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Via Regular Mail and Email
SupremeCTBrief.mailbox@njcourts.gov
Ms. Heather Joy Baker, Esq., Clerk

Re: Atlas Data Privacy Corporation, et al. v. We Inform, LLC, et al.,
New Jersey Supreme Court No.: 091145

Comment On The Third Circuit's Request To Answer Certified Questions

Plaintiffs respectfully encourage this Court to accept the Third Circuit's certified questions concerning Daniel's Law, N.J.S.A. 56:8-166.1. Such a determination will aid in over 150 litigations pending in State and Federal Court under this statute and satisfy Rule 2:12A-1. These certified questions are central to the issues pending before the Third Circuit. To date, the only federal decision to directly address them is Atlas Data Privacy Corp. v. We Inform, LLC, 758 F. Supp. 3d 322 (D.N.J. 2024), now on appeal. Several New Jersey Superior Court decisions have likewise examined these issues.

In Plaintiffs' view, the certified questions have straightforward answers. A claim for actual or liquidated damages under Daniel's Law requires proof by a preponderance of the evidence of (i) receipt of a nondisclosure request; (ii) disclosing or re-disclosing on the Internet or otherwise making available the home address (including street address) or unpublished home telephone number

information of a covered person more than 10 business days after receipt of the nondisclosure request; and (iii) acting with at least negligent disregard for the rights of the covered person who sent the request. See N.J.S.A. 56:8-166.1(a)(1), (2). This interpretation aligns with the statutory text and legislative intent, which instructs courts to construe the statute liberally to promote public safety and protect public officials from threats and reprisals, see N.J.S.A. 56:8-166.3.

In We Inform, the District Court correctly held that although "Daniel's Law does not state explicitly what standard of liability applies for actual or liquidated damages," the statute is best interpreted to adopt a negligence standard. Id. at 340-41. Given the increasing threats and violence against covered persons, this Court's confirmation of that interpretation would eliminate any doubt regarding interpretation of the statute and may aid in the Third Circuit's review.

In Florida Star v. B.J.F., 491 U.S. 524 (1989), the United States Supreme Court concluded that a statute prohibiting publication of the name, address, or other identifying information of a rape victim was not narrowly tailored in part because the statute used a "negligence *per se* standard" under which "liability follows automatically from publication" instead of requiring at least proof "of ordinary negligence." Id. at 540. And in Counterman v. Colorado, 600 U.S. 66, 75 (2023), the Court reiterated that speech restriction typically requires a *mens rea* element to

prevent chilling protected expression. Id. at 75-76 (quoting New York Times v. Sullivan, 376 U.S. 254, 280 (1964)). But when only speech on a matter of private concern is at issue (as in most cases under Daniel's Law), "permitting recovery of presumed and punitive damages" even without "a showing of 'actual malice' does not violate the First Amendment." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985); accord Senna v. Florimont, 196 N.J. 469, 491 (2008).

There is no dispute that Daniel's Law requires proof of *mens rea*—willful or reckless disregard—to support punitive damages. N.J.S.A. 56:8-166.1(c)(2). But the statute does not expressly state whether actual or liquidated damages require a comparable *mens rea* showing that the defendant acted with negligent disregard of the law or instead allows actual or liquidated damages on a strict liability basis. As noted by the Third Circuit, whether the statute implicitly incorporates a negligence standard—or instead imposes liability without fault—may have relevance to that appeal.

No controlling decision from this Court has yet clarified which elements of Daniel's Law require a *mens rea* or to what degree. In Kratovil v. New Brunswick, 261 N.J. 1 (2025), this Court upheld the statute's constitutionality as applied but did not address whether claims for damages may proceed absent proof of fault. Id. at 29. As noted, that question has been addressed in most depth by the District Court, and

its decision is obviously "not binding on New Jersey courts" or controlling for questions of New Jersey statutory interpretation, even if it is "entitled to respectful consideration." Glukowsky v. Equity One, Inc., 180 N.J. 49, 71 (2004).

Plaintiffs also respectfully submit that this Court's doctrine of constitutional avoidance provides a sufficient basis to construe Daniel's Law within constitutional bounds. While Plaintiffs maintain that this State's precedent is clear, they welcome this Court's review of Daniel's Law and the certified questions, given the statute's critical importance statewide and nationally, and the data-broker industry's ongoing noncompliance nearly five (5) years after its enactment.

Certification would eliminate any doubt as to the constitutionality of Daniel's Law as applied to claims for actual or liquidated damages following receipt of a nondisclosure request. It would also clarify that earlier iterations of N.J.S.A. 56:8-166.1, which had different *mens rea* requirements, belonged to a repealed statutory scheme and is irrelevant to the current law and the Third Circuit's review. Without this Court's guidance, the Third Circuit will be forced to decide whether Daniel's Law is valid under the First Amendment based on its own Erie guess as to the meaning of the statute. If the Third Circuit guesses wrongly, Daniel's Law could be held invalid under the First Amendment as a matter of Third Circuit caselaw—even while the statute continues to be recognized as valid by our courts as in Kratovil.

Finally, Plaintiffs also respectfully request that the Court reformulate the certified questions to add a third question, namely:

> If N.J.S.A. 56:8-166.1(c)(1) is held unconstitutional, does the balance of the statute remain valid under New Jersey severability and "judicial surgery" principles, insofar as it permits claims for actual, liquidated, and punitive damages based on willful or reckless disregard of the law, reasonable attorneys' fees and other litigation costs reasonably incurred, and any other preliminary and equitable relief that a court determines to be appropriate?

This additional question would ensure the Third Circuit properly applies New Jersey severability doctrine. See New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff, 669 F.3d 374, 396 (3d Cir. 2012) ("The issue of severability of a state statute is a question of state law."); State v. Comer, 249 N.J. 359, 399 (N.J. 2022) ("When a statute's constitutionality is doubtful, a court has the power to engage in 'judicial surgery'…[to] restore the statute to health." (internal quotation marks and citation omitted)); Shelton v. Restaurant.com, Inc., 214 N.J. 419, 427 (2013) (reformulating certified questions to include a third question).

Respectfully submitted,

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c: All counsel of record