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No. 09-2701

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SUPREME COURT OF THE UNITED STATES

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ERIC CARTMAN  
*PETITIONER*

v.

IKE BROFLOVSKI  
*RESPONDENT*

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ON APPEAL FROM THE COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT  
NO. 481-5162-342, CHIEF JUDGE MACKAY

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BRIEF FOR THE PETITIONER

TEAM NUMBER: 111

## **QUESTIONS PRESENTED**

- I. WHETHER PETITIONER ERIC CARTMAN IS PROTECTED BY A QUALIFIED REPORTER'S PRIVILEGE AGAINST COURT-COMPELLED DISCLOSURE OF AN ANONYMOUS SOURCE IN AN ONLINE DEFAMATION CLAIM.
  
- II. 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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## TABLE OF AUTHORITIES

### CASES:

*Baker v. F & F. Investments, et al*, 470 F.2d 778 (2d Cir. 1972)

*Branzburg v. Hayes*, 408 U.S. 665, 729 (1972)

*Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583 (1st Cir. 1980)

*Church of Scientology Int'l v. Daniels*, 992 F.2d 1329 (4th Cir. 1993)

*Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 160 (1967)

*Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308 (5th Cir. 1995)

*Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975)

*Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958)

*Gertz v. Welch*, 418 U.S. 323 (1974)

*Gonzales v. NBC*, 194 F.3d 29 (2d. Cir. 1998)

*In re Grand Jury Subpoena*, 438 F.3d 1141 (D.C. Cir. 2006)

*In re Madden*, 151 F.3d 125 (3d Cir. 1998)

*In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5 (2d Cir. 1982)

*In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004)

*James v. Gannett Co.*, 40 N.Y.2d 415, 423, 386 N.Y.S.2d 871, 353 N.E.2d 834 (1976)

*LaRouche v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir. 1986)

*Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984)

*Lovell v. Griffin*, 303 U.S. 444 (1938)

*Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980)

*N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006)

*New York Times Co. v. Sullivan*, 375 U.S. 254 (1964)

*Perk v. Reader's Digest Ass'n, Inc.*, 931 F.2d 408 (6th Cir. 1991)

*Scarce v. United States (In re Grand Jury Proceedings)*, 5 F.3d 397 (9th Cir. 1993)

*Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993)

*Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977)

*Silvester v. Am. Broad. Cos.*, 839 F.2d 1491 (11th Cir. 1988)

*St. Amant v. Thompson*, 390 U.S. 727 (1968)

*Storer Communications, Inc. v. Giovan*, 810 F.2d 580 (6th Cir. 1987)

*Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987)

*Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431 (5th Cir. 1987)

*United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986)

*United States v. King*, 194 F.R.D. 569 (E.D. Vir. 2000)

*United States v. Smith*, 135 F.3d 963 (5th Cir. 1998)

*Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980)

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

#### CONSTITUTIONS, STATUES, AND RULES:

U.S. Const. amend I.

Virginia Declaration of Rights § 12 (1776)

Free Flow of Information Act. H.R. 2102, 110th Cong. (2007)

#### SECONDARY SOURCES:

James C. Goodale et al., *Reporter's Privilege*, 952 PLI/Pat 161, 170 (2008)

James Thomas Tucker & Stephen Wermiel, *Enacting A Reasonable Federal Shield Law: A Reply To Professors Clymer And Eliason*, 57 Am. U.L. Rev. 1291, 1294-95 (2008)

## **JURISDICTIONAL STATEMENT**

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

## **STATEMENT OF THE CASE**

On September 20, 2008, Ike Broflovski ("Respondent") filed suit in Superior Court for the State of Silverado against Eric Cartman ("Petitioner"). Respondent Broflovski brought a common law cause of action for defamation, alleging Petitioner Cartman published false information on his online journal, or "blog," accusing Respondent and his company, Citrus Electronics, Inc. ("Citrus") of human rights violations in oversight of a Citrus manufacturing plant in Mumbai, India. Petitioner removed the case to the United States District Court for the Western District of Silverado on diversity grounds on October 14, 2008. On January 8, 2009, Respondent moved to compel discovery pursuant to Fed. R. Civ. P. 37, seeking the identity of Petitioner's anonymous source on which he based his published allegations. On January 16, 2009, Petitioner filed a reply motion both opposing the compelled disclosure and moving for summary judgment. On January 27, 2009, the District Court denied Respondent's motion to compel disclosure and granted Petitioner's motion for summary judgment. On February 5, 2009, Respondent filed a timely notice of appeal to the United States Court of Appeals for the Fifteenth Circuit. On May 14, 2009, the Fifteenth Circuit reversed the decisions of the District Court and remanded the case for further proceedings. Petitioner filed a timely appealed this Court for certiorari, which this Court granted on August 24, 2009.

## SUMMARY OF THE ARGUMENT

The Court of Appeals for the Fifteenth Circuit erred in ruling that Petitioner Eric Cartman, as a journalist, is not protected by a qualified reporter's privilege against disclosure of his confidential sources. This Court should reverse the decision of the Fifteenth Circuit and find that Petitioner, as a reporter, has a qualified right against compelled disclosure of a confidential source. The Court should so find because (1) a free and independent press is fundamental to our constitutional way of life; (2) Petitioner's First Amendment rights cannot be infringed absent a compelling or paramount interest, such as a grand jury investigation of a crime; and (3) Respondent has failed to satisfy the three prongs of the balancing test enunciated by Justice Stewart in *Branzburg v. Hayes*. The Court should further recognize Petitioner Eric Cartman's qualified reporter's privilege against court-compelled disclosure of his confidential source because Respondent has not demonstrated a compelling or paramount interest that overrides Petitioner's First Amendment rights. Finally, the Court should find that Petitioner qualifies as a reporter and is therefore protected by the qualified privilege against compelled disclosure of a confidential source because he regularly gathers and reports information to the public for profit.

## ARGUMENT

I. THE COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT ERRED IN RULING THAT PETITIONER ERIC CARTMAN, AS A JOURNALIST, IS NOT PROTECTED BY A QUALIFIED REPORTER'S PRIVILEGE AGAINST DISCLOSURE OF HIS CONFIDENTIAL SOURCES.

A. Background

The First Amendment of the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend I. This constitutional protection of the "Fourth Estate" is "deeply rooted in the press's unique role in

promoting speech and self-governance for all Americans.” James Thomas Tucker & Stephen Wermiel, *Enacting A Reasonable Federal Shield Law: A Reply To Professors Clymer And Eliason*, 57 Am. U.L. Rev. 1291, 1294-95 (2008) (discussing history and purpose of First Amendment protection of freedom of the press). A free press performs many roles that are crucial to a democratic society, including bringing issues of great societal import to the public’s attention. *Id.* at 1295 (analyzing press’s ability to “promot[e] an informed electorate”). Courts have found a “paramount public interest” in maintaining a free and independent press – an interest that would be threatened by compelled disclosure of confidential sources. *See Baker v. F & F. Investments, et al*, 470 F.2d 778, 782 (2d Cir. 1972).

The idea of a qualified reporter’s privilege is rooted in the seminal United States Supreme Court case of *Branzburg v. Hayes*, 408 U.S. 665, 729, 710 (1972). In that case, the Supreme Court held that journalists were not immune “from disclosing to a grand jury information . . . received in confidence” any more than other citizens. *Id.* at 682-83. Writing for the majority, Justice White framed the specific nature of the decision by stating, “the sole issue before [the Court] is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of a crime.” *Id.* at 682. The Court recognized that First Amendment rights may not be infringed absent a “compelling” or “paramount” state interest, and concluded that the investigation of a crime by a grand jury was one such compelling interest. *Id.* at 700. According to the majority, the only exception would be in the event of a grand jury investigation “instituted or conducted other than in good faith.” *Id.* at 707. In a concurring opinion, Justice Powell also emphasized the limited nature of the Court’s holding, stating:

[I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other

reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

*Branzburg*, 408 U.S. at 710 (Powell, J., concurring). Justice Powell sought to provide guidance to future courts faced with weighing of freedom of the press and grand jury investigations, stating:

[T]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

*Id.*; see also *United States v. King*, 194 F.R.D. 569, 580 (E.D. Vir. 2000) (noting “many courts of appeal” find qualified reporter’s privilege based on Justice Powell’s concurrence in *Branzburg*).

In his dissenting opinion, Justice Stewart argued for a qualified reporter’s privilege, reasoning that informants are “necessary to the news-gathering process” and “the free flow of information to the public.” *Branzburg*, 408 U.S. at 738 (Stewart, J., dissenting). In order to protect the integrity of a free press, reporters must enjoy a qualified privilege against court-compelled disclosure of their confidential sources. *Id.* at 720-21 (arguing compelled disclosure will “impede the wide-open and robust dissemination of ideas and counterthought [sic] which a free press both fosters and protects and which is essential to the success of intelligent self-government.”) Justice Stewart articulated his own balancing test, arguing that, in order to compel disclosure of a reporter’s confidential source, the government must:

(1) [S]how that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of *First Amendment* rights; and (3) demonstrate a compelling and overriding interest in the information.

*Id.* at 743. A majority of federal circuit courts have applied this balancing test and found a qualified reporter’s privilege to withhold confidential information in civil cases.<sup>1</sup> *See* Tucker, *supra* at 1307-10 (analyzing differing levels of protection afforded reporters in civil cases). However, some courts of appeal, including the Fifteenth Circuit below, have erroneously concluded that *Branzburg* was a “rejection [] of the reportorial privilege in words both plain and clear . . . .” *United States v. King*, 194 F.R.D. 569, 579-82 (E.D. Vir. 2000) (analyzing post-*Branzburg* circuit split). Such courts maintain that, “[a] plain reading of *Branzburg* forecloses the idea of a reporter’s privilege inherent in the First Amendment.” (J.A. at 23.) They would be correct if they were to add, as did Justice White, the caveat, “in the context of a grand jury investigation of a crime.” The Court should find any attempt to extend *Branzburg*’s limited holding to the civil context erroneous and unpersuasive. *See Baker*, 470 F.2d at 784-85.

B. The Supreme Court should recognize Petitioner Eric Cartman’s qualified reporter’s privilege against court-compelled disclosure of his confidential source because Respondent has not demonstrated a compelling or paramount interest that overrides Petitioner’s First Amendment rights.

Petitioner, as a reporter, enjoys a qualified privilege against court-compelled disclosure of confidential sources. *See, e.g., Gonzales v. NBC*, 194 F.3d 29, 32 (2d. Cir. 1998); *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986); *Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583,

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<sup>1</sup> *See, e.g., N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 169-74 (2d Cir. 2006); *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004); *In re Madden*, 151 F.3d 125, 128-29 (3d Cir. 1998); *Church of Scientology Int’l v. Daniels*, 992 F.2d 1329, 1335 (4th Cir. 1993), *cert. denied*, 510 U.S. 869 (1993); *Scarce v. United States (In re Grand Jury Proceedings)*, 5 F.3d 397, 402-03 (9th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987); *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977).

595-96 (1st Cir. 1980); *Baker v. F & F Investments, et al*, 470 F.2d 778, 783 (2d Cir. 1972).

Thirty-four states and the District of Columbia have enacted statutes codifying this privilege in the context of civil litigation. (J.A. at 9) (*citing* James C. Goodale et al., *Reporter's Privilege*, 952 PLI/Pat 161, 170 (2008)). However, the privilege is not absolute, and courts must balance judicial fairness and First Amendment concerns “to determine where lies the paramount interest.” *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975); *accord Shoen*, 5 F.3d at 1293. A reporter’s right to protect confidential sources “may not take precedence over that rare overriding and compelling interest . . . .” *Baker*, 470 F.2d at 783. Federal courts of appeal have held that disclosure of a reporter’s confidential source may be ordered only upon “a clear and specific showing that the information is [1] highly material and relevant, [2] necessary or critical to the maintenance of the claim, and [3] not obtainable from other available sources.” *Gonzales*, 194 F.3d at 33 (*citing In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir. 1982)). In such circumstances, the party moving to compel disclosure must “exhaust[] reasonable alternative means of obtaining this [] information.” *LaRouche*, 780 F.2d at 1139.

*Baker v. F & F Investments, et al*, involved a civil rights class action suit brought by African-Americans in Chicago, IL who purchased homes from 60 named defendants. 470 F.3d at 780. The plaintiffs alleged that the defendant real estate agents engaged in “blockbusting,” or inflating the sale price of homes to racially discriminate against minority groups. *Id.* During discovery, plaintiffs deposed Alfred Balk, a journalist who had previously written an article on blockbusting based on information from a confidential source. *Id.* Though Balk was sympathetic to plaintiffs’ case, he refused to disclose the identity of the confidential source used in his article. *Id.* at 780-81. Plaintiffs moved for the lower court to compel disclosure; when that court denied the motion, plaintiffs appealed to the Second Circuit. *Id.* at 781. Writing for the

court, Judge Kaufman affirmed the lower court ruling and held that, in the absence of an “overriding or compelling interest,” a reporter has a privilege against compelled disclosure of a confidential source. *Id.* at 783. The court reasoned that “[c]ompelled disclosure of confidential sources unquestionably threatens a journalist’s ability to secure information that is made available to him only on a confidential basis . . . .” 470 F.3d at 782. The court found this fact particularly important in light of the “preferred position which the First Amendment occupies in the pantheon of freedoms.” *Id.* at 783 (emphasis omitted). The court also based its decision on the plaintiff’s failure to exhaust other means of finding the confidential source, which further supported the conclusion that compelled disclosure was “not essential to protect the public interest in the orderly administration of justice in the courts.” *Id.*

The *Baker* court went on to distinguish the Supreme Court’s decision in *Branzburg* and its own earlier decision in *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958). Regarding *Garland*, the court emphasized that the plaintiff in that case “had taken active steps independently to determine the identity of the confidential news source.” *Baker*, 470 F.2d at 784. As such, “the identity of [the reporter’s] source became essential to the libel action . . . it ‘went to the heart of the plaintiff’s claim.’” *Id.* (quoting *Garland*, 259 F.2d at 550). Addressing *Branzburg*, the Second Circuit stressed that that case was limited to a reporter’s privilege against compelled disclosure within the context of a grand jury investigation of a criminal act. *Id.* (citing *Branzburg*, 408 U.S. at 682). The court noted that “[n]o such criminal overtones color the facts of this civil case.” *Id.* The Second Circuit concluded that the lack of a grand jury investigation of a crime was *the* distinguishing factor differentiating *Branzburg* from civil cases such as *Baker*. *Id.* at 784-85. Furthermore, the court reasoned that, if *Branzburg* allowed exceptions even in criminal cases, then “surely in civil cases, courts must recognize that the public interest in non-

disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure." *Id.* at 785.

Here, Petitioner is protected by a qualified reporter's privilege because he, as a journalist, raised public awareness about the unscrupulous tactics of a commercial entity. *See Baker*, 470 F.2d at 782. Like the author in *Baker*, the Petitioner satisfied a "significant public and private interest[]" by authoring an expose based on confidential information provided by an "inside" source. *Id.* As the District Court noted below, the Petitioner "gathered the information pertaining to potential human rights abuses at the Mumbai Citrus factory with the intent to utilize that information as a journalist." (J.A. at 12.) In doing so, the Petitioner exercised "a principle fundamental to our constitutional way of life, that where the press remains free so too will a people remain free." *Baker*, 470 F.2d at 785. Respondent has not "exhausted reasonable alternative means of obtaining this [] information . . . [h]e did not exhaust all his non-party depositions before making the motion, and he failed to demonstrate to the court unsuccessful, independent attempts to gain the requested information." *LaRouche*, 780 F.2d at 1139. Indeed, the District Court here reviewed Respondent's attempts to procure the identity of "Professor Chaos" and concluded, "the Broflovskis conducted only a cursory internal investigation . . . ." (J.A. at 14.) As such, the Respondent has failed to demonstrate that the identity of the Petitioner's confidential source goes "to the heart of [his] claim." *Garland*, 259 F.2d at 550. Accordingly, "disclosure by [the reporter] of his source was not essential to protect the public interest in the orderly administration of justice in the courts." *Baker*, 470 F.2d at 783. Petitioner is also distinguishable from the reporter in *Branzburg*, who was called to testify before a grand jury investigating a criminal act. As noted *supra* at pg. 1, the sole issue before the *Branzburg* Court was whether a reporter had a qualified privilege against compelled disclosure of a

confidential source *within the context of a grand jury investigation of a crime*. Here, as in *Baker*, “[n]o such criminal overtones color the facts of this civil case.” 470 F.2d at 784. This is a civil dispute between an upper level executive of a *Fortune* 500 company and a “lonely pamphleteer.” *Branzburg*, 408 U.S. at 704. Under such circumstances, Respondent’s desire for confidential information does not outweigh the significant public interest in ensuring that “debate on issues” remains “uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 375 U.S. 254, 270 (1964).

Petitioner does not question the important public interest in the “fair administration of justice.” *Garland*, 259 F.2d at 549. Rather, Petitioner urges this Court to recognize, as have many other courts of appeal, the “preferred position which the First Amendment occupies in the pantheon of freedoms.” *Baker*, 470 F.2d 783. As stated *supra* at pg. 2, the First Amendment may take precedence even when an individual’s liberty is at stake. The Court here should be persuaded by Justice Powell’s concurrence and require that “the balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.” *Branzburg*, 408 U.S. at 738. To provide clear guidance to future jurists, the Court here should apply Justice Stewart’s balancing test, which requires the moving party:

- (1) [S]how that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of *First Amendment* rights; and (3) demonstrate a compelling and overriding interest in the information.

408 U.S. at 743 (Stewart, J., dissenting); *see also LaRouche*, 780 F.2d at 1139 (*citing Miller*, 621 F.2d at 721); *Zerilli*, 656 F.2d at 713-14; *Silkwood*, 563 F.2d at 438. This test effectively balances the interest of “the free flow of information to the public,” *Branzburg*, 408

U.S. 738 (Stewart, J., dissenting), and the obligation of all citizens to give relevant testimony. *See Storer Communications, Inc. v. Giovan*, 810 F.2d 580, 586 (6th Cir. 1987). Application of the aforementioned analysis reveals that Respondent's desire for discovery is not "so compelling as to override the precious rights of freedom of speech and the press." *Baker*, 470 F.2d at 785. The District Court found, and Petitioner concedes, that the identity of the confidential source is "potentially relevant to the issue of fault in the defamation claim." (J.A. at 13.) However, the District Court went on to find that this confidential information was not "absolutely essential." *Id.* The court found that Respondent had other available means of inculcating Petitioner, which included investigating "whether Petitioner performed due diligence in verifying his source's claim, or whether the defendant actively sought to corroborate the first source." *Id.* Thus, Respondent fails to satisfy the second prong of the analysis because he did not seek out less destructive means to gain relevant information. Finally, as mentioned *supra* at pg. 7, Respondent's "cursory internal investigation" does not suffice to satisfy the third prong of the analysis. Because he has failed to exhaust all reasonable options, Respondent has not demonstrated the confidential information goes "to the heart of [his] claim." *Garland*, 259 F.2d at 550. Accordingly, "disclosure by [the reporter] of his source was not essential to protect the public interest in the orderly administration of justice in the courts." *Baker*, 470 F.2d at 783.

The Court should be persuaded by decisions of the majority of federal circuit courts and reverse the decision of the Fifteenth Circuit, finding that Petitioner, as a reporter, has a qualified right against compelled disclosure of a confidential source. The Court should so find because (1) a free and independent press is fundamental to our constitutional way of life; (2) Petitioner's First Amendment rights cannot be infringed absent a compelling or paramount interest, such as a

grand jury investigation of a crime; and (3) Respondent has failed to satisfy the three prongs of Justice Stewart's balancing test.

C. The Court Should Find That Petitioner Qualifies as a Reporter and Is Therefore Protected By the Qualified Privilege Against Compelled Disclosure of a Confidential Source Because He Regularly Gathers and Reports Information to the Public For Profit.

The Supreme Court has previously interpreted "freedom of the press" broadly to ensure that this fundamental right "is not confined to newspapers and periodicals." *Branzburg*, 408 U.S. at 704 (citing *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)). Individuals such as "lecturers, political pollsters, novelists, academic researchers, and dramatists" all gather information and communicate it to the public. *Id.* at 705. Indeed, this Court has found that "almost any author" could claim the need to protect his or her confidential sources from compelled disclosure. *Id.* However, some courts of appeal have recognized the difficulty in determining who qualifies as a "reporter" in the Information Age. See *In re Grand Jury Subpoena*, 438 F.3d 1141, 1156 (D.C. Cir. 2006) (Sentelle, J., concurring). This Court should be persuaded by Congress's findings in their recent attempt to create a statutory reporter's privilege with the Free Flow of Information Act. H.R. 2102, 110th Cong. (2007). Congress defined a reporter, *inter alia*, as one who (1) regularly gathers information that concerns matters of public interest; (2) with the intent of disseminating that information to the public; and (3) does so "for their livelihood or for substantial financial gain." H.R. 2102 § 4(2). This clear and simple analysis will ensure that the casual "blogger" will not dilute the qualified privilege and frustrate the important public interest in the "fair administration of justice." *Garland*, 259 F.2d at 549. Rather, individuals who are legitimately exercising "one of the greatest Bulwarks of Liberty," Virginia Declaration of Rights § 12 (1776), will avail themselves of this crucial protection so as to continue providing an important public interest.

When applied to the Petitioner, this analysis demonstrates that Eric Cartman was indeed exercising his First Amendment rights as a journalist when he published his expose on Respondent's activities as a high-ranking executive in a *Fortune* 500 company. The District Court found that Petitioner began publishing his for-profit online political journal in June 2005. (J.A. at 4.) He regularly gathers and transmits news on a variety of issues, including local and international politics, to his devoted audience of over 100,000 readers. *Id.* Petitioner receives information from many confidential sources, including Professor Chaos, and disseminates that news to the public. *Id.* at 4-5. In the instant case, the District Court concluded, "Cartman gathered the information pertaining to potential human rights abuses at [Respondent's] factory with the intent to utilize that information as a journalist. *Id.* at 12. Petitioner also generates revenue from his website by streaming advertisements that pay out in proportion to the number of daily visits to the page. *Id.* at 4. It stands to reason that Petitioner generates a "substantial financial gain" from these advertisements due to his audience of over 100,000 readers, and that he therefore satisfies the third prong of the aforementioned test.

For these reasons, the Court should follow its own precedent by interpreting the terms "journalist" and "reporter" broadly to encompass any individual actively engaged in gathering and disseminating information to the public for profit. The Court should be guided by Congress's aforementioned analysis and find that Petitioner satisfies all three prongs and therefore may avail himself of the qualified reporter's privilege.

Petitioner now addresses the issue of whether he should be held liable on an actual malice standard in the online defamation claim brought by Ike Broflovski on the grounds that Broflovski constitutes a limited-purpose public figure. For the reasons articulated below, the Court should reverse the ruling of the Court of Appeals, hold that the actual malice standard and limited-purpose public figure designation apply respectively to Cartman and Broflovski, and uphold the District Court's grant of summary judgment for Cartman.

II. CARTMAN IS ENTITLED TO SUMMARY JUDGMENT FOR LACK OF CLEAR AND CONVINCING EVIDENCE THAT HE INTENTIONALLY OR RECKLESSLY MADE FALSE AND DEFAMATORY STATEMENTS AGAINST IKE BROFLOVSKI.

Respondent Broflovski argues that he is a private citizen and therefore entitled to a mere showing of simple negligence in support of his defamation suit. Restatement (Second) of Torts § 580B (1977). However, information in the record outlined below argues persuasively for the classification of Broflovski as a public figure. *See generally N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). If so classified as a public figure, Broflovski must show something more than mere negligence, namely that Petitioner Cartman made the offending communication with “actual malice.” *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 160 (1967). Actual malice, for the purposes of a defamation claim, consists of either a knowing and intentional defamation of the plaintiff or a defamatory statement made with reckless disregard for the actual truth of the matter asserted. (J.A. at 15.) Because Broflovski is a limited-purpose public figure whose defamation claim must therefore be reviewed under the stricter actual malice standard, Cartman’s actions must meet this standard for the suit to proceed. As outlined below, they do not, and Cartman is consequently entitled to summary judgment as the District Court has previously ruled.

- A. For the purpose of the suit, Broflovski is a limited-purpose public figure rather than a private figure.

In *Gertz v. Welch*, the Supreme Court held that a plaintiff who “had achieved no general fame or notoriety” could not be considered a public figure, and therefore could prove ordinary negligence on the part of the defendant in a defamation suit. *See Gertz*, 418 U.S. 323, 351-52 (1974). However, the Court went on to say in *Gertz* that the public figure concept is malleable within the context of the alleged defamatory remarks, allowing that a person could become a public figure for a limited purpose or matter of public controversy. *Gertz*, 418 U.S. at 352.

The District Court for the Western District of Silverado (the “District Court”) utilized a three-pronged test, adopted by a plurality of circuits, to determine whether a defendant qualifies as a limited-purpose public figure. Under this test, the defendant qualifies if (1) the relevant controversy is a matter of public concern; (2) the plaintiff plays more than a “trivial or tangential” role in the controversy; and (3) the defendant’s allegedly defamatory remarks are relevant to the public controversy. *See Silvester 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); *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980). Under the circumstances in the record, Broflovski qualifies as a limited-purpose public figure.

First, the relevant controversy, alleged human rights abuses at Citrus’s Mumbai factory, constitutes a matter of public concern. While the Court of Appeals may have expressed the view that “it is difficult to see how the average American possesses an immediate need to know of potential use of slave labor by Citrus on the other side of the globe” (J.A. at 31,) other courts have held that it is not the position of the judiciary to determine what matters of public concern should be. *See Gertz*, 418 U.S. at 346. Citrus “quickly rose to the top of the consumer

electronics industry” and intended to “permanently entrench the ePlay brand as the premier portable music player on the market” (J.A. at 2 and 3,) illustrative of standing as a powerful company whose business practices could be deemed a matter of public concern.

Second, Broflovski, in his position as Director of Research & Development for Citrus and “charged with overseeing the development of the ePlay Touché” (J.A. at 3,) plays more than a ‘trivial or tangential’ role in the controversy. As Director of Research & Development, his words and actions guide the activities of all below him, and place him at the center of any matter related to the areas under his charge.

Third, Cartman’s allegedly defamatory remarks are absolutely relevant to the public controversy. In *Lerman v. Flynt Distrib. Co.*, the Second Circuit said that a public “controversy” is any topic upon which sizeable segments of society have different, strongly held views. *Lerman*, 745 F.2d 123, 138 (2d Cir. 1984). That Cartman’s blog *The Sludge Report*, in which he regularly criticizes Citrus’s business practices, has become increasingly popular concurrently with Citrus’s own increasing popularity in the marketplace indicates the “different, strongly held views” required by the *Lerman* court for a determination of a public controversy. Further, Cartman’s blog entry of July 8 essentially ignited this controversy, alerting his readers to the possibility of human rights abuses and setting the stage for the cable news, stock price, and store responses of August 19 and following (J.A. at 6 and 7.)

The District Court ruled below that as long as the plaintiff is directly involved in the issue of public concern and the defendant’s remarks were geared toward plaintiff’s participation as such, then the plaintiff may be considered a public figure in that circumstance (J.A. at 17.) On appeal, the Court of Appeals disagreed that Broflovski was a limited-purpose public figure, adopting and applying a four-prong test outlined in *Lerman* (J.A. at 29.) 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 136-37. The Court of Appeals held that since Broflovski did not meet even the first prong of this test, he was not a limited-purpose public figure, rendering examination of the other prongs unnecessary (J.A. at 29.)

On their face, Broflovski’s actions do not appear to “successfully invite public attention.” He is “shy and does not enter the public limelight” and at his introductory press conference said nothing other than “Thank you for the warm welcome, Kyle, and I look forward to pushing Citrus, its employees, and its products to new heights” (J.A. at 3.) Following Cartman’s blog post, Broflovski “did not address demands by the news media to respond to the allegations save for a message delivered through his attorney” (J.A. at 7.) The Court of Appeals, in evaluating Broflovski’s conduct, cited *Tavoulaareas v. Piro* for the proposition that simply occupying a position of high influence within a prominent company is insufficient to qualify one as a public figure. *Tavoulaareas*, 817 F.2d 762, 773 (D.C. Cir. 1987). However, the *Tavoulaareas* court went on to say: “But that is not to say that an individual's position as president and chief operating officer of one of the world's largest multinational corporations, with a quarter-million stockholders, is irrelevant to whether that person has “invite[d] attention and comment” with respect to public issues affecting his business dealings...More specifically, Tavoulaareas avowedly attempted to “thrust [Mobil and himself] to the forefront” of the national controversy over the state of the oil industry. *Tavoulaareas*, 817 F.2d at 773. Broflovski, in his capacity as Director of Research & Development at Citrus, a leading consumer electronics company

commanding a large market share, has *ipso facto* invited public attention. As Tavoulaareas attempted to “thrust [Mobil and himself] to the forefront” of an oil controversy, Broflovski pledged in his press conference to “push Citrus, its employees, and its products to new heights” (J.A. at 3.) His visits to the Mumbai factory in his capacity as director effectively invited public attention and any potential accompanying controversy; as the District Court wrote, “Broflovski plays an affirmative role in this controversy due to his influence over Citrus’s internal workings and the process he oversees (J.A. at 18.) The *Lerman* court supported this proposition in citing *James v. Gannett Co.*: “The essential element underlying the category of public figures is that the publicized person has taken an affirmative step to attract public attention.” *James*, 40 N.Y.2d 415, 423, 386 N.Y.S.2d 871, 353 N.E.2d 834 (1976). Though not intended to be affirmative, Broflovski’s acceptance of a position so central to the controversy nonetheless constitutes a successful invitation of public attention, a stance echoed by the *Waldbaum* court:

“Occasionally, someone is caught up in the controversy involuntarily and, against his will, assumes a prominent position in its outcome. Unless he rejects any role in the debate, he too has “invited comment” relating to the issue at hand...Similarly, the responsibilities of a position may include decisionmaking that affects significantly one or more public controversies, in which case the occupant becomes a limited public figure for those controversies” *Waldbaum*, 627 F.2d at 1298 and 1300 n. 36.

- B. Because Broflovski is a limited-purpose public figure, a court must review his defamation claim under an actual malice standard.

If the allegedly defamed party in a defamation suit qualifies as a general- or limited-purpose public figure, the First Amendment requires that the defendant must demonstrate clear and convincing evidence of actual malice in the publication of false information about the

plaintiff. *See Gertz*, 418 U.S. at 331-32. The showing of “actual malice” does not necessarily include any personal animosity against the allegedly defamed party by the defendant (J.A. at 19.) Rather, the “actual malice” test, outlined in *N.Y. Times Co. v. Sullivan*, requires clear and convincing proof that the dissemination of false information was either 1) knowing and intentional; or 2) done with reckless disregard for the falsity of the matter asserted. *See N.Y. Times Co.*, 376 U.S. at 279-80. If Cartman knew his information was false or seriously doubted its veracity, he would have met this standard. *See Id.* A simple failure to verify information, however, 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) (citing *N.Y. Times Co.*, 376 U.S. at 287-88).

As the District Court further notes, the truthfulness of allegedly defamatory statements will resolve any defamation suit (J.A. at 19.) The record shows that Broflovski has visited India on several occasions and that there have been other accusations of human rights abuses, hinting at least at the possibility of such truth (J.A. at 19.) Even if the photograph was doctored, leading to inaccurate statements by Cartman, the actual malice standard requires him to show that he made the statements knowingly or recklessly in the face of falsity (J.A. at 20.) On this point, the Appeals Court makes too much of Cartman’s personal animosity toward Broflovski (J.A. at 31-32;) as other courts have shown, a showing of personal animosity is not a requirement of actual malice. *Compare Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 315 n. 10 (5th Cir. 1995) (“Although we recognize that proof of ill will or animosity is not required to show actual malice, evidence of ulterior motive can often bolster an inference of actual malice”); *Perk v. Reader's Digest Ass'n, Inc.*, 931 F.2d 408, 411 (6th Cir. 1991) (the defendant's motive is "circumstantial evidence which, when combined with other evidence, may amount to malice").

- C. Cartman has not demonstrated clear and convincing evidence of either 1) knowing and intentional dissemination of false information or 2) dissemination of false information with reckless disregard for the falsity of the matter asserted, and therefore has not met the required actual malice standard.

As discussed previously, for Cartman to meet the actual malice standard required in a defamation case brought by a limited-purpose public figure, he must present clear and convincing evidence of one of two actions: 1) knowing and intentional dissemination of false information or 2) dissemination of false information with reckless disregard for the falsity of the matter asserted. In discovery, Broflovski learned that “the photograph of [Broflovski] was **likely** doctored” (J.A. at 7, emphasis added.) Cartman did have photo scanning software on his computer and admittedly “did not test Professor Chaos’s photo with this software before publishing it” (J.A. at 7.) These facts may indicate that, in hindsight, Cartman should have conducted a more thorough investigation of the photograph before publishing it, but they do not indict his behavior to the extent that a finding of actual malice is possible.

The Appeals Court, citing *Masson*, stated that “receipt of alleged proof of such serious allegations clearly warranted follow-up investigations to determine their veracity” (J.A. at 31.) Cartman, however, had previously received several reliable tips from “Professor Chaos” (J.A. at 5,) and therefore had no reason to doubt the veracity of, and conduct further tests on, the photograph in question here. Further, Broflovski stipulated to several visits to Mumbai (J.A. at 7,) arguably reducing the likelihood of “falsity of the matter asserted.” For all these reasons, Cartman has failed to meet the actual malice standard required in a defamation suit against a limited-purpose public figure, and is therefore entitled to summary judgment.

## **CONCLUSION**

For the reasons discussed herein, Petitioner respectfully requests that this Court reverse the decision of the Fifteenth Circuit and find that (1) there exists a qualified reporter's privilege against compelled disclosure of confidential sources based in the First Amendment; and (2) Petitioner is protected by that privilege based on his status as a reporter. Further, Petitioner requests that this Court reverse the Fifteenth Circuit's decision and find that Respondent is a limited-purpose public figure to whom an actual malice standard applies, and that Petitioner, having failed to meet that standard, is entitled to summary judgment.