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No. 09-2701

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*In the Supreme Court of the United States*

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**ERIC CARTMAN**  
*PETITIONER,*

v.

**IKE BROFLOVSKI**  
*RESPONDENT*

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

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**BRIEF FOR THE PETITIONER**

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Team No. 104  
Counsel for the Petitioner

## **QUESTIONS PRESENTED**

- I.** Is Eric Cartman protected by a reporter's privilege against revealing the identity of his confidential source if Ike Broflovski has neither established a compelling need for disclosure, nor exhausted reasonable alternative means of uncovering the source?
  
- II.** Is Eric Cartman liable to Ike Broflovski only upon a showing that Cartman acted with actual malice in publishing an allegedly defamatory photograph of Broflovski—a top executive in a high public *Fortune 500* company—is a limited purpose public figure?

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## **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

### I. SUMMARY OF THE FACTS

In June 2005, Eric Cartman (“Cartman”) launched the news blog *The Sludge Report*. (J.A. at 4.) Cartman updates *The Sludge Report* daily, posting stories on topics ranging from entertainment to politics. (J.A. at 4.) Readers have responded to the nationalist tone of the website, and Cartman’s insights on international trade. (J.A. at 4.) While *The Sludge Report* is, at times, critical of corporate America, its rhetoric has resonated with the people and it has generated an audience exceeding 100,000 readers. (J.A. at 4.) Often, it’s these readers that send Cartman inside scoops, allowing him to break stories even before the mainstream media picks them up. (J.A. at 5.)

One of Cartman’s most reliable tipsters goes by the name Professor Chaos (“Prof. Chaos”)—a pseudonym used to protect his identity. (J.A. at 5.) Cartman met Prof. Chaos two years ago at an electronics trade show. (J.A. at 5.) Since that time, Prof. Chaos has consistently provided Cartman with reliable inside information about the electronics giant, Citrus Corporation (“Citrus”). (J.A. at 5.) Like most of Cartman’s tipsters, Prof. Chaos sends the tips to an e-mail address linked to on *The Sludge Report*. (J.A. at 5.) Cartman states that sources who send tips or other information to this e-mail address are treated as confidential sources unless they request otherwise. (J.A. at 5.) In general, neither Cartman nor Blogeroo, the website that hosts *The Sludge Report*, have personal information about the anonymous tipsters. (J.A. at 5.)

On July 7, 2008, Prof. Chaos e-mailed a tip regarding the Citrus factory in Mumbai, India. (J.A. at 5.) In the e-mail, Prof. Chaos detailed human rights abuses conducted by Citrus under the direction of top Citrus executive Ike Broflovski (“Broflovski”). (J.A. at 5.) To support his account, Prof. Chaos attached a digital photograph depicting Ike berating assembly line

workers. (J.A. at 5.) The Citrus workers appeared to be in unsafe conditions and wearing minimal protective gear. (J.A. at 5.)

Citrus is a *Fortune 500* company specializing in consumer electronics. (J.A. at 2.) Though most electronics companies have suffered in the last decade, Citrus has enjoyed soaring stock prices. (J.A. at 2.) This success is largely due to Citrus' flagship product, the ePlay mobile media device. (J.A. at 2.) The ePlay has been so successful it is now considered a status symbol amongst teenagers and young adults. (J.A. at 2.)

Citrus' CEO and figurehead is Kyle Broflovski ("Kyle"). (J.A. at 2.) Kyle is a self-admitted celebrity whose company announcements garner significant media attention. (J.A. at 3.) At a press conference in 2006, Kyle appointed his brother Ike to be Citrus' Director of Research and Development. (J.A. at 3.) During the conference, Kyle praised his brother, calling him a "genius" and stating that Ike may "one day be as famous as I am." (J.A. at 3.) Ike promised to "push Citrus, its employees and its products to new heights." (J.A. at 3.) News of Ike Broflovski's appointment was reported by the Associated Press and printed in several newspapers. (J.A. at 3.)

On July 8, 2008, the positive press coverage turned around when Cartman released the inside account and photograph relayed to him by Prof. Chaos. (J.A. at 5-6.) Cartman posted the photo on *The Sludge Report*, accompanied by a strong critique of Citrus and Broflovski. (J.A. at 5-6.) The mainstream media quickly picked up the story. (J.A. at 6.) On August 19, 2008, it was even featured on the top-rated cable news show "The Countdown Factor." (J.A. at 6.) As a result of this negative attention, Citrus' stock dropped twenty-five percent (25%). (J.A. at 6.) Some retailers even removed Citrus' products from their stores. (J.A. at 7.) Ike Broflovski's attorney responded through the media, declaring the photo a fake and threatening a lawsuit. (J.A. at 7.)

## **II. PROCEDURAL HISTORY**

On September 20, 2008, Ike Broflovski filed the current suit in Silverado Superior Court. (J.A. at 7.) On October 14, 2008, the case was removed to the United States District Court for the Western District of Silverado. (J.A. at 7.) During discovery, Broflovski admitted that he had visited the Mumbai factory several times. (J.A. at 7.) It was also learned that Prof. Chaos' photo was likely doctored, in that Broflovski's image was superimposed. (J.A. at 7.) Cartman had photo software capable of detecting this type of digital distortion. (J.A. at 7.) Although Cartman occasionally used the software, he did not test Prof. Chaos' photo. (J.A. at 7.)

On December 15, 2008, Broflovski requested that Cartman disclose the identity of Prof. Chaos. (J.A. at 8.) Cartman refused, asserting a qualified reporter's privilege under the First Amendment. (J.A. at 8.) On January 8, 2009, Broflovski filed a motion to compel discovery. (J.A. at 8.) On January 16, 2009, Cartman filed a motion in opposition to the motion to compel, and a counter motion for summary judgment on the grounds that Broflovski is a public figure and has failed to provide clear and convincing evidence of actual malice. (J.A. at 8.)

The District Court denied the motion to compel and granted summary judgment for Cartman. (J.A. at 8.) The Court found that Cartman was presumptively protected by a qualified reporter's privilege that Brofloski had not overcome. (J.A. at 9, 12.) The Court also found that Broflovski was a limited purpose public figure and had not presented sufficient evidence of actual malice in order to sustain the suit. (J.A. at 14.) On February 5, 2009, Broflovski appealed to the United States Court of Appeals for the Fifteenth Circuit. (J.A. at 22.) The Fifteenth Circuit reversed on both counts, finding that no privilege for journalists exists under the First Amendment and that Broflovski was not a public figure. (J.A. at 23, 27.) On August 24, 2009, this Court granted certiorari.

## SUMMARY OF THE ARGUMENT

### **I. A REPORTER'S PRIVILEGE PROTECTS CARTMAN FROM DISCLOSING HIS CONFIDENTIAL SOURCE'S IDENTITY.**

Cartman enjoys a reporter's privilege rooted in the First Amendment. This Court acknowledged protection for reporters in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Following this Court's holding in *Branzburg*, a clear majority of circuits have recognized a presumptive, qualified reporter's privilege against disclosure of confidential information in civil matters.

Courts apply this privilege broadly, recognizing that the First Amendment does not create a "hierarchy of news." Rather than look to the reporter's affiliation with a traditional news outlet, courts focus on whether the reporter intended to disseminate information to the public. Once the privilege is invoked, the burden shifts to the party seeking discovery to show by clear and convincing evidence that the privilege is outweighed by competing discovery concerns.

Here, Cartman evinced a clear intent to relay Prof. Chaos' photograph and inside account to the public. The Fifteenth Circuit erred by ignoring *Branzburg* and categorically denying any reporter's privilege. The District Court correctly held that Cartman is presumptively protected by a reporter's privilege. Furthermore, Broflovski cannot overcome this burden. He has failed to establish a compelling need and has not exhausted reasonable alternative means of uncovering the information. The District Court properly weighed these competing concerns, and determined that the privilege had not been overcome.

### **II. CARTMAN IS NOT LIABLE FOR DEFAMATION.**

Cartman is not liable for publishing the allegedly defamatory photograph for two primary reasons. First, Broflovski is a limited purpose public figure because he played a central role in a matter of public concern. Second, Cartman did not act with actual malice in publishing the photograph.

Broflovski is a limited purpose public figure. As a top executive in charge of overseeing manufacturing and development for a *Fortune 500* company, Broflovski has taken on a position of special prominence in the debate concerning the treatment of workers in American-run factories overseas. Although he did not thrust himself into the vortex of a public issue, he assumed a position that drew him into the center of public debate. Because Broflovski played a central role in a matter of public concern, he is a limited purpose public figure.

Cartman did not act with actual malice in publishing the allegedly defamatory photograph. To prove actual malice, Broflovski must show that Cartman acted with knowledge of probable falsity or with reckless disregard for whether the photograph was false or not. Mere failure to investigate is insufficient to show actual malice. Broflovski has put forth no evidence to show that Cartman acted with knowledge that the photograph was doctored. Moreover, Broflovski has not put forth evidence to show that Cartman acted with reckless disregard for the truth. Rather, Cartman acted on the basis of a previously reliable source.

Because Broflovski is a limited purpose public figure and Cartman did not act with actual malice in printing the photograph, Cartman is not liable to Broflovski for defamation.

**I. CARTMAN, REPORTER AND EDITOR OF *THE SLUDGE REPORT*, IS PROTECTED BY A PRESUMPTIVE, QUALIFIED PRIVILEGE AGAINST DISCLOSING THE IDENTITY OF HIS ANONYMOUS SOURCE.**

The First Amendment protects the press so that they may serve as “a vital source of public information.” *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). Without such protections, reporters would be unable to obtain crucial information on pressing public issues. At a time where businesses and government are plagued by a lack of transparency, drastic restrictions on the ability of reporters to investigate and communicate the news is an untenable option.

The District Court correctly held that Cartman is shielded from disclosure of his confidential sources. First, Cartman is protected under the reporter’s privilege recognized by this Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972). While the circuits vary slightly on the scope of this privilege, an overwhelming majority recognize a presumptive, but qualified privilege against disclosing confidential information in civil cases. Second, Cartman is able to assert this privilege because he is a reporter and acquired information with the intent to disseminate it to the public. Finally, Broflovski cannot compel discovery because he has not presented a compelling need sufficient to overcome Cartman’s presumptive privilege.

**A. The Qualified Reporter’s Privilege, Arising From the First Amendment and Recognized by This Court in *Branzburg v. Hayes*, Presumptively Protects Reporters From Discovery of Confidential Information in Civil Matters.**

The First Amendment’s grant of freedom of the press is a constitutional protection that empowers journalists to serve as a check upon the government, encouraging them to “bare the secrets of government and inform the people.” *New York Times v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

This Court has long recognized the fundamental need for a press free from any prior restraint or censorship. *Grojean*, 297 U.S. at 249. However, noting the conflict between this need and the duty of all citizens to present evidence, this Court carved out a narrow exception to

the broad protections afforded by the First Amendment. *See Branzburg*, 408 U.S. at 666. Seizing on this holding, a clear majority of the circuits and states have recognized a presumptive, qualified reporter’s privilege against disclosure of confidential sources. James C. Goodale et al., *Reporter’s Privilege*, 952 PLI/Pat 161, 170 (2008). These efforts have helped to maintain a robust and meaningful press. But some circuits have mistakenly interpreted the narrow holding of *Branzburg* and denied reporters fundamental First Amendment protections. *See McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003); *Storer Comms. v. Giovan*, 810 F.2d 580, 583-84 (6th Cir. 1987). The Fifteenth Circuit goes even further, categorically eliminating any privilege for news reporters. (J.A. at 23.) This view is not shared by any circuit, and is unsupported by either the First Amendment or this Court’s precedent. Thus, this Court should reinstate the holding of the District Court.

**1. *This Court Recognizes a Qualified Reporter’s Privilege Arising Under the First Amendment.***

The First Amendment protects reporters from government interference in the development and printing of news. U.S. Const. amend. I; *Branzburg v. Hayes*, 408 U.S. at 667. In *Branzburg*, this Court recognized protection based in the First Amendment. *Id.* at 667, 709. The *Branzburg* Court examined grand jury proceedings in which reporters had refused to name their confidential sources. 408 U.S. at 681. Though the Court ordered disclosure in these criminal proceedings, eight Justices acknowledged that reporters are entitled to some protection against discovery. *See id.* at 667, 709, 725. This Court warned, “without some protection for seeking out the news, freedom of the press could be eviscerated.” *Id.* at 681. Thus, reporters are not required to disclose sources indiscriminately or merely on request. *Id.* at 681.

However, the Court also recognized the traditional importance of grand jury investigations into criminal matters. *Id.* at 707. Thus, rather than deny outright or uphold

unconditionally a reporter's privilege against all disclosure, the *Branzburg* Court carved out a narrow exception to the First Amendment's broad protections. This Court noted the "limited nature" of the holding, confining it to criminal matters where the need for discovery outweighed the fundamental protections conferred by the First Amendment. *Id.* (J. Powell, *concurring*). In all other instances, the privilege should be evaluated on a "case by case basis." *Id.* at 710.

The Fifteenth Circuit erred in holding that *Branzburg* "foreclose[s] the idea of a reporter's privilege inherent in the First Amendment." (J.A. at 23.) The Fifteenth Circuit states that this view agrees with the holdings of the Sixth and Seventh Circuits in *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) and *Storer Comm. v. Giovan*, 810 F.2d 580 (6th Cir. 1987) respectively. However, neither case supports this holding.

In *Storer*, the court rejected an absolute privilege for reporters in criminal cases. 810 F.2d at 581. It reasoned that this Court's decree to "strike a proper balance" between the freedom of the press and the obligation of all citizens to testify is honored simply by determining whether the inquiry is being brought in bad faith. *Id.* at 585. However, the *Storer* Court limited its holding to criminal cases, noting that the *Branzburg* Court likewise limited its holding. *Id.* at 585-86. The Fifteenth Circuit erroneously extends this analysis to civil matters. When the matter is civil, the stakes are lower and the interest in a free press need not be weighed against the interest in having citizens cooperate with a grand jury. *Carey v. Hume*, 492 F.2d 631, 632 (D.C. Cir. 1974); *Cervantes v. Time*, 464 F.2d 986, 993 (8th Cir. 1972).

In *McKevitt*, the court compelled discovery of recorded interviews of a criminal defendant. 339 F.3d at 531. However, the court based its holding on the fact that these interviews were non-confidential. *Id.* at 533. The court noted that "[w]hen the information in the reporter's possession does not come from a confidential source, it is difficult to see what

possible bearing the *First Amendment* could have on the question of compelled disclosure.” *Id.* Here, the identity of Prof. Chaos is confidential. (J.A. at 5.) Prof. Chaos sent the photographs to an e-mail address that Cartman had set up in order to keep the identity of his sources confidential. (J.A. at 5.) The Fifteenth Circuit erroneously applied *McKevitt’s* reasoning.<sup>1</sup>

The Fifteenth Circuit also errs by holding that *Branzburg* merely creates protection against grand jury inquiries conducted in bad faith. (J.A. at 24.) *Branzburg* does not define protection so narrowly. First, this Court noted, “news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.” *Branzburg*, 408 U.S. at 707-708. Courts have distinguished bad faith inquiries in general from inquiries directed at the press. As recognized in *Garland v. Torre*, “[i]f an additional *First Amendment* liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice.” 259 F.2d 545, 549 (2d Cir. 1958). The Fifteenth Circuit’s interpretation ignores this distinction, reading a fundamental right out of the First Amendment. Moreover, this interpretation impermissibly creates a bright line rule. In *Branzburg*, this Court recognized cases of bad faith require no balancing at all, because “harassment of the press...ha[s] no justification.” *Id.* Therefore, the mandate that the privilege be analyzed on a “case by case basis” is incompatible with the Fifteenth Circuit’s interpretation. *Id.* at 709.

**2. *A Qualified Privilege Protects Reporters in Civil Cases From Disclosing Confidential Sources by Carefully Balancing the Need for the Evidence Against the Vital Need for the Free Flow of Information.***

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<sup>1</sup> Some Circuits have gone so far as to recognize a privilege against disclosure of non-confidential information, noting the “paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters.” *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972). While the courts apply less weight to the privilege in these cases, they still engage in case-by-case analysis.

The District Court correctly interpreted *Branzburg* to provide for a presumptive, but qualified privilege against disclosure of confidential sources in civil cases. This is the interpretation shared by the clear majority of circuit courts. *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *Zerilli v. Smith*, 656 F.2d 705, 706 (D.C. Cir. 1981); *Baker*, 470 F.2d at 779. This allows for the case-by-case analysis mandated by *Branzburg* and gives appropriate weight to the competing interests. 408 U.S. at 709.

This privilege does not apply in every case. The critical question in determining whether a reporter is protected by the privilege is “whether the person, at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation.” *Von Bulow v. Von Bulow*, 811 F.2d 136, 143 (2d Cir. 1987). The District Court correctly applied this test, noting that a reporter may assert the privilege when the reporter: (1) intends to use information from an anonymous source in the dissemination of news; and (2) such intent existed when the information was obtained. (J.A. at 12) (citing *Von Bulow*, 811 F.2d at 142-43). This test honors the intent of the First Amendment while eliminating opportunistic use of the privilege by parties merely gathering information for personal use. *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 35 (2d Cir. 1998). Courts have applied this test broadly, including to reporters outside of the traditional news industry. *See Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (applying the privilege to “investigative book authors”); *See also Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) (applying the privilege to an independent documentary film-maker).

**3. *Alternative Methods of Protecting Reporters From Disclosing Confidential Sources Are Inadequate, and Do Not Provide a Level of Protection Consistent With This Court's Precedent.***

Not only is a federally recognized privilege mandated by the First Amendment, it is the best method for ensuring the free flow of information and for addressing the concerns noted in *Branzburg*. While it has been proposed that state shield laws, federal rules or guidelines, or Congressional act may adequately address such concerns, they are inadequate measures.

First, state shield laws are inconsistent and erratic. They are often difficult to invoke, because they rely on the reporter's affiliation with a specified news agency, rather than the intent the reporter held when gathering the information. See *Ohio Rev. Code Ann* §§2739.04, 2739.12 (West 2006); *Colo. Rev. Stat. Ann.* §13-90-199(1)(a) (West 2005). Specialized news agencies or other investigative bodies would be excluded from any protection under many of these shield laws, even if they operate in exactly the same manner as larger news outlets, simply because they lack affiliation with a long-standing institution. *Protecting the New Media: Application of the Journalist's Privilege to Bloggers*, 120 Harv. L. Rev. 996, 1000 (2007). This results in protection far below what this Court outlined in *Branzburg*, and impermissibly creates a "hierarchy of news." (J.A. at 11.) Furthermore, protection that varies state to state is ill suited to the regulation of a national industry such as the news.

Second, procedural rules are insufficient because they are vaguely worded and inconsistently applied. The Fifteenth Circuit contends that Federal Rule of Civil Procedure 26(c) is sufficient to protect reporters. (J.A. at 25.) This sentiment has been echoed with regard to Federal Rule of Evidence 501.<sup>2</sup> However, these rules have proven ineffective. This is illustrated by the widespread recognition of the privilege by a majority of the circuits. Using these standards alone, a district court would be unable to address this Court's concerns in *Branzburg*.

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<sup>2</sup> In criminal cases, some have contended that Department of Justice guidelines would be sufficient to protect reporters. However, these guidelines provide no enforceable rights. Rather, they merely guide the discretion of the prosecutor, who is free to ignore them at will. *In re Grand Jury Proceeding of Judith Miller*, 438 F.3d 1141, 1152 (D.C. Cir. 2006).

These rules are ambiguously worded and provide little guidance on how to weigh the privilege, or against what the privilege must be weighed.

Finally, while a Congressional statute would help courts define and enforce a reporter's privilege, one is not necessary. The Fifteenth Circuit erroneously gives weight to Congress' failure to pass a proposed statutory privilege. *See* Free Flow of Information Act, H.R. 2102, 110th Cong. (2007). Both H.R. 2102 and its modern incarnation, H.R. 985, 111th Cong. (2009) have enjoyed broad bipartisan support in both houses of Congress. Their failure to pass is based on disagreement over the scope of the privilege, rather than on any fundamental disagreement over a federally recognized reporter's privilege. Further, any privilege recognized would still have to be weighed against competing constitutional concerns. Thus, a Congressional statute would not fundamentally alter the analysis courts have engaged in since *Branzburg*.

**B. Cartman is Protected From Disclosing Prof. Chaos' Identity Because He is Entitled to a Presumptive Privilege Which Outweighs Broflovski's Modest Interest in Discovery.**

Cartman investigates society and business, uncovers note-worthy information, and relays it to a mass audience. (J.A. at 4.) The fact that he does this from home does not in any way change the character of his actions. Cartman is protected against disclosure of Prof. Chaos' identity for the following reasons. First, Cartman is able to assert the reporter's privilege against the disclosure of Prof. Chaos' identity because he held the requisite intent to disseminate the contents of Prof. Chaos' e-mail. Second, Broflovski cannot overcome this privilege because he cannot present an interest sufficient to justify the infringement of a constitutional right, nor has he exhausted his reasonable alternative means of acquiring the desired information.

- 1. *The District Court Correctly Found That Cartman is a Reporter, and Entitled to Invoke the Reporter's Privilege Against Disclosure of Confidential Sources.***

A party may assert the reporter's privilege against disclosure of information when the reporter: (1) intends to use information from an anonymous source in the dissemination of news; and (2) such intent existed when the information was obtained. *Von Bulow*, 811 F.2d at 142-43; *Shoen*, 5 F.3d at 1293.

Here, Cartman meets both elements of the test. First, Cartman regularly receives e-mails from readers, which he converts into news stories. (J.A. at 5.) He encourages his readers to send in leads on news stories, and states that those sending e-mails will be treated as confidential sources. (J.A. at 5.) His declaration that these tipsters would be "sources" indicates his intent to relay the information contained within as news. Second, Prof. Chaos had served as Cartman's source for news articles on Citrus on multiple occasions. (J.A. at 5.) This created a clear expectation from both parties that future e-mails would be used in the same manner. Third, Cartman posted the story soon after it was mailed in by Prof. Chaos. (J.A. at 5.) As the District Court noted, it is clear from the context that Cartman intended to use this information in the dissemination of news. (J.A. at 12.) Thus, Cartman is properly able to assert the privilege.

Some courts have added a third element to this inquiry, requiring that the reporter be "engaged in investigative reporting." *In re Madden*, 151 F.3d 125, 129 (3d Cir. 1998). This requirement inappropriately shifts the focus of the inquiry from the flow of information to the public, to the manner in which that information was acquired by the reporter. In *Madden*, the court denied protection for an entertainer who created fictional stories for promotional purpose at the request of the stories' subject. 151 F.3d at 130. Here, Cartman acquired inside information in order to inform the public about grave human rights abuses. (J.A. at 5.) The article was not merely for entertainment, and was certainly not sanctioned by Citrus.

Although some contend that the reporter's privilege should not apply to bloggers, this Court has long recognized that the freedom of the press granted in the First Amendment is not "confined to newspapers and periodicals." *Lovell v. Griffin*, 303 U.S. 444, 452 (1935). Furthermore, "the First Amendment does not create a hierarchy of journalism." *Id.* Rather, courts have interpreted the terms "reporter" and "journalist" expansively, noting this Court's holding that "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell*, 303 U.S. at 452.

Narrowly defining the term 'reporter' to exclude bloggers is in sharp contrast to the growing consensus among courts that bloggers are an integral part of the modern news media. *Blumenthal v. Drudge*, 992 F. Supp. 44, 45 (Dist. D. C. 1998). The blogging industry has emerged as a check upon the mainstream news itself, often correcting erroneous stories or exposing bias. Bloggers hold themselves out as journalists, and run all the same risks. Thus, they should be entitled to the same protections. *See Blumenthal*, 992 F. Supp. at 45.

Here, Cartman was able to assemble an audience of 100,000 readers by carefully selecting articles that would appeal to his audience and injecting his own insightful, albeit politically charged, commentary. (J.A. at 4-5.) Furthermore, his stories were picked up by major news outlets, indicating that they were viewed, even by industry professionals, as reliable and newsworthy. (J.A. at 5.) Denying Cartman protection simply because of the manner in which he relays this information is not supported by any principle of logic or law.

**2. *Broflovski Cannot Overcome Cartman's Presumptive Privilege Because Broflovski Does Not Have a Compelling Interest in Overriding Cartman's Privilege, Nor Has He Exhausted Other Reasonable Means For Obtaining the Information.***

Once the privilege has been invoked, it is not absolute. Rather, the burden shifts to the party seeking discovery to overcome the privilege. *Gonzales*, 194 F.3d 29, 30 (2d Cir. 1998).

Courts apply a balancing test in order to weigh the competing constitutional concerns and determine if discovery is warranted. *Id.* By establishing a balancing test, the matter is properly left to the sound discretion of the district courts. *LaRouche*, 780 F.2d 1134 at 1139. This comports with Justice Powell’s command that the privilege be evaluated on a “case by case basis,” and the task of weighing vital constitutional concerns is placed in the hands of the most capable body, a federal court.

The balancing test requires that the party seeking to overcome the privilege must show, by clear and convincing evidence, that: (1) the information sought is highly material and relevant to the litigation; (2) there is a compelling interest in obtaining the information, such that the party’s claim could not be maintained without it; and (3) the party has exhausted all other means reasonably available to obtain the information. *See Zerilli*, 656 F.2d at 713-14. This balancing test creates a clear standard that can be applied consistently by courts. Upon faithful application of the balancing test, Cartman’s First Amendment protections should be upheld.

First, the identity of Prof. Chaos is potentially relevant to Broflovski’s claim. Plaintiffs in defamation cases often assert that defendant deviated from the appropriate standard of care by relying on an untrustworthy source, but this alone does not override the reporter’s privilege. *Cervantes*, 464 F.2d at 993. It merely implies that the information is potentially relevant. *Id.* There is substantial danger in skipping this element of the balancing test. As the Eighth Circuit noted, “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.” *Id.* at 993 (fn 10). Although Prof. Chaos’ identity may be relevant, this alone cannot overcome Cartman’s privilege.

Second, there is no compelling interest in obtaining Prof. Chaos's identity. Broflovski would likely assert that obtaining the true identity of Prof. Chaos would help him prove that Cartman acted without due care in relying on Prof. Chaos' tips and photos. (J.A. at 13.) While this may go towards proving Prof. Chaos' actual reliability, it does not have any bearing on whether Cartman believed or had reason to believe that Prof. Chaos was reliable.

For example, in *Cervantes*, the court refused to compel disclosure of a reporter's confidential sources in a libel action. 464 F.2d at 987. The plaintiff claimed that these sources were necessary in order to prove actual malice. *Id.* However, the court noted that defendant had taken time to corroborate and support the information allegedly supplied by the confidential source. *Id.* at 994. Furthermore, the court noted that in light of plaintiff's limited evidentiary showing that the information was false, no discovery was necessary or warranted. *Id.*

Here, Cartman had every reason to believe that Prof. Chaos' tip was accurate. Cartman had previously received reliable tips from Prof. Chaos. (J.A. at 5.) These accurate tips affirmed Cartman's trust in Prof. Chaos, and left Cartman no reason to question Prof. Chaos' account. Broflovski has made no showing that the underlying claims in Cartman's article are false. *See infra* p. 29. Absent strong evidentiary support, the privilege cannot be overcome. *Cervantes*, 464 F.2d at 987. Even assuming that Prof. Chaos is an unreliable source, this would have little bearing on Broflovski's underlying claim. At most, it would provide Broflovski with a single alternative method of proving a single element of the four-part test for defamation. (J.A. at 15.) Such a minor gain does not overcome a fundamental constitutional right.

Finally, Broflovski is precluded from demanding disclosure because he failed to take alternative measures in order to uncover Prof. Chaos' identity. *Shoen*, 5 F.3d at 1296 (holding failure to exhaust alternative measures a necessary condition in overcoming reporter's privilege).

For example, in *LaRouche*, the court declined to override the reporter's privilege on the grounds that LaRouche had not exhausted reasonable alternative means of uncovering NBC's confidential sources. 780 F.2d at 1134. The court noted that LaRouche had not deposed all known persons who may have known the sources, and had failed to demonstrate unsuccessful, independent attempts to gain the requested information. *Id.*

Here, Broflovski has made even less of an effort to uncover the identity of Cartman's confidential source. Broflovski's efforts, in total, consisted of: (1) deposing the manager and top engineers of Citrus' Mumbai factory; and (2) sending an e-mail to Citrus employees requesting information on the source of the leak. (J.A. at 8.) These efforts are merely cursory. (J.A. at 14.) Broflovski did not: (1) sweep the company's servers in a search for the photo; (2) create a list of the workers with access to the specific section of the Mumbai factory on the nights of Broflovski's visits; or (3) depose a meaningful number of factory workers. (J.A. at 14.) All of these efforts would be trivial matters for Broflovski, one of Citrus' top executives. An e-mail sweep is a common measure often performed during discovery. Most importantly, Broflovski's assertions that the identity of Prof. Chaos is vital to his claim must be viewed in light of his failure to perform these basic tasks. These failures preclude Broflovski from overriding Cartman's First Amendment protection. *LaRouche*, 780 F.2d at 1134.

This element of the balancing test is the most critical, and should be afforded the most weight. As the *Branzburg* Court noted, the interest that must be weighed against the need for a free press is the interest in obtaining evidence and uncovering the truth. *Branzburg* 408 U.S. at 673. If the information sought can be obtained without a reporter's testimony, then the First Amendment protection stands unopposed and should be honored without reservation.

## **II. CARTMAN IS NOT LIABLE TO BROFLOVSKI FOR DEFAMATION BECAUSE BROFLOVSKI IS A LIMITED PURPOSE PUBLIC FIGURE AND CARTMAN DID NOT ACT WITH ACTUAL MALICE.**

Publishers are liable for defaming public figures only upon a showing that the publisher acted with actual malice in printing the defamatory material. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Cartman is not liable to Broflovski for two reasons. First, Broflovski is a limited purpose public figure because he played a central role in a matter of public concern. Second, Broflovski cannot show by clear and convincing evidence that Cartman acted with actual malice, because Cartman did not publish the allegedly defamatory photograph with actual knowledge of its falsity or with reckless disregard for whether it was true.

### **A. Broflovski is a Limited Purpose Public Figure Under This Court's Precedent.**

Broflovski is a limited purpose public figure under *New York Times* and its progeny. In *New York Times*, the Court held that the constitutional guarantees of freedom of speech and of the press require a federal rule that prohibits a public official from recovering damages for defamation relating to official conduct, unless he proves that the statement was made with actual malice. *New York Times*, 376 U.S. at 279-80. The Court defined actual malice as publishing with knowledge that the statement was false or publishing with reckless disregard for whether the statement was true. *Id.* This “constitutional safeguard” was “fashioned to assure unfettered interchange of ideas for the bringing about of...social change desired by the people.” *Id.* at 269.

In *Curtis Publishing Co. v. Wallace*, 388 U.S. 130, 155 (1967) the Court extended the *New York Times* rule to cover public figures. The Court reasoned that the citizenry had a legitimate interest in public figures' conduct, and that freedom of the press to engage in robust debate about their involvement in public issues was crucial to democratic government. *Id.*

In *Gertz v. Welch*, 418 U.S. 323 (1974) this Court further extended the *New York Times* rule to encompass limited purpose public figures. The *Gertz* Court held that a person who “voluntarily injects himself or is drawn into a particular public controversy” thereby becomes a public figure for a limited range of issues. 418 U.S. at 351. The *Gertz* Court reasoned that “such persons assume a special prominence in the resolution of public questions” and using an actual malice standard encourages wide-open, robust and uninhibited debate. *Id.* It has become “well-settled that private individuals may become limited-purpose public figures.” *Lohrenz v. Donnelly*, 350 F.3d 1271, 1278 (D.C. Cir. 2003).

**1. *This Court Should Adopt the Three-Pronged Limited Purpose Public Figure Test Used by a Plurality of the Circuits Because it Best Aligns With This Court’s Precedent.***

Since *Gertz*, the circuit courts have adopted a variety of standards, each trying faithfully to implement the *Gertz* Court’s decision. *McDowell v. Paiewonsky*, 769 F.2d 948 (3d Cir. 1985) (using a two-pronged test); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984) (using a four-pronged test). This Court should adopt the three-pronged limited purpose public figure standard, already used by a plurality of the circuits, because it “best comports with the Supreme Court’s commentary in *Gertz*.” *Harris v. Quadracci*, 48 F.3d 247, 251 (7th Cir. 1995).

In *Gertz*, the Court narrowed the plurality’s holding in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). 418 U.S. at 338-39. In *Rosenbloom*, the Court held that respondent was liable for defamation of a private person on an actual malice standard so long as the private person was involved in a public event. 403 U.S. at 70. The *Gertz* Court rejected this reasoning, finding that it would abridge the legitimate state interest in compensating private subjects of defamation to an “unacceptable degree.” 418 U.S. at 346.

The *Gertz* Court stated that a limited purpose public figure is one who “is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” *Id.* at 351. The Court reasoned that the actual malice standard is appropriate where a person has assumed “special prominence in the resolution of public questions.” *Id.* at 351. The Court noted that it is “preferable to reduce the public-figure question to a more meaningful context by looking at the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.” *Id.* at 352.

The three-pronged test is appropriate because it takes into account the reasoning in *Gertz*, and addresses each of the *Gertz* Court’s concerns. Under the three-pronged test, Broflovski is a limited purpose public figure if: (1) the controversy is a matter of public concern; (2) Broflovski played a more than “trivial or tangential” role in the controversy; and (3) the allegedly defamatory remarks are relevant to the public controversy. *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1494 (11th Cir. 1998); *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 433-34 (5th Cir. 1987).

This three-pronged analysis comports with *Gertz* for three reasons. First, this test does not rely solely on the “public event” standard set forth in *Rosenbloom*. Rather, whether an event is of ‘public concern’ is only the first prong of the limited purpose public figure inquiry. Because ‘public concern’ is only one prong, the test does not ‘unacceptably abridge’ the legitimate state interest in compensating private individuals for harm done by defamation. *See Gertz*, 418 U.S. at 346 (criticizing *Rosenbloom*).

Next, the second prong requires that a person must play a more than “trivial or tangential” role in the controversy. Similarly, *Gertz* mandates that a plaintiff either voluntarily inject himself or be drawn into the public controversy, putting him in a position of “special

prominence in the resolution of public questions.” *Id.* at 351. In *Gertz* the Court held that petitioner was a private individual because he played only a “minimal role” in a public controversy. *Id.* The three-pronged inquiry, because it requires that one play more than a ‘trivial or tangential role,’ produces analogous results.

Finally, the third prong requires that the court examine the context in which the alleged defamation was made, and determine if the remarks were germane to the public controversy. This echoes the *Gertz* Court’s reasoning that it is “preferable to reduce the public-figure question to a more meaningful context by looking at the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.” 418 U.S. at 352.

The three-pronged test is the proper standard because it affords sufficient “breathing space” to First Amendment values, while respecting the states’ interest in protecting private citizens from the harm caused by defamatory speech. *Gertz*, 418 U.S. at 342; *Rosenbloom*, 403 U.S. at 52. As the *Gertz* Court noted, “punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press...[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.” 418 U.S. at 340-41.

This Court need not “sacrifice the competing value served by the law of defamation.” *Id.* at 341. Rather, this Court should conclude that the widely-recognized three-pronged inquiry is the appropriate standard to determine whether Broflovski is a public figure.

**2. *The Four-Pronged Test Used by the Appellate Court is Unduly Restrictive and Does Not Give the First Amendment Sufficient “Breathing Space.”***

The Fifteenth Circuit erred when it adopted the four-pronged test promulgated by the Second Circuit. This test is unduly restrictive and does not comport with this Court’s precedent.

Under the four-pronged inquiry, for a plaintiff in a defamation suit to 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*, 745 F.2d at 136-137.

Supreme Court precedent does not mandate that the plaintiff must “successfully invite public attention prior to the remarks litigated.” Rather, under *Gertz* “it may be possible for someone to become a public figure through no purposeful action of his own.” 418 U.S. at 345. *See also Trotter*, 818 F.2d at 435-36 (responding to plaintiff’s allegation he was not a public figure because he did not actively engage the press— “[t]hese facts are to be taken into account, but they are not decisive. While an individual can achieve public-figure status by aggressively seeking public attention...an individual cannot erase public-figure status by limiting public comment and maintaining a low public profile.”).

Nor is the second prong supported by the *Gertz* decision. *Gertz* states that a limited purpose public figure is one who “voluntarily injects himself or is drawn into a particular public controversy.” *Gertz*, 418 U.S. at 351. Therefore, the Second Circuit impermissibly forecloses an entire class of people from becoming limited purpose public figures (those who are drawn into a particular controversy) to the detriment of the public, which deserves constitutionally protected ‘uninhibited, robust, and wide-open debate.’ *New York Times*, 376 U.S. at 720.

The Second Circuit’s third prong is also under-inclusive. It requires that the plaintiff take on a “position of prominence” in the public controversy. The only standard mandated by the Supreme Court in *Gertz* is that plaintiff’s role be more than ‘minimal.’ The more than minimal standard reconciles “state law with the competing interest grounded in the constitutional

command of the First Amendment.” *Gertz*, 418 U.S. at 349. As the *Gertz* court noted, it is “appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate state interest involved.” *Id.* The Second Circuit’s test allows the remedy to reach beyond the state interest involved and impinge on the constitutional protections found in the First Amendment.

Moreover, the final prong of the analysis is not mandated by *Gertz*. Although access to the media may be a factor in determining whether a defamation plaintiff is a limited purpose public figure, it is not dispositive. *Trotter*, 818 F.2d at 435-36. Thus, the four-pronged test used by the Second Circuit does not afford the First Amendment ‘breathing space’ and restricts uninhibited, robust and wide-open debate.

**D. Because Broflovski Played a Central Role in a Matter of Public Concern He is a Limited Purpose Public Figure Under the Three-Pronged Standard.**

Under the three-pronged standard, Broflovski is a limited purpose public figure if: (1) the controversy is a matter of public concern; (2) Broflovski played more than a “trivial or tangential” role in the controversy; and (3) the allegedly defamatory remarks are relevant to the public controversy. *Silvester*, 839 F.2d at 1494; *Trotter*, 818 F.2d at 433-34. Because Broflovski satisfies all three prongs, he is a limited purpose public figure.

**1. *Broflovski Satisfies the First Prong of the Limited Purpose Public Figure Inquiry Because The Working Conditions in American-Run Factories Overseas Are a Matter of Public Concern.***

The working conditions in the factories of *Fortune 500* Companies overseas are a matter of public concern.<sup>3</sup> A controversy is a matter of public concern if it is evident that the resolution

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<sup>3</sup> Several newspapers and books have explored the ramifications of working conditions in Indian factories specifically. See Mark Holmstrom, *South Indian factory workers: Their life and their word* (Cambridge University Press, 2008) (1976); Madeline Ravich, *Can International Attention Improve Factory Conditions?*, Qn, Publication of the Yale School of Management, 2009 at 81; Meg Milne, *Are you carrying a sweatshop bag when you go to the*

of the controversy will affect people who do not directly participate in it. *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980). If the issue is being debated publicly and has foreseeable and substantial ramifications for nonparticipants, it is a public controversy. *Id.* at 1297.

For example, in *Silvester* the court found that allegations of illegal cooperation and alliance between jai alai players, management, and professional systems betters were a matter of public concern. 839 F.2d at 1495. The court reasoned that because the jai alai industry was highly regulated and the controversy involved alleged violations of state regulations, the controversy was a matter of public concern. *Id.* The “potential loss of tax revenue” was evidence that the scandal “could affect many others” who did not directly participate in the controversy. *Id.* Further, the court noted that, “corruption in the industry also affects the hundreds of thousands of citizens who patronize jai alai frontons each year.” *Id.*

Similarly, the court in *Waldbaum* found that a grocery store that used pathbreaking marketing policies, unit pricing, open dating, and highly competitive advertising was a matter of public concern. 627 F.2d at 1299. The court reasoned that the store “was an innovative company often the subject of news reports...it attracted attention...and was the subject of public debate within the supermarket industry.” *Id.* Therefore, the court found that the wisdom of the store’s policies was a matter of public controversy. *Id.*

Here, the controversy is a matter of public concern far-exceeding the issues in *Silvester* and *Waldbaum*. Similar to the store at issue in *Waldbaum*, Citrus is an innovative company often the subject of news reports. (J.A. at 5-6.) Moreover, the conditions in American-run overseas factories are of much greater public importance than the “unit pricing” and “open dating” at issue

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*supermarket?*, S.C. New Sunday Express, Feb. 10, 2008, at 39; Madhur Singh, *Gap Threatens India’s Clothing Boom*, Time Magazine, October 29, 2007.

in *Waldbaum*. Just as corruption in the jai alai industry affects jai alai fans, the conditions of Citrus' Mumbai factory affect all consumers who purchase the popular ePlay or other Citrus' products.

Because the working conditions in the factories of popular American companies are matters of public concern, the controversy satisfies the first prong of the limited purpose public figure test.

**2. *Broflovski Satisfies the Second Prong of the Limited Purpose Public Figure Test Because He Played More Than a “Trivial or Tangential” Role in The Public Controversy.***

Broflovski, as the Director of Research & Development for a *Fortune 500* company, developer of the company's iconic ePlay Touché, and the man who looked forward to “pushing Citrus, its employees, and its products to new heights,” played a central role in the public controversy. (J.A. at 2-3.) To determine if Broflovski played a more than ‘trivial or tangential’ role, courts look—through the eyes of a reasonable person—at his past conduct, the extent of press coverage, and the public reaction to his conduct and statements. *Waldbaum*, 627 F.2d at 1297. Although Broflovski may contend that an individual can only achieve public figure status by “aggressively seeking public attention, or by exercising access to the media,” these are only some of the factors the court considers. *Trotter*, 818 F.2d at 436. In fact, “an individual cannot erase his public figure status by limiting public comment and maintaining a low public profile.” *Id.* at 435.

For example, in *Lohrenz v. Donnelly*, 350 F.3d 1272, 1274 (D.C. Cir. 2003) the court found that Lohrenz played a central role in the controversy about women in combat simply by choosing to fly combat jets. Although Lohrenz “never initiated any contacts with the media prior to the alleged defamation [her] new combat assignment made a few headlines.” *Id.* at 1275.

The court found that because “Lohrenz’s evidence shows that she chose the F-14 combat jet” while a controversy existed concerning women in combat roles, “her challenge to the ruling that she was a voluntary limited purpose public figure...rings hollow.” *Id.* Lohrenz contended that she was “at most on the broad periphery of a broad debate” and that “she was only trying to do her job and her involvement in the public controversy was tangential at best.” *Id.* at 1278, 1280. Lohrenz maintained that the “general controversy” about women in combat was insufficiently linked to her performance as a combat pilot to render her a public figure. *Id.* at 1280.

The court disagreed, holding that “a reasonable person would have concluded” that Lohrenz would play or was seeking to play a major role in determining the outcome of the women in combat controversy. *Id.* at 1281. The court continued that the controversy was not about Lohrenz’s “fitness or competence,” but rather about the “general question of women in combat.” *Id.* Because the controversy was whether women should be allowed in combat positions, the court found that Lohrenz’s “voluntary act of choosing combat aircraft” gave her special prominence in the controversy. *Id.*

Similarly, Broflovski accepted a position in a highly public *Fortune 500* company that had previously been criticized in the media. (J.A. at 4.) Although he had no media contact prior to assuming his position with Citrus, a press conference was held to announce his hire. (J.A. at 3.) Moreover, the Associated Press released a story on the conference that was printed in several newspapers. (J.A. at 3.) Much like Lohrenz, Broflovski assumed a position of prominence by accepting a Director position at a Company that had continuous contact with the media.

Moreover, Broflovski cannot—under the decision in *Lohrenz*—rationally construe the public controversy as one focused solely on his position at Citrus. Rather, the larger public

controversy—the conditions in American-run factories overseas—existed prior to Broflovski assuming a position of prominence in it. And a reasonable person could conclude that Broflovski, by accepting the Director position, played or was seeking to play a major role in determining the Citrus’ policies in Mumbai.

Broflovski contends that he cannot have public-figure status because he did not actively engage the public attention and his name did not appear very frequently in the press.<sup>4</sup> While “[t]hese facts are to be taken into account,” they are not decisive. *Trotter*, 818 F.2d at 436. This Court should find that Broflovski “cannot erase his public figure status by limiting public comment and maintaining a low public profile.” *Id.* Rather, Broflovski assumed a position of prominence in a public controversy, satisfying the second prong of the limited purpose public figure inquiry.

**3. *The Third Prong of the Limited Purpose Public Figure Test is Satisfied Because Cartman’s Allegations Were Germane to the Controversy Surrounding Conditions in American-Run Factories Overseas.***

The District Court correctly found the third prong of the limited purpose public figure test was satisfied because the alleged defamatory material was related to Broflovski’s participation in the controversy. (J.A. at 18.)

In *Silvester*, the court found that it was “self evident” that the defamatory parts of the 20/20 broadcast were germane to plaintiffs’ participation in the jai alai controversy. *Silvester*, 839 F.2d at 1494. The court noted that the primary concern of the segment was “the alleged corruption in the jai alai industry and the plaintiffs’ role in it.” *Id.*

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<sup>4</sup> Ike Broflovski argues that his brother, Kyle Broflovski, garners most of Citrus’ media attention. Kyle Broflovski, may, in many circumstances, deflect the media attention that rightfully belongs to Ike. Similarly, in *Lohrenz*, the court noted that Lohrenz’s commanding officer “succeeded in deflecting most the media attention.” 350 F.3d 1276. However, the court found that this was not dispositive of whether Lohrenz was a limited purpose public figure. *Id.*

Here, Cartman’s article focused on the conditions in American factories overseas. Moreover, the alleged defamatory portions of the reporting focused on Broflovski’s apparent participation in that controversy. Because the allegedly defamatory statements were germane to Broflovski’s participation in an on-going public controversy, the third prong of the limited purpose public figure inquiry is satisfied.

**E. Cartman is Entitled to Summary Judgment Because He Did Not Intentionally or Recklessly Make False and Defamatory Statements About Broflovski.**

Cartman is not liable to Broflovski for defamation because Cartman did not act with actual malice in printing the allegedly defamatory photograph. In order for Broflovski to even survive a motion for summary judgment, Broflovski must have set forth facts that would “permit a reasonable finder of fact, by clear and convincing evidence, to conclude that [Cartman] published a defamatory statement with actual malice as defined by Supreme Court cases.” *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 508 (1991); *Harris*, 48 F.3d at 252. Mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. *Gertz*, 418 U.S. at 332. Rather, a writer/publisher must have acted with a high degree of awareness of probable falsity. *Id.* This is because, as the Court noted in *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) “the stake of the people in public business...is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.”<sup>5</sup>

For example, in *Lohrenz* the court held that the publisher of a report containing falsehoods about a woman combat pilot did not act with actual malice despite evidence showing

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<sup>5</sup> In *St. Amant*, this Court held that, despite the publisher: (1) having no personal knowledge; (2) relying solely on another’s affidavit; (3) without evidence as to the veracity of the affidavit’s author; (4) failing to investigate or verify the information in the affidavit; (5) giving no consideration to whether the statements may be defamatory; and (6) not believing that it would be liable for the media broadcast because it was merely quoting another’s words, there was insufficient evidence to find actual malice. 390 U.S. at 730.

that the publisher was “on a mission to reinstate the ban against women being assigned to combat positions.” *Lohrenz*, 350 F.3d at 1284. Even though the publisher acted on “the basis of a biased source and incomplete information” the court found that that the evidence did not “demonstrate...that the defendants realized that their statement was false or that they subjectively entertained serious doubts as to the truth of their statement.” *Id.* (internal quotations omitted). Moreover, several top Naval officials had told the publisher in *Lohrenz*, prior to publication, that the conclusions were wrong. *Id.* at 1285. The court reasoned, however, that this was insufficient to show actual malice because a “publisher need not accept denials however vehement; such denials are so commonplace in the world of polemic charge that...they hardly alert the conscientious reporter to the likelihood of error.” *Id.*

Here, there is even less evidence of actual malice than in *Lohrenz*. Unlike the publisher in *Lohrenz*, Cartman did not act on the basis of a biased source, nor had he been told that his conclusions were wrong. Furthermore, under *Gertz*, failure to further investigate is insufficient to show actual malice. *Gertz*, 418 U.S. at 332 (noting “that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth.”) Rather, Cartman runs a news blog heavily dependent on anonymous sources for its stories. (J.A. at 4-5.) Unlike the publisher in *Lohrenz*, Cartman had no reason to doubt the information provided by Prof. Chaos. Rather, Cartman had previously received “reliable information from Prof. Chaos” regarding Citrus products, that he had used in various stories on his site. (J.A. at 5.) Because there is no evidence that Cartman recklessly published false information about Broflovski, he is not liable for defamation under an actual malice standard.

**CONCLUSION**

For the aforementioned reasons, this court should reverse the decision of the Court of Appeals for the Fifteenth Circuit, and reinstate the grant of summary judgment for Petitioner Eric Cartman.

Respectfully submitted,

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