel’s Law”), Pub. L. No. 117-263, §§ 5933, 5934, 136 Stat. 2395, 3460-65 (2022) (narrowly defining “data broker” and allowing various disclosures barred under New Jersey’s Law); Wis. Stat. Ann. § 757.07 (same).

<sup>5</sup> See, e.g., Colo. Rev. Stat. Ann. § 18-9-313 (dissemination must “pose[] an imminent and serious threat to the protected person’s safety”); Kan. Stat. Ann. § 21-5905(a)(7) (same); Wash. Rev. Code Ann. § 4.24.680 (same).

<sup>6</sup> See, e.g., Federal Daniel’s Law, § 5934(d), 136 Stat. at 3464-65; Haw. Rev. Stat. § 92H-6; Md. Code Ann., Cts. & Jud. Proc. § 3-2301; N.Y. Judiciary Law § 859; Okla. Stat. Ann. tit. 20, § 3016; Wis. Stat. Ann. § 757.07.

<sup>7</sup> See, e.g., Federal Daniel’s Law § 5934(f)(1), 136 Stat. 3466; Md. Code Ann., Cts. & Jud. Proc. § 3-2303(e)(1).

<sup>8</sup> See, e.g., Federal Daniel’s Law § 5934(f), 136 Stat. at 3466 (authorizing damages only if entity “knowingly” violates an order granting injunctive or declarative relief under the statute); Okla. Stat. Ann. tit. 20, § 3017 (same).

unconstitutional. See Jackson, 2025 WL 2407201, at \*17, 20 (Da012, 014-15) (striking down West Virginia law that provided a civil action for discretionary damages, but only if disclosure was made “under circumstances in which a reasonable person would believe that providing such information would expose another to harassment or risk of harm to life or property”).

#### **IV. Atlas and This Litigation**

Atlas is a Delaware company that was incorporated in April 2021, shortly after the original version of Daniel’s Law was passed. (Ja795).<sup>9</sup> As early as spring 2023, Atlas began soliciting members of New Jersey police unions for its services. (Ja798). At the same time, its lawyers lobbied the New Jersey Legislature for the amendments that paved the way for its claims here. (See, e.g., Ja781). Atlas subsequently received funding for this litigation from investors. (E.g., Ja149 at Dkt. 38).

Atlas built its business model on the amended legislation. (Ja801-13). As explained in the company’s Terms of Service, Atlas “schedule[s] the delivery dates of [customers’] takedown notices” and can “batch[] notices” for “delivery.” (Ja805). The Terms require Atlas’s customers to “irrevocably assign[]” to Atlas “all of [their] rights to bring a claim (and seek damages . . . )

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<sup>9</sup> “Ja” refers to the Joint Appendix filed by Defendants in the Third Circuit. See Atlas Data Priv. Corp. v. We Inform, LLC, No. 25-1555 (3d Cir. Mar. 31, 2025), Dkt. Nos. 24, 25, 27, 30.

for violations” under Daniel’s Law. (Ja806). Atlas can unilaterally “trigger” this assignment at its “discretion” and then bring “civil litigation,” where “individual claims . . . [can be] aggregated.” Ibid.

After recruiting thousands of covered persons over many months, Atlas put its profit-maximizing plan into action. Starting around Christmas in 2023, approximately 150 companies were each sent thousands of emails within seconds of each other demanding nondisclosure -- all from addresses with an “Atlasmail” domain. (E.g., Ja550-51). None of those spam-style emails contained information demonstrating that persons were “covered” under the Law. Ibid. Weeks later, in February 2024, Atlas and several individuals filed more than 140 nearly identical lawsuits in state court, purportedly based on assignments from more than 19,000 covered persons. (E.g., Ja541).<sup>10</sup>

The lawsuits consolidated in this appeal name as Defendants an array of entities across many industries, including Defendants that provide contact information for uses central to the economy, political process, and public safety. These uses include credit reporting regulated under the Fair Credit Reporting Act; real estate transactions; business-to-business direct mailing and marketing; threat intelligence services; background information for use by law enforcement officials in criminal investigations, courts in cases, and financial

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<sup>10</sup> In some complaints, the alleged number of assignors is less than 19,000. (See, e.g., Ja520) (alleging assignment of 14,476 claims).

institutions in fraud prevention; address autocomplete functions for business websites using data from the U.S. Postal Service; and dissemination of voter information to political campaigns, government offices, news outlets, and universities, as well as by advocacy groups seeking to ensure transparent and fair elections.<sup>11</sup>

The complaints allege that Defendants violated Daniel’s Law by failing to cease disclosing thousands of covered persons’ information within ten business days of Atlasmail notifications being sent. (E.g., Ja552). For each violation, the complaints seek “liquidated damages,” attorney’s fees, costs, and punitive damages. (E.g., Ja553). In total, the lawsuits in this appeal involve hundreds of thousands of claims with the potential for three quarters of a billion dollars in liquidated damages alone. Atlas also is prosecuting more than 120 additional lawsuits in state and federal court, seeking billions of dollars more in damages and fees.

## **V. The District Court’s Ruling and Third Circuit’s Certified Questions**

The lawsuits in this appeal were removed to federal court, and, at the district court’s invitation, Defendants filed a motion to dismiss, arguing the Law facially violates the First Amendment because, inter alia, it is (1) a content-based restriction on protected speech that cannot satisfy strict scrutiny

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<sup>11</sup> See Joint Br. of Appellants at 15-16, Atlas Data Priv. Corp. v. We Inform, LLC, No. 25-1555 (3d Cir. Mar. 31, 2025), Dkt. No. 27 (citing complaints).

and (2) a strict liability statute that imposes monetary damages for truthful speech without any culpability standard.

The district court denied the motion. Atlas Data, 758 F. Supp. 3d at 342. The court agreed with Defendants that Daniel’s Law is a content-based restriction on non-commercial speech, but nevertheless held that it survived facial constitutional scrutiny. Id. at 334-35. The district court also recognized that the Law’s text does not include a mens rea requirement and acknowledged that imposing strict liability would be unconstitutional. Id. at 340; see, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974) (holding state defamation law cannot “impose liability without fault”); Video Software Dealers Ass’n v. Webster, 968 F.2d 684, 691 (8th Cir. 1992) (declaring strict liability statute facially unconstitutional); Am.-Arab Anti-Discrimination Comm. v. City of Dearborn, 418 F.3d 600, 613 (6th Cir. 2005) (declaring strict liability ordinance facially unconstitutional).

To save the Law, the district court inserted a “negligence standard” into it, holding that liability can be imposed “only if a defendant unreasonably disclosed or made available the home addresses and unlisted telephone numbers of covered persons after the statutory deadline had expired.” Atlas Data, 758 F. Supp. 3d at 341.

The district court sua sponte certified its order for immediate appeal, citing substantial grounds for disagreement with its opinion, (Ja131), and the United States Court of Appeals for the Third Circuit granted Defendants’ Petition seeking interlocutory review. On appeal, Defendants again contend that Daniel’s Law violates the First Amendment because it cannot survive strict scrutiny and because it imposes strict liability for protected speech. After oral argument, the Third Circuit entered a petition and order seeking to certify questions to this Court. Atlas Data Priv. Corp. v. We Inform, LLC, No. 25-1555 (3d Cir. Mar. 31, 2025), Dkt. No. 103 (“3d Cir. Order”). The order noted that the Law “raises hard constitutional questions because it restricts [Defendants’] speech and seems to make them liable without fault.” Id. at 3. The Third Circuit recognized the Law “has no explicit mens rea” and that “an earlier version of the law expressly required negligence, . . . [b]ut the Legislature later removed that language.” Id. at 8. In these circumstances, the Third Circuit was unsure, under New Jersey jurisprudence, whether an “implicit” requirement could be read into the Law. Id. at 8-10. The order thus sought to certify two questions: (1) whether the Law “require[s] a mens rea for any of its elements,” and (2) “if so, what level of mens rea is required”? Id. at 11. This Court reformulated the questions into a single question and accepted that question: What mental state, if any, is required to establish

liability under Daniel’s Law? Atlas Data Priv. Corp. v. We Inform, LLC, 262 N.J. 69 (2025).

This Court has addressed Daniel’s Law once before, when a journalist filed an as-applied constitutional challenge to enjoin the Law’s application to his proposed disclosure of a retired police officer’s address. Kratovil, 261 N.J. at 5. The journalist knew the officer was covered under the Law, knew he had received a valid nondisclosure notice, and was aware that he would be intentionally disclosing a covered person’s home address. Id. at 5, 8. The Court held that the Law “as applied to prevent Kratovil’s proposed republication” of the address was narrowly tailored, id. at 6, including because, “in the specific circumstances of th[at] case,” the notice requirement ensured the Law was not “a trap for the unwary,” id. at 26, 27, 29. The mens rea required to impose damages for the disclosure of that home address was not at issue in Kratovil and has not been decided by this Court.

### **LEGAL ARGUMENT**

The question presented raises an issue of statutory interpretation. The current Law’s text is clear. Unlike its predecessor, and by legislative design, the amended Law includes no mens rea requirement. The district court’s attempt to insert a negligence standard runs afoul of the longstanding doctrines of statutory construction applied by this Court and effectively overrules the

Legislature’s removal of a negligence standard. In any event, the conduct-based negligence standard that the district court inserted into the State’s uniquely broad and punitive civil cause of action falls short of what the First Amendment demands. It is the responsibility of the Legislature -- not this Court -- to fill that gap and tailor the Law more narrowly.

**I. DANIEL’S LAW IS A STRICT LIABILITY STATUTE.**

**A. The Law’s Text Is Clear and Unambiguous.**

The principles guiding this Court’s statutory interpretation are well-settled: “statutory construction begins with an examination of the plain language of the statute.” State v. Higginbotham, 257 N.J. 260, 280 (2024). When the terms of a statute are “clear and unambiguous,” the Court “appl[ies] the law as written,” W.S. v. Hildreth, 252 N.J. 506, 518 (2023), and “the court’s job is complete,” In re Civil Commitment of W.W., 245 N.J. 438, 449 (2021) (citation omitted). While “[t]he overriding goal of statutory interpretation is to determine and give meaning to the Legislature’s intent,” State v. Carter, 247 N.J. 488, 513 (2021), the Court “may neither rewrite a plainly-written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of plain language.” Higginbotham, 257 N.J. at 280. Simply stated, it is not the Court’s “function

to ‘re-write a plainly written enactment.’” Id. at 287 (quoting J.H. v. R&M Tagliareni, LLC, 239 N.J. 198, 214 (2019)).

Here, the text of the Law’s provisions imposing financial liability are plainly written, clear, and unambiguous. As this Court explained in Kratovil, the Law “plainly state[s]” that “the statute’s restrictions . . . go into effect” when “the ‘person from whom the authorized person is seeking nondisclosure’ receives a notice in the form prescribed.” 261 N.J. at 14 (citing N.J.S.A. 56:8-166.1(a)(1)). If the recipient “violates” that restriction, it “shall be liable” under the Law’s “civil action,” and “the court shall award” the prescribed damages. Id. at 14-15 (quoting N.J.S.A. 56:8-166.1(c)). To impose financial liability, nothing more is required.

Because the Law’s text contains no mens rea requirement, the Court “need delve no deeper than the act’s literal terms to divine the Legislature’s intent.” O’Connell v. State, 171 N.J. 484, 488 (2002) (quoting State v. Butler, 89 N.J. 220, 226 (1982)). The notice requirement focuses solely on the actions of an authorized person, not the defendant. While the Law’s restrictions are triggered upon receipt, the plain text does not contain any requirement that the defendant know whether the sender is “authorized,” the person is “covered,” or the address or phone number is for a person’s “home”; indeed, the Law provides no mechanism for a defendant to learn this information. The Law

also does not require a defendant to know of its obligations under the statute or that its disclosure would expose a covered person to a reasonable risk of harm. The Legislature “could have directed” the Law to include any of these requirements, but it did not. State v. Bailey, 251 N.J. 101, 126 (2022). All that is required to impose liability is that, ten business days after receiving a notice, the defendant fails to “cease the disclosure of the information and remove the protected information from the Internet or where otherwise made available.” N.J.S.A. 56:8-166.1(a)(2), (b), (c). The Law is thus “devoid of any indication that the Legislature intended to” require any mens rea to impose liability. Bailey, 251 N.J. at 127.

Beyond the plainly written text outlining what constitutes a violation and the absence of any mens rea requirement in that text, the Legislature’s intent to impose strict liability here is underscored in three ways.

**First**, other provisions of Daniel’s Law require explicit mental states. Punitive damages are available only “upon proof of willful or reckless disregard of the law.” N.J.S.A. 56:8-166.1(c)(2). A defendant is criminally liable only if it acted “knowingly, with purpose to expose another to harassment or risk of harm to life or property, or in reckless disregard of the probability of such exposure.” N.J.S.A. 2C:20-31.1(b), (d). Additionally, the provisions of the Law governing nondisclosure requests to the government

state that “a custodian of a public agency who makes a reasonable effort to comply . . . shall be presumed to have acted without willful, purposeful, or reckless disregard of the law.” N.J.S.A. 47:1B-2(b)(2).

Under the expressio unius est exclusio alterius canon of statutory construction, the explicit mental state requirements in these provisions of the Law demonstrate that the Legislature intentionally omitted such a requirement for civil liability. As the Court explained in Higginbotham, “[i]t is elementary that when the Legislature includes limiting language in one part of a statute, but leaves it out of another section in which the limit could have been included, we infer that the omission was intentional.” 257 N.J. at 285 (quoting Ryan v. Renny, 203 N.J. 37, 58 (2010)).

In State v. Pomianek, this Court dealt with this precise situation. It considered a statute that contained a mens rea requirement in two subsections, but not in another. 221 N.J. 66 (2015). The Court held that the subsection that was silent on mens rea could not be rewritten to contain one. As the Court explained, “[t]he Legislature pointedly decided not to include” a mens rea element in that subsection, which was “evident by the presence of mens rea elements” in the two other subsections. Id. at 90; see also Higginbotham, 257 N.J. at 285 (explaining that “because the Legislature intentionally crafted subsection (c) to be different from subsections (a) and (b), . . . we cannot heed

the State’s request that we interpret subsection (c) only to reach ‘circumstances of the same or like depictions as those enumerated in subsections (a) and (b)’”); In re R.H., 258 N.J. 1, 12 (2024) (“[C]ourts should not add language to section (x) that the Legislature chose to include in section (y) but left out of (x).”); Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 104 (2009) (“We find further support that the Legislature did not include a scienter requirement in section 7(b) by looking to the section immediately preceding it. . . . Section 7(a) sets forth two ways in which a person can be excluded from benefits, and both involve knowing wrongdoing by the insured. . . . No such requirement appears in section 7(b).” (citations omitted)).

**Second**, the Legislature made clear its intent to create a strict liability regime through its amendments. See In re Commitment of W.W., 245 N.J. at 449 (“[A] change of language in a statute ordinarily implies a purposeful alteration in [the] substance of the law.” (quoting DiProspero v. Penn, 183 N.J. 477, 494 (2005))). The original version of the Law permitted recovery of money damages only if “a reasonable person would believe that providing that information would expose another to harassment or risk of harm to life or property.” L. 2020, c. 125, § 6. One year later, the Legislature amended the Law to remove that “reasonable person” standard. Supra at 8. At the same time, the Legislature added a requirement that a covered person receive

“approval from the Office of Information Privacy” before submitting a notice, providing recipients of nondisclosure notices with a mechanism to verify whether a person is “covered.” Supra at 8-9. But, in 2023, the Legislature amended the Law to remove that requirement. It also struck the language making awards discretionary (“the court may award”) and replaced it with text compelling mandatory awards -- explicitly providing that “the court shall award” money damages. Supra at 9. There is no legislative history explaining these amendments. Their import, however, is clear: By excising the Law’s preexisting scienter requirement, the Legislature “pointedly decided not to include” one. Pomianek, 221 N.J. at 90.

**Third**, the Legislature’s intent to impose strict liability is evident from its use of the same language employed in other strict liability statutes. For example, New Jersey’s Dog Bite Statute provides that dog owners “shall be liable” for damages when their dogs bite other people. N.J.S.A. 4:19-16. In Goldhagen v. Pasmowitz, this Court explained that the statute modified the common law, under which dog owners were liable “only when they had scienter.” 247 N.J. 580, 594 (2021). The Court recognized that, when the Legislature enacted the provision stating that owners “shall be liable for such damages,” the Legislature “expanded the liability of dog owners by imposing a standard of strict liability.” Ibid. Here, as there, the Legislature “changed the

law theretofore existing in that it made liability absolute upon the happening of the act.” Ibid.; Tanga v. Tanga, 94 N.J. Super. 5, 13 (App. Div. 1967) (“For the most part, where such statutes have used the language ‘shall be liable’ or the equivalent, they have been held or assumed to eliminate the necessity for the plaintiff to show negligence by the defendant.”).

The Legislature “is presumed to have been ‘thoroughly conversant with its own legislation and the judicial construction of its statutes.’” In re J.S., 223 N.J. 54, 75 (2015); In re Commitment of W.W., 245 N.J. at 449 (“[T]he Legislature is presumed to be aware of judicial construction of its enactments.” (quoting DiProspero, 183 N.J. at 494)). By employing the same “shall be liable” language that it used in the Dog Bite Statute, the Legislature made clear that it sought to impose strict liability in the amended Daniel’s Law.

The Legislature also eschewed explicit mens rea requirements it has used in other statutes that impose liability for speech in the name of securing confidential information or protecting people from harm. The Legislature has included explicit mens rea requirements not only in criminal statutes serving these purposes,<sup>12</sup> but also in statutes imposing civil liability for similar speech-based offenses.

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<sup>12</sup> See, e.g., N.J.S.A. 2C:52-30 (criminal disclosure of expunged and sealed records requires “knowledge that the records and information pertaining thereto have been expunged or sealed”); N.J.S.A. 2A:4A-60(h) (criminal

The State’s new deepfake law is a particularly apt example. Like Daniel’s Law, that law restricts speech to prevent harm to others, targeting deceptive audio or visual media that may be used to “deceive, humiliate, or violate the privacy” of individuals portrayed in them or “to accomplish illicit ends.” N.J.S.A. 2C:21-17.7. Those who are injured by the nefarious use of a deepfake may seek to hold the disseminator civilly liable. N.J.S.A. 2C:21-17.8(f). Liability can be imposed, however, only if a defendant (1) discloses deceptive media “for the purpose of attempting or furthering the commission of any crime or offense, or with the knowledge that the work is to be used by another for such purpose”; or (2) “knowingly or recklessly” discloses deceptive media created for or with knowledge of such purpose. N.J.S.A. 2C:21-17.8(c). Moreover, a court “may award actual damages, but not less than liquidated damages computed at the rate of \$1,000” only for a “knowing or reckless violation” of the law. N.J.S.A. 2C:21-17.8(f).

The deepfake law is just one of many examples. For instance:

- The Wiretapping and Electronic Surveillance Control Act provides a civil cause of action for violating the Act by disclosing wiretapped communications, N.J.S.A. 2A:156A-24, but an actionable violation occurs

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disclosure of protected juvenile court, probation, or law-enforcement records requires that defendant “knowingly disclose[d]” such information); N.J.S.A. 2C:33-4, 2C:33-4.1 (criminal harassment and cyber-harassment statutes require relevant act committed “with the purpose to harass another”).

only if a person “purposely discloses” the contents of a wire, electronic, or oral communication “knowing or having reason to know” the information was obtained through an unlawful interception, N.J.S.A. 2A:156A-3(b).

- The stored communications section of the Wiretapping and Electronic Surveillance Control Act likewise is violated if a person covered by that section “knowingly divulge[s]” the “contents of communications.” N.J.S.A. 2A:156A-28(a). And, civil liability is imposed only if an individual “knowingly or purposefully engaged in the conduct constituting the violation.” N.J.S.A. 2A:156A-32(a).

- Victims of child pornography can recover damages in civil actions against any person “who knowingly sells,” “distributes,” or “offers or agrees to offer” such material. N.J.S.A. 2A:30B-3(a)(3).

Unlike each of these laws -- but just like the Dog Bite Statute -- the current, as-amended version of Daniel’s Law has no mens rea requirement. It imposes damages on a strict liability basis. See In re R.H., 258 N.J. at 12 (“The Legislature knows how to write [a] . . . statute.” (citation omitted, alterations in original)).

In this case, the district court overlooked this authority, the plain language of the Law, and each of the clear indicators of the Legislature’s intent -- including its removal of a “reasonable person” standard -- and inserted a

“negligence” standard into the Law. Atlas Data, 758 F. Supp. 3d at 341.

Notwithstanding that the Law’s civil cause of action provides a legislatively created statutory right, the district court attempted to import a standard from the very different “publication of private facts” tort. Ibid. (citing Romaine v. Kallinger, 109 N.J. 282, 291-92 (1988)). That tort, however, applies only to information that is “actually private” and then only if the disclosure of those private facts “would be offensive to a reasonable person.” Romaine, 109 N.J. at 297. But neither actual privacy nor a reasonable expectation of privacy is required for a civil action under Daniel’s Law. Indeed, a covered person can recover money damages from a defendant even if their information is still publicly accessible in government records, from other private entities to whom they have not sent nondisclosure notices, or in their own online posts. See supra at 10.

The district court’s addition of a new “negligence standard” into the Law is also at odds with the longstanding precedent directing that courts “cannot ‘write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment.’” DiProspero, 183 N.J. at 492 (quoting Craster v. Bd. of Comm’rs of Newark, 9 N.J. 225, 230 (1952)). Rather, as this Court has long held, when the Legislature sets out precisely what “must be proven” to impose liability, courts should “not presume” that “the Legislature left for the

judiciary to impose an additional hurdle for the plaintiff to clear for an actionable claim.” Id. at 493.

The Law’s text about civil liability is clear: If the defendant discloses or makes available prohibited information “ten business days after . . . it receives notice,” it “violates” the Law and is subject to “a civil action” by the covered person or the covered person’s assignee. Kratovil, 261 N.J. at 14. The text requires nothing more. When a defendant “violates” the Law’s restrictions, it “shall be liable,” and the court “shall award” damages. Ibid.

**B. A Mens Rea Cannot Be Read into the Law.**

In its certification order, the Third Circuit stated that the Law’s “text does not seem to require a mens rea for actual or statutory damages,” noting that “Daniel’s Law has no explicit mens rea” for civil liability and that the Legislature removed the original Law’s negligence requirement. 3d Cir. Order at 8. Nevertheless, the Third Circuit expressed uncertainty about whether, under New Jersey “legal principles,” the Law “implicitly requires mens rea.” Ibid. The certification order suggested three lines of precedent that might “infer implicit requirements in a statute.” Id. at 9. None apply.

First, the Third Circuit pointed to the “constitutional-avoidance doctrine,” recognizing that this Court “prefers the constitutional reading.” Ibid. But, as the Third Circuit observed, that doctrine only applies “if a statute

can be read two ways.” Ibid. As this Court has instructed, “[t]he doctrine of constitutional avoidance comes into play when a statute is susceptible to two reasonable interpretations, one constitutional and one not.” Pomianek, 221 N.J. at 90-91. The doctrine does not apply where, as here, the statutory language is clear, and “there is no doubt about [its] meaning.” Id. at 91; see, e.g., Higginbotham, 257 N.J. at 287 (ruling that child pornography statute was “not reasonably susceptible to the State’s limiting construction”). The Law’s text is unambiguous: It contains no mens rea requirement.

Even if the doctrine of constitutional avoidance could apply in these circumstances, the doctrine permits only “judicial surgery,” which allows a court to “excise a constitutional defect or engraft a needed meaning.” Usachenok v. Dep’t of the Treasury, 257 N.J. 184, 201 (2024) (citation omitted). It does not permit a court to add a substantive element through “a judicial transplant,” Pomianek, 221 N.J. at 91, much less a substantive element intentionally removed by the Legislature.

Several cases highlight this distinction. In Pomianek, just as in this case, the statutory provision in question had no mens rea requirement. Like the district court, the Appellate Division read one in to save the provision. Id. at 70. This Court reversed that decision, holding that the Appellate Division “erred by rewriting the statute to impose a mens rea element.” Id. at 91. It

characterized the lower court's decision to "reconfigure" the provision as "a judicial transplant" that went "beyond [the judiciary's] authority." Ibid. Similarly, in Usachenok, the Court declined to "rewrite" a "regulation to render it constitutional," explaining that adding the "substantial language" advocated by the Attorney General to a regulation that was silent on the issue "would extend beyond the limits of judicial surgery." 257 N.J. at 201. And, in Higginbotham, despite the compelling state interest in combatting child pornography, this Court declined to save a statutory provision because doing so would have required "re-writ[ing] a plainly written enactment." 257 N.J. at 287 (quoting J.H., 239 N.J. at 214).

By contrast, in State v. Natale, this Court used judicial surgery to save a sentencing statute challenged on Sixth Amendment grounds by "sever[ing]" an "offending portion." 184 N.J. 458, 486 (2005). Likewise, in Town Tobacconist v. Kimmelman, this Court performed judicial surgery to save the Drug Paraphernalia Act from a vagueness challenge by "eliminat[ing]" a potentially ambiguous phrase from the statute's definition of drug paraphernalia. 94 N.J. 85, 103-04 (1983). And, in Hamilton Amusement Center v. Verniero, the Court rejected a constitutional challenge to a statute imposing certain restrictions on the signs of sexually oriented businesses by interpreting the statutory term "identification" in a manner to "allow[] a

sexually oriented business to display the basic elements and function of its commercial identity.” 156 N.J. 254, 281-82 (1998).

Here, adding a mens rea standard necessarily would not be excising a constitutional defect or engrafting a needed meaning into an ambiguous term as in Natale, Town Tobacconist, or Hamilton Amusement. Rather, imposing such a standard would rewrite the Law, just as the Court declined to do in Higginbotham, and undertake just the kind of “judicial transplant” that Pomianek and Usachenok forbid. Indeed, if “reconfiguring” the statute to create a mens rea standard was an erroneous “transplant” in Pomianek, then certainly putting a mens rea requirement back into the statute after the Legislature removed it altogether would be a transplant that goes far beyond the judicial surgery permitted by the doctrine of constitutional avoidance.

**Second**, in contrast to the approach taken in Pomianek, where this Court declined to “‘read’ into a statute ‘a mens rea element that is absent from [it],’” the Third Circuit suggested that this Court might have undertaken “a more flexible approach” to save a statute in State v. Comer, 249 N.J. 359 (2022). 3d Cir. Order at 9. Comer, however, is neither in conflict with Pomianek nor applicable to the question presented in this case. Comer did not involve an attempt to save a statute by installing a new substantive element, as would be required here. Rather, the Court implemented a new judicial procedure.

In Comer, the Court confronted the constitutionality of the mandatory sentencing provision of New Jersey’s homicide statute as applied to juveniles. The Court was deeply divided in how to address that question. Instead of declaring the statute unconstitutional as applied to all defendants sentenced as juveniles, the majority held that juvenile offenders sentenced under the statute may petition courts to review their sentences after serving twenty years, thereby providing a judicial procedure to ensure they do not serve unconstitutional prison sentences. Comer, 249 N.J. at 399. That decision was met with a three-Justice dissent that criticized the Court’s holding as an “impos[ition] by judicial fiat rather than by statute,” arguing that this “policy decision” should “be left to the Legislature.” Id. at 409 (Solomon, J., concurring in part, dissenting in part).

The majority explained its holding, however, as follows: “Precedential case law supports that approach. Courts have added procedures to statutes that would otherwise be unconstitutional to ‘save them from infirmity.’” Id. at 401-02 (citation omitted) (emphasis added); see Callen v. Sherman’s, Inc., 92 N.J. 114, 134 (1983) (prescribing a notice and hearing requirement that landlords must follow before limiting a tenant’s access to property to save an unconstitutional statute); see also State v. Thomas, 470 N.J. Super. 167, 192 (2022) (noting that in Comer, “[t]he Court adopted the following procedure”);

Norman J. Singer & J.D. Shambie Singer, 2A Sutherland Statutes and Statutory Construction § 45:11, at 75-79 (7th ed. 2014) (“Courts . . . may imply constitutionally requisite procedures for a statute’s administration to preserve its validity.”) (quoted by Comer, 249 N.J. at 402).<sup>13</sup>

Here, unlike in Comer, adding a mens rea element would not be adopting a judicial procedure. It would be rewriting the essential substantive elements required for a civil action -- a “judicial transplant” that this Court has held is beyond the judiciary’s authority. Pomianek, 221 N.J. at 91.

**Third**, in its certification order, the Third Circuit stated that “common-law background principles may influence how to interpret the statute,” citing Marshall v. Klebanov, 188 N.J. 23 (2006). 3d Cir. Order at 9. That principle also is inapposite. In Marshall, this Court noted that statutes should be interpreted to make the “least rather than the most change in the common law.” 188 N.J. at 37 (2006) (citation omitted). That canon applies, however, only when a statute is “in derogation of the common law,” and only when there is “[d]oubt about the meaning of such statute[.]” Ibid.; see J.H., 239 N.J. at 247 (Rabner, C.J., dissenting) (“Courts construe statutes narrowly if they are in

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<sup>13</sup> Since issuing its decision, the Court has not cited Comer in interpreting a statute. Rather, it has continued to decline to read in substantive provisions to save a law’s constitutionality, including in the First Amendment context. See Higginbotham, 257 N.J. at 287; Usachenok, 257 N.J. at 201.

derogation of the common law, especially when a statute grants immunity from tort liability.”).

Marshall illustrates this principle. There, a defendant-psychiatrist faced a malpractice lawsuit alleging he had abandoned a patient who then committed suicide. The appeal to this Court centered on the meaning of a statute that provides medical professionals with immunity from civil liability when a patient carries out “an act of imminent, serious violence,” unless the professional “incurred a duty to warn” and “fail[ed] to discharge that duty.” Marshall, 188 N.J. at 35 (quoting N.J.S.A. 2A-62A-16a). Before the statute’s enactment, New Jersey common law imposed liability whenever medical professionals violated the appropriate standard of care. Id. at 33-34. The defendant argued that the new immunity statute “shields a mental health practitioner from any civil liability when the underlying cause of action arises out of a patient’s violent acts,” unless there was a duty to warn. Id. at 33 (emphasis added). The Court explained that because the immunity statute was “in derogation of the common law,” it “should be strictly construed” to “make[] the least rather than the most change in the common law.” Id. at 37 (citation omitted). It thus held that the immunity is only implicated in the narrow circumstance covered by the statute -- failing to fulfill a duty to warn. Id. at 38. Consistent with the common law, a medical professional remained

liable for violating the appropriate standard of care, such as failing to provide adequate treatment or abandoning a patient, which “exists separate and apart from any duty to warn.” Ibid.

Another example is Velazquez ex rel. Velazquez v. Jimenez, 172 N.J. 240 (2002), where the Court applied the same principle to the Good Samaritan Law. Like the law in Marshall, the immunity provided by the Good Samaritan Law was “enacted in derogation of the common law” and was “subject to more than one plausible reading.” Id. at 256-57. The Court interpreted the statute narrowly so that it did “not affect those common law principles that govern the conduct of professionals in a hospital setting.” Id. at 263.

The Marshall line of cases simply does not apply here. Daniel’s Law does not carve out an exception to liability imposed under common law. Nor does it codify any pre-existing common-law right into statute. See Rivera v. Valley Hosp., Inc., 252 N.J. 1, 18 (2022) (drawing from common law to interpret the availability of punitive damages under the Punitive Damages Act because that statute had “codified common law principles underlying punitive damages”). Daniel’s Law instead creates a new statutory right that did not exist at common law. Regardless, there is no place for employing common-law principles because there is no doubt about the Law’s meaning.

\* \* \* \* \*

Daniel's Law does not include a mens rea requirement to impose liability for money damages. At one time, the Law included such a requirement, but the Legislature removed it. In its place, the Legislature enacted language that this Court has held imposes strict liability. In that regard, this State's Daniel's Law is unique. Its punitive regime for restricting and sanctioning protected speech poses significant First Amendment concerns. Nevertheless, "it is not [the Court's] function to re-write a plainly written enactment." Higginbotham, 257 N.J. at 287. As this Court explained two decades ago when considering a similar question of statutory interpretation, "if the Legislature intended that [covered persons or their assignees] should have a more difficult hurdle in obtaining a recovery, then it must draft a statute that accomplishes that end. We will not write that statute." DiProspero, 183 N.J. at 506. Instead, the Court "must respect and enforce the Legislature's judgment" in the statute it voted to enact, States Newsroom Inc. v. City of Jersey City, 261 N.J. 392, 419 (2025), even if it is unconstitutional, Pomianek, 221 N.J. at 92.

## **II. IT IS THE LEGISLATURE, NOT THIS COURT, THAT MUST REWRITE DANIEL'S LAW.**

Defendants recognize the compelling need to protect covered persons. They are not challenging the Legislature's ability to address that need through legislation providing a narrowly tailored restriction on disclosures of covered persons' contact information. But the crafting of a constitutionally sound

statute is a complex task that is a quintessential legislative function. A judicial transplant of a negligence-based standard into the Law's financial liability provisions would not only exceed the proper judicial role but would also fail to provide the needed cure. Indeed, any effort at judicial intervention would entangle the Court further in a dense constitutional thicket.

To begin to appreciate why, it is important to understand the constitutional role played by the First Amendment's mens rea requirement. Well-established United States Supreme Court precedent requires "a showing of a culpable mental state" to impose liability -- even for unprotected speech. Counterman v. Colorado, 600 U.S. 66, 75-78 (2023) (collecting cases). Mens rea requirements for regulations of unprotected speech serve to ensure "breathing space," preventing encroachment into "fully protected expression." Id. at 75, 82. Sufficient mens rea requirements are thus "essential." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278-79 (1964) (explaining that, absent a mens rea standard, uncertainties and expense of litigation would deter speakers from making truthful statements). That is precisely what the Third Circuit observed in certifying its mens rea questions to this Court: "when a law risks chilling protected speech, a mens rea requirement is needed to protect against that danger." 3d Cir. Order at 8.

While mens rea requirements “play out differently in different contexts,” Counterman, 600 U.S. at 78, a few principles emerge. First, a “subjective mental-state requirement” -- not merely an objective “reasonableness” requirement -- is generally necessary to adequately safeguard protected speech. Id. at 76-78; see also Manual Enters., Inc. v. Day, 370 U.S. 478, 493 (1962) (because scienter is constitutionally required, merely “showing that a defendant did not make a ‘good faith effort’ to ascertain the character of his advertiser’s materials” is insufficient).

Second, the mens rea requirement must be tailored to the harm the speech restriction seeks to prevent. For example, the tort of defamation remedies reputational harm caused by a material falsehood. Thus, when a public official brings a claim for defamation, the Supreme Court requires a showing that the defendant either knew of, or recklessly disregarded, the statement’s falsity. Sullivan, 376 U.S. at 280. Likewise, because laws punishing true threats address speech that places a person in fear that the speaker plans to “commit an act of unlawful violence,” the defendant must have “consciously disregarded a substantial risk that his communications would be viewed as threatening violence.” Counterman, 600 U.S. at 69, 74; see also, e.g., Hess v. Indiana, 414 U.S. 105, 109 (1973) (state could not

punish speech that “had a tendency to lead to violence” without showing that speaker “intended to produce . . . imminent disorder”).

Third, the First Amendment’s mens rea requirement applies to criminal and civil liability alike. See Sullivan, 376 U.S. at 277 (“What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.”).

These principles take on even greater importance where, as here, a law seeks to directly punish “protected rather than unprotected speech.” 3d Cir. Order at 7 (emphasis in original). Indeed, these principles all apply against the constitutional backdrop of the Supreme Court’s admonition that, in general, “it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.” Bartnicki v. Vopper, 532 U.S. 514, 529-30 (2001); see also, e.g., IMDb.com Inc. v. Becerra, 962 F.3d 1111, 1123 (9th Cir. 2020) (recognizing that First Amendment typically protects truthful speech “that a third-party might use to facilitate its own illegal conduct”).

That is for good reason. Examples abound of innocent speech that could be used to cause harm. Chemistry textbooks teach explosive chemical reactions. Encyclopedias identify deadly poisons. Instruction manuals describe how to use guns. See Eugene Volokh, Crime-Facilitating Speech, 57

STAN. L. REV. 1095, 1097-1102 (2004) (citing additional examples of crime- and tort-facilitating speech). While this speech could help people commit crimes, the First Amendment protects it because the same speech “also help[s] others do legal and useful things.” *Id.* at 1111. Thus, in general, the “mere foreseeability or knowledge” that information “could be misused for an impermissible purpose” is insufficient to give rise to liability, given the potential to punish or chill “entirely innocent, lawfully useful speech.” Rice v. Paladin Enters., Inc. 128 F.3d 233, 247 (4th Cir. 1997) (emphasis added); see also, e.g., N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 918 (1982) (“award[ing] compensation for the consequences of nonviolent, protected activity” runs afoul of the First Amendment).

In Kratovil, this Court recognized that Daniel’s Law restricts protected speech to deter unlawful conduct “facilitated by malefactors obtaining the home address or unlisted phone number of their targets.” 261 N.J. at 25-26 (citation omitted). As amended, the Law does so, in part, by restricting large swaths of protected speech that serves lawful purposes, with no required nexus to the harm it seeks to prevent: the Law restricts every conceivable disclosure of a covered person’s contact information, regardless of where, how, why, or to whom it is made available, with no exceptions. These vast restrictions on constitutionally protected speech are coupled with mandatory financial

liability, and the power of enforcing the Law is placed in the hands of assignees, including profit-seeking corporations like Atlas, that can selectively enforce that power against whichever entities they choose. Faced with the risk of targeted enforcement and the certainty of mandatory civil penalties, private entities will feel compelled to comply with every notice, regardless of whether it is even valid. This, in turn, will further limit the public's access to information "that the statute does not purport to regulate and that the First Amendment fully protects." Video Software Dealers Ass'n, 968 F.2d at 690-91. The importance of a proper mens rea requirement in this context cannot be overstated.

Yet, the "negligence" standard inserted by the district court does not adhere to the First Amendment principles governing mens rea and does not apply the appropriate constitutional guardrails. The objective standard it adopted is not tied to the harm Daniel's Law seeks to prevent: the safety risk posed to the covered person. Nor is it tied to an alleged loss of privacy. The standard is not even tied to a defendant's state of mind. Rather, the standard exclusively concerns a defendant's ability to comply with a nondisclosure notice within the mandatory ten-business day period. Atlas Data, 758 F. Supp. 3d at 341 (offering fire, hurricane, and computer failure as exculpatory examples). While that conduct-based requirement is a necessary element, it is

not sufficient. A culpability standard must account for a person’s ability to comply with a speech prohibition, as the district court recognized, but that kind of conduct-based standard is not sufficient to provide the breathing space required to guard speech protected by the First Amendment.

Just last year, in State v. Hill, this Court recognized that when laws attempt to deter unlawful conduct by punishing speech, heightened mens rea requirements are necessary to protect against unconstitutional overreach. See 256 N.J. 266 (2024). There, the Court held that a defendant could be constitutionally punished under a witness tampering statute for the contents of a “facially innocuous” letter he sent to a carjacking victim only if he “intended his letter” to tamper with the witness’s testimony. Id. at 291-92. The United States Supreme Court has consistently recognized the necessity of this same constitutional protection. See, e.g., United States v. Hansen, 599 U.S. 762, 770, 781 (2023) (construing statute that criminalized “encourag[ing] or induc[ing]” a noncitizen to enter the United States as reaching “no further than the purposeful solicitation and facilitation of acts known to violate federal law” to comport with the First Amendment (emphasis in original)); United States v. Aguilar, 515 U.S. 593, 605 (1995) (upholding application of statute that criminalizes disclosure of law-enforcement wiretaps against First Amendment challenge because it was limited to “those who disclose wiretap

information ‘in order to obstruct, impede, or prevent’ the interception”); Claiborne Hardware, 458 U.S. at 920 (First Amendment allows punishment of individual’s association with a group possessing “unlawful goals” only if the individual holds “a specific intent to further those illegal aims”).

To be clear, Defendants are not taking the position that these same heightened mens rea standards must be used for the State to protect covered persons through a law like Daniel’s Law. Nor are they saying that merely adding a mens rea requirement would solve the constitutional problems raised by the current Law’s financial liability provisions, as strict liability is just one of the uniquely punitive features the Legislature chose to enact through its amendments. Rather, in amending the Law and coupling restrictions on protected speech with severe financial penalties, the Legislature should have considered these precedents and other First Amendment tailoring requirements.

That is precisely what unfolded earlier this year when the State enacted a law targeting “deepfakes.” N.J.S.A. 2C:21-17.7 to 17-8. That law is similar to Daniel’s Law in that it regulates deepfakes in part because they “can be a powerful tool to accomplish illicit ends.” N.J.S.A. 2C:21-17.7. After the Legislature passed its bill, A. 3540 (Jan. 30, 2025), Governor Murphy issued a conditional veto in which he recommended numerous amendments to ensure the legislation would be “sufficiently precise,” “reduce potential First

Amendment concerns,” and not “run[] afoul of constitutional precept,” Assemb. Comm. Substitute for A. 3540 (Second Reprint) (Mar. 17, 2025), available at [https://pub.njleg.state.nj.us/Bills/2024/A4000/3540\\_V1.PDF](https://pub.njleg.state.nj.us/Bills/2024/A4000/3540_V1.PDF) (last accessed Nov. 20, 2025).

Among the proposed amendments were significantly higher mens rea requirements than the original legislation. For example, as originally drafted, the legislation would have allowed criminal liability when a person “reasonably should know” that a deepfake was created (1) “for the purpose” of a crime or offense or (2) “with the knowledge” that it was to be used for such a purpose. Ibid. The amendments proposed by the Governor removed this reasonableness standard and instead required a defendant to act “knowingly or recklessly” with regard to whether a deepfake was created for an illegal use. Ibid. And while the original legislation would have imposed civil liability automatically upon violation of its criminal provisions, the proposed amendments required “knowing or reckless” violations of those provisions. Ibid. The Legislature adopted these recommendations in full. See N.J.S.A. 2C:21-17.8.<sup>14</sup>

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<sup>14</sup> Similar issues were considered by the Department of Justice when, in the wake of the Oklahoma City bombing, it analyzed proposed legislation designed to address the widespread availability of information that could help people build bombs. See Dep’t of Justice, Report on the Availability of Bombmaking Information (1997), available at

Although there is no one-size-fits-all approach to legislation designed to protect covered persons, transplanting a “negligence” standard into the current version of Daniel’s Law, as the district court sought to do, is insufficient to render the Law’s civil action constitutional. But mens rea is just one of many factors to be weighed in drafting a statute that comports with the First Amendment. There are numerous paths that lawmakers might take in drafting a law that is properly tailored to address First Amendment concerns, and many options are available to calibrate a law’s provisions to comply with constitutional requirements.

The Legislature is well-equipped for this task, as it demonstrated when considering First Amendment tailoring requirements for the State’s deepfake law and enacting numerous other laws that have withstood constitutional scrutiny. It can look to previous versions of Daniel’s Law, which had safeguards for speech that are absent from the current Law. See supra at 8-9. It can also look to other similar laws that impose more narrowly tailored

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<https://webharvest.gov/peth04/20041026201550/http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html> (last accessed Nov. 20, 2025). The report concluded that, to constitutionally punish the publication of bombmaking information, a defendant must “either have the specific purpose of facilitating criminal conduct” or “knowledge that a particular recipient intends to make improper use of the material.” Ibid. (emphasis in original). Congress ultimately adopted the report’s recommendation in the legislation it enacted, 18 U.S.C. § 842(p)(2). See United States v. Coronado, 461 F. Supp. 2d 1209, 1216 (S.D. Cal. 2006) (rejecting constitutional challenge to law).

restrictions and provide a more limited range of remedies. See supra at 10-12. Or it can look to other of this State's laws that restrict speech through narrower and less punitive means. See supra at 24-26. In the end, however, the legislative branch is the proper branch to offer a remedy. While courts may be called upon to determine whether the chosen path is a constitutional one, that path is the Legislature's to choose.

### **CONCLUSION**

For the foregoing reasons, Defendants respectfully propose that the answer to the certified question is that the current version of Daniel's Law does not require any mens rea to impose liability.

Respectfully submitted,

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