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CHARLES KRATOVIL Plaintiff, v. CITY OF NEW BRUNSWICK, and ANTHONY A. CAPUTO, in his capacity as Director of Police.	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY** Docket No.:

BRIEF IN SUPPORT OF PLAINTIFF'S ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS

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PRELIMINARY STATEMENT

The New Jersey Supreme Court has adopted a principle articulated at least seven times by the United States Supreme Court: if the media lawfully obtains truthful information about a matter of public significance, then despite an existing statute, "state officials may not constitutionally punish publication of that information, absent a need of the highest order[.]" The state laws challenged in the U.S. Supreme Court cases each had important statutory purposes: they were meant to protect the names of rape victims or juvenile offenders, classified national security information, wiretapped conversations, or information about judicial discipline. Yet, in what became known as "the *Daily Mail*[1] principle," the Supreme Court ruled that free speech and free press principles demand a strict scrutiny test and that each of these statutes failed to show a "need of the highest order."

New Jersey's version of Daniel's Law—which allows for redaction of certain personal information such as home addresses from public records—is certainly another important statute, designed to protect public servants such as judges and law enforcement from the potential of bodily harm from criminal elements. But as applied to journalists who would report on an issue related to

[1] *Smith v. Daily Mail Publ'g Co.,* 443 U.S. 97 (1979).

the actual residency of a protected official, the statute similarly punishes publication of lawfully obtained, truthful information about an important public issue and fails to show a need of the highest order.

In this Order to Show Cause, Plaintiff Charles Kratovil, the editor of a local online publication called *New Brunswick Today*, seeks to have this Court simply apply the State Constitution to the facts in this matter, which are on all fours with more than one of these seven U.S. Supreme Court cases, recognized by the New Jersey Supreme Court.

Mr. Kratovil learned in the course of his reporting that Anthony A. Caputo, New Brunswick's Director of Police and member of the City's Parking Authority, resides in and registered to vote in a municipality that is more than a two-hour drive from his employer. He obtained the information legally through an Open Public Records Act ("OPRA") request to the Cape May Board of Elections.

While attempting to raise questions about this issue with the City Council at a public meeting, he mentioned the street name (but not the house number) of Director Caputo's residence in Cape May; he simultaneously provided the City Council with copies of Director Caputo's Voter Profile that he received through the OPRA request, which did contain the house number.

Mr. Kratovil was then served with a Cease-and-Desist Notice pursuant to Daniel's Law by Director Caputo on official city letterhead, which essentially warned that that Mr. Kratovil faced criminal and civil penalties if he repeated the disclosure of such information and did not remove the information from the Internet or wherever it had been made available.

What Mr. Kratovil did—and what he hopes to do by writing a news story about what he found—is at the core of what is protected by Article I, Paragraph 6 of the New Jersey Constitution: speech about the activities of local government. As the U.S. Supreme Court said in *Daily Mail*: "state action to punish the publication of truthful information seldom can satisfy constitutional standards." By threatening criminal and civil sanctions for reporting on truthful, legally obtained information, the City and its Director of Police have chilled, and are chilling, Mr. Kratovil's free speech and free press rights and unconstitutionally violated the *Daily Mail* principle protected by the New Jersey Constitution. Thus, this Court should issue appropriate restraints on enforcement of this statute as applied.

FACTUAL ALLEGATIONS

A. New Jersey's version of Daniel's Law.

Daniel's Law was enacted by the New Jersey Legislature and signed by Governor Philip Murphy in November 2020 in response to the tragic murder of Daniel Anderl, the son of U.S. District Court Judge Esther Salas and her husband, Mark Anderl. In that case, law enforcement identified the primary suspect as an aggrieved attorney who had been litigating a case before Judge Salas who later killed himself.[2]

The law—with criminal and civil provisions—prohibits disclosure of the residential addresses of certain persons covered by the law ("Covered Persons") on websites controlled by state, county, and local government agencies. Covered Persons include former, active, and retired judicial officers, prosecutors, and members of law enforcement and their immediate family members residing in the same household. The state created a website to provide details of the law:

[2] President Biden signed into law the similarly-intentioned Daniel Anderl Judicial Security and Privacy Act on December 23, 2022, which aims to improve the safety and security of federal judges and their immediate family members by requiring government agencies, persons, businesses, and associations to remove the personal information of judges from public view within 72 hours of receiving a request for removal. It also authorizes grants to state and local governments to create programs that prevent the release of personal information of judicial officers.

> With respect to Internet postings other than those on New Jersey state, county, and municipal government websites, an authorized person, as defined by law, seeking to prohibit the disclosure of the home address or unpublished home telephone number of any covered person shall provide written notice to the entity or person advising that they are an authorized person and that they are requesting that the entity or person cease the disclosure of the information and remove the protected information from the Internet or where it is otherwise made available. See, N.J.S.A. 2C:20-31.1(c) and N.J.S.A. 56:8-166.1(a)(2).
>
> [N.J. Dep't of Cmty. Affs., *Daniel's Law*, https://danielslaw.nj.gov/Default.aspx?ReturnUrl=%2f (last visited July 6, 2023)]

But then the law goes much further, specifically providing that upon notice, a person shall not disclose the home address or unpublished telephone number of a covered person. N.J.S.A. 56:8-166.1(a)(1). The law explains how a Covered Person provides notice. N.J.S.A. 56:8-166.1(a)(2). It then provides for significant civil damages including $1,000 per violation, punitive damages, and attorney's fees. N.J.S.A. 56:8-166.1(c). Although the law lists some exceptions to the general prohibition on disclosure of voter records, namely that certain persons and entities may disclose the information consistent with the purposes for which they received it, but only for those purposes, it is not at all clear how that would apply to the news media. N.J.S.A. 56:8-166.1(e) (*but see* N.J.S.A. 56:8-166.1(f) (not requiring media to remove *previously* printed newspapers containing the home address of a Covered Person)). In addition to

the significant civil liability, the law sets forth almost identical statutory language making a violation punishable as a criminal sanction: a "reckless violation of [Daniel's Law] is a crime of the fourth degree. A purposeful violation of [the law] is a crime of the third degree." N.J.S.A. 2C:20-31.1(d).

B. The Daniel's Law warning to Plaintiff

Charles Kratovil ("Kratovil" or "Plaintiff") is a journalist, activist, and editor of *New Brunswick Today* ("NBT"), an independent, print and digital newspaper founded in 2011 with the mission to improve the level of civic discourse in the City of New Brunswick by accurately covering local government and demanding transparency and accountability from those in authority. Verified Complaint ("Compl.") ¶7. Since its inception, NBT has received several prestigious journalism awards from organizations including the New Jersey Society of Professional Journalists and the New Jersey Press Association, and numerous other acknowledgments of its investigative work and coverage of major public issues, including public safety and corruption. *Id.*

NBT has written extensively on the city police department and its civilian Police Director, Defendant Anthony Caputo ("Director Caputo" or "Vice Chair Caputo"). Compl. ¶10. Director Caputo was a city policeman and then police director before he retired in 2010 with a $115,000 annual pension.

Id. Sixteen months later, he was rehired at a salary of $120,000 to be Police Director again (in addition to receiving his pension). *Id.*

Since being rehired, Director Caputo has, upon information and belief, not attended a single City Council meeting, and remains the only city department head who does not routinely attend at least some of the Council's public meetings. Compl. ¶10. Director Caputo also does not typically host or attend community meetings, town halls, press conferences, or other public events. *Id.* During the course of his reporting, Plaintiff learned that Director Caputo actually lived in Cape May, New Jersey, more than a two-hour drive from New Brunswick. *Id.*

Since at least 2010, Director Caputo served as a mayor-appointed board member of the New Brunswick Parking Authority ("NBPA") Board of Commissioners, an autonomous local government agency with significant political power. Compl. ¶11. The NBPA is among the state's largest municipal parking authorities, and Director Caputo is currently the Vice Chair of the NBPA's Board. *Id.* Although the NBPA Board has consistently met in-person, even throughout the COVID-19 pandemic, Vice Chair Caputo has not attended any board meetings in-person since August 4, 2021. *Id.* When he does participate, it is only via telephone. *Id.* He is the only board member who does

not make regular appearances at meetings, and he is the only member who does not live in New Brunswick. *Id.*

NBT's coverage of the city government has drawn the enmity of many New Brunswick officials, including Director Caputo, toward NBT and Mr. Kratovil over the years. Compl. ¶12. Under Director Caputo's leadership, the NBPD has lacked transparency and violated public disclosure laws. *Id.* On several occasions, Plaintiff has successfully brought affirmative litigation against the city government related to its lack of compliance with OPRA, N.J.S.A. 47: 1A-1, *et seq.*, and these cases often involved police matters. *Id.*

Between 2013 and 2017, Director Caputo acquired at least two properties in Cape May City, at a combined cost of $1.2 million. Compl. ¶13. According to his financial disclosure statements, he used at least one of the properties to produce significant rental income each year since 2014. *Id.* In January 2021, Caputo promoted Joseph "JT" Miller ("Deputy Director Miller") to the rank of Deputy Director. Compl. ¶14. That same month, Deputy Director Miller purchased a Cape May property for $695,000. *Id.* The property is located in the same small condominium complex as one of Director Caputo's homes. *Id.*

In the course of researching this news story on Director Caputo's residency in March 2023, Mr. Kratovil filed an OPRA request with the Cape

May County Board of Elections Records Custodian seeking Director Caputo's Voter Profile ("the Voter Profile"). Compl. ¶15. On March 20, 2023, he received a heavily redacted version of the Voter Profile after the records custodian claimed in an email that full disclosure would "interfere with his [Director Caputo's] reasonable expectation of privacy," under *Burnett v. County of Bergen*, 198 N.J. 408 (2009). *Id.*

In a subsequent email exchange with the Records Custodian, Mr. Kratovil pointed out that the New Jersey Supreme Court's decision in *Brennan v. Bergen County Prosecutor's Office*, 233 N.J. 330 (2018) overruled *Burnett*, and the Court determined there was no expectation of privacy for home addresses. Compl. ¶16. Finally, on April 17, 2023, he received a far less redacted version of the Voter Profile, with only Director Caputo's date of birth redacted. *Id.*

The lawfully obtained Voter Profile reveals that as of November 30, 2022, Director Caputo had changed his registered voting address to an address in Cape May, N.J. after having voted regularly in New Brunswick since at least 1998. Compl. ¶17.

On March 14, 2023, Plaintiff asked Director Caputo via email if he still lived in New Brunswick and Deputy Director Miller responded on his behalf:

"The public release of a law enforcement officer's place of residence is protected under Daniel's Law." Compl. ¶18.

On March 22, 2023, Plaintiff attended the NBPA Board of Commissioners meeting and asked Vice Chair Caputo (who participated via telephone) if he still resided in New Brunswick. Compl. ¶19. Vice Chair Caputo responded: "Thank you for your comment." *Id.* Plaintiff then shared with the Board the heavily redacted Voter Profile he had lawfully obtained at that point, stated that it showed Director Caputo had registered to vote in a different county, and asked whether there was a residency requirement for NBPA Commissioners. *Id.* The commissioners responded collectively that they could not answer the question, but they promised a response in the future. *Id.*

Plaintiff has found that it is virtually impossible for him to get direct, on-the-record responses from City Council members outside of their meetings, so he asks many of his most important questions during the public portion of the meetings. Compl. ¶20.

On April 5, 2023, Plaintiff attended the New Brunswick City Council regular public meeting and, during the public participation portion, he asked whether Anthony Caputo was still a New Brunswick resident. Compl. ¶21. One member of the Council said she believed Director Caputo was still a resident, while another said he believed Director Caputo had moved out of town. *Id*.

The Council President said she would look into the question and report back. *Id.* Plaintiff also asked if there was a residency requirement to serve on the NBPA Board, whether Director Caputo was a full-time employee, and how many hours he was "putting in from Cape May." *Id.* No answer was received at or after the meeting. *Id.*

On May 3, 2023, Plaintiff again attended the New Brunswick City Council meeting, where he spoke briefly during the public portion of the meeting about Director Caputo's official change of residence, the fact that the residence was two hours or more from his duties in New Brunswick, and that Director Caputo continued to serve on the NBPA Board as a non-resident. Compl. ¶22.

During his speaking time at that May 3 meeting, Plaintiff publicly stated the street where Director Caputo was registered to vote, but not the house number. Compl. ¶23. Upon information and belief, there are more than 60 addresses on the street that he mentioned and the house numbers run to three digits. *Id.* Plaintiff did, however, provide Council members with copies of the less redacted Voter Profile he received through the later OPRA request, which contained the exact street address. *Id.* He also made a digital video recording of the meeting. *Id.*

The issue of the residency of a Police Director and appointed member of the Parking Authority, who has largely absented himself from the City of New Brunswick, is indisputably a matter of public concern and an issue related to news coverage of government, which is a central tenant of the First Amendment.

On May 15, 2023, Plaintiff received a letter via both certified mail and United States Mail on the letterhead of the New Brunswick Police Department dated May 4, 2023, which purportedly constituted "NOTICE pursuant to N.J.S.A. 2C:20-31.1 & N.J.S.A. 56:8-166.1[.]" Compl. ¶25. Two days later he received the same letter from Deputy Director Miller via email. The letter read:

> On Wednesday, May 3, 2023, you published and/or announced my home address at a public meeting of the New Brunswick City Council. Kindly accept this letter a written notice as required by the above referenced statute.
>
> Pursuant to **N.J.S.A. 2C:20-31.1** and **N.J.S.A. 56:8-166.1,** and as an authorized and otherwise covered person whose home address and unpublished home telephone number are not subject to disclosure, I do hereby request that you cease the disclosure of such information and remove the protected information from the internet or where otherwise made available.
>
> I trust you will be guided accordingly.

As noted above, both statutes cited in the letter require the Cease-and-Desist Notice, after which a violation would be subject to criminal (a third- or fourth-degree crime) and civil penalties. Compl. ¶27. Plaintiff continued to

prepare to write a story about the residency issue. Compl. ¶29. He made an OPRA request of the City's Records Custodian, seeking the unedited and unredacted video recording of the May 3, 2023, City Council meeting. *Id.* He also asked during the public portion of a subsequent City Council meeting why the City's video still had not been posted to the internet in a timely fashion. *Id.* The City's public information officer told Plaintiff that "there was some content . . . that required some redaction." *Id.*

On May 26, 2023, the Records Custodian provided the following OPRA response to Plaintiff, containing a Vimeo link:

> Your Opra Request is asking for an unedited and completed video footage of the May 3, 2023 Council meeting. Please click the link below and be advised, the complete video provided is an edited version with an audio redaction. The unedited version contained personal identifying information, such as a home address, of a covered person. The redaction has been made in accordance to Daniel's Law.
>
> https://vimeo.com/cityofnewbrunswick/may3?share=copy
>
> [Compl. ¶30.]

The video shows that during the public portion of the May 3, 2023, meeting, beginning at 1:12:19, Plaintiff asked a series of questions about various issues of public concern in the City for which the City Council has responsibilities. Compl. ¶31. At about the 1:15:59 mark of the video, Plaintiff

began to disclose what he learned about Director Caputo living in Cape May. *Id.* He handed out copies of the Voter Profile to the City Clerk and the video depicts the clerk providing the copies Plaintiff brought with him to the Council. *Id.* Plaintiff continued to discuss the issue for more than a minute until 1:17:23. *Id.*

In the version of the video provided under OPRA, the City unlawfully redacted much of Plaintiff's public participation. This redaction went beyond mere mention of any address: the City redacted any discussion of the Director living outside New Brunswick. In the version of the video provided under OPRA, the portion containing Plaintiff's public participation was improperly redacted, even beyond mention of any address, to redact any *discussion* of the Director living outside New Brunswick. Compl. ¶32. In fact, the recording provided by the city mutes the audio of Plaintiff's entire statement about the residency issue, not simply the second or two where he stated Director Caputo's actual street of residence. *Id.*

The Records Custodian stated that the City made the "redaction" pursuant to Daniel's Law. Compl. ¶33.

ARGUMENT

To be entitled to interim relief pursuant to *R.* 4:52-1, a party must show (a) that the restraint is necessary to prevent irreparable harm, *i.e.*, that the injury suffered cannot be adequately addressed by money damages, which may be inadequate because of the nature of the right affected; (b) that the party seeking the injunction has a likelihood of success on the merits; (c) that the equities favor the party seeking the restraint; and (d) that the restraint does not alter the status quo ante. *Crowe v. De Gioia*, 90 N.J. 126, 132–36 (1982). Plaintiff easily satisfies these requirements.

Whether the City's Police Director and vice chair of a powerful local government board should live so far from New Brunswick is a matter of public concern that Plaintiff has every intention to write and speak about as a journalist. The voting address of the Police Director, and the addresses of other real estate owned by the Director, or of other business ventures or sources of income that he may have, are all integral parts of the news story. Compl. ¶34.

Plaintiff has these materials in his possession and is prepared to write a news story describing the residency issue. The existence of Daniel's Law and the pendency of the Warning Notice act as an unconstitutional prior restraint on freedom of speech and the press and/or unconstitutional application of a state statute.

I. Plaintiff is likely to succeed on the merits of his free speech and free press claim.

A. The *Daily Mail* principle forbids the state from punishing the publication of lawfully obtained information, absent a need of the highest order.

1. First Amendment prohibitions against prior restraint.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." *U.S. Const.* amend. I. The Fourteenth Amendment to the United States Constitution made the First Amendment restriction on governmental interference with free speech applicable to the states. *U.S. Const.* amend. XIV, § 1; *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 516 (1996); *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

Since at least *Near v. Minnesota*, the U.S. Supreme Court has applied the Fourteenth Amendment's due process clause to the First Amendment to protect the press against prior restraint from state action. 283 U.S. 697, 722-23 (1931). Forty years later, in the famed Pentagon Papers case, *New York Times Co. v. United States*, the government obtained injunctions against the *New York Times* and *Washington Post* for publishing parts of a classified study on the history of the Vietnam War that, while having been stolen from a government vendor, were received legally by the two newspapers. 403 U.S. 713, 714

(1971) (plurality). The Supreme Court issued a brief *per curiam* opinion dissolving the injunctions and reaffirming the high bar for justification for such restraints. *Id.* The brief decision (every Justice wrote their own as well) set forth the almost impossibly high bar the government would need to meet to curtail publication of the Pentagon Papers:

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *see also Near v. Minnesota*, 283 U.S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).
>
> [*Id.*]

2. The State Constitution's broader reach.

Article I, Paragraph 6 of the New Jersey Constitution provides: "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." *N.J. Const.* art. I, ¶ 6. In *Hamilton Amusement Center. v. Verniero*, the New Jersey Supreme Court explained that it ordinarily interprets the State Constitution's free speech clause to be no more restrictive than the federal free speech clause. 156 N.J. 254, 264–65 (1998). Two exceptions to this general rule cited by the Court, which are not involved here, are political expressions at privately-owned-and-

operated shopping malls, *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.,* 138 N.J. 326, 366–70 (1994), and defamation, *Sisler v. Gannett Co.,* 104 N.J. 256, 271 (1986).

There are no decisions under the New Jersey Constitution specifically adopting a broader prohibition on prior restraint than the already strict standard adopted under the First Amendment. But in *Sisler*, an early defamation case involving imposition of actual malice on a private individual through operation of the fair comment privilege, the New Jersey Supreme Court described much stronger state constitutional protections in making plain that "[o]ur constitution and common law have traditionally offered scrupulous protection for speech on matters of public concern." 104 N.J. at 271.

> "The entire thrust of Art. I, § 6 is protection of speech." *Maressa v. New Jersey Monthly,* 89 N.J. 176, 192 *cert.* denied, 459 U.S. 907…(1982). This provision, more sweeping in scope than the language of the First Amendment, has supported broader free speech rights than its federal counterpart. *E.g., State v. Schmid,* 84 N.J. 535 (1980), app. dism. *sub nom. Princeton Univ. v. Schmid,* 455 U.S. 100…(1982) (right of free speech on private university campus). Legislative enactments echo the Constitution, evincing a paramount concern for freedom of speech and press. *N.J.S.A.* 2A:84A-21 (Shield Law); *Maressa v. New Jersey Monthly*, …89 N.J. 176 (1982). Thus, our decisions, pronounced in the benevolent light of New Jersey's constitutional commitment to free speech, have stressed the vigor with which New Jersey fosters and nurtures speech on matters of public concern.

[*Id.*]

Thus, while there are no analogous prior restraint cases in New Jersey, the State Constitution should be applied in such a fashion as to foster and nurture free speech on public concern in this matter.

3. The *Daily Mail* principle.

The basic principle that the government may not prevent reporting on matters of public significance, using lawfully obtained material, absent extraordinary need, has been developed and reaffirmed in a series of cases over the last half century.

a) *Cox Broad. Corp. v. Cohn.*

In 1972, Martin Cohn filed an action against media entities for revealing the identity of his 17-year-old daughter during a newscast covering guilty pleas by six youths who were indicted for her rape and murder, in violation of a Georgia law meant to protect the privacy of rape victims. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471–72 (1975). The reporter learned the name of the victim from the indictments available for his inspection in the courtroom, which were public records. *Id.*

After noting the news media's important role in reporting governmental proceedings, the Court weighed the privacy interests of the victim against the First Amendment interests at stake and found it not to be a close contest:

> even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record. The conclusion is compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press. The Georgia cause of action for invasion of privacy through public disclosure of the name of a rape victim imposes sanctions on pure expression—the content of a publication—and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition.
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> [*Id.* at 494–95.]

Further, the Court noted that because the records were public, any attempt to impose sanctions would be unconstitutional:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. *The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business*. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.
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> [*Id.* at 495 (emphasis added).]

Similar to a prior restraint, the law prevented the media from reporting truthful information that it had in its possession. The Court essentially declared the law unconstitutional as applied.

b) *Neb. Press Ass'n v. Stuart.*

In *Nebraska Press Association v. Stuart*, the Court held unconstitutional an order prohibiting the press from publishing certain information they came to learn during an open public hearing, declaring that the order "plainly violated settled principles." 427 U.S. 539, 568 (1976). The Nebraska Supreme Court previously allowed, as modified, an order that precluded the news media from publishing certain details of a high-profile murder case—like the existence of a confession—in order to protect the accused's right to an impartial jury. *Id.* at 545. The United States Supreme Court agreed that the state courts had "acted responsibly, out of a legitimate concern, in an effort to protect the defendant's right to a fair trial." *Id.* at 555. The Court also agreed "that there would be intense and pervasive pre-trial publicity concerning this case" that might impact the defendant's ability to have a fair trial. *Id.* at 562–63. Still, the Court held that the state court was not justified in imposing a restraint on reporting on what had been a hearing open to the public. *Id.* at 568. The Court reaffirmed that "the barriers to prior restraint remain high and the presumption against its use continues intact." *Id.* at 570.

c) *Okla. Publ'g Co. v. Dist. Ct.*

The following year, in *Oklahoma Publishing Company v. District Court*, a newspaper challenged application of a state statute providing for closed juvenile proceedings unless specifically open to the public when the press had been allowed into a hearing without an order and had photographed a juvenile defendant. 430 U.S. 308, 308–09 (1977). The newspaper did not seek to have the statute declared unconstitutional, only to have the Court declare that a trial court's injunction against the press was unconstitutional. *Id.* at 310. The Court agreed, ruling that the state cannot prohibit the publication of widely disseminated information obtained at court proceedings, which were, in fact, open to the public. *Id.* Like *Cox Broadcasting*, the Court said, the name of the party protected by the statute "was placed in the public domain." *Id.* at 311.

d) *Landmark Commc'ns, Inc. v. Virginia.*

In *Landmark Communications, Inc. v. Virginia*, the Court considered a state criminal statute protecting the confidentiality of complaints about a judge's disability or misconduct. 435 U.S. 829, 830 (1978). The *Virginian Pilot* wrote a story about a pending inquiry into a judge's fitness, and a grand jury indicted the newspaper, which was fined $500 plus costs, a conviction that was upheld in the state courts. *Id.* at 831–34. Like the cases before it, the Court found the interests protected by the law insufficient when balanced against the

First Amendment. The Court was especially dismissive of protecting judicial reputations or even administration of judicial discipline outside of the Commission itself:

> We conclude that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom.
>
> [*Id.* at 838.]

e) *Smith v. Daily Mail Publ'g Co.*

West Virginia's statute protecting the anonymity of juvenile offenders required written approval of the court before a juvenile offender's name could be published in a newspaper. In its 1979 *Daily Mail* decision, the U.S. Supreme Court reviewed and reaffirmed each of its previous decisions on the issue in declaring that whether a statute acts as a prior restraint or penal sanction, "it must nevertheless demonstrate that its punitive action was necessary to further the state interests asserted." 443 U.S. at 102. And while the Court refused to declare a categorial approach to this rule, it was no less definite about how the statute could not be enforced in view of the First Amendment considerations:

> None of these opinions directly controls this case; however, all suggest strongly that if a newspaper

> lawfully obtains truthful information about a matter of public significance[,] then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order. These cases involved situations where the government itself provided or made possible press access to the information. That factor is not controlling. Here respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant.
>
> [*Id.* at 103.]

In addition, while the Court said that the reasons for protecting the anonymity of juvenile defendants was important, there was no evidence to demonstrate that the imposition of criminal penalties was necessary. *Id.* at 105. The Court also pointed out that while the statute applied to newspapers, it was underinclusive because it did not apply to other forms of media and therefore did not accomplish its stated purpose. *Id.* at 104–05.

f) *The Fla. Star v. B.J.F.*

Ten years later, in *The Florida Star v. B.J.F.*, the Court was again faced with a statute making it unlawful to "'print, publish or broadcast . . . in any instrument of mass communication'" the name of the victim of a sexual offense. 491 U.S. 524 (1989). A Florida newspaper, *The Florida Star,* copied the name from a police report subsequently included in a police blotter column. *Id.* at 527. Ironically, the release was not only against police

regulations but also against the newspaper's own internal policy, neither of which affected the Court's determination. *Id.* at 528.

Again, there was no dispute the newspaper had *lawfully* obtained the information and that the story as a whole was a matter of "paramount public import[,]" and the Court concluded once more that "[i]mposing liability on the Star does not serve 'a need to further a state interest of the highest order.'" *Id.* at 525, 537.

The Court explained that because "government retains ample means of safeguarding significant interests upon which publication may impinge, including protecting a rape victim's anonymity, . . . [w]here information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." *Id.* at 534.

Secondly, the Court said that punishing the press for its dissemination of information which is already publicly available "is relatively unlikely to advance the interests in the service of which the State seeks to act. It is not, of course, always the case that information lawfully acquired by the press is known, or accessible, to others." *Id.* at 535. "But where the government has made certain information publicly available," the Court said, "it is highly anomalous to sanction persons other than the source of its release." *Id.*

Third, the Court explained that allowing the media to be censored in this fashion would result in "timidity and self-censorship." *Id.* (quoting *Cox Broad.*, 420 U.S. at 496).

Florida authorities argued to the Supreme Court that among the most important reasons for the statute were the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure, all of which the Court acknowledged as "highly significant interests[.]" *Id.* at 537. However, for several reasons, the Court determined that those reasons were not of the highest order.

For example, the government failed to police itself in disseminating information. Thus "it is clear under *Cox Broadcasting, Oklahoma Publishing,* and *Landmark Communications* that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity." *Id.* at 538. Once the government places information in the public domain, "reliance must rest upon the judgment of those who decide what to publish or broadcast," *Id.* (citing *Cox Broad.*, 420 U.S. at 496).

In addition, the *Florida Star* Court, just as in the *Daily Mail* case, cited

the underinclusiveness of the Florida statute. Although that statute prohibited the publication of identifying information only if this information appears in an "instrument of mass communication," a term the statute does not define, it left open the opportunity for those who would "maliciously spreads word of the identity of a rape victim . . . despite the fact that the communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers." *Id.* at 540.

g) *Bartnicki v. Vopper.*

The final case in this series came 12 years later in *Bartnicki v. Vopper*, which involved a radio host broadcasting a recording of an intercepted telephone conversation between a teachers' union president and a union negotiator, who were involved in contentious negotiations with a school board in Pennsylvania. 532 U.S. 514, 518–19 (2001). The recording, which was intercepted by unknown persons, and brought by a union opponent to be played on a local radio show, was clearly obtained in violation of the federal wiretapping act for the interceptor, the intermediary, and those who played the recording. *Id.* at 521. The Court accepted the fact that the recordings were made intentionally and both the radio host and the person who provided the tape "had reason to know" it was unlawful to do so. *Id.* at 524–25. The only

question before the Court was whether the application of the wiretap laws in such circumstances violated the First Amendment. *Id.* at 521.

The Court noted that (1) the "respondents played no part in the illegal interception[,]" found out about the interception only after it occurred, and never learned the identity of the interceptor; (2) "access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else[;]" and (3) "the subject matter of the conversation was a matter of public concern." *Id.* at 525.

The Court acknowledged the government's arguments that the interests served by the statute—removing an incentive for parties to intercept private conversations, minimizing the harm to persons whose conversations have been illegally intercepted, and even the need to avoid chilling expression of those who fear their conversations may be intercepted—were adequate to justify the law. *Id*. at 529, 533. But the Court quickly held that "it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends." *Id.* at 529–30.

"Although there are some rare occasions in which a law suppressing one party's speech may be justified by an interest in deterring criminal conduct by another . . ." the Court held, "this is not such a case." *Id.* at 530.

> In other words, the outcome of these cases does not turn on whether [the wiretapping statute] may be enforced with respect to most violations of the statute without offending the First Amendment. The enforcement of that provision in these cases, however, implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern.
>
> [*Id.* at 533–34.]

Importantly, the Supreme Court also applied the *Daily Mail* protections to a non-journalist, Jack Yocum, the head of a local taxpayer organization who testified he found the tape recording of the call in his mailbox, recognized the voices, played it for some members of the school board, and later delivered it to the radio host. *Id.* at 519.

h) The New Jersey Supreme Court's recognition of the *Daily Mail* Principle.

In *G.D. v. Kenny*, the New Jersey Supreme Court tackled a similar issue. 205 N.J. 275 (2011). There, the plaintiff sought damages for a political campaign's revelation of his expunged criminal record. *Id.* at 282. The expungement statute prohibited disclosure of expunged records with some exceptions. *Id.* at 294–96. Plaintiff argued that because his criminal record had been expunged, his conviction—as a matter of law—was deemed not to have occurred and a campaign flyer's description of the conviction was a violation of his privacy rights. *Id.* at 290. The Court, in affirming dismissal, went right

to the heart of the high standard required to punish publication of truthful information:

> The publication of truthful information lawfully obtained is protected from criminal prosecution by the First Amendment except in the rarest of circumstances. *Florida Star v. B.J.F.,*; *Near v. Minnesota,* ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."). In *Smith v. Daily Mail Publishing Co.,* two newspapers published the names of juvenile offenders in violation of a state statute that prohibited the publication of such information. The United States Supreme Court held that, consistent with the First Amendment, a state could not "punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper." ("We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order. . . .").
>
> [*Id*. at 299–300 (citations omitted).]

This passage reaffirms our State Supreme Court's commitment to the *Daily Mail* principle.

B. The *Daily Mail* principle applies to Daniel's Law under the New Jersey Constitution.

Because Plaintiff obtained the address information lawfully and it is undisputedly a matter of public concern, Daniel's Law cannot be applied as a sanction to him or any other journalist whether they receive the address information via public access or through traditional reporting. None of the

Supreme Court cases cited above declared any of the sanctioning statutes unconstitutional, but every one of them found their application a violation of the First Amendment because they sanctioned an individual for repeating or reporting information of public concern that the statute was created to protect. So too here.

1. In some instances, homes addresses are matters of public concern.

News reporters should not be threatened by the government with prosecution or civil liability if they write a news story or share information about something questionable going on with a public servant's address. There are countless instances where a public servant's home address is a matter of significant public concern. Here, the government employee lives so far out of town that a daily appearance at work is unlikely, but the street address of a Covered Person might be newsworthy for other reasons too: a suspicious real estate transaction;[3] noncompliance with a residency requirement;[4] illegally

[3] *See, e.g.*, Abbie VanSickle, *Justice Thomas Failed to Report Real Estate Deal With Texas Billionaire*, N.Y. Times (Apr. 13, 2023), https://www.nytimes.com/2023/04/13/us/politics/clarence-thomas-harlan-crow-real-estate.html (describing questionable land deal engaged in by United States Supreme Court Justice and a billionaire).

[4] *See, e.g.*, Mikenzie Frost, *Residency questions continue for BPD's Acting Commissioner Worley*, Fox45News (June 13, 2023), https://foxbaltimore.com/news/local/residency-questions-continue-for-bpds-acting-commissioner-worley (reporting on Baltimore police commissioner who lives outside city in violation of city charter).

voting in the wrong jurisdiction;[5] or other issues. This is not to say that news media could not use their own discretion in attempting to disguise actual street numbers or figure out other ways to tell the story, but that would be a voluntary act rather than a legal requirement, just as most news organizations agree not to use youthful defendants' names or the names of rape victims.

Daniel's Law already makes it even more difficult for journalists to ascertain home addresses for public servants, and, as applied in this circumstance, at least, it creates a chilling fear of criminal and civil prosecution. Having received written Notice required under Daniel's Law, Plaintiff has reasonable grounds to fear that he would be a target for an enforcement action that would seek to criminalize his investigative journalism work. Because of the potential for criminal and civil penalties, Plaintiff seeks declaratory relief from this Court asking no more than to recognize the free speech and free press rights set forth in the above cases.

[5] *See, e.g.*, Stephen Koranda, *Kansas Rep. Steve Watkins Charged With Felonies Over Voter Registration At UPS Store*, NPR, (July 14, 2020), https://www.npr.org/2020/07/14/891242761/kansas-rep-steve-watkins-charged-with-felonies-over-voter-registration-at-ups-st (describing criminal charges flowing from member of U.S. House of Representatives registering to vote in a district where he did not live).

2. The *Daily Mail* principle applies whether information is obtained through a public record or through traditional reporting techniques.

In this case, Plaintiff obtained Director Caputo's address through an OPRA request, which placed it in the public domain. But even if Plaintiff had obtained it through other reporting channels, the analysis would remain the same, as Director Caputo's address is likely known to many on his street or his social circles, which also places it into the public domain. "A free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Daily Mail*, 443 U.S. at 104.

Daniel's Law provides that voter records should be made available only as redacted *except* for use in political campaigns – by the chairpersons of county or municipal committees, challengers, candidates, and vendors working for Boards of Election. N.J.S.A. 47:1B-3. Thus, if Director Caputo had timely provided notice to Cape May that he was a Covered Person, the Cape May Records Custodian arguably provided more information than permitted under Daniel's Law. But this case does not concern what information should be disclosed by government, rather what journalists may do with information they obtain through lawful means. As the U.S. Supreme Court explained in *The Florida Star v. B.J.F*, the fact that a government agency failed to redact or

withhold information does not make a journalist's "ensuing receipt of this information unlawful." 491 U.S. at 536.

Indeed, when journalists obtain information through ordinary sources, they may generally publish that information, even when their source illegally obtained the information. *Bartnicki*, 532 U.S. at 535 ("a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.").

3. Daniel's Law is not narrowly tailored to achieve its laudable goals.

In *Daily Mail*, the United States Supreme Court reminded government entities that even where important interests (there, the identity of juvenile defendants) are at stake, the government also must demonstrate that the associated prohibitions and penalties are necessary to achieve that interest. 443 U.S. at 105–06. In that case, the statute applied to newspapers but not to other forms of media. *Id.* at 104–05. The underinclusiveness of that statute undermined any assertion of narrow tailoring. *Id.*

Similarly, Daniel's Law at N.J.S.A. 47:1B-3 provides that non-redacted voter records can be made available only for use in political campaigns—by the chairpersons of county or municipal committees, challengers, candidates, and vendors working for Boards of Election. This widespread, yet calculated dissemination of the same information to established political parties,

undermines any claim of narrow tailoring and undermines the constitutionality of the prohibition, as applied to journalists like Plaintiff. *See, e.g.*, *Donrey Media Grp. v. Ikeda*, 959 F. Supp. 1280, 1286 (D. Haw. 1996) (an individual who is a reporter as well as a member of a certain political party could very well gain access to the voter registration records because of her status as a member of a political party, eliminating any legitimate state interest in voter privacy served by the statute).

In addition to the underinclusiveness of Daniel's Law, it also appears to be overinclusive in an unrealistic manner when it states "a person, business, or association shall not disclose or re-disclose on the Internet or otherwise make available, the home address or unpublished home telephone number of any covered person…." N.J.S.A. 56:8-166.1(a). The law, in a vague and ambiguous way, appears to bind every person to silence, not just journalists. As written, a person could not tell a story about an annoying neighbor (if the neighbor were a Covered Person) nor could a person give directions to a mutual friend that referenced a Covered Person's home (*e.g.*, "to get to the park, pass Bob's house, go a block, and turn right"). Moreover, the statute is vague in that it does not explain whether it refers to the exact street address (123 Main Street), the street (Main Street), the town, or the county within which the Covered Person resides.

4. Although Daniel's Law serves a laudable interest, it does not amount to a need of the highest order.

None of the cases that have established or reaffirmed the *Daily Mail* principle adopted a categorical rule. But all of the cases have made clear that the circumstances under which the government may prohibit the publication of truthful information on important topics are exceedingly rare. *See, e.g.*, *G.D. v. Kenny*, 205 N.J. at 299–300 (citing *Near v. Minnesota*, 283 U.S. at 716, for the proposition that "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.").

The publication of Director Caputo's address as part of reporting about areas of certain public significance, lies near the core of the State Constitution's protection of free speech and free press; and the State's interests, however altruistic, are insufficient to justify the actual and potential encroachments on freedom of speech and the press that flow from Daniel's Law's prohibition on Plaintiff's truthful reporting. As described above, courts have previously found that protecting the names of rape victims (*Cox Broad.*, 420 U.S. at 496; *Fla. Star*, 491 U.S. at 541), juvenile offenders (*Okla. Publ'g Co.*, 430 U.S. at 311–12; *Daily Mail*, 443 U.S. at 106), or people who benefited from expungements (*G.D.*, 205 N.J. at 300), or preventing publication of classified national security information (*N.Y. Times Co.*, 403

U.S. at 714), wiretapped conversations (*Bartnicki*, 532 U.S. at 535), highly prejudicial pretrial publicity (*Neb. Press Ass'n*, 427 U.S. at 570), or information about judicial discipline (*Landmark Commc'ns*, 435 U.S. at 845) do not constitute a "need of the highest order[.]"

II. Plaintiff easily meets the remaining standards for granting temporary restraints.

Crowe v. De Gioia requires additional showings in order to obtain interim relief: the risk of irreparable injury, the balance of the equities, and maintenance of the *status quo ante*. 90 N.J. at 132–36. Plaintiff can demonstrate all of them.

A. Absent interim relief, plaintiff will continue to suffer harm because the only sufficient remedy for his ongoing injury is an injunction.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality). When free speech rights are "'either threatened or in fact being impaired'" injunctions are the only method to prevent ongoing injuries. *Davis v. N.J. Dep't of L. & Pub. Safety, Div. of State Police*, 327 N.J. Super. 59, 69 (Law. Div. 1999) (quoting *Elrod*, 427 U.S. at 373).

Moreover, because Daniel's Law affects significant constitutional interests, the harms at stake will be suffered not only by the Plaintiff, but by any journalist seeking to report on issues of public concern related to a

Covered Person's home address. Accordingly, absent preliminary relief, immediate irreparable harm exists here for Plaintiff and others.

B. The balance of the equities, including the public interest, favors the issuance of an immediate injunction.

The Court should grant immediate temporary restraints because the Defendants will not suffer injury from an injunction allowing Plaintiff to report on truthful information about Director Caputo's residence far from New Brunswick. If the case is adjudicated in the normal course, it is uncertain how long the Plaintiff will be prevented from reporting on an issue of public significance. Plaintiff will either have to not report the story or risk significant civil and criminal penalties.

A preliminary injunction also serves the public interest. When the public interest is at stake, "courts, in the exercise of their equitable powers, 'may, and frequently do, go much farther both to give and withhold relief . . . than they are accustomed to go when only private interests are involved.'" *Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. Auth.*, 399 N.J. Super. 508, 520–21 (App. Div. 2008) (*quoting Yakus v. United States*, 321 U.S. 414, 441 (1944)). In this case, there is a significant public interest in protecting free press and free speech.

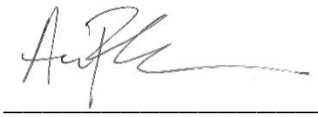
C. The restraint does not alter the *status quo ante*.

Issuing an injunction maintains the *status quo*. For years, Plaintiff and other investigative journalists were free to engage in reporting on issues of public concern, even if that reporting revealed the home address of a public official. Daniel's Law, at least as applied to Plaintiff in these circumstances, seeks to change that *status quo*. More than a decade ago, in *G.D. v. Kenny*, the New Jersey Supreme Court could not "conceive that the Legislature intended to punish, under our Criminal Code, persons who have spoken truthfully about lawfully acquired information long contained in public records . . . ." 205 N.J. at 300. An injunction maintains the state of the law for journalists that existed for decades prior to the passage of Daniel's Law.

CONCLUSION

For the reasons set forth above, Daniel's Law is unconstitutional as applied to Plaintiff, and Defendants must be enjoined from using the law to prevent Plaintiff's reporting on a truthful, lawfully obtained matter of public concern.

Respectfully submitted,



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