CHARLES KRATOVIL,

Plaintiff-Petitioner,

v.

CITY OF NEW BRUNSWICK, and ANTHONY A. CAPUTO, in his capacity as Director of Police,

Defendants-Respondents.

Supreme Court Docket No. 089427

CIVIL ACTION

On Petition for Certification from a Final Order of the Superior Court Appellate Division

Docket No.: A-000216-23T1

Sat Below:
Hon. Robert J. Gilson, P.J.A.D.
Hon. Patrick DeAlmeida, J.A.D. and
Hon. Avis Bishop-Thompson, J.A.D.

SUPPLEMENTAL BRIEF

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PRELIMINARY STATEMENT

This is an as-applied challenge to Daniel's Law, which was designed to serve the laudable purpose of protecting some public servants by limiting public access to their home addresses. This lawsuit challenges the law only as applied to a journalist, Charles Kratovil.

This case is not about whether the government may impose limits on the disclosure of public officials' home addresses; instead, this case only asks whether—after the government provides the official's address to a journalist—it may constitutionally criminalize the journalist's reporting on that very information, when the address relates to a matter of public concern. It cannot. The Appellate Division's contrary conclusion ignores well-established law and allows courts and law enforcement agencies to assume the role of editor in ways that the free press protections of the New Jersey Constitution forbid.

The facts of the case are not disputed. At issue is whether the trial court and the Appellate Division erroneously rejected Kratovil's reliance on the *Daily Mail* line of cases, which forbids punishing the truthful reporting on issues of public concern except in the rarest cases. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979). The lower courts found instead that, although a high-ranking police official living hours from his city of employment is an issue of public concern, the specific address at which he lives is not.

But those conclusions ignore United States Supreme Court precedent that explains how courts should determine whether content "concerned a matter of public significance." When properly analyzed, Kratovil's proposed article—including the exact address—"involved a matter of paramount public import." (Point I).

The *Daily Mail* test prohibits punishing the publication of truthful, lawfully-obtained information on issues of public significance, unless the party opposing publication can show that the prohibition is narrowly tailored to achieve a government need of the highest order. Kratovil easily satisfies the elements of the test. No one contests that the information he seeks to report is true. And, although Director Caputo suggested that Kratovil, who is not an attorney, provided faulty legal advice to a government employee in seeking to obtain the information, the trial court held, consistently with the caselaw, that—even were that true—Kratovil lawfully obtained Director Caputo's address. (Point II).

Once the Court determines that the *Daily Mail* principles apply, it follows that Daniel's Law cannot be constitutionally applied to prevent Kratovil from publishing an article that contains Director Caputo's exact home address. Although the United States Supreme Court has avoided creating a *per se* rule regarding these cases, it has *never* held that a party seeking to prevent

reporting could show that a law was narrowly tailored to achieve a government need of the highest order.

That is the case here as well. Because the government failed to prevent the disclosure of the address in the first instance, it cannot show that attempts to punish its subsequent disclosure are narrowly tailored to the government's admittedly compelling interest in protecting some public officials from violence at their homes. (Point III).

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Charles Kratovil is a journalist who writes for and edits *New Brunswick Today*, an online publication. PCa 4.[2] Anthony Caputo is a retired police officer who served as Director of New Brunswick's Police Department; he was also a Commissioner of the City's Parking Authority. *Ibid.*

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[1] Because they are so intertwined, for the convenience of the Court, Plaintiff combines the Statement of Facts and Procedural History.

[2] PCa refers to Plaintiff's Appendix to the Petition for Certification;
Pa refers to Plaintiff's Appendix to his Appellate Division brief;
PSa refers to Plaintiff's Appendix to this supplemental brief;
3T refers to the transcript dated Sept. 21, 2023;
DTBr refers to the Defendants' trial court brief;
DBr refers to Defendants' Appellate Division brief;
AGBr refers to the Attorney General's amicus brief; and
AGa refers to the Appendix to the Attorney General's amicus brief.

For the convenience of the Court, Plaintiff provides the reference to both PCa and 3T, where appropriate.

Kratovil learned that Director Caputo was living in Cape May. *Id.* at 5. To confirm that, he filed an Open Public Records Act (OPRA) request for Director Caputo's voter profile with the Cape May County Board of Elections. *Ibid.* The Board provided a redacted version of Director Caputo's voting profile, but after follow-up communications from Kratovil, it provided Kratovil with a voter profile that included Caputo's full home address. *Ibid.*

On May 3, 2023, Kratovil attended a New Brunswick City Council meeting. During public comment, he told the council that Director Caputo's residence in Cape May—where he lived and was registered to vote—was approximately a two-hour drive from New Brunswick, and that Director Caputo was serving on the City's Parking Authority even though he did not live there. *Ibid.* During that discussion, Kratovil publicly provided the name of the street in Cape May where Director Caputo lived. *Ibid.* He also provided City Council members with copies of Director Caputo's voter profile, which included Director Caputo's complete home address. *Id.* at 5–6.

On May 15, 2023, Kratovil received a cease-and-desist letter invoking Daniel's Law (N.J.S.A. 56:8-166.1 and N.J.S.A. 2C:20-31.1), which prohibits disclosure of the residential addresses of certain persons covered by the law. *Id.* at 6. Kratovil does not contest that Director Caputo, as a former police officer, was eligible to seek coverage under Daniel's Law. The record does not

reveal whether or when Director Caputo registered with the state to avail himself of the law's protection.

Daniel's Law provides that upon notice that someone is covered by the law, a person shall not disclose the home address or telephone number of that covered person. N.J.S.A. 56:8-166.1(a)(1). It 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). In addition to civil liability, the law makes 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).

Kratovil continued to prepare a news story about the residency issue. But, chilled by the threat of civil and criminal prosecution, he did not publish anything containing Director Caputo's complete home address. Instead, on July 12, 2023, through counsel, Kratovil filed an Order to Show Cause with Temporary Restraints and a Verified Complaint alleging that Defendants' threat of criminal prosecution and civil punishment violated the State Constitution's free press and free speech protections under Article I, Paragraph 6. PCa 6. Citing *Daily Mail*, and its progeny, Kratovil sought preliminary and permanent injunctions preventing Defendants from seeking to impose criminal or civil sanctions based on his publication of truthful, lawfully obtained

information. *Ibid.* He also sought a declaration that Daniel's Law was unconstitutional as applied to the particular facts of his case. *Ibid.* Several law enforcement groups sought and received leave to appear as amicus curiae on Defendants' behalf. Pa 49–55.

On September 21, 2023, Kratovil argued his order to show cause in Middlesex County Superior Court. PCa 27-61 (3T 4:1–72:1). Although the Attorney General's Office received notice of the case, it declined to intervene, explaining in a letter to the court that, although it had an interest in defending Daniel's Law from a facial challenge, it did not have an interest in defending its application on these specific facts: "Plaintiff's entire theory rests on his factual assertions that he obtained the underlying information lawfully, that the information is otherwise still available, and that he is a journalist who wishes to publish that information in a story relating to a high-level official's residency." Pa 66–67.

The trial court denied Kratovil relief and dismissed the Complaint. PCa 60 (3T 70:14-16); Pa 68–69. Kratovil sought emergent relief, which both the Appellate Division and this Court denied. Pa 77–78; Pa 80–81. The Appellate Division agreed to hear the appeal on an accelerated basis. PCa 19–20. The Reporters' Committee for Freedom of the Press and other media organizations were granted leave to appear as amicus curiae. PCa 21. After oral argument on

January 29, 2024, the Appellate Division affirmed the trial court's dismissal of Kratovil's Complaint in an unpublished, per curiam decision, dated April 26, 2024. PCa 1–18.

As did the trial court, the appellate panel held that Caputo's living in Cape May while serving as New Brunswick's Police Director and a Commissioner of the City's Parking Authority *was* a matter of public concern. PCa 16. But without analysis, the panel also held that the "trial court's conclusion that Caputo's exact street address is not a matter of public concern is supported by the record and consistent with the law." *Ibid.* The panel further agreed with the trial court "that protecting public officials from violent attacks and harassment is a compelling State interest of the highest order." *Ibid.* The panel did not analyze—or even discuss—whether the law was both necessary and narrowly tailored to achieve that interest.

On September 20, 2024, the Court granted Kratovil's Petition for Certification. *Kratovil v. City of New Brunswick*, 258 N.J. 468 (2024). On October 10, 2024, Kratovil sought leave to file a supplemental brief, which the Court granted on December 27, 2024. The Office of the Attorney General and the Foundation for Individual Rights and Expression timely filed motions for leave to appear as amicus curiae. This brief follows.

ARGUMENT

Over the last half-century, in what has become known as the *Daily Mail* line of cases, the United States Supreme Court has developed and reaffirmed the principle that the government may not prevent truthful reporting on matters of public significance, based on lawfully obtained material, absent extraordinary need. *See, e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471–72, 495 (1975) (holding that despite a Georgia law meant to protect the privacy of rape victims, where the government places information in the public domain, journalists cannot be punished for reporting on it); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 568 (1976) (explaining that an order prohibiting the press from publishing certain information they came to learn during an open public hearing "plainly violated settled principles"); *Okla. Publ'g Co. v. Dist. Ct. in and for Okla. Cnty.*, 430 U.S. 308, 308–09 (1977) (siding with newspaper that 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); *Daily Mail*, 443 U.S. at 102–103 (setting forth the test for when government can punish publication of lawfully obtained, truthful information about a matter of public significance, in a case about the identity of juvenile offenders); *Fla. Star v. B.J.F*, 491 U.S. 524, 534 (1989) (finding that

government has other ways to protect the privacy and safety of rape victims, without punishing the publication of information provided by the government); *Bartnicki v. Vopper*, 532 U.S. 514, 529–30 (2001) (determining that even the government's important interest in preventing surreptitious recording of conversations could not justify punishing people for republishing illegally recorded conversations where they were not responsible for the illegal recordation).

The Court has evaluated each case on its own facts and has endeavored to avoid a *per se* rule that the press can always print matters of public concern. "Our cases have carefully eschewed reaching" the question of whether "truthful publication may never be punished consistent with the First Amendment." *Fla. Star*, 491 U.S. at 532.

But where *the government* itself provides the sensitive information, the Court has been even more absolute in its refusal to allow punishment for republication by the press. "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Cox Broad. Corp.*, 420 U.S. at 496. *See also Neb. Press Ass'n*, 427 U.S. at 568 (explaining that the trial court could have closed the hearing, "but once a public hearing had been held, what transpired there could not be subject to prior restraint"); *Okla. Publ'g Co.*, 430 U.S. at 311 (explaining that,

although the court had not issued an order opening the courtroom, it was, in fact, open to the press, and therefore the information was "publicly revealed").

The Attorney General contends that the "public-interest-by-estoppel" rationale that animates those cases does not apply here. AGBr 44–47. It notes, correctly, that "obtaining information through an OPRA request" differs from a situation where the government includes a name in an incident report left in a pressroom open to the public, as occurred in *Florida Star*. *Id.* at 47.

But that difference cuts against the Attorney General's position. In responding to an OPRA request, the government takes affirmative steps to make information public and has both time and access to resources to help determine what to disseminate. *See infra* 26–28. In contrast, in *Florida Star*, the government created a "crime incident report that inadvertently included B.J.F.'s name" and accidentally "posted [it] in a room that contained signs making it clear that the names of rape victims were not matters of public record, and were not to be published." 491 U.S. at 546 (White, J., dissenting). Here, the government's failure to police itself provides a stronger justification to prevent the imposition of penalties against the press than in *Florida Star*.

Whether a blanket prohibition exists on punishing the republication of public records, the *Daily Mail* line of cases governs resolution of this matter.[3] Thus, the Court must ask whether the disputed information relates to a matter of public importance, whether the person seeking to publish the information lawfully obtained it, and whether the information is truthful. *Daily Mail*, 443 U.S. at 102–103. If those conditions are met, the government may punish publication only if it can show that the restriction on speech is narrowly tailored to achieve an interest of the highest order. *Id.* at 104.

New Brunswick cannot satisfy this demanding standard.

I. Director Caputo's home address relates to an issue of public concern.

Speech on public issues receives special protection because it "occupies the highest rung of the hierarchy of First Amendment values." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted)). That special protection

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[3] This challenge is brought under Article I, Paragraph 6 of the State Constitution, which is "broader than practically all other[ ]" free speech clauses "in the nation." *State v. Fair*, 256 N.J. 213, 231 (2024) (quoting *Green Party v. Hartz Mountain Indus., Inc.*, 164 N.J. 127, 145 (2000)). Nevertheless, this Court frequently relies upon federal constitutional jurisprudence for certain free expression issues. *Id.* (citing *E & J Equities, Ltd. Liab. Co. v. Bd. of Adjustment of Franklin*, 226 N.J. 549, 568 (2016)). This Court has expressly adopted the federal test at issue here. *G.D. v. Kenny*, 205 N.J. 275, 299–300 (2011) (adopting the *Daily Mail* test).

attaches because of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

New Jersey also specifically recognizes this core principle. "Our constitution and common law have traditionally offered scrupulous protection for speech on matters of public concern." *Sisler v. Gannett Co.*, 104 N.J. 256, 271 (1986). Decisions under the State Constitution "have stressed the vigor with which New Jersey fosters and nurtures speech on matters of public concern." *Id.* at 271–72.

At least two federal district courts have taken a capacious view of circumstances where police officers' home addresses relate to matters of public concern. In *Brayshaw v. City of Tallahassee*, the United States District Court for the Northern District of Florida explained that "the issue of police accountability is certainly political and of legitimate public interest." 709 F. Supp.2d 1244, 1249 (N.D. Fla. 2010). It then held that truthful publication of officers' home addresses would promote accountability by allowing service of process, enabling research into officers' criminal histories, and facilitating lawful pickets. *Ibid.* In *Sheehan v. Gregoire*, the district court in the Western District of Washington reached the same conclusion, although there defendants did "not dispute that plaintiff's speech [wa]s political in nature or addresse[d]

a matter of public significance." 272 F.Supp.2d 1135, 1145 (W.D. Wash. 2003).

Recently, Judge Bartle took a narrower view of the significance of home addresses, concluding that they are not—categorically—matters of public significance. *Atlas Data Priv. Corp. v. We Inform, LLC*, ___ F. Supp.3d___, Civ. No. 24-10600, 2024 WL 4905924 (D.N.J. Nov. 26, 2024) (AGa 007). Judge Bartle's decision has limited persuasive value for at least four reasons. First, the district court distinguishes the long *Daily Mail* line of cases by explaining simply that those "cases concerned criminal activity and its prosecution" and noting, without further explanation, that the "public clearly has a vital interest in such information while the same cannot be said of the speech governed by Daniel's Law." *Ibid.* That superficial analysis provides no basis for jettisoning binding United States Supreme Court precedent. There is no reason to believe that the public has a greater interest in the name of a rape victim than the details of a high-ranking police official living too far away to properly do his job.

Second, the opinion conceded that if the home address of a covered person was newsworthy *in a particular case*, the appropriate "remedy is to challenge Daniel's [L]aw as unconstitutional as applied." *Id.* at AGa 007-008. That is exactly the posture here.

Third, the district court applied a less exacting standard of review because it rejected the suggestion that Daniel's Law was designed to protect safety rather than privacy. *Id.* at AGa 006-007. But Defendants in this case have argued exactly the opposite—that Daniel's Law is a *safety* statute—for the entirety of this litigation. *See, e.g.*, DBr at 24 (contending that "in our case, the interests of the Defendants-Respondents—the protection of the safety of the Covered Persons and their families—are sufficient" to justify the law); *id.* at 20 (explaining that "the purpose of Daniel's Law is to allow judges, prosecutors, and law enforcement officers to redact their personal addresses from publications to protect the safety of themselves and their families."). Fourth, Judge Bartle himself acknowledged that the "controlling question of law" in the case before him presented an issue "as to which there is a substantial ground for difference of opinion." *See Atlas Data Priv. Corp. v. We Inform, LLC*, No. 1:24-cv-04380-HB, ECF No. 30 (D.N.J. Dec. 2, 2024) (citing 28 U.S.C. § 1292(b)). PSa 01-08.

The Court need not take an expansive view of the relationship between police officers' home addresses and police accountability in deciding this as-applied challenge. As the Appellate Division noted, "[a]ll parties agree, and the record confirms, that the matter of public concern was that Caputo lived in Cape May while serving as [New Brunswick's] Director of Police and a

Commissioner of the City's Parking Authority." PCa 15. The question according to the trial court and the Appellate Division was whether Director Caputo's specific address—the street name and house number—added anything of public significance to the story, or whether it was "superfluous." PCa 55–56 (3T 61:17–62:7).[4] In other words, the courts below asked whether the specific detail was *necessary* to tell the story on an issue that all parties agree is a matter of public significance.[5]

But United States Supreme Court cases teach that the courts below asked the wrong questions. *Florida Star* addressed 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. at 526. The Court examined whether "the news article concerned 'a matter of public significance,' in the sense in which the *Daily Mail* synthesis of prior cases used that term." 491 U.S. at 536 (citing several cases in the *Daily Mail* line of cases). The Court

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[4] The Attorney General offers a variant of the same flawed test, arguing that "on these specific facts, the matter of public concern was fully satisfied by reporting that Caputo lived in Cape May—and there is no residual public interest in reporting he lived at 123 Main Street." AGBr 28. As explained below (*infra* 23-25), that is both factually incorrect and not the inquiry demanded by precedent.

[5] The trial court at one point explained that the particular address was "logically immaterial" to the story, suggesting that it was not imposing a necessity test, but the proper "related to" test. PCa 55 (3T 61:17–18). But the rest of the trial court's explanation makes clear that it actually imposed a necessity test. PCa 55–56 (3T 61:17–62:7).

explained exactly what it meant, undercutting the Appellate Division's—and the trial court's—cramped reading in the instant case: Does "the article *generally*, as opposed to the specific identity contained within it, involve[] a matter of paramount public import[?]" *Id.* at 536–37 (emphasis added). Because "the commission, and investigation, of a violent crime which had been reported to authorities" was a matter of public importance, the Court did not ask whether the rape victim's name, *specifically*, was required to tell the story. *Id.* at 537.

Florida Star dictates the result of this case. The questions the Court asked there—does the article *concern* a matter of public significance (*id.* at 536) and does the article generally *involve* a matter of public concern (*id.* at 536–37)—reject a necessity test and impose instead a relational requirement. *Connick v. Myers* and *Snyder v. Phelps* reinforce that the proper inquiry is relational: can the contested piece of speech "be fairly considered as *relating to* any matter of political, social, or other concern to the community." *Snyder,* 562 U.S. at 453 (quoting *Connick*, 461 U.S. at 146) (emphasis added).

And as this Court recently held, the phrase "relating to" in its ordinary usage "is a broad one—to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Savage v.*

Twp. of Neptune, 257 N.J. 204, 218 (2024) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)) (quotation marks omitted in *Savage*).

In another context, the United States Supreme Court recently read the phrase "relating to" in a similarly broad fashion. In *Pugin v. Garland,* the Court held that the phrase "relating to obstruction of justice" in 8 U.S.C. § 1101(a)(43)(S) does not require that an investigation or proceeding be pending. 599 U.S. 600, 607–10 (2023). The majority did so despite a three-justice dissent lamenting that "in isolation," the phrase "relating to" "is endlessly expansive because, absent a . . . 'limiting principle,' relations 'stop nowhere.'" *Id.* at 628–29 (Sotomayor, J., dissenting, joined by Justices Gorsuch, and Kagan) (quoting *Maracich v. Spears*, 570 U.S. 48, 59–60 (2013) (internal quotation marks omitted)). Those dissenting justices looked to statutory text to rein in the otherwise capacious meaning of the phrase; here there is no statute to which to turn.

The *Pugin* dissenters' view did not carry the day, but even if one could read into the test articulated by the United States Supreme Court a different meaning of "related to"—one that contained a requirement of some significant or close nexus between the contested speech and the issue of public concern—courts cannot impose a requirement of a connection closer than the one accepted as sufficient by the Court in *Florida Star.* That is, courts cannot

demand a closer relationship between a contested fact (here the home address) and an issue of public concern (here the fact that the police director lives far from the municipality he serves) than the Supreme Court found sufficient in *Florida Star* (the relationship between a rape victim's name and violent crime).[6]

The Attorney General's reliance on *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (*see* AGBr 30–32) is misplaced. All the cases in the *Daily Mail* line of cases—and this case—address the publication of *truthful* information. The defendants in *Firestone*, on the other hand, sought to extend the protection for civil liability "based upon the publication of truthful information contained in official courts records open to public inspection" "to safeguard even inaccurate and false statements." *Id.* at 455. *Firestone* did not weaken the "public interest in *accurate* reports" found in public records, *id.* at 457 (emphasis added); it simply refused to expand the *Daily Mail* rule to falsehoods. All parties agree

[6] The Attorney General concedes—as it must—that "a rape victim's name is a matter of public concern" but doubts that a victim's home address, Social Security number, or medical history would qualify. AGBr 39. Perhaps. That issue was not before the United States Supreme Court in *Florida Star* and is not before this Court today. But any court's analysis must turn on the precise nature of the issue of public concern. If, for example, a rapist targeted people living in certain buildings or with certain medical conditions, a court's inquiry would necessarily consider that fact.

that Kratovil sought to include only truthful information about Director Caputo in his article.

But even if *Firestone* somehow governed the inquiry in this case, the Attorney General grossly understates the degree of connection between the exact home address and the news story. Although the Attorney General references a "generalized nexus" between court records and issues of public concern (AGBr 31) and properly notes that "an *asserted* link to a general topic of interest cannot be the end of the inquiry" (*id.* at 32) (emphasis added), it fails to grapple with the closeness of the relation between the exact home address and the matter of public interest.

This is not merely a case where Kratovil asserted a tangential or remote link between a fact and a story: here, no one disputes that the fact Director Caputo lives far from New Brunswick is a matter of public concern; where he lives is exactly how one establishes that precise fact. The Court need not decide whether Daniel's Law protects against the Attorney General's parade of horribles that could flow from the inclusion of facts that that are "tangentially connected to a newsworthy topic" (AGBr 32) because in this as-applied challenge, the connection between the fact and the newsworthy topic is apparent and direct, not tangential.

In *Snyder*, Chief Justice Roberts examined how courts determine whether signs displayed at a picket outside a funeral addressed "matters of public import." 562 U.S. at 454. Although some signs contained messages specifically related to the deceased servicemember and his family—for example, "You're going to hell" and "God hates you"—the Court focused on "the overall thrust and dominant theme of" the signs. *Ibid.*

The context of the speech may provide additional evidence that the speech relates to an issue of public concern. Where, as here, a journalist seeks to include the information in a news article discussing a public figure, free speech protections reach their zenith. *Mills v. Alabama,* 384 U.S. 214, 219 (1966). Sometimes, as in *Snyder*, the context of speech—there a funeral—suggests that speech is more private than if it had been made in a town square at a political rally, but still the context fails to alter the conclusion that the speech is "'fairly characterized as constituting speech on a matter of public concern.'" *Snyder*, 562 U.S. at 454–55 (quoting *Connick,* 461 U.S. at 146).

At other times, the context itself transforms speech that is otherwise private into a matter of public concern. In *Publius v. Boyer-Vine*, 237 F.Supp.3d 997, 1003-06 (E.D. Cal. 2017), for example, a blogger compiled the names and addresses of California legislators who voted to create a database of ammunition purchasers. The district court explained that "in isolation . . .

legislators' home address and phone numbers may not, in and of themselves, constitute 'a matter of public significance.' But when considered in the specific context of Plaintiffs' speech—political protest, which is 'core political speech,' with First Amendment protection 'at its zenith,' the information takes on new meaning." *Id.* at 1014. (internal citations omitted).[7]

It is no coincidence that courts look merely at the relationship between particular facts and matters of public concern. "Exuberant judicial blue-pencilling after-the-fact would blunt the quills of even the most honorable journalists." *Ross v. Midwest Commc'ns, Inc.*, 870 F.2d 271, 275 (5th Cir. 1989). The press—and not the courts—must make the *ad hoc* decisions as to what are matters of genuine public concern, and while subject to review, editorial judgments as to news content will not be second-guessed so long as they are sustainable. *Gaeta v. N.Y. News, Inc.*, 465 N.E.2d 802, 805 (N.Y. 1984). "These considerations apply with equal force to the determination of

[7] Professor Eugene Volokh pointed out the bizarre impact on residential picketing that affirmance of the Appellate Division holding in this case would have. Eugene Volokh, *N.J. S. Ct. Will Decide Whether Journalist May Publish Police Chief's Home Address*, The Volokh Conspiracy (Sept. 26, 2024, 12:46 PM), https://reason.com/volokh/2024/09/26/n-j-s-ct-will-decide-whether-journalist-may-publish-police-chiefs-home-address/. Noting that New Jersey does not forbid residential picketing, he assumed that it follows that "people must have the legal right to organize such picketing." *Id.* If that is the case, he queried how someone could organize a picket "if they can be legally barred from publicizing the address at which the picketing is to occur?" *Id.*

what is 'reasonably related to matters warranting public exposition.'" *Ibid.* (citing *Chapadeau v. Utica Observer-Dispatch*, 341 N.E.2d 569, 571 (N.Y. 1975)). Put differently, when courts assume the role of editors, they inevitably produce the very chilling effect that constitutional free press protections are designed to prevent.

The courts below held, and Director Caputo conceded, that his living far from the town he served was a matter of public concern. PCa 15. That concession should end the inquiry. Once that determination has been made, if the information that Kratovil wants to publish *relates* to the distance from home to work—which the home address plainly does—the information concerns an issue of public significance.

The courts below disregarded the analysis demanded by *Florida Star*, and instead, proposed a "commonsense resolution to this as-applied challenge." PCa 16. The Appellate Division essentially directed Kratovil to write an article explaining that Director Caputo lived in Cape May, far from New Brunswick, but without mentioning the exact address. *Id.* at 16–17.[8] The

[8] The Attorney General asks the Court to "confirm that 'home address' means a street address, not just a town name." AGBr 22. The amicus brief explains that "it appears that all parties agree that 'Cape May' alone is not covered by Daniel's Law." *Ibid.* Although that is *now* true, when Plaintiff filed this suit, that was far from certain. Indeed, before the trial court Plaintiff explained that the parties and amici had vastly different conceptions of what Plaintiff could report without subjecting himself to liability under Daniel's Law. *See* PCa 35

court below erred legally and factually in proposing this "commonsense resolution."

As a legal matter, "the choice of material to go into a newspaper" "and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Government "regulation of this crucial process" cannot "be exercised consistent with First Amendment guarantees of a free press." *Ibid.*

But even if courts were constitutionally permitted to pick up an editor's pen, here the lower courts' limitations allow New Brunswick to whitewash the story Kratovil planned to write. After the trial court dismissed Kratovil's complaint, New Brunswick issued a press release stating that Kratovil, "has tried to contend without factual support that the Director has a no-show job."[9] In the press release, Mayor Jim Cahill was quoted as saying that "[t]he contentions, raised by Mr. Kratovil in his lawsuit, could not be further from

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(3T 20:1–21:18) (explaining differing positions on what could be permissibly reported and noting that confusion about the scope of the law creates self-censorship that free press protections abhor). Clarity is always welcome—but the Legislature must write statutes that explain their reach and not rely on after-the-fact clarification from courts.

[9] Press Release, City of New Brunswick, *Judge Upholds "Daniel's Law" in Case Filed by New Brunswick Activist* (Sept. 21, 2023), https://www.cityofnewbrunswick.org/news_detail_T10_R1151.php.

the truth." *Ibid.* New Brunswick relied on the fact that "Director Caputo maintains two addresses, one in Middlesex County and the second in Cape May County." *Ibid.* The press release stressed that Director Caputo "has a local residence within 10 minutes of police headquarters in New Brunswick." *Ibid.* In other words, New Brunswick publicly argued that, although Director Caputo owned multiple properties, he spent enough time at his Middlesex County property to effectively serve the residents of New Brunswick.

A journalist might rebut that contention by ascertaining how much time Director Caputo spent at each location. To do this, the reporter could interview neighbors to obtain statements about the frequency with which they saw Director Caputo. But would Daniel's Law prevent naming the person who lived nearby? What if the neighbor had a unique name, which would make it easy to look up their address? Could the article explain just how close the source lived to Director Caputo? Could the journalist divulge the neighbor's address, which would help verify the veracity of the account?

Under the Appellate Division's "commonsense resolution," New Brunswick can challenge the veracity of Kratovil's reporting, and he is left powerless to rebut their narrative. But courts have long recognized that journalists must be able to include facts—even facts that might otherwise be outside the reach of the First Amendment's protection—"because they

strengthen the impact and credibility of the article." *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981); *see also Midwest Commc'ns, Inc.*, 870 F.2d at 274 (inclusion of victim's name in story about possible innocence of person convicted of rape was "of unique importance to the credibility and persuasive force of the story").

In other words, on the facts of this case, there exists "residual public interest" (AGBr 28) in reporting on Director Caputo's exact address because it strengthens the credibility of the article that Defendants themselves have attacked.

II. Kratovil satisfies the other prongs of the *Daily Mail* test.

The *Daily Mail* test applies to matters of public significance when a person 1) "lawfully obtains" 2) "truthful information." 443 U.S. at 102–103. From the outset of this litigation, Defendants have acknowledged that Director Caputo lives, at least part-time, in Cape May. PCa 38 (3T 26:21–23). That is, the truthfulness of Kratovil's proposed speech has never been at issue.

Although the Appellate Division did not address the lawfulness of Kratovil's receipt of Director Caputo's address, the trial court properly determined that "[P]laintiff obtained Mr. Caputo's home address through inquiry with the Cape May Board of Elections." PCa 51 (3T 53:19–20). Although Defendants contended that Kratovil bore responsibility for obtaining

the information by subterfuge, the trial court held that "there was no indication that the [P]laintiff did anything illegal. . . in this regard." PCa 51 (53:21–25).

That determination was correct. Director Caputo suggested that Kratovil caused the government's (possibly) erroneous disclosure of Director Caputo's home address via OPRA. *See* DBr at 35–36 (contending that Kratovil obtained Director Caputo's home address "by misleading the records custodian about the holding in *Brennan v. Bergen County Prosecutor's Office*, 233 N.J. 330 (2018).").

As a threshold matter, it is not clear that the Cape May County Board of Elections erred in providing Director Caputo's address. All parties agree that Director Caputo is eligible for protection of his home address under Daniel's Law. In the cease-and-desist letter, he asserted that he was, in fact, a protected person under Daniel's Law. Pa 10. The record does not reveal whether, when the Cape May Board disclosed the records to Kratovil, Director Caputo had gone through the administrative steps necessary to obtain coverage under the law. *See* N.J.S.A. 56:8-166.1(a)(1) (requiring registration with the Office of Information Privacy and receipt of approval). If he had not, the Board of Elections did not err.[10]

[10] For that reason, the Attorney General's contention that "Caputo validly invoked the protections of Daniel's Law" assumes too much. AGBr 1–2.

But, assuming both that Director Caputo timely sought protection under Daniel's Law and, for the purpose of this brief only, that Director Caputo's reading of *Brennan* is correct, the facts do not change the reality that the government provided Director Caputo's home address to Plaintiff. Plaintiff is not an attorney.[11] The OPRA custodian for the Cape May Board of Elections, of course, has access to an attorney. *See Gannett Satellite Info. Network, LLC v. Twp. of Neptune*, 254 N.J. 242, 264 (2023) (explaining that when faced with

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[11] Director Caputo's contention that Kratovil "should not be dispensing legal guidance to others," DBr 35–36 (citing N.J.S.A. 2C:21-22), grossly overstates the legal implications of a statement made by a layperson, not holding themself out as an attorney, about what a particular case says or does not say. Non-lawyers are permitted to express views on court opinions without engaging in the unauthorized practice of law. *Cf. State v. Rogers*, 308 N.J. Super. 59, 66 (App. Div. 1998) (explaining that a person engages in the practice of law "whenever and wherever legal knowledge, training, skill and ability are required.") (internal quotations omitted). Were it otherwise—and a person could be prosecuted for expressing an opinion on the holding of *Miranda*, *Heller*, or *Dobbs*—everyone from criminal defendants arguing with their lawyers to politicians pandering to their bases would be subject to criminal prosecution; and the statute would run afoul of the First Amendment.

Similarly, the Attorney General's suggestion that "the record raises questions about Kratovil's role in obtaining" Caputo's address ignores the operative test. AGBr 47. The question is not whether Kratovil played a role in getting the document—surely he did—but whether he did so unlawfully. As the trial court properly held, "there was no indication that the [P]laintiff did anything illegal" PCa 51 (3T 53:21–25). Indeed, Kratovil did nothing wrong. But even if he had, that would not remove him from the protections of the *Daily Mail* line of cases. *See, e.g.*, *Fla. Star*, 491 U.S. at 546 (White, J., dissenting) (noting that the record revealed that "The Star's reporter . . . understood that she '[was not] allowed to take down that information' (*i.e.*, B.J.F.'s name) and that she '[was] not supposed to take the information from the police department.'").

claims under the common law right of access to public information, custodians can seek the advice of counsel). The custodian also has access to various helpful materials[12] and a toll-free hotline and email address where the Government Records Council provides answers to OPRA questions to both requestors and custodians.[13] If the custodian instead chose to rely on the legal analysis provided by a requestor, the Board bears responsibility for that error.

Whether the Cape May Board of Elections should have disclosed the address, or whether Plaintiff accurately described the state of the law, the inescapable conclusion is that Plaintiff obtained the document from the government and did so lawfully. As the U.S. Supreme Court explained in *Florida Star*, which dealt with "the erroneous, if inadvertent, inclusion" of information (491 U.S. at 538), a government agency's failure to redact or withhold information does not make a journalist's "ensuing receipt of this information unlawful." *Id.* at 536.

Indeed, in *Bartnicki*, information was *unlawfully* obtained by a third party and then transferred to a radio station that had not commissioned the original illegal seizure. 532 U.S. at 525. The Court held that the radio station

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[12] Government Records Council, *OPRA Handbook for Records Custodians, (Nov. 2022)*, https://www.nj.gov/grc/custodians/handbook/.
[13] Government Records Council, *Got an OPRA Question?*, https://www.nj.gov/grc/custodians/question/ (last visited Dec. 30, 2024).

and the intermediary obtained the recording lawfully, "even though the information itself was intercepted unlawfully by someone else." *Ibid.*

So too in the Pentagon Papers case. Although Daniel Ellsberg removed the Pentagon Papers from the RAND Corporation without authorization, the *New York Times* did not participate in his illegal activity.[14] Still, neither the *per curiam* opinion in *New York Times Co. v. United States* nor any of the concurring opinions mention illegality. 403 U.S. 713, 714 (1971); *see also id.* at 714–20 (Black, J., concurring); *id.* at 720–24 (Douglas, J., concurring); *id.* at 724–27 (Brennan, J., concurring); *id.* at 727–30 (Stewart, J., concurring); *id.* at 730–40 (White, J., concurring); *id.* at 740–48 (Marshall, J., concurring).

When courts apply the *Daily Mail* test and ask whether the information was lawfully obtained, they look to whether the journalist or entity seeking publication acted unlawfully, not whether someone else may have. The court below properly held that Plaintiff obtained Director Caputo's address lawfully and that the information was truthful.

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[14] *See 'We're Going to Publish' An Oral History of the Pentagon Papers,* The New York Times (June 9, 2021), https://www.nytimes.com/interactive/2021/06/09/us/pentagon-papers-oral-history.html.

III. Daniel's Law cannot be constitutionally applied to the particular facts of this case.

To satisfy the *Daily Mail* test and justify punishing truthful reporting on lawfully obtained information on issues of public concern, the government must establish both that the interests at stake constitute needs of the highest order and also that the associated prohibitions and penalties are necessary to achieve that interest. *Daily Mail*, 443 U.S. at 104.

Accepting that protecting some public figures by withholding their home addresses is a need of the highest order,[15] this Court must ask whether, as applied to the facts of this case, Daniel's Law is narrowly tailored to achieve its objective. To "narrowly tailor [a restriction on speech], the state must choose 'the least restrictive means among available, effective alternatives.'" *Schrader v. Dist. Att'y of York Cnty.*, 74 F.4th 120, 127 (3d Cir. 2023) (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)). Here, Kratovil has provided at

[15] Kratovil does not dispute the real risks that some law enforcement officers might face from the disclosure of personal information. However, the Attorney General's citation to a 2020 shooting at the home of police officers in Camden, however tragic, does not bear on that issue. Two weeks after the publication of the news report cited by the Attorney General, the Camden County Police Chief announced that the suspects arrested for the shooting "did not know who they were shooting at." April Saul, *Suspects who fired on home of two Camden cops 'had the wrong house'*, WHYY, (Oct. 5, 2020), https://whyy.org/articles/suspects-who-fired-on-home-of-two-camden-cops-had-the-wrong-house/. In other words, law enforcement acknowledged that the victims in that case were *not* targeted based on their law enforcement status.

least three workable alternatives, each of which would defeat a claim of narrow tailoring.

First, the government could prioritize policing itself (*e.g.*, training and auditing its OPRA custodians) to prevent the initial disclosure of information. *See Fla. Star*, 491 U.S. at 538 (explaining that where "the government has failed to police itself in disseminating information" "the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding" privacy). Put differently, "where the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech." *Ibid.*

Where "sensitive information is in the government's custody, it has . . . great[] power to forestall or mitigate the injury caused by its release" and therefore always has "a less drastic means" "for guarding against the dissemination of private facts" "than punishing truthful publication[.]" *Id.* at 534. It can "classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination." *Ibid.*

Daniel's Law does classify as private certain information—a provision of the law not questioned by this as-applied challenge—but does not provide liability for the negligent disclosure of information by records custodians. *Compare* N.J.S.A. 2C:52-30 *and G.D.*, 205 N.J. at 299 (providing a penalty for disclosing expunged convictions by "certain statutorily named government agencies that have custody of expunged records") *with* N.J.S.A. 2C:20-31.1(d) (providing no limitation on those prohibited from disclosing address information). Nor does the statute provide training for records custodians to ensure they do not release records protected by the law. Those are two ways—though not the only ways—New Jersey could prevent the disclosure of information it wishes to keep private, without imposing the risk of self-censorship or criminal and civil liability on journalists who lawfully obtain the information.

Courts are rigorous in their analysis of narrow tailoring: *no* case has found that a law punishing publication of lawfully obtained information on issues of public concern is narrowly tailored to achieve a government interest of the highest order. *See, e.g.*, *Cox Broad. Corp.*, 420 U.S. at 496; *Daily Mail*, 443 U.S. at 104; *Fla. Star*, 491 U.S. at 541. But, even if the "factual differences between this case and *Cox Broadcasting* and *Florida Star* suggest the need for a more nuanced analytical approach to the *Daily Mail* standard's

narrow-tailoring requirement," *Ostergren v. Cuccinelli*, 615 F.3d 263, 285 (4th Cir. 2010), punishing Kratovil for publishing a story including Director Caputo's home address is not narrowly tailored to the interests that animate Daniel's Law.

Ostergren addressed a Virginia statute that prohibited people from intentionally communicating other people's Social Security numbers to the general public. *Id.* at 266. To critique Virginia's failure to redact Social Security numbers on property records, a privacy advocate republished the exact, unredacted records that Virginia had made available online. *Ibid.* The privacy advocate challenged constitutionality of the law as applied to her. *Ibid.*

The Fourth Circuit considered whether a different view of narrow tailoring should apply to Virginia's effort to punish people for publishing sensitive information found easily online, as the plaintiff had done, than would apply to an effort to publish unredacted Social Security numbers found on the more than 200 million physical documents that comprise original land records. *Id.* at 285–86, n.18. The court concluded that First Amendment precedent did "not necessarily require Virginia to redact SSNs from all original land records maintained in courthouse archives before someone like Ostergren may be prevented from publishing them online." *Id.* at 285. But the panel was clear

that, where the unredacted records are easily available online, the statute that prohibited their republication could not be narrowly tailored. *Id.* at 286.

Here, Kratovil did not scour the dark web to find a record containing a covered person's address that had otherwise been well-hidden. Instead, he simply asked the government for the record, and they readily handed it over. At the time of oral argument before Judge Rea, Director Caputo's home address remained widely available and easily accessible on the Internet. *See* PCa 50 (3T 50:6–51:6) (explaining that, although some covered individuals had scrubbed their addresses from the Internet, "in Mr. Caputo's case, that information is out there"). Before the trial court, counsel cited to a journalist who had confirmed Plaintiff's contention about the ease of finding Director Caputo's address using simple Internet queries. *See* PCa 50 (3T 50:19–25) (citing Nikita Biryukov, *Judge declines to temporarily block Daniel's Law*, New Jersey Monitor, (Aug. 30, 2023), https://newjerseymonitor.com/2023/08/30/judge-declines-to-temporarily-block-daniels-law/ (explaining that "Caputo's address is readily available online and was obtained by the New Jersey Monitor after a cursory Google search.")).

The Fourth Circuit Court of Appeals' reasoning in *Ostergren* is applicable here: even if courts *should* treat narrow-tailoring analysis

differently in cases where the government took significant steps to safeguard the information it ultimately released, in cases such as this one—where the government did not meaningfully attempt to prevent the release of information—its later attempt to criminalize publication is not narrowly tailored to its interest. 615 F.3d at 286. The government's failure to police itself and prevent dissemination in the first instance dooms the narrow tailoring inquiry in this as-applied challenge.

Second, Daniel's Law could recognize—as does the federal Daniel Anderl Judicial Security and Privacy Act of 2021—an exception for "the transfer of the covered information . . . if the information is relevant to and displayed as part of a news story, commentary, editorial, or other speech on a matter of public concern." S. 2340, 117th Cong. § 4 (2021). Other than a limited exception for newspapers printed prior to the law's effective date, N.J.S.A. 2C:20-31.1(f), New Jersey's Daniel's Law contains no exception for news reporting, unlike the more narrowly tailored federal version. That the federal law is able to protect federal judges without similarly chilling journalists is powerful evidence that Daniel's Law is not narrowly tailored to achieve the asserted government interests.

To be clear, the exception that exists in the federal Daniel's Law does not turn on the identity of the person—whether they are a journalist or not—

but on the context in which the information is transferred. A *New York Times* reporter who wanted to print a list of covered people's home addresses simply because he disliked them and not because they were relevant to a news story would have no shelter under the federal law's exception, but a reader of the paper who included an official's home address in a letter to the editor on a topic of public concern would be beyond the law's reach. Thus, this proposed exception does not implicate any concerns that exist about "the difficulty in defining who is a 'newsperson' in the age of the Internet." *Too Much Media, LLC v. Hale*, 206 N.J. 209, 222 (2011) (internal quotations omitted).

Third, "there are civil penalties. [Daniel's] Law could, for instance, [exclusively] authorize fines." *Schrader*, 74 F.4th at 127. No evidence exists that "without criminal sanctions the objectives of [the Law] would be seriously undermined." *Id.* (citing *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 841 (1978)). The analysis of New Jersey's version of Daniel's Law might be different if, like its federal counterpart, it focused exclusively on civil, not criminal, penalties.[16]

The Attorney General contends that the constitutionality of Daniel's Law's criminal provisions is "not before this Court" because "there is no

[16] Despite Director Caputo's claim to the contrary (DBr 42), that a civil-only scheme would be *more* narrowly tailored does not mean that it would be sufficiently so.

substantial likelihood of criminal charges against Kratovil in light of the facts presented." AGBr 26. Not so. Kratovil's Complaint alleges that he feared civil *and* criminal penalties. Pa 13.

As the Appellate Division correctly noted, because the trial court dismissed the complaint, reviewing courts must view the facts in the light most favorable to the plaintiff. PCa 4 (citing *Smerling v. Harrah's Ent., Inc.*, 389 N.J. Super. 181, 186 (App. Div. 2006)). But this deferential standard of review is not Kratovil's only protection; by any objective measure, the risk of criminal prosecution is real. When Defendants sent Kratovil a cease-and-desist letter, they copied the Middlesex County Prosecutor's Office on the letter. Pa 10. Why would the Prosecutor's Office be copied if there was no threat of criminal prosecution?

Indeed, even under the Attorney General's own view of when a risk of criminal prosecution attaches, it applies to Kratovil. Noting the heightened scienter requirement for criminal prosecution, the Attorney General expresses skepticism that "simply being made aware that a covered person *is* a covered person would constitute reckless disregard." AGBr 27. Perhaps. But in this case, Director Caputo attached evidence regarding the "quantity and nature of criminal arrests, which have occurred during the Director's tenure," to demonstrate that "the threat of harm to the Director and his family is tangible."

DTBr 30 (citing news articles and press releases regarding arrests that occurred while Director Caputo oversaw the New Brunswick Police Department). Because Kratovil has been told that information—and because he does not know whether that would be sufficient to create a "probability" that dissemination would expose Director Caputo to harm—Kratovil has a reasonable fear of criminal prosecution.

Director Caputo contends that the three alternatives "are more appropriate to send to the legislators who write the law [because] '[i]t is not the function of the Court to appraise the wisdom of the governmental regulation because the government must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'" DBr 42 (citing *Hamilton Amusement Ctr. v. Verniero*, 156 N.J. 254, 278 (1998)).

But appraising the relative reach and efficacy of a statute is *exactly* the function of the Court in a narrow-tailoring analysis. *Hamilton Amusement* concerned the regulation of business signage, an issue that implicates free speech protections, but, unlike speech on issues of public concern, does not occupy "the highest rung of the hierarchy of First Amendment values." *Snyder*, 562 U.S. at 452. When the Constitution demands narrow tailoring, a court cannot simply defer to legislative determinations; "[i]nstead, the court should

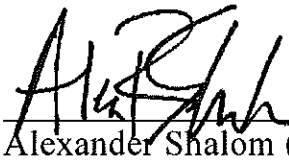
ask whether the challenged regulation is the least restrictive means among available, effective alternatives." *Ashcroft*, 542 U.S. at 666.

Because there exist alternatives that would achieve the interests advanced by Daniel's Law without prohibiting the publication of true, lawfully obtained information on issues of public concern, the law is not narrowly tailored, as applied to Kratovil.

CONCLUSION

For the reasons described above, Daniel's Law cannot be constitutionally applied to prevent Kratovil's reporting on the information he received from the Cape May County Board of Elections about Director Caputo's home address, so the decision of the Appellate Division should be reversed.

Respectfully submitted,



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