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FILED

JUN 25 2024

Heather J. Baker
CLERK

CHARLES KRATOVIL,

Plaintiff-Petitioner,

v.

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

Defendants-Respondents.

SUPREME COURT OF NEW JERSEY
DOCKET NO: 089427

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.

CIVIL ACTION

**AMICUS CURIAE NEW JERSEY STATE ASSOCIATION OF CHIEFS
OF POLICE'S BRIEF IN OPPOSITION TO PLAINTIFF'S PETITION
FOR CERTIFICATION**

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JUN 25 2024

SUPREME COURT
OF NEW JERSEY

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PRELIMINARY STATEMENT

Plaintiff Charles Kratovil seeks to publish a news story concerning New Brunswick Police Director, Anthony Caputo. The story's subject is that Director Caputo resides over 100 miles away from New Brunswick in Cape May. No court has prevented Plaintiff either from publishing this story, from disclosing the municipality in which Director Caputo lives, or from commenting upon the implications of Director Caputo residing in a municipality located a substantial distance from New Brunswick.

Despite his general ability to publish the story he seeks to distribute and to inform his audience and the general public of the pertinent facts regarding Director Caputo's location, Plaintiff claims that his free speech rights have been curtailed because the lower courts held that it would be unlawful for him to disclose a single detail of no intrinsic newsworthy value: Director Caputo's precise street address. Plaintiff is prohibited from doing so by Daniel's Law, *N.J.S.A.* 2C:20-31.1 and *N.J.S.A.* 56:8-166.1, which was enacted in response to increasing real and threatened violence against judges and law enforcement, most notably the tragic murder of the son of a federal judge, from which the Law draws its name. Daniel's Law's purpose is to "shield[] the home addresses and private contact information for those who serve on the bench and enforce our laws" so that they may "answer the call of justice . . . without fear for their

personal safety, or that of their loved ones.” (Office of the Governor, Governor Murphy Signs “Daniel’s Law,” Nov, 20, 2020, available at <https://www.nj.gov/governor/news/news/562020/20201120b.shtml> (signing statement of Governor Murphy) (hereinafter, “Governor’s Press Release”).

Both the Appellate Division and the trial court here interpreted Daniel’s Law to prohibit the disclosure only of Director Caputo’s precise home address. Such information, both courts held, was not a matter of public concern and therefore not entitled to heightened First Amendment protection. The lower courts also concluded that Daniel’s Law was necessary to further the compelling government interest of protecting the health, safety, and welfare of judges and law enforcement officials and their families.

Plaintiff contends that the lower courts were incorrect, and that he has a near unlimited First Amendment right to publish any truthful information of his choosing, so long as it is somehow related to the “newsworthy” story he seeks to publish. In advocating for this position, Plaintiff seeks to introduce purely private information of no newsworthy value (Director Caputo’s precise street address) by bootstrapping it to information that is of newsworthy value (Director’s Caputo’s residence is far from New Brunswick). Plaintiff does not seriously dispute that Director Caputo’s precise street address is of no public concern, but instead contends that he has the right to publish it because the

government is prohibited from “editorializing” his work and removing truthful information relating to the subject matter of his article.

The case law provides otherwise. Decades of Supreme Court precedent establish three core principles that support the Appellate Division’s decision below: (1) privacy rights and the protection of government agents are compelling government interests worthy of protection; (2) courts must distinguish between matters of public concern, which garner rigorous First Amendment protection, and matters of purely private concern, which warrant far less protection; and (3) courts must parse the record carefully and determine which discrete facts are matters of public concern and which are not. The Appellate Division followed those principles here scrupulously. The panel determined that Daniel’s Law protects a compelling government interest; that Director Caputo’s general location is a matter of public concern but his precise street address is not; and that Plaintiff lawfully could publish almost all of the information contained in his article, with the sole exception of Director Caputo’s street address, which is not in and of itself a matter of public concern.

The Appellate Division’s decision therefore is unassailable. This Court should not disturb it. To the extent the Court grants certification in this matter, it should be only to affirm the panel’s decision wholesale.

STATEMENT OF FACTS

Respondent¹ New Jersey State Association of Chiefs of Police relies on the statement of facts set forth in the Appellate Division's written opinion, contained in Plaintiff's appendix at PCa1-18.

LEGAL ARGUMENT

I. THE APPELLATE DIVISION'S OPINION PROPERLY INTERPRETED UNITED STATES SUPREME COURT PRECEDENT AND DETERMINED THAT DIRECTOR CAPUTO'S PRECISE STREET ADDRESS IS NOT A MATTER OF PUBLIC CONCERN.

The Appellate Division's conclusion that Director Caputo's precise street address is not a matter of public concern rests on its astute adherence to the Supreme Court's admonition that First Amendment matters must be adjudicated on a case-by-case basis. Time and again, the Court has refused the "invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment." *The Fla. Star v. B.J.F.*, 491 U.S. 524, 532-33 (1989). Instead, the Court has "eschewed reaching this ultimate question," mindful of

¹ The New Jersey State Association of Chiefs of Police ("NJSACOP") appeared as amicus curiae before the trial court in this matter. Upon review of NJSACOP's appellate brief, the Office of the Clerk of the Appellate Division advised that NJSACOP should be listed as a respondent; apparently the Clerk has determined that all amicus parties below will be labeled as respondents going forward. NJSACOP notes that it has not been named as a party in this action and no party seeks relief against it. Nonetheless, we refer to NJSACOP as a "Respondent" to comply with the instruction from the Office of the Clerk of the Appellate Division.

“future . . . scenarios” that will require flexibility rather than a rigid and unyielding categorical bar to government intrusion on certain types of speech. Among potential future scenarios which might permit government restriction of the dissemination of truthful information, the Court noted “the sailing dates . . . or the number and location of troops,” “purely private libels,” and -- most critically -- “**privacy rights**,” including “**area[s] of privacy defined by the State**.” *Id.* (emphasis added).

Several points from the Court’s discussion in *The Florida Star* are critical here, and contravene Plaintiff’s arguments. Plaintiff strongly suggests that the government has virtually no ability to prohibit the publication of truthful information, that the Supreme Court has not yet found any instance where doing so would be appropriate, and that the circumstances warranting such a restriction require a state interest of near unimaginable magnitude. In reality, the *Florida Star* Court put forth several commonplace interests that would meet the standard for protection from publication, including personal privacy rights and the security of government agents and actors. Both of those interests are implicated here because Daniel’s Law specifically protects the personal privacy rights of government agents. The Appellate Division recognized this principle in reaching its holding.

In other cases, the Supreme Court has elucidated further on the distinction between speech of “public concern” and speech of “purely private concern.” *See Snyder v. Phelps*, 562 U.S. 443, 454 (2011). In contrast to matters of public concern, which receive the highest constitutional protection, “speech on matters of purely private concern is of less First Amendment concern.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985). This is particularly true where “[t]here is no threat to the free and robust debate of public issues” and “there is no potential interference with a meaningful dialogue of ideas concerning self-government[.]” *Id.* Thus, although speech relating to matters of private concern “is not totally unprotected by the First Amendment . . . its protections are less stringent.” *Id.* at 760. To that end, the Supreme Court frequently has denied First Amendment protection to speech focused on matters of private concern. *See City of San Diego v. Roe*, 543 U.S. 77, 83-85 (2004); *Connick v. Myers*, 461 U.S. 138, 147 (1983).

In *City of San Diego*, the Court explained that “expression[s] of public concern” generally should be judged under the “same standard used to determine whether a common-law action for invasion of privacy is present.” *Id.* at 83. Thus, matters of public concern generally relate to “something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.” *Id.* at 83-84. Matters of public

concern generally end where personal privacy begins. Private concerns, on the other hand, are limited to the private interests and affairs of a particular person, and do not affect or otherwise concern “public affairs” or “public issues.” *Dun & Bradstreet, Inc.*, 472 U.S. at 759-60.

To determine whether speech is of public or private concern, a court must examine the “content, form, and context of that speech, as revealed by the whole record.” *Snyder*, 562 U.S. at 453 (internal quotations omitted). In *Connick*, for example, the Court assessed whether a questionnaire circulated by a public employee to other employees regarding office morale and other similar issues addressed matters of public concern. The Court held that the questionnaire, with one exception, concerned a private employment dispute between the employee and her supervisor and therefore was not of sufficient “public import” to warrant First Amendment protection. 461 U.S. at 154-55. In reaching its holding, the Court cautioned against an over-inclusive analysis of the issues that might rise to the level of a public concern. The Court explained: “To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark -- and certainly every criticism directed at a public official -- would plant the seed of a constitutional case.” *Id.* at 149.

The Court thus carefully parsed the record to determine which portions of the questionnaire were matters of public concern and which were not. After

undertaking that analysis, the Court determined that one question concerning employee political contributions *did* touch upon a matter of public concern and thus was entitled to greater constitutional protection, even though the rest of the questionnaire was not. *Id.* at 149. By doing so, the *Connick* Court's holding affirmatively supports what both the trial court and the Appellate Division did here. Like the *Connick* Court, both the trial court and the Appellate Division parsed the record and determined which particular facts were subject to heightened protection as matters of public interest and which were not. Both courts determined that most of what Plaintiff seeks to publish is protected speech of public concern, but that a single fact -- Director Caputo's precise street address -- is not. *Connick* endorses precisely this type of careful parsing of the record and of singling out particular and discrete pieces of speech based on whether they meet the test for an issue of public concern.

Similarly, in *Snyder*, the Court considered whether protesters attending military funerals were engaged in speech of public or private concern. Ultimately, the Court concluded that the protests at issue were protected speech on matters of public concern because the speech concerned "broad issues of interest to society at large." 562 U.S. at 454. In reaching its holding, the Court determined that the protests were designed to "condemn . . . modern society," not to "mask an attack on [the plaintiffs] over a private matter." *Id.* at 455. The

Court thus again drew a sharp distinction between matters of public and private concern, and intimated that its holding would have been different had the speech at issue related to purely private matters concerning the family at issue. *See id.* at 462 (“Does our decision leave the State powerless to protect the individual against invasions of, e.g., personal privacy, even in the most horrendous of such circumstances? the Court’s opinion . . . does not hold or imply that the State is always powerless to provide private individuals with necessary protection. Rather, the Court has reviewed the underlying facts in detail, as will sometimes prove necessary where First Amendment values and state-protected (say, privacy-related) interests seriously conflict.”) (Breyer, J., concurring).

Relying on the case law, the Appellate Division found a “commonsense resolution” to this matter by permitting Plaintiff to publish his story with almost all of the relevant details intact. Most importantly, the panel held that Plaintiff is permitted to publish a story detailing that Director Caputo resides in Cape May County, a “substantial distance” from New Brunswick. (PCa16.) The lone detail Plaintiff cannot publish is Director Caputo’s precise street address, a detail that adds nothing to the public debate surrounding Director Caputo’s position.

Plaintiff complains that the courts, through Daniel’s Law, are unconstitutionally assuming editorial control over his work. On the contrary, the

case law permits, and the Supreme Court has endorsed, similar restrictions in the past. In *Dun & Bradstreet*, for example, the Court considered whether publication of a contractor's credit report was a matter of public concern. The Court held, as a general matter, that information about a particular individual's credit report "concerns no public issue." 472 U.S., at 762. "There is simply no credible argument," the Court explained, "that this type of credit reporting requires special protection to ensure that 'debate on public issues [will] be uninhibited, robust, and wide-open.'" *Id.* at 762 (alteration in original). Similarly, in *City of San Diego*, the Court held that private video tapes created by a city police officer were not a matter of public concern because they "did nothing to inform the public about any aspect of the [employing agency's] functioning or operation." 543 U.S. at 84.

The same is true here. Director Caputo's precise street address does not, in and of itself, concern "free and robust debate of public issues." *See Snyder*, 562 U.S. at 452. Nor does the restriction on its publication cause "interference with a meaningful dialogue of ideas" or "self-censorship on matters of public import." *See id.* (quoting *Dun & Bradstreet*, 472 U.S. at 760). His precise home address is inconsequential and does nothing to inform the debate. It is a gratuitous detail that should not warrant special First Amendment protection. The Appellate Division parsed through the record as the case law requires and

properly determined which facts regarding Director Caputo's residence were matters of public concern subject to heightened First Amendment Protection and which were not.

Moreover, Plaintiff's attempt to disclose Director Caputo's home address by bootstrapping it to the facts that do warrant heightened speech protection directly contravenes the established case law. Plaintiff argues that the Appellate Division "incorrectly asked whether *particular facts* were issues of public concern, rather than asking whether the *topic* of the proposed article, generally, related to issues of public concern." (Plaintiff's petition for certification at 6.) (emphasis added). In fact, the Supreme Court endorsed this precise approach in *Connick*. Rather than assess the "topic" of the questionnaire created by the public employee in that case and determine whether the questionnaire as a whole related to a matter of public concern, the Court parsed through the each question, assessed the discrete issues discussed in the questionnaire, and determined that one question was a matter of public concern, but the rest were not. Indeed, the Court cautioned that it should not merely "presume that all matters . . . are of public concern." *Id.* at 149. Plaintiff's argument thus directly contradicts the Supreme Court's holding in *Connick*.

Accordingly, the Appellate Division's analysis here comfortably comports with the Supreme Court's jurisprudence concerning the publication of

truthful information and the distinction between matters of public and private concern. The decision therefore does not require further comment, and to the extent that this Court determines to grant certification in this matter, its decision should be limited to affirming the Appellate Division's decision for the reasons expressed in the panel's *per curiam* decision.

II. THE APPELLATE DIVISION PROPERLY DETERMINED IN ACCORDANCE WITH PRIOR CASE LAW THAT DANIEL'S LAW IS NARROWLY TAILORED TO ACHIEVE A COMPELLING STATE INTEREST, AND ITS DETERMINATION IS SUPPORTED COMFORTABLY BY THE EXPANSIVE RECORD SETTING FORTH THE REASONS FOR THE LAW'S PASSAGE.

There is no dispute that "state officials may not constitutionally punish publication of" truthful information of public significance "absent a need . . . of the highest order." *Bartnicki v. Vopper*, 532 U.S. 514, 527-28 (2001). *See also Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Critically, however, the doctrine applies only to information of "public significance." *See Bartnicki*, 532 U.S. at 527-28 (noting that speech must concern public significance in order to receive heightened judicial scrutiny). First Amendment protections are far "less rigorous" where matters of "purely private significance are at issue." *Snyder*, 562 U.S. at 452. *See also Dun & Bradstreet*, 472 U.S. at 760 ("[S]peech on matters of purely private concern is of less First Amendment concern."). Indeed,

if a restriction on speech poses “no threat to the free and robust debate of public issues,” then the restriction may be “wholly without . . . First Amendment concerns.” *Dun & Bradstreet*, 472 U.S. at 760.

As noted above, Director Caputo’s precise street address is of no public value and therefore should not garner any significant First Amendment protection. But even assuming it should, the trial court and the Appellate Division correctly determined that Daniel’s Law is necessary to further a compelling government interest. That compelling interest serves a matter no less serious than the protection of judicial and law enforcement officials. It is undisputed that Daniel’s Law was passed in response to a heinous act of violence against the family of Judge Esther Salas, made possible by the assailant obtaining Judge Salas’ home address. The Legislature’s concern was well founded, not only in response to the terrible events concerning Judge Salas, but in response to growing and widespread violence and inappropriate communications directed towards judicial and law enforcement officials. According to the federal judiciary’s 2022 Facilities and Security Annual Report:

The proliferation of judges’ personally identifiable information (PII) . . . has been a major concern for the Judiciary in the wake of several attacks on judges in recent years.

There also has been a dramatic rise in threats and inappropriate communications against federal judges and other court personnel, from 926 incidents in 2015 to 4,511 in 2021, according to the U.S. Marshals Service. Some cases have involved litigants angered by

judges' decisions in cases. And the home addresses of judges handling controversial cases have been circulated on social media.

United States Courts, *Facilities and Security – Annual Report 2022*, available at <https://www.uscourts.gov/statistics-reports/facilities-and-security-annual-report-2022#:~:text=There%20also%20has%20been%20a,by%20judges'%20decisions%20in%20cases.>

Contrary to the assertions Plaintiff puts forth, the Supreme Court in *The Florida Star* expressly contemplated that the protection both of personal privacy and of government agents are compelling government interests. *See* 491 U.S. at 532. Both are implicated here in the Legislature's effort to protect the personal identifiable information of judicial and law enforcement officers. Plaintiff contends that the Appellate Division's remedy is not "narrowly tailored" to serve that compelling interest. It is difficult to conceive of how the trial court and Appellate Division could have further narrowed their decisions; both courts permitted Plaintiff to publish a story informing the public of the county and municipality in which Director Caputo lives. Director Caputo's precise street address -- which adds nothing of newsworthy value -- is the only information Plaintiff cannot disclose. The lower courts' remedy not only is narrowly tailored, but comports with prior case law, discussed above, in which the Supreme Court parsed the record and determined which portions of the speech at issue were protected and which were not. *See Connick*, 461 U.S. at 154-55

Undeterred, Plaintiff proposes “three workable alternatives” to the Appellate Division’s holding that are more limited in scope: (1) the government “policing itself” by preventing the negligent disclosure of the information at issue; (2) recognizing an exception to Daniel’s Law for journalists; and (3) limiting Daniel’s Law to civil, rather than criminal, sanctions. (Plaintiff’s petition for certification at 12-14.) Each argument will be addressed in turn, but in general these “alternatives” are solutions in search of a problem, and provide impractical alternatives in this purportedly as-applied challenge to a practical and commonsense decision by the Appellate Division rooted firmly in Supreme Court precedent.

Plaintiff’s first point appears to be rooted in his contention that the fault here should lie with the records custodian who provided him with Director Caputo’s unredacted home address in response to an OPRA request. Plaintiff appears to claim that, once he received the information, he could disseminate it as he pleased. Of course, this proposed “solution” solves only part of the problem; it would not, in and of itself, protect information obtained through a non-government source. More importantly, it conflicts with the case law. In *The Florida Star*, the Court stated that

to the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of

any information so acquired. To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release.

[491 U.S. at 534.]

The Supreme Court thus has contemplated that the government may prohibit the dissemination of certain information both through internal measures, as Plaintiff proposes, as well as through external measures designed to prevent the dissemination of information resting in "private hands." Undoubtedly, to the extent Plaintiff received the information improperly through an OPRA request, the government can and perhaps should do more to protect the negligent disclosure of such information. But that cannot be the only remedy, nor does the case law establish any such limit. On the contrary, the case law supports the efficient and practical solution the Appellate Division fashioned here: allowing the dissemination of information of public concern, and prohibiting the disclosure of purely private information of no newsworthy value.

Plaintiff's second and third alternatives require little discussion. The second proposed alternative to provide an exception for "journalists" -- a broad term to say the least in the age of the internet -- would hollow out Daniel's Law beyond recognition by allowing any self-proclaimed "journalist" to publish otherwise restricted information. More importantly, it would be

unconstitutional. In *The Florida Star*, the Supreme Court held that the Florida law at issue was unconstitutional in part because it applied only to “instrument[s] of mass communication,” rather than to all forms of media. 491 U.S. at 540. The Court also found that the term “mass communication” was vague and subject to imprecise application. To the extent Plaintiff here seeks a similar exception applied to a similarly vague term, it is expressly foreclosed by the Court’s holding in *The Florida Star*.

As to the third alternative, the Supreme Court’s prior precedent does not require, or even encourage, courts to engage in an analysis of the penalties at issue. Rather, courts are tasked with determining whether the speech at issue is of public or private concern by examining the “content, form, and context of that speech, as revealed by the whole record.” *Snyder*, 562 U.S. at 453. The Appellate Division here engaged in the proper analysis by focusing on the speech at issue, not the nature of the penalties under Daniel’s Law. Plaintiff’s proposal to do otherwise is little more than impractical, conclusion-based reasoning designed to allow him to publish the information he chooses while escaping criminal liability. Moreover, any such remedy would serve the interests neither of the persons Daniel’s Law is designed to protect nor of persons who seek to engage in protected speech. Instead, it would allow persons and entities who have the wherewithal to pay a fine -- such as Plaintiff, perhaps -- to violate

the law at will. To that end, Plaintiff's third proposed remedy serves no wider interest other than his own.

The Appellate Division reached a far more sensible, workable, and practical decision. More importantly, it reached its decision by adhering to the established framework that Supreme Court precedent demands. The panel parsed the record, reviewed the information at issue, determined which facts were matters of public concern and which were not, and crafted a careful decision that allows Plaintiff to publish a news story concerning Director Caputo with all of the essential details intact, and with only a single detail of no newsworthy value excluded. Even putting aside that the excluded information is of no intrinsic public value and therefore does not require traditional strict scrutiny analysis, the panel's decision was narrowly tailored to achieve the undoubted compelling interest Daniel's Law serves by restricting no more speech than is necessary to protect that interest. Plaintiff is free to disclose the municipality in which Director Caputo lives, is free to draw conclusions on the nature of Director Caputo's position given the distance between New Brunswick and Cape May, and is free to criticize Director Caputo. The only thing he cannot do is reveal the purely private details of Director Caputo's precise street address. The panel's decision thus struck the appropriate balance based on a correct and unassailable application of the case law.

Accordingly, this Court's intervention is not required in the interests of justice or to correct an obvious error of a lower court in what Plaintiff alleges is a simple as-applied challenge to the law. To the extent the Court is compelled to grant certification of this matter because it concerns an issue of public importance, the Court should affirm substantially for the reasons set forth in the Appellate Division's *per curiam* opinion.

CONCLUSION

For the foregoing reasons, the New Jersey State Association of Chiefs of Police respectfully request that the Court deny Plaintiff's Petition for certification.

Respectfully submitted,

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By:


Vito A. Gagliardi, Jr.

Dated: June 5, 2024