

No. 09-2701

IN THE

Supreme Court of the United States

OCTOBER TERM, 2009

ERIC CARTMAN,

Petitioner,

v.

IKE BROFLOVSKI,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifteenth Circuit**

BRIEF FOR PETITIONER

TEAM 110

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether Eric Cartman is protected by a qualified reporter's privilege against court-compelled disclosure of the identity of an anonymous source in an online defamation claim.
 - A. Whether the First Amendment creates a qualified reporter's privilege against the court-compelled discovery of sources.
 - B. If A is answered in the affirmative, whether Eric Cartman qualifies as a reporter for the purposes of this defamation suit and is, therefore, entitled to shield the identity of his anonymous source.
2. Whether Eric Cartman, author of the Internet blog *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.

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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

Citrus's Ike Broflovski

Ike Broflovski, the Director of Research & Development for Citrus, is charged with overseeing the development of Citrus's anticipated ePlay Touché, the next generation of Citrus's flagship product. (J.A. at 2–3.) Citrus is a *Fortune 500* company helmed by Broflovski's brother Kyle. (J.A. at 2.) Citrus dominates the consumer electronics industry, having virtually cornered the market in personal computers, televisions, stereo systems, DVD players, mobile phones, and portable digital music players. (Id.) The ePlay, Citrus's portable digital music player, is a coveted status symbol among teenagers and twenty-somethings. (Id.) Citrus has thrived despite the dot-com bust because of its innovative and highly popular products. (Id.)

On August 7, 2006, Ike Broflovski was named Citrus's Director of Research & Development at a press conference covered by the Associated Press and reported on by several newspapers. (J.A. at 3.) After boasting that Citrus was on the verge of redefining the standard in mobile touch screen technology, Citrus CEO Kyle Broflovski introduced his 23-year-old "genius brother" to the media and promised a new and exciting line of Citrus products. (Id.) The wire story published in several newspapers included the news of Ike's hiring and his brief remarks at the press conference. (Id.) Despite Ike's efforts to maintain a low profile since arriving at Citrus, Kyle has gone out of his way to praise Ike's work, and customers in Citrus MegaStores across the United States are greeted by employees wearing "I Like Ike" buttons. (J.A. at 3–4.)

Under Ike Broflovski's direction, the ePlay Touché is manufactured around the clock in Mumbai, India, by employees working with minimal protective gear. (J.A. at 5, 7.) Broflovski has made numerous visits to Mumbai since ascending to the top of the ePlay product line. (J.A. at 7.)

Eric Cartman

Petitioner Eric Cartman is a small business owner and part-time Internet journalist in Lake Washoe, Washoe. (J.A. at 4.) Cartman is the sole proprietor of Cartman's Computer World, a slumping electronics repair and retail outlet. (Id.) After a Citrus MegaStore opened across the street from Cartman's strip-mall storefront, Cartman began blogging for profit in order to supplement his declining income. (Id.) Cartman's blog, *The Sludge Report*, has acquired an audience of over 100,000 readers who check the page for Cartman's nightly updates on an array of topics, ranging from celebrity gossip to local and international politics. (Id.) The blog reflects Cartman's decidedly populist and nationalist political views, which inform his belief that large companies engaged in international trade, especially Citrus, are driving him out of business. (Id.) Cartman's particular contempt for Citrus arises out of Citrus's practice of exporting jobs and engaging in "the systematic oppression of the peoples of the Third World." (Id.)

With its increased popularity, *The Sludge Report* contains more original reporting based on reader tips. (J.A. at 4–5.) The bulk of the material on *The Sludge Report* is links to news items Cartman finds on the Internet and the headlines of major newspapers. (J.A. at 4.) Cartman has also posted a link on the blog that directs readers to Cartman's personal email address. (J.A. at 5.) By using this link, Cartman's readers have anonymously provided scoops on protests, scandals in local and state government, and other information. (J.A. at 4–5.) Neither Cartman,

nor his third-party server, Bloggeroo, have any personal information about the users who provide anonymous tips to Cartman. (J.A. at 4, 5.)

Cartman Reveals Citrus's Exploitation of its Indian Workforce

One of Cartman's anonymous sources is a Citrus employee who takes the alias of "Professor Chaos." (J.A. at 5, 6.) After meeting face-to-face at a consumer electronics show two years ago, Professor Chaos has provided Cartman with reliable information about various Citrus products. (J.A. at 5.) Cartman relied on Professor Chaos's previous tips to publish stories on *The Sludge Report*. (Id.)

On July 7, 2008, Professor Chaos emailed Cartman a digital photograph that appeared to show Ike Broflovski walking through Citrus's Mumbai factory, yelling at the workers assembling the ePlay Touché. (Id.) The photograph showed workers wearing surgical masks and using factory machinery with minimal protective gear. (Id.) Professor Chaos's email alleged that Citrus, at Broflovski's direction, was forcing its employees to work sixteen hours a day, seven days a week, with few breaks. (J.A. at 6.) .

The following day, July 8, 2008, Cartman published his story, "Citrus Engaging in Acts of Modern-Day Slavery?" as *The Sludge Report's* lead story. (J.A. at 5.) Cartman's story detailed how Citrus and Ike Broflovski force their workers to work in deplorable, slave-like conditions, with the accompanying photograph. (J.A. at 6.) The mainstream media picked up the story after it spread rapidly throughout the blogosphere. (Id.) On August 19, 2008, Keith McRiley awarded Broflovski his nightly "Most Heinous Individual in the Galaxy" award on his top-rated cable news program. (Id.) McRiley credited Cartman with breaking the story and urged a boycott of Citrus. (Id.) In the outcry over Citrus's labor conditions, Citrus's stock fell 25%, and Q-Mart and its fellow retailers pulled Citrus products from their stores. (J.A. at 6-7.)

Broflovski never denied the allegations in Professor Chaos's email and claimed merely that the photograph is a total fabrication. (See J.A. at 7.)

Proceedings Below

On September 20, 2008, Ike Broflovski filed a defamation suit against Eric Cartman in Silverado Superior Court. (J.A. at 1.) On October 14, 2008, Cartman removed the case to the United States District Court for the Western District of Silverado. (J.A. at 7.) Discovery produced the following facts: (1) Broflovski made a number of trips to Mumbai, but it is unknown if he visited the factories; (2) though invisible to the naked eye, the photograph of Broflovski was likely doctored; (3) a sophisticated photographic scan revealed that Broflovski's image was superimposed on a photograph of the factory's night-shift workers; (4) Cartman recently installed software on his computer to detect photographic forgeries, but he has only used it a handful of times; and (5) Cartman did not test Professor Chaos's photo. (J.A. at 8.)

The Broflovskis made only a few, futile efforts to determine the source of the leak. (J.A. at 6.) The manager of the Mumbai factory and a few of his engineers were deposed. (Id.) Kyle Broflovski also sent an email to all Citrus employees requesting information on the leak. (Id.)

On December 15, 2008, Broflovski submitted an interrogatory to Cartman requesting the identity of Professor Chaos. (J.A. at 8.) On December 29, 2008, Cartman invoked his First Amendment qualified reporter's privilege and refused to respond. (Id.) On January 8, 2008, Broflovski moved to compel disclosure of Professor Chaos's identity, to which Cartman responded on January 16, 2008 by filing his opposition to the motion along with a motion for summary judgment on the defamation claim based on Broflovski's failure to adduce clear and convincing evidence that Cartman acted with actual malice. (Id.)

The Western District of Silverado denied Broflovski's motion to compel and granted Cartman's motion for summary judgment. (J.A. at 20.) The district court found that the First Amendment implies a qualified reporter's privilege that protects Cartman against compelled disclosure of an anonymous source. (Id.) Moreover, Cartman is protected from Broflovski's motion to compel because Broflovski had neither exhausted other means for obtaining Professor Chaos's identify nor demonstrated a compelling interest sufficient to arrogate Cartman's privilege. (J.A. at 12.) The district court also found that Broflovski was a limited-purpose public figure, so Cartman was entitled to summary judgment on Broflovski's defamation claim where Broflovski failed to produce evidence that Cartman acted with actual malice. (J.A. at 14–15.)

On February 5, 2009, Broflovski appealed the decision to the United States Court of Appeals for the Fifteenth Circuit. (J.A. at 22.) The Fifteenth Circuit reversed the district court and remanded for further proceedings. (J.A. at 32.) The court held that the First Amendment does not imply a qualified reporter's privilege, and, even if it did, Cartman's interest in maintaining Professor Chaos's confidentiality is outweighed by Broflovski's need for the evidence. (J.A. at 22.) The Fifteenth Circuit further held that Broflovski is not a public figure, because he declined to inject himself into a public controversy. (J.A. at 28.) Consequently, a reasonable jury could conclude that Cartman was liable under the less-stringent negligence standard applicable to private figures, so summary judgment was inappropriate. (J.A. at 30.)

On August 24, 2009, Cartman's petition for a writ of certiorari was granted by this Court.

SUMMARY OF ARGUMENT

The Fifteenth Circuit incorrectly held that the First Amendment does not imply a qualified reporter's privilege that covers bloggers such as Cartman. Further, the court erred in overturning the district court's decision to grant Cartman's motion for summary judgment; a

reasonable finder of fact could not conclude that Broflovski is not a limited-purpose public figure or that Cartman acted with actual malice in publishing information about Citrus' labor abuses.

When Cartman published information from a confidential source on his Internet blog, his source was shielded from court-compelled disclosure because the First Amendment implies a qualified reporter's privilege that protects against such disclosure in civil litigation. **(Part I.A.)** The First Amendment was ratified with the express intent to prevent unnecessary intrusions upon the freedom of the press that had been experienced by the Framers of the Constitution. **(Part I.A.1.)** This Court's precedent on a reporter's privilege to shield his sources from court-compelled disclosure only applies to criminal proceedings and not applicable to civil litigation. **(Part I.A.2.)** A vast majority of lower courts across the country have extended a qualified reporter's privilege in the context of civil litigation, allowing reporter's to protect their confidential sources. **(Part I.A.3.)**

Doubts of Cartman's qualifications as a legitimate journalist shielded by the First Amendment are unfounded because they ignore the weight of substantial precedent and the expanding development of the Internet as a forum for disseminating news to the widespread public. Circuit courts throughout the nation have historically expanded the scope of the First Amendment qualified reporter's privilege to new media, holding that the medium is irrelevant when reviewing whether the privilege exists. **(Part I.B.1.)** Moreover, modern bloggers are the functional equivalents of reporters by researching and breaking stories, gaining widespread readership, and becoming a primary source of information for the American public. **(Part I.B.2.)** Cartman's actions satisfy a two-prong test handed down by the Second Circuit that demonstrate he acted as a journalist by gathering his confidential source's information with the intent to publish that information. **(Part I.B.3.)** For these reasons the First Amendment's qualified

reporter's privilege doesn't distinguish between the relatively immaterial physical differences between Cartman's blog and the traditional media. Finally, Broflovski had not exhausted other means to obtain the confidential information that may be less burdensome on the freedom of the press than the blanket demand that Cartman must disclose his source. **(Part I.B.4.)**

In order for Broflovski to establish liability for defamation of character as a limited-purpose public figure, he must demonstrate that Cartman acted with actual malice. First, as someone who has reaped significant personal benefits from his prominent position in a worldwide consumer electronics firm, his direction of the firm's highest profile product, and the public's interest in the labor conditions at Citrus's factories, Broflovski cannot legally claim not to be a limited-purpose public figure. **(Part II.A.)** Because he is a limited-purpose public figure, Broflovski must produce clear and convincing evidence that Cartman acted with actual malice. **(Part II.B.)** Yet, discovery produced no such evidence. Moreover, Broflovski failed to demonstrate that Cartman had reason to believe his confidential source was anything but truthful. **(Part II.B.1.)** Broflovski's suggestions that the burden of investigating the veracity of the source's claims shifted to Cartman is irrelevant where Cartman had a bona fide belief in the truth of the allegations. **(Part II.B.2.)**

ARGUMENT

I. THE FIRST AMENDMENT IMPLIES A QUALIFIED REPORTER'S PRIVILEGE WHICH PROTECTS CARTMAN FROM COURT-COMPELLED DISCLOSURE OF HIS ANONYMOUS SOURCE BECAUSE BLOGGERS ARE THE LEGAL AND FUNCTIONAL EQUIVALENTS OF A REPORTER.

"The Liberty of the Press is a great Bulwark of the Liberty of the People: It is, therefore, the incumbent Duty of those who are constituted the Guardians of the People's Rights to defend and maintain it."

Cato's Letters, No. 15, Of Freedom of Speech: That the same is inseperable from publick Liberty (Feb. 15, 1720) (later incorporated in James Madison's original proposal for the First Amendment).

A. Branzburg Does Not Apply to Civil Litigation And there is Overwhelming Support in the Historical Record, Circuit Courts, and State Legislatures to Justify Finding a Qualified Reporter’s Privilege in the First Amendment.

The First Amendment implies a qualified reporter’s privilege that protects journalists from court-compelled disclosure of a confidential source. The historical record demonstrates that the Framers of the Constitution believed that the First Amendment believed that the First Amendment should protect the press and their sources from retaliation or punishment, even for unpopular messages. While this Court has analyzed the scope of the privilege in a criminal context, an overwhelming majority of circuit courts and states have found that the qualified reporter’s privilege exists in civil litigation.

1 The framers intended to imply a qualified reporter’s privilege in the First Amendment.

This Court has long held that the meaning of the Constitution necessarily depends on the original intentions its drafters. McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 358-59 (1995) (Thomas, J. concurring); see, e.g., Rhode Island v. Massachusetts, 37 U.S. 657, 721 (1838) (analyzing the Framers’ original intent to analyze the scope of Supreme Court’s jurisdiction).

A qualified reporter’s privilege is essential to preserving the ‘free press’ that was contemplated by the Framers when constructing the First Amendment. One of the primary purposes behind the First Amendment’s ratification was to protect confidential sources from retaliation and unpopular ideas from suppression. See, e.g., McIntyre, 514 U.S. at 357; see also Scott J. Street, “Poor Richard’s Forgotten Press Clause”: How Journalists can Use Original Intent to Protect their Confidential Sources, 27 Loy. L.A. Ent. L. Rev. 463, 465 (2007). In a common experience prior to the American Revolution, many of the Framers were forced to write under pseudonyms to avoid prosecution for criticizing the royal family or British government

who would often censure or jail any newspaper or pamphlet publisher who failed to disclose the identities of their anonymous authors. See id. at 465-67; see also David A. Anderson, The Origins of the Press Clause, 30 UCLA L. Rev. 455, 533-34 (1983). Seditious libel and government compulsion of anonymous sources were the primary forms of restraint on the press; therefore the “freedom of the press” clause written into the First Amendment suggests a reporter’s privilege to maintain the confidences of sources. See Id. at 515. The Framers’ concept of a free press implies a qualified reporter’s privilege because the privilege would have helped to protect them from retaliation for expressing unpopular ideas. Considering the historical record, this Court should find that the First Amendment implies a qualified reporter’s privilege.

2. This Court’s ruling in Branzburg distinguishes between criminal and civil proceedings and therefore does not apply to civil litigation.

This Court’s seminal ruling in Branzburg v. Hayes, 408 U.S. 665 (1972) compelled a reporter to disclose his source to the grand jury to aid in the detection and prosecution of individuals that have violated valid criminal laws. Id. at 689. While Branzburg is often cited for the proposition that the reporter’s privilege is not absolute, the Court goes to great lengths to explain how the freedom of the press is limited in *criminal proceedings*. Id. at 684-88 (explaining that the press has been excluded from scenes of crimes, grand jury proceedings, judicial conferences, and the press are often subpoenaed to answer inquiries relevant to criminal investigations) (emphasis added). Chief Justice Byron White asserted that “we cannot seriously entertain the notion that the First Amendment protects a newsman’s agreement to conceal the criminal conduct of his source...” in large part because effective law enforcement is in the public interest that overrides the interests in the press maintaining confidential sources. Id. at 690-92.

Branzburg's single-minded focus on criminal proceedings nevertheless excludes greater consideration of how civil litigation should consider the First Amendment privilege. Justice Powell's concurrence suggests that the majority opinion applies *only* to criminal prosecution and that the courts should consider a qualified reporter's privilege for "newsmen under circumstances where legitimate First Amendment interests require protection." Id. at 710. The great public interest in effective law enforcement that permeates the majority opinion in Branzburg does not hold true for civil litigation where the court-compelled disclosure of sources represents an undue invasion of First Amendment rights. As discussed below, lower courts have consistently interpreted Branzburg to apply to criminal proceedings only, leaving open the spectrum of civil litigation for a more appropriate balance of First Amendment privileges and individual interests.

3. The overwhelming majority of circuit courts and states that recognize a reporter's privilege and this Court's First Amendment jurisprudence weigh in favor of finding a privilege.

The overwhelming majority of the circuit courts of appeals have found that Branzburg limits the scope of the reporter's First Amendment privilege to criminal litigation, but that the precedent is not controlling in civil proceedings where the public interest in effective law enforcement is absent. Zerilli v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981); Carey v. Hume, 492 F.2d 631, 636 (D.C. Cir. 1974), cert. dismissed, 417 U.S. 938 (1974); Bill Kenworthy, Branzburg v. Hayes, Reporters' Privilege & Circuit Courts, First Amendment Center, <http://www.firstamendmentcenter.org/analysis.aspx?id=15525> (July 12, 2005).¹ The Fifteenth

¹ See United States v. LaRouche Campaign, 841 F.2d 1176, 1181-82 (1st. Cir. 1988) (recognizing a qualified reporter's privilege); New York Times Co. v. Gonzales, 459 F.3d 160 (2d. Cir. 2006) (same); In re Madden, 151 F.3d 125, 128-29 (3d. Cir. 1998) (same); In re Shain, 978 F.2d 850, 852 (4th. Cir. 1992) (same); Miller v. Transamerican Press, 621 F.2d 721, 725 (5th. Cir. 1980), cert. denied, 450 U.S. 1041 (1981) (same); Shoen v. Shoen, 5 F.3d 1289, 1292 (9th. Cir. 1993) (same); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 437 (10th. Cir. 1977) (same); United States v. Caporale, 806 F.2d 1487, 1504 (11th. Cir. 1986) (same); Zerilli, 656 F.2d at 711 (same).

Circuit however, takes the minority approach and relies on the Sixth and Seventh Circuits to support an erroneous interpretation of Branzburg. See In re Grand Jury Proceedings, 810 F.2d 580 (6th. Cir. 1987); McKevitt v. Pallasch, 339 F.3d 530 (7th. Cir. 2003) (doubting the existence of a reporter's privilege, but reaching no ultimate findings regarding its existence). The Fifteenth Circuit's holding fails to recognize the narrowness of the Branzburg holding, and it inappropriately ignores the majority of circuit courts that have ruled in favor of a qualified reporter's privilege in civil litigation.

Moreover, in weighing the question of a qualified reporter's privilege, this Court should consider that the collective will of the many states experiences should be afforded a strong presumption of constitutionality. See, e.g., McIntyre, 514 U.S. at 378 (Scalia, J. dissenting) (stating that if the constitutional text is unclear, the widespread and long-accepted practices of the American people are the next best indication of what fundamental beliefs the Constitution was intended to enshrine). Forty-nine states, plus the District of Columbia recognize a privilege either by statute or by case law. In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 986-87 (D.C. Cir. 2005) (Tatel, J. concurring), op. sup'seded by 438 F.3d 1141. This is overwhelming evidence that the states, where the great deliberations of the nation occur, have asserted that a qualified reporter's privilege is worth preserving in order to protect the freedom of the press.

If this Court fails to be persuaded by the overwhelming majority of states and circuit courts that have found a qualified reporter's privilege, then it need look no further than its own jurisprudence. This Court has strong precedent of using the First Amendment to protect anonymous communications. See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 166-67 (2002) (finding a local ordinance unconstitutional because it violated First Amendment principles of allowing people to support public causes anonymously);

McIntyre, 514 U.S. at 357 (finding that decisions concerning omissions or additions to a publication is protected by the First Amendment); Talley v. California, 362 U.S. 60, 64 (1960) (finding that the First Amendment protects the distribution of unsigned handbills). In many respects, an expansion of Branzburg to civil litigation would be at odds with these more recent decisions, but finding that the First Amendment implies a civil qualified reporter's privilege would be entirely consistent with this Court's protection of anonymous communications.

Finally, there is a great societal interest in a qualified reporter's privilege for civil litigation. Without a First Amendment qualified reporter's privilege to protect confidential sources from court-compelled disclosure, freedom of the press will be eviscerated. Branzburg, 408 U.S. at 682. Thus, if this Court fails to find a qualified reporter's privilege, it is likely that sources will be deterred from giving information, and reporters will be deterred from publishing information that relies on a confidential source. James Thomas Tucker and Stephen Wermiel, Enacting A Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason, 57 Am. U. L. Rev. 1291, 1300 (2008). Confidential conversations will be chilled and the public will be deprived of valuable reporting. Id.; see Brief for ABC, Inc., et al., as Amici Curiae Supporting Petitioners, at *7, Drogin v. Lee, 547 U.S. 1187 (2006) (No. 05-969, 05-1114) (numerous unnamed sources, including "Deep Throat" were protected under a pledge of confidentiality when they gave information on the Watergate scandal, and the federal courts did not disturb this promise of confidentiality); New York Times Co. v. United States, 403 U.S. 713, 717, 754 (1971) (Harlan, J., dissenting) (recognizing it was in the public interest for newspaper to rely on anonymous sources and report on the Vietnam war, by revealing secret workings of the government, the newspapers did what the Framers had hoped they would do); John E. Osborn, The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of

Subpoenas, 17 Colum. Hum. Rts. L. Rev. 57, 74 (1985) (almost two-thirds of all Pulitzer Prize winning stories contain information from a confidential source).

This Court should be persuaded that the majority of circuit courts and nearly every state have found a qualified reporter's privilege in civil litigation. Further, this Court's own jurisprudence places a high premium on protecting anonymous communications under the First Amendment, and protecting the public interest in quality reporting is also paramount.

B. The First Amendment's Qualified Reporter's Privilege Against Court-Compelled Disclosure of Confidential Sources Shields Cartman Because Bloggers Are the Functional and Legal Equivalent of Reporters.

The First Amendment's qualified reporter's privilege against the court-compelled discovery of confidential sources protects a wide range of journalists. Though few courts have examined whether the privilege extends to Internet journalists such as Cartman, this Court's has held that the press liberties guaranteed by the First Amendment "[are] not confined to newspapers and periodicals." Lovell v. City of Griffin, 303 U.S. 444, 452 (1938). Lower courts have relied on this tenet to cover new forms of media under the First Amendment qualified reporter's privilege, suggesting that the natural progression will be to cover bloggers. As further evidence, bloggers are already assuming the roles and responsibilities of traditional media by researching, investigating and reporting on issues for widespread readership. These blogs are surpassing in popularity the major newspaper readership and broadcast television viewership, and rapidly becoming the way Americans receive information. Cartman's blog is already the functional equivalent of traditional media sources covered by the qualified reporter's privilege.

Lower courts apply a two-prong test that analyzes when an individual acts as a reporter normally covered by the qualified reporter's privilege. In this instance a fact-based inquiry of Cartman's actions demonstrate that he met each prong of the two-part test when he published Citrus's labor abuses on his blog because, first, he used the information from his confidential

source in the dissemination of public information, and second, he intended to use that information when he initially collected it.

1. Courts have regularly expanded the First Amendment’s qualified reporter’s privilege to cover new and evolving types of media.

As the media has evolved, courts have correspondingly expanded the coverage of the First Amendment’s qualified reporter’s privilege to new types of journalists. See generally, Melissa Troiano, The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs, 55 Am. U. L. Rev. 1447, 1472 (2006). Though the question of whether a blogger is considered a journalist for the purposes of the qualified reporter’s privilege has not been expressly answered by any circuit or this Court, precedent indicates that the privilege should cover new journalists such as Cartman.

The rise of new media has required the regular reconsideration of the scope of the qualified reporter’s privilege. Lower courts have adopted this Court’s position that “[T]he liberty of the press is not confined to newspapers and periodicals...The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.” Lovell, 303 U.S. at 452; see also Von Bulow v. Von Bulow, 811 F.2d 136, 144-45 (2d Cir. 1987) (“the constitutional guarantees of a free press do not discriminate based on medium”); Shoen, 5 F.3d at 1292; In re Madden, 151 F.3d 125, 129 (3d Cir. 1998).

Under such guidance, circuit courts and other district courts consistently affirm the invocation of the qualified reporter’s privilege by new “journalists”. See generally Shoen, 5 F.3d at 1293 (investigative book authors); Silkwood, 563 F.2d 433 (independent documentary filmmakers); King v. Photo Mktg. Ass’n Int’l, 327 N.W.2d 515, 517-18 (Mich. Ct. App. 1982) (trade magazines and newsletters); Cusumano v. Microsoft Corp., 162 F.3d 708 (1st Cir. 1998) (pre-publication manuscripts of an academic); Summit Tech., Inc. v Healthcare Capital Group,

Inc., 141 F.R.D. 381 (D. Mass. 1992) (independent researcher and analyst hired by an institutional investor); Blum v. Schlegel, 150 F.R.D. 42 (W.D.N.Y. 1993) (students); Apicella v. McNeil Labs., Inc., 66 F.R.D. 78, 85 (E.D.N.Y. 1975) (CEO of technical medical).

The Internet, though it represents a vast capability that the Framers of the Constitution may not have envisioned, is an extension of communication that has clear First Amendment implications. See generally ACLU v. Reno, 521 U.S. 844 (1997). Confronting this question for the first time, this Court held in ACLU v. Reno that the Internet is “the most participatory form of mass speech yet developed” and “a far more speech-enhancing medium than print.” 521 U.S. at 854. Despite its differences with traditional media, the Internet represents a brave new world of free speech. Blumenthal v. Drudge, 922 F. Supp. 44, 48 (D.D.C. 1998).

Despite such wholly unique circumstances, in the only opportunity to consider whether bloggers should be considered journalists, a California District Court echoed the spirit of Lovell by holding that new media are not to be treated any differently for the purpose of the qualified reporter’s privilege than the institutionalized press. O’Grady v Superior Court, 139 Cal. App. 4th 1423, 1437 (2006); cf. Jarvik v. Cent. Intelligence Agency, 495 F. Supp. 2d 67, 69 (D.D.C. 2007) (avoiding the question of whether a personal blog qualified as journalistic activity). In O’Grady, the district court found “[n]o sustainable basis to distinguish [bloggers] from newsgatherers who provide news to the public through traditional print and broadcast media. They gather, select and prepare for the purposes of publication to a mass audience, information about current events of interest and concern to that audience.” Id. at 1437. The First Amendment’s qualified reporter’s privilege shielded the blogger from compelled disclosure of a confidential source. Id. at 1432. Notably, the respondent failed even to challenge the existence of the First Amendment’s implied protection for bloggers. Id. at 1467.

While opponents of the freedom of the press may want to decry the O’Grady decision as an outlier, the clear evidence of this Court’s own jurisprudence as well as the developing law of circuit courts highlight that the qualified reporter’s privilege does not set barriers for those special media it will cover and those that are not. Lovell, 303 U.S. at 452. The constitutional guarantees of the First Amendment do not make choices between mediums. Rather, there is no legal difference between the modern blogger such as Cartman and the traditional media outlets that have been covered by the qualified reporter’s privilege.

2. As a blogger, Cartman serves as the functional equivalent of a modern day journalist.

The most recent advancement in mass communication has been the widespread use of the Internet, which despite the capacity for “people to communicate with one another with unprecedented speed and efficiency,” Blumenthal, 922 F.Supp. at 48, the Internet nevertheless shares with its predecessors the same fundamental intent to disseminate information to the public. O’Grady, 139 Cal. App. 4th at 1437. As such, bloggers like Cartman are the modern derivatives of the lonely pamphleteer, the newspaper reporter, or the television investigative journalist, all covered by the qualified reporter’s privilege.

Despite the mainstream media’s doubts that bloggers are truly journalists, Americans are increasingly receiving more of their news from the Internet at the expense of traditional media outlets. According to a December 2008 Pew Research Center survey, 40 percent of U.S. adults get most of their news from the Internet, compared to 35 percent from newspapers. Andrew Kohut, Pew Research Center for the People and the Press, Internet Overtakes Newspaper as News Outlet 1 (Dec. 23, 2008), <http://people-press.org/reports/pdf/479.pdf>. This figure skyrockets to 59 percent for younger adults. Id. In July 2006, new surveys estimated that the U.S. blog readers grew to an estimated 57 million adults—39% of the US online population.

Amanda Lenhart, Pew Internet & American Life Project, Bloggers: A portrait of America's new storytellers 1 (July 19, 2006), <http://www.pewinternet.org/Reports/2006/Bloggers.aspx>.

Readership is not the only indicator that blogs are supplanting traditional media outlets. Investigative bloggers like Cartman report key stories that have either been missed or neglected by the traditional media outlets. Bloggers broke stories on CBS's erroneous reporting of President George W. Bush's National Guard Service, the "Swift Boat Veterans for Truth", and the White House credentialing conservative activist James Guckert. See generally David L. Hudson, Jr., First Amendment Center, Blogging 1 (Nov. 2005). As a result of investigative reporting, a blogger was awarded the prestigious George Polk Award for legal reporting. Noam Cohen, Blogger, Sans Pajamas, Rakes Muck and a Prize, N.Y. Times, Feb. 25, 2008, at C1. Bloggers have even now being credentialed at political conventions. Jennifer Lee, Web Diarists Are Now Official Members of Convention Press Corps, N.Y. Times, July 26, 2004.

Bloggers function by collecting, editing and then publishing content, just like any other news organization. See Troiano, 55 Am. U. L. Rev. at 1475. Even an analysis of the dictionary definition of "journalism"—"[t]he collection and editing of news for presentation through the media."—shows that the meaning of journalism is broad enough to include non-traditional sources. Merriam-Webster Online, Merriam-Webster Online Dictionary: Journalism (2009), <http://www.merriam-webster.com/dictionary/journalism>. There is no mention of any material differences that could limit the scope of the term to an indiscriminate societal conception of traditional reporters.

Cartman's blog may not physically manifest itself in the same manner as a traditional newspaper report, but such comparisons obscure the more important functional similarities. Cartman, in reporting on Citrus's labor abuses utilized an available communication outlet to

relay a story that had not been presented by the traditional media. (J.A. at 4-5.) Once initially published, his blog got picked up by other media sources for dissemination (J.A. at 6), much like an Associated Press story gets picked up by newspapers across the country. Finally, *The Sludge Report* has a larger readership—100,000 readers—than many smaller newspapers. (J.A. at 4.)

His medium aside, a blogger like Cartman is no different than a *New York Times* journalist. Such functional similarities cannot be dismissed in the consideration of whether a qualified reporter's privilege attaches to bloggers.

3. The First Amendment's qualified reporter's privilege applies to Cartman because he intended to use the information from his confidential source in the dissemination of public information and that intent existed when the information was obtained.

In publishing the photograph and story about Citrus's labor abuses occurring in Mumbai (J.A. at 4-5), Cartman's actions exceeded a two-prong test that determines whether he acted as a reporter entitled to protection by the First Amendment. A fact-based analysis demonstrates that Cartman's intent was to publish his source's information about Broflovski, and that he intended to do so when he obtained the information.

Courts have adopted a two-prong test to determine whether an individual acted as a journalist in disseminating information. Von Bulow, 811 F.2d at 144; see also Schoen, 5 F.3d at 1293. The Von Bulow test is a functional analysis that distinguishes between those who acted as newsgathers and those who are not fulfilling legitimate social roles as journalists. Id. at 145. First, the journalist must show that he intended to use the information from an anonymous source in the dissemination of public information, and second, that the intent existed when the information was obtained. Id. at 144. Though the proponent of the privilege bears the burden to demonstrate this intent, courts are unconcerned with "prior experience as a professional journalist" and the medium involved. Id. at 144-45. Bloggers of all kinds can depend on the

qualified reporter's privilege so long as they can demonstrate that they acquired the sought-after information with the intention of publicizing it.

For all of his sources, Cartman took measures to offer a link on *The Sludge Report* to his email address. (J.A. at 5.) This link wasn't used for casual conversation, but rather an avenue to collect information for possible publication. (Id. (“Neither Carman nor Bloggeroo have any personal information about the users who send Cartman emails unless those users disclose the information to him in their email or through other means.”).) As part of his standard policy, Cartman established a presumption of anonymity with all potential sources that send information to this address. (Id.) There can be no clearer statement that Cartman intended to widely disseminate the information that he was gathering from this email address.

In this instance, Cartman published an unsolicited photograph and story from Professor Chaos. (J.A. at 5.) The interaction between Cartman and this source did not extend beyond the professional journalist-source relationship that developed over several years. (Id.) For two full years, Cartman received and published information from this source. (Id.) When his source provided Carman with the photographs and allegations, there was no question that Cartman would use this information for the broader dissemination to the public. Cartman's inner deliberations will never be known, but his previous interactions of collecting this tip and publishing them both strongly suggest that he had the requisite intent to publish the information about Citrus's labor abuses from Professor Chaos at the time the information was collected.

Cartman's actions satisfy the Von Bulow two-prong test; he intended to use the material gathered to dissemination information to the public and that intent existed when he gathered the news. The central focus of the Von Bulow test is to distinguish between those acting as individuals and those acting as reporters. Von Bulow, 811 F.2d at 145. The record clearly

demonstrates that Cartman was fulfilling a role of an investigative reporter, albeit on a different medium, and he intended to disseminate information at the time such news was gathered. He should therefore be shielded by the First Amendment.

4. The qualified reporter's privilege protects Cartman from court-compelled disclosure because his First Amendment rights as a reporter outweigh Broflovski's interest in obtaining the information.

In civil litigation, a cause of action for defamation will not automatically override the invocation of the qualified reporter's privilege. See Cervantes v. Time, 464 F.2d 986, 994 (1972); see generally, Branzburg, 408 U.S. at 682 (stating that the Court is not attempting to require the press to indiscriminately disclose sources upon request). The overwhelming majority of circuit courts have adopted the test that the compelling party may only overcome the privilege upon a *clear and specific* showing that the information is: (1) highly material and relevant to the litigation; (2) necessary and critical to the maintenance of the claim; and (3) not obtainable from other available sources after all other means have been exhausted. United States v. Cutler, 6 F.3d 67, 71 (2d. Cir 1993).

First, the inherent worth of speech does not always depend upon the identity of its source, even in individual cases. McIntyre, 514 U.S. at 353-54 (identifying an anonymous author may be particularly intrusive). The Fifteenth Circuit stated that only if the source is highly disreputable is the identity probative of recklessness. (J.A. 26.) Professor Chaos however, is a reputable, credible source. The worth of his speech does not depend on his identity; rather its worth should be measured by his reputation for providing Cartman with accurate, truthful information for the last two years. It is improbable that disclosing his identity will suddenly render him 'highly disreputable.' Thus, Professor Chaos's identity is not *per se* relevant to resolve the merits of Broflovski's defamation claim because it is not probative to prove recklessness.

Second, the identity of the source may provide some evidence of his relative trustworthiness. See Carey, 492 F.2d at 637. Unreliability of the source is only one method of proving fault in a defamation claim. (J.A. at 13.) The district court noted that the reporter's due diligence in verifying or corroborating the source's claim, or lack thereof, is another way to prove fault. (Id.) Thus, Professor Chaos's identity is not necessary or critical for Broflovski to argue the fault element of his claim. He is free to use other methods to prove fault that are not intrusive to Cartman's First Amendment qualified reporter's privilege.

Last, the court of appeals erred in finding that Broflovski has exhausted all other possible means to obtain the information. Moreover, the court of appeals argued that we cannot conflate Broflovski's power to investigate within Citrus with his brother Kyle's. (J.A. at 26-27.) This assertion is inconsistent with the discovery that Kyle Broflovski has already engaged in on his brother's behalf. The Broflovskis jointly have made a few, futile attempts uncover Professor Chaos's identity, including: deposing the manager of the Mumbai factory and a few engineers were deposed; and emailing Citrus employees to ask for leads on the leak. (J.A. at 6.) The district court noted that the Broflovski's could easily review Citrus' internal records, or sweep the servers to see if the photograph and the email originated from one of its user accounts (J.A. at 14.) Those actions are not wholly different from the actions already undertaken, and they are not at all intrusive of Cartman's qualified reporter's privilege.

Cartman's First Amendment qualified reporter's privilege outweighs Broflovski's interest in obtaining Professor Chaos's identity. That identity is not highly material to the claim, nor is it necessary or critical to proving fault, and Broflovski has come far from exhausting all available means to obtain the identity of Professor Chaos. The Fifteenth Circuit should be reversed and

Broflovski's motion to compel denied because he has failed to show with clear and convincing evidence that his interests outweigh Cartman's First Amendment qualified reporter's privilege.

II. CARTMAN IS NOT LIABLE FOR DEFAMATION BECAUSE BROFLOVSKI IS A LIMITED-PURPOSE PUBLIC FIGURE AND CANNOT DEMONSTRATE THAT CARTMAN ACTED WITH ACTUAL MALICE.

The First Amendment protects the media from liability when public figures complain of defamation. See generally N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). A public figure can prevail in a defamation claim only upon a showing by clear and convincing evidence that the defendant made third-party communications with "actual malice." Curtis Publ'g Co. v. Butts, 388 U.S. 130, 160 (1967). Cartman and the rest of the media are "entitled to act on the assumption that . . . public figures have voluntarily exposed themselves to increased risk of injury by defamation" because each has "relinquished . . . part of his interest in the protection of his good name." Thomas v. Tel. Publ'g Co., 155 N.H. 314, 929 A.2d 993 (2007). Because Broflovski is a limited-purpose public figure in connection with the public controversy over American manufacturers outsourcing high-paying American jobs to third-world sweatshops, the Fifteenth Circuit should be reversed.

A. Broflovski Must Be A Limited-Purpose Public Figure Because He Cannot Hide Behind Privacy After Reaping Benefits From His Prominent Position in a Dominant Consumer Electronics Firm with Suspect Overseas Labor Practices.

The Fifteenth Circuit should be reversed because it applied the Second Circuit's overly restrictive Lerman test in holding that Broflovski is not a limited-purpose public figure. Lerman v. Flynt Distrib. Co., 745 F.2d 123, 136–37 (2d Cir. 1984). The "limited-purpose" public figure doctrine is based on the ideas (i) that public figures have greater access to media for the purpose of rebutting falsehoods; and (ii) that those who seek the public arena must accept the heat of the fire as part of the price of entering the kitchen. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–46 (1974). A plurality of Circuits have adopted tests less-stringent than Lerman's that

require a showing that (i) the relevant controversy is a matter of public concern; and (ii) the plaintiff plays more than a trivial or tangential role in the controversy. See Silvester v. Am. Broad. Cos., 839 F.2d 1491, 1494 (11th Cir. 1988); Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 433–34 (5th Cir. 1987); McDowell v. Paiewonsky, 769 F.2d 942, 948 (3d Cir. 1985); Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1296–98 (D.C. Cir. 1980); Partington v. Bugliosi, 825 F. Supp. 906, 917 (D. Haw. 1993), aff'd, 56 F.3d 1147 (9th Cir. 1995).² Lerman goes well beyond the Gertz rationale and privileges public figures who timidly seek notoriety by requiring a showing that the public figure was notorious *because of* his or her involvement in the relevant public controversy. This Court should adopt the plurality, two-step analysis because it more closely follows the Court's reasoning in Gertz.

1. Citrus's use of slave-like labor conditions in its Mumbai ePlay Touché factory is a legitimate matter of public concern.

Cartman's posting on *The Sludge Report* brought to light the deplorable, slave-like labor conditions in which Citrus manufactures its ePlay Touché. Despite Citrus's best efforts to hide its sweatshop practices, these working conditions constitute a legitimate public controversy that can render Broflovski a limited-purpose public figure. Courts have repeatedly found public controversies to exist even where the issue giving rise to the allegedly defamatory speech was previously secret. See, e.g., Lawrence v. Moss, 639 F.2d 634 (10th Cir.), cert. denied, 451 U.S. 1031 (1981) (plaintiff alleged to be a "bagman" for former Vice-President Spiro Agnew); Rosanova v. Playboy Enters., Inc., 580 F.2d 859 (5th Cir. 1978) (plaintiff alleged to have connections to organized crime); Schultz v. Reader's Digest Ass'n, Inc., 468 F. Supp. 551 (E.D. Mich. 1979) (involving Teamster leader Jimmy Hoffa's disappearance). The public may have a general interest sufficient to constitute a public controversy in organized crime, political

² The Fifth, Eleventh, and District of Columbia Circuits add a third element, uncontested here, that the allegedly defamatory remarks relate to the public controversy.

corruption, attorney misconduct, or consumer protection, for example, but be not yet aware that a specific individual has a crime connection, or is guilty of political abuse, or is involved in attorney misconduct, or has perpetrated consumer fraud. See Rosanova, 580 F.2d 859 (organized crime); Rancho La Costa v. Superior Court, 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980) (same); Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982) (same); Lawrence, 639 F.2d 634 (political corruption); Littlefield v. Fort Dodge Messenger, 614 F.2d 581 (8th Cir.) cert. denied, 445 U.S. 945 (1980) (attorney misconduct); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980) (consumer protection); Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932 (2d Cir.) (same). Many courts have held that this type of situation satisfies the public controversy requirement. See Steaks Unlimited, 623 F.2d 264; Yiamouyiannis, 619 F.2d 932; Rosanova, 580 F.2d 859; Marchiondo, 649 P.2d 462 (N.M.); but see Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979) (general interest in KGB operations in the United States did not qualify as a general public controversy).

A public controversy is a dispute that has received public attention because its ramifications will be felt by people other than the direct participants. Carr v. Forbes, Inc., 259 F.3d 273, 280 (4th Cir. 2001); Avins v. White, 627 F.2d 637 (3d Cir. 1980) (public controversy existed over accreditation of law school); Fitzgerald v. Penthouse Int'l, Ltd., 525 F. Supp. 585 (D. Md. 1981) (public controversy existed regarding use of dolphins for military and intelligence purposes); Bose Corp. v. Consumers Union of the United States, 508 F. Supp. 1249 (D. Mass. 1981) (public controversy existed regarding quality of plaintiff manufacturer's speaker systems).

Undoubtedly, the practice of corporations like Citrus to export manufacturing jobs to developing countries in order to exploit sweatshop conditions and ineffective labor regulations is a public controversy. Since the 1996 revelation that television personality Kathy Lee Gifford's

Wal-Mart clothing line was manufactured by pre-teen girls in Honduran sweatshops, the American public has been vigilant about corporate overseas labor practices. See, e.g., Nancy L. Mensch, Codes, Lawsuits, or International Law: How Should the Multinational Corporation Be Regulated With Respect to Human Rights?, 14 U. Miami Int'l & Comp. L. Rev. 243, 244 (2006). As recently as 2007, popular clothing retailer Gap, Inc., was pilloried in the press for reports that it employed ten-year old Indian children to manufacture the Gap Kids line of clothing. See Dan McDougall, Indian 'Slave' Children Found Making Low-Cost Clothes Destined for Gap, The Observer (Oct. 28, 2007). In response, Gap, Inc., terminated its relationship with the supplier and publicized its history of overseas labor monitoring. See Larry Cata Baker, Multinational Corporations as Objects and Sources of Transnational Regulation, 14 ILSA J. Int'l & Comp. L. 499, 508–17 (2008). Importantly, Gap, Inc., reported its *history*—prior to any allegations of sweatshop conditions—of labor monitoring and disclosures, Id., demonstrating that Gap, Inc., was well aware of the damage caused by sweatshop allegations and took prophylactic action to avoid precisely the situation in which Broflovski and Citrus now find themselves.

Citrus is a major manufacturer “at the top of the consumer electronics industry” (J.A. at 2) and is undoubtedly aware of the history of negative publicity that have damaged blue-chip companies like Wal-Mart, Gap, Inc., and Nike, see Nike, Inc. v. Kaskey, 539 U.S. 654 (2003), after their exploitative labor practices were made public. These concerns are especially prevalent among the ePlay’s core demographic of teenagers and twenty-somethings, as illustrated by the near-decade long campaign by the Worker Rights Consortium to enroll colleges and universities in the Designated Supplier Program, which ensures that no college-logo apparel is produced in conditions like Citrus’s factory in Mumbai. See, e.g., Press Release, Indiana University, “IU Affirms Commitment to Designated Supplier Program” (March 7, 2006). The ongoing, global

fight for human rights protections for factory workers is precisely the type of public controversy found to be based on general concerns about “community values.” Wells v. Liddy, 186 F.3d 505, 540 (4th Cir. 1999). As such, Broflovski is a limited-purpose public figure if he voluntarily embroiled himself in the public controversy over corporate exploitation of slave-like labor conditions.

2. As Citrus’s Director of Research & Development in charge of the ePlay Touché, Broflovski is the public face of Citrus’s new premier product line and, therefore, centrally involved in the controversy over the conditions of its manufacture.

While courts have repeatedly held that merely being a director of a corporation does not make a plaintiff a public figure, Tavoulaareas v. Piro, 817 F.2d 762, 773 (D.C. Cir. 1987), the Plaintiff himself is not in control of the First Amendment standard, Rosanova, 580 F.2d at 861. “It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn’t choose to be. It is sufficient . . . that [the plaintiff] voluntarily engaged in a course that was bound to invite attention and comment.” Id. When a figure like Broflovski has “chosen to engage in a profession which draws him regularly into regional and national view and leads to fame and notoriety in the community, even if he has no ideological thesis to promulgate, he invites general public discussion.” Chuy v. Phila. Eagles Football Club, 341 F. Supp. 254, 267 (E.D. Pa. 1977). While a party cannot be compelled into public figure status, Firestone v. Time, Inc., 424 U.S. 448, 453 (1976), where a person, by his actions, voluntarily assumes responsibility for a public controversy he becomes a public figure in the context of that controversy, Carr, 259 F.3d at 280–81. Similarly, a person can become a public figure in a controversy through “sheer bad luck,” Dameron v. Wash. Magazine, Inc., 779 F.2d 736 (D.C. Cir. 1985), or by knowingly stepping into a controversial role, Lohrenz v. Donnelly, 350 F.3d 1272 (D.C. Cir. 2003).

In Lohrenz, the plaintiff was one of only two female combat fighter pilots in the United States military in the early 1990s. Following an accident aboard an aircraft carrier that killed the other female combat pilot, the plaintiff became the focus of public scrutiny and accused of incompetence. The plaintiff argued that by avoiding media attention and not boasting of her unique status, she was not a public figure in the controversy over women in combat. The District of Columbia Circuit disagreed, holding that a legitimate controversy existed over women in combat, and that the plaintiff was well aware of the controversy when she put herself forward for combat duty. 350 F.3d at 1296–97.

Broflovski has behaved similarly. The public has monitored overseas labor practices for more than a decade, and Citrus is intimately involved in overseas manufacture of its popular electronics. When Broflovski accepted his position as the head of the team designing the new generation of ePlay Touché, he knowingly accepted a role in the controversy he attempted to conceal. See Lawrence, 639 F.2d 634; Rosanova, 580 F.2d 859. Broflovski’s shyness cannot save him from being a public figure. See Lohrenz, 350 F.3d at 1297.

Moreover, Broflovski’s cult celebrity within the community of Citrus fanatics may render him a limited-purpose public figure. Goldreyer, Ltd. v. Dow Jones & Co., 259 A.D.2d 353, 687 N.Y.S.2d 64 (1999) (notoriety within the art appraisal world sufficient to render plaintiff a limited-purpose public figure). Broflovski’s brother regularly publicized his involvement, advertising Broflovski’s importance to the ePlay project, and shoppers in Citrus stores across the country are greeted to employees wearing “I Like Ike” buttons. Courts have routinely held such that advertising invites just this variety of investigation and criticism. See Quantum Elecs. Corp. v. Consumers Union of the U.S., Inc., 881 F. Supp. 753, 765–66 (D.R.I. 1995); Prager v. Am. Broad. Cos., 469 F. Supp. 1229, 1236–38 (D.N.J. 1983); Bose Corp., 508 F. Supp.; Reliance Ins.

Co. v. Barron's, 442 F. Supp. 1341, 1341 (S.D.N.Y. 1977); Univ. of the S. v. Berkley Publ'g Corp., 392 F. Supp. 32, 33 (S.D.N.Y. 1974).

Just like the female fighter pilot in Lohrenz, Broflovski cannot accept the admiration of his industry and the interested public when times are good, and then seek to escape involvement in an emergent public controversy based on his desire for privacy. Broflovski may refrain from interviews, but he is not in control of the First Amendment. Because Broflovski is intimately involved in the controversy over Citrus's slave-like labor practices, he is a limited-purpose public figure.

B. Cartman Is Entitled to Summary Judgment Because Broflovski Failed to Produce Clear and Convincing Evidence that Cartman Published the Photograph and Allegations with Actual Malice.

As a limited-purpose public figure, Broflovski's defamation claim fails unless he can prove by clear and convincing evidence that Cartman disseminated information about Citrus's slave-like labor conditions with actual malice. Broflovski cannot prevail here because he has not advanced evidence to show that Cartman disseminated false information either (i) knowingly or intentionally; (ii) or with reckless disregard for the truth or falsity of the matter. Sullivan, 376 U.S. at 279–80. A simple failure to verify information, particularly 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. See St. Amant v. Thompson, 390 U.S. 727, 733 (1968). As Broflovski has failed to adduce evidence that Cartman knew that the photograph of Broflovski overseeing Citrus's slave-like labor conditions was doctored, he can only prevail upon a showing that Cartman acted with subjective "serious doubts about the truth of his publication" or with "a high degree of awareness of . . . probably falsity." Harte-Hanks Comm'ns, Inc. v. Connaughton, 491 U.S. 657, 688 (1989). Absent the necessary evidence, Cartman is entitled to summary judgment and the Fifteenth Circuit should be reversed.

1. Despite several rounds of discovery, Broflovski has failed to produce clear and convincing evidence that Cartman had anything but a bona fide belief that Professor Chaos spoke truthfully.

After several rounds of discovery Broflovski remains unable to provide clear and convincing evidence of malice on Cartman's part. Actual malice is a subjective standard, requiring an inquiry into Cartman's state of mind. Harte-Hanks, 491 U.S. at 688. As most defendants do not admit to serious doubts about the veracity of the information published, circumstantial evidence is an appropriate means of proving actual malice. Tavoulaareas, 817 F.2d at 789. Evidence likely to provide support a finding of actual malice includes (i) evidence the story was fabricated; (ii) evidence the story was so inherently improbable that only a reckless man would have put it in circulation; or (iii) evidence that the story was based wholly on an unverified anonymous source the defendant had "obvious reason to doubt." Id. at 790 (citing St. Amant, 390 U.S. at 732).

At the close of discovery, Broflovski has determined that the photograph Cartman distributed was likely doctored. (J.A. at 7.) Broflovski has also learned that Cartman did not test the photograph for doctoring using all means at his disposal prior to disseminating it. (Id.) The record also shows, however, that Professor Chaos had repeatedly given Cartman reliable information in the past and that the doctoring of the photograph was invisible to the naked eye. (J.A. at 5, 7.) This evidence is woefully inadequate to demonstrate actual malice. Broflovski has not demonstrated that the story is wholly fabricated. Broflovski has failed to suggest the allegations are inherently improbable. And as Cartman was familiar with Professor Chaos and his previously reliable tips, Broflovski has no evidence of the third variety. As such, Cartman is entitled to summary judgment.

2. Cartman’s failure to conduct further investigation into the truth or falsity of the allegations is irrelevant where he had a bona fide belief in the truth of the allegations.

Broflovski is not permitted to rely on inferences drawn from Cartman’s failure to corroborate or investigate the photograph’s veracity prior to publication in order to satisfy his onerous burden of proof. The mere failure to investigate, even when that failure is less than reasonable or responsible journalism, does not, in and of itself, meet the actual malice standard. Desnick v. Am. Broad. Cos., 233 F.3d 514 (7th Cir. 2000). Courts have repeatedly held that a plaintiff cannot prove actual malice based solely on a failure to investigate, including failure to check against information already in internal files, Sullivan, 376 U.S. at 287, failure to contact obvious sources, Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440, 447 (S.D. Ga), and failure to investigate where defendant knew of bias of source, Tavoulaareas, 759 F.2d at 117–20. Cartman’s subjective bias against Citrus does not and cannot prove actual malice. The mere fact that the photograph was later determined to have been doctored cannot render Cartman’s allegations defamatory. This coincidental fabrication is precisely the type of “falsehood” requiring constitutional protection to ensure that “the freedoms of speech and press [receive] that ‘breathing space’ essential to their fruitful exercise.” Gertz, 418 U.S. at 342. Where Professor Chaos had previously provided Cartman with reliable information about Citrus products (J.A. at 5), Cartman’s failure to investigate the authenticity of the photograph prior to its publication cannot form the basis of Broflovski’s evidence of actual malice.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Fifteenth Circuit

Respectfully submitted,
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October 2, 2009