

**SUPREME COURT OF NEW JERSEY
091145**

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, :

ATTORNEY GENERAL OF :
NEW JERSEY, :

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.; :

[cont'd on following page] :

**BRIEF OF DEFENDANTS-APPELLANTS
IN RESPONSE TO BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY**

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INC.; ACCURATE APPEND, INC.; :
ZILLOW, INC.; ZILLOW GROUP, :
INC.; EQUIMINE, INC.; :
THOMSON REUTERS CORP.; :
THOMSON REUTERS :
HOLDINGS, INC.; THOMSON :
REUTERS CANADA LIMITED; :
THOMSON REUTERS :
APPLICATIONS, INC.; :
THOMSON REUTERS :
ENTERPRISE CENTRE GMBH; :
WEST PUBLISHING CORP.; :
MELISSA DATA CORP.; :
RESTORATION OF AMERICA; :
VOTER REFERENCE :
FOUNDATION, LLC; :
I360, LLC; GOHUNT, LLC; :
GOHUNT MANAGEMENT :
HOLDINGS, LLC; GOHUNT :
MANAGEMENT HOLDINGS :
II, LLC; ACCUZIP, INC.; :
SYNAPTIX TECHNOLOGY, LLC; :
VOTERRECORDS.COM; JOY :
ROCKWELL ENTERPRISES, :
INC.; FORTNOFF FINANCIAL, :
LLC; E-MERGES.COM, :
INC.; NUWBER, INC.; :
ROCKETREACH, LLC; :
BELLES CAMP :
COMMUNICATIONS, INC.; :
PROPERTYRADAR, INC.; THE :
ALESCO GROUP, LLC; :
SEARCHBUG, INC.; AMERILIST, :
INC.; U.S. DATA CORP.; :
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ARGUMENT

Defendants-Appellants submit this response to the brief submitted by amicus curiae American Civil Liberties Union of New Jersey (“ACLU”) (“Ab”). For the reasons that follow, the amicus brief offers additional support for the arguments set forth in the Brief of Defendants-Appellants (“Db”) and Reply Brief of Defendants-Appellants (“Drb”), demonstrating that the current version of Daniel’s Law, N.J.S.A. 56:8-166.1, does not require any mens rea to impose financial liability and underscoring the need for a fix that only the Legislature can make.

First, the certified question is narrow, asking only what, if any, mens rea Daniel’s Law requires to impose liability. The amicus brief correctly concludes that the Law’s text has no mens rea requirement. Ab4-5. That should end the inquiry. Db18-28; Drb3-7; see also State v. Carter, 247 N.J. 488, 513 (2021) (“If the text of a law is clear, the court’s task is complete.” (internal marks omitted)). The amicus brief also correctly observes that the Law’s imposition of strict liability is the result of a “purposeful alteration” by the Legislature. Ab6 (quoting In re Civil Commitment of W.W., 245 N.H. 438, 449 (2021)). The Legislature amended the Law twice, first removing the mens rea requirement, and then making previously discretionary damages awards mandatory. Id. at 5-6; see also Db8-9, 22-23. As the ACLU explains,

the text and legislative intent are therefore clear: “No reading of Daniel’s Law, as amended, supports a construction that mens rea of any degree is an element of a claim for actual or liquidated damages.” Ab6.

Second, the amicus brief is also correct that transplanting a negligence standard into the current version of the Law, with its uniquely broad and punitive features, would not pass constitutional muster. Ab9-13. Whether state power is used to impose liability criminally or civilly, robust mens rea requirements are “essential” to safeguard protected speech. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278-79 (1964); see also Ab10; Db37-44. The brief cites, for example, State v. Hill, where this Court refused to punish a criminal defendant for sending a “facially innocuous” letter to a witness unless he “intended” the letter to tamper with her testimony. 256 N.J. 266, 292 (2024); see also Ab9-10 (citing Counterman v. Colorado, 600 U.S. 66, 77, 78-80 (2023), for the proposition that a “subjective element” is required to punish true threats); Db42-43 (collecting cases). And as the brief points out, stringent mens rea requirements are especially critical when the government seeks to “deter conduct by a non-law abiding third party” through punishing speech by a “law-abiding possessor of information.” Ab12 (quoting Bartnicki v. Vopper, 532 U.S. 514, 529-30 (2001)). The negligence standard inserted by the district court -- and the watered-down variations of that standard proposed by

Plaintiffs and the Attorney General -- fall well below the First Amendment's high bar. Db18-25; see also Ab12 (“A simple negligence standard comes nowhere near the protections owed the regulated speech under Daniel’s Law.”).

Third, although the amicus brief suggests that a mens rea standard could be added to the Law to “salvage” it, the cases it cites for this proposition do not justify diverging from the Law’s text and the Legislature’s intent. Ab16-20. The amicus brief relies primarily on State v. Comer, 249 N.J. 359 (2022), which it claims allows the Court to “supply a stop-gap constitutional interpretation.” Ab18. But as Defendants have explained, and as the amicus brief seems to recognize, id. at 19, that case did not provide any new interpretation of the sentencing statute. It merely held that adding a new procedure -- the right of juvenile offenders to petition the court for a hearing to review lengthy sentences -- is within the judiciary’s authority. See Db31-33; Drb6.

Critically, the Court in Comer did not subvert or contravene the intent of the Legislature. The Legislature had not yet responded to the “constitutional issues” with the State’s sentencing scheme that had been raised by recent precedent from this Court and the United States Supreme Court. Comer, 249 N.J. at 389. Here, in contrast, the Legislature deliberately removed the mens

rea requirement from Daniel’s Law against the backdrop of longstanding jurisprudence requiring mens rea to punish speech. See Db37-40. Unlike in Comer, a “stop-gap constitutional interpretation” transplanting a mens rea standard would contravene the Legislature’s actions and its clear intent. Further, Comer did not condone judicial tinkering with the elements of the statute. See Comer, 249 N.J. at 369 (declining to strike statute’s mandatory sentencing requirement). Accordingly, Comer does not provide the Court authority to substantively rewrite Daniel’s Law, let alone transplant a mens rea element into the Law after the Legislature rewrote it to impose strict liability.

More on point here is State v. Pomianek, 221 N.J. 66 (2015), which the ACLU agrees “would seem to bear some similarities to this case.” Ab17. In Pomianek, the Court refused to “rewrit[e] [a] statute to impose a mens rea element” where the “Legislature pointedly decided not to include” one. 221 N.J. at 90; see also Db21-22 (collecting cases). The cases cited by the ACLU that predate Pomianek by fifty-plus years, see Ab18, do not override this clear instruction. Pomianek is the precedent the Court should follow in this case.

While the amicus brief notes two factors it says “distinguish[.]” Pomianek, those factors only highlight why a judicial transplant is not warranted here. Ab17-18. The brief first asserts that the Court could avoid the “redundancy” at issue in Pomianek by reading in a standard “lower than the

punitive damages or criminal liability mens rea standards.” Ab18. But the only standard lower is negligence, which the ACLU agrees is unworkable. Ab12; see N.J.S.A. 56:8-166.1(c)(2) (awarding punitive damages “upon proof of willful or reckless disregard of the law”).¹ In any event, the Court declined to adopt the Appellate Division’s rewrite in Pomianek not only because it would be redundant, but also because there was “no doubt” as to the meaning of the statute. 221 N.J. at 90-91. The same reasoning applies here. See Db21-22 (“the explicit mental state requirements in [other] provisions of the Law demonstrate that the Legislature intentionally omitted such a requirement for civil liability”).

The amicus brief also asserts that Pomianek is distinguishable because there is no opportunity here “to strike the offending statutory provision.” Ab18. That factor counsels against transplanting a mens rea standard that the Legislature rejected. The question certified by the Third Circuit is a narrow question of statutory construction, not an invitation to rewrite Daniel’s Law.

Fourth, even if a statutory rewrite were proper, there is no clear answer to what mens rea requirement the Court should select. For example, unlike in State v. De Santis, 65 N.J. 462 (1974), one of the decades-old cases cited by

¹ Moreover, to punish speech, the mens rea must be tailored to the harm a law seeks to prevent, not merely an awareness of the law itself. See Db38-39.

the ACLU, there is no legislative history or other guidance indicating how the Legislature would want to fix the Law's constitutional flaws. In De Santis, the Court interpreted the obscenity statute to comport with recent Supreme Court precedent because legislative history left "no room for doubt" that the Legislature sought to "proscribe obscenity to the extent consistent with constitutional limitations." Id. at 473 (cited at Ab18). Here, in stark contrast, the history of the Law shows the Legislature intended to remove the mens rea requirement and impose strict liability, without regard for the constitutional consequences. Db5-10. Absent clear legislative guidance, the amicus brief is left to offer yet another mens rea option to the competing proposals already before the Court. See Ab19; see also Drb18-20 (explaining differences between proposals from Plaintiffs and the Attorney General). This growing menu of proposed rewrites reveals a straightforward conclusion: no one can agree on what standard should be read into the Law because the "Legislature pointedly decided not to include" one. Pomianek, 221 N.J. at 90.

Fifth, the amicus brief highlights why the Court should be "reluctant" to add a mens rea requirement. Ab19. As the brief explains, the posture of this case is unique: a certified question that will help the Third Circuit determine whether Daniel's Law is facially constitutional. Id. at 2 ("The only issue before this Court is how the statute must be construed."). The constitutionality

of the Law has been the subject of substantial briefing and argument in federal court, and the Law’s lack of any mens rea requirement is just one of many factors the Third Circuit will consider. See Db16; see also Atlas Data Priv. Corp. v. We Inform, LLC, No. 25-1555 (3d Cir. Mar. 31, 2025), Dkt. No. 103 (the Law “raises hard constitutional questions”).

The amicus brief explores some of the Law’s First Amendment problems, which are more pervasive than a transplanted mens rea standard can solve. For example, the brief identifies sharp differences between New Jersey’s Daniel’s Law and similar laws enacted across the country, which are far narrower and far less punitive. See Ab14-16 (discussing laws that limit where damages are imposed); see also Db10-12 (discussing other tailoring mechanisms).² Despite the existence of these less restrictive alternatives, New

² The ACLU cites only four other laws that it says allow recovery of damages prior to an injunction. Ab15. While it cites Delaware’s law, that law appears to only permit damages after a court has issued injunctive or declaratory relief. Del. Code Ann. tit. 10, § 1923(c)(1), (2) (equitable relief available upon violation of “subchapter,” while damages available upon violation of “subsection”). And as the brief notes, West Virginia’s law was recently struck down by a federal court. See Jackson v. Whitepages, Inc., 798 F. Supp. 3d 583 (N.D. W. Va. 2025), appeal filed, No. 25-2122 (4th Cir. Sept. 19, 2025). The remaining two laws are far more narrowly tailored than New Jersey’s law. Under Washington’s law, damages are permitted only when the disclosure is made “knowingly” on the “world wide web” and poses an “imminent and serious threat” that is “reasonably apparent.” Wash. Rev. Code Ann. § 4.24.680. And Maryland’s law contains significant exceptions that New Jersey’s law lacks. See Db10-11 nn. 2, 6-7 (citing Md. Code Ann., Cts. & Jud. Proc. §§ 3-2301, 3-2303).

Jersey stands alone in allowing corporate assignees to collect money damages on a strict liability basis, under a regime that punishes any disclosure. Id. at 11. Trying to transplant a mens rea standard into the Law would not fix these problems: it would only entangle the Court further into a constitutional thicket. Db36-46.

This Court’s task is not to write a constitutional law. See State v. Fearick, 69 N.J. 32, 38 (1976) (“[Courts] are charged with the duty of interpreting statutes, not of legislating.”). Its task is instead to answer a narrow question: “What mental state, if any, is required to establish liability under Daniel’s Law, N.J.S.A. 56:8-166.1?” By removing the Law’s previous mens rea requirement and refusing to put a new one in its place, the Legislature provided the Court with the answer to that question: “None.” If the Third Circuit determines that the amended Law is unconstitutional, the Legislature must decide how to fix it. That is a task the Legislature is well-equipped to do. See Db43-46 (discussing Legislature’s consideration of First Amendment requirements when enacting deepfake law).

CONCLUSION

The amicus brief submitted by the ACLU confirms the answer to the certified question: No mens rea is required to impose liability under the current version of Daniel’s Law.

Respectfully submitted,

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