SUPREME COURT OF NEW JERSEY
DOCKET NO: 086861

VIKTORIYA USACHENOK,	:	CIVIL ACTION
Plaintiff-Petitioner,	:	
	:	ON APPEAL FROM
	:	SUPERIOR COURT OF NEW JERSEY
v.	:	APPELLATE DIVISION
STATE OF NEW JERSEY DEPARTMENTOF THE TREASURY, ET AL.,	:	
	:	SAT BELOW:
	:	Hon. Jose L. Fuentes, J.A.D.
Defendants-Respondents.	:	Hon. Robert J. Gilson, J.A.D.
	:	Hon. Katie A. Gummer, J.A.D.

SUPPLEMENTAL BRIEF OF PETITIONER

Date Submitted: November 8, 2023

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PRELIMINARY STATEMENT

This brief is submitted in response to the supplemental brief filed by the State of New Jersey ("State")in this matter. For all the reasons set forth in Appellant Viktoria Usachenok's Petition for Certification, in Appellant's prior appeal submissions and in the ACLU's amici curiae brief, it is respectfully submitted that the New Jersey Supreme Court should reverse the Appellate Division's decision and invalidate the confidentiality directive set forth in N.J.A.C. 4A:7-3.1(j).

The State's supplemental submission asks the Court to create a new prior restraint test for constitutional challenges to laws and regulations. Specifically, the State asks this Court to concoct an "intent to coerce" test, which will essentially require a challenger of the law or regulation to prove the government had an "intent to coerce" to prove a law or regulation amounts to a prior restraint on free speech. Under this theory, the State contends the Court must first analyze the intent of the government in enacting the challenged law or regulation, and only after the challenger can establish the government's intent to coerce the waiver of constitutional rights, can the Court then employ the Pickering/NTEU test to determine whether the law or regulation amounts to a prior restraint or otherwise offends free speech rights. The State has not set forth any legal support that such a test has been adopted by any state or federal court with regard to prior

restraint challenges under the United States Constitution or the New Jersey Constitution, and it is posited this Court should not adopt it here.

In cases challenging a government law or regulation that infringes free speech before it happens, our federal and state courts determine whether the law or regulation has a deterrent effect upon the speaker's exercise of free speech. In the present matter, a state employee will obviously be deterred from disregarding an EEO/AA officer's "request" for confidentiality. Notably, the State stays clear of addressing this issue head on, by instead citing to easily distinguishable, non-binding cases in a last-ditch attempt to gain support for the survival of its long-standing practice to secure confidentiality from witnesses or victims of discrimination.

There is no dispute by the State concerning the public importance of the issues presented to this Court. Similarly, the State does not dispute the unconstitutionality of its prior regulation, which expressly "required" confidentiality. Moreover, the State offers no response to Appellant's arguments regarding the ambiguity and vagueness of the amended confidentiality regulation, including what constitutes a business justification, who makes that decision and how that decision can be appealed. Instead, the State rests its argument on the fanciful contentions that an employee can simply disregard what their employer asks of them - a notion that no employed person can possibly maintain.

For these reasons as well as all the reasons set forth in support of Appellant's appeal, it is respectfully requested that the Court invalidate the amended confidentiality regulation. It is further respectfully submitted that this Court should establish a test or framework for all New Jersey employers and employees regarding the appropriate limitations of a request to witnesses and victims for confidentiality in workplace investigations.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Petitioner refers to and incorporates the Statement of Facts and Procedural History set forth in her Petition for Certification.

ARGUMENT

POINT I

THE AMENDED CONFIDENTIALITY REGULATION IS AN UNCONSTITUTIONAL PRIOR RESTRAINT BECAUSE IT CHILLS PROTECTED SPEECH

A. The State's Intent in Drafting a Regulation Does Not Determine its Chilling Effect

The test for whether a regulation has a deterrent or chilling effect upon protected speech does not hinge on the subjective intent of the government. The issue before the Court is whether employees' right to speak freely about issues of workplace discrimination are infringed when their employer explicitly requests that employees not exercise those rights. The answer to this question is obvious… any person who has ever had a job understands that they are required

to do what their employer requests of them, and to do otherwise, risks their employment.

In sidestepping the precise issue of whether N.J.A.C. 4A:7-3.1(j) has a chilling effect upon protected speech, the State relies upon non-binding, non-employment, non-prior restraint cases to try to convince the Court to limit its constitutional analysis to the subjective intent of the government. However, the government's intent is simply not relevant in a prior restraint constitutional challenge. Because the amended confidentiality regulation deters employees' speech on matters of public concern relating to workplace discrimination, the State's argument fails. This is especially so when viewed in the light of the inherent power imbalance present in every employment relationship.

The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . .." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 252 (1974). "Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009) (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007); *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)). Further, "[t]he Court has emphasized that '(a) system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" *Carroll v.*

President & Comm'rs of Princess Anne, 393 U.S. 175, 180–81 (1968) (quoting *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965)). Such a provision is particularly disapproved of as it "chills potential speech before it happens." *United States v. National Treasury Employees Union ("NTEU")*, 513 U.S. 454, 468 (1995).

Casting aside all federal and state prior restraint jurisprudence, the State relies heavily on a string of easily distinguishable cases in support of its contention that there must be some explicit threat intended and written into the language of the regulation for constitutional considerations to arise. For instance, the State relies heavily on *R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85 (3d Cir. 1984), for the proposition that there must be "actual coercion" in order to prove that protected speech has been deterred or chilled. However, the facts and outcome of this case do not support that argument.

First, *R.C. Maxwell* involved neither a prior restraint on speech nor an employment relationship. The plaintiff in *R.C. Maxwell* was the owner of billboards and a lessee of space owned by Citibank, N.A., who sued the borough in which its billboard was located for asking the lessor, Citibank, to terminate its lease. *Id.* at 85-86. The governmental request in that case was not made to the party claiming a First Amendment violation, but instead, to the lessor of the land. The lessor voluntarily complied with the request, not because it was pressured,

intimidated, or coerced by the government to do so, but because it had plans to develop the parcel and was concerned as to how the lessor would be viewed by the community in which it owned the land. *Id.* at 87. While the lessee attempted to argue that the lessor was coerced by the Borough to breach its lease, the lessor denied this was the case. The court noted that not only was there minimal government involvement in that case, the Borough could not have exacted any punishment at all on the parties for failure to comply with the request. *Id.* at 88 ("the Borough Council of New Hope could brandish nothing more serious than civil or administrative proceedings under a zoning ordinance not yet drafted."). Finally, the dispute in *R.C. Maxwell* was in Pennsylvania and thus, did not invoke any rights under the New Jersey Constitution.[1] In sum, the issues raised in *R.C. Maxwell* provide no support for the argument that requesting confidentiality does not have a deterrent or chilling effect on an employee's protected speech.

The State also relies on *Zieper v. Metzinger,* 474 F. 3d 60 (2d Cir. 2007), along with a string of non-binding Second Circuit opinions, to argue that a "mere

[1] The State's contention that Appellant has not argued that the New Jersey Constitution provides more free speech protections than the United States Constitution, and thus the Supreme Court cannot consider this argument in crafting an appropriate standard of review for prior restraint challenges, is without merit. Appellant has long argued that the confidentiality directives used by the State in state employment have violated both the United States and New Jersey Constitutions, and that the New Jersey Constitution provides even greater free speech protections than the federal Constitution. *See* Petition for Certification, p. 11. Of course, this Court should take this into consideration of their state constitution analysis of the issues presented herein.

request to not engage in protected speech, by contrast, is distinct from a threat 'to employ coercive state power to stifle protected speech.'" Respondent's Supplemental Brief, p. 14. Like *R.C. Maxwell*, this case does not involve a prior restraint, a claim of chilled speech or any employment relationship, and thus, is also entirely distinguishable.

The plaintiff in *Zieper* was an individual filmmaker who posted a controversial film on his website. *See id.* at 63. The defendants were the Federal Bureau of Investigations and the United States Attorney's Office for the Southern District of New York, who sought to remove the video from the internet for reasons of public safety. *See id.* In evaluating whether the defendants' actions "could reasonably be interpreted as intimating that some form of punishment would follow his failure to accede to their request", the court noted that "[t]he existence of regulatory or *other direct decisionmaking authority* is certainly relevant to the question of whether a government official's comments were unconstitutionally threatening or coercive…" *Id.* at 66 (emphasis added). While dismissing the case on qualified immunity grounds, the Court also noted that a jury could reasonably find the conversations between the FBI and Zieper gave rise to a First Amendment claim. Although the FBI agent who spoke to Zieper and his attorneys never expressly told Zieper that he would be punished for his actions, never referred to any impending consequences, and "spoke in a tone that

was facially polite and non-threatening," it was still reasonable, based on the totality of the circumstances, for Zieper to believe that he could be facing legal consequences if he failed to accede to the government's request to remove his video. *Id.* at 66-67. If *Zieper* offers any guidance with respect to the issues here, it is that an explicit or implied threat of punishment is not necessary to implicate First Amendment rights.

Because the government's intent in drafting legislation is irrelevant to whether a protected right is restricted and because coercion need not take the form of an explicit threat of punishment, the State's position is without merit. For the foregoing reasons, the amended confidentiality regulation is a facially unconstitutional restraint on protected speech and should be invalidated.

B. The Power Imbalance Inherent in Employment Relationships is a Vital Consideration in Whether the Amended Confidentiality Regulation Burdens Employee Speech

An employee cannot easily ignore an EEO/AA investigator's required instruction to "request" confidentiality. In fact, no reasonable employee could possibly view an EEO/AA investigator's "request" as meaningless. If this were true, then the State would not require all its EEO/AA investigators to make the request to all witnesses in the first place.

As the State acknowledges, if a government's request is not merely a request, that label is not dispositive. Respondent's Supp. Brief, p. 16. However,

in support of that contention, the State relies on *Bantam Books, Inc. v. Sullivan*, which is a case concerning a dispute between book publishers and the Rhode Island Commission to Encourage Morality in Youth, which was created pursuant to state law. 372 U.S. 58, 59 (1963).

The facts of *Bantam Book*s support Petitioner's contention that what is really coercion can easily be dressed as a request, and the words used by the government in seeking to restrict expression are not dispositive. *Id.* at 68. The Court in *Bantam Books* stated, "[i]t is true that [plaintiff] was 'free' to ignore the Commission's notices, in the sense that his refusal to 'cooperate' would have violated no law." *Id.* Despite that purported freedom to choose, the Court found that compliance was not truly voluntary. *Id.* at 63. The Commission's notices were more akin to orders than requests given the Commission's inherent ability to recommend book publishers for prosecution by the Attorney General. *Id.* at 68. The Court recognized that even where the plaintiff's refusal to comply with a government request would not violate any law, due to the inherent power imbalance between the parties, the request actually served as an instrument of governmental regulation. *Id.* at 68-69. The Court noted:

> Herein lies the vice of the system. The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. Criminal

> sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission's practice is in striking contrast, in that it provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law. What Rhode Island has done, in fact, has been to subject the distribution of publications to a system of prior administrative restraints, since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned. Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.

Id. at 69-70.

Analogous to *Bantam Books,* the State has created a system whereby it regulates protected speech of public employees without any safeguards against the suppression of expression. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77-78 (1990) (what the first amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly).

By now continuing the system of suppression by simply changing the regulation to an alleged “simple request”, the State is disingenuously attempting to sidestep the constitutional considerations that attach to prior restraints on protected speech.

It is well established that "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, *incidentally or intentionally*, the liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (emphasis added) (but holding that where speech occurs as part of routine job duties, the First Amendment is not implicated). The State's specious arguments and reliance on inapposite case law skirt the fact, ubiquitously recognized by New Jersey courts in multiple areas of law, that the employer-employee relationship is defined by a power imbalance in favor of the employer that requires consideration when analyzing employee conduct. This is true regardless of the employer's subjective intent.

A bedrock principle underlying all employment relationships is that employees do what their employer requests of them. The State's contention that an employee can simply disregard what their employer, here the government, expressly requests of them is tone deaf to the realities of working people. Equally out of touch is the State's suggestion that any employees who are "confused" over the request, will simply ask the EEO/AA Investigator whether they are facing any consequences by rejecting it. This reasoning once again ignores the slanted playing field of the employment relationship.

It is patently unreasonable to assume that all employees who are requested as part of an investigation to not speak about the investigation unless they have some undefined "business reason" to do so, will decide to inquire about their constitutional rights as private citizens in response. At best, most employees would conclude that the request is something they cannot freely disregard. *See* Monica Youn, The Chilling Effect and the Problem of Private Action, 66 Vanderbilt Law Review, 1471, 1492-1493 (2019)("in situations where legal rules create doubt in the minds of speakers as to whether their speech is protected, the resulting chilling effect renders that uncertainty constitutionally intolerable. The benefit of the doubt must go to the speaker, not the state."). A request from an employer, even an innocuous, properly worded request, burdens the subsequent actions and decisions of the employee, whether the employer intends it to or not. For this reason, as well, the amended confidentiality regulation chills protected speech regardless of the intent of the Civil Service Commission ("CSC") in revising its language.

In the context of employment harassment and discrimination cases, New Jersey courts have routinely held that an employer's position of authority over its employees results in greater protection for the employees and greater duties of care for the employer than would be found outside the employment relationship. *See Taylor v. Metzger*, 152 N.J. 490, 511 (holding in a LAD action that "the

power dynamics of the workplace" were a deciding factor in finding outrageousness of employer's conduct); *Wigginton v. Servidio*, 324 N.J. Super. 114, 131 (App. Div. 1999) (holding that a comment made "as a part of everyday living…can take on entirely different connotations" when spoken in the workplace).

This Court has also found it appropriate, in negligence actions, to weigh "[t]he demand of employment, and the reality of the power imbalance between employer and employee…in determining whether an employee acted prudently in continuing to perform his or her assigned task in the face of a known risk." *Fernandes v. DAR Development Corp*., 222 N.J. 390, 412 (2015) (citing *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 275 (1963) in support of the long-standing acknowledgment that "a man or woman who must work to live is not necessarily negligent when he or she proceeds with an assigned task after learning of a hazard.").

The Appellate Division has held that an employee was properly denied unemployment benefits after refusing to comply with her employer's "properly worded request." *Dennery v. Bd. of Rev.*, No. A-4055-08T2, 2010 WL 1425249, at * 2 (N.J. Super. Ct. App. Div. Apr. 12, 2010). In *Dennery*, a Department of Labor Review Board upheld the denial of a former employee's application for unemployment benefits on the grounds that she resigned voluntarily and without

good cause. The former employee had refused her employer's request to bring him a file. *Id.* at *1. After her refusal, he became angry and spoke unprofessionally to her. She resigned from her position and filed for unemployment. *Id.* at *1. In upholding the appeal tribunal's decision to deny her application for benefits, the Appellate Division clearly stated that despite the employer's unprofessional and harassing conduct, "[h]e did so, however, only after appellant refused his first appropriately worded request to bring the correct file." *Id.* at *1. The Court also upheld the appeal tribunal's decision that the employee "had no right to refuse to comply with her employer's first properly worded request" and characterized her decision not to comply with the proper, non-harassing request as insubordination. *Id.* at *2.

The National Labor Relations Board ("NLRB") has similarly long recognized the power imbalance impacting employer-employee relationships and the necessity of factoring that power imbalance into analyses of the validity of workplace rules. *See Banner Health System*, 362 NLRB 1108, 1113 (2015); *Stericycle, Inc. and Teamsters Local,* 628, 372 NLRB No. 113, at 1 (2023).

The totality of the circumstances in this case, include the following:

1. The government's mandate that every complainant and witness to discrimination in the workplace must be requested to not speak about the issues of discrimination unless they have a legitimate business reason to do so;

2. The lack of any explanation to employees concerning their right to speak as private citizens about matters of public concern;

3. The power imbalance inherent in the employer-employee relationship including, but not limited to, valid employee concerns about job security, meeting employer expectations, and fear of being insubordinate if the employee does not comply with the "request";

4. The ever-present ability of employers to terminate at-will employees for any reason or no reason at all; and

5. The ambiguity of the amended confidentiality regulation's plain language (discussed *infra*).

Based upon the foregoing, it is highly probable that an employee will reasonably understand that his or her failure to accede to the mandated request at issue will result in life-changing consequences. For all these reasons, the amended confidentiality regulation deters employees from engaging in protected speech and is constitutionally invalid on its face.

POINT II

THE CONFIDENTIALITY DIRECTIVE DOES NOT PASS THE CONSTITUTIONAL VAGUENESS TEST

In addition to the chilling effect the amended confidentiality regulation has on the exercise of protected speech, it also does not pass the constitutional vagueness test, which is an independent reason for invalidation.

A regulation is facially unconstitutional for vagueness "if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *State, Tp. of Pennsauken v. Schad*, 160 N.J. 156, 181 (1999). "The vice of unconstitutional vagueness is further aggravated where…the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Cramp v. Board of Public Instruction*, 368 U.S. 287, 287 (1961).

In cases that involve vagueness in the First Amendment context such as here, courts are to apply the same strict scrutiny standard used in criminal prosecutions. *Smith v. Goguen,* 415 U.S. 566, 574 (1974). "[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or association, a more stringent vagueness test should apply." *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982).

The United States Supreme Court has explained why vague laws are intolerable:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be

> prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

A law may be unconstitutionally vague on its face even if "there is some conduct that clearly falls within the provision's grasp." *Johnson v. U.S.*, 576 U.S. 591, 602 (2015). A regulation is unconstitutionally vague if it meets one of two criteria: (1) it fails to provide a reasonable opportunity for people of ordinary intelligence to understand what conduct is prohibited; or (2) it allows for arbitrary enforcement. *Grayned*, 408 U.S. at 108. The amended confidentiality regulation is unconstitutionally vague on its face under both criteria.

Regarding the first criterion, the amended confidentiality regulation fails to allow people of ordinary intelligence to understand what they are being asked to do. Specifically, the phrase "legitimate business reason" in the context of the regulation is incapable of a commonsense interpretation. While the State guesses in fn. 6 of its brief that this phrase "seems to narrow the suggestion to only those situations where the employee's reason has to do with the workplace", the State clearly does not know what it means or how a reasonable employee would interpret it despite the fact it drafted the language in the first place.

The Appellate Division has held that legislative enactments are unconstitutionally vague even when they contain common words and phrases to carve out exceptions to prohibited behavior but fail to define them or provide objective standards by which to measure them. *Betancourt v. Town of West New York*, 338 N.J. Super. 415, 423-24 (App. Div. 2001) (holding that a juvenile curfew ordinance was unconstitutionally vague because the terms "social events", "cultural events", "activities sponsored by a community organization", "direct transit", and "errand involving a medical emergency" were undefined and susceptible to multiple interpretations). *C.f. Petition of Soto*, 236 N.J. Super. 303, 328-29 (App. Div. 1989) (finding that the term, "thing of value," when read in the context of a statute prohibiting casino employees from making political contributions, was capable of commonsense interpretation); *Heyert v. Taddese*, 431 N.J. Super. 388, 425 (App. Div. 2013) (rent control ordinance sufficiently defined the word "dwelling" as a building or housing structure rented to a tenant); *State v. Caba*, No. A-2469-14T1. 2016 WL 1551430, at *3 (N.J. Super. Ct. App. Div. Apr. 18, 2016) (finding that an ordinance prohibiting the parking of buses on the street overnight was sufficiently clear that plaintiff should have known that he could not park his school buses overnight).

Unlike in the state cases cited above, the term "legitimate business reason," although commonplace in the context of employment litigation, is incapable of a

commonsense interpretation in the context of the amended confidentiality regulation. The CSC has clumsily attempted to use a term that defines the motivations of employers in making employment decisions, to the motivations of employees in making highly personal decisions to speak out about their experiences of harassment and discrimination in the workplace. This ill-fitting carve-out creates ambiguity and confusion in the plain language of the amended confidentiality regulation. What is a legitimate business reason to support protected speech from the perspective of an employee? Does the employer or the employee decide whether a reason is a legitimate business reason? If the employer decides, as is usually the case with business justifications, what are the criteria for determining a reason's legitimacy in relation to the business? Because speech on matters of workplace harassment and discrimination are made by employees acting as private citizens speaking on matters of public concern, how does the notion of a legitimate business reason even factor into their decision-making process? The State makes no attempt to answer any of these questions or provide any other clarity to the inherent vagueness presented by the language of the regulation.

Regarding the second criterion for unconstitutional vagueness, the amended confidentiality regulation also allows for arbitrary enforcement. If it is the employer that determines what constitutes a legitimate business reason, the

amended confidentiality regulation allows for employers to arbitrarily decide what reasons are valid and which employees may speak out without fear that they have failed to meet their employer's expectations.[2] In any case, no one, including the State knows who makes the determination, and whether an employee has any say as to whether he or she has a legitimate business reason.

For all these reasons, the amended confidentiality regulation is unconstitutionally vague on its face and should be invalidated on this basis as well.

POINT III

THE AMENDED CONFIDENTIALITY REGULATION VIOLATES THE LAD'S ANTI-RETALIATION AND ANTI-INTERFERENCE PROVISIONS AND NEW JERSEY PUBLIC POLICY

A. The Amended Confidentiality Regulation Interferes with Protected Activity Under the LAD

Another detrimental consequence of the State's regulation requiring EEO/AA Investigators to request that employees keep all aspects of discrimination investigations confidential is that it interferes with their right to engage in protected activity under the New Jersey Law Against Discrimination

[2] While the State emphasizes that N.J.A.C. 4A:7-3.1(j) no longer explicitly threatens employment consequences for failure to comply with the government's request, N.J.A.C. 4A:7-3.1(k) still contains an express threat of disciplinary action for anyone violating any portion or portions of the State Policy. Clearly, a reasonable employee who was asked by the government to maintain confidentiality could believe that they would be subjecting themselves to disciplinary action for violating the State Policy under this subsection.

N.J.S.A. 10:5-1, et seq. ("LAD"). As such, not only is the State violating the rights of state employees under the First Amendment, but they are also violating their rights under the LAD.

The LAD was enacted to protect not only the civil rights of individual, aggrieved employees, but also to protect the public's strong interest in a discrimination-free workplace. *Lehmann v. Toys R. Us.,* 132 N.J. 587, 603-04 (1993). The LAD expressly makes it an unlawful act for an employer to "coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [the LAD]." N.J.S.A. 10:5-12(d). The LAD's anti-retaliation provision has been interpreted to cover two general categories of protected employee activity: (1) opposing practices or acts that are unlawful under the LAD, which include complaining about or protesting against discrimination in the workplace; and (2) filing a complaint or testifying or assisting in any proceeding under the LAD. New Jersey Model Jury Charge 2.22.

Any employee who makes a reasonable and good faith complaint to the EEO/AA office or is a witness to any EEO/AA investigation is engaging in protected activity under the LAD. The State's request for confidentiality interferes with that employee's right to complain about or protest against

unlawful discrimination. Indeed, the LAD contains broad restrictions on actions that anyone, especially an employer, can take including prohibitions on coercing, intimidating, threatening, or interfering with the exercise of rights under the LAD. The government's "request" to all state employees to maintain confidentiality in all workplace investigations has a coercive, intimidating, threatening, and interfering effect on the employee's decision to grant or reject the request.

As such, not only does the amended confidentiality regulation offend the United States and New Jersey Constitutions, it also violates the LAD, providing yet another basis for the Court to invalidate it.

B. The Amended Regulation Violates New Jersey Public Policy

New Jersey maintains a strong public policy against discrimination. *Fuchilla v. Layman*, 109 N.J. 329, 334, *cert. denied*, 488 U.S. 826 (1988). As this Court has stated, "[e]mployers are best situated to avoid or eliminate impermissible vindictive employment practices, to implement corrective measures, and to adopt and enforce employment policies that will serve to achieve the salutary purposes of the respective legislative mandates." *Abbamont v. Piscataway Tp. Bd. of Educ.*, 138 N.J. 405, 418 (1994).

The State contends that N.J.A.C. 4A:7-3.1(j) is in keeping with the practices of other jurisdictions and their respective guidance on maintaining

confidentiality in workplace harassment investigations, relying on resources from New York, Pennsylvania and the Federal EEOC. The State's reliance on these resources is severely misplaced. New Jersey's enactment of a specific regulation first requiring, and now requesting confidentiality is unique[3] to only New Jersey.

Foremost, as all three of the cited resources are *guidance documents*, and not codified statutes or regulations, they "lack the force of law." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000); *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001); *Big M, Inc. v. Texas Roadhouse Holding, LLC*, 415 N.J. Super. 130, 136 (App. Div. 2010) ("[guidance documents] are not regulations that enjoy the force of law.") (citing *Christensen*, 529 U.S. at 587). This principle is shared by New York and Pennsylvania as both explicitly do not regard the very sources the State has relied on as having the force of law. *Application of Riverkeeper, Inc. v. Seggos*, 75 N.Y.S.3d 854, 867 (N.Y. Sup. Ct. 2018) ("manuals lack the force of law")(citing *Christensen*, 529 U.S. at 587); *Cutler v. State Civ. Serv. Comm'n (Off. of Admin.)*, 924 A.2d 706, 711 (Pa. Commw. Ct. 2007) ("A management directive is not an administrative regulation with the force and effect of law"). As a codified regulation, N.J.A.C. 4A:7-3.1(j) does "have the force and effect of law" and has "a binding effect on all persons subject to [it]." *Russell v. Rutgers*

[3] In fact, our research has failed to discover any other state that has enacted a statute or regulation requiring or requesting confidentiality in workplace investigations.

Cas. Ins. Co., 234 N.J. Super. 175, 179 (App. Div. 1989) (citing *State v. Atlantic City Electric Co.*, 23 N.J. 259, 270 (1957)). On this basis alone, the State's argument is unavailing as it seeks to diminish the authority of the amended confidentiality regulations by equating it to mere suggestive materials.

Aside from this, the principles within the documents relied on by the State are not comparable to N.J.A.C. 4A:7-3.1(j). N.J.A.C. 4A:7-3.1(j) mandates that the "investigator shall request" confidentiality and notes that such a mandatory "request" should be relayed to employees alongside an instruction that they "not discuss any aspect of the investigation with others, unless there is a legitimate business reason to disclose such information." This instruction further limits and narrows the free speech rights of public employees. No such mandate is imposed by the language in the EEOC's, New York's or Pennsylvania's guidance documents, nor is there a further directive given to the investigator to specifically qualify, by means of an undefined term, when it is appropriate to breach confidentiality. Moreover, the EEOC's guidance document cited by the State pertains to the confidentiality owed to the employee by the employer, *i.e.,* the investigator, which the State readily admits. As N.J.A.C. 4A:7-3.1(j) pertains to the confidentiality obligations of the employee, not the employer/investigator, the EEOC's guidance document is entirely inapplicable.

For all the foregoing reasons, including the chilling effect of N.J.A.C. 4A:7-3.1(j), its vague and ambiguous terms, its interference with protected employee activity under the LAD, and its singularity among our country's laws, the Court should also invalidate the amended confidentiality regulation on public policy grounds.

POINT IV

THE COURT SHOULD ADOPT THE *STERICYCLE* BALANCING TEST TO DETERMINE THE VALIDITY OF GOVERNMENTAL CONFIDENTIALITY REGULATIONS

The State argues that the Court should refrain from adopting a test or providing any guidance to New Jersey employers concerning the role of confidentiality in workplace investigations. Respectfully, this would be a mistake.

This Court has a long history of interpreting statutes and other laws to establish tests or provide important guidance concerning relevant employment laws. *See*, e.g., *Anderson v. Exxon Co*., 89 N.J. 483, 492 (1982)(adopting the federal McDonnell Douglas test for evaluating claims of employment discrimination); *Aguas v. the State*, 220 N.J. 494 (2015) (adopting the Ellerth/Faragher test used by federal courts to determine employer liability for discrimination claims under Title VII); *Hargrove v. Sleepy's, LLC*, 220 N.J. 289,

316 (2015) (adopting the "ABC" Test derived from unemployment law for claims under the Wage and Hour Law and Wage Payment Law).

Since 2015, the NLRB has grappled with establishing the appropriate test to balance an employer's need for confidentiality with an employee's right to freely discuss work conditions. In *Banner Health System d/b/a Banner Estrella Medical Center*, 362 NLRB No. 137 (June 26, 2015), the NLRB held that employers may only inform employees not to discuss an ongoing investigation when they have a "legitimate and substantial business justification" for requesting confidentiality that outweighs the employee's section 7 rights. *Id.* at 3. The NLRB further ruled that workplace rules that required confidentiality after the investigation's conclusion were per se unlawful. Specifically, the Board recognized that where an investigation has already closed, "[w]hatever need for confidentiality the employer initially might have had, it had long passed." *Id. at 3*. Where an investigation is no longer ongoing, therefore, a rule requiring confidentiality would be unlawful. The NLRB decision further identified situations in which an employer could show legitimate and substantial business justifications, such as when witnesses are in need of protection and discussion of the investigation may endanger them, evidence is in danger of being destroyed, testimony is at risk of being fabricated, there is a need to prevent a cover-up, and

the existence of other comparably serious threats to the integrity of an investigation sufficient to justify a confidentiality requirement. *Id. at 3.*

In 2019, the NLRB overturned the *Banner* test in favor of a new framework finding that confidentiality rules for the duration of investigations were lawful without a case-by-case balancing of interest. *Apogee Retail, LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019). However, in August 2023, the NLRB overruled *Apogee Retail*, and held that an employer's workplace investigation confidentiality rule will be "presumptively unlawful" if the challenged rule has a "reasonable tendency to chill" the employee's exercise of Section 7 rights. An employer may rebut the presumption by showing the rule advances a legitimate and substantial interest that cannot be achieved by a more narrowly tailored rule. *Stericycle, Inc. and Teamsters Local 628*, 372 NLRB No. 113, at 1 (2023).

In reaching its decision, the NLRB explicitly considered how to ensure that it would interpret work rules going forward "(a) …in a way that accounts for the economic dependence of employees on their employers and the related potential for a work rule to chill the exercise of Section 7 rights by employees; (b) the Board properly allocates the burden of proof in cases challenging an employer's maintenance of a work rule under Section 8(a)(1); and (c) the Board

appropriately balances employees' rights under Section 7 and employers' legitimate business interests?" 372 NLRB No. 113, at 1 (2023).

The NLRB stated, "[t]o begin, the current standard fails to account for the economic dependency of employees on their employers. Because employees are typically (and understandably) anxious to avoid discharge or discipline, they are reasonably inclined both to construe an ambiguous work rule to prohibit statutorily protected activities and to avoid the risk of violating the rule by engaging in such activity." *Id.* at 1. The NLRB then adopted a standard of case-by-case analysis of individual workplace rules, their language, and the employer interests actually implicated by them to remedy these fundamental defects. In doing so, the NLRB clarified that it would interpret workplace rules from the perspective of an employee who is financially dependent on their employer, making the employer's intent immaterial. *Id.* at 2. The NLRB held:

> Rather, if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable. If the General Counsel carries her burden, the rule is presumptively unlawful, but the employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. If the employer proves its defense, then the work rule will be found lawful to maintain.

Id. at 2.

New Jersey courts have not adopted a test or other framework regarding the role of confidentiality during workplace investigations. The State's request that the Court ignore the current void in state law on this vitally important issue concerning discrimination is detrimental to the rights of all employees in this State and runs completely contrary to the State's own strong public policy to eradicate workplace discrimination.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that the Court invalidate the amended confidentiality regulation and establish a test or framework for all New Jersey employers and employees regarding the appropriate limitations of a request to witnesses and victims for confidentiality in workplace investigations.

Respectfully Submitted,

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