Supreme Court of New Jersey

Docket No. 089427

CHARLES KRATOVIL, *Plaintiff-Appellant,* vs. CITY OF NEW BRUNSWICK and ANTHONY A. CAPUTO, in his capacity as Director of Police, *Defendants-Respondents.*	:	CIVIL ACTION ON GRANT OF PETITION FOR CERTIFICATION OF THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-0216-23 Sat Below: HON. ROBERT J. GILSON, PRESIDING JUDGE HON. PATRICK DEALMEIDA HON. AVIS BISHOP-THOMPSON

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFF-APPELLANT

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AMICUS INTEREST STATEMENT

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the rights of all Americans to the freedoms of speech, expression, and conscience—the essential qualities of liberty. Founded in 1999 as the Foundation for Individual Rights in Education, FIRE's sole focus before expanding its mission in 2022 was defending student and faculty rights at our nation's colleges and universities. Given our decades of experience combating campus censorship—including on behalf of campus newspapers—FIRE is all too familiar with the constitutional problems presented when state actors infringe upon the First Amendment rights of journalists. Because a free press and freedom of speech are indispensable to a free state, FIRE strongly opposes government attempts to curtail press freedoms. *See, e.g.*, *Villarreal v. City of Laredo*, 94 F.4th 374 (5th Cir.), *cert. granted and judgment vacated sub nom. Villarreal v. Alaniz*, --- S. Ct. ---, No. 23-1155 (Oct. 15, 2024). Informed by our unique history, FIRE has a keen interest in ensuring the censorship it continues to fight on college campuses does not take hold in society at large, including through misapplication of privacy statutes to restrict journalistic freedoms.

PRELIMINARY STATEMENT

This case involves a clash between the First Amendment's protection of press freedom and a state privacy statute wielded by a high-ranking public official to bar publication of an article critical of him that includes his home address. Longstanding Supreme Court jurisprudence dictates that freedom of the press must prevail.

The New Jersey Legislature enacted Daniel's Law[1] to protect certain public servants by shielding their home addresses, among other information, from public disclosure. In part, it provides that a person who receives notice under the Law shall not disclose the home address or telephone number of a covered person on pain of civil and criminal penalties. Here, Plaintiff-Appellant Kratovil, a journalist, used open records requests to obtain materials that disclosed Anthony Caputo's home address in Cape May—more than a two-hour drive from New Brunswick, where he serves as Director of Police.[2] The Director sent Kratovil notice under the Law, demanding that he not republish the address. Thus began this suit by which Kratovil challenges the constitutionality of that application of Daniel's Law to him.

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[1] N.J.S.A. 56:8-166.1; N.J.S.A. 2C:20-31.1.

[2] Amicus FIRE will refer to Defendants-Respondents Caputo and the City of New Brunswick collectively as the "State."

Importantly, the government voluntarily disclosed the Director's home address to journalist Kratovil from public records, where it remains publicly available. Kratovil's challenge rightly advocates that the First Amendment prohibits the government from punishing journalists who publish true information lawfully obtained from public records—especially when information is freely accessible therein. As the Supreme Court explained: "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

Even beyond the blanket rule announced in *Cox* and reinforced in subsequent cases, other Supreme Court precedent protects publication of the Director's address. In *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the Court held the First Amendment prevents the government from punishing journalists who disclose truthful information relating to a matter of public importance *unless* the government carries its burden of proving its regulation is "narrowly tailored" and necessary to advance a "state interest of the highest order." 491 U.S. at 541. As applied to Kratovil, Daniel's Law is neither. It is not narrowly tailored nor does it advance the state's asserted interest of protecting certain public servants from harm. At the same time, preventing Kratovil from publishing a story

critical of an issue of public significance—*i.e.*, the fact that New Brunswick has a high-ranking police official who lives more than two hours away—violates freedom of the press and free speech. Worse still, although the Supreme Court has repeatedly emphasized the inviolability of editorial discretion, the Appellate Division arbitrarily prescribed how much information it believed was necessary for Kratovil to disclose to address what is indisputably matter of serious public interest.

This Court should follow longstanding Supreme Court precedent banning punishment of journalists for publishing true information lawfully obtained from public records and reverse.

PROCEDURAL AND FACTUAL HISTORY

To avoid repetition, *amicus* FIRE incorporates Kratovil's statement of the procedural and factual history of this matter. *See* Pl.-Pet'r's Pet. for Cert. Brief & App. 1–5.

ARGUMENT

I. UNITED STATES SUPREME COURT PRECEDENT PROHIBITS THE GOVERNMENT FROM PUNISHING THOSE WHO PUBLISH TRUE INFORMATION LAWFULLY OBTAINED FROM PUBLIC RECORDS.

The Supreme Court of the United States has established a broad rule protecting disclosure of truthful information lawfully obtained from public

records. On the undisputed facts of this case, that rule protects Kratovil's publication of an article mentioning the Director's home address.

In *Cox Broadcasting*, the Court considered whether a state may authorize damage suits in tort against the press for publishing the name of a rape victim revealed in indictments available for public inspection, a matter of public record. 420 U.S. at 471. Weighing privacy concerns against the freedom of the press to report truthful information, the Court noted the "public interest in a vigorous press" and explained that "interests in privacy fade when the information involved already appears on the public record." *Id.* at 494–95. Because the state targeted the contents of a publication, the Court explained that the state was creating sanctions for pure speech. And the Court took a dim view of such sanctions where the information was already in the public domain: "In preserving that form of government [in which citizens are the final judges of the proper conduct of public business] the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." *Id.* at 495.

To protect privacy interests, therefore, the Court put the onus on the government to use "means to avoid public documentation or other exposure of private information" in the first place. *Cox*, 420 U.S. at 496. Placing this burden

on the government is the only way to prevent disclosure; when otherwise private information is included in "documents open to public inspection, the press cannot be sanctioned for publishing it." *Id.*; *see also Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 559 (1976) ("The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events."). Accordingly, once information is contained in public records disclosed to the public, "reliance must rest upon the judgment of those who decide what to publish or broadcast." *Cox*, 420 U.S. at 496 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)). Because the First and Fourteenth Amendments prohibit tort liability for publishing true information obtained from the public record, the Court reversed the Georgia Supreme Court's judgment.

The Court soon revisited the conflict between freedom of the press and privacy interests with similar results. *See Okla. Publ'g Co. v. District Ct.*, 430 U.S. 308 (1977) (per curiam). There, reporters learned the name of a juvenile criminal defendant in open court proceedings. Subsequently, a state court enjoined the press from disseminating the name or image of the minor. *Id.* at 308. The state courts rejected the press's challenge that the order was an unconstitutional prior restraint of speech. *Id.* at 309.

Considering the question, the Court held that the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public. *Id.* at 310. Explaining its decision, the Court stated that that the "result is compelled by our recent decisions in *Nebraska Press Ass'n v. Stuart* and *Cox Broadcasting Corp. v. Cohn*." *Id.* (cleaned up). The Court explained that *Cox* "made clear that the press may not be prohibited from truthfully publishing information released to the public in official court records." *Id.* (internal quotation omitted). And *Stuart* concluded that a court order prohibiting the publication of evidence presented during a hearing open to the public and press "plainly violated settled principles." *Id.*

In so ruling, the Court rejected the state's argument that the gag order was valid because a statute required closed juvenile court hearings unless the judge expressly ordered the hearing to be public. *Id.* at 311. Because no one objected to the press's presence in the courtroom, however, the Court held the reporters lawfully obtained the juvenile defendant's name and picture. *Id.* The trial court's order thus violated the freedom of the press guaranteed by the Constitution. *Id.*[3]

[3] Notably, the Court itself used the juvenile's full name in its opinion since it was previously disclosed. *Okla. Publ'g Co.*, 430 U.S. at 309.

Florida Star, in which a reporter obtained a rape victim's name from a police incident report left for inspection in the Duval County Sheriff Department's press room, rounds out the bedrock Supreme Court precedent on this issue. After reporter's paper published her name to its 18,000 readers, B.J.F. brought suit under a Florida statute that allowed for civil sanctions against anyone who printed, published, or broadcast the name of a sexual assault victim. *Fla. Star*, 491 U.S. at 526. State courts rejected the paper's argument that it was unconstitutional for Florida to punish publishing true information lawfully obtained from the government. *Id.* at 528–29. The Supreme Court granted review, and reversed.

The Court noted that it addressed the tensions between the First Amendment freedom of the press and state laws purporting to protect personal privacy "several times in recent years," citing *Cox* and *Oklahoma Publishing* as well as *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). *Fla. Star*, 491 U.S. at 530–31. The Court noted its prior holdings barred states from imposing liability for truthful reporting of information obtained from judicial records open to public inspection, *id.* at 533, picking up a point that *Daily Mail* drove home in explaining that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." 443 U.S. at 102.

As in *Cox*, the Court put the onus on the state to protect sensitive private information from disclosure in the first place:

> [T]he government retains ample means of safeguarding significant interests upon which publication may impinge, including protecting a rape victim's anonymity. . . . 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. The government may 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. *Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts*.

Fla. Star, 491 U.S. at 534 (emphasis added).

The Court went on to explain that "punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act." *Id.* at 535. The Court noted the government's failure to police itself in disseminating information meant that allowing civil sanctions for subsequent publication is not "a narrowly tailored means of safeguarding anonymity." *Id.* at 538. The Court restated the warning issued in *Cox* that once the government places information "in the public domain, reliance must rest upon the judgment of those who decide what to publish or broadcast." *Id.* Thus, the Court reasoned that had "appellant merely reproduced the news release . . . , imposing civil

damages would surely violate the First Amendment" and the fact that appellant converted the police report into a news story" could not "change this result." *Id.* at 539.

Cox, *Oklahoma Publishing*, *Daily Mail*, and *Florida Star* set forth a broad rule: The First Amendment prohibits governments from punishing those who lawfully obtain and publish truthful public domain information disclosed by the government voluntarily.

There is no dispute here that Kratovil lawfully obtained the Director's true address from the government through open records requests, or that the government voluntarily provided the relevant public record.[4] By "placing the information in the public domain . . . the State must be presumed to have concluded that the public interest was thereby being served." *Cox*, 420 U.S. at 495. Under these facts, it is unconstitutional to apply Daniel's Law to punish Kratovil or the *New Brunswick Today*. By disclosing the information to the public, the government surrendered control of it to the "judgment of those who decide what to publish or broadcast." *Id.* at 496.

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[4] While the government redacted some information in the record that it disclosed, it ultimately chose not to redact the Director's address. *Kratovil v. City of New Brunswick*, No. A-0216-23, 2024 WL 1826867, at *1 (N.J. App. Div. Apr. 26, 2024) (per curiam).

II. THE APPELLATE DIVISION ERRED IN APPLYING *DAILY MAIL*'S STRINGENT TEST

This Court should also reverse because the state cannot show it meets *Daily Mail*'s stringent test of whether the information at issue involves an issue of serious public significance, whether the state has shown an interest of the highest order that warrants punishing someone who publishes it, and whether the regulation is necessary to advance the state's interest and narrowly tailored to do so. 443 U.S. at 103. *Id.* In short, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Id.* at 102.

A. The Appellate Division erred in holding the Director's address was not of significant public importance.

There is no dispute in this case that Kratovil investigated an issue implicating a matter of significant public importance. *Kratovil*, 2024 WL 1826867, at *5. However, in an apparent "commonsense" attempt to split the baby, the Appellate Division held that, although whether the Director lived in a distant city was of public significance and could be reported, his specific street address was not a matter of public interest and could not. *Id.* That result cannot be squared with *Florida Star*, where the Court noted the name of the rape victim was not itself a matter of public interest, but nonetheless held the First Amendment barred punishing the press for including it in a story of public interest about a rape and its investigation by police. *Fla. Star*, 591 U.S. at 536.

It was also error because the Appellate Division invaded the First Amendment-protected province of editorial judgment.

The editorial prerogative is sacrosanct in the Court's First Amendment jurisprudence. Fifty years ago, the Court explained that:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and *the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.* It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (emphasis added) (footnote omitted). The Court reinforced this just last Term in extending the same principles to online publishers, noting "the editorial function itself is an aspect of speech" the First Amendment fully protects. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2401–02 (2024).

Thus, contrary to the Appellate Division's conclusion, whether the street address the government disclosed to Kratovil is properly made part of a story of public interest is not a question for the courts. Instead, once disclosed in public records available for request and inspection, as here, it is a question entrusted to the "judgment of those who decide what to publish or broadcast." *Cox*, 420 U.S. at 496. And here, after concluding the matter of the Director's residence in

another city was a story that implicated issues of significant public importance, the Appellate Division wrongly usurped Kratovil and *New Brunswick Today*'s editorial discretion to determine that the director's street address was material.

In the face of the First Amendment's protections of the editorial function, the Appellate Division missed the mark when it heralded its own decision as a "commonsense resolution to this as-applied challenge to Daniel's Law." *Kratovil*, 2024 WL 1826867, at *5. Subjectively commonsense notions of fairness are not adequate when crucial First Amendment rights are at stake. *See Miami Herald Publ'g Co.*, 418 U.S. at 258 (noting that "the decisions made as to . . . treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment"). The Appellate Division's line drawing based on common sense is subjective, does not provide journalists with the bright line needed to avoid chilling protected speech, and abridges the First Amendment's protection of the free press.

Editors are entitled to decide whether to publish information voluntarily disclosed in public records in connection with a story of public interest. The Appellate Division erred when it tacitly concluded it was the proper arbiter of that question.

B. The Appellate Division erred by failing to analyze whether applying Daniel's Law to Kratovil was necessary to further a government interest of the highest importance and narrowly tailored to do so.

The Appellate Division's application of *Daily Mail* took the first off-ramp encountered and, having erroneously done so, further erred by ignoring the remainder of the test's exacting scrutiny. Specifically, its per curiam opinion paid little more than lip service to whether the Defendant-Respondents proved Daniel's Law's application to Kratovil was necessary and narrowly tailored. Proper application of the test's remainder reveals the state could not meet its burden: Daniel's Law is neither necessary to advance the government's interest in protecting certain public servants nor narrowly tailored as applied to Kratovil and the press.

1. Daniel's Law is not necessary to advance the state's claimed interest

The State has not shown and cannot show Daniel's Law is necessary to advance the government's interest in protecting public servants as applied to Kratovil's publication of an article including the Director's address.[5] The Supreme Court describes "punishing truthful publication in the name of privacy" as an "extraordinary measure." *Florida Star*, 491 U.S. at 540. Protecting public

[5] This assumes for the sake of argument that the state's claimed interest is of the highest importance.

servants' privacy to prevent people from stalking, harassing, or physically attacking them is a laudable goal and one in which the government has a significant interest. But creating a punitive system that allows those public servants to quash publication of information already available in the public domain does nothing to advance that interest.

Florida Star's application of *Daily Mail* is instructive and shows Kratovil is entitled to challenge Daniel's Law as applied to him. Explaining this prong of *Daily Mail*, the *Florida Star* Court observed that "punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act." 491 U.S. at 535. As a result, "where the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release." *Id.* The Court further confirmed that the *Daily Mail* Court formulated its test knowing it would rarely—if ever—apply to information in the public domain, observing *Daily Mail*'s summary of *Oklahoma Publishing*: "Once the truthful information [in *Oklahoma Publishing*] was publicly revealed or in the public domain the court could not constitutionally restrain its dissemination." *Id.*

These principles show that even a state interest of the "highest order" cannot justify punishing the press for publishing true information that the

government itself has placed in the public domain. Daniel's Law's penalties cannot undo the fact that anyone may obtain the Director's address through open records requests, just as Kratovil did. For that reason, the government's asserted interest in protecting the privacy of public servants like the Director by shielding their home addresses from public disclosure isn't served where that information is available to the public, as it was to Kratovil.

2. Daniel's Law is not narrowly tailored to advance the government's claimed interest in protecting the Director's privacy and safety

Not only is Daniel's Law wholly inadequate to further a state interest of the "highest order," it is not narrowly tailored as applied to Kratovil to advance that interest. Rather than preventing disclosure of public officials' private information by the government in the first place, Daniel's Law adopts a broad, blanket approach that sweeps in information lawfully obtained from the government by private parties. It provides that any covered person may squelch private publication of such publicly available information by giving notice to those who obtain it. Where, "as here, the government has failed to police itself in disseminating information, it is clear under *Cox Broadcasting*, *Oklahoma Publishing*, and *Landmark Communications* that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity." *Fla. Star*, 491 U.S. at 538.

Daniel's Law notably provides no carve-outs or defenses for journalists, even in connection with matters of significant public interest. The law thus chills protected speech. Punishing publication of lawfully obtained information may result in "timidity and self-censorship" in the press, chilling speech even when the media intends to reproduce information obtained legally from the government without substantial change. As a result, the law's overbreadth chills the press from publishing protected political speech. *See, e.g.*, *Fla. Star*, 491 U.S. at 535–36.

Following the tragic murder of Daniel Anderl at his home, the New Jersey legislature sought to protect civil servants. In so doing, however, it did not carefully craft a law to protect their private information from disclosure by the government. The legislature instead targeted those who obtain the information, whether lawfully or not. This is precisely the kind of "highly anomalous" regime that "sanction[s] persons other than the source" of the private information's release. *Id.* at 535. Daniel's Law thus runs directly into *Florida Star*'s observation that when "information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." *Id.* at 534 (emphasis added).

Because less drastic and narrower alternatives to Daniel's Law's regime exist, the State cannot show that it is narrowly tailored to advance the

government's claimed interest in protecting the Director from Kratovil publishing his home address. If New Jersey wants to shield such private information in its hands from publication, it may impose redaction requirements on its public clerks who handle it. As the Supreme Court has suggested, a state can incentivize public custodians entrusted with private data to act with caution by providing for penalties against them if they inappropriately disclose such information to the public. With that narrowly tailored approach available, New Jersey may not impose penalties on Kratovil, who lawfully obtained the information from open public records maintained by the government, to prevent him from disseminating it in *New Brunswick Today*.

CONCLUSION

For these reasons, the Court should uphold and protect Kratovil and the press's First Amendment rights by reversing the Appellate Division and reinstating Kratovil's as-applied challenge.

Respectfully submitted,

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