IN THE SUPREME COURT OF THE STATE OF NEVADA

SAM TOLL,
Petitioner,

vs.

THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CARSON CITY; AND THE HONORABLE JAMES E. WILSON, DISTRICT JUDGE,
Respondents,

and

LANCE GILMAN,
Real Party in Interest.

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CASE NO.: 78333
District Court Case No.: 18TRT00001

[PROPOSED] BRIEF OF *AMICI CURIAE* THE NEVADA PRESS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE NEWS MEDIA ALLIANCE, THE ONLINE NEWS ASSOCIATION, THE MEDIA INSTITUTE, THE SOCIETY OF PROFESSIONAL JOURNALISTS, AND REPORTERS WITHOUT BORDERS

(In Support of Petitioner For Vacating District Court Order)

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

1. The Nevada Press Association is a nonprofit organization and has no parent corporation or stock.

2. The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

3. The News Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

4. The Online News Association is a nonprofit organization and has no parent corporation or stock.

5. The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

6. The Society of Professional Journalists is a non-stock corporation with no parent company.

7. Reporters Without Borders is a nonprofit association with no parent corporation.

8. No law firm or lawyer has appeared for the *amici* below; the only law firm and lawyer appearing for *amici* in this case is:

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I. STATEMENT OF INTEREST OF *AMICI CURIAE*

The Nevada Press Association is the formal trade organization for the newspaper industry in Nevada. It is a voluntary nonprofit association that represents six (6) daily and nineteen (19) nondaily newspapers in Nevada, as well as three (3) online news services. The Associated Press is also a member of the Nevada Press Association.

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The News Media Alliance is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-daily print publications. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

The Online News Association ("ONA") is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

The Media Institute, founded in 1979, is a nonprofit foundation specializing in communications policy issues. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents

through its network of over 150 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

II. SUMMARY OF ARGUMENT

The Petitioner, Sam Toll, is a reporter for an online news site that publishes "articles [that] contain facts or alleged facts, opinions, commentary, and/or satire related to events in Storey County." (12 PA2481.) The Real Party in Interest, Lance Gilman, sued Mr. Toll for defamation and sought to compel Mr. Toll to reveal information and the sources of information obtained or prepared by him in his professional capacity in gathering, receiving or processing information for communication to the public. (*Id.*) NRS 49.275, the Nevada news media shield statute (the "Shield Law") prohibits compelled disclosure of that sort of information by reporters and employees of "any newspaper." NRS 49.275. Because Mr. Toll is protected by the Shield Law, he cannot be compelled to disclose any such information. *Id.*

The district court nonetheless erroneously compelled disclosure of the information, ruling that Mr. Toll's publication, the Storey Teller, is not a "newspaper." (12 PA2485.) The district court's ruling is based on two fundamental flaws. One flaw relates to the district court's misunderstanding of the Legislature's clear intent regarding the scope of the Shield Law and breadth of the statute's

purpose. The law's scope clearly encompasses the First Amendment protected activity engaged in by Mr. Toll, as discussed more fully in Section III(A) below.

The second flaw in the district court's analysis, mentioned briefly by Mr. Toll and discussed more fully in Section III(B) of this *amici* brief, involves the plain language of the Shield Law. The word "newspaper" is not defined in the Shield Law. The district court wrongly based its analysis of the meaning of "newspaper" on the faulty premise that the Legislature's use of the phrase "printed newspaper" in an unrelated chapter of the NRS (Chapter 238), means the phrase "any newspaper" in the Shield Law (without the word "printed") must be restricted to printed newspapers. However, contrary to the district court's reasoning, the use of the phrase "printed newspaper" in other statutes demonstrates that the word "newspaper" alone is not restricted to printed publications. Furthermore, the Shield Statute refers to reporters for "any newspaper." NRS 49.275. There are many types of newspapers (daily and weekly; English language and foreign language; printed and digital; to give just some examples). Printed newspapers are one type of newspaper, but the Shield Law covers any newspaper. Therefore, Mr. Toll is protected by the Shield Law, and this Court should grant Petitioner's request for a writ.

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III. ARGUMENT

A. The Shield Law Is Broad, and Designed to Advance the First Amendment.

The Shield Law is designed to promote journalism and a free press. It states:

> **No reporter,** former reporter **or editorial employee of any newspaper**, periodical or press association or employee of any radio or television station **may be required to disclose 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, in any legal proceedings, trial or investigation**:
>
> 1. Before any court, grand jury, coroner's inquest, jury or any officer thereof.
> 2. Before the Legislature or any committee thereof.
> 3. Before any department, agency or commission of the State.
> 4. Before any local governing body or committee thereof, or any officer of a local government.

NRS 49.275 (emphases added). Reflecting the Shield Law's broad scope, this Court has held, "Nevada's news shield statute is one of the most liberal in the country." *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93–94, 993 P.2d 50, 54 (2000) (citation omitted). "[T]he plain language of the news shield statute… [states] that journalists, when acting as such, are protected from disclosing any information that is gathered or prepared for public dissemination." *Id.* at 97, 56.

Protection for journalists under the law extends to online speech. In fact, the United States Supreme Court has made clear that online speech stands on the same footing as other speech—there is "no basis for qualifying the level of First

Amendment scrutiny that should be applied" to online speech. *Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (*cited in In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011)).

Likewise, there is no basis to limit the Shield Law, which is designed to further the First Amendment, to online newspapers and reporters. This Court has held that the "policy rationale behind [the Shield Law] is to enhance the newsgathering process and to foster the free flow of information encouraged by the First Amendment to the U.S. Constitution." *Diaz*, 116 Nev. at 99, 993 P.2d at 57 (citation omitted).

The district court's limited definition of "newspaper" frustrates the Legislature's clear intent in enacting the Shield Law. It also is at odds with this Court's explanation of the Shield Law's purpose of furthering free speech. Therefore, this Court should grant Petitioner's request and issue a writ.

B. The Plain Language of the Shield Law Shows It Applies to Online Newspapers.

1. The Shield Law Applies to "Any Newspaper"

The district court's limiting application of the Shield Law is also at odds with the Shield Law's plain language. The word "newspaper," without further qualification, as the Nevada Legislature uses it, is a general term. The expansive nature of the Shield Law's application is obvious not only from the lack of the use of the word "printed," as discussed below, but also from the use of the word "any."

The Shield Law covers reporters and editorial employees of "**any** newspaper." NRS 49.275 (emphasis added). As noted below, throughout the Nevada Revised Statutes, the Legislature has recognized there are various types of newspapers (printed, of general circulation, daily, triweekly, and English language, just to list a few). In the Shield Law, the Legislature makes clear the law's protection applies to all of them—"any newspaper." NRS 49.275. This Court should not ignore the use of the word "any" as the district court did. *See, e.g., Harris Associates v. Clark County Sch. Dist*., 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) ("no part of a statute should be rendered meaningless").

Because it ignored the plain language of the statute, the district court erred in finding that a newspaper must be printed in order to be covered by Shield Law. *See McKay v. Bd. of Supervisors,* 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). ("It is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act.").

In *Diaz*, this Court held that its prior decisions incorrectly found that confidentiality was key to the application of the privilege based on legislative intent because "the news shield statute's language is plain and unambiguous" and thus, "no legislative history analysis was warranted." *Diaz*, 116 Nev. at 97, 993 P.2d at 56. In *Aspen Fin. Services, Inc. v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 129 Nev. 878, 883, 313 P.3d 875, 879 (2013), this Court rejected another

effort to read language (an affidavit requirement) into the Shield Law, again upholding its plain meaning.

The plain language of the Shield Law does not limit its scope. Just as it did in *Diaz and Aspen Financial*, this Court should uphold its plain meaning and find that "any newspaper"—including an online newspaper—is protected.

2. The District Court Erred In Incorporating Limitations from the Notice Statute Into the Shield Law.

The district court correctly points out that "newspaper" is not defined in NRS 49.275. The district court then uses what it claims is a definition of "newspaper" contained in Chapter 238 of the Nevada Revised Statutes. Not only is Chapter 238 unrelated to the Shield Law,[1] it does not in fact define "newspaper." Rather, Chapter 238 (the "Legal Notice Law"), limits which types of newspapers are qualified to publish legal notices.

Pursuant to Chapter 238, the only newspapers qualified to publish legal notices are those newspapers, which, among other things, are "printed." NRS 238.020; NRS 238.030. Although ignored by the district court, Chapter 238 also

[1] For this reason, the district court's reliance on Chapter 238 violates this Court's mandate to give meaning to the plain language of the Shield Law. *Diaz*, 116 Nev. at 97, 993 P.2d at 56. Even if an excursion into legislative intent were appropriate here, which it is not, "[i]nterpretation of one statute by reference to an unrelated statute is an unreliable means of ascertaining legislative intent." *Bertrand v. Bd. of County Com'rs of Park County*, 93SC95, 1994 WL 136039 (Colo. 1994) (citing 2B Norman J. Singer, *Sutherland Statutory Construction* § 53.05, at 238 (5th ed. 1992)).

restricts public notice publication to newspapers that possess a second-class mailing permit. NRS 238.040. A newspaper does not cease being a newspaper simply because it does not have a second-class mailing permit, even if a newspaper without a second-class mailing permit is not qualified to publish legal notices. By the same token, a newspaper does not cease being a newspaper simply because it is published online but not printed.

A further look at Chapter 238 demonstrates the fallacy of the district court's reliance on the limitation in that chapter related to publishing legal notices. According to Chapter 238, some legal notices must be published in daily newspapers, while others can or must be published in triweekly, semiweekly, weekly or semimonthly newspapers. *See* NRS 238.030. However, a newspaper need not be daily, triweekly, semiweekly, weekly or semimonthly (and of course, a newspaper could not be all of those at once) in order to be a newspaper. Nor must a newspaper be of general circulation in order to be a newspaper, even though a newspaper must be of general circulation in order to publish legal notices. *See* NRS 238.030(1). ("all legal notices or advertisements shall be published only in a… newspaper of general circulation…").[2]

[2] It is also worth noting that in Chapter 238, qualified newspapers must be both "printed" and "published," demonstrating that "printed" and "published" are two different things. NRS 238.020(1) – (5). A published newspaper does not cease to be a newspaper simply because it is not printed.

As noted above, the word "newspaper," without further qualification, as the Nevada legislature uses it, is a general term. There are various types of newspapers. One type is a printed newspaper, but "any" type of newspaper is covered by the Shield Law. NRS 49.275 ("no reporter… of any newspaper… shall be required to disclose information…"). This plain meaning must be given effect, and a separate Chapter of the NRS does not limit the scope of the Shield Law.

If the Legislature had intended to limit the definition of "newspaper" in the Shield Law or limit its application to printed newspapers, it would have done so. The Legislature has seen fit to qualify the "newspapers" that laws apply to in other contexts, but not the Shield Law. In *Williams v. State Dep't. of Corr.*, this Court explained that the use of a word in one statute and its absence from another means the two statutes have different meanings:

> We must presume that the variation in language indicates a variation in meaning. *See generally Henson v. Santander Consumer USA Inc.*, 582 U.S. ——, ——, 137 S.Ct. 1718, 1723, 198 L.Ed.2d 177 (2017) ("And, usually at least, when we're engaged in the business of interpreting statutes we presume differences in language ... convey differences in meaning."); *Loughrin v. United States*, 573 U.S. ——, ——, 134 S.Ct. 2384, 2390, 189 L.Ed.2d 411 (2014) ("[W]hen [the Legislature] includes particular language in one section of a statute but omits it in another ... this Court presumes that [the Legislature] intended a difference in meaning." (internal quotation marks and alteration omitted)); *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("[The Legislature's] explicit decision to use one word over another in drafting a statute is material. It is a decision that is imbued with legal significance and should not be presumed to be random or devoid of meaning." (internal citations omitted)).

Williams v. State Dep't of Corr., 402 P.3d 1260, 1264 (Nev. 2017). Applying this principle, the Shield Law cannot be interpreted to printed newspapers.

As discussed above, the Legislature defines the qualities a newspaper must have in order to engage in certain types of public notice publishing. This reflects that the Legislature knows how to limit which types of newspapers are covered by each statute, and which are not**.** And Chapter 238 is not the only example of statutes in which the Legislature has shown it knows how to limit which types of newspapers are covered.

NRS 278C.080, for example, limits the "newspapers" covered by Chapter 287 to newspapers that are not only printed, but printed in English. Applying to the Shield Law to limitations in the various public notice statutes would, quite obviously, lead to absurd results, which must be avoided. *See, e.g., Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) ("a statute's language should not be read to produce absurd or unreasonable results.") (citation and internal quotation marks omitted). Certainly, the Shield Law is not limited to English language newspapers simply because the notice publication limitations in an unrelated chapter of the NRS requires the particular notice to be published in an English language newspaper. Likewise, the Shield Law is not limited to printed newspapers and had the Legislature intended it to be, it would have said so.

As a further example, in Chapter 244A, the Legislature set forth the

procedures necessary for a governmental entity to, among other things, construct or operate a sewage facility. Included in that chapter is the requirement to publish notice of certain public meetings. The statute requires that the notice be published in a newspaper, but not just any newspaper. Rather, the newspaper must be (1) "printed" and (2) at least once per week. NRS 244A.479. Again, if a publication had to be printed in order to be a newspaper, there would be no need to specify in Chapter 244A that the newspaper be one that is printed. And, if the district court's reasoning is to be followed, in order to be a newspaper, the publication would have to be printed at least once per week.

The Legislature has also provided clarity regarding which newspapers it intends a law to apply to in Chapter 52. NRS 52.145, dealing with self-authentication of evidence, states, "[p]rinted materials purporting to be newspapers or periodicals are presumed to be authentic." If newspapers were necessarily printed, then the statute would need say nothing more than "newspapers and periodicals are presumed to be authentic."[3] It does not follow that only printed newspapers are newspapers. In fact, the opposite is the case: printed newspapers are but a subset of newspapers.

Unlike these other examples, in the Shield Law, the Legislature chose not to

[3] It is the fact that printed newspapers cannot be easily altered that gives rise to the self-authentication rule and it is a basis for restricting public notice to printed newspapers, but it has nothing to do with the Shield Law.

limit protection to certain types of newspapers. The Shield Law instead applies to "any" newspaper. Therefore, this Court should grant Mr. Toll's petition and issue a writ.

IV. CONCLUSION

Sam Toll publishes an online newspaper and is a reporter for and employee of the newspaper. The district court compelled him to produce information even though he invoked the protections afforded by the Shield Law. The district court based its decision on the faulty conclusion that because public notices under NRS Chapter 238 must be published in newspapers that are printed, no digital newspaper is a newspaper for purposes of any statute. The district court's ruling is contrary to the plain meaning of the Shield Law, which applies to "any newspaper," as well as the clear intent of the legislature and the policies that underlie the First Amendment and Nevada's commitment to freedom of the press. Therefore, this Court should issue the writ sought by Mr. Toll.

DATED this 25th day of March, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2:

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the Brief of *Amici Curiae* has been prepared in a proportionally spaced typeface (14-point Times New Roman font).

I further certify that this brief complies with the page- or type- volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is 3,148 words which, pursuant to NRAP 29(e), is no more than one-half the maximum length authorized by NRAP for a party's brief.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that I am an employee of McLetchie Law and that on this 25th day of March, 2019 the *[PROPOSED] BRIEF OF AMICI CURIAE* (In Support of Petitioner) was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the Master Service List as follows:

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I hereby further certify that on this 25th day of March a true and correct copy of the *[PROPOSED] BRIEF OF AMICI CURIAE* (In Support of Petitioner) will be mailed by depositing the same in the United Stated mail, first-class postage pre-paid, to the following:

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