

TOWNSHIP OF BERKELEY,

Plaintiff-Respondent,

v.

SCOTT MADLINGER,

Defendant-Appellant.

SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION,
DOCKET NO: A-1719-24

A Civil Action

On appeal from a final judgment of
the Law Division,
Docket No. OCN-1308-24

Sat Below:

Hon. Francis R. Hodgson, Jr., A.J.S.C.

Brief of Amici Curiae American Civil Liberties Union of New Jersey,
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PRELIMINARY STATEMENT

Last year, the Legislature passed a bill to amend the Open Public Records Act (OPRA), despite the public's overwhelming opposition. One provision created a cause of action for agencies to sue people who seek records "with the intent to substantially interrupt the performance of government function[s]."

Governor Murphy signed the bill in June 2024 and issued a lengthy signing statement. Among other things, he assured the public there was a tool to defend against such lawsuits: the Uniform Public Expression Protection Act (UPEPA), an "anti-SLAPP" law. Murphy explained, "I am confident that this 'anti-SLAPP' law will allow individuals to obtain expedited dismissals of any improper lawsuits brought under this new provision of OPRA."

The Township of Berkeley was apparently so eager to sue its resident, Scott Madlinger, that it filed a complaint before the bill was signed and long before its effective date. The lawsuit alleged "harassment" and "malicious use of process," seeking to punish Madlinger not only for filing OPRA requests, but also for his "bullying," "accusatory," and "offensive" emails; his complaints to the Government Records Council (GRC); and his complaints to the Attorney General, Department of Community Affairs, and other agencies about the Township's conduct. It sought to permanently restrain him from filing such complaints and to limit his OPRA requests to five per month.

Madlinger filed a UPEPA motion. The trial court correctly held the complaint failed to state a claim upon which relief could be granted because it contained no allegations of conduct after the effective date of the OPRA amendment and was otherwise legally deficient. But the court committed other errors that deprived Madlinger of UPEPA's protections.

The trial court held that UPEPA does not apply because filing OPRA requests is not protected free speech activity. That decision was wrong for two reasons. First, the complaint also seeks to punish Madlinger for his free speech (i.e., his offensive emails), his other petitioning activity (i.e., his complaints to the GRC and other entities), and communications he had about matters under review in administrative proceedings. UPEPA applies even if only "part of a cause of action" is protected. Second, Murphy's signing statement establishes that UPEPA can be used by requestors who are sued, and some courts have held that filing records requests is protected petitioning activity

The trial court also made serious procedural errors. Once a UPEPA motion is filed, a plaintiff cannot amend or dismiss its complaint to stave off an unfavorable UPEPA ruling. And UPEPA expressly states that a court must dismiss a complaint "with prejudice" if it is legally deficient. The court violated these procedures by dismissing the complaint without prejudice and granting the Township leave to amend the complaint to fix its deficiencies. The Township

then voluntarily dismissed the complaint to try to evade a UPEPA fee award.

The Township's maneuvering was rewarded. The court held that it was an unwritten requirement that a complaint be deemed a "frivolous complaint made to punish or to intimidate" for fees to be awarded under UPEPA. Because the court found the Township's complaint was not frivolous, it denied Madlinger's fee application. The Appellate Division has held that frivolity is not the standard and that fee-shifting is mandatory where a UPEPA movant obtains a dismissal.

As argued further below, the allegations in the Township's complaint relate to Madlinger's exercise of free speech and his right to petition the government for redress about matters of public concern (which Madlinger calls "whistleblowing activity"). The trial court should have concluded that UPEPA applies, dismissed the complaint with prejudice, and awarded Madlinger attorney's fees and costs. This Court should reverse.

STATEMENT OF INTEREST OF AMICI CURIAE

For over 60 years, the **American Civil Liberties Union of New Jersey (ACLU-NJ)** has defended liberty and justice guided by the vision of a fair and equitable New Jersey for all. Its mission is to preserve, advance, and extend the individual rights and liberties guaranteed to every New Jerseyan by the State and Federal Constitutions in courts, in legislative bodies, and in our communities. Founded in 1960 and based in Newark, the ACLU-NJ is a non-partisan organization that operates on several fronts – legal, political, cultural – to bring about systemic change and build a more equitable society. ACLU-NJ has served as amicus curiae in dozens of cases, including numerous cases involving the free speech and right to petition provisions of the U.S. and New Jersey Constitutions. See, e.g., State v. Higginbotham, 257 N.J. 260 (2024); Usachenok v. Dep’t of Treasury, 257 N.J. 184 (2024); State v. Hill, 256 N.J. 266 (2024); State v. Fair, 256 N.J. 213 (2024).

Libertarians for Transparent Government (LFTG) is a non-profit organization devoted to transparency and open government in New Jersey, which is run by well-known transparency advocate John Paff. LFTG regularly files Open Public Records Act (OPRA) requests and litigates OPRA cases, either via the courts or via the Government Records Council (GRC). See, e.g., In re Adoption of N.J.A.C. 5:105-1.6(a)(1), 479 N.J. Super. 301 (App. Div. 2024);

Libertarians for Transp. Gov't v. Cumberland Cnty, 250 N.J. 46 (2022). LFTG has also appeared as amicus curiae in many cases before New Jersey courts, providing helpful information about how the court's decision will impact the public. See, e.g., Am. Civil Liberties Union of New Jersey v. Cnty. Prosecutors Ass'n of New Jersey, 257 N.J. 87 (2024); Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 254 N.J. 242 (2023); Bozzi v. City of Jersey City, 248 N.J. 274 (2021); In re Att'y Gen. Directive, 246 N.J. 462 (2021).

The **New Jersey Press Association (NJPA)** is a non-profit organization incorporated in 1857 under the laws of the State of New Jersey. The NJPA membership is composed of daily newspapers, affiliate newspapers, weekly newspapers, digital news websites, as well as corporate and non-profit associate members. NJPA's mission is to help newspapers remain editorially strong, financially sound and free of outside influence. NJPA has participated as amicus curiae in numerous cases before New Jersey courts impacting reporters, including cases involving the First Amendment and the right of access to public records. See, e.g., Kratovil v. City of New Brunswick, 261 N.J. 1 (2025); Fuster v. Twp. of Chatham, 259 N.J. 533 (2025); Libertarians for Transp. Govt v. Cumberland Cnty., 250 N.J. 56 (2022); Petro-Lubricant Testing Labs. Inc. v. Adelman, 233 N.J. 236 (2018); In re Carter, 230 N.J. 258 (2017).

This case calls upon the Court to determine whether retaliatory lawsuits by the government against those who file frequent OPRA requests or those who file complaints with the GRC or other law enforcement agencies may utilize UPEPA's protections. The amici have a strong interest in this case and will be directly impacted by the Court's decision because they, and/or their members, regularly file OPRA requests to advance their missions. And ACLU-NJ and LFTG have petitioned courts or the GRC to challenge unlawful denials of access by public agencies, as have NJPA's members, and thus they could be targets of similar lawsuits for exercising their right to petition. See, e.g., Am. Civil Liberties Union of N.J. v. N.J. Div. of Criminal Justice, 435 N.J. 533 (App. Div. 2014); Libertarians, 250 N.J. 46; Gannett, 254 N.J. 242.

Pursuant to Rule 1:13-9:

an application to appear as amicus curiae in any court shall be made by motion in the cause stating with specificity the identity of the applicant, the issue intended to be addressed, the nature of the public interest therein and the nature of the applicant's special interest, involvement or expertise in respect thereof. The court shall grant the motion if it is satisfied under all the circumstances that the motion is timely, the applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby.

[R. 1:13-9.]

“Rule 1:13-9 has been interpreted as establishing ‘a liberal standard for permitting amicus appearances.’” K.D. v. A.S., 462 N.J. Super. 619, 633 (App. Div. 2020) (explaining that amicus curiae need not be impartial).

The Court should grant the motion to appear as amici curiae because the proposed amici have fully complied with Rule 1:13-9. They have also retained counsel who has litigated cases under both UPEPA and OPRA, and thus amici’s participation will be especially helpful to the Court.

STATEMENT OF FACTS AND PROCEDURE¹

A. Madlinger and His Protected First Amendment Activity

Madlinger is a civically engaged resident of Berkeley Township. (Da164).² He routinely files OPRA requests about town finances, police matters, and public health issues to monitor his local government and to prevent corruption and waste. (Da165). Sometimes he files multiple requests for certain categories of records, like email logs, to break the requests into more manageable parts because the Township has tried to dissuade his requests by imposing service charges when his requests are too “voluminous.” Ibid.

When he believes that the Township has mishandled his requests, he has petitioned the GRC or Superior Court for legal relief. (Da166). He has voluntarily withdrawn many GRC complaints after the Township produced the records in response to his complaint.³ (Da167-Da168).

Madlinger has also filed complaints with the Attorney General (AG), the

¹ The Statement of Facts and Procedural History are combined for ease of reading because they are intricately linked.

² Da = Madlinger’s Appendix; 1T = Oct. 11, 2024 Transcript; 2T = Jan. 17, 2025 Transcript; Pb = Township’s Appellate Brief

³ A complainant with counsel likely would not withdraw a complaint after the voluntary production of records and would instead ask the GRC to rule that the complainant was a prevailing party entitled to counsel fees. Because Madlinger has been pro se in the GRC, there is no need for such a ruling—all seeks is records. The fact that he withdrew the complaints after receiving the records is evidence that he was not seeking to pursue frivolous actions.

Department of Community Affairs (DCA), the Internal Affairs Unit, and other entities when he believes that some action by the Township needs independent review. (Da168-Da169). For example, he requested the Standard Operating Procedure (SOP) for “ARRIVE Together,” a program that pairs mental health professionals with police to respond to those having a mental health crisis. When the Township responded that no such SOP exists, Madlinger said he would notify the AG. (Da44). He believed the AG should be aware that the Police Department did not even have an SOP to implement the program. (Da169).

Township officials are clearly annoyed by Madlinger’s OPRA requests and his complaints about their conduct. Records show that Madlinger requested records for properties owned by two township officials to see if they complied with local rental regulations. The custodian said it was an example of “how he uses [OPRA] to try to intimidate, harass and attack public officials” and that she expected a “snarky accusatory comment” in response to her denial. (Da56).

At other times, the Township has responded to Madlinger by placing unreasonable obstacles in the way of access, clearly hoping to dissuade his requests. For example, Madlinger requested a single one-page email sent to the mayor. The Township responded that it needed to print the email to redact the mayor’s personal email address, so he would need to provide a check or money

order for five cents to receive the email. (Da63-64). Madlinger responded that, “all of ya’s will be reported to the state corruption unit.” (Da63).

B. The Township’s Complaint

On May 20, 2024, the Township filed a verified complaint against Madlinger, alleging “harassment” (count I) and “malicious use of process” (count II). (Da1-79). The complaint alleged he had filed hundreds of OPRA requests since 2022. (Da2). It further alleged that Madlinger had filed at least thirty denial of access complaints with the GRC and that he had “bullied” Township employees by filing complaints with the AG or DCA for “allegations of official misconduct, ethical violations, and personal attacks.” (Da3). Moreover, Madlinger had also filed internal affairs complaints. Ibid.

The complaint claimed that Madlinger’s “voluminous and meritless complaints and disorderly behavior” was “intimidating, offensive, hostile and abusive and constitutes harassment of the Township and its employees.” (Da3-4) (emphasis added). It further alleged he “perverted the use” of OPRA. Thus, the Township sought an order permanently restraining him “from engaging in the further filing of meritless complaints” and permanently limiting him to filing five OPRA requests per a month. (Da4) (emphasis added).

In support of its order to show cause (OTSC), the Township submitted a certification by Township Attorney Robin La Bue. (Da22). La Bue’s certification

attached several exhibits,⁴ including the alleged legal costs it took to fulfill Madlinger’s OPRA requests and to respond to his GRC complaints (Da15-19); Madlinger’s statements that he was filing complaints with the AG (Da34; Da44; Da63), Ocean County Prosecutor’s Office (Da47), and the “state corruption unit” (Da63); and emails between Madlinger and the Monmouth Ocean Tax Collector’s Association (Da67) and DCA (Da69-76) regarding his complaints.

C. The Governor Signs OPRA Amendments into Law

On June 5, 2024, Governor Murphy signed Senate Bill 2930, which amended OPRA, into law. See L. 2024, c. 16. The bill sparked public outrage for many reasons, one of which is a provision that allows a public agency to obtain a protective order against “a requestor [who] has sought records with the intent to substantially interrupt the performance of government function.” N.J.S.A. 47:1A-5.1(a). If the court finds the public agency met its burden by “clear and convincing evidence,” the court “may limit, or, in appropriate circumstances, eliminate the public agency's duty to respond to government records requests from the requestor in the future.” N.J.S.A. 47:1A-5.1(b).

Murphy issued a signing statement responding specific criticisms about the bill. In relevant part, he wrote:

⁴ It is unclear how La Bue could have personal knowledge of these exhibits.

Another provision that has garnered a significant amount of controversy concerns the ability of public entities to sue requestors. In order to prevent abuse, the bill establishes an extraordinarily high standard for such lawsuits, as the public entity must prove harassment or substantial interruption of government functions by clear and convincing evidence. Some advocacy groups claim that the mere threat of a lawsuit will deter citizens from making requests under OPRA. However, I signed an important law last September that protects individuals from meritless lawsuits intended to intimidate them for exercising their free speech rights. I am confident that this “anti-SLAPP” law will allow individuals to obtain expedited dismissals of any improper lawsuits brought under this new provision of OPRA.

[Governor’s Statement Upon Signing S. 2930 (2nd Reprint), June 5, 2024 (emphasis added).]

On September 3, 2024, the amendments took effect, giving public agencies standing to sue requestors for the first time. See L. 2024, c. 16 §12 (“This act shall take effect 90 days following the date of enactment.”).

D. The Township’s June 11, 2024 Amended Verified Complaint

The Township filed an amended verified complaint on June 11, 2024, about a week after Murphy signed L. 2024, c. 16 into law but long before it went into effect. This complaint mirrored the original version except it included a new allegation: “In fact, [Madlinger] threatened Police Department employees with punitive OPRA requests as a punishment for failure to dismiss a motor vehicle summons.” (Da83).

La Bue's certification attached a six-year-old police report in which a lieutenant said that on May 31, 2018, Madlinger threatened to make daily OPRA requests unless a summons he received was withdrawn. (Da124). The complaint contained no allegations that Madlinger had filed such daily requests after the alleged threat. It referred only to requests years later, in 2022 to 2024 (Da81).

E. Madlinger's July 2, 2024 UPEPA Motion

On July 2, 2024, Madlinger filed an OTSC pursuant to UPEPA seeking to have the amended verified complaint dismissed with prejudice. (Da138). The OTSC also sought a stay of all proceedings (Da218), and an award of counsel fees. Among other things, Madlinger argued New Jersey does not recognize "harassment" as a free-standing cause of action for damages and that the Township could not establish all the elements of malicious use of process.

F. The Township's July 24, 2024 Amended Verified Complaint

The Township filed a second amended verified complaint on July 24, 2024. (Da222). This complaint was clearly a response to Madlinger's UPEPA motion, which established there were no viable causes of action for harassment or malicious use of process and the OPRA amendments were not yet effective. The factual allegations copied the prior version of the complaint, but count I was renamed "intentional interruption of a government function" to mirror the language in L. 2024, c. 16 (i.e., N.J.S.A. 47:1A-5.1). Count I alleged:

19. Defendant's voluminous and meritless complaints and disorderly behavior has been a repeating and continuing uninvited contact made with the intent to purposefully create alarm, annoyance and emotional distress and substantially interrupt the governmental functions of the Township of Berkeley.

20. Defendant's conduct is intimidating, offensive, hostile and abusive and results in the disruption of governmental functions of the Township of Berkeley.

21. As a direct and proximate result of the substantial interruption committed by the Defendant the Plaintiff has been damaged.

[Da225].

The requested relief remained the same: an order permanently restraining Madlinger "from engaging in the further filing of meritless complaints" and permanently limiting him to five records requests per a month. (Da226) (emphasis added). Thus, it remained clear that Madlinger's repeated objections and his complaints to legal authorities remained a driving motivator behind the Township's lawsuit.

After Madlinger objected to the amended filing, the trial court stayed proceedings to allow the Township to formally move to amend. (Da228). The Township delayed filing its motion to amend until September 25, 2024. (Da229). Madlinger's UPEPA motion remained unheard, despite UPEPA's instruction that it be heard "as expeditiously as possible." N.J.S.A. 53A-53(a).

G. The Trial Court's Decisions

On October 11, 2024, the trial court heard oral argument and entered three orders. The first two orders denied the Township's motion to amend its complaint and its OTSC, both without prejudice. (Da243; Da247). The third order partially granted Madlinger's OTSC. (Da245-246).

The court found that UPEPA did not apply, but it nonetheless dismissed the Township's complaint⁵ for failure to state a claim upon which relief could be granted. The court found that the OPRA amendments were not effective until September 3, 2024, and thus count I failed to state a claim because it contained no allegations of any conduct after that date. (1T31). As to count II, the court found that the Township failed to plead a "special grievance." (1T33). UPEPA requires a dismissal with prejudice, but the court dismissed complaint without prejudice and with leave to amend to cure the legal deficiencies. (Da245).

The Township did not file an amended complaint. Madlinger submitted a proposed form of order to dismiss the complaint and to permit a fee application. (Da248). The Township then filed a stipulation of dismissal without prejudice. (Da253). It said it was not filing an amended complaint because Madlinger's

⁵ Amici use "complaint" throughout the remainder of this brief to refer to the June 11, 2024 amended verified complaint, which was filed prior to Madlinger's UPEPA motion and was the basis for the trial court's dismissal.

requests had “slowed considerably” and it “does not feel it necessary to seek relief under the new provisions of OPRA at this time.” (Da253).

After permitting Madlinger to move for fees, the trial court denied the fee application. (Da348-349). During oral argument, the court again found that UPEPA does not apply because OPRA requests do not constitute “speech.” (2T20). But it held that even if UPEPA did apply, a fee award would be inappropriate because the lawsuit was not “frivolous.” The court stated:

[A]lthough it’s not specifically a requirement of the anti-SLAPP statute, I think that in the background is a requirement that the application be made solely or primarily to punish for a frivolous – a frivolous complaint made to punish or intimidate.

These types of applications were really made to address a party that had unlimited funds that would, essentially, cause a defendant to suffer from having to endure the process of discovery and maybe hire attorneys. That’s not the case here. This was done specifically to address the – what is perceived as a – numerous and unfounded filings that were made solely to punish – as a strategy for punishing the town.

. . .

The Court is also satisfied that, specifically, the anti-SLAPP provisions do not apply to this specific case even if generally it would apply. That is because the statute or the complaint made by the township was not surreptitiously made in order to intimidate or punish the defendant. It was specifically made to stop the defendant from having to file continual OPRA requests,

which it deemed to be punishment or a form of harassment. . . .

(2T22).

LEGAL ARGUMENT

I. UPEPA’S LEGAL PROCEDURES

New Jersey’s UPEPA is “based on the 2020 uniform act drafted and approved by the Uniform Law Commission[.]” See Sponsor’s Statement to S. 2802 (L. 2023 c. 155). UPEPA allows a party to file OTSC to seek dismissal, or partial dismissal, of:

any cause of action asserted in a civil action against a person based on the person's:

- (1) communication in a legislative, executive, judicial, administrative, or other governmental proceeding;
- (2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding;
or
- (3) exercise of the right of freedom of speech or of the press, the right to assembly or petition, or the right of association, guaranteed by the United State Constitution or the New Jersey Constitution, on a matter of public concern.

[N.J.S.A. 2A:53A-50(b) (emphasis added).]

Once an OTSC is filed, a hearing shall be held “as expeditiously as possible.” N.J.S.A. 53A-53(a). There is a presumption that all proceedings shall be stayed while the OTSC is pending. N.J.S.A. 2A:53A-52(a)(3).

In ruling on the OTSC, the court “may consider the pleadings, the [OTSC] application and supporting certifications, briefs, any reply or response to the [OTSC], and any evidence that could be considered in ruling on a motion for summary judgment.” N.J.S.A. 2A:53A-54. The court must construe UPEPA “broadly . . . to protect the exercise of the right of freedom of speech and of the press, the right to assembly and petition, and the right of association, guaranteed by the United State Constitution or the New Jersey Constitution.” N.J.S.A. 2A:53A-59. “In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact [UPEPA].” N.J.S.A. 2A:53A-60.

A court “shall dismiss with prejudice a cause of action, or part of a cause of action” if two steps are satisfied. N.J.S.A. 2A:53A-55(a) (emphasis added). Step one requires a court to determine that UPEPA applies to the type of speech at issue, and that no exceptions apply.⁶ N.J.S.A. 2A:53A-55(a)(1) and (2).

Step two requires finding either:

⁶ The exceptions, N.J.S.A. 2A:53A-50(c) are not relevant in this case.

- (a) the responding party fail[ed] to establish a prima facie case as to each essential element of any cause of action in the complaint; or
- (b) The moving party establishe[d] that:
 - i. The responding party failed to state a cause of action upon which relief can be granted; or
 - ii. There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

[N.J.S.A. 2A:53-55(a)(3) (emphasis added).]

In other words, a court may decide a UPEPA motion based either on a motion to dismiss standard or a motion for summary judgment standard.

II. STEP ONE: MADLINGER'S SPEECH IS PROTECTED BY UPEPA

Madlinger's speech was protected by two provisions of the First Amendment and New Jersey Constitution: the right to free speech and the right to petition the government for redress. Some speech also relates to communications about matters under consideration or review in administrative, executive, or other governmental proceedings. N.J.S.A. 2A:53A-50(b)(2). Thus, the court erred in concluding that step one of UPEPA was not satisfied.

A. Madlinger’s Speech Constituted Exercises of His Right to Free Speech and His Right to Petition the Government

The First Amendment and the New Jersey Constitution protect the freedom of speech. U.S. Const. amend. I (“Congress shall make no law ... abridging the freedom of speech.”); N.J. Const. art. I, ¶ 6 (“Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.”). The New Jersey Supreme Court has held that “New Jersey’s constitutional protection of free expression is ‘more sweeping in scope’ than the First Amendment.” State v. Hill, 256 N.J. 266, 281 (2024) (quoting State v. Schmid, 84 N.J. 535, 557 (1980)). See also Green Party v. Hartz Mountain Indus., Inc., 164 N.J. 127, 145 (2000) (describing the New Jersey’s free speech clause as “broader than practically all others in the nation”).

Freedom of speech includes “the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.” Baumgartner v. United States, 322 U.S. 665, 673–74 (1944). As a result, “public figures as well as public officials will be subject to ‘vehement, caustic, and sometimes unpleasantly sharp attacks.’” Hustler Mag. Inc. v. Falwell, 485 U.S. 46, 51 (1988) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

Put simply, the “First Amendment ‘does not embrace the trite wallflower politeness of the cliché that ‘if you can’t say something good about a person you should say nothing at all.’” Ward v. Zelikovsky, 136 N.J. 516, 529 (1994) (quoting Rodney A. Smolla, Law of Defamation, §6.09[2], at 6–37 (1986)). “[N]ame calling, epithets, and abusive language, no matter how vulgar or offensive, are not actionable.” Ibid. (quoting Smolla, §6.12[9], at 6–54).

The First Amendment also guarantees “the right of the people ... to petition the Government for a redress of grievances.” Accord N.J. Const. art. I, ¶ 13 (“The people have the right . . . to petition for redress of grievances.”).⁷ “The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression.” McDonald v. Smith, 472 U.S. 479, 482 (1985). It is “one of the most precious of the liberties safeguarded by the Bill of Rights.” BE & K Const. Co v. NLRB, 536 U.S. 516, 524 (2002) (internal quotation marks omitted).

Among other things, “the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.” Borough of Duryea v. Guarnieri, 564 U.S. 379, 387 (2011). “A petition enjoys constitutional protection whether it is addressed . . .

⁷ Madlinger’s brief primarily refers to petitioning as “whistleblowing activities.”

to a local government, or to a state or national government.” Mirabella v. Villard, 853 F.3d 641, 654 (3d Cir. 2017). Accord Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (“Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.”).

The U.S. Supreme Court

has said that the right to speak and the right to petition are “cognate rights.” Thomas v. Collins, 323 U.S. 516, 530, (1945); see also Wayte v. United States, 470 U.S. 598, 610, n. 11 (1985). “It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances.” Thomas, 323 U.S., at 530. Both speech and petition are integral to the democratic process, although not necessarily in the same way. The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs. Beyond the political sphere, both speech and petition advance personal expression, although the right to petition is generally concerned with expression directed to the government seeking redress of a grievance.

[Duryea, 564 U.S. at 388.]

1. UPEPA Protects Requestors Who Are Sued for Filing OPRA Requests

Although the U.S. Supreme Court has stated, in analyzing whether a citizens-only public records law violates the Privileges and Immunities Clause and the dormant Commerce Clause of the U.S. Constitution, that “there is no constitutional right to obtain all the information provided by [Freedom of Information] laws,” McBurney v. Young, 569 U.S. 221, 232 (2013), other courts have distinguished that right to receive documents from the right to request records and have accordingly held that filing a request is an expressive activity or a petitioning activity that is protected from First Amendment retaliation. See, e.g., DeMartini v. Town of Gulf Stream, 942 F.3d 1277, 1288–89 (11th Cir. 2019) (“[A] citizen's public records requests and lawsuits against the government [challenging denials of those requests] can clearly constitute protected First Amendment activity.”); Handy-Clay v. City of Memphis, 695 F.3d 531, 546 (6th Cir. 2012) (holding plaintiff had engaged in constitutionally protected conduct and established an inference of causation because she was terminated the day after she made records requests with her employer); Moore v. Shelby Cnty., Kentucky, 233 F. Supp. 3d 569, 573 (E.D. Ky. 2017) (filing records requests was protected First Amendment conduct but allegations did not prove retaliation), vacated, 718 Fed. Appx. 315 (6th Cir. 2017).

After all, UPEPA is to be construed broadly and the act of requesting records is a type of petition because it asks the government to perform an action—to release public records.⁸ That, as well as the fact that the New Jersey Constitution is far more protective than the U.S. Constitution, is likely why Governor Murphy assured the public that anyone who is targeted by an agency for filing too many OPRA requests could use UPEPA to seek dismissal.⁹ This Court should give weight to the Governor’s signing statement. See State v. F.E.D., 469 N.J. Super. 45, 63 n.16 (App. Div. 2021) (“[A] Governor's signing statement carries weight because a Governor, in issuing it, exercises his or her role in the legislative process.”), aff'd as modified, 251 N.J. 505 (2022).

Therefore, the trial court should have held that a records requestor who is

⁸ Courts have held that filing records requests is protected by anti-SLAPP laws because it is “newsgathering activity” and “part and parcel” of reporting news. See, e.g., Iloh v. Regents of Univ. of California, 312 Cal. Rptr. 3d 674, 682 (Ct. App. 2023), reh'g denied (Sept. 11, 2023), review denied (Dec. 13, 2023).

⁹ This does not mean a requestor would prevail—that decision takes place in step two. See Uniform Law Commission, Uniform Law and Commentary, § 7, cmt. 2 (“To use [UPEPA], a movant need not prove that the responding party has violated a constitutional right—only that the responding party's suit arises from the movant's constitutionally protected activity.”). If, in step two, an agency proved by clear and convincing evidence that the requestor “sought records with the intent to substantially interrupt the performance of government function[s],” N.J.S.A. 47:1A-5.1(a), the complaint would not be dismissed. But if the agency did not meet its burden, UPEPA would require a dismissal with prejudice and an award of counsel fees to the requestor. As Murphy recognized, the threat of UPEPA sanctions will ensure that agencies do not sue requestors except where they can satisfy the “extraordinarily high standard for such lawsuits.”

sued pursuant to N.J.S.A. 47:1A-5.1 may use UPEPA to move for dismissal.

2. UPEPA Protects Madlinger’s Express Speech, His Filing GRC Complaints, and His Other Petitioning Activities

Even assuming for purposes of argument that filing OPRA requests is not covered by UPEPA, the trial court erred in reviewing only those allegations in the complaint. The complaint also seeks to punish Madlinger for his “snarky,” “accusatory,” or “bullying” emails to the Township, which it labels “offensive” and “uninvited contact.” (Da83). Madlinger’s commentary about the Township’s conduct, no matter how snarky or accusatory, is the type of expressive speech the constitution was designed to protect. Ward, 136 N.J. at 529.

Moreover, it is impossible to read the complaint and not conclude that the Township seems at least as concerned, if not more so, about Madlinger’s complaints about Township officials to other government entities than his OPRA requests. In fact, count I is for “harassment,” which does not even mention Madlinger’s OPRA requests, but instead alleges that his “voluminous and meritless complaints and disorderly behavior has been a repeating and continuing uninvited contact made with the intent to purposefully create alarm, annoyance and emotional distress” and “is intimidating, offensive, hostile and abusive and constitutes the harassment[.]” (Da83-Da84) (emphasis added). Its first demand for judgment is not a limitation on the OPRA requests, but rather

an order “[p]ermanently restraining [Madlinger] from engaging in the further filing of meritless complaints.” (Da84) (emphasis added).¹⁰ Moreover, the bulk of the exhibits to the La Bue certification are attached to demonstrate how Madlinger complained to other authorities about the Township. See Da34; Da44; Da47; Da63; Da67; Da69-Da76. Finally, Point IV of the Township’s brief claims Madlinger’s “use of the [GRC] constitutes malicious use of process.” (Pb26).

The trial court took an all-or-nothing approach, which UPEPA does not allow. Because it erroneously concluded that some of the speech (OPRA requests) alleged in the complaint was not protected speech, it held that UPEPA does not apply at all. But UPEPA expressly applies even to “part of a cause of action.” N.J.S.A. 2A:53A-55(a). See also N.J.S.A. 2A:53A-51 (a party may move to “dismiss the cause of action or part of the cause of action”) (emphasis added); Uniform Public Expression Protection Act, Cmt. 1 to §7 (UPEPA “recognizes that a court can strike or dismiss a part of a cause of action—for example, certain operative facts or theories of liability—and deny the motion as to other parts of the cause of action.”). The court should have reviewed the

¹⁰ This negates the Township’s claim in its Appellate Division opposition brief that the references to those complaints were simply included to “inform the Court about the severity of his behavior, actions and intent.” (Pb22). The complaint specifically sought to punish Madlinger for that speech and petitioning activity and to permanently enjoin him from filing future complaints.

complaint line-by-line to determine if any allegations were protected by UPEPA. Id. at Cmt. 5 to § 2 (“The term ‘cause of action’ refers to a group of operative facts that give rise to one or more bases for recovery in a civil action.”).

3. The Speech Relates to Matters of Public Concern

UPEPA applies to speech and petitioning activity that relates to matters of public concern.

Speech deals with matters of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” Connick v. Myers, 461 U.S. 138, 146 (1983) or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,” San Diego v. Roe, 543 U.S. 77, 83–84 (2004) See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Time, Inc. v. Hill, 385 U.S. 374 (1967).

[Snyder v. Phelps, 562 U.S. 443, 453 (2011).]

Accord Uniform Public Expression Protection Act, Cmt. 9 to §2 (explaining “matter of public concern” also means “public issue” or “public interest”).

Where speech relates to the conduct of public officials or public agencies, it automatically is a matter of public concern. Senna v. Florimont, 196 N.J. 469, 496-97 (2008) (adding that “public health and safety, a highly regulated industry, or allegations of criminal or consumer fraud or a substantial regulatory violation will, by definition, involve a matter of public interest or concern”). See also Kratovil v. City of New Brunswick, 261 N.J. 1, 24 (2025) (police director’s

address was a matter of public concern because it related to allegation that he was an absentee public official); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 576 (2017) (police transparency is a matter of public concern).

Here, Madlinger certified that he often files requests for “payroll logs, legal invoices, and the like . . . to ensure the proper expenditure of public funds[.]” (Da165). Public spending is clearly a matter of public concern—one of OPRA’s core goals is to allow the public “to play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct.” Burnett v. County of Bergen, 198 N.J. 408, 414 (2009). Moreover, Madlinger certified that due to the opioid epidemic—a health crisis that is a matter of public concern—he files requests about police emergency responses. (Da164).

Even the OPRA requests and communications that the Township attaches in support of its OTSC demonstrate that Madlinger was filing OPRA requests or otherwise communicating about matters of public concern, such as police emergency responses to drug overdoses (Da35); the failure of the police department to maintain proper SOPs (Da54); the failure to comply with Daniel’s Law (Da57; Da63); potentially unlawful tax credits (Da49; Da69-Da76); and whether public officials comply with local rental regulations (Da56).

Madlinger is permitted to utilize UPEPA because he has established that at least some of the allegations in the complaint relate to free speech or petitioning

activities involving matters of public concern. The trial court erred by concluding that UPEPA did not apply.

B. The Complaint Relates to Communications About Matters Under Consideration or Review in Executive, Administrative, or Other Governmental Proceedings

UPEPA also applies if any of the allegations relate to a “communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding.” N.J.S.A. 2A:53A-50(b)(2). This provision applies to at least some of the allegations in the complaint. For example, the Township attached communications that Madlinger had with DCA staff regarding his complaint about what he believed were illegal tax credits given by the Township. (Da69-Da76). His complaint was clearly under review or consideration by DCA. The Township also attached numerous communications about complaints Madlinger said he would file with the AG (Da34; Da44; Da63), OCPO (Da47), and the “state corruption unit” (Da63). Thus, at a minimum some of the complaint fell within N.J.S.A. 2A:53A-50(b)(2) and the trial court should have held that UPEPA applies.

In sum, the trial court erred by concluding that UPEPA was not applicable. The Township’s complaint seeks to punish Madlinger for his free speech about matters of public concern (i.e., his statements to them that he finds their behavior unlawful and unethical); his right to petition the government (i.e., OPRA

requests and complaints filed with the GRC, AG, etc.); and his communications about those complaints. Although the court did move to UPEPA's step two by finding the complaint failed to state a claim, the court deprived Madlinger of UPEPA's core protections (e.g., a dismissal with prejudice and fee-shifting) by finding step one was not satisfied.

III. STEP TWO: THE COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND THUS DISMISSAL WITH PREJUDICE WAS MANDATORY

Amici adopt the arguments of Madlinger as to why the complaint failed to state a claim upon which relief can be granted. In short, as to count I, New Jersey does not recognize a civil cause of action for damages for harassment, Juzwiak v. Doe, 415 N.J. Super. 442, 444 (App. Div. 2010). As to count II, malicious use of process is a highly disfavored cause of action because it interferes with the right to petition the government for redress and the Township did not any "special grievance" that "consisted of interference with one's liberty or property,"¹¹ Baglini v. Lauletta, 338 N.J. Super. 282, 301 (App. Div. 2001).

Amici add the following: Although the court's ultimate holding that the complaint failed to state a claim upon which relief could be granted was correct,

¹¹ Ironically, malicious use of process claims often have been brought in response to SLAPP suits. Prior to UPEPA, the claim was the only method to "SLAPP back" after successfully defeating a meritless lawsuit that infringed upon free speech. See, e.g., LoBiondo v. Schwartz, 199 N.J. 62, 72–73 (2009).

the court erred by 1) allowing the Township to file a motion to amend after Madlinger had filed its UPEPA motion; 2) dismissing the complaint without prejudice; 3) allowing the Township the opportunity to amend after the dismissal; and 4) allowing the Township to voluntarily dismiss its complaint without prejudice after these rulings to try to evade liability for attorney's fees.

UPEPA, and other similar anti-SLAPP laws, are robust laws meant to protect free speech and petitioning activity. As such, once a UPEPA motion is filed, a plaintiff is essentially "locked in" to the complaint and the consequences for having filed it. A plaintiff cannot, for example, evade a UPEPA dismissal and liability for attorney's fees by voluntarily dismissing its cause of action (or part of a cause of action) after the UPEPA motion is filed. See N.J.S.A. 2A:53A-55(b) ("A voluntarily dismissal without prejudice of a responding party's cause of action, or part of a cause of action, that is the subject of an [OTSC] under [UPEPA] does not affect the moving party's right to obtain a ruling on the [OTSC] and seek costs, attorney's fees, and expenses[.]"); N.J.S.A. 2A:53A-55(c) ("A voluntary dismissal with prejudice of a responding party's cause of action, or part of a cause of action, that is the subject of an [OTSC] under [UPEPA] establishes for purposes of [UPEPA's fee-shifting provision] that the moving party prevailed on the motion."). See also Satz v. Starr, 282 N.J. Super. 55, 65 (App. Div. 2025) (plaintiff's voluntarily dismissal after the UPEPA

motion was filed did not extinguish defendant's right to obtain a ruling on its UPEPA motion and its right to fees).

Similarly, once a UPEPA motion is filed, a stay is presumptive, and a plaintiff may not amend the complaint to fix its deficiencies and evade a UPEPA dismissal. See, e.g., Vannah v. Law Office of Daniel S. Simon, 506 P.3d 1073 (Nev. 2022) (“[T]he district court erred when it permitted respondents to file an amended complaint while the appellants’ anti-SLAPP special motions to dismiss were pending and then relied on the amended complaint to deny the motions.”); Salma v. Capon, 74 Cal. Rptr. 3d 873, 888-89 (Ct. App. 2008) (holding that a plaintiff cannot amend a complaint after an anti-SLAPP motion has been filed).

Finally, UPEPA makes it clear that when a court performs its step two analysis and decides that the complaint should be dismissed, that dismissal “shall” be “with prejudice.” N.J.S.A. 2A:53A-55(a). Thus, courts have held that “[t]here is no such thing as granting an anti-SLAPP motion with leave to amend.” Dickinson v. Cosby, 225 Cal. Rptr. 3d 430, 450 (Ct. App. 2017).

These procedures may sound harsh, but they are designed to deter lawsuits that chill speech. A person should think twice before filing a suit that punishes speech, and they should ensure that the complaint can survive the standards of a motion to dismiss or motion for summary judgment. Otherwise, the complaint must be dismissed without any ability to cure the legal deficiencies, and the

plaintiff must pay counsel fees and costs. These provisions protect not only the person who was sued, but the public at large. See LoBiondo v. Schwartz, 323 N.J. Super. 391, 424 (App. Div.) (“[I]t is not only the defendant in a SLAPP suit who suffers. The common weal is obviously impaired as well since the consequence of a SLAPP suit is not only to silence the defendant but to deter others who might speak out as well.”), certif. denied, 162 N.J. 488 (1999).

Therefore, as soon as Madlinger filed his UPEPA motion on July 2, 2025, the Township was prohibited from amending its complaint and the UPEPA motion was to be decided based on the allegations in the June 11, 2024 complaint. That complaint was legally deficient not only for the reasons stated in Madlinger’s brief, but also because no cause of action existed prior to September 3, 2025 (the effective date of L. 2024, c. 16) for a town to sue a records requestor for filing too many OPRA requests.¹² See Matter of New

¹² The OPRA amendment was not retroactive, as it expressly said, “This act shall take effect 90 days following the date of enactment.” L. 2024, c. 16, § 12. This deliberate choice by the Legislature is “akin to a legislative flare, signaling to the judiciary that prospective application is intended.” State v. J.V., 242 N.J. 432, 445 (2020) (quoting Olkusz v. Brown, 401 N.J. Super. 496, 502 (App. Div. 2008)). The Supreme Court has repeatedly taken the Legislature’s postponement of a statute’s effective date as “clear evidence that the Legislature intended the statute to apply prospectively only.” Id. at 444. Moreover, retroactive application would result in manifest injustice because it would allow people to be sued for conduct that was not yet actionable. In re D.C., 146 N.J. 31, 58 (1996). Prospective application, as the Legislature intended, put requestors on

Jersey Firemen's Ass'n Obligation to Provide Relief Applications Under Open Pub. Records Act, 230 N.J. 258, 284 (2017) (Albin, J., concurring) (explaining that the Court’s decision does not allow an agency to “haul a records requestor before a Superior Court judge on an order to show cause to justify why he requested a document”); Twp. of Teaneck v. Jones, Docket No. A-0840-17T3 (App. Div. July 12, 2019) (agency could not obtain a protective order against a requestor who was “abusing” OPRA by filing hundreds of requests).

After concluding the complaint failed to state a claim upon which relief can be granted, the trial court made additional errors by dismissing the complaint without prejudice and by giving the Township the ability to amend its complaint. UPEPA required a dismissal with prejudice. N.J.S.A. 2A:53A-55(a). These errors defeated the entire purpose of UPEPA, essentially agreeing with Madlinger that the complaint was legally insufficient but giving him none of the benefits of UPEPA (i.e., dismissal with prejudice and fee-shifting).

IV. THE TRIAL COURT ERRED IN DENYING MADLINGER COUNSEL FEES AND COSTS

The trial court held that Madlinger was not entitled to attorney’s fees because it found that UPEPA did not apply. But it also concluded that fee-

notice that they could be sued and allowed them to adjust their behavior accordingly, as Madlinger evidently has done.

shifting was also not available because the complaint was not “frivolous.” The court stated that “[A]lthough it’s not specifically a requirement of the anti-SLAPP statute, I think that in the background is a requirement that the application be made solely or primarily to punish for a frivolous – a frivolous complaint made to punish or intimidate.” (2T22). Because the court believed the complaint was “not intended to intimidate or punish” Madlinger, it denied Madlinger’s request for a fee award. Ibid.

UPEPA expressly provides that if a court determines that UPEPA applies and dismisses any cause of action, or part of a cause of action, then the court “shall award court costs, reasonable attorney’s fees, and reasonable litigation expenses related to the [OTSC].” N.J.S.A. 2A:53A-58 (emphasis added). By inserting its own unwritten requirements into the statute, the court ignored UPEPA’s plain language and imposed the wrong standard. In Satz, this Court recognized that UPEPA’s fee shifting is mandatory where a court decides that UPEPA applies and that a cause of action, in whole or part, should be dismissed. 482 N.J. Super. at 60 (citing N.J.S.A. 2A:53A-55(a) and -58). The panel held that frivolity matters only where the responding party (here, the Township) prevails and the court finds that UPEPA motion “was frivolous or filed solely with intent to delay the proceeding.” Ibid. (quoting N.J.S.A. 2A:53A-58(2)).

CONCLUSION

The Court should reverse. The Township was annoyed by Madlinger's OPRA requests, his "accusatory" and "offensive" emails, and his complaints to other agencies. It sought to restrain him from further petitioning the government for redress and to limit his use of OPRA. The lawsuit failed to state a claim because, among many other reasons, no cause of action to sue a records requestor existed when the complaint was filed. The trial court should have dismissed the complaint with prejudice and awarded Madlinger counsel fees.

Respectfully Submitted,

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