CASE NO. SC-2025-0370

IN THE SUPREME COURT OF ALABAMA

THE NEW YORK TIMES CO.,

PETITIONER/DEFENDANT

V.

KAI SPEARS,

PLAINTIFF/RESPONDENT

Certified Question from the United States District Court
For the Northern District of Alabama
Case No. 7:23-CV-00692-ACA

BRIEF OF PLAINTIFF/RESPONDENT KAI SPEARS

R. Matt Glover
Prince Glover Hayes
2311 University Blvd, Suite A
Tuscaloosa, AL 35401
(205) 345-1234
mglover@princelaw.net

M. Virginia Buck
Attorney at Law
13112 Martin Rd. Spur
Northport, AL 35473
(205) 752-6773
bucklaw@charter.net

Attorneys For Plaintiff/Respondent Kai Spears

STATEMENT REGARDING ORAL ARGUMENT

The Respondent, Kai Spears, does not request oral argument in this case.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Ala. R. App. P. 18(a) which provides,

> When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal court may certify such questions or propositions of law of this State to the Supreme Court of Alabama for instructions concerning such questions or propositions of state law, which certified question the Supreme Court of this State, by written opinion, may answer.

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

The certified questions submitted to this Court derive from a defamation case arising from The New York Times' misidentification of Respondent/Plaintiff Kai Spears as the passenger in a vehicle which delivered a gun to the scene of a deadly shooting. (Tab 1, Tab 2, Tab 3).

As the District Court noted in its Certification Order, The Times' heavy reliance on the reporter's privilege, including the Alabama shield statute, has been the source of significant discovery disputes between the Parties. (Tab 1, pgs. 7-9).

While Spears never asserted that Alabama's shield statute did not protect the ***identity*** of Source A, the District Court raised this issue *sua sponte* and asked the Parties to brief the question of whether Alabama's shield statute even applies to online publications. (Tab 1, p. 8, Tab 4). Spears responded by conceding that because The Times had also published the defamatory article in print, the statute did apply. (Tab 5). The Times, however, unwilling to accept this limited concession, urged the District Court to find that the statute applies broadly to any online article posted by a newspaper. (Tab 6).

Spears replied and disagreed with The Times' assertion that the Alabama shield statute broadly applies to online publications simply because the publisher is a newspaper organization. (Tab 7). Spears argued that ***to the extent this was The Times' argument***, "The Times' argument that its false assertion about Spears constituted information 'published in the newspaper' ***for purposes of the*** initial ***online*** publication of the article is due to be rejected." (Tab 7, p. 8)(emphasis added). Spears made no argument that the statute did not apply for purposes of the print version of the article. However, The Times continued to press the District Court for a much broader interpretation of the statute[1] and also asked the Court to submit a certified question to this Court to address the issue. (Tab 8, p. 17).

The District Court then submitted the question to this Court but ***framed in accordance with the argument The Times made*** as follows:

> Is the identity of a source, whose information is published online by a corporation that also publishes a newspaper, protected from compelled disclosure by a court?

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[1] The Times similarly argues to this Court, "The Times respectfully submits that Alabama's statutory privilege applies to articles published online by newspapers ***regardless of whether they were published in print***." The Times' Brief at 55 (emphasis added).

(Tab 1, p. 10).

The District Court also went ahead and submitted another question about which the Parties had disagreed:

> Does the Shield Statute protect any and all information that could lead to the identification of a source whose identity is protected from compelled disclosure under Alabama's Shield Statute?

(Id.).

This Court accepted certification of the two questions on July 2, 2025. This Court kept the District Court's framing of the issues as

> 1. Is the identity of a source, whose information is published online by a corporation that also publishes a newspaper, protected from compelled disclosure by a court?
>
> If Question 1 is answered affirmatively:
>
> 2. Does the Shield Statute protect any and all information that could lead to the identification of a source whose identity is protected?

STATEMENT OF THE ISSUES

1. Is the identity of a source, whose information is published online by a corporation that also publishes a newspaper, protected from compelled disclosure by a court?

If Question 1 is answered affirmatively:

2. Does the Shield Statute protect any and all information that could lead to the identification of a source whose identity is protected from compelled disclosure under Alabama's Shield Statute?

STATEMENT OF FACTS

A. THE SUBJECT ARTICLE'S REFERENCE TO AN ANONYMOUS SOURCE

On the evening of March 15, 2023, The Times published a story online with the headline, "A Fourth Alabama Player Was at a Deadly Shooting, in a Car Hit by Bullets." (Tab 3). The subheading was, "The presence of a fourth Crimson Tide player at the deadly shooting in January has come to light as the team begins its run as the top overall seed in the N.C.A.A. men's tournament." (Id.) The article was authored by a journalist for The Times named Billy Witz . (Id.). A print version of the article was published the next day with the headline, "On Eve of Tournament, Fourth Alabama Player is Placed at Shooting." (Tab 9).

The original version of the article went on to assert that Kai Spears was that fourth player, and that Spears was Miller's passenger when Miller drove the murder weapon to the scene: "In another car that was struck were Brandon Miller, a star player for the Crimson Tide, and Kai Spears, a freshman walk-on whose presence at the scene had not been previously reported." (Tab 3). The article asserted Spears' presence in

Miller's car at the time of the shooting as "an unequivocal fact,"[2] at least six times before finally informing the reader, eleven paragraphs into the story, that this information came from one anonymous source. The eleventh paragraph of the story explains that Investigator Culpepper testified at the preliminary hearing in the capital murder case that Miller had a passenger in his vehicle at the time of the shooting. The next sentence states, "***A person*** familiar with the case identified that person as Spears. ***That person*** spoke on condition of anonymity to discuss sensitive matters in the case." (Id.)(emphasis added).

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[2] This was the phrase used by The Times' Standards Editor Phil Corbett to describe how the story presented the allegation about Spears:

> "Are we hanging this fact entirely on the ***one*** anonymous source we cite way down in the story? To state the painfully obvious, I hope we're right on this. Also, I hope we did our usual level of due diligence in handling this anonymous sourcing.
>
> Even assuming we are confident and correct – I'm not sure it was a good idea to give the ID as ***an unequivocal fact*** at the top, with no attribution at all, if our basis was ***one*** anonymous source. Seems as though we should at least have attributed it from the get-go."

(Tab 10)(emphasis added).

The University of Alabama, Kai Spears, Spears' father, Spears' attorney, and Alabama Athletic Director Greg Byrnes all issued statements informing The Times that the information about Spears was incorrect. (Tabs 11 - 16). The Times responded by doubling down on the false allegation and issuing a statement, "We're confident in our reporting and stand by it." (Tab 17). The Times only corrected the story 79 days after publication of the original article after Spears filed suit.[3] (Tabs 18, 19).

B. THE ANONYMOUS SOURCES NOTED IN DISCOVERY

The privilege log produced by The Times identifies two anonymous sources – Source A and Source B – even though the article only refers to

[3] Even now, The Times continues to make misrepresentations about Spears. The Times asserts, "Kai Spears got into a car driven by a high school friend that passed ***through the scene*** within ***seconds*** of the shooting, unscathed." The Times' Brief at 15 (emphasis added). That is not the evidence. The shooting occurred down Grace Street. (Tab 9). The evidence is that Spears and his friends who were visiting him from out of town left Moe's Original Barbeque downtown and drove straight down University Blvd to Spears' dorm with no knowledge of any shooting or altercation until after Spears was back at his dorm. (Tab 23, pgs. 54, 63, 295-296; Tab 24, pgs. 83-84; Tab 25, pgs. 66-67). There is no evidence Spears was on Grace Street at any point after leaving Moe's, much less within "seconds" of the shooting.

one anonymous source. (Tab 20). Witz testified that Source A is the anonymous source referenced in the article. (Tab 21, p. 194).

Source B is a person who told Witz he was "likely wrong" about Spears in the following text message exchange between Witz and Times sports editor Andrew Das:

> DAS: You feel OK on the Alabama stuff? Been thinking about you. It never feels great when they turn on reporting but if you're confident your right then that's all that matters. Have a good weekend. Onward.
>
> WITZ: Yeah, it's been weird. Alabama hasn't engaged me beyond sending statements that they make public. Won't answer questions about the statement which I think are full of semantics games. And it's curious to me that nobody has asked for a retraction. The hillbilly ambulance chaser who represents the dad hasn't contacted our legal which he's told everybody he has. My source has been steadfast but there's some ***equivocation about how the source knew***. ***Another source told me yesterday I'm likely wrong*** but won't elaborate or go on the record. I'm continuing to dig – I spent yesterday back in Tuscaloosa – trying to get more information, which I have. It's an uncomfortable exercise.

(Tab 22)(emphasis added.)

Witz identified that person as Source B:

Q. So Source B tells you you're likely wrong, right?

A. Yes.

(Tab 21, p. 293).

The privilege log produced by The Times identifies no anonymous sources other than Source A and Source B. (Tab 20).

C. WHAT THE DISCOVERY REVEALS ABOUT SOURCE A

The discovery produced by The Times shows that Source A was a person who provided Witz with access to investigative materials. Early drafts of the subject article provided in discovery show the progression of the article before and after Witz spoke with Source A. The earliest draft of the article in the wee hours of the morning on March 15 included nothing but Witz's interview of an Alabama fan wearing a controversial t-shirt. (Tab 26).

However, at 10:31AM central time on March 15 Witz, who was in Tuscaloosa[4] at the time, emailed Times employee Alain Delaquérière, who was assisting with research, to inform him that Witz "just found out another player who was a witness that hasn't been reported." (Tab 27). Witz tells Delaquérière "his name is Kai Spears ... and he's a freshman." Witz then asked Delaquérière to see what he could find out about Spears and his family and provide Witz with that information. Witz stated in his deposition that this information came from Source A:

[4] (Tab 21, p. 196).

A. Yes. I learned that the identity of the passenger in Brandon Miller's car was Kai Spears.

Q. Alright. And how did you learn that?

A. Through a source.

Q. Source A or Source B?

A. Source -- Source A in an off-the-record conversation.

(Tab 21, p. 194).

The evolving draft then changes dramatically. At 12:04PM CT, the draft begins, "The fatal shooting that has defined top ranked Alabama basketball team's season could have been more consequential based on witness transcripts and video." (Tab 28). By 2:32PM CT, the draft of the subject article named Kai Spears as the previously unidentified passenger in Brandon Miller's car at the time of the shooting. (Tab 29).

So the evidence indicates that on the morning of March 15, Source A provided Witz with investigative materials in the form of a video of the shooting and "witness transcripts." Witz confirmed that Source A provided him with the video and "documents."

A. Source A showed me -- source – and this was all off-the-record conversation that Source A showed me documents and surveillance video on March 15th.

(Tab 21, pgs. 195-196).

D. THE TIMES' REFUSAL TO PRODUCE DOCUMENTS OR ANSWER INTERROGATORIES BASED ON THE REPORTER'S PRIVILEGE

The Times has withheld or redacted numerous documents based on its assertion of a reporter's privilege and has also refused to answer, in whole or in part, several interrogatories based on this same assertion of a reporter's privilege. In its Response to Plaintiff's First Requests for Production, The Times' broadly defined the scope of information protected by the "Reporter's Privilege" as "information protected by … ***Section 12-21-142*** of the Alabama Code … that protects journalists from disclosing ***information obtained during the course of their newsgathering activity***." (Tab 30)(emphasis added).

The Times similarly refused to answer interrogatories, in whole or in part, based on an assertion of the reporter's privilege which The Times broadly interpreted as covering "information protected by … ***Section 12-21-142*** … that protects journalists from disclosing ***information obtained during the course of their newsgathering activity***." (Tab 31)(emphasis added). The Times asserted this broadly defined "Reporter's Privilege," in whole or in part, with regard to questions about communications with members of the Tuscaloosa Police Department (¶3);

University of Alabama employees (¶4); law enforcement officials generally (¶6); what steps The Times or its agents took before publication to determine whether Kai Spears was "involved in" Jamea Harris' shooting or present in Miller's car at the time of the shooting (¶7); what steps The Times or their agents took from March 15, 2023 until the filing of the lawsuit to review the accuracy of Witz's reporting about Spears (¶8); and communications with members of the media concerning Spears (¶9)(Tab 31).

The Times also listed "reporter's privilege" fifty times on its most recent privilege log as a basis for withholding information. (Tab 20).

E. WHAT THE TIMES REFUSED TO DISCLOSE IN EMPLOYEE DEPOSITIONS BASED ON THE TIMES' INTERPRETATION OF THE REPORTER'S PRIVILEGE

During the deposition of Billy Witz, The Times' attorney instructed him not to answer questions about what information Source A shared with him and not to answer questions as to any "off the record" discussions he may or may not have had with ***anyone***.

> Q. So was it a document or documents that Source A showed you?
>
> A. Plural.
>
> Q. Documents?

A. Yes.

Q. What were the documents?

COUNSELOR BOWMAN: Same objection. Same instruction. Witness can answer. Without -- if you can do so without revealing source identifying information.

A. Documents related to the case.

Q. No joke. What documents related to the case?

COUNSELOR BOWMAN: Same objection. Same instruction.
…

A. I'm not sure I can answer that without ***narrowing the -- the universe***.

(Tab 21, pgs. 198-199).

In particular Witz refused to disclose whether Source A purported to have first-hand, direct knowledge that Spears was Miller's passenger at the time of the shooting:

Q. My question is, let's ask you first, do you understand the difference between a witness having first-hand, direct knowledge as opposed to having been told something by someone else?

A. Yes.

Q. Okay. You understand that distinction?

A. Yes.

> Q. Did Source A purport to tell you that he or she or they had first-hand personal knowledge that Kai Spears was Brandon Miller's passenger?
>
> COUNSELOR BOWMAN: Same privilege objection. Same instruction. Answer if you can do so without providing source identifying information.
>
> A. Yeah, I don't think I can.

(Tab 21, pgs. 205-206).

Similarly, when Spears' Counsel attempted to question Witz with regard to the adequacy of his investigation and what steps Witz did or did not take to verify the information from Source A, The Times' Counsel broadly instructed Witz not to answer questions with regard to any "off the record" discussions with ***any*** person, including whether such a discussion even occurred:

> Q. Well, lets break that down a little bit and back up. Family members of the victim, Jamea Jonae Harris, I don't care whether it was on the record or off the record, did you speak with any of them?
>
> COUNSELOR BOWMAN: Objection on the basis of Reporter's Privilege under Alabama and New York Law and the 1st Amendment ***to the extent the question encompasses content that may have been off the record.*** Witness can answer this and other questions about on the record contacts.

(Tab 21, p. at 115).

This objection served as the basis for Witz's repeated refusal to answer questions about what steps Witz took to interview key witnesses including people who were present at the time of the shooting, members of law enforcement, and members of the district attorney's office. (Tab 21, pgs. 225, 226, 256-257). For instance, Witz was instructed not to answer questions as to whether he bothered to talk to key witness Branden Culpepper, the officer who testified about Miller's passenger at the preliminary hearing, unless Witz had an "on the record" discussion with Culpepper:

> Q. Did you talk to [Inspector] Culpepper?
>
> A. I did not speak with [Inspector] Culpepper on the record.
>
> Q. You spoke to him off the record?
>
> COUNSELOR BOWMAN: Objection. On the basis of the Reporter Privilege as previously articulated and ***instruct the witness not to answer***.

(Tab 21, p. 267).

Similarly, with regard to Deputy Chief Severn "Sebo" Sanders, the officer who informed Steve New that police knew Spears was not at the scene, the following exchange occurred:

> Q. [W]ho else did you talk to before the lawsuit?

A. Well, I think when we -- you and I -- when I called you up and one of the things that, you know, I -- I -- I think I expressed my interest, like that I want -- if we got it wrong, I want to know how and you mentioned that I should talk to Severn Sanders.

Q. Yes.

A. And –

Q. Did you?

A. I was not able to speak with him ***on the record***.

Q. Did he tell you that the Tuscaloosa Police Department had cleared Kai Spears of any wrongdoing or being present in the car that night?

A. He did not tell me that on the record.

Q. Did he tell you that off the record?

COUNSELOR BOWMAN: Same objection. Based on the Reporter Privilege, ***instruct the witness not to answer***.

(Tab 21, pgs. 299-300).

Likewise, when Witz was asked if he had talked to Jaden Bradley, who would have had first-hand knowledge that Spears was not at the scene, The Times' Counsel instructed Witz not to answer:

Q. Did you ask Jaden Bradley who was there, whether Spears was the passenger in Miller's car at the time of the shooting?
…

> A. I don't -- I don't -- no, I don't believe I talked with him ***on the record*** about -- about whether Kai was in the car at the time.
>
> Q. Did you talk to him off the record?
>
> COUNSELOR BOWMAN: Same Reporter's Privilege objection. Same instruction not to answer.

(Tab 21, pgs. 269-270).

The Times asserted the reporter's privilege in a similar fashion during the deposition of The Times' deputy sports editor Oskar Garcia, who worked with Witz on the subject article. Garcia, under instruction from The Times' Counsel, refused to answer questions with regard to any "off the record" discussions Witz may or may not have had with a number of key witnesses in the case including members of law enforcement, members of the DA's office, and people who were present at the time of the shooting. (Tab 32, pgs. 31, 32, 34, 69, 70, 71, 163, 164, 165).

Likewise, during the deposition of Randy Archibold, The Times' sports editor at the time, The Times' Counsel repeatedly instructed Archibold not to disclose if he was told whether or not Source A claimed to have first-hand, direct knowledge of the identity of Miller's passenger at the time of the shooting:

> A. I discussed the source with Oskar.

Q. When in that 7 hour 40 minutes did Oskar tell you the source has first-hand knowledge, if at all?

MR. BOWMAN: Objection on the basis of the reporter's privilege under the First Amendment, Alabama Law and New York Law.

…

Q. Did Garcia tell you the source has first-hand direct knowledge?

MR. BOWMAN: Same objection. Same instruction.

…

Q. As you sit here today you don't know whether the source had first-hand knowledge or secondhand knowledge, do you?

…

A. I do know.

Q. They had first-hand knowledge?

A. I can't answer that.

(Tab 33, pgs. 95-96).

Witz also would not reveal the identity of Source B, the person who told him he was "likely wrong" about Spears being the passenger in question, because Source B had "provided partial confirmation of what Source A had said before publication." (Tab 21, p. 295). Oskar Garcia testified that Source B had opined that Miller's passenger was "someone with Alabama." (Tab 32, p. 155).

STANDARD OF REVIEW

The certified questions presented to this Court involve the interpretation of a statute. "The interpretation of a statute presents a question of law; consequently, [this Court's] review is de novo." *Ex parte Quick*, 23 So.3d 67, 70 (Ala. 2009).

SUMMARY OF THE ARGUMENT

The Northern District of Alabama has asked this Court to answer two questions regarding the scope of Alabama's reporter's shield statute. The first, "Is the identity of a source, whose information is published online by a corporation that also publishes a newspaper, protected from compelled disclosure by a court," should be answered "no."

First, the statute does not apply generally to online articles. As the Court in *Price v. Time, Inc.*, 416 F.3d 1327, 1342 (11th Cir. 2005) noted in finding that a magazine is not a "newspaper" within the meaning of §12-21-142, the statute should be construed strictly and narrowly under Alabama law since it is in derogation of common law.

Furthermore, the Alabama Legislature has demonstrated that it knows how to expand the scope of the shield statute to new forms of media. It amended the statute in 1949 to include radio and television broadcasts. The Legislature has not further amended the statute to apply to online publications, and this Court should decline The Times' invitation to amend the statute by judicial fiat.

Nor does the fact that The Times "also publishes a newspaper" extend the protections of the statute to all of its online publications. The

statute still additionally requires that the information in question be "published in the newspaper" for its protections to apply. Therefore, the answer to the question, as framed, is no.

The second question is whether Alabama's shield statute protects "any and all information that could lead to the identification of a source whose identity is protected from compelled disclosure under" the statute. It does not.

In addressing this question, it is important to note that Spears is not seeking information that is facially source-identifying, nor is he seeking information for the purpose of trying to deduce the identity of Source A. Spears is simply seeking the information necessary to prove the elements of his claims. The Times has attempted to use an overly broad reading of Alabama's shield statute to deny Spears information necessary to evaluate the reliability of Source A and the information provided, or to evaluate the adequacy of The Times' investigation into the accuracy of the information. The information sought is relevant to whether The Times was negligent or even reckless in relying on the false information in printing the defamatory story.

The letter of the statute extends no further than protecting "the sources" of information published in the newspaper. Nothing in the language of the statute extends that protection to the information itself. This is true even if some of that information "could" potentially lead to discovery of a source's identity.

Nor is there anything in the letter of the shield statute that would extend its protection to every "off the record" discussion a journalist has. The statute plainly limits its application to "the sources of any information … published in the newspaper." Nothing in this language embraces all newsgathering activities or all "off the record" conversations.

The Times' reliance on non-defamation cases interpreting more broadly worded privileges is badly misplaced. Those cases are obviously not helpful in determining the meaning of the language of ***this*** narrowly worded statute. Furthermore, the cases cited by The Times involve qualified privileges or statutes which include express provisions permitting courts to strip media defendants of the privilege in defamation cases. Alabama's statute, though limited in scope, is absolute. The Times seeks to have it both ways in urging this Court to

give Alabama's shield statute the same broad coverage provided by states with more expansive shield statutes while affording none of the protections those states provide to those defamed by media defendants.

If The Times believes Alabama's shield statute should include a provision protecting potentially source-identifying information, it should make that argument to the Legislature. This Court has explained it is not its "role to assume the legislative prerogative to correct defective legislation or amend statutes." *Siegelman v. Chase Manhattan Bank (USA), Nat. Ass'n*, 575 So.2d 1041, 1051 (Ala. 1991).

Finally, to the extent this Court finds it is appropriate to do so in light of the manner in which the certified questions are framed, Spears would request that this Court find that the identity of Source B, to whom The Times repeatedly refers in its brief to this Court, is not protected by the shield statute. Source B, who told The Times' reporter he was "likely wrong" about Kai Spears, did not supply The Times with information that was "published in the newspaper." Therefore, the statute does not protect the identity of Source B.

For these reasons, this Court should answer both certified questions as "no" and also find the statute inapplicable to Source B.

ARGUMENT

I. THE IDENTITY OF A SOURCE WHOSE INFORMATION IS PUBLISHED ONLINE BY A CORPORATION IS NOT PROTECTED FROM DISCLOSURE MERELY BECAUSE THE CORPORATION ALSO PUBLISHES A NEWSPAPER

Spears would urge this Court to answer the first certified question, as framed, as "no." Ala. Code §12-21-142 protects the "sources of any information" "published in the newspaper, broadcast by any broadcasting station, or televised by any television station." The statute does not, on its face, extend to information published online even if the publishing corporation also publishes a newspaper.

A. ALA. CODE §12-21-142 DOES NOT APPLY GENERALLY TO ONLINE PUBLICATIONS

The current version of Alabama's shield statute, last modified in 1949, provides,

> No person engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a news-gathering capacity, shall be compelled to disclose … the sources of any information procured or obtained by him ***and published in the newspaper***, broadcast by any broadcasting station, or televised by any television station on which he is engaged, connected with or employed.

Ala. Code §12-21-142 (emphasis added).

There are no cases addressing whether §12-21-142 applies to online publications. However, the Eleventh Circuit has previously noted that the word "newspaper" in the statute should be strictly and narrowly construed. In *Price v. Time, Inc.*, 416 F.3d 1327 (11th Cir. 2005), the plaintiff, former Alabama football coach Mike Price, sued the defendant after it printed an article in Sports Illustrated reporting details of Price's alleged sexual misconduct in Pensacola. This included a detailed description of a ménage à trois in Price's hotel room with two women who were both named in the article. The reporter who wrote the article testified in his deposition that he had one confidential source for the information about Price's alleged Pensacola misdeeds, and the reporter ***testified about everything the source told him***. However, he refused to divulge her identity claiming protection under §12-21-142.[5]

The court found that §12-21-142 was inapplicable because it does not apply to magazines. In making that determination, the court first noted that Alabama courts would construe §12-21-142 strictly and narrowly because it is in derogation of common law. The court explained,

[5] The reporter also asserted a First Amendment qualified privilege, not at issue in this certification.

"Under Alabama law, '[s]tatutes in derogation or modification of the common law are strictly construed.'" 416 F.3d at 1342 (quoting *Arnold v. State*, 353 So.2d 524, 526 (Ala. 1977). The court reasoned,

> The Alabama shield law is "in derogation or modification of the common law." … ***At common law, a reporter did not have a privilege to withhold the identity of a confidential source*** of information, and a court could compel disclosure in proceedings before a court, grand jury, or other governmental body.
>
> … Because the common law is that there is no confidential source privilege, Alabama courts would ***construe the shield statute***, which provides one, ***narrowly***. … ***Where there is any doubt*** about the meaning of statutes in derogation of the common law, Alabama courts ***interpret the statute to make the least***, rather than the most, ***change in the common law***.

Id. (emphasis added)(internal citations omitted).

The court then looked to the definition of "newspaper" provided by two legal dictionaries:

> In its most recent edition, *Black's* defines "newspaper" as "[a] publication for general circulation, usu. ***in sheet form***, appearing at regular intervals, usu. daily or weekly, and containing matters of general public interest, such as current events." *Black's Law Dictionary* 1069 (8th ed.2004). Ballentine's has a similar definition. *Ballentine's Law Dictionary* 848 (3d ed. 1969) ("A publication appearing at regular, or almost regular, intervals at short periods of time, as daily or weekly, usually in ***sheet form***, and containing news ....").

Id. at 1337 (emphasis added).

The court reasoned, "This definition of 'newspaper' tends not to cover Sports Illustrated, which is ***not in sheet form*** but instead is stapled and bound into individual pages, as magazines usually are." *Id*. (emphasis added). The court also noted,

> The most recent edition of the *OED* defines "newspaper" as: "A printed publication, now usually issued daily or weekly, consisting of ***folded*** unstapled ***sheets*** and containing news, freq. with the addition of advertisements, photographs, articles, and correspondence ...."

Id. at 1338 (emphasis added).

The court reasoned, "Of course, Sports Illustrated does not consist of folded unstapled sheets." *Id*.

Likewise, in this case, The Times' online publication of the subject article does not constitute a "newspaper." Online publications are not "in sheet form" nor do they consist of "folded unstapled sheets." 416 F.3d at 1338. Interpreting §12-21-142 strictly and narrowly, as *Price* did, this Court should likewise conclude that an online publication is not a "newspaper" within the meaning of §12-21-142.

The history of Ala. Code §12-21-142 also provides a basis for this Court to reject The Times' assertion that this Court should expand the

statute by judicial fiat to keep up with the changing ways in which readers get their news. As the history of §12-21-142 makes clear, "The Legislature knows how to change the law when it is inclined to do so." *Laidlaw Transit, Inc. v. Ala. Educ. Ass'n*, 769 So.2d 872, 883 (Ala. 2000). The statute did not originally encompass radio or television broadcasts. However, in 1949 the Legislature acted to expand the statute to embrace the changing ways in which people were receiving their news. As explained by L. Michael Higgins Jr. in *Rusty Shields for Those Who Wield the Pen: The State of Alabama's Reporter Shield Law in the Aftermath of Price v. Time*, 37 Cumb. L. Rev. 263 (2006-2007),

> The 1949 revision of the statute took notice that the statute was commonly called the Newspaper Privilege, and ***took action to extend this privilege*** to include persons engaged in newspaper, ***radio*** broadcasting stations, and ***television*** stations. While no other legislative history exists to provide a more explicit rationale for the broadening language, it is reasonable to infer that the increased number of televisions and radios in Alabama homes meant that more people were receiving their news from these emerging sources, and that the Alabama legislature believed it appropriate to extend journalistic protection to these media sources.

37 Cumb. L. Rev. at 281-182 (emphasis added).

However, the author notes that the Alabama Legislature has declined to create any further expansion of the statute since that time:

"***Despite the advent*** of cable news channels, computers, the ***internet***, satellite radio, and wireless communications, ***no further expansion of Alabama's shield law has occurred***." *Id.* at 282 (emphasis added).

The Legislature could have included open-ended language in the 1949 modification to embrace any other new technology that might come along, but it did not. It limited the 1949 expansion to add only radio and television broadcasts. The Legislature has also had ample opportunity to amend the statute again to embrace online media publications, but it has declined to do so. The Times' argument to this Court that "[t]he Shield Statute must come along, too, or else newspapers without print editions will be less and less able to obtain vital information"[6] should be made to the Alabama Legislature. The Legislature, if it chooses to expand the statute to apply to online publications, could also include any safeguards or limitations it considers necessary in expanding the statute to include a means of publication so readily available to lay persons. But for The Times to ask this Court to take on the task of expanding the statute in this way demonstrates a fundamental misunderstanding of the proper role of a court in statutory interpretation.

[6] The Times' Brief at 55.

The Times' reliance on authority from other jurisdictions to support its argument that §12-21-142 applies to online publications is problematic. First, The Times fails to construe §12-21-142 narrowly and strictly in urging this Court to follow *Toll v. Wilson*, 453 P.3d 1215 (Nev. 2019). There the court found "[t]he words of the statute should be construed in light of the policy and ***spirit*** of the law" in concluding that Nevada's shield statute could apply to an internet blogger. 453 P.3d at 1218 (emphasis added).

For this Court to try to divine the "spirit" of §12-21-142 in determining its applicability to online publications would be to run afoul of this Court's direction that "[s]tatutes in derogation or modification of the common law are strictly construed." *Arnold,* 353 So.2d at 526; "A statute which is an innovation upon the common law will not be extended further than is required by the ***letter*** of the statute." *Pappas v. City of Eufaula*, 210 So.2d 802, 804 (Ala. 1968)(emphasis added).

The Times' reliance on *O'Grady v. Super. Ct.*, 139 Cal. App. 4th 1423 (Cal. Ct. App. 2006) is puzzling given that court's observation that the online publication in question was ***not*** a "newspaper." There, the court addressed the question whether a web publisher was "[a] publisher,

editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication" within the meaning of California's reporter's shield statute. In going through each term in the statute, the court had "little difficulty" in determining that the website was not a "newspaper" within the meaning of the statute: "The term 'newspaper' presents little difficulty; it has always meant, and ***continues to mean***, a regularly appearing publication ***printed on*** large format, inexpensive ***paper***." 139 Cal. App. 4th at 1460 (emphasis added). The court went on, however, to find that the website did fit under the broader category of "other periodical publications."

The Alabama shield statute, of course, contains no similar language which would extend the privilege beyond newspapers, radio broadcasts, and television broadcasts. Therefore, this Court, like the court in *O'Grady*, should have "little difficulty" in determining that an online publication is not a "newspaper" which "has always meant, and continues to mean, a regularly appearing publication printed on large format, inexpensive paper." *O'Grady*, 139 Cal. App. 4th at 1460.

The Times' reliance on *Gubarev v. Buzzfeed, Inc.*, No. 1:17-cv-60426, 2017 WL 6547898 (S.D.N.Y. Dec. 21, 2017) is equally misplaced. There

the court was interpreting Florida's reporter's shield statute which broadly defines "professional journalist" as

> a person regularly engaged in collecting, photographing, recording, writing, editing, reporting, or publishing news, for gain or livelihood, who obtained the information sought while working as a salaried employee of, or independent contractor for, a ***newspaper***, ***news journal***, ***news agency***, press association, wire service, radio or television station, network, ***or news magazine***.

2017 WL 6547898, at *3 (emphasis added).

In finding that this broad definition encompassed digital media, the court concluded, "There is nothing in the statute that limits the privilege to traditional print media. Because BuzzFeed writes stories and publishes news articles on its website, ***it qualifies as a 'news agency,' 'news journal' or 'news magazine***.'" 2017 WL 6547898 at *4 (emphasis added). Nowhere in the case does the court likewise opine that BuzzFeed would be considered a "newspaper" within the meaning of the statute.

Alabama's statute does not similarly extend broadly to any sort of a "news agency,' 'news journal' or 'news magazine.'" *Gubarev*, 2017 WL 6547898, at *4 Therefore, *Gubarev* provides no support for The Times' argument that "newspaper" includes an online publication within the meaning of Alabama's shield statute.

Accordingly, the cases cited by The Times provide no support for its argument that an online publication is a "newspaper" within the meaning of §12-21-142.

For these reasons, Spears would urge this Court to find that §12-21-142 does not generally apply to online publications.

B. THE MERE FACT THAT THE TIMES ALSO PUBLISHES A NEWSPAPER DOES NOT MAKE ALA. CODE §12-21-142 APPLICABLE TO THE ONLINE ARTICLE

The certified question, as framed, asks whether "the identity of a source, whose information is published online by a corporation ***that also publishes a newspaper***" is "protected from compelled disclosure by a court." (Emphasis added). The answer to the question, as framed, is no. The statute contains three distinct requirements for its applicability with regard to newspapers. First, the journalist in question must work for or with a "newspaper." That is only ***one*** of the three requirements. The second requirement is that the journalist is "engaged in a news-gathering capacity" at the time it receives the information. The third requirement is that the journalist's confidential source provided information which is "published in the newspaper" that the journalist works for or with. The statute requires ***all*** of these components for its applicability. Therefore,

the mere fact that a corporation publishes a newspaper means nothing if the information it obtained from its source is not "published in the newspaper" within the meaning of the statute. Therefore, the answer to the question, as framed, is no.

The more difficult question is whether the statute applies where a news organization did publish, in a traditional printed newspaper, information obtained from a source after first publishing that information online. As noted above, Spears made no argument to the District Court, and does not intend to argue to this Court, that the statute would be inapplicable under these facts. (Tab 5). However, The Times, unsatisfied with that concession, has made a point of arguing to this Court, "The Times respectfully submits that Alabama's statutory privilege applies to articles published online by newspapers ***regardless of whether they were published in print***." The Times' Brief at 55 (emphasis added). Spears has certainly never conceded that the statute applies to online articles "regardless of whether they were published in print" and would urge this Court to reject such a broad application of the statute for all of the reasons discussed above.

II. THE SHIELD STATUTE DOES NOT PROTECT ANY AND ALL INFORMATION THAT COULD LEAD TO THE IDENTIFICATION OF A SOURCE WHOSE IDENTITY IS PROTECTED FROM COMPELLED DISCLOSURE UNDER ALABAMA'S SHIELD STATUTE

With regard to the second certified question, Spears urges this Court to find that §12-21-142 does not extend to "any and all information" provided by a confidential source even if such information "could" ultimately "lead to the identification" of the source.

As noted above, in *Price v. Time,* the court concluded that because Alabama's reporter's shield statute is in derogation of common law, it must be "narrowly" and "strictly construed." 416 F.3d at 1342 (quoting *Arnold,* 353 So.2d at 526. This finding in *Price* is correct and in accordance with a host of cases from this Court applying this principle of law in varied contexts. *See e.g. Pappas v. City of Eufaula*, 210 So.2d 802 (Ala. 1968)(condemnation statute in derogation of common law is strictly construed); *BMJA, LLC v. Murphy*, 41 So.3d 751 (Ala. 2010)(judgment recordation statute in derogation of common law is strictly construed); *Davis v. Gobble-Fite Lumber Co., Inc.*, 592 So.2d 202 (Ala. 1991)(materialman's lien in derogation of common law is strictly construed); *Walker v. Garris*, 368 So.2d 277 (Ala.1979)(guest statute in

derogation of common law is strictly construed); *Grant v. State Dept. of Human Resources*, 560 So.2d 1050 (Ala. 1989)(exception to hearsay rule in derogation of common law is strictly construed); *Ivey v. Wiggins*, 159 So.2d 618 (Ala. 1964)(survival statute in derogation of common law is strictly construed).

Ala. Code §12-21-142, strictly and narrowly construed, does not preclude discovery of "any and all information" provided by a source that "could" ultimately "lead to the identification" of a source.

A. THE INFORMATION SPEARS SEEKS IS IMPORTANT IN ESTABLISHING HIS CLAIMS AGAINST THE TIMES

To understand the fallacy in The Times' position on this issue, it is necessary to first examine the importance of the information Spears seeks and its relevance to his claims. For his defamation claim, Spears is required to show that The Times was "at least negligent" in falsely reporting that he was Miller's passenger at the time Miller was transporting the murder weapon to the scene of the shooting. *Nelson v. Lapeyrouse Grain Corp.*, 534 So.2d 1085, 1091 (Ala. 1988). To prove his false light claim, Spears must show that The Times "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter." *Regions Bank v. Plott*, 897 So. 2d 239, 244 (Ala. 2004). Additionally,

Spears is required to show "knowledge of falsity or reckless disregard for the truth" in order to recover punitive damages on his defamation claim. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

Because of these requirements, the United State Supreme Court has refused to impose obstacles to discovery which would illuminate a media defendant's negligence or reckless disregard for the truth in defamation cases:

> ***Nor did [our] cases suggest any First Amendment restriction on the sources from which the plaintiff could obtain the necessary evidence to prove the critical elements of his cause of action***. On the contrary, *New York Times* and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect that his publication is false. In other cases proof of some kind of fault, negligence perhaps, is essential to recovery.

Herbert v. Lando, 441 U.S. 153, 160 (1979)(emphasis added)(declining to shield media defendants from discovery as to their editorial processes in defamation cases).

In *Miller v. Transamerican Press, Inc.* (*Miller I*), 621 F.2d 721 (5th Cir. 1980) *modified on reh'g*, *Miller v. Transamerican Press, Inc.* (*Miller II*), 628 F.2d 932 (5th Cir. 1980)(*per curiam*), where the defamatory information published about the plaintiff was based entirely on a

confidential informant, the court noted, "The only way that [plaintiff] can establish malice and prove his case is to show that [the publisher] knew the story was false or that it was reckless to rely on the informant. In order to do that, he must know the informant's identity. 621 F.2d at 726-727 (emphasis added).

Similarly, in *Price v. Time*, the court noted that Mike Price was required to show either that the defendant lied about having a confidential source or that

> the ***circumstances surrounding her information were so unreliable*** that it was reckless to publish a story relying on information she provided. In either case, the identity of the source is necessary, indeed vital, to the ***proper preparation and presentation of the plaintiff's case***.

416 F.3d at 1346 (emphasis added).

See also Desai v. Hersh, 954 F.2d 1408 (7th Cir. 1992) where the court noted,

> Proof of actual malice under *Sullivan* invariably depends on knowing the identity of the reporter's source, since a libel plaintiff needs to demonstrate that the reporter's ***source was unreliable*** or ***that the reporter failed to take sufficient steps to verify his or her story***. … Without such information, however, inquiring into the reliability of these sources would be a futile exercise: ***reporters could volunteer information buttressing their defense, and then plead the privilege to prevent the disclosure of any detrimental facts***.

954 F.2d at 1412 (emphasis added).

With regard to Source A, Spears has not sought the actual identity of the source, but only the relevant substance of the information conveyed including how Source A purported to know that Spears was Miller's passenger at the time of the shooting. This information is relevant as to whether The Times was negligent or even reckless in relying on that information. The Times' own guidelines provide,

> Our basic, longstanding criteria remain unchanged: Anonymity should be, as our stylebook entry says, "a last resort, for situations in which The Times could not otherwise publish information it considers newsworthy and reliable." … [I]t should be information we consider "reliable" — ideally because we have additional corroboration, or because we know that ***the source has first-hand, direct knowledge***. Our level of skepticism should be high and our questions pointed. Without a named source, readers may see The Times as vouching for the information unequivocally — or, worse, as carrying water for someone else's agenda. As far as possible, ***we should explain*** the source's motivation and ***how he or she knows the information***.

(Tab 34)(emphasis added).

Therefore, establishing whether Source A purported to have "first-hand, direct knowledge" of the identity of Miller's passenger at the time of the shooting is relevant in determining whether Witz and his editor, Oskar Garcia, complied with The Times' own guidelines.

More importantly, reasonable jurors could conclude from their own experience that if Source A was merely passing on something said by a third person, The Times was negligent or acted with reckless disregard for the truth in simply publishing that hearsay allegation "as an unequivocal fact,"[7] if Witz never even spoke with the person claiming to know this information.

How Source A claimed to know Spears was the passenger is also important because, as Witz revealed in the text exchange with Andrew Das discussed above, the day after the subject article appeared in print, Source A expressed "some equivocation about ***how the source knew***." (Tab 22)(emphasis added). Witz was asked to elaborate on this in his deposition, but he never gave a coherent answer:

> A. Well, the source had been steadfast, solid, but -- but there was some -- ***when I asked the source how they knew this information***, there were some things that -- there -- there were some things that ***the source told me that they couldn't tell me about where or how they -- how they knew***.
>
> Q. Told you that your story was wrong?
>
> A. No. On the contrary, this was just in questions about ***how the source knew***.

[7] (Tab 10).

> Q. Who was equivocating, your source?
>
> A. The source was -- the source said that there were some restrictions -- not – maybe not or maybe constraints about what the source could tell me about ***how they knew***.

(Tab 21, pgs. 292-293).

How a source claims to know information is one of the most important factors in determining the reliability of the source and the information. If "how the source knew" is the very thing the source was equivocating about, this is a matter which Spears and the jury are entitled to examine in determining The Times' reasonableness in relying on this source initially and in continuing to rely on this person in doubling down on the story and refusing to correct it after numerous people told The Times the information was wrong.

Likewise, the information Spears seeks as to which key witnesses Witz or other Times employees did or did not speak to in an effort to verify what Source A said, as well as the content of those discussions, is highly relevant. The Eleventh Circuit Court of Appeals has noted,

> [W]hen an article is not in the category of "hot news," that is, information that must be printed immediately or it will lose its newsworthy value, "***actual malice may be inferred*** when the ***investigation*** for a story ... was ***grossly inadequate*** in the circumstances."

Hunt v. Liberty Lobby, 720 F.2d 631, 643 (11th Cir. 1983)(quoting *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir. 1971)(emphasis added).

Witz admitted in his deposition there was no reason The Times had to rush out a story identifying Spears as an additional player at the scene of a shooting that occurred two months earlier.[8] Rather, Witz testified that The Times ran the story when it did simply because "we felt like we had enough information to publish it." (Tab 21, p. 92; *see also* pgs. 93-98, 191-192). So the adequacy of The Times' investigation, including a failure to talk to key witnesses who would know the identity of the passenger in question, is relevant not only to negligence, but to malice.[9]

---

[8] Witz claims to have received the information that Spears was the passenger shortly before 10:30AM CT on March 15, 2023. (Tab 27). At 7:10PM CT, less than nine hours later, The Times published this allegation as an unequivocal fact. (Tab 3). A jury could find that the only reason The Times felt it needed to rush out the story was it wanted to get out a hit piece on Alabama on the eve of the NCAA tournament.

[9] The importance of this issue is highlighted by The Times' assertion to this Court that its defamation of Spears was "an ***inadvertently*** significant decision." The Times' Brief at 16 (emphasis added). Just an accidental bit of bad luck. No doubt that at trial The Times will similarly try to downplay its disregard for journalistic standards in rushing this story out without an adequate investigation and in later doubling down on the story after being repeatedly told the information was incorrect.

Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967) provides some helpful discussion about what a grossly inadequate investigation looks like. In *Butts*, the Court affirmed a jury verdict for the plaintiff where the Saturday Evening Post printed a story accusing the plaintiff of fixing a football game between Georgia and Alabama. In affirming the jury's verdict, the Court noted the jury was properly instructed to assess "the reliability, the nature of the sources of the defendant's information, its acceptance or rejection of the sources, and ***its care in checking upon assertions***." 388 U.S. at 156 (emphasis added). In finding that the jury could have reasonably determined the investigation to be "grossly inadequate," the Court noted that the evidence showed the Post published the story based on the affidavit of only one source "without substantial independent support." *Id.* at 157. A witness who was with the source when he overheard the conversation which he understood to be an attempt to fix the game "was not interviewed." *Id.* Further, "No attempt was made to screen the films of the game to see if [the source's] information was accurate, and no attempt was made to find out whether Alabama had adjusted its plans after the alleged divulgence of information." *Id.*

Similarly, in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), the Court found sufficient evidence of malice where the reporter "failed to make any effort" to "interview a key witness" and failed to listen to tapes which would have provided relevant information because the reporter claimed he "thought they would provide no new information." 491 U.S. at 692, 698. The Court noted this was evidence from which the jury could find a "purposeful avoidance of the truth" by the reporter which amounted to malice. *Id*. at 692.

In the present case, if The Times failed to interview Investigator Culpepper, who provided the relevant testimony about Miller's passenger at the preliminary hearing, failed to interview Deputy Chief Sanders, whom The Times was told could definitively answer the question as to whether Spears was the passenger in question, and failed to interview witnesses at the scene of the shooting, this is highly relevant to the question of whether The Times' investigation was "grossly inadequate" or whether it engaged in a "purposeful avoidance of the truth."

This information is also relevant as to whether The Times followed its own guidelines to only use anonymous sources as a "last resort" and

to seek "additional corroboration" for information provided by an anonymous source. (Tab 34).

Accordingly, in determining whether to interpret Alabama's shield statute in the broad and sweeping manner urged by The Times, it is important to consider that the information sought by Spears "is necessary, indeed vital, to the proper preparation and presentation of the plaintiff's case." *Price,* 416 F.3d at 1346.

B. THE LETTER OF THE STATUTE PROVIDES ONLY THAT THE "SOURCE OF" THE INFORMATION IS PROTECTED, NOT THE INFORMATION ITSELF

"[T]he letter of the [Alabama shield] statute"[10] precludes only discovery of "the ***sources*** of any information … published in the newspaper" and does not extend to the information provided or discussions regarding how the source purported to know the information, which is relevant in determining whether the information provided was reliable under the circumstances. This is true even if that information "could" ultimately "lead to" the discovery of the source's identity.

As noted above, the scope of the Alabama shield statute was examined extensively in *Rusty Shields for Those Who Wield the Pen: The*

[10] *Pappas v. City of Eufaula*, 210 So.2d 802, 804 (Ala. 1968).

State of Alabama's Reporter Shield Law in the Aftermath of Price v. Time, 37 Cumb. L. Rev. 263 (2006-2007). The author, in emphasizing the minimal scope of the 1949 statute, points out,

> The current version of the Alabama shield law leaves journalists vulnerable because ***only the identity of the source–not the information*** derived from the source--is protected by the statute. … The statute makes ***no provision to protect information*** that may have been obtained in confidence, but not included in the actual publication.

37 Cumb. L. Rev. 263, p. 284 (emphasis added).

The author continues, "The provisions of the current Alabama shield law do not exempt qualified journalists from answering questions regarding additional information the reporter may have received from the source, ***even if that additional information would unavoidably disclose the identity of the source***." *Id*. (emphasis added). The *Rusty Shields* author urged the Alabama Legislature to amend the shield statute to add a "provision guarding against disclosure of unpublished information that the reporter reasonably believes would unavoidably lead to the disclosure of the source's identity" which "would cure ***a deficiency in the existing protection***." *Id*. at 286 (emphasis added). However, the Legislature has made no such amendment.

Alabama's reporter's shield statute is not alone in limiting the scope of the privilege in this way:

> [A]lmost every one of the state statutes gives the newsman the right to refuse to disclose the identity of an informant, or as it is most commonly phrased "the source of information" for his stories. Indeed, it has been argued that this is as far as the privilege may justifiably go, and ***many of the state statutes cover only "sources", not other information***.

23A Fed. Prac. & Proc. Evid. §5426 (1st ed.)(emphasis added).

See e.g. Branzburg v. Pound, 461 S.W.2d 345, 347 (Ky. 1970) *aff'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972)(Kentucky statute "grants a privilege from disclosing the source of the information but does not grant a privilege against disclosing the information itself."); *Lightman v. State*, 294 A.2d 149, 156 (Md. Ct. Spec. App. 1972) *aff'd* 295 A.2d 212, *cert. denied* 411 U.S. 951 (1973)("The Maryland statute, however, does not protect against the disclosure of communications; it privileges only the source of the information.").

In the present case, Spears has not sought discovery of the ***identity*** of Source A. Rather, he has only sought discovery of the ***information*** Source A conveyed including how Source A purported to know this information. As explained above, this is evidence which is relevant to

whether The Times was negligent or acted with reckless disregard for the truth in printing the source's false information.

The manner in which The Times is asserting the privilege with regard to Source A highlights the inherent problems with its assertion that §12-21-142 should be read as including "any and all information that could lead to the identification of a source." According to The Times, we are all simply required to take its word for it that providing the information sought "could" potentially "lead to" identification of the source. However, "[t]he person invoking the privilege does bear the burden of proving its existence." *In re Grand Jury Investigation*, 842 F.2d 1223, 1225 (11th Cir. 1987); "The party asserting the privilege bears the burden to provide a factual basis for its privilege assertion and blanket and general assertions of a claim of privilege are insufficient." *Drummond Co., Inc. v. Collingsworth*, Case No.: 2:11-cv-3695-RDP, 2022 WL 89175, at *8 (N.D. Ala. Jan. 7, 2022). If the information sought is not source-identifying on its face, such as "tell me you your source's home address," how is the court to determine whether that burden has been met? Asking the media defendant how providing the requested information would reveal the identity of the source would inevitably lead

to the defendant's further assertion that answering that inquiry could likewise lead to discovery of the source's identity. It would also mean that in defamation cases, "reporters could volunteer information buttressing their defense, and then plead the privilege to prevent the disclosure of any detrimental facts." *Desai v. Hersh*, 954 F.2d 1408, 1412 (7th Cir. 1992). This is an extremely problematic and unworkable interpretation of the statute.

It has been more than twenty years since the author of the *Rusty Shields* article urged the Alabama Legislature to amend the shield statute to add a "provision guarding against disclosure of unpublished information that the reporter reasonably believes ***would unavoidably*** lead to the disclosure of the source's identity." 37 Cumb. L. Rev. 263, p. 284 (emphasis added). Yet the Legislature has made no such revision. Now The Times wants this Court to go even further by simply reading into the statute a provision protecting "any and all information" that merely "***could*** lead to" such disclosure. As this Court has noted, "This Court's role is not to displace the legislature by amending statutes to make them express what we think the legislature should have done. Nor is it this Court's role to assume the legislative prerogative to correct

defective legislation or amend statutes." *Siegelman v. Chase Manhattan Bank (USA), Nat. Ass'n*, 575 So.2d 1041, 1051 (Ala. 1991).

C. NOTHING IN THE LANGUAGE OF ALA. CODE §12-21-142 ENCOMPASSES ALL "OFF THE RECORD" DISCUSSIONS

As noted above, Alabama's shield statute protects only "the sources of any information … published in the newspaper." Yet The Times has used its overly broad interpretation of §12-21-142 to refuse to answer questions involving any "off the record" discussions. As noted above, The Times' Counsel instructed Witz not to answer questions as to any "off the record" discussions including whether such discussions even occurred:

> COUNSELOR BOWMAN: Objection on the basis of ***Reporter's Privilege under Alabama*** … to the extent the question encompasses ***content that may have been off the record.*** Witness can answer this and other questions about on the record contacts.

(Tab 21, p. 115).

The Times similarly asserted Alabama's shield statute in response to interrogatories directed at its communications with members of the Tuscaloosa Police Department, University of Alabama employees, and law enforcement officials generally; what steps The Times or its agents took before publication to determine whether Kai Spears was "involved in" Jamea Harris' shooting or was present in Miller's car at the time of

the shooting; what steps The Times or their agents took from March 15, 2023 until the filing of the lawsuit to review the accuracy of Witz's reporting about Spears; and communications with members of the media concerning Spears. (Tab 31, ¶¶3, 4, 6, 7, 8, 9).

This information is relevant to an examination of the adequacy of The Times' investigation, including whether The Times took "sufficient steps to verify"[11] the information from its source, whether it took "care in checking upon assertions,"[12] and whether it sought the requisite corroboration for the anonymous source's information in accordance with The Times' own guidelines. As discussed above, this included Witz's refusal to answer whether he had bothered to talk to key witness Branden Culpepper, the officer who testified at Miles' preliminary hearing with regard to Brandon Miller's passenger. (Tab 21, p. 267). It also included Witz's refusal to disclose whether he talked to Deputy Chief Severn "Sebo" Sanders, even though Witz admitted that he was told that Sanders could definitively tell him whether Spears was Miller's passenger at the time of the shooting. (Tab 21, pgs. 299-300). Nor would

[11] *Desai*, 954 F.2d at 1412

[12] *Butts*, 388 U.S. at 156

Witz disclose whether he had talked to Jaden Bradley, who would have had first-hand knowledge that Spears was not in Brandon Miller's car at the time of shooting. (Tab 21, pgs. 225, 269-270).

As discussed above, Alabama's reporter's shield statute protects only the identity of a source who provides information "published in the newspaper." This certainly does not extend to all "off the record" discussions a journalist has with anyone.

The Times, however, argues that the "Times witnesses also refused to testify about who they had not spoken to off the record, so as to avoid identifying the source by process of elimination." The Times' Brief at 64. However, allowing a media defendant in a defamation case to use the Alabama shield statute to go so far as to refuse to discuss any and all "off the record" discussions simply because this could, conceivably, allow identification of the source "by process of elimination" goes far beyond any reasonable reading of the statute.[13] This hampers the defamed party's right to prove his case by showing the inadequacy of the

[13] In *Price v. Time, supra*, the defendant, although claiming the protection of the Alabama shield statute to avoid disclosing the identity of its confidential source, nonetheless provided the plaintiff with the names of all seventeen people the reporter talked to in working on the story. 416 F.3d at 1347.

investigation into the reliability of the information and the informant. As noted above, this would also mean "reporters could volunteer information buttressing their defense, and then plead the privilege to prevent the disclosure of any detrimental facts." *Desai*, 954 F.2d at 1412. There is nothing in the wording of the Alabama shield statute, which expressly limits its protection to the "sources of any information … published in the newspaper," which supports The Times' assertion that it applies to all "off the record" conversations.

D. THE TIMES' RELIANCE ON CASES INTERPRETING OTHER SHIELD PROVISIONS TO SUPPORT ITS INTERPRETATION OF ALABAMA'S SHIELD STATUTE IS MISPLACED

The Times relies on a number of non-defamation cases interpreting other shield provisions to support its interpretation of §12-21-142. Those cases are not at all instructive as to how this Court should interpret Alabama's shield statute.

For instance the Times cites *In re Taylor*, 193 A.2d 181 (Pa. 1963) in which the court broadly interpreted Pennsylvania's reporter's shield statute to mean that "the source of any information procured or obtained by such person" "includes documents as well as personal informants." 193 A.2d at 184-185. However, that case was later severely abrogated as

applied to defamation actions. In *Hatchard v. Westinghouse Broadcasting Co*., 532 A.2d 346 (Pa. 1987), the court explained,

> ***We do not believe the legislature has evinced any intention to make it close to impossible for individuals to seek redress against the media for*** maliciously or negligently ***publishing false statements*** that seriously damage the reputations of individuals. ***Such a result would follow if we interpreted the Shield Law as broadly as appellees urge*** because of ***the changes in the law of defamation since In re Taylor was decided***, and would run afoul of the principle of statutory construction that the legislature must be presumed not to intend a result that is absurd, impossible of execution or unreasonable.

532 A.2d at 350 (emphasis added).

Additionally, the court in *In re Taylor*, in interpreting the Pennsylvania statute, stated that "if there were ***any doubt*** as to the interpretation, the Statute must be ***liberally construed*** in favor of the newspapers and news media." *Id*. at 185. (emphasis added). However, as *Price v. Time* correctly noted, "Where there is ***any doubt*** about the meaning of statutes in derogation of the common law, Alabama courts interpret the statute to ***make the least***, rather than the most, change in the common law." *Price*, 416 F.3d at 1342 (emphasis added).

The one defamation case The Times cites specifically notes, "[T]he decisions that have afforded the most extensive protection to the editorial

or newsgathering processes are ***non-libel actions*** in which the journalist or ***newspaper*** protesting discovery has ***not been a litigant***." *Tavoulareas v. Piro*, 93 F.R.D. 35, 41 (D.C.C. 1981)(emphasis added). In *Tavoulareas* the court, in applying the qualified First Amendment privilege (which does allow a plaintiff a way to overcome the reporter's privilege if it makes the requisite showing), found that the plaintiff was not entitled to travel records, telephone bills, and expense vouchers which could lead to the disclosure of the source's identity. However, that was based on the court's finding that the items sought were of "***minimal relevance*** to any factual issue ***other than to the discovery of confidential sources*** from The Post." *Tavoulareas*, 93 F.R.D. at 39 (emphasis added). With regard to a host of other materials sought by the plaintiff, however, the court found "that defendants' legitimate first amendment interests must yield to plaintiffs' need for discovery of this information." *Id*. at 41.

In the present case, Spears is not seeking information that is of "minimal relevance to any factual issue other than to the discovery of confidential sources from" The Times." *Tavoulareas*, 93 F.R.D. at 39. Spears is not trying to get information for the purpose of figuring out the

identity of Source A. Nor is he seeking information that is facially source-identifying, such as Source A's phone number. Spears is merely seeking the information which is necessary to evaluate the reasonableness of Witz's reliance on the false information provided by Source A and the adequacy of Witz's investigation in attempting to verify that information. This is directly relevant to the elements of Spears' claims.

The rest of the cases cited by The Times, none of which are defamation cases, are also not helpful to The Times' argument. For instance, The Times cites *Aspen Fin. Servs., Inc. v. Eighth Jud. Dist. Court of State*, 313 P.3d 875, 877, 879 (Nev. 2013), which was interpreting Nevada's shield statute, in support of its broad interpretation of Alabama's shield statute. However, as *Newton v. National Broadcasting Co., Inc.*, 109 F.R.D. 522, 529 (Nev. 1985) noted, "Nevada's shield law provides the broadest protection to news media sources of any State shield law enacted in the United States." That statute extends not only to the source of confidential information published in the newspaper, but also to "any published or unpublished information obtained or prepared by such person in such person's professional capacity in gathering, receiving or processing information for communication to the public, or

the source of any information procured or obtained by such person." *Newton*, 109 F.R.D. at 532, n.1.

Alabama's shield statute, by contrast, has been criticized as providing minimal protection because it does not protect additional, unpublished information provided by a confidential source "even if that additional information would unavoidably disclose the identity of the source." *Rusty Shields,* 37 Cumb. L. Rev. 263, p. 284.

The Times' reliance on *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300 (7th Cir. 1990), which interpreted Illinois' shield statute to apply broadly to source-identifying information, is also misplaced. The Illinois statute broadly defines "source" to include "the person ***or*** means from or through which the news or information was obtained." 735 ILCS 5/8-902(c)(emphasis added). Furthermore, Illinois' shield statute balances its expansive scope with express protection for those who are defamed by media defendants. The statutory scheme includes a measure providing that in "libel or slander cases where a person claims the privilege conferred by [the shield statute], the plaintiff may apply in writing to the court for an order divesting the person named therein of such privilege and ordering him or her to disclose his or her source of

information." 735 ILCS 5/8-903(b). The applicant is entitled to that relief in a defamation case if they make a prima facie case of falsity and establish "the necessity of disclosure of the information sought to the proof of plaintiff's case." 735 ILCS 5/8-904.

In fact, as the court noted in *Newton*, *supra*, "[S]everal states have enacted provisions in their shield laws which render them either inapplicable or of limited applicability in defamation actions." 109 F.R.D. at 529-530. The Alabama shield statute, though more limited in scope than other state's shield statutes, is absolute. The Times wants to have it both ways in urging this Court to give the Alabama shield statute the same broad coverage provided by states with more expansive shield statutes while affording none of the protections those other states provide to those defamed by media defendants.

The Times' citation to cases applying the qualified First Amendment privilege is problematic for the same reason. The court in *Price* noted that "'a reporter has a First Amendment privilege which protects the refusal to disclose the identity of confidential informants.'" 416 F.3d at 1343 (quoting *Miller I*, 621 F.2d at 725). However, the court noted that "the privilege is not absolute." *Id.*

> It may be pierced if the party seeking the reporter's confidential source presents: "substantial evidence[:][1] that the challenged statement was published and is both factually untrue and defamatory; [2] that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and [3] that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case."

Id. (quoting *Miller II*, 628 F.2d at 932).

Again, The Times wants to impose whatever reading of this qualified privilege other jurisdictions might have found onto Alabama's absolute statute which provides a defamed person no way to get around the statute to obtain relevant information from the media defendant which defamed him no matter how necessary that information is "to a proper preparation and presentation of the case." *Id*.

There is nothing in the wording of the Alabama shield statute, the history of the statue, or any judicial interpretation of the statute which supports the Times' interpretation which would be so oppressive to the rights of those who are defamed by media defendants. For these reasons, Spears would urge this Court to reject The Times' overly broad and fundamentally unfair interpretation of Alabama's shield statute.

III. THE SHIELD STATUTE DOES NOT PRECLUDE DISCOVERY OF THE IDENTITY OF SOURCE B

Spears is unsure whether the issue regarding the identity of Source B is appropriate for this Court's review given the specific framing of the certified questions. However, the District Court noted in its Certification Order,

> The New York Times … conten[ds] that Alabama's Shield Statute prohibits the "compelled disclosure of newsgathering information." … According to The New York Times, 'newsgathering information' ***includes the identity of a source*** who provides information that it publishes as well as the identity of a source ***who corroborates some part*** of the published information.

(Tab 1, p. 7)(emphasis added).

The Certification Order also notes, "The court's phrasing of the questions 'is only suggestive and is not meant to restrict the Alabama Supreme Court's consideration of the matter.' *LeFrere v. Quezada*, 582 F.3d 1260, 1269 (11th Cir. 2009)." (Tab 1, p. 11). *LeFrere* explained,

> "[T]he particular phrasing used in the certified question is ***not to restrict*** the Supreme Court's ***consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the record certified in this case***. This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even contingent parts."

LeFrere, 582 F.3d at 1269 (quoting *Martinez v. Rodriquez*, 394 F.2d 156, 159 n. 6 (5th Cir.1968)(emphasis added).

Additionally, The Times repeatedly refers to Source B in its brief to this Court: "The article relied, in part, on ***two*** confidential sources." The Times' Brief at 13 (emphasis added); "The Times has invoked the Shield Statute to guard against the disclosure of information that would identify its ***two*** confidential sources. In connection with ***that dispute***, the ***District Court certified two questions to this Court*** …." *Id.* (emphasis added); "[Spears] seeks discovery into the ***two*** confidential sources on whom The Times relied. Having granted anonymity to the source***s***, The Times refused to provide information that might lead to ***their*** identification, relying on the Shield Statute." The Times' Brief at 16-17 (emphasis added).

So to the extent Source B has been brought into the issues placed this Court, Spears asserts that Alabama's shield statute does not protect the identity of Source B. The subject article mentions only ***one*** confidential source. The article notes that Investigator Culpepper provided testimony at the preliminary hearing that Brandon Miller had a passenger in his vehicle at the time of the shooting. The article then

reports, "***A person*** familiar with the case identified that person as Spears. ***That person*** spoke on condition of anonymity to discuss sensitive matters in the case." (Tab 3)(emphasis added). That person is "Source A." (Tab 21, p. 194).

"Source B" is the person referenced in the text message between Witz and Andrew Das who told Witz he was "likely wrong" about Spears being the passenger in question. (Tab 21, pgs. 194, 293).

Alabama's shield statute only protects the source of information "published in the newspaper." §12-21-142. The fact that Source B told Witz he was "likely wrong" about Spears was never "published in the newspaper." Therefore, the identity of Source B is not privileged.

The Times, however, argues that Source B "provided partial confirmation" of what Source A said which, more than anything else, sounds like an argument made up after the fact to try to avoid telling Spears who told Witz he was "likely wrong" about Spears. Witz's testimony was,

> Q. Alright. Did anything that Source B revealed to you ever show up in the actual articles? We know you didn't report that Source B told you you were likely wrong….
>
> A. Source B provided partial confirmation of what Source A had said before publication.

(Tab 21, p. 295).

> Witz's editor, Oskar Garcia, elaborated by testifying,
>
> A. Source B corroborated that ***someone with Alabama*** was in the car. Source A identified who that person was. So Source A went a little bit farther than Source B did.

(Tab 32, p. 155).

First, it is not at all clear that Source B ever claimed to actually ***know*** that the passenger was "someone with Alabama," since only a short time later Source B said that Witz was "likely" wrong about the passenger being Spears. Second, the "information … published in the newspaper" was that a "player" named "Kai Spears" was the passenger. That information most assuredly did not come from Source B. The subject article names only one source as identifying the passenger as Spears. Garcia acknowledged that "***Source B is not attributed in this story***." (Tab 32, p. 155). As discussed above §12-21-142 is to be construed "narrowly" and "strictly." *Price*, 416 F.3d at 1342. Under a narrow and strict construction of the statute, Source B is not the source of information "published in the newspaper" regardless of whether The Times viewed this information as, in some extremely vague sense, partially corroborating the information published in the newspaper.

For these reasons, Spears would urge this Court to find that Ala. Code §12-21-142 does not preclude discovery of the identity of Source B.

CONCLUSION

For these reasons, Respondent/Plaintiff Spears respectfully requests that this Honorable Court answer both certified questions submitted as "no." Spears would also request that this Court find that Alabama's shield statute does not protect the identity of Source B.

Respectfully submitted this 18th day of August, 2025.

/s/ R. Matt Glover (asb-7828-a43g)
R. MATT GLOVER
Attorney for Respondent/Plaintiff
PRINCE GLOVER HAYES
2311 University Blvd, Suite A
Tuscaloosa, Alabama 35401
Phone: (205) 345-1234
Email: mglover@princelaw.net

/s/ M. Virginia Buck (asb-7341C58M)
M. VIRGINIA BUCK
Attorney at Law
Attorney for Respondent/Plaintiff
13112 Martin Rd. Spur
Northport, AL 35473
(205) 752-6773
Email: bucklaw@charter.net

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Ala. R. App. P. 32(a)(7). This brief contains 12,611 words toward the 14,000 words permitted by Ala. R. App. P. 28(j)(1), excluding the parts of the brief exempted by that provision. The brief uses Century Schoolbook, 14 point type.

/s/ R. Matt Glover (asb-7828-a43g)
R. MATT GLOVER

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of August, 2025 served a copy of Respondent Spears' Brief on Certified Question from the United States District Court for the Northern District of Alabama by means of email on the attorneys of record in this matter as listed below.

I further certify that I will mail two hard copies of the e-filed document to the Clerk of the Alabama Supreme Court within 24 hours of e-filing, along with a copy of the transaction confirmation, to Megan B. Rhodebeck, Clerk of the Alabama Supreme Court, 300 Dexter Avenue, Montgomery, Alabama 36104.

/s/ R. Matt Glover (asb-7828-a43g)
R. MATT GLOVER

John G. Thompson
jthompson@lightfootlaw.com
Matthew J. Winne
mwinne@lightfootlaw.com
Nikaa Jordan
njordan@lightfootlaw.com

Jay Ward Brown
brownjay@ballardspahr.com
Chad R. Bowman
bowmanchad@ballardspahr.com
Emmy Parsons
parsonse@ballardspahr.com

James P. Pewitt LLC
jim@jamespewitt.com