

ALAN R. LEVY and LISA S.  
VANDEVER-LEVY,

*Appellants/Plaintiff/Counter-Defendants*

vs.

TOM O'REILLY, JOANNA  
PAPADAKIS, BILL TOMKIEWICZ,  
RAHWAY COMMUNITY VOICE,  
JOHN DOES 1-10 (FICTITIOUS  
NAMES REPRESENTING UNKNOWN  
INDIVIDUALS) AND/OR XYZ CORP.  
1-10 (FICTITIOUS NAMES  
REPRESENTING UNKNOWN  
CORPORATIONS, PARTNERSHIPS,  
AND/OR LIMITED LIABILITY  
COMPANIES OR OTHER TYPES OF  
LEGAL ENTITIES),

*Respondents/Defendants/Counter-  
Plaintiffs.*

SUPERIOR COURT OF NEW JERSEY,  
APPELLATE DIVISION

APPELLATE DOCKET NO.  
A- 000760-25

On Appeal from the  
Superior Court of New Jersey  
Chancery Division: Union County

Sat Below:  
The Hon. Robert J. Mega, P.J.Ch.

Trial Court Docket No.:  
UNN-C-0088-24

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**BRIEF OF PROPOSED AMICUS CURIAE AMERICAN CIVIL  
LIBERTIES UNION OF NEW JERSEY IN SUPPORT OF PLAINTIFFS**

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Bruce S. Rosen, Esq. (018351986)  
CJ Griffin, Esq. (031422009)  
PASHMAN STEIN WALDER HAYDEN, P.C.  
21 Main Street  
Court Plaza South, Suite 200  
Hackensack, NJ 07601  
T: 201.488-8200  
[brosen@pashmanstein.com](mailto:brosen@pashmanstein.com)

JEANNE LOCICERO, ESQ. (024052000)  
EZRA D. ROSENBERG, ESQ. (012671974)  
American Civil Liberties Union of New Jersey  
P.O. Box 32159  
570 Broad Street, 11th Floor  
Newark, New Jersey 07102  
973-854-1705  
[erosenberg@aclu-nj.org](mailto:erosenberg@aclu-nj.org)

*Attorneys for Proposed Amici Curiae,  
American Civil Liberties Union of New Jersey*

On the Brief:  
Bruce S. Rosen, Esq. (#018351986)  
CJ Griffin, Esq. (#031442009)

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**Rules:**

## **PRELIMINARY STATEMENT**

Plaintiffs are husband and wife activists suing over lost access to a Facebook group about public affairs in the City of Rahway (“the City”) that is privately-operated by Defendants but is essentially a public forum that allows for public discussion of the City’s business to more than 20,000 members. Plaintiffs are also frequent public critics of the City’s administration and its lawyers. The Defendants are from the opposing political party. The law firm representing Defendants in this case, Rainone Coughlin Minchello (“the law firm”), is politically-connected and also separately represents the City itself. After Plaintiffs filed an unsuccessful motion to disqualify the law firm for alleged conflicts of interest, Defendants counterclaimed for malicious abuse of process.

Plaintiffs reacted by filing an order to show cause under the Uniform Public Expression Protection Act (“UPEPA”), claiming their motion to disqualify was “petitioning activity” and an exercise of free speech, both qualifying for the statute’s protections. In the first step of the law, the trial court, correctly but too narrowly, ruled that UPEPA applied. But in the second step – whether Defendants had demonstrated prima facie evidence of each element of their claim for abuse of process – the trial court essentially punished Plaintiffs for their protected speech critical of the City and law firm, which was made outside of the litigation, by

declaring it presented prima facie evidence of an “ulterior purpose,” an element of the tort. Taking an extremely narrow view of Plaintiff’s motion to disqualify, the trial court refused to even consider allegations that the alleged conflict stemmed from the law firm’s simultaneous representation of the City, primarily because the City was not a party.

Thus, the trial court first engaged in a narrow view of whether the law applies, rather than the broad interpretation required by the law. Then trial court then contorted the second step – whether a prima facie case had been established or a motion to dismiss should be granted – again narrowly construing its interpretation of the law and ignoring First Amendment principles. This Court should respectfully review these holdings to comport with the Legislature’s intent.

### **ARGUMENT**

#### **I. THE TRIAL COURT ERRONEOUSLY LIMITED APPLICATION OF STEP ONE OF THE UPEPA PROCESS TO ONLY FREEDOM OF SPEECH, RATHER THAN A COMMUNICATION ON AN ISSUE UNDER REVIEW IN A JUDICIAL PROCEEDING, OR A RIGHT TO PETITION**

UPEPA allows a defendant to file an OTSC to seek dismissal, or partial dismissal, of any:

cause of action asserted in a civil action against a person based on the person’s:

- (1) communication in a legislative, executive, judicial, administrative, or other governmental proceeding
- (2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or
- (3) exercise of the right of freedom of speech or of the press, the right to assembly or petition, or the right of association, guaranteed by the United State Constitution or the New Jersey Constitution, on a matter of public concern.

[N.J.S.A. 2A:53A-50(b).]

While it may seem a small point, the trial court accepted that the UPEPA application fell within the statute's free speech protections under N.J.S.A. 2A:53A-50(b)(3), but failed to recognize that the speech was protected as petitioning activity. Moreover, it also failed to recognize that Plaintiffs' speech is also a "communication in [or on an issue under consideration in] a legislative, executive, judicial, administrative or other governmental proceeding" under N.J.S.A. 2A:53A-50(b)(1) and (2). As this court knows, the Legislature requires that the statute be "broadly construed and applied to protect the exercise of the right of freedom of speech and the press, the right to assembly and petition..." N.J.S.A. 2A:53A-59.

Although the trial court allowed the matter to proceed to second step of the UPEPA process, where the merits are evaluated, it is important that going forward,

this Court instruct trial courts to broadly interpret the communications that qualify for application of the statute.<sup>1</sup>

As Plaintiffs explain in their brief and as the trial court agreed, there can be no doubt that based on the language of the counterclaim, Defendants' claim is based on Plaintiffs' political speech: Plaintiffs are critics of the City of Rahway, its Mayor, and its law firm (which is also Defendants' law firm), and routinely post critical comments on social media about them. (Pa150-52). Needless to say, this speech involves statements critical of government; at the core of the First Amendment. Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 499 (2012) (citing In re Att'y Gen.'s "Directive on Exit Polling: Media & Non-Partisan Pub. Interest Grps.", 200 N.J. 283, 311(2009) (quoting Morse v. Frederick, 551 U.S. 393, 403 (2007)). See also Mills v. Alabama, 384 U.S. 214, 218–19 (1966) (“[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes

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<sup>1</sup> Contrary to Defendants' assertions, this Court's review of the trial court's interpretation and application of UPEPA is *de novo*. See, Saccone v. Bd. of Trs. of Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (noting that interpretation of statute is “question of law subject to *de novo* review” on appeal). In reviewing the trial court's legal determinations *de novo*, this Court affords no special deference to the courts' interpretation of the relevant statutes. Manalapan Realty, L.P., v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995).

discussions of candidates . . . and all . . . matters relating to political processes.”); Buckley v. Valeo, 424 U.S. 1, 52 (1976) (“The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates.”).

Plaintiffs are correct that in addition to an exercise of free speech, their motion was petitioning activity under N.J.S.A. 2A:53A-50(b)(3). Moreover, the abuse of process counterclaim itself should *per se* trigger anti-SLAPP protection. For example, in Massachusetts, another anti-SLAPP state, “claims for malicious prosecution and abuse of process are based solely on the opposing party's petitioning activity, and thus are prima facie subject to dismissal under the anti-SLAPP statute.” Hidalgo v. Watch City Constr. Corp., 105 Mass. App. Ct. 148, 151 (2024).

In California, which has the most developed anti-SLAPP law in the country, it has long been established that abuse of process claims fall under the anti-SLAPP statute. California’s criteria for anti-SLAPP eligibility is essentially identical to New Jersey’s: CA CIV PRO § 425.16(e) identifies four general categories of protected activities of petition or free speech. The first two categories are relevant here: “(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, [and] (2) any

written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.”

“Indeed, that is the essence of the tort of abuse of process—some misuse of process in a prior action—and it is hard to imagine an abuse of process claim that would not fall under the protection of the statute. Abuse of process claims are subject to [the anti-SLAPP law].” Booker v. Rountree, 155 Cal. App. 4th 1366, 1370–71 (2007) (citing Rusheen v. Cohen, 37 Cal.4th 1048 (2006)). See also, Maleti v. Wickers, 82 Cal. App. 5th 181, 200–01 (2022), as modified on denial of reh'g (Sept. 9, 2022). In fact, California law could not be clearer that petitioning also applies to motions: “The anti-SLAPP protection for petitioning activities applies not only to the filing of lawsuits, but extends to conduct that relates to such litigation, including statements made in connection with or in preparation of litigation. Kolar v. Donahue, McIntosh & Hammerton, 145 Cal. App. 4th 1532, 1537 (2006).

Further, definitions of “petition” include “an earnest request,” and “a formal written request addressed to an official person or organized body.” Webster's Third New Int'l Dictionary 1690 (unabridged ed. 2002). The right of petition has been defined as “[t]he constitutional right—guaranteed by the First Amendment—of the people to make formal requests to the government, as by lobbying or writing letters

to public officials.” Black's Law Dictionary 1350-51 (8th ed. 2004). That is exactly the law in New Jersey. Miah v. Ahmed, 359 N.J. Super. 151 (App. Div. 2003), rev'd, 179 N.J. 511 (2004)(“Words in [a] statute which are not specifically defined are given their common meaning”).

Among other things, “the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.” Borough of Duryea v. Guarnieri, 564 U.S. 379, 387 (2011). “A petition enjoys constitutional protection whether it is addressed . . . to a local government, or to a state or national government.” Mirabella v. Villard, 853 F.3d 641, 654 (3d Cir. 2017). Accord Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (“Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.”).

The model UPEPA statute sets forth how a court should analyze the activity to determine whether it is protected:

This [first] step focuses on the movant’s activity, and whether the movant can show that it has been sued for that activity. See, e.g., Navellier v. Sletten, 52 P.3d 703, 711 (Cal. 2002) (“The anti-SLAPP statute’s definitional focus is not [on] the form of the plaintiff’s cause of action but, rather, the defendant’s activity that gives rise to his or her asserted liability and whether that activity constitutes protected speech or petitioning.” (emphasis original)).<sup>2</sup>

[Cmt. 1 to Section 2 (Scope), Uniform Public Expression Protection Act (UPEPA), Nat’l Conf. of Commissioners on Uniform State Laws (2020), [https://www.uniformlaws.org/viewdocument/final-act-110?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1&tab=librarydocuments.](https://www.uniformlaws.org/viewdocument/final-act-110?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1&tab=librarydocuments)]

Plaintiffs’ motion to disqualify counsel was a matter of public concern based on allegations of a connection between the political alliances and activities involving Defendants’ lawyers and the Democratic-controlled city government. For whatever reason, the trial court focused on its conclusion that the “lawsuit in its present form is devoid of any public figure or entity,” ignoring Plaintiffs’ arguments that the Defendant *Rahway Community Voice*, although privately operated, had become a virtual town square subject to state constitutional free speech protection under State v. Schmid, 84 N.J. 535 (1980) and its progeny. That case and others to follow interpreted Article I, Paragraphs 6 and 18, of the N.J. State Constitution to form a basis for free speech principles in the face of private property rights, in that case involving distribution of political handbills on the Princeton University campus.

Instead, the trial court instead rejected any notion that the lawsuit – or the disqualification motion – could be petitioning activity because “the defendants named in the present matter are not identified as agents or representatives of a government funded program.” The trial court did not consider, at least as part of its

opinion, that the Defendant owners of the website had created a limited public forum in which free speech rights might apply, or that these Defendants' law firm could or would have ties, connections, loyalties or differing interests that might create a conflict or that State v. Schmid might apply.<sup>2</sup> It also did not consider that the filing of a lawsuit or motion is itself petitioning activity.

The statute also covers a cause of action asserted in a civil action against a person based on the person's "[c]ommunication in [or on an issue under consideration or review in] a legislative, executive, judicial, administrative or other governmental proceeding." N.J.S.A. 2A:53A-50(b)(1) and (2). The UPEPA Commentary instructs that the word "communication" should also be broadly interpreted:

"Communication" should be construed broadly—consistent with holdings of the Supreme Court of the United States—to include any expressive conduct that likewise implicates the First Amendment. See Texas v. Johnson, 491 U.S. 397, 404 (1989) ("[W]e have long recognized that [First Amendment] protection does not end at the spoken or written word."); Spence v.

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<sup>2</sup> Moreover, if there were a conflict of interest, a municipality, unlike a private corporation, cannot consent to the conflict. and the law firm would have to get out of this case or stop representing the City. See R.P.C. 1.7(b) and In re Advisory Comm. on Pro. Ethics, Docket No. 18-98, 162 N.J. 497, 504 (2000). This makes the issues set forth in the disqualification motion an important matter of public concern, a petition to the court, and communication in a court and on an issue under consideration in a court. N.J.S.A. 2A:53A-50(b).

Washington, 418 U.S. 405, 409-11 (1974) (holding that conduct constitutes “communication” when it is accompanied by an intent to convey a particularized message and, given the surrounding circumstances, the likelihood is great that the message will be understood by those who view it)

[Cmt. 6 to Section 2 (Scope), Uniform Public Expression Protection Act (UPEPA), Nat’l Conf. of Commissioners on Uniform State Laws (2020). [https://www.uniformlaws.org/viewdocument/final-act-110?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1&tab=librarydocuments.](https://www.uniformlaws.org/viewdocument/final-act-110?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1&tab=librarydocuments)]

Even if the Defendants allege falsity in Plaintiffs’ “communication,” or speech forming the basis for the disqualification motion, that allegation alone does not affect the analysis in Step One of the UPEPA process:

Certainly, if a defendant were precluded from satisfying step one anytime a plaintiff alleged that the defendant’s otherwise-protected statements were false, it would undercut the purposes of the anti-SLAPP statute and would allow a plaintiff to evade the statute merely by alleging falsity.

[L.S.S. v. S.A.P., 523 P.3d 1280, 1287 (Colo. Ct of Appeals 2023) cert. denied, No. 22SC880, 2023 WL 4568488 (Colo. July 17, 2023) .]

The counterclaim is undisputedly based on a motion to disqualify counsel, which is a not only a petition but a communication in and about a judicial proceeding. The trial court should have recognized that as a second, third and fourth reason for allowing the UPEPA OTSC to proceed to Step Two of the process.

## **II. THE TRIAL COURT ERRED IN ASCRIBING “ULTERIOR’ PURPOSE” TO PLAINTIFF’S DISQUALIFICATION MOTION WITHOUT REGARD TO FIRST AMENDMENT RIGHTS.**

### **A. The trial court erred by ascribing ulterior motive to plaintiffs based on extrajudicial statements on social media.**

Where the trial court decision more significantly stumbled is where it ignored Plaintiff’s First Amendment rights by allowing extrajudicial facts – such as Plaintiff’s Facebook posts criticizing Defendant O’Reilly, the law firm and Rahway elected officials – to demonstrate a prima facie case for the counterclaim. The Facebook posts were political speech, claiming that Defendant O’Reilly, who was chair of a Rahway Democratic campaign committee, censored and banished Plaintiffs and others from the Rahway website on the eve of the 2024 municipal elections because of Plaintiffs’ criticism of city government. (Pa35-26). Although the trial court rejected a motion to dismiss the Schmid claims (Pa43-44) because Plaintiffs adequately pleaded them and therefor they were not frivolous, its decision rejecting the UPEPA OTSC did not recognize even an allegation of any protected rights under the First Amendment and in fact did not mention or consider extrajudicial facts Plaintiffs presented in their motion to show the connection between law firm, the Defendants and the City. The very pleading that alleged a Schmid claim also alleged that the political alliances between Defendants and the

City formed the basis for the banning from the *Rahway Community Voice* in the first place. (Pa29-36).

Thus, the trial court decided in a conclusory fashion that because the disqualification motion's reasoning involves ties to a "non-party client," meaning the City, the court would not look beyond the parties in the litigation to determine whether there was a potential conflict ("Plaintiffs filed the motion to disqualify the within Defendants' counsel, it appears in part, due to ties with a non-party client.") (Pa11). The trial court then chastised Plaintiffs for repeatedly making the allegation: "Plaintiffs have repeatedly attempted to tie these three individual Defendants and their counsel Mr. Trelease [of the law firm], to the City of Rahway." (Pa14).

While Plaintiffs have attempted to show the law firm had financial interests in its representation of the Defendants in order to maintain their position as municipal counsel, the Court would not recognize it, and assumed that Plaintiffs were conversely, "targeting Mr. Trelease and the Rainone law firm solely because of their professional affiliation with the City, thereby allegedly infringing upon Defendants' right to be represented by counsel of their choice." *Id.*

The First Amendment's Petition Clause provides broad protection for litigation activity. In Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, 508 U.S. 49, 57 (1993), the Supreme Court held that "an objectively

reasonable effort to litigate cannot be sham regardless of subjective intent.” The Supreme Court’s test for sham litigation has two parts: (1) “the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits,” and (2) “only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation” to determine “whether the baseless lawsuit conceals ‘an attempt to interfere *directly* with the business relationships of a competitor,’ through the ‘use [of] the governmental *process* as opposed to the *outcome*.’” *Id.* at 60–61 (emphasis in original) (citations omitted). The plaintiff bears the burden to disprove the challenged lawsuit's legal viability before subjective intent can be considered. *Id.* This test looks at objective merit at the outset, not whether the claim ultimately prevailed. *Id.* at 61, n. 5. Critically, courts can only examine subjective motivation after first determining that the petition lacks objective merit.

In Bryant v. Military Department of Mississippi, 597 F.3d 678 (5th Cir. 2010) the court declined to create a retaliatory intent exception to First Amendment protection for petitioning activity. The Ninth Circuit agreed in B&G Foods North America, Inc. v. Embry, 29 F.4th 527 (2022) that “only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation.”

In New Jersey, the essential elements of abuse of process are: first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding Gambocz v. Apel, 102 N.J.Super. 123, 130 (App. Div. 1968). “There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.” Id. at 128 (citing Prosser, Law of Torts, §115, pp.876-77 (3d ed. 1964)). Further, and most importantly, “An ulterior motive alone is not sufficient. To constitute improper direction of process, the mere ulterior motive in doing an act, proper in itself, does not suffice.” Id. at 130( citing Earl v. Wynne, 34 N.J. Super. 605 (Law Div. 1955)).

Putting aside the issue of whether a motion is process, a point argued by the parties, in declaring that Plaintiffs had an “ulterior motive” the trial court was essentially determining that Defendants had set forth a prima facie showing of Plaintiffs’ subjective intent to obstruct or abuse the litigation based upon the opinions expressed outside of the litigation, and punishing Plaintiffs for their speech.

UPEPA requires that in applying and construing the act “consideration must be given to the need to promote uniformity of the law with respect to its subject matter among [S]tates that enact it.” N.J.S.A. 2A:53A-60. In Satz v. Starr, 482 N.J. Super. 55, 62–63 (App. Div. 2025), the Appellate Division extended that consideration to law from a non-UPEPA jurisdiction with a similar anti-SLAPP law,

in that case the District of Columbia. Massachusetts courts have consistently held that merely alleging improper motivation cannot defeat anti-SLAPP protection when the underlying conduct consists solely of filing lawsuits or using legal process. See, e.g., Hidalgo, 105 Mass.App.Ct. at 152 (“The test for whether the petitioning activity—the lawsuit—had a reasonable basis is an objective one; it does not turn on the plaintiff’s subjective motivation in filing suit, or whether that motivation is considered in some way improper.”).

And Massachusetts is not alone. In Wilson v. Cable News Network, Inc., 7 Cal.5th 871 (2019) the California Supreme Court reinforced this principle by holding that the anti-SLAPP statute does not require a defendant to disprove allegations of illicit motive. (Courts examining anti-SLAPP motions must “examine the defendant’s actions without regard to the plaintiff’s allegations about the defendant’s motives.”)

**B. The trial court erred by punishing Plaintiffs for their protected political speech on social media.**

Even if Plaintiffs were ultimately incorrect about the conflict of interest, they were entitled to pursue their theories and the trial court erred by simply assuming that a prima facie case of abuse of process occurred by imputing ulterior motives through Plaintiffs’ free speech outside of the litigation. Plaintiffs had a right to set

forth their theories of conflict, regardless of the ultimate impact of that filing; in other words, even if it could ultimately deprive Defendants of their chosen counsel, such a motion is not an abuse of process, especially when it is based on protected speech.

Improper motives in using the process do not, without more, constitute a collateral objective, provided the process itself is used for its legitimate purpose. “[T]he falsity of [defendant's] allegations and the defendant's malicious motive in making them do not, of themselves, give rise to a cause of action for abuse of process.” Butler v. Ratner, 210 A.D.2d 691 (N.Y. 3d Dep't 1994)(citing Chamberlain v. Lishansky, 970 F. Supp. 118, 122 (N.D.N.Y. 1997)).

The trial court's conclusory treatment of Plaintiffs' claim includes the assumption that the Facebook posts were evidence of an abuse of process, but an examination of those posts – attached to Defendants' opposition to the UPEPA OTSC – demonstrate that Plaintiff Levy's speech was simply was in further explanation of Plaintiffs' position on a matter of public concern (Pa169-74), explaining the court processes, accusing Defendants' attorneys of torpedoing settlement negotiations, and explaining why he believed their actions constituted ethical violations. It does not matter whether the speech was false; his speech was commenting on matters of public concern and he should not be punished -- as he

was by the trial court -- for extrajudicial statements explaining his position. Those statements hardly reflect an ulterior motive to abuse process; they simply explain his position all along in the litigation, including in the disqualification motion.

In Mandelbaum v. Arseneault, No. A-1042-15T4, 2017 WL 4287837, at \*5 (App. Div. Sept. 28, 2017), the Appellate Division considered whether a divorce lawyer's extrajudicial communications (namely sending a knowingly false filed certification in the matter to the news media) was not an abuse of process.. That court ruled that "even if her statement could be regarded as a threat to "carry out the [criminal] process to its authorized conclusion," it was not abuse of process. Ibid. The court further ruled that even if the attorney leveraged the process in a further attempt to extort an outlandish settlement, "publicizing process is not abuse of process." Therefore, whatever Plaintiffs published in furtherance of their right to free speech should not be used as an indicia of "ulterior motive," as the communications "did not use or threaten the use of process in a coercive manner as required by our precedent." Id. at \*4-5.

## **CONCLUSION**

For the reasons stated above, Proposed Amicus ACLU-NJ requests that this Court reverse and remand Appellant/Plaintiff's UPEPA application with instructions.

**PASHMAN STEIN WALDER HAYDEN, PC**  
*Attorneys for Proposed*  
*Amicus American Civil Liberties Union of*  
*New Jersey*

*s/Bruce Rosen* \_\_\_\_\_  
BRUCE S. ROSEN, ESQ. (#018351986)

JEANNE LOCICERO, ESQ. (#024052000)  
EZRA D. ROSENBERG, ESQ. (#012671974)  
*American Civil Liberties Union of New Jersey*  
P.O. Box 32159  
570 Broad Street, 11th Floor  
Newark, New Jersey 07102  
973-854-1705

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