To be Argued by:
MICHAEL LINHORST
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

MARC ANTHONY,

Plaintiff-Respondent,

Case No.: CV-24-1707

– against –

KAITLIN HAAS and THE TOWN BOARD OF THE TOWN OF HIGHLAND,

Respondents.

JOSEPH ABRAHAM,

Non-Party Appellant.

BRIEF FOR NON-PARTY APPELLANT

CORNELL LAW SCHOOL
FIRST AMENDMENT CLINIC
Attorneys for Non-Party Appellant
Myron Taylor Hall
Ithaca, New York 14853
(315) 256-1602
mml89@cornell.edu

Sullivan County Clerk's Index No. E2023-260

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PRELIMINARY STATEMENT

In a decision squarely at odds with statutory law and precedent, the court below failed to apply the New York Shield Law, Civil Rights Law § 79-h, and in doing so deprived nonparty journalist Joseph Abraham of protections critical to the functioning of an independent press. The Shield Law enshrines the First Amendment's free-press guarantee by giving journalists the right to avoid compelled disclosure of information. For information from or about confidential sources, the Shield Law provides "[a]bsolute protection." Civil Rights Law § 79-h(b). For any other information that the journalist chooses not to publish, the Shield Law provides a qualified privilege, setting out a stringent three-part test that must be met before the journalist can be forced to disclose it. Civil Rights Law § 79-h(c). These are essential protections for ensuring journalists do not regularly get hauled into court as involuntary party witnesses just for doing their jobs. Without a stringent application of these protections, any litigant could endanger the work and independence of journalists.

Yet the trial court utterly failed to apply the Shield Law protections here, where Plaintiff-Respondent issued an extremely broad subpoena to Mr. Abraham, the Appellant, seeking information about an article published by the newspaper where Mr. Abraham worked. Remarkably, the court below did not enforce the law's "[a]bsolute protection" for confidential sources, notwithstanding the clear mandate

of the Shield Law. It also did not properly apply the law's three-part test for other unpublished information, which only allows compelled disclosure of the information if a party can make "a clear and specific showing" that the information is "highly material and relevant" to his claim, is "critical or necessary" to the claim, and "is not obtainable from any alternative source." Civil Rights Law § 79-h(c). In fact, Plaintiff-Respondent has made no showing that the information he seeks is even relevant to his claim, let alone that he can meet the other two requirements of the test.

The underlying case is a defamation matter in which Plaintiff-Respondent Marc Anthony ("Plaintiff" or "Mr. Anthony") claims Defendant-Respondent Kaitlin Haas ("Defendant" or "Ms. Haas"), a Town of Highland Town Board member, defamed him in connection with an investigatory report written by the Town. Details from the report were published in the *Sullivan County Democrat*, a newspaper where Mr. Abraham worked as managing editor. The newspaper relied on a confidential source in obtaining the report and an unnamed source in confirming the report's authenticity. Plaintiff subpoenaed Mr. Abraham to seek "[a]ny documents" that "refer[]" *in any way* to Plaintiff, the Town of Highland Constabulary, or the newspaper's article. Mr. Abraham filed a motion to quash the subpoena pursuant to the Shield Law.

The court below improperly denied the motion, holding that Mr. Abraham could be compelled to disclose the information. The court ignored the Shield Law's absolute privilege and misapplied the law's qualified privilege, and it provided no findings in support of its ruling. This Court should reverse the lower court's decision.

Several bases independently require reversal:

First, the subpoena seeks information about the newspaper's confidential source, which cannot be obtained under any circumstances, given the Shield Law's "[a]bsolute protection" of such information. Civil Rights Law § 79-h(b). Supreme Court ignored this requirement.

Second, the subpoena seeks other unpublished information, the disclosure of which can only be compelled if Plaintiff is able to meet all three elements of the stringent test set out in the Shield Law. Yet Plaintiff failed to meet any of the three requirements. The unpublished information Plaintiff seeks is not "highly material and relevant" to his defamation claim, it is not "critical or necessary" to the claim, and it can be obtained from "alternative source[s]." Civil Rights Law § 79-h(c). Supreme Court offered no analysis of these factors and, in fact, misapplied each of them.

Third, even if a court believes that a party has met the Shield Law's three-part test, it may order disclosure of the protected information only upon issuing "clear

and specific findings made after a hearing." *Id*. Supreme Court issued no such findings here.

For each of these reasons, the Shield Law requires reversal of the lower court's decision. This Court should do so and quash Plaintiff's subpoena.

QUESTIONS PRESENTED

1. The New York Shield Law provides an absolute privilege for journalists against being forced to divulge information obtained from a confidential source. Does that privilege prevent a party from enforcing a subpoena against a journalist to obtain information about the journalist's confidential source? The lower court incorrectly held that it does not.
2. The New York Shield Law provides a qualified privilege for journalists against being forced to divulge unpublished information. Does that privilege prevent a party from enforcing a subpoena against a journalist to obtain unpublished information when that information is not highly material and critical to the party's claim and could be obtained from other sources? The lower court incorrectly held that it does not.
3. The New York Shield Law requires a court to issue clear and specific findings to support any order that forces a journalist to divulge unpublished information. Where a court issues no findings and merely makes a conclusory, one-sentence statement in support of its order, has the Shield

Law's requirement been met? The lower court incorrectly issued its order without adhering to the law's findings requirement.

STATEMENT OF FACTS

In an article published August 19, 2022, the newspaper *Sullivan County Democrat* reported on the findings of an investigation that the Town of Highland had conducted regarding the Town's Constabulary. R. at 100 (copy of newspaper article).[1] The Town's investigative report described "substantiated" allegations against the Constable, Marc Anthony, including violations of policy, "workplace harassment," and inappropriate comments. R. at 101. While the Town had previously released a redacted version of the report, the newspaper's article was based on the full, unredacted report. *Id*. In reporting the article, the newspaper relied on two sources. R. at 77 ¶ 7 (Abraham affirmation). The first was a confidential source who provided the unredacted copy to the newspaper. *Id*. The second was someone who was identified in the article as being with "[t]he town," who confirmed the authenticity of the unredacted report. *Id*.; *see* R. at 101 (article stating "[t]he town has confirmed the contents of the unredacted report obtained by the Democrat"). Neither source's identity, including that of this second source — the "Town source" — was published in the article. *See generally* R. at 100.

[1] Unless otherwise indicated, citations refer to the page number in the Record on Appeal filed alongside this brief.

Mr. Anthony was suspended as the Town Constable in April 2022, four months before the newspaper published its article. R. at 42 ¶ 1 (amended verified complaint). He filed a lawsuit on February 13, 2023, that contains one count relevant to this appeal: He alleges that Defendant Kaitlin Haas, a Town board member who he claims was acting in her personal capacity, defamed him in "[a] defamatory statement [that] was published in the Sullivan County Democrat." R. at 50 ¶ 81. The Complaint does not specify what that "statement" was. *See id*. The Complaint does not allege that Plaintiff was defamed by the *Sullivan County Democrat* or by any of its editors or reporters. Neither the *Sullivan County Democrat* nor any editors or reporters are parties to this suit. Additionally, Plaintiff has never disputed the authenticity of the investigative report that the newspaper obtained.

On April 23, 2024, Plaintiff attempted to serve a subpoena on Joseph Abraham, the nonparty appellant. Mr. Abraham was managing editor of the *Sullivan County Democrat* from April 2021 to April 2023, including when the newspaper published the article about the Town's investigatory report. R. at 76 ¶ 3. Mr. Abraham was not the reporter assigned to the article; he did not write it, and his name was not included on the byline. R. at 77 ¶ 6. The subpoena was not properly served on Mr. Abraham, and Supreme Court quashed it for that reason. *See* R. at 53 (Amended Order dated July 8, 2024).

Plaintiff issued a new subpoena to Mr. Abraham on July 18, 2024. R. at 76 ¶ 4 & 79 (subpoena). It seeks an incredibly wide swath of information. Among other things, the subpoena demands "[a]ny documents" in Mr. Abraham's possession "which refer[] to Marc Anthony, the Town of Highland Constabulary, or to an article published in the Sullivan County Democrat on or about August 19 or 22, 2022 regarding the Town of Highland Constabulary, including but not limited to notes, and texts with Kaitlin Carney Haas." R. at 79. The subpoena additionally states that it was served on Mr. Abraham because he allegedly "possess[es] information which would identify the person or people that confirmed the Constable Report and other information received anonymously by the Sullivan County Democrat which resulted in the publication of the article entitled 'Highland Constabulary internal turmoil.'" *Id*.

Although Plaintiff's counsel repeatedly stated, including to Supreme Court, that "[t]he information that is sought from Mr. Abraham is simply who at the Town confirmed the authenticity of the report," R. at 86 ¶ 36 (Aff. in Opp. to Abraham Mot.) — information that itself is not relevant to the underlying lawsuit — the subpoena stretches much farther than that. The subpoena requires disclosure of *any* document that "refers" to Mr. Anthony or the Town of Highland Constabulary, regardless of whether the document has anything to do with the unnamed sources, or even whether the document is related to the newspaper's article at all. R. at 79.

It additionally seeks any document that "refers" to the article, regardless of whether the document has anything to do with the unnamed sources. *Id*.

PROCEDURAL HISTORY

Mr. Abraham filed a motion to quash Plaintiff's subpoena on August 19, 2024. R. at 55. After briefing on the motion was complete, Supreme Court held a hearing on September 10, 2024. *See* R. at 4 (transcript). The Court issued an oral ruling at the end of the hearing, denying the motion to quash. The entirety of the Court's reasoning for its decision was: "I'm going to deny the motion to quash the subpoena. Because I disagree with [Mr. Abraham's counsel] Mr. Linhorst. I think that the three prongs are met here. And I agree with [Plaintiff's counsel] Ms. Van Malden. And so, I'm granting -- I'm denying the motion to quash the subpoena." R. at 14:23-15:2. The next day, the Court filed a written order to the same effect, stating the motion to quash was denied "for the reasons set forth on the record at the close of the oral argument." R. at 3 (Order filed Sept. 11, 2024).

Mr. Abraham timely filed a notice of appeal in the court below on October 9, 2024. R. at 1.

ARGUMENT

Plaintiff's subpoena is wholly barred by the New York Shield Law. This Court should enforce the Shield Law's stringent requirements, which are critical to maintaining a free press, and grant Mr. Abraham's motion to quash. The lower court

abused its discretion for three reasons. First, the law requires the subpoena to be quashed to the extent Plaintiff seeks information about the newspaper's confidential source, yet the court below failed to do so. Second, the court below failed to recognize that the Shield Law's stringent three-part test necessitates quashing the remainder of the subpoena. Third, the lower court failed to issue the "clear and specific findings" that the Shield Law requires before a court may order disclosure of protected information.

Any information that a journalist chooses not to publish is protected by the Shield Law. *See* Civil Rights Law § 79-h. The Shield Law provides journalists the "broadest possible protection" against forced disclosure of newsgathering information, and it is "recognized as the strongest in the nation."[2] *Holmes v. Winter*, 22 N.Y.3d 300, 308, 310 (2013); *see also Canning v. Revoir*, 220 A.D.3d 16, 20 (3d Dep't 2023) (explaining that the Shield Law was "[d]istilled from the reporter's privilege, which has roots from the colonial era and in the free press provisions of

[2] In addition to the Shield Law, the First Amendment protects against disclosure of confidential or unpublished information. Compelled disclosure of unpublished information impinges on the press's constitutionally protected right of autonomy in editorial judgment. *See Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241 (1974). In doing so, it subjects news organizations' editorial decisions to external pressures that may "seriously hamper [the press's] ability to function in its editorial role." *Application of Consumers Union of U.S., Inc.*, 495 F.Supp. 582, 586 (S.D.N.Y. 1980). Especially when (as here) the press is not even a party to the proceeding, respect for a free press requires that journalists' "editorial privacy" be protected from incursion. *See People v. Iannaccone*, 112 Misc.2d 1057, 1063 (Sup. Ct., N.Y. Cnty. 1982) ("Compelling this reporter to produce her resource materials significantly intrudes into the news gathering and editorial processes.").

the State and Federal Constitutions"). As the Court of Appeals has explained, the Shield Law reflects the Legislature's decision to give "reporters strong protection against compulsory disclosure of their sources or information obtained in the news-gathering process." *Beach v. Shanley*, 62 N.Y.2d 241, 245 (1984).

The particular level of protection depends on the nature of the source. For information from a confidential source, including the source's identity, the Shield Law provides "[a]bsolute protection" against forced disclosure. Civil Rights Law § 79-h(b). For all other unpublished information, the Shield Law provides a qualified privilege against disclosure, imposing a "demanding" test that a party must meet before it can compel the journalist to disclose the information. *Flynn v. NYP Holdings Inc.*, 652 N.Y.S.2d 833, 835 (3d Dep't 1997); *see also Giuffre v. Maxwell*, 221 F. Supp. 3d 472, 476 (S.D.N.Y. 2016) (describing the "stringent" test and quashing subpoena of nonparty journalist in defamation case); Civil Rights Law § 79-h(c). To obtain any unpublished information from a non-confidential source, Plaintiff must make a "clear and specific showing" that the information "(i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source." Civil Rights Law § 79-h(c).

The lower court's decision would require Mr. Abraham to give up a vast amount of information. Some of the information is from a confidential source, while

other information is non-confidential but unpublished. All of it is protected by the Shield Law.[3] The court below ignored some portions of the Shield Law and misapplied others. Its denial of Mr. Abraham's motion to quash endangers New York's protections for journalists, undercutting the State's nation-leading guarantee of a vibrant free press, and exposing the *Sullivan County Democrat*'s protected reporting and information-gathering. The decision must be reversed.

I. THE SHIELD LAW'S ABSOLUTE PROTECTION AGAINST DISCLOSURE OF CONFIDENTIAL INFORMATION MUST BE APPLIED HERE.

The lower court ignored the Shield Law's complete protection for journalists' confidential sources, failing to quash the subpoena to the extent it sought any information that was about or obtained from a confidential source. The Shield Law squarely requires that decision to be reversed.

The Shield Law provides "[a]bsolute protection" for any information "obtained or received in confidence" by a journalist, including "the identity of the source of any such news." Civil Rights Law § 79-h(b). It provides no exceptions. The statute specifically notes that its protection applies regardless of whether "the material or identity of a source of such material . . . is or is not highly relevant to a

[3] Plaintiff has not questioned the fact that the Shield Law applies to Mr. Abraham, and for good reason. The *Sullivan County Democrat* is plainly a qualifying "newspaper" under the terms of the Shield Law, Civil Rights Law § 79-h(a)(1), and Mr. Abraham is a "professional journalist" who enjoys the protections of the statute, *id*. § 79-h(a)(6).

particular inquiry," and regardless of whether the journalist did or did not solicit the information. *Id.*

New York courts have been clear about the strength of this privilege, describing it as "unqualified protection." *Flynn*, 652 N.Y.S.2d at 835 (explaining that, for confidential information, journalists are "afforded unqualified protection from having to divulge such sources or materials"); *see also Baker v. Goldman Sachs & Co.*, 669 F.3d 105, 107 (2d Cir. 2012) ("New York's Shield Law provides journalists an absolute privilege from testifying with regard to news obtained under a promise of confidentiality.").

Here, the Shield Law's "[a]bsolute protection" plainly covers information pertaining to the *Sullivan County Democrat*'s first source, who was involved in providing an unredacted copy of the Town's investigative report. This source was promised confidentiality. R. at 77 ¶ 7 (Abraham Aff.). The identity of this source, and all information about or received from the source, was thus "obtained or received in confidence," and Plaintiff cannot force its disclosure.

Yet Plaintiff is attempting to do just that. Despite repeatedly claiming that the only information he wants from Mr. Abraham "is simply who at the Town confirmed the authenticity of the report," R. at 86 ¶ 36 (Pl.'s Aff. in Opp. to Abraham Mot.),[4]

[4] *See also* R. at 14:4-5 (Plaintiff's attorney stating to Supreme Court: "All we want is to know the name of the Town source.").

Plaintiff's subpoena encompasses *all information related to this confidential source*. In seeking "[a]ny documents . . . which refer[] to Marc Anthony, the Town of Highland Constabulary, or to an article published in the Sullivan County Democrat," R. at 79, the subpoena covers *all* confidential information related to the article. The subpoena includes no exemption for confidential information that enjoys the Shield Law's "[a]bsolute protection," and Supreme Court did not limit the subpoena in any way.

The facts here closely mirror those in *Beach v. Shanley*, where an anonymous source gave a journalist confidential reports about alleged wrongdoing in a county sheriff's office. 62 N.Y.2d 241, 246 (1984). The journalist promised anonymity to the source. *Id*. A grand jury investigating the leak issued a subpoena to the journalist, but the Court of Appeals held that the subpoena had to be quashed under the Shield Law. *Id*. at 247; *see also id*. at 252 ("Although this may thwart a grand jury investigation, the statute permits a reporter to retain his or her information, even when the act of divulging the information was itself criminal conduct.").

The same holds here. The source who provided the investigative report was promised confidentiality. R. at 77 ¶ 7. Information from or about that source is entirely shielded. Civil Rights Law § 79-h(b); *Beach*, 62 N.Y.2d at 247. The lower court's decision must be reversed, and to the extent the subpoena seeks any information about this first source, it must be quashed.

II. FOR ALL OTHER UNPUBLISHED INFORMATION, PLAINTIFF COMPLETELY FAILED TO MEET THE THREE-PART TEST REQUIRED FOR OVERCOMING THE QUALIFIED PRIVILEGE.

The court's decision must also be reversed because it failed to properly apply the Shield Law's protection for other unpublished information. The statute provides a qualified privilege against disclosure for all information that a journalist chooses not to publish, including information derived from anything other than a confidential source. That protection extends to the identity of the Town source that Plaintiff seeks, as well as all other non-confidential information covered by Plaintiff's subpoena.

For all such information, a party must pass the Shield Law's "stringent" three-part test, described *supra*, before it can compel a journalist to disclose the information. Civil Rights Law § 79-h(c); *Giuffre v. Maxwell*, 221 F. Supp. 3d 472, 476 (S.D.N.Y. 2016). "[A]ll three prongs" of the test "must be satisfied before disclosure can be ordered." *In re Grand Jury Subpoenas to Maguire*, 161 Misc. 2d 960, 966 (Sup. Ct., Westchester Cnty. 1994). This is a "demanding" test, requiring a court to "go beyond the general considerations typically relevant to discovery matters." *Flynn*, 652 N.Y.S.2d at 835.

The information Plaintiff seeks in his subpoena cannot possibly meet the three-part test. Plaintiff's subpoena is extremely broad, seeking "*[a]ny documents*" that "refer[]" in any way to "Marc Anthony, the Town of Highland Constabulary,"

or the newspaper's article — a demand that would include *all* reporter notes referring to the controversy over the Town's Constabulary (not just notes for this one article), plus *all* unpublished information referring to the controversy, plus any material that mentions Mr. Anthony or the Town Constabulary, even if it has nothing to do with this controversy. R. at 79 (emphasis added). Additionally, the subpoena seeks notes and texts with Ms. Haas, a Town board member who may have been in communication with the local newspaper about any number of issues. *Id*. The subpoena must be quashed because its scope is far beyond anything that could *even arguably* overcome the Shield Law's protections.

But even if the subpoena were limited to the information that Plaintiff claims to seek — the identity of the Town source, *see* R. at 86 ¶ 36 — it would still be barred by the Shield Law. As with the other information that Plaintiff seeks, he has not made the required "clear and specific showing" to overcome the Shield Law's protections. Plaintiff has failed to show that the information is "highly material and relevant," is "critical or necessary" to his claim, or that it could not be obtained "from any alternative source." *See* Civil Rights Law § 79-h(c). In fact, the identity of the Town source who confirmed the authenticity of the investigative report is not even relevant, much less "highly material and relevant," to the underlying lawsuit, since

Plaintiff is not contesting the authenticity of the report.[5] For a similar reason, the information is not "critical or necessary." And Plaintiff has an obvious "alternative source" to obtain the information: Ms. Haas herself. In ignoring these realities, the court below failed to properly apply this test, and it reached a patently wrong conclusion.

Plaintiff cannot meet even one of the prongs required by the Shield Law, let alone all three. The Court should therefore reverse the court below and grant Mr. Abraham's motion to quash.

A. Strict application of the Shield Law's test is necessary to protect press freedom.

This qualified privilege, overcome only by meeting all three prongs of the test, is "necessary to insure the protections guaranteed by the First Amendment." *O'Neill v. Oakgrove Const., Inc.*, 71 N.Y.2d 521, 528 (1988). Without it, the free press would come under threat in multiple ways. First, journalists often report on allegations of misconduct in government, along with any number of other controversies that could result in litigation. But if every time journalists reported on such topics they risked getting subpoenaed — with all the time and expense that responding to a subpoena requires — the press would face a serious impediment to

[5] The identity of the Town source who authenticated the report might be relevant if this were a defamation lawsuit against the *newspaper* in which Plaintiff claimed that the report was not authentic and the newspaper should not have relied on the source for authenticating it. But this is not a lawsuit against the newspaper. Neither the *Sullivan County Democrat* nor Mr. Abraham are a party to this suit; Plaintiff does not allege that either of them defamed him.

freely covering the news. *See, e.g.*, *Giuffre*, 221 F. Supp. 3d at 477 (noting that the Shield Law protects journalists from becoming, in effect, "an investigative arm of the judicial system, the government, or private parties" (quoting *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 35 (2d Cir. 1999))); *see also O'Neill*, 71 N.Y.2d at 532 (Bellacosa, J., concurring).

The Shield Law's protections also guard against "incursions into the integrity of the editorial process." *Giuffre*, 221 F. Supp. 3d at 477 (quoting *In re Grand Jury Subpoenas Served on Nat. Broad. Co., Inc.*, 178 Misc.2d 1052, 1055 (Sup. Ct., N.Y. Cnty. 1998)). The Legislature aimed to protect "the privacy of editorial processes and the press's independence in its selection of material for publication," as doing so promotes a press that is free, unhampered by undue scrutiny from the government or private litigants. *Id*. (quoting *Pugh v. Avis Rent A Car Sys., Inc.*, 1997 WL 669876, at *5-6 (S.D.N.Y. Oct. 28, 1997)).

Plaintiff's argument at Supreme Court illustrated how opening the door to compelled disclosure inevitably leads to wholly inappropriate incursions into "the privacy of editorial processes." Plaintiff's counsel repeatedly opined about what constitutes "good journalist procedure and policy" and speculated that without the unnamed Town source, the newspaper would not have published the article about the Town's investigative report. R. at 14:14-19 ("You don't publish just random anonymous things unless you're Truth Social. This is not how newspapers work. . . .

Without this confirmation [from the Town source], they don't publish, we don't have this cause of action."). In proposed questions for Mr. Abraham that Plaintiff submitted to Supreme Court, Plaintiff's counsel revealed that she wants to ask about Mr. Abraham's "practice as . . . editor," among other invasive questions. R. at 98.

But, again, Plaintiff does not allege that he was defamed by either Mr. Abraham or the *Sullivan County Democrat*. Neither Mr. Abraham nor the newspaper is a party to this suit. Plaintiff's questions demonstrate how deeply into the *Sullivan County Democrat*'s constitutionally protected editorial processes he wants to inquire — an inquiry that is entirely improper. In a similar situation, a federal court applying the Shield Law held that all such information was protected. *Giuffre*, 221 F. Supp. 3d at 478 (explaining that questions about a journalist's background, investigation, and sources were "all inquiries into the newsgathering process protected by the Shield Law"); *see also Baker v. Goldman Sachs & Co.*, 669 F.3d 105, 109, 111 (2d Cir. 2012) (stating that the Shield Law's privilege covers such information as who within a newspaper interviewed particular sources, techniques for the reporters' investigation, and the backgrounds of editorial staff).

Thus, to ensure the press remains fully vital and unfettered, as the Constitution demands, courts apply the Shield Law's three-part test "stringent[ly]," *Giuffre*, 221 F. Supp. 3d at 476, and Plaintiff failed to even come close to meeting this high bar.

B. The information would not be "highly material and relevant."

Plaintiff fails the first part of the test because none of the information he seeks in his subpoena is "highly material and relevant" to Plaintiff's defamation claim against Ms. Haas. The identity of the Town source who confirmed the authenticity of the investigatory report is not relevant, and neither is the multitude of other information scooped up by his overbroad subpoena.

To succeed in this claim that Ms. Haas defamed him by making a statement that "was published in the Sullivan County Democrat on August 19, 2022," R. at 50 ¶ 81, Plaintiff will have to establish that Ms. Haas (1) made a false statement of fact, (2) to a third party, (3) without privilege or authorization, (4) "constituting fault as judged by, at a minimum, a negligence standard," (5) "and it must either cause special harm or constitute defamation per se." *Jule v. Kiamesha Shores Prop. Owners Ass'n Inc.*, 210 A.D.3d 1330, 1334 (3d Dep't 2022). Mr. Abraham's testimony is not "highly material and relevant" to any of those elements. Plaintiff therefore cannot meet the first prong of the Shield Law test, and the court below was wrong in holding otherwise.

First, Plaintiff's Complaint never identifies the precise "defamatory statement" that it claims Ms. Haas made. While it lists some statements that it claims were false, *see* R at 47 ¶¶ 45 & 46, those statements all came from the Town Board's investigative report, whereas the Complaint says that Ms. Haas's "defamatory

statement" was made "without any authority of the Town of Highland, and not made while acting in her capacity as a Town Board member." R. at 50 ¶¶ 81 & 82. It therefore appears to be referring to some other, unspecified statement of Ms. Haas. Additionally, the Complaint does not explain how statements published in the newspaper in August 2022 harmed Plaintiff, who was already suspended in April 2022. *See* R. at 22 ¶ 1. These failures are fatal to meeting the elements of defamation as well as enforcing this subpoena. *See Jule*, 210 A.D.3d at 1334 (affirming dismissal of defamation claim because, among other reasons, "[n]othing in the pleadings provides any actual words attributed to [defendant]" that could amount to defamation).

But even if Plaintiff had made out a cognizable defamation claim, he still could not show that Mr. Abraham's testimony would be relevant, because the identity of the Town source has no bearing on any element of Plaintiff's defamation claim. The Town source merely confirmed that the investigative report provided to the newspaper was authentic. This was a true statement; Plaintiff does not claim that the report was faked. Therefore, no matter who the Town source was, the fact that they authenticated the report would not help at all in establishing that they made any false statement against Plaintiff. What Plaintiff needs to prove is that allegations *within* the report were false, and the identity of the Town source has no bearing on that question or on whether Ms. Haas is liable for defamation.

None of the other information that Plaintiff's subpoena seeks could be relevant, either. Hypothetical examples illustrate the point. The subpoena would require disclosure of any of these documents if they exist in Mr. Abraham's possession:

- notes about a law enforcement action taken by the Town Constabulary;
- a draft article written about Plaintiff's first day as Constable;
- a text message with Ms. Haas regarding a Town Board vote on the Constabulary's budget; and
- an email with another editor about a typo in a draft of the Town investigation article.

But none of these are even arguably "highly material and relevant" to Plaintiff's defamation claim. Plaintiff never made a "clear and specific" showing that any of the information sought by his subpoena meets this first prong of the Shield Law's test, and, indeed, it does not. Plaintiff fails right out of the gate; the subpoena must be quashed.

C. The information would not be "critical or necessary."

Plaintiff cannot meet the second prong of the test, either. Because the identity of the Town source — and the variety of other information sought by the subpoena — is not even relevant, it certainly is not "critical or necessary." To satisfy this second prong, "plaintiff cannot merely show that the materials were useful. He must

convince the court that the claim 'virtually rises or falls with the admission or exclusion of the proffered evidence.'" *Flynn v. NYP Holdings Inc.*, 652 N.Y.S.2d 833, 835 (3d Dep't 1997) (quoting *In re Application to Quash Subpoena to Nat'l Broad. Co.*, 79 F.3d 346, 351 (2d Cir. 1996)). In other words, to meet this element, "a petitioner cannot merely show that it would be useful, but rather that the defense could not be presented without it." *Perito v. Finklestein*, 51 A.D.3d 674, 675 (2d Dep't 2008).

In the court below, Plaintiff fell woefully short of the line, merely repeating in a conclusory fashion the elements of the Shield Law. He offered nothing to explain *why* his defamation claim "virtually rises or falls" with whether Ms. Haas was the Town source who confirmed the authenticity of the report. And since the identity of that source is not even relevant to a defamation claim, Plaintiff's claim certainly does rise or fall on the source's identity. Plaintiff likewise did nothing to explain why he would be unable to pursue his claim without the various other material his broad subpoena seeks. Plaintiff failed to show that Mr. Abraham's testimony is "critical or necessary" — yet another reason why he cannot meet the Shield Law's test.

D. Any relevant information can be obtained from other sources.

Even if the identity of the Town source were highly material and critical to Plaintiff's claim — and it is not — the Shield Law would still bar the subpoena of

Mr. Abraham because Plaintiff could obtain the information from other sources. Suppose Plaintiff were correct that Ms. Haas was the newspaper's Town source; he could have confirmed that in deposing Ms. Haas or in seeking relevant discovery from her. If Ms. Haas was not the source, Plaintiff could similarly have confirmed that with her. Either way, Plaintiff could get the information he claims to need by deposing Ms. Haas. He therefore cannot establish that the information is "not obtainable from any alternative source." Civil Rights Law § 79-h(c). The Shield Law prohibits subpoenaing Mr. Abraham to obtain this information. *See id*.

Plaintiff's counsel has stated that she already deposed Ms. Haas. R. at 86 ¶¶ 40 & 41. Apparently, Ms. Haas denied being the source, and Plaintiff's real purpose in seeking Mr. Abraham's testimony is merely to cast doubt on Ms. Haas's credibility. *Id*. This is not enough to overcome the Shield Law. The law's protections do not yield to "general and ordinary impeachment material or matters which might arguably bear on the assessment of credibility of witnesses. To permit that might well result in the piercing of the privilege far more often and with far less basis than the legislative history suggests is appropriate." *In re Am. Broad. Companies, Inc.*, 189 Misc. 2d 805, 808 (Sup. Ct., N.Y. Cnty. 2001); *see also Perito*, 51 A.D.3d at 675 (holding that petitioner could not overcome Shield Law when the testimony he sought related to "the credibility of witnesses in the impending trial"). Instead, Plaintiff would have to identify a "specific issue, other than general

credibility," for which Mr. Abraham's testimony would be "truly necessary." *In re Am. Broad. Companies, Inc.*, 189 Misc. 2d at 808; *see also Application of CBS Inc.*, 232 A.D.2d 291, 292 (1st Dep't 1996).

For example, in one case, a defendant tried to obtain unpublished out-takes from a television news organization, which the defendant claimed would contradict important parts of the plaintiff's deposition testimony. *In re Application to Quash Subpoena to Nat. Broad. Co., Inc.*, 79 F.3d 346, 350 (2d Cir. 1996). The Second Circuit, applying the Shield Law, quashed the defendant's subpoena, explaining that (1) the defendant provided no evidence to establish that the unpublished information would actually contradict the testimony, and (2) such "impeachment material is not critical or necessary to the maintenance or defense of a claim, and there is no clear and specific showing that it would be so here." *Id*. at 352; *see also Brown & Williamson Tobacco Corp. v. Wigand*, 1996 WL 350827, at *5 (Sup. Ct., N.Y. Cnty. Feb. 28, 1996) (holding that information was "obtainable from an[] alternative source" when it could be obtained from the defendant, despite plaintiff's claim that defendant was "inherently dishonest").

The same holds here. If Ms. Haas were the Town source, then Plaintiff could obtain that information from Ms. Haas. But since Plaintiff has already deposed Ms. Haas and she denied it, then the most he could get from Mr. Abraham would be impeachment material, which is not sufficient to overcome the Shield Law's

privilege. Either way, the law requires that Plaintiff's subpoena be quashed. And as for the wide array of other material that Plaintiff's subpoena seeks, to the extent any of it is relevant, there are likely numerous other sources who could provide it, and Plaintiff has made no showing at all that he has attempted to seek that material elsewhere.

* * *

For each piece of non-confidential information that Plaintiff seeks, he must make a "clear and specific" showing that he can pass all three parts of the test for overcoming the Shield Law's privilege. Civil Rights Law § 79-h(c). Plaintiff has failed to pass the test with respect to information about the Town source; he has not even attempted with respect to any other information. The court below plainly erred, and the subpoena must be quashed.

III. THE SHIELD LAW REQUIRES A COURT THAT ORDERS DISCLOSURE TO ISSUE 'CLEAR AND SPECIFIC FINDINGS,' AND THE COURT BELOW ISSUED NONE.

The court below should also be reversed because it failed to issue the required findings to support its decision. The law mandates that if a court believes the three-part test is satisfied and decides to order disclosure of information, it must "support such order with clear and specific findings made after a hearing." Civil Rights Law § 79-h(c). However, the court below did not support its order with any findings, let alone "clear and specific" ones. It violated the Shield Law's requirements — and,

in doing so, made it more difficult for this Court to evaluate how the lower court applied the law's test.

All that the lower court said in support of its order was that it "disagree[d]" with Mr. Abraham's counsel, it believed "that the three prongs are met here," and it "agree[d]" with Plaintiff's counsel. R. at 14:23-15:2. It provided no further detail and no findings of fact at all, either orally at the hearing or in its written order issued the following day. *See generally* R. at 14-15; R. at 3 (Order filed Sept. 11, 2024). The written order merely states that the motion to quash was denied "for the reasons set forth on the record at the close of the oral argument." R. at 3. But the court made no findings to support its conclusion that "the three prongs are met" as to the Shield Law's qualified privilege. This is an important requirement, both because it ensures a court engages in careful deliberation and explanation before ordering disclosure of a journalist's protected material, and because it enables thoughtful appellate review of any disclosure order. Without the lower court's findings, this Court has less on which to evaluate how the lower court applied the Shield Law.

By failing to provide the required "clear and specific findings" in support of its order denying the motion to quash, Supreme Court's order does not comply with the Shield Law. It must be reversed for this additional, independent reason.

CONCLUSION

The Shield Law provides "[a]bsolute protection" against compelling Mr. Abraham to testify about the confidential source who was involved in providing the investigative report. And it provides a strong, qualified privilege against compelled disclosure of all other unpublished information, including the identity of the unnamed Town source who confirmed the report's authenticity. Plaintiff did not come close to meeting even one, let alone all three, of the elements required for overcoming the qualified privilege.

The court below erred by utterly ignoring the absolute privilege, failing to recognize that Plaintiff had fallen far short of meeting the test for the qualified privilege, and failing to make the required findings in support of its unprecedented decision. The subpoena therefore cannot be enforced under the New York Shield Law. Mr. Abraham respectfully requests that this Court reverse the court below and quash the subpoena.

Dated: April 9, 2025

Respectfully submitted,

By: 

Michael Linhorst
Heather E. Murray
Cornell Law School
First Amendment Clinic
Myron Taylor Hall
Ithaca, New York 14853

Tel.: (607) 255-8518
MML89@cornell.edu
HEM58@cornell.edu

Counsel for Nonparty Joseph Abraham

PRINTING SPECIFICATION STATEMENT

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc., is 6,473.

Dated: April 9, 2025

Signed:

Michael Linhorst
Cornell Law School
First Amendment Clinic
Myron Taylor Hall
Ithaca, New York 14853
Tel.: (607) 255-8518
MML89@cornell.edu