

Burton D. Wechsler
First Amendment Moot Court Competition

TEAM 101

No. 09-2701

In the Supreme Court of the United States

ERIC CARTMAN,
PETITIONER,

v.

IKE BROFLOVSKI,
RESPONDENT.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT**

Team 101

Counsel for Petitioner

October 2, 2009

QUESTIONS PRESENTED

1. Under the First Amendment, whether Eric Cartman, an Internet journalist who used an anonymous source to uncover human rights violations, is protected by a qualified reporter's privilege against court-compelled disclosure of the identity of his source in a defamation claim, given that Cartman operates a website that reports major headline news, appeals to an audience of over 100,000 readers, and fosters discussion on matters of significant public and political concern, which is essential to the free flow of information guaranteed by the First Amendment and justifies the need for the privilege of confidentiality regarding the identity of anonymous sources.

- II. Whether Ike Broflovski, the Director of Research and Development of a *Fortune* 500 consumer electronics company, is a limited-purpose public figure who must prove actual malice to establish his claim for defamation against Eric Cartman, given that Broflovski allegedly participated in human rights violations while in charge of the internal workings of Citrus's factories, affirmatively made statements in response to the allegations, and maintained continued public attention throughout his tenure at Citrus, becoming so popular that his innovations were celebrated throughout the United States with "I Like Ike" buttons.

TABLE OF CONTENTS

QUESTIONS PRESENTED	2
TABLE OF CONTENTS	3
TABLE OF AUTHORITIES	5
JURISDICTIONAL STATEMENT	9
STATEMENT OF THE CASE.....	10
SUMMARY OF THE ARGUMENT	15
ARGUMENT.....	18
I. UNDER THE FIRST AMENDMENT, A REPORTER IS PROTECTED BY A QUALIFIED PRIVILEGE AGAINST COURT-COMPELLED DISCLOSURE OF THE IDENTITY OF AN ANONYMOUS SOURCE, AND CARTMAN, AN INTERNET JOURNALIST, IS ENTITLED TO SUCH PRIVILEGE BECAUSE THE LIBERTY OF THE PRESS IS NOT CONFINED TO MAINSTREAM MEDIA AND BROFLOVSKI HAS FAILED TO DEMONSTRATE A COMPELLING INTEREST THAT WOULD OVERCOME CARTMAN’S PRIVILEGE	18
A. Given the Importance of Newsgathering, the First Amendment Creates a Qualified Reporter’s Privilege Against Court-Compelled Disclosure of an Anonymous Source Relied Upon in a News Report on a Matter of Great Public Concern.....	19
B. Cartman Qualifies as a Reporter Entitled to Assert the Qualified Privilege Inherent in the First Amendment Because the Privilege Applies Equally to the Mainstream Media as it Does to an Internet Journalist	23
C. Broflovski’s Asserted Interests in Compelling the Disclosure of the Identity of Professor Chaos are Not Sufficiently Compelling to Override Cartman’s First Amendment Right to Keep the Identity of His Source Confidential.....	25
II. THE COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT ERRED IN	

DENYING CARTMAN’S MOTION FOR SUMMARY JUDGMENT BECAUSE BROFLOVSKI IS A LIMITED-PURPOSE PUBLIC FIGURE WHO HAS FAILED TO PROVE THAT CARTMAN PUBLISHED HIS BLOG WITH KNOWLEDGE THAT IT WAS FALSE OR WITH RECKLESS DISREGARD FOR THE TRUTH	29
A. In a Defamation Claim, the First Amendment Imposes a Higher Standard of Proof for Plaintiffs who are Deemed Limited-Purpose Public Figures and Voluntarily Thrust Themselves Into the Forefront of a Public Controversy	31
1. As a <i>Fortune</i> 500 Company Cornering the Consumer Electronics Industry, Citrus’ Possible Use of Slave Labor at One of its Factories is a Matter of Great Public Concern at the Heart of an Intense Public Controversy	33
2. As the Director of Research and Development for Citrus, Broflovski Played an Affirmative Role in the Public Controversy as a Result of his Influence Over the Internal Workings of the Corporation.....	35
B. Broflovski Cannot Prove with Clear and Convincing Evidence that Cartman Knowingly or Recklessly Published Defamatory Statements in his Blog.....	37
CONCLUSION	39

TABLE OF AUTHORITIES

CASES

<i>Altemose Constr. Co. v. Building & Constr. Trades Council of Phila.</i> , 443 F. Supp. 489 (E.D. Pa. 1977)	22
<i>Ashcraft v. Conoco, Inc.</i> , 218 F.3d 282 (4th Cir. 2000).....	21
<i>Baker v. F & F Inv.</i> , 470 F.2d 778 (2d Cir. 1972)	22, 26, 27, 29
<i>Blumenthal v. Drudge</i> , 992 F. Supp. 44 (D.D.C. 1998).....	24
<i>Blumenthal v. Drudge</i> , 186 F.R.D. 236 (D.D.C. 1999)	24, 26
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972).....	18, 20, 21, 23, 29
<i>Brinston v. Dunn</i> , 919 F. Supp. 240 (S.D. Miss. 1996)	22
<i>Bruno & Stillman, Inc. v. Globe Newspaper Co.</i> , 633 F.2d 583 (1st Cir. 1980).....	21
<i>Carey v. Brown</i> , 447 U.S. 455 (1980)	33
<i>Carey v. Hume</i> , 492 F.2d 631 (D.C. Cir. 1974).....	28
<i>Carr v. Forbes, Inc.</i> , 259 F.3d 273 (4th Cir. 2001)	32, 35, 38
<i>Cervantes v. Time, Inc.</i> , 464 F.2d 986 (8th Cir. 1972)	22, 27, 29
<i>Curtis Publ'g Co. v. Butts</i> , 388 U.S. 130 (1967)	30
<i>Damiano v. Sony Music Entm't, Inc.</i> , 168 F.R.D. 485 (D.N.J. 1996).....	23
<i>Democratic Nat'l Committee v. McCord</i> , 356 F. Supp. 1394 (D.D.C. 1973).....	22
<i>Eastwood v. Nat'l Enquirer Inc.</i> , 123 F.3d 1249 (9th Cir. 1997).....	38
<i>First Nat'l Bank v. Bellotti</i> , 435 U.S. 765 (1978).....	33
<i>Freedlander v. Edens Broad., Inc.</i> , 734 F. Supp. 221 (E.D. Va. 1990).....	31

<i>Garland v. Torre</i> , 259 F.2d 545 (2d Cir. 1958)	27
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964)	20, 38
<i>Gertz v. Welch, Inc.</i> , 418 U.S. 323 (1974)	30, 31, 33
<i>Gilbert v. Allied Chem. Corp.</i> , 411 F. Supp. 505 (E.D. Va. 1976)	22
<i>Grosjean v. Am. Press Co.</i> , 297 U.S. 233 (1936)	19
<i>Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.</i> , 455 F. Supp. 1197 (N.D. Ill. 1978)	22
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979)	26
<i>Holton v. Rothschild</i> , 108 F.R.D. 720 (D. Mass. 1985)	22
<i>Howard v. Antilla</i> , 191 F.R.D. 39 (D.N.H. 1999)	23
<i>In re Selcraig</i> , 705 F.2d 789 (5th Cir. 1983)	21
<i>Int'l Union v. Nat'l Right to Work Legal Defense and Educ. Found.</i> , 590 F.2d 1139 (D.C. Cir. 1978)	26
<i>Lee v. Dep't of Justice</i> , 413 F.3d 53 (D.C. Cir. 2005)	21, 26
<i>Lee v. Dep't of Justice</i> , 428 F.3d 299 (D.C. Cir. 2005)	19
<i>Lerman v. Flynt Distrib. Co., Inc.</i> , 745 F.2d 123 (2d Cir. 1984)	32
<i>Lohrenz v. Donnelly</i> , 350 F.3d 1272 (D.C. Cir. 2003)	32, 33
<i>Lovell v. City of Griffin</i> , 303 U.S. 444 (1938)	23, 24
<i>Martin v. City of Struthers</i> , 319 U.S. 141 (1943)	19
<i>Miller v. Clinton County</i> , 544 F.3d 542 (3d Cir. 2008)	33
<i>N.A.A.C.P. v. Button</i> , 371 U.S. 415 (1963)	30
<i>N.A.A.C.P. v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	33
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	<i>passim</i>
<i>Newton v. Nat'l Broad. Co., Inc.</i> , 930 F.2d 662 (9th Cir. 1990)	39

<i>Nike Inc. v. Kasky</i> , 539 U.S. 654 (2003).....	34
<i>O’Grady v. Superior Court</i> , 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006)	24, 25
<i>Pell v. Procnunier</i> , 417 U.S. 817 (1974)	19
<i>Phila. Newspapers, Inc. v. Hepps</i> , 474 U.S. 767 (1986)	30
<i>Price v. Time, Inc.</i> , 416 F.3d 1327 (11th Cir. 2005).....	21, 22
<i>Quigley v. Rosenthal</i> , 43 F. Supp. 2d 1163 (D. Colo. 1999)	31
<i>Reuber v. Food Chem. News, Inc.</i> , 925 F.2d 703 (4th Cir. 1991).....	35, 36
<i>Riley v. City of Chester</i> , 612 F.2d 708 (3d Cir. 1979)	20-22
<i>Rosenbloom v. Metromedia, Inc.</i> , 403 U.S. 29 (1971).....	33
<i>Silkwood v. Kerr-McGee Corp.</i> , 563 F.2d 433 (10th Cir. 1978)	21, 25
<i>Sinclair v. TubeSockTedD</i> , 596 F. Supp. 2d 128 (D.D.C. 2009)	25, 28, 29
<i>Shoen v. Shoen</i> , 5 F.3d 1289 (9th Cir. 1993)	26
<i>Shoen v. Shoen</i> , 48 F.3d 412 (9th Cir. 1995)	21, 26
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958).....	30
<i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968).....	38
<i>Tavoulareas v. Piro</i> , 817 F.2d 762 (D.C. Cir. 1987)	35
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940)	19, 33, 34
<i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967).....	20
<i>United States v. Caporale</i> , 806 F.2d 1487 (11th Cir. 1986).....	26
<i>United States v. Lloyd</i> , 71 F.3d 1256 (7th Cir. 1995)	21
<i>United States Commodity Futures Trading Comm’n v. McGraw-Hill Companies, Inc.</i> , 390 F. Supp. 2d 27 (D.D.C. 2005)	20, 23
<i>von Bulow v. von Bulow</i> , 811 F.2d 136 (2d Cir. 1987).....	23-25
<i>Waldbaum v. Fairchild Publ’n, Inc.</i> , 627 F.2d 1287 (D.C. Cir. 1980).....	31-33, 35-37

Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981)19, 26, 28

Zurcher v. Stanford Daily, 436 U.S. 547 (1978)19

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. I19

JURISDICTION STATEMENT

A Formal Statement of Jurisdiction has been omitted in accordance with the Rules of the Washington College of Law's Burton D. Wechsler First Amendment Moot Court Competition.

STATEMENT OF THE CASE

Eric Cartman is an Internet blogger who operates a website featuring various news items and major newspaper headlines. (J.A. at 4.) The website has over 100,000 readers and has grown increasingly popular since it was created in 2005. (J.A. at 4.) He generates revenue by streaming advertisements on his website, entitled *The Sludge Report*, in much the same way as traditional media outlets. (J.A. at 4.) *The Sludge Report* has a populist and nationalist tone, featuring articles on a range of topics from celebrity news to international politics, particularly highlighting human rights abuses committed by large corporations and their “the systematic oppression of the peoples of the Third World.” (J.A. at 4.) The website also criticizes large, profit-seeking corporations from exporting jobs to Third World nations. (J.A. at 4.)

A. A Capitalist Machine and the Fruits of its Very Poisonous Tree

Citrus is a *Fortune* 500 consumer electronics company engaged in the manufacture and sale of high-powered, fully-integrated computer systems. (J.A. at 2.) Citrus’ products, especially the ePlay portable digital music player, have saturated the electronics industry, and in attempting to permanently entrench the ePlay brand as the premier music player on the market, Citrus’s CEO, Kyle Broflovski, hired his brother, Ike, as his new Director of Research and Development. (J.A. at 3.) Charged with overseeing the development of the brand new ePlay Touché, Ike was introduced to the public at a press conference held at Citrus campus. (J.A. at 3.) Kyle boasted about Ike’s highly innovative capabilities, and Ike addressed the public, ensuring all those at the conference that he “look[s] forward to pushing Citrus . . . and its products to new heights.” (J.A. at 3.) The Associated Press released a story on the press conference, and Ike’s statement to the public was included in the article. (J.A. at 3.)

Ike quickly became a major public player within Citrus, exerting considerable influence on Citrus’ internal workings and operations. (J.A. at 3.) Ike’s work has been publicly praised on

television and magazine interviews, and in affirmatively maintaining continued public attention, Ike listed his information on Citrus' website, accessible to the public at large, including his name, telephone number, e-mail and mailing address, as well as a head shot photograph of himself. (J.A. at 4.) Ike's image has become well known throughout the United States, as employees at various Citrus Megastores wear makeshift "I Like Ike" buttons to celebrate Ike's innovations. (J.A. at 3-4.)

B. *The Sludge Report's Anonymous Source and the Rise of a Matter of Great Public Concern*

As *The Sludge Report* grew more popular, a significant number of readers began contacting Cartman, providing him with inside information regarding protests, scandals in local and state governments, and other information of public concern. (J.A. at 5.) Cartman treats such informants as confidential sources unless otherwise requested, and one of Cartman's sources, "Professor Chaos," whom Cartman knows personally, has provided Cartman with reliable information in the past regarding Citrus and its products. (J.A. at 5.) Cartman has used that information in numerous stories posted on *The Sludge Report* and has not provided false or inaccurate information in those stories. (J.A. at 5.)

On July 7, 2008, Cartman received an e-mail from Professor Chaos alleging that Citrus, at the direction of Ike, was engaging in human rights abuses at its manufacturing facility outside of Mumbai, India. (J.A. at 5.) Attached to the e-mail was a digital photograph portraying what appeared to be Ike walking through the factory yelling at the workers assembling the ePlay Touché. (J.A. at 5.) Forced to work in slave-like conditions, the workers appeared to be wearing surgical masks while working on machines with minimal protective gear. (J.A. at 5.) Cartman published this information as his lead story on *The Sludge Report* the next day under the headline "Citrus Engaging in Acts of Modern-Day Slavery." (J.A. at 5.) Underneath the photograph,

Cartman inserted the caption “Ike Broflovski surveys his minions . . . but where’s the whip, Ike?” (J.A. at 6.) The publication was intended to inform the public of a matter of public concern, Citrus’ capitalist oppression and human rights violations lead by Ike, who exerts considerable influence over Citrus’ internal operations and “whose face dominates billboards and commercials across the fruited field.” (J.A. at 6.)

Cartman’s story attracted attention from the mainstream press, including a news report on “The Countdown Factor,” a top-rated cable news show, during which Carman was credited with breaking the story. (J.A. at 6.) As a result of the press coverage, Citrus’ stock dropped by 25 percent, and numerous retailers pulled Citrus’ products from their shelves. (J.A. at 6-7.) With ready access to the press, Ike responded to the allegations by delivering a message through his attorney, in which he stated, “[t]he photograph posted on that site is a total fabrication, and Ike Broflovski will soon seek civil justice against its authors in a court of law.” (J.A. at 7.)

C. The Decisions of the District Court for the Western District of Silverado and the United States Court of Appeals for the Fifteenth Circuit

On September 20, 2008, the Respondent, Ike Broflovski, filed a defamation suit against Cartman in Silverado Superior Court, alleging that Cartman’s statements were false and that the photograph was falsified. (J.A. at 7.) Petitioner removed the case to the District Court for the Western District of Silverado on diversity grounds, and Respondent filed a motion pursuant to Fed. R. Civ. P. 37 to compel discovery of the identity of Professor Chaos, the anonymous source who supplied Cartman with the information for the Citrus article. (J.A. at 21.) Petitioner filed a reply motion, opposing disclosure and moved for summary judgment. (J.A. at 22.)

During discovery, Respondent learned that the photograph posted on Cartman’s website likely had been doctored, superimposing Respondent’s image onto it. (J.A. at 7.) The distortions were not visible to the naked eye, but were detectable using specialized software. (J.A. at 7.)

Although Cartman possessed the software and had used it on previous occasions, this photograph contained no visible distortions and had been produced by a source that had consistently provided accurate information in the past. (J.A. at 7.)

The District Court denied Respondent's motion to compel discovery. (J.A. at 2.) Recognizing a qualified reporter's privilege implicit in the First Amendment, the District Court found that Cartman received the information from Professor Chaos with the intent to disseminate news. (J.A. at 11.) As a blogger, Cartman is a journalist protected from compulsory disclosure of his sources, and Respondent failed to demonstrate a compelling interest that would override this privilege. (J.A. at 2, 12.) Additionally, the District Court granted Cartman's motion for summary judgment. (J.A. at 2.) Under the three-pronged test adopted by a plurality of circuits used to determine whether an individual is a limited-purpose public figure, the District Court found Respondent to be a limited-purpose public figure. (J.A. at 16.) The court noted that Citrus's alleged human rights violations constitutes a matter of public concern, and the Respondent, as Director of Research and Development, plays an affirmative role in the controversy due to his influence over Citrus's internal workings. (J.A. at 18.) Finally, because Cartman's alleged defamatory remarks were relevant to the public controversy, Broflovski was a limited-purpose public figure. (J.A. at 18) As such, Respondent had the burden of demonstrating that Cartman published with actual malice, a standard he failed to satisfy. (J.A. at 20.)

The United States Court of Appeals for the Fifteenth Circuit reversed the decision of the District Court on both issues. (J.A. at 32.) Finding that the First Amendment does not create a qualified reporter's privilege of which Cartman may avail himself, and recognizing Respondent's need for evidence to prove the fault element of his defamation claim, the Fifteenth Circuit

granted Respondent’s motion to compel discovery of Professor Chaos’s identity. (J.A. at 25-27.) Adopting the rule promulgated by the Second Circuit, the court found that Respondent was a private figure since he did not “successfully invite public attention prior to the remarks litigated,” “voluntarily inject” himself into the relevant public controversy, take a “position of prominence” within the public controversy, or maintain continued access to the media to combat the remarks. (J.A. at 29.) As such, Respondent only had to show that Cartman published such statements negligently. (J.A. at 30.)

This Court granted certiorari to determine two issues. (J.A. at 33.) First, this Court must determine whether the First Amendment creates a qualified reporter’s privilege, and if so, whether Cartman, an Internet blogger, qualifies as a reporter for purposes of shielding the identity of his anonymous source. (J.A. at 33.) Second, this Court must decide whether Respondent is a limited-purpose public figure so as to hold Cartman liable under an actual malice standard. (J.A. at 33.)

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals for the Fifteenth Circuit should be reversed. In failing to recognize a qualified reporter’s privilege inherent in the First Amendment, and in refusing to apply the three-pronged test adopted by the plurality of circuits used to determine whether an individual is a limited-purpose public figure, the court’s decision violates the First Amendment’s guarantee of freedom to speak and publish on matters of great public concern.

I.

This Court has long recognized the importance of free speech upon matters of public

concern and the significance of newsgathering within a democratic society. The First Amendment guarantees a free press to inform the public on political, social, and economic issues of our times, and this constitutional guarantee is weakened whenever the ability of reporters to gather and disseminate news is impaired. In order keep the public informed, journalists constantly rely on confidential sources in reporting news, and the threat of having to disclose the identity of a source impairs the constitutionally protected function of the press to inform the public. As a result, in embracing the liberty to speak freely on matters of public concern and in seeking to protect society's interest in the free flow of information, the majority of circuits have recognized a qualified reporter's privilege inherent in the First Amendment.

In *Branzburg v. Hayes*, this Court first intimated the need to balance the First Amendment rights of newsmen to protect the identity of his confidential sources against the need for information of material relevance to the disposition of a judicial proceeding. Although the majority required disclosure of the identity of the reporter's source, the court noted that the intrusion on a reporter's First Amendment right to gather news and safeguard his sources was necessary to serve a "legitimate need of law enforcement." However, Justice Powell, in his concurrence, highlighted the majority's concession that courts cannot compel a reporter to reveal the identity of his source without good cause. In the context of a civil suit, the newsman's constitutional right to protect the identity of his sources trumps a litigant's need for information in furtherance of the disposition of a judicial proceeding in all but one of the circuit courts, which have upheld the preferred position that the First Amendment occupies in the pantheon of freedoms. Although the State of Silverado has not passed a statutory "shield law" of which journalists can avail themselves, this is not dispositive, as such cases should be decided on a "case-by-case basis," and Silverado cannot limit a privilege recognized by the Constitution.

The privilege is only available to reporters, and, under this Court's jurisprudence, Cartman is a reporter entitled to assert the privilege to shield the identity of his source. Freedom of the press is not confined to traditional institutional media, and the extent of constitutional protection for reporters does not depend on the identity of the reporter, but on the reporter's intent at the time of publication. Although there is little case law on whether bloggers qualify as reporters for purposes of asserting the privilege, the courts that have addressed this issue answer this question in the affirmative, holding that there is no basis for distinguishing bloggers from those who report to the public through traditional print and broadcast media. Since Cartman published his blog with the intent to disseminate news on possible human rights violations in one of Citrus's factories, a matter of great public concern, Cartman's blog, like the traditional media, served an informational purpose.

Although the qualified reporter's privilege is qualified and not absolute, Broflovski has failed to assert a substantial or compelling interest to overcome this privilege, and in a civil defamation suit, there are rare occasions in which the privilege can be overcome. Broflovski may overcome the privilege and demand disclosure of Professor Chaos's identity by an affirmative showing that the information cannot be ascertained through other means, that the litigant has exhausted all possible means of identifying the source, and that the information is absolutely necessary to an element of the claim. Broflovski has failed to satisfy any of these prongs, and as the Director of Research and Development, Broflovski had the authority and the ability to discover Professor Chaos's identity without seeking court-compelled discovery from Cartman. This Court should not permit a litigant to strong-arm a newsman into revealing his sources in violation of the First Amendment without having fully exhausted all other available remedies. Therefore, this Court should deny Broflovski's motion to compel disclosure of

Professor Chaos.

II.

The Court of Appeals for the Fifteenth Circuit also erred in denying Cartman’s motion for summary judgment because Broflovski is a limited-purpose public figure who must prove that Cartman published his blog with actual malice, a standard he cannot satisfy.

The First Amendment requires “breathing space” in the reporting on public issues, including news reports on otherwise private persons who have become “limited-purpose public figures” as a result of their involvement in a public controversy. This Court expanded the *New York Times v. Sullivan* actual malice standard to cover limited-purpose public figures, and the District Court properly concluded that Broflovski is a limited-purpose public figure due to his involvement in alleged human rights violations at the very factories he supervised.

In recognizing that labor conditions within an industry is “indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society,” this Court should find that the use of possible slave labor within the factories of a *Fortune* 500 company is a matter of great public concern. This is evidenced by the amount of publicity Cartman’s blog received, and as the Director of Research and Development at Citrus, Ike played an affirmative role in the public controversy. Although an individual’s position within a corporation is not dispositive as to whether an individual has voluntarily thrust himself to the forefront of the controversy, Broflovski affirmatively projected his image and that of Citrus, exerted considerable influence over the internal workings of the company, and responded to the allegations in Cartman’s blog. Moreover, even if this Court were to apply the limited-purpose public figure analysis adopted by the Fifteenth Circuit, Broflovski still qualifies as a limited-purpose public figure because he affirmatively maintained continued public attention

throughout his tenure at Citrus.

Finally, Broflovski cannot prove by clear and convincing evidence that Cartman published his blog with knowledge that the information was false or with reckless disregard for the truth given that there is not a scintilla of evidence that Professor Chaos or the information received was unreliable. Therefore, this Court should grant Cartman's motion for summary judgment.

ARGUMENT

I. UNDER THE FIRST AMENDMENT, A REPORTER IS PROTECTED BY A QUALIFIED PRIVILEGE AGAINST COURT-COMPELLED DISCLOSURE OF THE IDENTITY OF AN ANONYMOUS SOURCE, AND CARTMAN, AN INTERNET JOURNALIST, IS ENTITLED TO SUCH PRIVILEGE BECAUSE THE LIBERTY OF THE PRESS IS NOT CONFINED TO MAINSTREAM MEDIA AND BROFLOVSKI HAS FAILED TO DEMONSTRATE A COMPELLING INTEREST THAT WOULD OVERCOME CARTMAN'S PRIVILEGE.

The decision of the Court of Appeals for the Fifteenth Circuit stifles free speech in violation of the First Amendment and directly contravenes this Court's long standing respect for "the significance of free speech" upon public questions and the importance of newsgathering in a democratic society. See *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943). The First Amendment to the United States Constitution guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. "The First Amendment guarantees a free press primarily because of the important role it can play as 'a vital source of public information.'" *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)). This guarantee "embraces at least the liberty to discuss publicly . . . all matters of public concern," *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940), and without an uninhibited press, society is deprived of vital information regarding

political, social, and economic issues. *Zerilli*, 656 F.2d at 711.

“The press’s function is weakened whenever the ability of journalists to gather news is impaired.” *Id.* Journalists constantly rely on confidential sources in reporting news, and the threat of having to disclose the identity of a source significantly impairs the constitutionally protected function of the press to inform the public. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 571 (1978). This Court has recognized that “without some protection for seeking out the news, freedom of the press could be eviscerated.” *Pell v. Procunier*, 417 U.S. 817, 833 (1974) (internal quotations omitted). As a result, the majority of circuits have recognized a qualified reporter’s privilege against disclosure of the identity of an anonymous source in civil cases, and this Court should also recognize that Cartman, an Internet journalist who received information from an anonymous source on a matter of public concern, is entitled to the privilege inherent in the First Amendment. *Lee v. Dep’t of Justice*, 428 F.3d 299, 301 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of rehearing en banc).

A. Given the Importance of Newsgathering, the First Amendment Creates a Qualified Reporter’s Privilege Against Court-Compelled Disclosure of an Anonymous Source Relied Upon in a News Report on a Matter of Great Public Concern.

The freedom of the press “assures the maintenance of our political system and an open society,” *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967), and secures “the paramount public interest in a free flow of information to the public.” *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). “A journalist’s inability to protect the confidentiality of sources s/he must use will jeopardize the journalist’s ability to obtain information on a confidential basis.” *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979). Several courts have recognized “that forcing journalists to disclose confidential sources will discourage sources from communicating with reporters, thereby disrupting the ‘free flow of information protected by the First Amendment.’” *United States*

Commodity Futures Trading Comm'n v. McGraw-Hill Companies, Inc., 390 F. Supp. 2d 27, 31 (D.D.C. 2005) (quoting *Branzburg*, 408 U.S. at 679).

In *Branzburg*, this Court first intimated the need to balance the First Amendment rights of newsmen to protect the identity of confidential sources against the need for information of material relevance to the disposition of a judicial proceeding. 408 U.S. at 724 (Powell, J., concurring). There, Petitioner, a newspaper reporter, received information from anonymous sources regarding the manufacturing of hashish in Jefferson County, Kentucky, and the “drug scene” in Frankfort, Kentucky. *Id.* at 667-669. The information was published in two articles along with a photograph depicting “a pair of hands” synthesizing marijuana. *Id.* at 667. No other information about the identity of Petitioner’s sources was published in the article, and such sources only revealed the information to the Petitioner on the condition of anonymity. *Id.* at 668. When the grand jury subpoenaed Petitioner for the identity of his sources in order to procure a criminal indictment, Petitioner refused to testify, asserting that as a reporter, he is entitled to a First Amendment privilege against court-compelled disclosure of his anonymous sources. *Id.* at 668-69. Rejecting Petitioner’s argument, this Court held that a reporter’s First Amendment right to conceal the identity of his sources is outweighed by the constitutionally mandated role of the grand jury in seeking information material to a criminal proceeding. *Id.* at 690-91. However, the majority conceded that courts cannot compel a news reporter to reveal the identity of his source without good cause. *Id.* at 707-08.

In his concurrence, Justice Powell noted that the majority’s intrusion on a reporter’s First Amendment right to gather news and safeguard his sources is limited to situations where the identity of the confidential source is necessary to serve a “legitimate need of law enforcement.” *Id.* at 709 (Powell, J., concurring). Even then, newsmen are not without remedy because they

have access to the courts “under circumstances where legitimate First Amendment interests require protection.” *Id.* at 710 (Powell, J., concurring). Therefore, this Court should balance, on a “case-by-case basis,” the newsman’s First Amendment interest in protecting the identity of his sources with society’s need for information in furtherance of law enforcement. *Id.*

In response to Powell’s concurring opinion in *Branzburg*, “all but one of the federal circuits to address the issue have interpreted *Branzburg* as establishing a qualified privilege for journalists against compelled disclosure of information gathered in the course of their work.” *Shoen v. Shoen*, 48 F.3d 412, 414 (9th Cir. 1995); *see also Lee v. Dep’t of Justice*, 413 F.3d 53, 59-60 (D.C. Cir. 2005); *Price v. Time, Inc.*, 416 F.3d 1327, 1343 (11th Cir. 2005); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000); *United States v. Lloyd*, 71 F.3d 1256, 1269 (7th Cir. 1995); *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980); *Riley*, 612 F.2d at 715-16 (upholding an assertion of the qualified privilege recognized in *Branzburg*); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-38 (10th Cir. 1978) (recognizing that *Branzburg* has been limited in its scope to criminal cases and a qualified privilege is developing in civil cases); *Baker v. F & F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972) (upholding the preferred position that the First Amendment occupies in the pantheon of freedoms); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972) (noting compulsory disclosure of anonymous sources may offend the First Amendment). In the civil context, several courts have noted that the reporter’s qualified privilege trumps a litigant’s desire to obtain confidential information. *See, e.g., Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197, 1202 (N.D. Ill. 1978) (recognizing that in the majority of civil cases, the reporter’s interest in non-disclosure of an anonymous source outweighs the private interest in compelled disclosure); *Altemose Constr. Co. v. Building & Constr. Trades*

Council of Phila., 443 F. Supp. 489, 491 (E.D. Pa. 1977) (same); *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 508 (E.D. Va. 1976) (same); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1398 (D.D.C. 1973) (recognizing a qualified reporter's privilege inherent in the First Amendment).

The Court of Appeals for the Fifteenth Circuit relied upon the fact that neither the State of Silverado nor Congress has enacted a statutory "shield law," though several bills had been introduced in Congress to create a statutory reporter's privilege. (J.A. at 9.) However, the absence of a state statute creating a reporter's privilege is not dispositive. *See, e.g., Riley*, 612 F.2d at 715; *see also Price*, 416 F.3d at 1334 (noting inquiry into the scope of Alabama's state shield statute is distinct from qualified reporter's privilege provided by the First Amendment); *Brinston v. Dunn*, 919 F. Supp. 240, 242 (S.D. Miss. 1996) (finding qualified privilege arising under First Amendment, even where Mississippi had not enacted a "shield law" to protect journalists); *Holton v. Rothschild*, 108 F.R.D. 720, 722 (D. Mass. 1985) (noting First Amendment creates qualified reporter's privilege, even in the absence of a state law creating such privilege). Therefore, while states are free to extend the scope of the reporter's privilege, the statutes cannot limit the qualified reporter's privilege created by the First Amendment. *See Branzburg*, 408 U.S. at 706 (noting states are "free, within First Amendment limits, to fashion their own [shield laws] . . ." regarding protection of reporters); *see also Howard v. Antilla*, 191 F.R.D. 39, 43 (D.N.H. 1999) (noting New York law creates absolute privilege for reporter's engaged in newsgathering); *Damiano v. Sony Music Entm't, Inc.*, 168 F.R.D. 485, 494-95 (D.N.J. 1996) (noting New Jersey shield law affords newsmen an absolute privilege while First Amendment affords only a qualified privilege). It is the duty of the federal courts to uphold the intent of the Framers of the Constitution, and this Court should recognize the existence of the

qualified reporter's privilege inherent in the First Amendment.

B. Cartman Qualifies as a Reporter Entitled to Assert the Qualified Privilege Inherent in the First Amendment Because the Privilege Applies Equally to the Mainstream Media as it Does to an Internet Journalist.

“It is self evident that the reporter's privilege is available only to reporters.” *United States Commodity*, 390 F. Supp. 2d at 32. In determining who qualifies as a reporter entitled to invoke the privilege, “an individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press.” *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987). This Court has explicitly noted that “freedom of the press is a fundamental personal right . . . not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.” *Branzburg*, 408 U.S. at 704. This Court further noted that the constitutional protections afforded to the press include “every sort of publication which affords a vehicle of information and opinion.” *Id.* (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938)). Therefore, the privilege extends to all persons who “at the inception of the investigatory process, had the intent to disseminate to the public the information.” *von Bulow*, 811 F.2d at 142.

The reporter's privilege has been invoked successfully by persons who are not considered “journalists” in the traditional sense. *Id.* Although there is little case law on the issue of First Amendment protection for Internet journalists, the courts that have addressed this issue have held that the qualified privilege applies with equal force to Internet journalists and “bloggers.” In *Blumenthal v. Drudge*, for example, an individual maintained an online gossip column entitled *The Drudge Report*. 992 F. Supp. 44, 47-48 (D.D.C. 1998). He distributed content through his website and e-mail to a list of regular readers, and to American Online, which published the

content. *Id.* After allegedly making libelous statements about a White House official, the plaintiff demanded the identity of the source of the information. *Blumenthal v. Drudge*, 186 F.R.D. 236, 238-39 (D.D.C. 1999). The court, ruling in favor of the Internet journalist, held that the plaintiff failed to prove a compelling interest that would justify the radical measure of requiring the journalist to reveal the identity of his source. *Id.* at 244.

Similarly, in *O’Grady v. Superior Court*, the only other case to address the issue of whether the constitutional reporter’s privilege applies to bloggers, the California Court of Appeals held that bloggers are entitled to the privilege. 44 Cal. Rptr. 3d 72, 106 (Cal. Ct. App. 2006). In so ruling, the court held that there is “no sustainable basis to distinguish [bloggers] from reporters, editors, and publishers who provide news to the public through traditional print and broadcast media.” *Id.* Because bloggers and Internet journalists “gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience,” they are entitled to the same constitutional privileges afforded to traditional media. *Id.* See also *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 131 (D.D.C. 2009) (noting the First Amendment right to anonymity in speech applies with equal force “to speech on the Internet”). Therefore, the extent of constitutional protection for reporters does not depend on the identity of the reporter, but on the reporter’s intent at the time of publication. See *von Bulow*, 811 F.2d at 142; see also *Silkwood*, 563 F.2d at 436-37 (noting filmmaker and free lance writer was entitled to privilege due to the investigative and informational nature of the reporter’s actions and intent).

Cartman qualifies for the First Amendment privilege because, as an Internet blogger, Cartman posted news headlines with the requisite intent to inform the public about matters of great public concern, notably alleged human rights violations by mega-corporations. (J.A. at 5-

6.) His website has attracted a growing readership, reporting on societal interests in much the same way as traditional media outlets. (J.A. at 4.) Therefore, since his intent was to expose alleged human rights violations, a significant societal concern, this Court should find that Cartman is a journalist and, therefore, is entitled to invoke the qualified reporter's privilege against disclosure of his sources.

C. Broflovski's Asserted Interests in Compelling the Disclosure of the Identity of Professor Chaos are Not Sufficiently Compelling to Override Cartman's First Amendment Right to Keep the Identity of His Source Confidential.

"Rooted in the First Amendment, the privilege is a recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.'" *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (quoting *Herbert v. Lando*, 441 U.S. 153, 183 (1979) (Brennan, J., dissenting)). However, in weighing the constitutional interest in protecting a journalist's sources with society's need for information in furtherance of discovery in a civil defamation suit, there are rare occasions in which the qualified privilege can be overcome. *See Blumenthal*, 186 F.R.D. at 244; *see also Baker*, 470 F.2d at 783 (cases where First Amendment rights must yield are "few in number" and interests asserted sufficiently compelling to override the privilege will be "rare").

A party seeking disclosure of the identity of a journalist's anonymous source may overcome the privilege by an affirmative showing that "(1) the information cannot be discovered through alternative sources, (2) the party seeking the information has exhausted all reasonable alternative means of identifying the source, and (3) the information sought goes to the heart of the [party's] claim." *Shoen*, 48 F.3d at 415; *see also Lee*, 413 F.3d at 59-60; *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Int'l Union v. Nat'l Right to Work Legal*

Defense and Educ. Found., 590 F.2d 1139, 1152 (D.C. Cir. 1978). However, “[e]ven when the information is crucial to a litigant’s case, reporters should be compelled to disclose their sources only after the litigant has shown that he has exhausted every reasonable alternative source of information.” *Zerilli*, 656 F.2d at 713.

In *Baker*, the plaintiffs sued real estate agents pursuant to the Civil Rights Act, alleging that the agents had discriminated against them in the sale of houses within the Chicago area. 470 F.2d at 782. Prior to the commencement of the lawsuit, plaintiffs moved to compel the disclosure of a journalist’s sources for a story written several years prior, in which racially discriminatory practices of real estate speculators and landlords were exposed. *Id.* The Second Circuit denied plaintiffs’ motion, relying heavily on plaintiffs’ failure to demonstrate that the identity of the journalist’s sources was clearly relevant to the litigation and their failure to exhaust all other means reasonably available to obtain the information. *Id.* Although the case at bar is a defamation suit in which Cartman, the journalist, is a party, Professor Chaos’ identity is only tangentially relevant to the claim, and “to compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate newsgathering activity.” *Cervantes*, 464 F.2d at 993 n.10. Moreover, even if this Court were to find that the identity of Professor Chaos is related to the claim, the relative reliability of a source is not the only way in which Broflovski can prove the necessary elements his claim and Broflovski did not exhaust all other means of ascertaining the identity of Professor Chaos.

The Court of Appeals for the Fifteenth Circuit relies on *Garland v. Torre*, 259 F.2d 545, 549 (2d Cir. 1958), to assert that the freedom of the press “must give place under the Constitution to a paramount public interest in the fair administration of justice.” However,

Garland differs from the instant case because *Garland* had no reasonable alternative to discovering the identity of the journalist's anonymous source. 259 F.2d at 551. While the court noted that the plaintiff had taken a handful of depositions, "her reasonable efforts in that direction had met with singular lack of success." *Id.* The court also noted that further discovery proceedings were unlikely to result in discovery of the identity of the source. *Id.* The plaintiff, however, was limited to the judicial process because she was an outsider to CBS without access to alternative means of discovering the information. On the contrary, Broflovski, as one of the top executives of Citrus, has the ability to ascertain the information through internal investigations and interviews of Citrus employees. Therefore, the Fifteenth Circuit wrongly concluded that requiring Broflovski to filter through thousands of corporate e-mails and interrogate Citrus employees is "a fool's errand." (J.A. at 27.) Several circuits have recognized that there are limits to the obligation to pursue alternative sources, and in *Carey*, the court recognized that the plaintiff did not have to depose every one of the United Mine Workers of America's employees to determine the reporter's source. *Carey v. Hume*, 492 F.2d 631, 638 (D.C. Cir. 1974). However, "the obligation is clearly substantial," and in *Hume*, the court suggested that "an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure." *Id.* at 639.

Broflovski cannot escape his obligation to exhaust alternative sources simply because he fears that deposing Citrus employees will prove "time-consuming, costly, and unproductive," and Broflovski can avail himself of alternatives that quite possibly would reveal Professor Chaos's identity without shattering Cartman's constitutional interest in maintaining confidentiality. *See Zerilli*, 656 F.2d at 714-15 (finding that the District Court did not abuse its discretion in denying disclosure since appellants failed to exhaust alternative sources). "The

values resident in the protection of the confidential sources of newsmen certainly point towards compelled disclosure from the newsman himself as normally the end, and not the beginning, of the inquiry,” *Hume*, 492 F.2d at 638, and Broflovski conducted only a “cursory internal investigation” of his staff at Citrus in an attempt to identify Professor Chaos, which fails to satisfy the plaintiff’s burden to prove that the judicial process is the last resort. (J.A. at 14.)

Although the privilege is qualified, and not absolute, in the “ordinary civil case the civil litigant’s interest in disclosure should yield to the journalist’s privilege,” and Broflovski’s interest in obtaining the identity of Professor Chaos hardly rises to the level required to overcome the privilege. *See TubeSockTedD*, 596 F. Supp. 2d at 131 (noting requirement of “both a compelling interest and a narrowly tailored restriction serving that interest where compelling identification of speakers threatens the First Amendment right to remain anonymous”). Because court-compelled disclosure of anonymous sources can have a “chilling effect” on the willingness of those sources to provide information, courts have adopted the stringent requirement of a compelling interest. *Id.* at 132. In civil cases, it is “rare” that the public interest of keeping news sources confidential will be overcome by the private interest in compelling the testimony. *Baker*, 470 F.2d at 783; *see also Cervantes*, 464 F.2d at 991-92 (finding no compelling interest to support disclosure of anonymous source in libel action against reporter); *Cf. Branzburg*, 408 U.S. at 680 (noting the importance of the grand jury’s role in investigating and prosecuting criminal activity is a sufficiently compelling interest to justify an invasion of a reporter’s First Amendment privilege).

Broflovski cannot demonstrate a compelling interest to support his need for the identity of Professor Chaos. Unlike the unique need of a grand jury for all potentially relevant information, Broflovski’s interest is entirely private. Whereas a grand jury investigation benefits

society generally, Broflovski's civil suit serves no such purpose. Moreover, since the identity of Professor Chaos is not an essential aspect of the litigation and is not required to prove the elements of the claim, Cartman's interest in keeping his source confidential and society's interest in maintaining an uninhibited free flow of information far outweighs Broflovski's need for the identity of Professor Chaos, which is only potentially relevant to the civil suit.

II. THE COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT ERRED IN DENYING CARTMAN'S MOTION FOR SUMMARY JUDGMENT BECAUSE BROFLOVSKI IS A LIMITED-PURPOSE PUBLIC FIGURE WHO HAS FAILED TO PROVE THAT CARTMAN PUBLISHED HIS BLOG WITH KNOWLEDGE THAT IT WAS FALSE OR WITH RECKLESS DISREGARD FOR THE TRUTH.

The First Amendment embodies the principle that debate on matters of public concern should be “uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.” *Phila. Newspapers, Inc. v. Hepps*, 474 U.S. 767, 772 (1986) (quoting *New York Times*, 376 U.S. at 270-71). The First Amendment requires “breathing space” in the reporting on public issues, *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963), and “chilling” debate would “only result in a deterrence of speech which the Constitution makes free,” which is antithetical to the constitutional protection of speech on matters of public concern. *Hepps*, 475 U.S. at 777 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

In *New York Times v. Sullivan*, this Court first established greater protection for news reports concerning public officials, holding that a public figure must prove that a journalist acted with “actual malice” in publishing false information. 376 U.S. at 279-80. In *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967), this Court expanded the *New York Times* actual malice standard to cover public figures who are not officials, but “whose views and actions with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of ‘public officials’ with respect to the same issues and events.” *See Butts*, 388 U.S. at 162

(Warren, C.J., concurring). This standard also applies to a “limited-purpose public figure,” one who ordinarily is a private person but “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues . . . assum[ing] special prominence in the resolution of public questions.” *Gertz v. Welch, Inc.*, 418 U.S. 323, 352 (1974).

To that end, this Court has held that journalists enjoy significant First Amendment protection when reporting about matters of great public concern, including reporting about otherwise private persons who have become public figures as a result of their involvement in a public controversy. *See New York Times*, 376 U.S. at 299 (noting that the First Amendment allows “every citizen to speak his mind and every newspaper [to] express its view on matters of public concern . . .”). Thus, where, as here, Broflovski becomes a limited-purpose public figure by virtue of his involvement in a matter of public concern, the First Amendment affords greater protection than it would for reports concerning a private person. *See Gertz*, 418 U.S. at 351; *see also Quigley v. Rosenthal*, 43 F. Supp. 2d 1163, 1175 (D. Colo. 1999) (observing that limited-purpose public figures must satisfy a significantly higher standard of proof in a defamation claim). This Court should find that Broflovski’s active involvement in alleged human rights violations constitutes a “public controversy” that qualifies him as a limited-purpose public figure who must prove “actual malice” in his claim against Cartman, a standard he fails to satisfy.

A. In a Defamation Claim, the First Amendment Imposes a Higher Standard of Proof for Plaintiffs who are Deemed Limited-Purpose Public Figures and Voluntarily Thrust Themselves Into the Forefront of a Public Controversy.

The ultimate touchstone in determining a person’s status for purposes of a defamation claim remains whether an individual has “assumed [a] role[] of especial prominence in the affairs of society . . . [that] invite[s] attention and comment.” *Gertz*, 418 U.S. at 345. “[A] person has

become a public figure for limited purposes if he has attempted to have or realistically can be expected to have a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.” *Waldbaum v. Fairchild Publ’n, Inc.*, 627 F.2d 1287, 1290 (D.C. Cir. 1980). Thus, where a person “voluntarily engaged in a course that inevitably invited attention and comment . . . by way of his business dealings, he not only thrust[s] himself into the vortex of a public issue, he create[s] the public controversy.” *Freedlander v. Edens Broad., Inc.*, 734 F. Supp. 221, 230 (E.D. Va. 1990).

“Whether a person has achieved the status of a limited-purpose public figure is a question of law.” *Carr v. Forbes, Inc.*, 259 F.3d 273, 278 (4th Cir. 2001). The circuit courts have articulated varied “tests” to determine whether or not an individual has achieved limited-purpose public figure status. *See, e.g., id.* (utilizing a two-part test focusing on whether a public controversy gave rise to a defamatory statement and whether the plaintiff’s participation in that controversy was sufficient); *Lerman v. Flynt Distrib. Co., Inc.*, 745 F.2d 123, 136-37 (2d Cir. 1984) (utilizing a four-part test requiring defendant to prove that the plaintiff successfully invited public attention in an effort to influence others, voluntarily injected himself into a public controversy, assumed a position of prominence, and maintained regular and continuing access to the media). This Court should adopt the plurality test articulated in *Waldbaum* to determine whether Broflovski has become a limited-purpose public figure. *Id.* In doing so, this Court “must [first] isolate the public controversy.” *Lohrenz v. Donnelly*, 350 F.3d 1272, 1279 (D.C. Cir. 2003). A public controversy is “a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.” *Waldbaum*, 627 F.2d at 1296. Second, this Court must determine whether the plaintiff has achieved a “special

prominence” in the debate such that his involvement is more than “trivial or tangential.” *Id.* at 1297. Finally, this Court “must determine whether the alleged defamation was germane to the plaintiff’s participation in the controversy.” *Donnelly*, 350 F.3d at 1279 (citing *Waldbaum*, 627 F.2d at 1298). This test sufficiently balances the constitutional commitment to free speech and press with the interests in protecting private persons from defamatory statements by “set[ting] the dividing line between public and private figures based on those who assumed the risk of publicity and had access to channels of communication to defend themselves, and those who did not.” *Donnelly*, 250 F.3d at 1279 (citing *Gertz*, 418 U.S. at 344).

1. As a Fortune 500 Company Cornering the Consumer Electronics Industry, Citrus’ Possible Use of Slave Labor at One of its Factories is a Matter of Great Public Concern at the Heart of an Intense Public Controversy.

Speech on public issues occupies the “highest rung of the hierarchy of First Amendment values.” *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Consequently, speech on matters of public concern lies “at the heart of the First Amendment’s protection.” *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776 (1978). The First Amendment must protect the freedom of discussion on “all issues about which information is needed or appropriate to enable the members of society” to exchange information and address the “significant issues of the times.” *Thornhill*, 310 U.S. at 102. Therefore, “a court may not question the legitimacy of the public’s concern; such an approach would turn courts into censors of ‘what information is relevant to self-government.’” *Gertz*, 418 U.S. at 346 (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting)).

To determine whether a public controversy exists, this Court should look to the quantity of press coverage and whether the press was “reporting what people were saying and uncovering facts and theories to help the public formulate some judgment.” *Waldbaum*, 627 F.2d at 1297. If

the controversy is a publicly debated issue and its results have “foreseeable and substantial ramifications for nonparticipations,” then a public controversy exists. *Id. See also Miller v. Clinton County*, 544 F.3d 542, 549 (3d Cir. 2008) (holding that debate on matters of public concern relates to “any matter of political, social, or other concern to the community”).

It is now well-established that “satisfactory hours and wages and working conditions in industry have an importance which is not less than the interests of those in the business or industry directly concerned, [and t]he health of the present generation . . . may depend on these matters” *Thornhill*, 310 U.S. at 103. Information about a company’s labor practices is vital since “the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing.” *Id.* Therefore, “labor relations are not matters of mere local or private concern,” and this Court has recognized that the “free discussion concerning conditions in industry . . . [is] indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.” *Id.*

As a *Fortune* 500 company, Citrus has cornered the consumer electronics market, attracting investors and consumers alike. (J.A. at 2.) The production of the e-play Touché is an important tool to assist Citrus in achieving a complete stronghold of the electronics market. Given Citrus’ developing industry stronghold, its labor practices at its factories became a public debate concerning the social implications of using slave labor to produce its products. *See Nike Inc. v. Kasky*, 539 U.S. 654, 677 (2003) (Breyer, J., dissenting from the order dismissing certiorari as improvidently granted) (noting that Nike’s alleged human rights violations within its factories constituted a public controversy). Citrus has been accused in the past of exporting jobs and engaging in “the systematic oppression of the people of the Third World,” and Citrus’ alleged capitalist oppression can serve as a danger to humanity. (J.A. at 4, 6.)

Moreover, within a matter of days, Cartman’s blog generated significant attention from the mainstream press, encouraging consumers to boycott Citrus products. (J.A. at 6.) Several nationwide retailers stopped selling Citrus products, and investors sold their stock in the company in anticipation of declining sales as a result of the public controversy. (J.A. at 6.) Given the extent of the press coverage and the significant public backlash in response to Cartman’s blog, this Court should find that Broflovski’s involvement in alleged human rights violations at Citrus’ factory constituted an important public controversy.

2. As the Director of Research and Development for Citrus, Broflovski Played an Affirmative Role in the Public Controversy as a Result of his Influence Over the Internal Workings of the Corporation.

To satisfy the second prong of the limited-purpose public figure analysis, this Court must determine whether Broflovski has been “purposefully trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.” *Waldbaum*, 627 F.2d at 1297. Although “[b]eing an executive within a prominent and influential company does not by itself make one a [limited-purpose] public figure,” *id.* at 1299, “an individual’s position within one of the world’s largest multinational corporations . . . is relevant to whether that person has ‘invite[d] attention and comment’ with respect to public issues affecting his business dealings.” *Tavoulaareas v. Piro*, 817 F.2d 762, 773 (D.C. Cir. 1987) (citations omitted). Further, Broflovski directs a company that is embroiled in a “vigorous public debate touching on a vital national interest,” and therefore attained limited-purpose public figure status. *Id.*

Several courts have held that executives and directors of large corporations were limited-purpose public figures at the center of public controversies concerning the labor practices of their companies. For example, in *Carr v. Forbes, Inc.*, the plaintiff was a high level executive in

charge of his company's activities. 259 F.3d at 280. He decided how the company would develop projects, plan its operations, put together its deals, and directed and managed all of the projects referenced in the alleged defamatory article. *Id.* at 280-81. Similarly, in *Tavoulaareas v. Piro*, the executive "project[ed] his own image and that of [the company] . . ." in order to influence the outcome of a debate surrounding the oil industry. 817 F.2d at 773; *see also Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 708 (4th Cir. 1991) (recognizing that prominence in a professional field may be sufficient to satisfy the "special prominence" factor).

In this case, Broflovski assumed a position of prominence within Citrus as an executive and director. (J.A. at 3.) He had virtual control over the development of Citrus' products, including the production of the ePlay Touché, a product that promised to become the premier portable music player on the market and would have solidified Citrus' place as the worldwide leader in consumer electronics. (J.A. at 3.) Broflovski made a number of visits to Mumbai, India, and, given his position within the company, he has significant influence over the internal workings of the corporation. (J.A. at 7, 18.) Similar to the plaintiff in *Tavoulaareas*, Broflovski has become the face of Citrus. Company employees wear buttons that bear his name, and any consumer walking through the door of a Citrus MegaStore would, at the very least, know of Ike Broflovski and associate him with the company. Although he has not given many interviews to the press, his innovations are celebrated throughout the United States, and he has acquiesced to the use of his image to appear on "I Like Ike" buttons which are worn by employees at Citrus stores all across the country. (J.A. at 3-4.)

Moreover, the alleged defamation was "germane" to Broflovski's role within the human rights controversy, thereby satisfying the third prong of the analysis. Whether information is germane to the controversy at issue is a liberal standard, and a person's "talents, education,

experience, and motives” could be relevant to the controversy. *Waldbaum*, 627 F.2d at 1298. Moreover, only when statements are “wholly unrelated to the controversy” do journalists lose the *New York Times* protection. *Id.* Cartman’s blog revealed Broflovski’s active role within Citrus and his possible use of slave labor to advance a product that could entrench Citrus as the leader in the electronics consumer market, and even if Broflovski was involuntarily thrust into the public limelight, he retains his status as a limited-purpose public figure “unless he rejects any role in the debate.” *Id.*

Finally, even if this Court were to apply the limited-purpose public figure analysis adopted by the Fifteenth Circuit, Broflovski still qualifies as a limited-purpose public figure. Not only did he fail to reject any role in the debate surrounding Citrus’s labor practices, he affirmatively responded to it through channels of communication that are available only to public figures. (J.A. at 7.) Moreover, prior to the controversy occurring, Broflovski had affirmatively maintained continued public attention by making statements at a press conference, and advertising himself and his qualifications on Citrus’s website, which included a headshot photograph. (J.A. at 4.) While simply maintaining a website with contact information is not enough to attain limited-purpose public figure status, Broflovski did much more. He was not simply “play[ing] only a minor role” in the controversy; rather, his alleged actions within the company were at the heart of the public debate. Therefore, this Court should find that Broflovski is a limited-purpose public figure who must prove that Cartman’s statements were made with actual malice.

B. Broflovski Cannot Prove with Clear and Convincing Evidence that Cartman Knowingly or Recklessly Published Defamatory Statements in his Blog.

Since Broflovski is a limited-purpose public figure, he must prove that Cartman

published his commentary with actual malice, that is, that he “made the [false] statement with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times*, 376 U.S. at 280. Reckless disregard means “publishing with a high degree of awareness of . . . probable falsity,” *Garrison*, 379 U.S. at 74, and “reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). “Establishing actual malice is no easy task, because the defamation plaintiff bears the burden of proof by clear and convincing evidence.” *Carr*, 259 F.3d at 282. Simply showing that the published material was false is not sufficient because the “erroneous statement is inevitable in free debate.” *New York Times*, 376 U.S. at 272. Rather, “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *St. Amant*, 390 U.S. at 731.

Broflovski cannot prove that Cartman published his blog with knowledge that it was false. There was nothing about the photograph or information on its face to indicate falsity. Evidence that the photograph had been doctored was discoverable only through the use of enhanced technology, and even though Cartman has access to such technology, he was not obligated to use it, particularly because the photograph came from a reliable source. (J.A. at 5.) Moreover, even if industry standards dictate that use of the program was required before publishing, Cartman’s failure to use the program still does not rise to the level of actual malice. *Eastwood v. Nat’l Enquirer Inc.*, 123 F.3d 1249, 1256 (9th Cir. 1997) (holding that “there is no actual malice where journalists unknowingly mislead the public”).

Broflovski also cannot prove by clear and convincing evidence that Cartman acted recklessly in publishing the article. Cartman received this information from Professor Chaos, a

source with whom he had a working relationship. (J.A. at 5.) He had received information from him in the past, and Professor Chaos's position as an employee of Citrus would put him in a position of reliability. (J.A. at 5.) Therefore, Cartman had no reason to suspect that the material he was publishing was false. Further, Cartman was not required to investigate further, and his failure to do so does not rise to the level of actual malice. *See Newton v. Nat'l Broad. Co., Inc.*, 930 F.2d 662, 668 (9th Cir. 1990) ("Even an extreme departure from accepted professional standards of journalism will not suffice to establish actual malice."). Therefore, this Court should hold that Cartman did not publish his blog with actual malice and grant summary judgment in favor of Cartman.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that the judgment of the Court of Appeals for the Fifteenth Circuit be reversed.

Respectfully Submitted,
Team 101

Counsel for Petitioner

October 2, 2009.