
No. 09-2701

In the

Supreme Court of the United States

October Term, 2009

Eric Cartman, *Petitioner*,

-versus-

Ike Broflovski, *Respondent*.

On Writ of Certiorari to the United States
Court of Appeals from the Fifteenth Circuit

BRIEF FOR PETITIONER

Attorneys for Petitioner

Team #102

QUESTIONS PRESENTED

- I. Whether Petitioner Eric Cartman is protected, pursuant to the First Amendment, by a qualified reporter's privilege against court-compelled disclosure of the identity of an anonymous source in a civil action?

- II. Whether Petitioner Eric Cartman, as the author of the Internet webpage *The Sludge Report*, should be held liable on an actual malice standard in an online defamation claim brought by Ike Broflovski on the grounds that Broflovski is a limited-purpose public figure?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIESiii

STATEMENT OF JURISDICTIONvii

STATEMENT OF THE CASE1

SUMMARY OF THE ARGUMENTS3

ARGUMENTS 4

I. PETITIONER IS PROTECTED UNDER THE FIRST AMENDMENT BY A QUALIFIED REPORTER’S PRIVILEGE AGAINST COURT-COMPELLED DISCLOSURE OF THE IDENTITY OF AN ANONYMOUS SOURCE IN THIS DEFAMATION CLAIM..6

 A. The First Amendment supports a qualified reporter’s privilege against the court-compelled discovery of the identity of an anonymous source..9

 1. A majority of circuit and district courts recognize a qualified reporter’s privilege in defamation cases..9

 2. Continued recognition of the qualified reporter’s privilege protects the values of the First Amendment and interests of the public..12

 B. Petitioner qualifies as a reporter for the purposes of the reporter’s privilege in this civil defamation suit and is therefore entitled to shield the identity of his anonymous source.. 14

 C. Respondent has failed to overcome the qualified reporter’s privilege in this case.. . 16

 1. Respondent has failed to demonstrate a compelling interest in overriding Petitioner’s privilege. 18

2. Respondent has failed to exhaust other means for obtaining the anonymous source’s identity..	19
II. RESPONDENT IS A LIMITED-PUPOSE PUBLIC FIGURE ENTITLING PETITIONER TO SUMMARY JUDGMENT IN THE ABSENCE OF CLEAR AND CONVINCING EVIDENCE THAT HE INTENTIONALLY OR RECKLESSLY MADE FALSE AND DEFAMATORY STATEMENTS AGAINST RESPONDENT..	20
A. Respondent has enjoyed ready access to the media and voluntarily placed himself in a position inviting public scrutiny and comment, thereby establishing himself as more than a private individual..	21
B. Respondent qualifies as a limited-purpose public figure, and therefore must prove that Petitioner acted with actual malice to establish liability..	22
C. Under the actual malice standard, Respondent fails to provide any clear or convincing proof that Petitioner published the story and Professor Chaos’ photograph with reckless disregard or knowledge of falsity..	28
CONCLUSION	30

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

<i>Anderson v. Bessemer City</i> , 470 U.S. 564 (1985).....	5
<i>Bartnicki v. Vopper</i> , 532 U.S. 514 (2001)	13
<i>Bose Corp. v. Consumers Union of United States</i> , 466 U.S. 485 (1984)	5
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972).....	10, 11, 14, 17
<i>Easley v. Cromartie</i> , 532 U.S. 234 (2001).....	5
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	21, 22, 23, 24, 26, 28

<i>Grosjean v. American Press Co.</i> , 297 U.S. 233 (1936).....	13
<i>Harper v. Row, Publishers, Inc. v. Nation Enterprises</i> , 471 U.S. 539 (1985)	13
<i>Harte-Hanks Communications, Inc. v. Connaughton</i> , 491 U.S. 657 (1989)	5, 28
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979).....	19
<i>Hutchinson v. Proxmire</i> , 443 U.S. 111 (1979)	24
<i>Lovell v. Griffin</i> , 303 U.S. 444 (1938).....	14, 15
<i>Miller v. Fenton</i> , 474 U.S. 104 (1985).....	5
<i>N.A.A.C.P. v. Button</i> , 371 U.S. 415 (1963).....	21
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	13, 28, 29
<i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968).....	28, 29
<i>Time, Inc. v. Firestone</i> , 424 U.S. 448 (1976).....	24
<i>United States v. Diebold, Inc.</i> , 369 U.S. 654 (1962).....	5
<i>Wolston v. Reader's Digest Ass'n, Inc.</i> 443 U.S. 157 (1979).....	24

UNITED STATES COURT OF APPEALS CASES

<i>Baker v. F & F Investment</i> , 470 F.2d 778 (2d Cir. 1972).....	13
<i>Bressler v. Fortune Magazine</i> , 971 F.2d 1226 (6th Cir. 1992).....	28, 29
<i>Bruno & Stillman, Inc. v. Globe Newspaper Co.</i> , 633 F.2d 583 (1st Cir. 1980).....	9
<i>Carey v. Hume</i> , 492 F.2d 631 (D.C. Cir. 1972).....	11, 19
<i>Cervantes v. Time, Inc.</i> , 464 F.2d 986 (8th Cir. 1972).....	11, 12, 13, 18
<i>Cusumano v. Microsoft Corp.</i> , 162 F.3d 708 (1st Cir. 1998).....	15
<i>Farr v. Pitchess</i> , 522 F.2d 464 (9th Cir. 1975).....	9
<i>Foretich v. Capital Cities/ABC, Inc.</i> , 37 F.3d 1541 (4th Cir. 1994).....	24, 25, 26

<i>Gonzales v. National Broadcasting Co.</i> , 194 F.3d 29 (2d Cir. 1999).....	9
<i>Kasza v. Browner</i> , 133 F.3d 1159 (9th Cir.1998).....	7
<i>LaRouche v. NBC</i> , 780 F.2d 1134 (4th Cir. 1986).....	9, 17
<i>Lee v. Dep't of Justice</i> , 413 F.3d 53 (D.C. Cir. 2005).....	9, 11
<i>Lerman v. Flynt Distrib. Co.</i> , 745 F.2d 123 (2d Cir. 1984).....	24
<i>Malachinski v. Commissioner</i> , 268 F.3d 497 (7th Cir. 2001).....	5
<i>McDowell v. Paiewonsky</i> , 769 F.2d 942 (3d Cir. 1985).....	24
<i>McKevitt v. Pallasch</i> , 339 F.3d 530 (7th Cir. 2003)	11
<i>Miller v. Transamerican Press, Inc.</i> , 621 F.2d 721 (5th Cir. 1980).....	9, 20
<i>Price v. Time</i> , 416 F.3d 1327 (11th Cir. 2005).....	9
<i>Shoen v. Shoen</i> , 5 F.3d 1289 (9th Cir. 1993).....	7, 15, 19
<i>Silkwood v. Kerr-McGee Corp.</i> , 563 F.2d 433 (10th Cir. 1977)	9, 17
<i>Silvester v. American Broadcast Companies</i> , 839 F.2d 1491 (11th Cir. 1988).....	21, 23, 25, 26
<i>Riley v. City of Chester</i> , 612 F.2d 708 (3d Cir. 1979)	9, 17
<i>Thomas v. General Motors Acceptance Corp.</i> , 288 F.3d 305 (7th Cir. 2002).....	5
<i>Trotter v. Jack Anderson Enters., Inc.</i> , 818 F.2d 431 (5th Cir. 1987).....	24
<i>United States ex rel. Aflatooni v. Kitsap Physicians Serv.</i> , 314 F.3d 995 (9th Cir. 2002)	4
<i>Ventura v. Cincinnati Enquirer</i> , 396 F.3d 784 (6th Cir. 2005)	12
<i>Von Bulow v. Von Bulow</i> , 811 F.2d 136 (2d Cir. 1987)	13, 15
<i>Waldbaum v. Fairchild Publications, Inc.</i> , 627 F.2d 1287 (D.C. Cir. 1980) .	22, 23, 24, 25, 26, 27
<i>Zerilli v. Smith</i> , 656 F.2d 705 (D.C. Cir. 1981).....	5, 9, 10, 13, 14, 17, 18, 19

UNITED STATES DISTRICT COURT CASES

<i>In re Grand Jury Witnesses</i> , 322 F.Supp. 573 (N.D. Cal. 1970).....	14
---	----

<i>Partington v. Bugliosi</i> , 825 F.Supp. 906 (D.Haw. 1993).....	24
<i>United States Commodity Futures Trading Comm'n v. McGraw-Hill Cos.</i> , 390 F.Supp.2d 27 (D.C. Cir. 2005).....	19

STATE COURT CASES

<i>O'Grady v. Superior Ct. of Santa Clara County</i> , 139 Cal. App. 4th 1423 (Cal. Ct. App. 2006) .	16
--	----

STATUTES

Haw. Rev. Stat. § 33-621 (2008)	16
---------------------------------------	----

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I	7
----------------------------	---

FEDERAL RULES

Fed. R. Civ. Proc. 37.....	5
Fed. R. Evid. 501	7

OTHER AUTHORITIES

Blacks Law Dictionary (West 3d ed. 2007).....	7
Carl C. Monk, Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection, 51 Mo. L. Rev. 1 (1986)	14
23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5426 (1st ed. 1980)	14
2 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence (West 3d ed. 2007).....	7
David Abramowicz, Protecting Journalists' Confidential Sources, 108 Colum. L. Rev. 1949 (2008)	7, 8, 10, 17, 18
Mary-Rose Papandrea, Citizen Journalism and the Reporter's Privilege, 91 Minn. L. Rev. 515 (2007)	12, 16

1 McCormick on Evidence (Kenneth S. Broun et al eds., 6th ed. 2006).....	6
Restatement (Second) of Torts § 580(B) (1977).....	21

STATEMENT OF JURISDICTION

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

I. Statement of the Facts

Eric Cartman, Defendant and Petitioner in this action, is a sole proprietor of a small computer store and writer for a daily news webpage, *The Sludge Report*. (J.A. at 4.) His audience of over 100,000 readers enjoys a variety of enlightening topics, including local and international politics. (J.A. at 4.) On the webpage, Cartman set up a special email account to receive stories and tips from readers. (J.A. at 5.) Cartman explicitly states that all persons who send messages to the email address will be treated as confidential sources unless otherwise requested. (J.A. at 5.) Cartman does not have or know any personal information about his sources unless they choose to provide it to him. (J.A. at 5.)

On July 7, 2008, Cartman received an email to this designated address with an attached digital photograph from a confidential source known as “Professor Chaos.” (J.A. at 5). Professor Chaos works for Citrus, a *Fortune 500* consumer electronics company, and has also been personally known by Cartman since they met at a tradeshow two years ago. (J.A. at 5, 2.) Professor Chaos had previously provided Cartman reliable information regarding the release of various Citrus products. (J.A. at 5). The photograph sent by Professor Chaos depicted Plaintiff Ike Broflovski, the renowned Director of Research & Development for Citrus, walking through a factory yelling at workers assembling Citrus’s portable digital music player, the ePlay Touché. (J.A. at 5, 2.) The workers were wearing surgical masks and using assembly lines and machines with insufficient protective gear. (J.A. at 5.)

The following day, Cartman posted a story including the photograph, under the headline, “Citrus Engaging in Acts of Modern-Day Slavery?” (J.A. at 5.) In the story, Cartman reported the oppressive conditions of the workers in the photograph, as told to him by Professor Chaos. (J.A. at 6.) Although a scan later revealed Broflovski’s image had been superimposed on the

photograph of the factory workers, Cartman's story spread rapidly as public outrage over Citrus's overseas practices became known. (J.A. at 7, 6.) Other major news carriers picked up the story, including Keith McRiley, host of "The Countdown Factor." (J.A. at 6.) On August 19, 2008, McRiley awarded Ike Broflovski for being the "Most Heinous Individual in the Galaxy." (J.A. at 6.) Citrus provided no response to the story. (J.A. at 7.) Ike Broflovski, however, conveyed a message through his attorney that he would be suing. (J.A. at 7.) Discovery revealed Broflovski had traveled to the factory in Mumbai, India, numerous times. (J.A. at 7.)

Ike has been employed in his position since 2006, when he was hired by his brother, Kyle Broflovski, the CEO and majority shareholder of Citrus. (J.A. at 3.) A press conference and Associated Press story covered Ike's hiring, which was featured in several major newspapers. (J.A. at 3.) Ike personally addressed the media at the press conference. (J.A. at 3.) In addition to his contact information and photograph featured on the Citrus website, Ike's work at the company has been repeatedly praised by Kyle on television and in magazine interviews. (J.A. at 3.) Moreover, employees at Citrus stores throughout the United States wear "I Like Ike" buttons to celebrate Ike's innovations. (J.A. at 4.)

After filing suit, Ike and Kyle deposed management employees at the factory, but were unable to discover the source of the photograph. (J.A. at 8.) Kyle sent an email to all Citrus employees regarding the source, but he did not receive any leads. (J.A. at 8.) Ike took no further action to discover the identity of Professor Chaos. (J.A. at 8.)

II. Nature of the Proceedings

Respondent Ike Broflovski filed suit on September 20, 2008, in the Superior Court for the State of Silverado alleging Petitioner Eric Cartman published false information on his webpage regarding human rights violations by Broflovski and his employer, Citrus Electronics, Inc., in

managing a manufacturing plant in India. (J.A. at 1.) On October 14, 2008, Petitioner removed the case to the United States District Court for the Western District of Silverado on diversity grounds. (J.A. at 1.) After several rounds of discovery, Respondent moved the district court on January 8, 2009, to compel Petitioner to disclose the identity of an anonymous source who provided the photograph. (J.A. at 1.) Petitioner opposed the motion and moved for summary judgment based on Respondent's failure to provide evidence of actual malice in order to sustain the cause of action. (J.A. at 2.) The district court held a qualified reporter's privilege existed pursuant to the First Amendment and that Petitioner was protected under this privilege. (J.A. at 9, 12.) Petitioner's motion for summary judgment was granted after the court found Respondent was a limited purpose public figure and had failed to provide clear and convincing evidence that Petitioner intentionally or recklessly made false and defamatory statements against Respondent. (J.A. at 18, 20.)

Respondent appealed the district court's decision to the Fifteenth Circuit Court of Appeals. (J.A. at 21.) The Fifteenth Circuit found that a qualified reporter's privilege against disclosure of confidential sources was not recognized by the First Amendment. (J.A. at 22.) The appellate court also determined Respondent was not a public figure for defamation purposes, and therefore the lower standard of negligence applied. (J.A. at 22-23.) As a result, the lower court's holding was reversed. (J.A. at 32.) Defendant's petition for a writ of certiorari was granted by this Court on August 24, 2009. (J.A. at 33.)

SUMMARY OF THE ARGUMENTS

Under the First Amendment of the United States Constitution, Petitioner is protected by a qualified reporter's privilege against court-compelled disclosure of the identity of an anonymous source. A majority of federal circuit and district courts recognize a qualified reporter's privilege

in defamation cases. Continued recognition of the qualified reporter's privilege protects the values of the First Amendment and interests of the public. Furthermore, Petitioner qualifies as a reporter for the purposes of the privilege in this civil defamation suit and is therefore entitled to shield the identity of his anonymous source. Under the recognized test, he had intent to disseminate the information and is routinely involved in newsgathering activities. Respondent has failed to overcome the qualified reporter's privilege because he has not demonstrated a compelling interest sufficient to override the qualified privilege. Furthermore, Respondent has failed to exhaust other means for obtaining the anonymous source's identity.

Respondent qualifies as a limited-purpose public figure and therefore must prove that Petitioner acted with actual malice in order to establish liability in his defamation claim. Not only has Respondent enjoyed ready access to the media but also has voluntarily placed himself in a position which invites public scrutiny and comment, thereby excluding himself from the protection offered to private individuals. Additionally, Respondent meets the two basic criteria to establish himself as a limited-purpose public figure. First, Citrus' human rights violations qualify as a public controversy, giving rise to the story featured in *The Sludge Report*. Second, due to his many visits to Mumbai and position as Director of Research & Development, Respondent could have realistically been expected to have an impact on the controversy's resolution. Consequently, Respondent qualifies as a limited purpose public figure and is therefore required to prove actual malice by clear and convincing evidence in order to sustain his cause of action for defamation.

ARGUMENTS

Issue I. Standards of Review

District courts are given wide latitude in controlling discovery. *United States ex rel. Aflatooni v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002). Despite this latitude,

Petitioner concedes that because the privilege asserted under Rule 26(b)(5)¹ is of a constitutional and purely legal nature, the standard of review for determining its existence is a question of law reviewed *de novo*. See *Thomas v. General Motors Acceptance Corp.*, 288 F.3d 305, 307 (7th Cir. 2002). However, once that privilege has been established, as it was by the District Court below, the standard of review for denial of a motion to compel discovery is abuse of discretion. *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981).

“An issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question.” *Miller v. Fenton*, 474 U.S. 104, 113 (1985). Whether Petitioner qualifies as a reporter under the privilege is a question of fact in the sense that no legal knowledge or instruction is necessary to answer it. *Thomas*, 288 F.3d at 307 (citing *Malachinski v. Commissioner*, 268 F.3d 497, 505 (7th Cir. 2001)). It is therefore reviewed for clear error. *Id.* This Court has previously stated that it will not reverse a lower court's finding of fact simply because we “would have decided the case differently.” *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

Issue II. Standard of Review

This Court has stated that determination of actual malice is a question of fact reviewed *de novo*. *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 501-02 (1984). However, this Court has also stated that “whether the record may support a finding of actual malice is a question of law.” *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989). A grant of summary judgment is reviewed *de novo*. For purposes of this appeal, Petitioner assumes a *de novo* review of Issue II. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

¹ There is no indication in the record that before the Motion to Compel Discovery was filed Respondent “in good faith conferred or attempted to confer with [Petitioner] in an effort to secure the disclosure without court action” as required by Rule 37 of the Federal Rules of Civil Procedure. Accordingly, the District Court’s denial of the Motion should stand.

I. PETITIONER IS PROTECTED UNDER THE FIRST AMENDMENT BY A QUALIFIED REPORTER'S PRIVILEGE AGAINST COURT-COMPELLED DISCLOSURE OF THE IDENTITY OF AN ANONYMOUS SOURCE IN THIS DEFAMATION CLAIM.

A qualified reporter's privilege is essentially a rebuttable presumption that the public's interest in newsgathering is more significant than a litigant's interest in obtaining evidence. The term "privilege" has many meanings in the law. In this case, privilege is defined as "an evidentiary rule that gives a witness the option to not disclose the fact asked for, even though it might be relevant; the right to prevent disclosure of certain information in court, especially when the information was originally communicated in a professional or confidential relationship." *Black's Law Dictionary* 1235 (8th ed. 2004). A privilege will impede the search for certain information by litigants seeking to break the privilege. However, the rationale underlying the privilege is "the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice." 1 *McCormick on Evidence* 339 (Kenneth S. Broun et al eds., 6th ed. 2006).

In this case, the protected interest of the reporter's privilege is the free flow of information to the public, which is gathered by journalists and, at times, requires them to promise anonymity to their sources. The various favored relationships include, for example, spouses, attorneys and clients, clergymen and parishioners, and doctors and patients. 1 *McCormick on Evidence* at 340. Favoring free flow of information and reporters' relationships with their sources serves the social importance of an informed public about issues of global significance. Litigants

seeking the source's identity in private civil suits sacrifice discovering the knowledge, but without this sacrifice, the values of the First Amendment would be in jeopardy.

A qualified reporter's privilege implicitly exists under the First Amendment as a matter of policy. Generally, privileges are created by common law and statutes, which are an expression of public policy. *See Kasza v. Browner*, 133 F.3d 1159, 1179-80 (9th Cir.1998). The Federal Rules of Evidence provide for privileges in a diversity action to be derived from state law. Fed. R. Evid. 501. In this case, there is no state statute, commonly known as a shield law, for reporters in the State of Silverado. Instead, the privilege in this case is being claimed based on the First Amendment of the United States Constitution, which creates a federal question. *See Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (citations omitted). State shield laws simply codify an already existing right derived from the First Amendment and establish limits on the scope of the privilege. A state shield law is therefore unnecessary because the qualified reporter's privilege exists under the both the free speech and free press clauses of the First Amendment to the United States Constitution, which provides, "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

While the case concerns an evidentiary privilege, developments regarding reporters' ethical privileges have an impact as part of the larger context influencing reporters' decisions. The distinction between the two privileges is that an ethical privilege is usually broader than an evidentiary privilege. 2 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* 433-34 (West 3d ed. 2007). Reporters generally follow an ethical code that states a professional responsibility to their sources to keep identity confidential only as a last resort, after discussing the situation with editors and if doing so serves the public interest. David Abramowicz, *Calculating the Public Interest in Protecting Journalists' Confidential Sources*, 108 Colum. L.

Rev. 1949, 1951-52 (2008). Reporters' use of confidential sources is becoming increasingly rare, which demonstrates a renewed commitment to honesty in reporting. *Id.* Courts should be cognizant that reporters are using professional judgment and abiding by an increasingly tighter ethical code in determining whether to keep a source confidential.

Within this context of how privileges work generally, there is a basis for recognition of a qualified reporter's privilege in civil cases pursuant to the First Amendment. A majority of federal courts have recognized such a limited privilege, which can be overcome by application of a three-prong balancing test. Upholding the privilege fulfills the values of the First Amendment by ensuring free flow of information from sources to the press, who in turn publish information to the public. The privilege protects the relationships reporters have with their sources.

Petitioner qualifies to claim this privilege. Historically, this Court has not discriminated against different types of news media. Lower courts have developed a workable test that instead looks at the intent of the individual claiming the privilege. Under the recognized test, Petitioner had the intent to disseminate the news when he received it. He published the story the next day, like any mainstream journalist would. Furthermore, he is regularly involved in traditional newsgathering activities as shown by his daily journalistic writing for his webpage.

Finally, the qualified reporter's privilege has not been overcome in this case. Respondent has failed to give a compelling interest that would rebut the presumption in favor of ensuring the information regarding Citrus' human rights violations is available to the public. Additionally, Respondent has failed to exhaust alternative resources in either identifying the confidential source or finding other evidence to support his claim of actual malice by Petitioner.

A. The First Amendment supports a qualified reporter's privilege against the court-compelled discovery of the identity of an anonymous source.

A qualified reporter's privilege has been recognized by a majority of federal circuit courts in civil cases, only differing by scope and what level of private litigant interest is necessary to overcome the privilege. Acknowledgment of this privilege fulfills the value of an informed public, as established by the Framers of the Constitution and supported in modern society. The privilege ensures the continued ability for sources to report wrongdoing without fear of disclosure by journalists, thereby protecting a time-honored relationship.

1. A majority of circuit and district courts recognize a qualified reporter's privilege in defamation cases.

Some form of the qualified reporter's privilege has been recognized by a majority of federal circuits, including the District of Columbia Circuit, *Lee v. Dep't of Justice*, 413 F.3d 53, 60 (D.C. Cir. 2005) (citing *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981)); First Circuit, *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 586 (1st Cir. 1980); Second Circuit, *Gonzales v. National Broadcasting Co.*, 194 F.3d 29, 32 (2d Cir. 1999); Third Circuit, *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979); Fourth Circuit, *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986), *cert denied*, 479 U.S. 818 (1986); Fifth Circuit, *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980), *opinion supplemented, reh'g denied*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Ninth Circuit, *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Tenth Circuit, *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 435 (10th Cir. 1977); and Eleventh Circuit, *Price v. Time*, 416 F.3d 1327, 1343 (11th Cir. 2005).

Of the nine federal circuits that have affirmatively adopted the qualified reporter's privilege under the First Amendment, the only difference in their approaches to the privilege is its boundaries in civil cases. *Abramowicz, supra*, at 1950. The scope of a privilege fixes a balance between interests of society and rights of litigants. *Id.* at 1958. For example, there is a noteworthy difference between civil and criminal settings because every privilege weighs different values based on the context. *Zerilli*, 656 F.2d at 712 n.44. The current case is limited to confidentiality of sources' identity in civil cases, the narrowest formation of the reporter's privilege. Also, in examining scope, it is significant that this is recognition of a *qualified* privilege. Courts retain the ability to determine if the claimed privilege has been overcome.

In *Branzburg v. Hayes*, this Court established one boundary of the qualified reporter's privilege in relation to reporters called to testify at grand jury proceedings. 408 U.S. 665, 667 (1972). In a 5-4 decision, this Court held it was not a violation of the freedom of speech or of the press as guaranteed by the First Amendment to require newsmen to appear and testify before grand juries. *Id.* However, this Court explicitly stated that *Branzburg* applies only to cases involving potential criminal conduct being investigated by a grand jury. *Id.* at 682 ("The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime). This Court noted the government had a compelling interest in obtaining justice in a criminal investigation, which outweighed any privilege the reporter may have had. *Id.* at 687-88.

Branzburg is distinguishable from the case before the Court. There is no grand jury investigation or suspicion of criminal behavior. The stated purpose of the majority in rejecting a privilege for reporters being questioned by a grand jury is a "public interest in law enforcement." *Id.* at 690. The issue currently presented is where the boundary of the reporter's privilege is

placed in civil cases. Once in the realm of a civil case where there are no criminal ramifications, the interests of society have changed. *Lee*, 428 F.3d at 302.

The majority in *Branzburg* left open the possibility of a qualified reporter's privilege in civil cases. *Branzburg*, 408 U.S. at 686 (“[T]here are occasional dicta that, in circumstances not presented here, a newsman might be excused [from publicly disclosing confidential information pursuant to a subpoena issued in a civil suit].”) This Court emphasized that “without some protection for seeking out the news, freedom of the press could be eviscerated.” *Id.* at 681. In his deciding concurrence, Justice Powell emphasized the limited nature of the Court's holding. *Id.* at 709. “The courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.” *Id.* at 710.

After *Branzburg* was announced in 1972, several circuits discussed how the decision would impact civil litigation. *See e.g. Carey v. Hume*, 492 F.2d 631, 635-36 (D.C. Cir. 1972); *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). Ultimately, it was concluded the *Branzburg* trilogy did not “disturb the balancing approach set forth in *Garland* . . . [i]ndeed, the *Branzburg* result appears to have been controlled by the vote of Justice Powell.” *Carey*, 492 F.2d at 636. The language used in *Branzburg*, while definitively settling any reporter's privilege in grand juries, did not foreclose the applicability of a privilege under the First Amendment for reporters. *Branzburg*, 408 U.S. at 686.

In the Seventh and Eighth Circuit Courts of Appeals, the question of whether journalists retain a qualified privilege under the First Amendment is still an open question. In *McKevitt v. Pallasch*, the Seventh Circuit adopted a “reasonable under the circumstances” test, which considers many of the same factors that are used by circuit courts when determining whether the privilege applies. 339 F.3d 530, 533 (7th Cir. 2003). The Eighth Circuit did not reach the

question of whether the privilege existed in *Cervantes* because it held there was no genuine issue as to actual malice regarding the identity of the sources. 464 F.2d at 991. Finally, the Sixth Circuit Court of Appeals has not addressed whether the First Amendment alone provides a qualified reporter's privilege in civil cases; instead, it has looked to state shield laws. *See e.g. Ventura v. Cincinnati Enquirer*, 396 F.3d 784 (6th Cir. 2005). It is therefore quite possible that, given the direct issue, all of the federal circuit courts of appeals would adopt the privilege.

Many state courts also recognize a qualified reporter's privilege. *See Mary-Rose Papandrea, Citizen Journalism and the Reporter's Privilege*, 91 Minn. L. Rev. 515, 546 n.176 (2007). Although their determinations are not controlling, the decisions are indicative of the societal expectation that reporters generally are expected to keep the identity of confidential sources to themselves. These decisions have been made based on the First Amendment, state constitutions, or common law. *Id.* Finally, at least thirty-two states and the District of Columbia have enacted state shield laws, the earliest in 1896. *Id.* at 545 n.175.

2. Continued recognition of the qualified reporter's privilege protects the values of the First Amendment and interests of the public.

The decision by the Fifteenth Circuit ignores a key value of the First Amendment: an informed public. The public is informed when there is a free flow of information to the press. The press receives this flow of information by protecting certain relationships, which includes sources wishing to remain anonymous to the public at large. Anonymity allows sources to speak with reporters about issues of great public concern without fear of exposure. Society as a whole has an interest in being fully informed about issues of public concern.

“The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within

suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.”

Bartnicki v. Vopper, 532 U.S. 514, 533 n.20 (2001) (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985)). This Court has stated, “freedom of speech and of the press are rights of the same fundamental character.” *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936). The First Amendment guarantees a free press primarily because of the important role it can play as “a vital source of public information.” *Zerilli*, 656 F.2d at 710 (quoting *Grosjean*, 297 U.S. at 250). In order for the public to be informed, there must be a free flow of information. This Court has recognized the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The press’ function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. *Zerilli*, 656 F.2d at 711. There is likely to be a deterrent effect on future undercover investigative reporting when the identity of confidential sources is compelled. *Von Bulow v. Von Bulow*, 811 F.2d 136, 142-43 (2d Cir. 1987) (citing *Baker v. F & F. Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973)). In this case, the information consisted of potential human rights abuses by a large, consumer-driven corporation. (J.A. at 6-7.) This story, as evidenced by its serious nature and the public’s response, was a matter of public concern. (J.A. at 6-7.)

The privilege also protects the relationship that reporters have with sources wishing to remain anonymous, thereby ensuring continued newsgathering. “[T]o 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. Many sources would not report if it could not be

done in secret. *Zerilli*, 656 F.2d at 712. They may be afraid of retaliation by their employer, public exposure, gaining a reputation as a snitch, or losing the ability to provide further information valuable to the public. In this sense, the privilege is analogous to the privilege enjoyed by informants. *See* 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5426, 720-21 (1st ed. 1980); Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 *Mo. L. Rev.* 1, 5 n.18 (1986).

In this case, Petitioner specifically stated that anonymous sources would be protected. (J.A. at 5.) Although Petitioner knew the source personally in this case, Professor Chaos relied on this statement and Petitioner's past anonymous usage of his information when deciding to provide the photograph. It is not unreasonable to assume Professor Chaos did not want his employer, Citrus, to find out he was the one who leaked the news; otherwise, he would not have requested Petitioner refer to him as "Professor Chaos." However, for Petitioner's story to be even remotely credible to readers, he needs to acknowledge that he received the information from someone who would know. In this case, readers were able to believe the conditions of the Mumbai factory because they were told Professor Chaos worked for Citrus. (J.A. at 6.)

B. Petitioner qualifies as a reporter for the purposes of the reporter's privilege in this civil defamation suit and is therefore entitled to shield the identity of his anonymous source.

"The liberty of the press is not confined to newspapers and periodicals." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). The traditional doctrine as pronounced by this Court is "that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher . . ." *Branzburg*, 408 U.S. at 704 (citing *In re Grand Jury Witnesses*, 322 F.Supp. 573, 574 (N.D. Cal. 1970)). Although the invention of the Internet has expanded the traditional legal

understanding of “press,” it still involves a “fundamental personal right . . . comprehend[ing] every sort of publication which affords a vehicle of information and opinion.” *Lovell*, 303 U.S. at 450. The Internet is simply a new medium for reaching a technology-driven public.

The Second, Ninth, and First Circuits follow a test announced in *Von Bulow* for determining whether the reporter’s privilege would apply to the person claiming it. *Von Bulow*, 811 F.2d at 144; *Shoen*, 5 F.3d at 1293; *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998). Under this test, the court considers whether the person had the intent at the inception of the information-gathering process to disseminate information to the public. *Von Bulow*, 811 F.2d at 142. Secondly, the court examines whether the individual 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. *Id.*

Petitioner has satisfied both parts of this test. First, he had intent to disseminate the information when he received it. He made a separate email address available to readers for the purpose of receiving information that would be put on his webpage. (J.A. at 5.) Petitioner was soliciting tips and stories that both he and the reader understood were meant for dissemination. Once Petitioner received Professor Chaos’ email, he posted the story and photograph the next day. (J.A. at 5.)

Next, Petitioner was regularly involved in traditional newsgathering and dissemination activities. He used the information from Professor Chaos as any other journalist would have. The photograph was not obtained or used for personal reasons. Other journalists, upon receiving such potentially high-profile information, would have arranged for it to be available for the public in whatever format he or she usually works in. In this case, Petitioner wrote an online webpage and that is how he published the story. (J.A. at 4.) Furthermore, it is both relevant and undisputed that

Petitioner received compensation for his work disseminating news, justly like a member of the institutionalized press. (J.A. at 4.)

Lower courts and states have already affirmatively answered that citizen journalists qualify as reporters. *O'Grady v. Superior Ct. of Santa Clara County*, 139 Cal. App. 4th 1423 (Cal. Ct. App. 2006). In *O'Grady*, the court found the producers of an online newspaper qualified for the privilege because “they gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience.” *Id.* at 1480. In 2008, the Hawaii state legislature passed a statute explicitly including citizen journalists within the state shield law. Haw. Rev. Stat. § 33-621 (2008). Other states, meanwhile, have based their standard on whether the citizen journalist is regularly engaged in newsgathering and dissemination. *See Papandrea, supra*, at 566 n.281 (Alaska, Illinois, Kentucky, Louisiana, and Oklahoma). This broad test generally encompasses writers for webpages.

If Petitioner and other citizen journalists are found not to qualify as members of the modern press, the result will be a judicially created hierarchy of journalism. These unconventional journalists have stories and sources outside the traditional media that the public wants and has a right to hear. The American public is growing to distrust the regular mainstream media. Channels consisting of all news, all day, every day content are increasingly being attacked and rejected for their partisan leanings. By not extending the same privileges the main media has to independent journalists, such as Petitioner, the public is left without an alternative for receiving news.

C. Respondent has failed to overcome the qualified reporter’s privilege in this case.

Recognition of the limited boundary of the qualified reporter’s privilege in a civil case will not shield a reporter from liability because it can be overcome. As the district court correctly

noted, the privilege is qualified, not absolute. (J.A. at 12.) Federal courts recognizing the privilege follow a three-prong balancing test to determine if the privilege has been overcome. *Abramowicz, supra*, at 1960-61 (providing a discussion of the test and its varying forms). Regardless of how the test is labeled, courts consider the same basic factors.

The three-prong test is derived from Justice Stewart's dissent in *Branzburg*, 408 U.S. at 725-52. The test generally states the qualified privilege can be overcome if the party moving to compel disclosure demonstrates by clear and convincing evidence that (1) the evidence sought is clearly relevant to the litigation; (2) there exists a compelling interest in obtaining the information that sufficiently outweighs the invocation of the privilege (i.e., it is absolutely necessary to maintain the claim, or goes to the "heart of the claim"); and (3) the party has exhausted all other means reasonably available to obtain the information. *See e.g. Silkwood*, 563 F.2d at 438; *LaRouche*, 780 F.2d at 1139; *Abramowicz, supra*, at 1961 n.74 (providing a list of cases following prong test). Some courts, however, frame the privilege as a balancing test. "To determine whether the privilege applies courts should look to the facts of each case, weighing the public interest in protecting the reporter's sources against the private interest in compelling disclosure." *Zerilli*, 656 F.2d at 713-14; *Riley*, 612 F.2d at 715-16. Regardless of whether it is explained as a three-prongs or as balancing, the test is essentially the same.

In applying the test, the First Amendment and importance of the press has a preferred position, which tips the balance in favor of nondisclosure. *Zerilli*, 656 F.2d at 712. Therefore, the civil litigant's interest in disclosure should yield to the journalist's privilege in all but the most unusual circumstances. *Id.* If the preferred position is not given effect, then its worth is substantially diminished and the values and interests it was meant to protect are placed in jeopardy. *Id.*

As a threshold matter, Respondent, as the plaintiff in the action, should have to prove that the statement is factually untrue and defamatory. *See Cervantes*, 464 F.2d at 993 (“But to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay [the *Branzburg* trilogy].”). If this threshold is not first met, plaintiffs in defamation cases will be able to lash out at sources without any regard to whether the information was true. Therefore, in order to maintain equilibrium between the First Amendment values and interests of litigants, it is essential that a plaintiff first prove the statements are not true before a reporter is required to reveal a source.

**1. Respondent has failed to demonstrate a compelling interest in overriding
Petitioner’s privilege.**

Respondent has failed to meet the threshold test of proving that Petitioner’s story was factually untrue and defamatory. Accordingly, the grant of summary judgment for Petitioner should be reinstated. However, if the Court continues on, Respondent has failed to demonstrate a compelling interest that would override the privilege. It is conceded here that the identity of the source is clearly relevant to the litigation. (J.A. at 13.) However, the identity, although relevant, is not essential to the claim.

There is still a need to balance the protections extended by the First Amendment with a litigant’s claim to have access to every piece of possible evidence. Courts consider the interest in compelling a reporter to testify to be at its weakest in civil proceedings. *Abramowicz*, *supra*, at 1960. The compulsion is based on the interests of a private party, as opposed to the public, thereby diminishing its purpose. *United States Commodity Futures Trading Comm’n v. McGraw-Hill Cos.*, 390 F.Supp.2d 27, 33 (D.C. Cir. 2005)

2. Respondent has failed to exhaust other means for obtaining the anonymous source's identity.

“Compelled disclosure from a journalist must be ‘a last resort after pursuit of other opportunities has failed.’” *Shoen*, 5 F.3d at 1297 (quoting *Carey*, 492 F.2d at 639). Therefore, even when the information is crucial to a litigant’s case, reporters should be compelled to reveal sources only after the litigant has shown that he has exhausted every reasonable alternative source. *Zerilli*, 656 F.2d at 713.

Respondent has done nothing to try to discover the source of the photograph other than to have his brother send a mass email to Citrus employees and question some of the staff at the Mumbai factory. (J.A. at 8.) There has been no review of the company’s servers to search for the photograph. Respondent has not attempted to narrow down who may have had access to the facility or question the assembly workers in the photograph about who may have taken it. Furthermore, the record does not reflect that Respondent ever attempted to learn Professor Chaos’s identity after he provided previous information to Petitioner. It was not confidential that Professor Chaos claimed to be employed by Citrus. (J.A. at 6.) There is no indication that Respondent thoroughly sought to determine which of his own employees would have been able to take the picture.

This case is to be distinguished from *Herbert v. Lando*, 441 U.S. 153, 169 (1979), in which this Court upheld inquiry into the editorial process for purposes of determining actual malice. Significantly, *Herbert* makes no mention of the confidentiality of a source. The process is discoverable, so far as it includes how the reporter handled the information once received from the source. Also, whether the reporter previously received information from the source, and its

reliability, is also discoverable. Respondent has made no effort to depose Petitioner and use other information besides the source's identity to determine if Petitioner was negligent.²

II. RESPONDENT IS A LIMITED-PURPOSE PUBLIC FIGURE ENTITLING PETITIONER TO SUMMARY JUDGMENT IN THE ABSENCE OF CLEAR AND CONVINCING EVIDENCE THAT HE INTENTIONALLY OR RECKLESSLY MADE FALSE AND DEFAMATORY STATEMENTS AGAINST RESPONDENT.

Petitioner is protected by a qualified reporter's privilege against the disclosure of confidential sources and therefore, may not be compelled by Respondent to disclose the identity of Professor Chaos. However, if this Court were to find that Petitioner is not permitted to shield the identity of his anonymous source, his liability should be adjudged under an actual malice standard due to the fact that Respondent is a limited-purpose public figure.

The district court was correct in determining that Respondent is a limited-purpose public figure and, therefore, his defamation claim must be reviewed under the actual malice standard. Respondent enjoyed ready access to the media for years prior to the photograph and remarks on *The Sludge Report*. He has also voluntarily placed himself in a position that invited public scrutiny and comment as Director of Research & Development at Citrus. Citrus' human rights abuses qualify as a public controversy and Respondent's subsequent involvement with Citrus and the controversy in question, establishing him as a limited-purpose public figure. Therefore, Respondent is bound to prove Petitioner's liability under the actual malice standard.

² In the event this Court orders disclosure of Professor Chaos' identity, Petitioner respectfully requests protective measures such as limiting the disclosure to counsel and ordering its use for litigation purposes only or sealing the record. *See Miller*, 621 F.2d at 727.

A. Respondent has enjoyed ready access to the media and voluntarily placed himself in a position inviting public scrutiny and comment, thereby establishing himself as more than a private individual.

While the Court has continually been challenged with establishing the proper balance between the need for an uninhibited press and the interest in redressing wrongful injury from defamatory language, it has been “especially anxious” to preserve [the] ‘breathing space’ essential to the fruitful exercise of the freedoms of speech and press. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). In maintaining this pledge of free speech preservation, the Court has provided a measure of protection to those who have suffered a defamatory falsehood. *Id.*

This measure of protection for determining liability in a defamation case turns on whether the libeled party is a public figure or private individual and on whether the defamatory publication addresses a public or private concern. *Silvester v. American Broadcast Companies*, 839 F.2d 1491, 1493 (11th Cir. 1988) (citations omitted). In cases where the plaintiff is a private citizen, a showing of simple negligence will suffice to support a cause of action for defamation. Restatement (Second) of Torts § 580(B) (1977); (J.A. at 15.) On the other hand, if the injured party is a public figure or official, and the defamatory material involves issues of legitimate public concern, then the plaintiff must prove that the defendant acted with actual malice to establish liability. *Silvester*, 839 F.2d at 1493.

In distinguishing between private and public figures, the Court has noted two fundamental differences. First, public figures usually have greater access to the media, which gives them “a more realistic opportunity to counteract false statements than private individuals normally enjoy.” *Gertz*, 418 U.S. at 344. Second, and more importantly, public figures invite

attention and comment by voluntarily exposing themselves to the increased risk of injury from defamatory falsehoods concerning them. *Id.* at 345. Thus, they accept the risk that the press, in fulfilling its role of reporting, analyzing, and commenting on well-known persons and public controversies, will focus on them and, perhaps, cast them in an unfavorable light. *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980).

Since his start at Citrus in 2006, Respondent has attracted the public's attention as the *Fortune 500* company's new Director of Research & Development. (J.A. at 3.) Beginning with Kyle Broflovski's publicized announcement of his brother's hiring, Respondent has been mentioned in press conferences, newspapers, as well as television and magazine interviews given by his brother Kyle. (J.A. at 3.) Although Respondent has declined to give interviews himself, he was present at the press conference announcing his new position within Citrus and made a point to briefly address the media. (J.A. at 3.) Additionally, his innovations at Citrus have been celebrated by Citrus employees across the United States who have taken it upon themselves to wear "I Like Ike" buttons. (J.A. at 4.) Therefore, Respondent has enjoyed ready access to the media for years prior to Petitioner's July 8, 2008 story, and voluntarily placed himself in a position and acted in a manner which invited public scrutiny and comment. As such, he has met the two basic requirements set forth in *Gertz*, distinguishing himself as a public figure, as opposed to a private individual for purposes of defamation liability. 418 U.S. at 344-45.

B. Respondent qualifies as a limited-purpose public figure, and therefore must prove that Petitioner acted with actual malice to establish liability.

The term "public figure" is a broad categorization. Accordingly, the Court has created three sub-classifications: involuntary public figures or persons who become public figures through no purposeful action of their own, persons who are public figures for all purposes, and

those who are public figures for particular public controversies. *Waldbaum*, 627 F.2d at 1292. Although this Court has noted the possibility for someone to become a public figure through no purposeful action of his own, “the instances of truly involuntary public figures must be exceedingly rare.” *Gertz*, 418 U.S. at 345. Instead, those who have attained public figure status are typically classified in the remaining two categories.

An individual becomes a public figure in all situations when he has attained a position of general fame and notoriety and has assumed a role of especial prominence in the affairs of society. *Id.* However, a public figure of this form is rare as well. Without “clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.” *Id.* at 352.

What is most commonly found are those persons who qualify as a limited purpose public figure. They are individuals thrust “to the forefront of particular public controversies in order to influence the resolution of the issues involved.” *Id.* at 345. These individuals “voluntarily injects himself or is drawn into a particular public controversy and therefore becomes a public figure for a limited range of issues.” *Id.* at 351.

Determining the standards by which a limited purpose public figure may be found has become a highly contested matter among the circuits. A plurality of courts, including the trial court in this case, have chosen to adopt a three-prong test in which a plaintiff is a limited-purpose public figure if (1) the relevant controversy is a matter of public concern; (2) the plaintiff plays more than a “trivial or tangential” role in the controversy; and (3) the defendant’s allegedly defamatory remarks are relevant to the public controversy. *See Silvester*, 839 F.2d at 1494; *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 433-34 (5th Cir. 1987); *Waldbaum*, 627 F.2d at 1296-98; (J.A. at 16.)

Alternatively, courts such as the Second Circuit Court of Appeals have established a more extensive rule. Under this standard, which was adopted by the Court of Appeals in this case, before a plaintiff in a defamation suit can be considered a limited-purpose public figure, he must (1) “successfully invite public attention” prior to the remarks litigated; (2) voluntarily inject himself into the relevant public controversy; (3) take on a “position of prominence” within the public controversy; and (4) maintain regular and continuing access to the media in order to combat the defamatory remarks. *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-37 (2d Cir. 1984); (J.A. at 29.)

On the other hand, a minority of courts, namely the Third, Fourth and Ninth Circuits, have adopted a more simplified version, which most accurately encompasses this Court’s precedent pertaining to the identification of limited-purpose public figures. *See McDowell v. Paiewonsky*, 769 F.2d 942, 948 (3d Cir. 1985); *Partington v. Bugliosi*, 825 F.Supp. 906, 917 (D.Haw. 1993) (quoting *Gertz*, 418 U.S. at 352), *aff’d.*, 56 F.3d 1147 (9th Cir. 1995) (requiring (1) the existence of a matter of public concern or controversy; and (2) a factual determination of the extent of the plaintiffs participation in that matter); (J.A. at 17.) As the Fourth Circuit Court of Appeals noted in *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1553 (4th Cir. 1994), while addressing the status of defamation plaintiffs subsequent to *Gertz*, this Court has developed a two-part inquiry for determining whether a defamation plaintiff is a limited-purpose public figure. *See Time, Inc. v. Firestone*, 424 U.S. 448, (1976); *Hutchinson v. Proxmire*, 443 U.S. 111, (1979); *Wolston v. Reader’s Digest Ass’n, Inc.* 443 U.S. 157 (1979). First, it must be determined whether there was a particular *public* controversy that gave rise to the alleged defamation. *Foretich*, 37 F.3d at 1553 (emphasis in original). Second, the nature and extent of the plaintiff’s participation in that particular controversy must be sufficient to justify “public

figure” status. *Id.* Because this standard most accurately encompasses the Court’s prior precedent on the matter, it shall be the standard utilized in this case.

Under the first prong of the standard, it must be determined whether there was a “public controversy” that gave rise to the alleged defamation. *Id.* The United States Court of Appeals for the District of Columbia has defined “public controversy” as follows:

A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way . . . [E]ssentially private concerns or disagreements do not become public controversies simply because they attract attention . . . Rather, 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.

Foretich, 37 F.3d at 1554 (citing *Waldbaum*, 627 F.2d at 1296). Therefore, if it is clear that resolution of the controversy will affect people who do not directly participate in it, the controversy is more than merely newsworthy and is of legitimate public concern. *Silvester*, 839 F.2d at 1494-95; *Waldbaum*, 627 F.2d at 1296.

In *Silvester*, the public controversy centered around corruption in the jai alai industry, including the allegation of illegal cooperation and alliance between jai alai players, management, and professional “system betters.” 839 F.2d at 1495. In determining whether the controversy was of legitimate public concern, the Court of Appeals for the Eleventh Circuit found that the potential loss of tax revenue because of corruption is evidence that resolution of the controversy could affect many others besides those directly involved or who were participants in the controversy. *Id.* In fact, the court noted that corruption in the industry also affects the “hundreds of thousands of citizens who patronize jai alai frontons each year.” *Id.*

In this case, the public controversy revolves around the alleged human rights violations Citrus, under the direction of Respondent, committed in its manufacturing facility outside of Mumbai, India. (J.A. at 6.) As one of the world’s top consumer electronics companies, the

subject of human rights violations within the corporation quickly became the topic of public debate. (J.A. at 2.) Included in this publicity was a highly-publicized discussion by Keith McRiley, host of the top-rated cable news show “The Countdown Factor,” who awarded Respondent as the “Most Heinous Individual in the Galaxy.” (J.A. at 6.) The results of such public debate resulted in a 25% drop in the company’s stock, which continued to drop in anticipation of declining sales. (J.A. at 6,7.) Additionally, numerous retailers, such as Q-Mart, pulled Citrus products from their shelves. (J.A. at 7.) Therefore, it is clear that resolution of the controversy affected many others besides those directly involved, including consumers and retailers located throughout the world. Consequently, the controversy qualifies as “more than merely newsworthy and is of legitimate public concern.” *Silvester*, 839 F.2d at 1495.

Next, the plaintiff’s role in the controversy must be analyzed in determining whether or not he qualifies as a public figure. *Foretich*, 37 F.3d at 1555. This Court has held that in conducting this analysis, it is preferable to look into the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation. *Gertz*, 418 U.S. at 352. Central to this inquiry is whether the plaintiff thrust himself into the “vortex” of the public issues, engaging the public’s attention in an attempt to influence its outcome. *Id.* The plaintiff must have achieved special prominence in the debate. *Waldbaum*, 627 F.2d at 1297. Additionally, the plaintiff either must have purposely been trying to influence the outcome or could realistically be expected, because of his position in the controversy, to have an impact on its resolution. *Id.* In this analysis, a court can look into the plaintiff’s past conduct, the extent of press coverage, and the public reaction to his conduct and statements. *Id.* at 1298.

In evaluating the nature and extent of Respondent’s participation in Citrus’ alleged human rights violations, the record reflects that Respondent has engaged the public’s attention on

numerous occasions. While acting as Director of Research & Development, Respondent has been extensively featured in the media both prior and subsequent to the July 8, 2008 webpage featured on *The Sludge Report* website. His hiring at Citrus was announced at a press conference at which he was not only present but also took the liberty of addressing the media himself. (J.A. at 3.) Additionally, his hiring and statement to the press were mentioned in an Associated Press news story printed in several newspapers. (J.A. at 3.) Finally, despite not personally conducting any subsequent interviews with the press, Respondent's brother, Kyle, has "gone out of his way" to praise his work in television and magazine interviews. (J.A. at 3.)

Additionally, the record reflects that as Director of Research & Development, Respondent has played an affirmative role in this controversy due to his influence over Citrus's internal workings and the process he oversees. (J.A. at 18.) While overseeing the development of the brand new ePlay Touché, which was to entrench the already popular ePlay brand as the premier portable music player on the market, Respondent made a number of visits to Mumbai. (J.A. at 7.) Although it is not clear whether he actually visited the factory during those visits, Respondent "could realistically [have] been expected" to have an impact on the controversy's resolution due to his presence in the country and position with the company. *Waldbaum*, 627 F.2d at 1297. Overall, this evidence demonstrates that Respondent was a limited-purpose public figure, and is therefore required to prove actual malice by clear and convincing evidence in order to sustain his cause of action for defamation.

C. Under the actual malice standard, Respondent fails to provide any clear or convincing proof that Petitioner published the story and Professor Chaos' photograph with reckless disregard or knowledge of falsity.

Under the standard outlined in *Foretich*, Respondent is a limited-purpose public figure. As such, he could only prevail in his defamation claim by showing that Petitioner published the article with actual malice or, in other words, “with knowledge that it was false or with reckless disregard of whether it was false or not.” *N.Y. Times Co.*, 376 U.S. at 279-80. This standard requires that a public figure, such as Respondent, must establish by clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. *Gertz*, 418 U.S. at 342.

While the concept of reckless disregard cannot be reduced into “one fallible definition,” the court has made it clear that the defendant must have made the publication with a “high degree of awareness of probable falsity.” *Bressler v. Fortune Magazine*, 971 F.2d 1226, 1228 (6th Cir. 1992) (quoting *Harte-Hanks*, 491 U.S. at 667). Such a finding cannot be measured objectively 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). Instead, the inquiry is “subjective,” focusing on whether the defendant “in fact entertained serious doubts as to the truth of his publication.” *Harte-Hanks*, 491 U.S. at 688.

Here, Respondent fails to provide any clear or convincing proof that Petitioner was aware of the probable falsity of Professor Chaos' photograph and email regarding Citrus. It should be noted that Petitioner's source, Professor Chaos, is not just an anonymous source. Instead, he is someone that Petitioner has known personally for approximately two years prior to the webpage

story in question. (J.A. at 5.) Since meeting Professor Chaos at an electronic tradeshow in 2006, Petitioner has received reliable information from Chaos concerning the release of various Citrus products, which Petitioner subsequently used in various stories posted on his site. (J.A. at 5.) Such a history allowed Professor Chaos to establish himself as a source of verifiable information, thereby diminishing the possibility that Petitioner had entertained any sort of serious doubts as to the truth of his publication regarding potential human rights abuses by Citrus.

Additionally, Petitioner's subjective antagonism against Citrus and the Broflovski brothers coupled with his general distrust of corporations further suggests that he fully believed that the information Professor Chaos delivered to him was true. (J.A. at 20.) The Court of Appeals erroneously concluded that because of this animosity towards Citrus and the Broflovski's, Petitioner "recklessly jumped to hasty conclusions about the meaning of the photograph." (J.A. at 32.) Furthermore, the Court noted that receipt of alleged proof of such human rights violations warranted follow-up investigations to determine their veracity. (J.A. at 31.) However, a simple failure to verify information, especially where the speaker has a bona fide belief in its accuracy, is plainly insufficient to establish actual malice, and falls far short of the requirement for clear and convincing evidence. (J.A. at 19.); *see also St. Amant*, 390 U.S. at 733 (citing *N.Y. Times Co.*, 376 U.S. 287-88) (failure to investigate goes not in itself establish bad faith). Here, Petitioner acted as could be expected of him, considering his long-standing relationship with a proven reliable source and general distrust of the Citrus corporation, and not with the knowledge or a reckless disregard that such information was false in part.

As the court found in *Bressler*, there is simply not enough evidence to show that the Petitioner actually "entertained serious doubts as to the truth of the publication." 971 F. 2d at 1233 (quoting *St. Amant*, 390 U.S. at 731). Consequently, Respondent has failed to meet his

burden under the actual malice standard to provide clear and convincing evidence of actual malice on the part of Petitioner in the publication of the photograph or commentary on his webpage. As such, the decision by the Court of Appeals for the Fifteenth Circuit should be reversed and remanded to the District Court, with instructions to enter summary judgment for the Petitioner.

CONCLUSION

Based on the preceding arguments, Petitioner respectfully requests that this Court reverse the Fifteenth Circuit: (I) because a qualified reporter's privilege exists pursuant to the First Amendment of the United States Constitution, Petitioner is a reporter, and the privilege has not been overcome; and (II) because Respondent is a limited purpose public figure and has failed to prove actual malice by clear and convincing evidence in order to sustain his cause of action for defamation.

Respectfully Submitted,

Attorneys for Petitioner

Team #102