
No. 09-2701

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

ERIC CARTMAN,

Petitioner,

- v. -

IKE BROFLOVSKI,

Respondent.

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

BRIEF FOR PETITIONER

Team 113
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether Eric Cartman is protected by the qualified reporter's privilege under the First Amendment of the United States Constitution against court-compelled disclosure of the identity of an anonymous source in an online defamation claim, where Eric Cartman engages in the routine functions of a typical journalist.

A. Whether the First Amendment creates a qualified reporter's privilege against the court-compelled discovery of confidential sources, where courts have found such a privilege exists and is necessary to prevent a chilling effect on the freedom of speech and the freedom of the press.

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, where Eric Cartman demonstrates the intent to disseminate information of public importance obtained from his confidential source, and where alternative means exist to discover the anonymous source's identity.

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 Mr. Broflovski is a limited-purpose public figure who played a significant role in a public human rights controversy that was germane to the alleged defamation.

TABLE OF CONTENTS

	<u>Page</u>
Questions Presented.....	p. ii
Table of Authorities	p. v
Jurisdiction Statement.....	p. x
Statement of the Case.....	p. 1
Summary of the Argument.....	p. 4
Argument	p. 6
I. THE APPELLATE COURT’S RULING SHOULD BE REVERSED BECAUSE THE QUALIFIED REPORTER’S PRIVILEGE OF THE FIRST AMENDMENT PROTECTS ERIC CARTMAN, A JOURNALIST, FROM BEING COMPELLED TO DISCLOSE HIS CONFIDENTIAL SOURCE’S IDENTITY, PROTECTING FREEDOM OF THE PRESS.....	p. 6
A. Inherent In The First Amendment Is A Qualified Reporter’s Privilege Against Court-Compelled Disclosure Of Confidential Sources In A Civil Proceeding.....	p. 8
B. Regardless Of The Mode Of Communication, Eric Cartman Is A Journalist Entitled To The Qualified Reporter’s Privilege Under the First Amendment	p. 10
C. The Qualified Reporter’s Privilege Protects Eric Cartman From Disclosing His Confidential Source Because Ike Broflovski Has Failed To Overcome The Test Established To Protect First Amendment Principles	p. 12
1. The First Amendment’s qualified privilege protects Eric Cartman from court-compelled disclosure because Ike Broflovski has failed to demonstrate a compelling interest.....	p. 13
2. The First Amendment’s qualified privilege protects Eric Cartman from court-compelled disclosure because Ike Broflovski failed to exhaust all reasonable alternatives to obtain the identity of the confidential source	p. 15
II. IKE BROFLOVSKI QUALIFIES AS A LIMITED-PURPOSE PUBLIC FIGURE UNDER THE <i>WALDBAUM</i> TEST, WHICH REQUIRES APPLICATION OF AN ACTUAL MALICE STANDARD OF LIABILITY, BECAUSE THE CONTROVERSY AT ISSUE IS A MATTER OF PUBLIC CONCERN, IKE BROFLOVSKI PLAYED A MAJOR ROLE IN SHAPING THE CONTROVERSY, AND HIS PARTICIPATION IN THE CONTROVERSY IS GERMANE TO THE ALLEGED DEFAMATION.....	p. 18

A. Though A Minority Of Circuits Has Applied Different Tests, The <i>Waldbaum</i> Test Is The Most Appropriate For Characterization Of A Limited-Purpose Public Figure Because It Accurately Captures The Intent Of <i>Gertz</i> And Balances The Freedom Of The Press With A State’s Interest In Protecting An Individual’s Integrity	p. 21
B. Application Of The Three-Pronged <i>Waldbaum</i> Test Reveals That Ike Broflovski Is A Limited-Purpose Public Figure Because Of His Significant Role In A Human Rights Controversy Which Was Directly Related To The Allegedly Defamatory Publication	p. 22
1. The potential human rights violations committed at the Citrus factory in Mumbai were a public controversy, based on public discourse and impact of the controversy’s resolution on uninvolved parties	p. 23
2. Ike Broflovski’s role in the public controversy over Citrus’s Mumbai factory was neither trivial nor tangential because he played a significant role in shaping it	p. 24
3. Ike Broflovski’s participation in the human rights controversy is germane to the alleged defamation because his actions were the focus of both the photograph and Eric Cartman’s accompanying commentary	p. 26
C. Ike Broflovski Cannot Prove Actual Malice In This Case Because Eric Cartman Relied On A Trusted Source When Publishing The Photograph On His Blog	p. 26
CONCLUSION.....	p. 29

TABLE OF AUTHORITIES

	Page
UNITED STATES SUPREME COURT CASES	
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972).....	<i>passim</i>
<i>Curtis Publ’g Co. v. Butts</i> , 388 U.S. 130 (1967).....	p. 19
<i>Edwards v. South Carolina</i> , 372 U.S. 229 (1963).....	p. 6
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974).....	<i>passim</i>
<i>Grosjean v. Am. Press Co.</i> , 297 U.S. 233 (1936).....	p. 6
<i>In re Roche</i> , 448 U.S. 1312 (1980).....	p. 16
<i>Lovell v. City of Griffin</i> , 303 U.S. 444 (1935).....	p. 11
<i>McIntyre v. Ohio Elections Comm’n</i> , 514 U.S. 334 (1995).....	p. 9, 10, 13, 14
<i>Mitchell v. United States</i> , 526 U.S. 314 (1999).....	p. 9
<i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	p. 6, 19, 22
<i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968).....	p. 27, 28
<i>Time, Inc. v. Firestone</i> , 424 U.S. 448 (1976).....	p. 24
UNITED STATES COURT OF APPEALS CASES	
<i>Carey v. Hume</i> , 492 F.2d 631 (D.C. Cir. 1972).....	p. 16, 17

<i>Foretich v. Capital Cities/ABC, Inc.</i> , 37 F.3d 1541 (4th Cir. 1994)	p. 6
<i>Frontier Ref. v. Gorman-Rupp Co.</i> , 136 F.3d 695 (10th Cir. 1998)	p. 6
<i>Gonzales v. NBC</i> , 194 F.3d 29 (2d Cir. 1999).....	p. 9, 11
<i>Haliym v. Mitchell</i> , 492 F.3d 680 (6th Cir. 2007)	p. 6
<i>In re Judith Miller</i> , 438 F.3d 1141 (D.C. Cir. 2005).....	p. 9
<i>In re Madden</i> , 151 F.3d 125 (3d Cir. 1998).....	p. 11
<i>In re Petroleum Prods. Antitrust Litig.</i> , 680 F.2d 5 (2d Cir. 1982)	p. 11, 13
<i>In re Special Proceedings</i> , 373 F.3d 37 (1st Cir. 2004).....	p. 9
<i>Lerman v. Flynt Distrib. Co.</i> , 745 F.2d 123 (2d Cir. 1984).....	p. 21
<i>Marcone v. Penthouse Int’l Magazine</i> , 754 F.2d 1072 (3d Cir. 1985).....	p. 21, 22
<i>Meisler v. Gannett Co., Inc.</i> , 12 F.3d 1026 (11th Cir. 1994)	p. 19
<i>Miller v. Transamerican Press, Inc.</i> , 621 F.2d 721 (5th Cir. 1980)	p. 14, 15
<i>NLRB v. Midland Daily News</i> , 151 F.3d 472 (6th Cir. 1998)	p. 14
<i>Price v. Time, Inc.</i> , 416 F.3d 1327 (11th Cir. 2005)	p. 13
<i>Reuber v. Food Chem. News, Inc.</i> , 925 F.2d 703 (4th Cir. 1991)	p. 28

<i>Rosanova v. Playboy Enters., Inc.</i> , 580 F.2d 859 (5th Cir. 1978)	p. 25
<i>Ryan v. Brooks</i> , 634 F.2d 726 (4th Cir. 1980)	p. 27
<i>Schiavone Const. Co. v. Time, Inc.</i> , 847 F.2d 1069 (3rd. Cir. 1988)	p. 19
<i>Shoen v. Shoen</i> , 5 F.3d 1289 (9th Cir. 1993)	p. 11, 16, 17
<i>Silkwood v. Kerr-McGee</i> , 563 F.2d 433 (10th Cir. 1977)	p. 11
<i>Silvester v. Am. Broad. Cos., Inc.</i> , 839 F.2d 1491 (11th Cir. 1988)	p. 23
<i>Star Editorial v. U.S. Dist. Court</i> , 7 F.3d 856 (9th Cir. 1993)	p. 16
<i>Trotter v. Jack Anderson Enters., Inc.</i> , 818 F.2d 431 (5th Cir. 1987)	<i>passim</i>
<i>United States v. Smith</i> , 135 F.3d 963 (5th Cir. 1998)	p. 9
<i>United States v. Tenorio</i> , 312 Fed. Appx. 122 (10th Cir. 2009).....	p. 13
<i>von Bulow v. von Bulow</i> , 811 F.2d 136 (2d Cir. 1987).....	p. 10, 11
<i>Waldbaum v. Fairchild Publ'ns, Inc.</i> , 627 F.2d 1287 (D.C. Cir. 1980).....	<i>passim</i>
<i>Zerilli v. Smith</i> , 656 F.2d 705 (D.C. Cir. 1981).....	<i>passim</i>

UNITED STATES DISTRICT COURT CASES

<i>Bagley v. Blagojevich</i> , No. 05-3156, 2008 U.S. Dist. LEXIS 20005 (C.D. Ill. 2008)	p. 17
<i>Blumenthal v. Drudge</i> , 186 F.R.D. 236 (D.D.C. 1999).....	p. 11, 12

<i>Buendorf v. Nat’l Pub. Radio, Inc.</i> , 822 F. Supp. 6 (D.D.C. 1993).....	p. 28
<i>Chevalier v. Animal Rehab. Ctr., Inc.</i> , 839 F. Supp. 1224 (N.D. Tex. 1993)	p. 19
<i>Condit v. Nat’l Enquirer, Inc.</i> , 289 F. Supp. 2d 1175 (E.D. Cal. 2003).....	p. 17
<i>Harbert v. Priebe</i> , 466 F. Supp. 2d 1214 (N.D. Cal. 2006)	p. 17
<i>In re Subpoena of Maykuth</i> , No. 05-0228, 2006 U.S. Dist. LEXIS 11386 (E.D. Pa. 2006)	p. 14
<i>NLRB v. Mortensen</i> , 701 F. Supp. 244 (D.D.C. 1988).....	p. 7
<i>Pittman v. Gannett River States Pub. Corp.</i> , 836 F. Supp. 377 (S.D. Miss. 1993).....	p. 19, 20
<i>Stickels v. Gen. Rental Co.</i> , 750 F. Supp. 729 (E.D. Va. 1990)	p. 7

STATE COURT CASES

<i>In re Roche</i> , 411 N.E.2d 466 (Mass. 1980).....	p. 9
<i>In re Subpoena Duces Tecum to Am. Online, Inc.</i> , 52 Va. Cir. 26 (2000)	p. 14
<i>James v. San Jose Mercury News, Inc.</i> , 20 Cal. Rptr. 2d 890 (Cal. Ct. App. 1993).....	p. 19
<i>Jones v. New Haven Register, Inc.</i> , 763 A.2d 1097 (Super. Ct. 2000).....	p. 26
<i>Kessler v. Zekman</i> , 620 N.E.2d 1249 (Ill. App. Ct. 1993)	p. 27
<i>O’Grady v. Superior Court</i> , 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006).....	p. 11, 12

Rotkiewicz v. Sadowsky,
730 N.E.2d 282 (Mass. 2000)p. 27

WFAA-TV, Inc. v. McLemore,
978 S.W.2d 568 (Tex. 1998).....p. 19

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. Ip. 6

LAW REVIEW ARTICLES

Daniel P. Dalton, *Defining the Limited-Purpose Public Figure*,
70 U. Det. Mercy L. Rev. 47 (1992).....p. 20, 22

Vince Blasi, *The Newsman’s Privilege: An Empirical Study*,
70 Mich. L. Rev. 229 (1971).....p. 6, 7

HISTORICAL REFERENCES

9 Writings of James Madison (G. Hunt ed. 1910)p. 9

JURISDICTION STATEMENT

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

STATEMENT OF THE CASE

Eric Cartman (“Cartman”) is the sole proprietor of a local electronics store, Cartman’s Computer World, in Washoe state. (J.A. at 4.) A competing *Fortune 500* company, Citrus Electronics, Inc. (“Citrus”), headquartered in Silverado state, opened a store across the street from him. (J.A. at 2, 4.) In order to offset the decrease in income that his business inevitably suffered, Cartman became a part-time blogger for profit in June 2005. (J.A. at 4.) Bloggeroo, a third-party server, hosts Cartman’s blog, *The Sludge Report*. (J.A. at 4.) The streaming advertisements on Cartman’s blog generate revenue proportional to the daily number of hits the page receives. (J.A. at 4.) Every evening, Cartman updates his blog with various news items he finds on the Internet and headlines from major newspapers. (J.A. at 4.) His topics range from celebrity gossip to local and international politics. (J.A. at 4.)

Popular interest in Cartman’s blog has grown over the last four years and it now has an audience of more than 100,000 readers. (J.A. at 4.) In addition to his own research, readers of Cartman’s blog send him e-mails informing him of relevant topics and issues. (J.A. at 5.) Cartman’s blog provides a notice that all identities of the sources are confidential unless otherwise requested. (J.A. at 5.) Furthermore, neither Cartman nor Bloggeroo has any personal information about the sources who send Cartman e-mails unless those users disclose their personal information to him. (J.A. at 5.)

On July 7, 2008, Cartman received an e-mail from a source known as “Professor Chaos.” (J.A. at 5.) The e-mail contained information that Citrus, under the direction of its Director of Research and Development, Ike Broflovski, was engaging in human rights violations at its manufacturing plant outside of Mumbai, India. (J.A. at 2, 5.) Attached to the e-mail was a digital photograph that depicted Ike Broflovski yelling at assembly line workers, who appeared to be

wearing surgical masks and minimal protective gear. (J.A. at 5.) Cartman knows Professor Chaos personally, including his real name and e-mail address. (J.A. at 5.) Professor Chaos has provided Cartman with reliable information about Citrus in the past, which Cartman has posted on his blog. (J.A. at 5.) The very next day, July 8, Cartman posted the information and photograph pertaining to Ike Broflovski on his blog. (J.A. at 5.) Cartman included a small caption detailing the public importance of this information. (J.A. at 6.)

Prior to this event, in 2006, Citrus CEO, Kyle Broflovski, announced, at a moderately-attended press conference, that his brother, Ike Broflovski, would serve as Director of Research and Development. (J.A. at 2–3.) Ike’s duties include overseeing the development of the brand new ePlay Touché, a premier portable music player, and other Citrus products. (J.A. at 3.) Since that time, Ike has garnered reasonable media attention. (J.A. at 2–3.) Kyle has praised Ike’s work on television and in magazine interviews. (J.A. at 3.) Citrus employees have created “I Like Ike” buttons to celebrate his innovations. (J.A. at 4.) Ike’s name appears on the Citrus website, which also includes his contact information. (J.A. at 4.)

With the release of the photo on Cartman’s blog, Ike garnered even more media attention. (J.A. at 6.) On August 19, 2008, Keith McRiley, host of a cable news show, encouraged his audience to boycott Citrus’s products because of Ike’s depicted conduct. (J.A. at 6.) After McRiley’s comments, Citrus’s stock dropped by twenty-five percent and sales declined. (J.A. at 7.) Ike did not make an effort to address the news media’s questions, except through his attorney, who stated the photograph was a fabrication. (J.A. at 7.)

After Citrus’s stock declined in value, Ike Broflovski filed a defamation suit against Eric Cartman in Silverado Superior Court, claiming that Cartman’s caption to the photo was libelous. (J.A. at 6, 7.) Ike also alleged that Cartman’s comments caused Ike to suffer depression. (J.A. at

7.) Cartman removed the suit to the United States District Court for the Western District of Silverado on diversity grounds. (J.A. at 7.)

Discovery at the District Court level revealed that Ike had visited Mumbai, India, to which Ike stipulated. (J.A. at 7.) In addition, a scan of the photograph, using Citrus's own software, revealed the possibility of fabrication, which is undetectable to the naked-eye. (J.A. at 7.) While Cartman had similar technology available to him, he does not test every photograph, and he did not test Professor Chaos's photo in this instance. (J.A. at 7.) In order to determine the source of the photograph, Kyle and Ike Broflovski deposed the Mumbai factory manager and several of top engineers. (J.A. at 8.) Kyle Broflovski also sent an e-mail to all Citrus employees requesting information on the source of the leak. (J.A. at 8.) Then, Ike submitted to Cartman an interrogatory requesting the identity and contact information of Professor Chaos. (J.A. at 8.) Cartman invoked the qualified reporter's privilege under the First Amendment of the United States Constitution, against the disclosure of his source. (J.A. at 8.)

On January 8, 2009, Ike filed a motion to compel Cartman to reveal the identity and contact information of Professor Chaos, pursuant to Fed. R. Civ. P. 37. (J.A. at 1, 8.) Cartman timely filed a motion in opposition to Ike's motion to compel discovery and filed a counter motion for summary judgment on Ike's defamation claim. (J.A. at 8.) The United States District Court for the Western District of Silverado denied Ike's motion to compel discovery and granted Cartman's motion for summary judgment. (J.A. at 2.) Ike appealed to the United States Court of Appeals for the Fifteenth Circuit, which reversed on both issues and remanded the matter. (J.A. at 32.) Subsequently, this Court granted certiorari. (J.A. at 33.)

SUMMARY OF THE ARGUMENT

Journalists, regardless of the medium they choose to convey their information, perform the vital and constitutionally protected function of informing the public on a wide range of matters of public importance. To that end, a qualified First Amendment privilege from compelled disclosure of journalists' confidential sources has been recognized by a majority of state and federal courts as necessary to protect journalists' ability to gather and report the news. In this instance, Eric Cartman, a journalist who uses an internet blog to convey his information, is rightly protected by the qualified privilege. Eric Cartman's intent to collect and disseminate, to the public, information provided to him by his confidential source falls squarely within the notions of news reporting that the Framers of the United States Constitution intended to protect.

The qualified privilege afforded to journalists can be overcome only by showing: (1) that the material requested is clearly relevant to the litigation; (2) there exists a compelling interest in obtaining the information, which outweighs the invocation of the privilege; and (3) the movant has exhausted all other means reasonably available to obtain the information. Here, The United States Court of Appeals for the Fifteenth Circuit erred in granting the motion to compel because Ike Broflovski has not sustained this heavy burden. Ike Broflovski has failed to demonstrate a compelling interest in obtaining the identity of Eric Cartman's source because he filed his defamation suit only after his company's stock lost substantial value. Thus, Ike Broflovski's motive behind his motion to compel is merely retaliation against the confidential source, Professor Chaos, which is not a compelling interest. Furthermore, at a minimum, the First Amendment's qualified privilege may not be overcome unless all reasonable sources of information have been exhausted. Ike Broflovski did not depose any Citrus assembly line employees who may have information relating to the identity of Professor Chaos. The burden

placed upon Ike Broflovski, and those in similar situations, must be construed strictly. Any less stringent interpretation not only threatens the constitutional rights of news gatherers, their confidential sources, and the public by chilling important protected speech, but also undermines the First Amendment, which is a fundamental guarantee in American democracy.

The First Amendment guarantees freedom of opinion and expression, which includes the right to impart information and ideas through any media regardless of boundaries. Over time, courts have adopted this protection and applied its principles in actions restricting First Amendment rights. The clearest case for constitutional protection of an allegedly libelous publication is one in which the plaintiff is a public official or public figure, the defendant is a representative of the media of mass communication, and the publication relates to a matter of public interest or concern. Thus, the First Amendment ensures that the media is free to disseminate information to the public regarding legitimate matters of public controversy without being held liable, provided that it was done in good faith. Here, Eric Cartman published and commented on a digital photograph he received from a trusted source that depicted a potential human rights violation by a top American company and one of its officials, Ike Broflovski. Although mere negligence would be the appropriate standard for a private defamation plaintiff, the actual malice standard applies here because Ike Broflovski is a limited-purpose public figure. He maintains this status because: (1) the controversy at issue is a matter of public concern; (2) he played a major role in shaping the controversy; and (3) his participation in the controversy is germane to the alleged defamation. As such, the actual malice standard applies and Eric Cartman cannot be held liable because he published the alleged defamatory material in good faith, from a trusted source, and with no indication that the photograph may have been fabricated.

ARGUMENT

Generally, an appeal of a trial court's ruling on a motion to compel discovery under Fed. R. Civ. P. 37 is subject to a deferential abuse of discretion standard. *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981). However, where the decision on a Rule 37 motion hinges on an assertion of a constitutional legal privilege, this Court reviews the matter *de novo*, making "an independent examination of the whole record" because the case presents a mixed question of law and fact. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 135 (1963)); accord *Haliym v. Mitchell*, 492 F.3d 680, 690 (6th Cir. 2007); *Frontier Ref. v. Gorman-Rupp Co.*, 136 F.3d 695, 699 (10th Cir. 1998). Since the question of whether a defamation plaintiff is a "limited-purpose public figure" is an issue of law, this Court should apply *de novo* review. *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1551 (4th Cir. 1994). In conducting its review, this Court should look through the eyes of a reasonable person at the facts taken as a whole. *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980).

I. THE APPELLATE COURT'S RULING SHOULD BE REVERSED BECAUSE THE QUALIFIED REPORTER'S PRIVILEGE OF THE FIRST AMENDMENT PROTECTS ERIC CARTMAN, A JOURNALIST, FROM BEING COMPELLED TO DISCLOSE HIS CONFIDENTIAL SOURCE'S IDENTITY, PROTECTING FREEDOM OF THE PRESS.

The First Amendment of the United States Constitution protects not only an individual's right to speech, but also the freedom of the press. U.S. Const. amend. I. Thus, the United States Constitution bestows on the press a distinctive role in American democracy. The First Amendment helps to "preserve an untrammelled press as a vital source of public information." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936). However, the press often receives information from sources that wish to remain confidential for various reasons. See Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 Mich. L. Rev. 229, 247, 284 (1971) (finding

that newspaper reporters rely on regular confidential sources 22.2% of the time). Consequently, shielding the identity of confidential sources is essential to preserving the freedom of the press. The more the law depends on journalists to reveal their sources, the less information journalists may have to offer because sources may choose never to release information in the first place.

This Court has acknowledged that “without some protection for seeking out the news, freedom of the press would be eviscerated.” *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Nevertheless, in order to maintain the free flow of information on matters of public interest and importance, this Court should explicitly recognize the qualified reporter’s privilege of the First Amendment.

The qualified privilege, although not absolute, affords journalists to ability to withhold their confidential sources from court-compelled discovery, and more importantly, it preserves society’s conviction in the freedom of the press. When applying this principle, federal courts have adopted Justice Powell’s concurrence in *Branzburg*, finding it necessary to balance the interests involved, emphasizing that the government or other litigants must exhaust all other potential sources of information before they may overcome the privilege. *Id.* at 709–10 (Powell, J., concurring); *see, e.g., Stickels v. Gen. Rental Co.*, 750 F. Supp. 729, 732 (E.D. Va. 1990); *NLRB v. Mortensen*, 701 F. Supp. 244, 246 (D.D.C. 1988) (citing federal courts adopting the approach).

Here, the appellate court erroneously compelled Eric Cartman to disclose his confidential source and concede his First Amendment rights. As a citizen journalist, Eric Cartman conducted research with the intent to disseminate the information through his blog. He engaged in the basic activity of any news reporter and the First Amendment’s qualified privilege affords him the protection to keep his sources confidential. Moreover, Ike Broflovski failed to exhaust all reasonable alternatives to discover the information sought from Eric Cartman. He did not take

depositions from any assembly line workers or similar Citrus employees, thus circumventing the mechanism implemented to protect Eric Cartman’s First Amendment rights. The resulting chilling effect of the appellate court’s ruling on the First Amendment’s freedom of the press is detrimental to reporters and consequently to society. Thus, the appellate court’s ruling to grant the motion to compel was improper on all grounds and should be reversed.

A. Inherent In The First Amendment Is A Qualified Reporter’s Privilege Against Court-Compelled Disclosure Of Confidential Sources In A Civil Proceeding.

In the seminal case, *Branzburg v. Hayes*, 408 U.S. 665 (1972), Justice Powell’s concurring opinion, along with four dissenting Justices, effectively established a majority recognition that the First Amendment affords journalists a qualified privilege to guard against court-compelled disclosure of confidential material. *Id.* at 709–10 (Powell, J., concurring); *id.* at 711–25 (Douglas, J., dissenting); *id.* at 725–52 (Stewart, J., dissenting). Justice Powell stated that “[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.” *Id.* at 709 (Powell, J., concurring). Justice Powell wrote separately to emphasize the limited nature of the Court’s holding, and to advocate explicitly a case-by-case balancing test to determine journalists’ claims of privilege. *Id.* Thus, any subpoena of a reporter or order to compel disclosure of confidential information necessarily implicates the First Amendment.

In *Branzburg*, the Court decided three cases involving journalists’ obligations to appear before a grand jury and testify about alleged criminal activity that they witnessed. *Id.* at 667–81. Although the majority opinion found no privilege protecting reporters who are eyewitnesses to crimes from testifying before grand juries, Justice White, writing for the plurality, acknowledged that “without some protection for seeking out the news, freedom of the press would be eviscerated.” *Id.* at 681. While the Court in *Branzburg* denied a reporter the qualified privilege of

the First Amendment, it limited its holding solely to grand jury subpoenas in criminal investigations. *Id.* at 682–86. Unlike civil cases, a criminal case has the potential to deprive a person of liberty or even life. *Mitchell v. United States*, 526 U.S. 314, 328 (1999). In the criminal context of *Branzburg*, the Court found a compelling interest overcoming the constitutional privilege of the journalists. *Branzburg*, 408 U.S. at 674; *see Mitchell*, 526 U.S. at 328; *United States v. Smith*, 135 F.3d 963, 967–72 (5th Cir. 1998). Compared to the case before this Court today, the constitutional privilege should not yield as in *Branzburg* because liberty and life are not at stake.

Nearly four decades since this Court decided *Branzburg*, it has become a majority position among the states and courts that journalists should have their confidential sources protected against compelled disclosure in legal proceedings. *See In re Judith Miller*, 438 F.3d 1141, 1170 (D.C. Cir. 2005) (Tartel, J., concurring) (finding that forty-nine states and the District of Columbia offer at least qualified protection to reporters’ sources); *In re Roche*, 411 N.E.2d 466, 475 (Mass. 1980) (stating that judges managing discovery must consider the First Amendment implications of a motion to compel). Nearly all courts cite *Branzburg* in support of their conclusions that the qualified reporter’s privilege exists. *See, e.g., In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004); *Gonzales v. NBC.*, 194 F.3d 29, 36 (2d Cir. 1998). However, the concept of a reporter’s privilege is not novel. James Madison wrote, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or, perhaps both.” 9 Writings of James Madison 103 (G. Hunt ed. 1910). Thus, the concept of the qualified privilege protecting the free flow of information stems from the founding principles of the Constitution. Moreover, the right to speak anonymously is well-settled in American democracy. *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347, 357

(1995). Indeed, as the Supreme Court noted in *McIntyre*, anonymous speech has played a crucial role in America democracy and is particularly deserving of protection. *Id.* at 357.

Thus, despite the ultimate result in *Branzburg*, the most plausible understanding of that decision in light of the Constitution's principles and resulting court decisions is that the First Amendment provides journalists with the degree of constitutional protection necessary to protect the free flow of information to the public. In addition, the national consensus among states along with the steady and consistent doctrinal development and extension of First Amendment protections adds authority to the notion that a qualified reporter's privilege exists within the First Amendment. Historical antecedents along with contemporary First Amendment jurisprudence lead to the conclusion that this Court should explicitly recognize the qualified reporter's privilege of the First Amendment and reverse the appellate court's erroneous ruling.

B. Regardless Of The Mode Of Communication, Eric Cartman Is A Journalist Entitled To The Qualified Reporter's Privilege Under the First Amendment.

The Supreme Court has recognized that "liberty of the press is the right of the lonely pamphleteer just as much as the large, metropolitan publisher." *Branzburg*, 408 U.S. at 703-04. Now, the Internet has converted the notion of the lonely pamphleteer into a powerful reality. Courts have recognized that the modes of journalism have progressively transformed and have declined to limit the reporter's privilege to traditional journalists and the regular employees of major news organizations. Rather, "an individual successfully may assert the journalist's privilege if he engages in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press," *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987), so long as "the person, at the inception of the investigatory process, had the intent to disseminate to the public the information obtained

through the investigation.” *Id.* at 143; *accord Gonzales v. NBC*, 194 F.3d 29, 36 (2d Cir. 1998); *In re Madden*, 151 F.3d 125, 129–30 (3d Cir. 1998).

As early as 1935, the Supreme Court recognized that “the liberty of the press is not confined to newspapers and periodicals. . . . The press . . . comprehends every sort of publication which affords a vehicle of information and opinion.” *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1935). Consistent with this functional understanding of journalism, courts have applied the reporter’s privilege to nontraditional journalists engaged in newsgathering. *See, e.g., Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (applying the privilege to author of a book); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 6 (2d Cir. 1982) (applying the privilege to trade newsletter compiling oil prices); *Silkwood v. Kerr-McGee*, 563 F.2d 433, 436 (10th Cir. 1977) (applying the privilege to a documentary filmmaker). More recently, courts have recognized that the reporter’s privilege extends to bloggers and website operators like Eric Cartman. For example, in *Blumenthal v. Drudge*, the court found the reporter’s privilege applicable in a case involving the blog, “The Drudge Report,” which the court had characterized in a prior opinion as a gossip column focusing on gossip from Hollywood and Washington, D.C. 186 F.R.D. 236 (D.D.C. 1999). In *O’Grady v. Superior Court*, the court applied the qualified reporter’s privilege to bloggers who published information about forthcoming Apple computer products against subpoenas by Apple, Inc. 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006). The court rejected the view that the bloggers were not engaged in “legitimate journalism or news.” *Id.* at 97. The court further decided that the bloggers engaged in “legitimate newsgathering” even when they “merely reprinted ‘verbatim copies’ of Apple’s internal information while exercising ‘no editorial oversight at all.’” *Id.*

In this case, Eric Cartman engages in activities traditionally associated with the gathering and dissemination of news. Although Respondent may argue that Eric Cartman is not a true journalist because he runs the blog to generate income, such a theory has never been accepted by any courts. His blog provides readers with updated information from the Internet and headlines of major newspapers, (J.A. at 4), thereby disseminating pertinent information. Eric Cartman also provides his readers with information obtained from confidential sources and readers of his blog. (J.A. at 5.) He engages in original analysis and opinion on the information as well. (J.A. at 5–6.)

Here, Eric Cartman had the intention to disseminate the information he obtained from his confidential source when he received it, regardless of the fact that he waited one day before posting the photograph. In the best traditions of a free press, his reporting has exposed potential corporate wrongdoing and has resulted in increased media attention and public interest. Moreover, his coverage goes beyond the scope of information that the court in *Blumenthal* protected. Eric Cartman’s blog includes relevant information relating to local and international politics. (J.A. at 4.) The blog post at issue included a digital photograph of Ike Broflovski, obtained from Cartman’s confidential source, and a factual and opinionated description of the photograph relating to human rights violations, not mere gossip. (J.A. at 6.) The reporter’s privilege is consistently applied to journalistic efforts similar to Eric Cartman’s blog, and should be applied to him in order to protect him from revealing his confidential source. There is no basis for drawing an artificial line confining the reporter’s privilege to print and broadcast publications while excluding bloggers, such as Eric Cartman, as demonstrated by the courts in *O’Grady* and *Blumenthal*.

C. The Qualified Reporter’s Privilege Protects Eric Cartman From Disclosing His Confidential Source Because Ike Broflovski Has Failed To Overcome The Test Established To Protect First Amendment Principles.

Given the First Amendment values at stake, courts emphasize that in all but the most exceptional cases, the civil litigant's interest in disclosure should yield to the journalist's privilege. *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981). To aid in striking the proper balance as to when a party may pierce the veil of the First Amendment privilege, a majority of circuit courts have adopted the following three-factor test, drawn from Justice Powell's concurrence and Justice Stewart's dissent in *Branzburg*, balancing each factor against the others. 408 U.S. 665, 710 (Powell, J., concurring), 743 (Stewart, J., dissenting). A movant may overcome the qualified privilege of the First Amendment only upon showing: (1) that the material requested is clearly relevant to the litigation; (2) there exists a compelling interest in obtaining the information, which outweighs the invocation of the privilege; and (3) the movant has exhausted all other means reasonably available to obtain the information. *See id.*; *accord In re Petroleum Prods. Antitrust Litig.*, 680 F.2d at 7; *Price v. Time, Inc.*, 416 F.3d 1327, 1343 (11th Cir. 2005). In this regard, the United States Court of Appeals for the Fifteenth Circuit determined incorrectly that Ike Broflovski had a prevailing compelling interest and that he exhausted all reasonable alternatives. (J.A. at 25–27.) Therefore, the appellate court erred in compelling Eric Cartman to disclose his confidential source.

1. The First Amendment's qualified privilege protects Eric Cartman from court-compelled disclosure because Ike Broflovski has failed to demonstrate a compelling interest.

Given the broad definition of "relevance" for discoverable information, a journalist's testimony could be sought in almost every case. *United States v. Tenorio*, 312 Fed. Appx. 122, 129 (10th Cir. 2009). Because court-compelled disclosure of confidential sources subverts the First Amendment right of anonymous speakers to remain anonymous, justification for an incursion on that right requires proof of a compelling interest. *See McIntyre v. Ohio Elections*

Comm'n, 514 U.S. 334, 347 (1995). In addition, the restriction must be narrowly tailored to serve that interest. *Id.* Courts define a compelling interest in two similar ways: “necessary for the development of the case” or “going to the heart of the claim.” *In re Subpoena of Maykuth*, No. 05-0228, 2006 U.S. Dist. LEXIS 11386, at *7 (E.D. Pa. 2006). In either instance, Ike Broflovski has failed to demonstrate a compelling interest because the anonymous source’s identity is not necessary to develop Ike Broflovski’s case, nor does it go to the heart of Ike Broflovski’s claim. Rather, Ike Broflovski appears to seek the identity of Professor Choas merely for retaliation.

In *In re Subpoena Duces Tecum to America Online, Inc.*, a plaintiff issued a subpoena to AOL in an effort to learn the identity of an online speaker. 52 Va. Cir. 26 (2000), *rev’d on other grounds by Am. Online v. Anonymous Publically Traded Co.*, 542 S.E.2d 377 (Va. 2001). The Virginia court held that “before a court abridges the First Amendment right of a person to communicate anonymously on the Internet, a showing, sufficient to enable that court to determine that a true, rather than perceived, cause of action may exist, must be made.” *In re Subpoena Duces Tecum to Am. Online, Inc.*, 52 Va. Cir. at 36. Similarly, in *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998), the Sixth Circuit denied the NLRB’s discovery request to reveal a newspaper’s confidential source because the NLRB sought a subpoena before it had developed “any factual support for its action, and before it had developed or implemented a less intrusive means to conduct its investigation.” *Id.* at 473. As the court further explained, “permitt[ing] the Board to obtain the identity of [the newspaper’s] advertiser, without demonstrating a reasonable basis for seeking such information, [would create a] chilling effect on the ability of every newspaper and periodical to publish lawful advertisements [that] would clearly violate the Constitution.” *Id.* In both cases, the courts denied that a compelling interest existed. Moreover, in *Miller v. Transamerican Press, Inc.*, the Fifth Circuit warned that “a

defamed plaintiff might relish an opportunity to retaliate against the informant.” 621 F.2d 721, 725 (5th Cir. 1980).

Here, the trial court below properly reasoned that although the identity of the confidential source is relevant, it does not stand that the identity of the source is necessary to develop a case of defamation. (J.A. at 13–14.) Ike Broflovski has not proven that the photograph is fabricated. Rather, Ike Broflovski’s lawyer simply stated that the photograph was “a total fabrication.” (J.A. at 7.) While it is true that a scan of the photograph using Citrus’s own software revealed that there is a possibility that the photograph was doctored, (J.A. at 7), there is no evidence that using other similarly designed non-Citrus software would necessarily yield the same result. Rather, Ike Broflovski is merely an opportunistic party seeking to retaliate against Professor Chaos, who is an alleged Citrus employee. (J.A. at 9.) Furthermore, Ike Broflovski did not file this action until after Citrus’s stock declined in value. The relationship between the declining value of Citrus’s stock and the defamation suit filed by Ike Broflovski is not mere coincidence. Ike Broflovski has failed to demonstrate a compelling interest to obtain the identity of Professor Chaos. Ike Broflovski can develop his claim further without the confidential information from Eric Cartman, especially where the defamation suit is merely pretext to retaliation. However, even if this Court were to find that Ike Broflovski demonstrated a compelling interest, he has failed to exhaust all reasonable alternatives to gain the information, which outweighs any potential compelling interest.

2. The First Amendment’s qualified privilege protects Eric Cartman from court-compelled disclosure because Ike Broflovski failed to exhaust all reasonable alternatives to obtain the identity of the confidential source.

While the qualified privilege is not absolute, at a minimum, the First Amendment requires that opponents exhaust all other potential sources of information before the privilege has

been overcome and court-compelled disclosure is appropriate. “The values resident in the protection of the confidential sources of newsmen certainly point towards compelled disclosure from the newsman himself as normally the end, and not the beginning, of the inquiry.” *Carey v. Hume*, 492 F.2d 631, 638 (D.C. Cir. 1972). The burden of proving exhaustion of all reasonable alternatives rests firmly with Ike Broflovski. *Zerilli*, 656 F.3d at 713 (“reporters should be compelled to disclose their sources only after the litigant [seeking to overcome the privilege] has shown that he has exhausted every reasonable alternative source of information.”). Since Ike Broflovski failed to exhaust all reasonable alternative sources of the information, he cannot overcome the qualified privilege.

Courts that have addressed the exhaustion requirement of the qualified privilege have applied it strictly. This Court and various other courts have required parties to take upwards of sixty to sixty-five depositions before finding that they satisfied the exhaustion requirement. *See, e.g., In re Roche*, 448 U.S. 1312, 1312, 1316 (1980) (requiring plaintiff to depose sixty-five individuals—a “not negligible” hardship before civil contempt proceeding could proceed against journalist for not revealing sources); *Carey*, 492 F.2d at 639 (suggesting that taking of sixty depositions is reasonable prerequisite to compelling disclosure); *see also Star Editorial v. U.S. Dist. Court*, 7 F.3d 856, 861 (9th Cir. 1993) (finding privilege overcome only when all non-confidential sources had been deposed). In *Shoen v. Shoen*, the Ninth Circuit held that the privilege had not been overcome because one of the parties had not been deposed, although he had been served with “written interrogatories which produced uninformative answers.” 5 F.3d 1289, 1296 (9th Cir. 1993). The court stated, “[w]ritten interrogatories are rarely, if ever, an adequate substitute for a deposition when the goal is discovery of a witness’ recollection of conversations.” *Id.* at 1297.

Here, Ike Broflovski has failed to carry his burden. The record clearly indicates that the Broflovskis only deposed the Mumbai factory manager and several top engineers. (J.A. at 8.) The depositions are not an exhaustion of all reasonable alternatives. Inherent in the courts' decisions is the notion that a deposition must be meaningful to further the exhaustion of reasonable alternatives. *See Carey*, 492 F.2d at 639; *Condit v. Nat'l Enquirer, Inc.*, 289 F. Supp. 2d 1175, 1180–81 (E.D. Cal. 2003). The depositions in this instance do not advance the exhaustion of reasonable alternatives. The photograph depicts assembly line workers and, therefore, it is highly unlikely that the factory manager, top engineers, or any other white-collar workers would be working on the assembly floor or within the assembly workers' area when the photograph was taken. Thus, they would not have knowledge of the source's identity.

Although Kyle Broflovski also sent an email to all Citrus employees requesting information on the source of the leak, (J.A. at 8), his effort was not an exhaustion of reasonable alternatives. Such an investigation was simply not comparable to under-oath depositions of all potentially knowledgeable workers enforced by a court's civil and criminal contempt powers. *See Zerilli*, 656 F.2d at 708–9, 714–15 (internal Justice Department investigation is not a substitute for depositions); *Shoen*, 5 F.3d at 1297 (written interrogatories are not a substitute for depositions). The e-mail was nothing more than an interrogatory, which courts have already found insufficient to constitute exhaustion of reasonable alternatives. *Shoen*, 5 F.3d 1297; *Bagley v. Blagojevich*, No. 05-3156, 2008 U.S. Dist. LEXIS 20005, at *4 (C.D. Ill. 2008); *Harbert v. Priebe*, 466 F. Supp. 2d 1214, 1216 (N.D. Cal. 2006).

Holding that interrogatories are insufficient to show and exhaustion of reasonable alternatives incentivizes a party to conduct a more thorough investigation of its own employees. While turning to journalists may instead seem like a convenient and more comfortable

alternative for the Broflovskis, it is one which the First Amendment does not permit. The obligation to exhaust all alternative sources may not be ignored simply because of a fear that it would be “time-consuming, costly, and unproductive.” *Zerilli*, 656 F.2d at 715. Journalists have a First Amendment privilege not to become the investigative tools of litigants, whereas the Broflovski’s employees do not. If for no other reason than this failure to exhaust potential alternative sources of information, Ike Broflovski has failed to overcome the qualified First Amendment privilege afforded to Eric Cartman against court-compelled disclosure of his confidential sources. Therefore, the appellate court’s order compelling Eric Cartman to reveal the identity of his confidential source is a violation of the qualified reporter’s privilege and should be reversed in order to uphold the protections guaranteed by the First Amendment.

II. IKE BROFLOVSKI QUALIFIES AS A LIMITED-PURPOSE PUBLIC FIGURE UNDER THE WALDBAUM TEST, WHICH REQUIRES APPLICATION OF AN ACTUAL MALICE STANDARD OF LIABILITY, BECAUSE THE CONTROVERSY AT ISSUE IS A MATTER OF PUBLIC CONCERN, IKE BROFLOVSKI PLAYED A MAJOR ROLE IN SHAPING THE CONTROVERSY, AND HIS PARTICIPATION IN THE CONTROVERSY IS GERMANE TO THE ALLEGED DEFAMATION.

The appellate court improperly reversed and remanded the district court’s grant of summary judgment in favor of Eric Cartman. This Court should grant Eric Cartman summary judgment because Ike Broflovski qualifies as a limited-purpose public figure under the most commonly-applied test for liability in a defamation action, the *Waldbaum* test. *See Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980). Ike Broflovski satisfies this three-prong test because the human rights controversy that brought about the alleged defamation at issue is a matter that affects not only Ike Broflovski, but the community at large. Additionally, Ike Broflovski played a major role in shaping this public controversy through his influence over the internal workings of Citrus and his participation in potential human rights violations is germane to the alleged defamation. The clearest case for constitutional protection of an allegedly libelous

publication is one in which the plaintiff is a public official or public figure, the defendant is a representative of the media of mass communication, and the publication relates to a matter of public interest or concern. *James v. San Jose Mercury News, Inc.*, 20 Cal. Rptr. 2d 890 (Cal. Ct. App. 1993).

Having evolved from common law, the constitutionalized test for liability in a defamation action depends on whether the libeled figure is a public or private figure and whether the defamatory publication addresses a matter of public or private concern. *Meisler v. Gannett Co., Inc.*, 12 F.3d 1026, 1029 (11th Cir. 1994). A defamation action brought by a private person currently merits a liability standard of mere negligence, whereas a similar action brought by a public figure merits the application of an actual malice standard of liability. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (drawing the line between standards of liability concerning private persons and public officials); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (companion cases extending the standard from public officials to public figures). Deconstructing the distinction further, there are several types of public figures, all of which trigger application of the actual malice standard of liability. The most commonly used types are those of general purpose and limited purpose. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069 (3rd Cir. 1988); *Chevalier v. Animal Rehab. Ctr., Inc.*, 839 F. Supp. 1224 (N.D. Tex. 1993). The question of public figure status is one of constitutional law for courts to decide. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

Eric Cartman concedes that Ike Broflovski is not a general-purpose public figure, who has voluntarily injected himself into the public limelight for all occasions and purposes. (J.A. at 18.) However, Ike Broflovski does qualify as a limited-purpose public figure, sometimes called a vortex public figure. *Pittman v. Gannett River States Pub. Corp.*, 836 F. Supp. 377 (S.D. Miss.

1993). In the landmark decision *Gertz v. Welch*, the United States Supreme Court granted certiorari and reversed a Seventh Circuit decision that refused application of the actual malice standard because the trial court found that a police officer was neither a public official nor a public figure. *Id.* at 329–31. The Supreme Court instead fractured the definition of “public figure” into general-purpose public figures and limited-purpose public figures, the latter of which characterizes Ike Broflovski, making him a public figure for a limited range of issues. *Id.* at 351. *Gertz* identified a limited-purpose public figure as a person, or group of people, who voluntarily inject themselves, or are drawn into a particular public controversy. *Id.* As a guideline, the Court instructed trial courts to look to the “nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.” *Id.* at 352. Therefore, this Honorable Court should analyze the course of Ike Broflovski’s employment at Citrus and naturally conclude that the totality of his involvement, in relation to a potential human rights violation, qualifies him as a limited-purpose public figure.

Since the *Gertz* decision, courts have developed several tests in efforts to capture the message of *Gertz* and to provide the legal world with a solid test to analyze plaintiffs in defamation lawsuits and thus determine which standard of liability to apply. In *Waldbaum v. Fairchild Publications*, the District of Columbia Circuit Court of Appeals evaluated and developed the oft utilized approach to the characterization of limited-purpose public figures. 627 F.2d 1287 (1980). The Court set out a three-part analysis, which isolated the core elements of the *Gertz* guidelines: (1) the controversy itself, (2) the plaintiff’s participation in it, and (3) the defamatory publication. Daniel P. Dalton, *Defining the Limited-Purpose Public Figure*, 70 U. Det. Mercy L. Rev. 47, 66 (1992). Therefore, the *Waldbaum* test indicates that as the first step in its inquiry, a court must isolate the public controversy. *Waldbaum*, 627 F.2d at 1296–97. Next a

court must establish the plaintiff's role in the controversy, whether it is trivial or tangential. *Id.* at 1297–98. Finally, a court must find that the libel plaintiff's participation in the controversy is germane to the alleged defamation. *Id.* at 1298.

A. Though A Minority Of Circuits Have Applied Different Tests, The *Waldbaum* Test Is The Most Appropriate For Characterization Of A Limited-Purpose Public Figure Because It Accurately Captures The Intent Of *Gertz* And Balances The Freedom Of The Press With A State's Interest In Protecting An Individual's Integrity.

The method by which this Court characterizes public figures is an issue of first impression. At least two other tests have been developed by a minority of the circuits, but the reasons for adoption of the *Waldbaum* test for the limited-purpose public figure are numerous and persuasive. The test developed by the Second Circuit in *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984) represents an evaluation of *Gertz* and an attempt to set its purpose out in a four-part test. The *Lerman* test was a noble effort, but it failed to comport fully with the teachings of *Gertz* because the public controversy element was treated too broadly, whereas *Gertz* focused solely on the plaintiff's relationship to the controversy as reported in the defamatory statement at issue. Dalton at 65. The Court in *Lerman* focused instead on the public's perception of a plaintiff writer's prior conduct in the erotic novel industry, as opposed to the controversy that brought about the alleged defamation, the novelist's alleged appearance in an erotic film. *Lerman*, 745 F.2d at 137.

The *Marcone* test was the Third Circuit Court of Appeals attempt at developing a two-part test, taken directly from the text of *Gertz*, to classify limited-purpose public figures. *Marcone v. Penthouse Int'l Magazine*, 754 F.2d 1072 (3d Cir. 1985). The test simply considers whether the matter in question is a public controversy and ascertains the “nature and extent” of the plaintiff's participation in the public controversy. *Id.* Though one might think that such a

literal application of *Gertz* would yield the perfect test, one key element was left out in *Marcone*: How does the alleged defamatory publication relate to the defamed individual's role in the public controversy? The progeny of *Gertz* indicates that the plaintiff's role in the controversy must be proven by the defendant, but the *Marcone* test simply assumes that a plaintiff played a significant role in a public controversy even just by being associated with a public figure. Dalton, 70 U. Det. Mercy L. Rev. at 66.

The *Waldbaum* court developed the only test that successfully recognized the interest of *Gertz* and established the constitutional standards by which the limited-purpose public figure issue is framed. *Id.* at 65. All three *Waldbaum* inquiries satisfy the root and purpose of *Gertz*, while maintaining the delicate balance between a state's interest in individual integrity and the constitutional protection afforded to the press. It is vital that this court adopt the *Waldbaum* test to create a uniform comfort that affords individuals contemplating involvement in a public controversy the ability to calculate the impact of their actions and possible legal recourse should a falsity be published, but also to ensure that the media will be able to publish stories concerning topics that might have been unconstitutionally suppressed. In the seminal *N.Y. Times v. Sullivan* case, the idea at the root of the court's distinction between private and public figures for defamation liability was that erroneous statements are inevitable in free debate, and must be protected if the freedoms of expression are to have the "breathing space" they need to survive. 376 U.S. at 271–72. Thus, the *Waldbaum* test strikes the perfect balance between constitutional intent and case law precedent.

B. Application Of The Three-Pronged *Waldbaum* Test Reveals That Ike Broflovski Is A Limited-Purpose Public Figure Because Of His Significant Role In A Human Rights Controversy Which Was Directly Related To The Allegedly Defamatory Publication.

The *Waldbaum* test was successfully applied in a Fifth Circuit decision having similar facts to the record at issue before this Honorable Court. In *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431 (5th Cir. 1987), the court held that the plaintiff, the president of a soft drink plant in Guatemala, was a public figure for the limited purpose of the public controversy surrounding anti-union violence at the plant. *Id.* at 433–35. Though the plaintiff in *Trotter* and Ike Broflovski serve different business functions, the case serves as an effective guideline for the application of the *Waldbaum* test to the facts on record. In making that application, this Honorable Court should grant summary judgment to Eric Cartman, as Ike Broflovski is a limited-purpose public figure who cannot prove actual malice.

1. The potential human rights violations committed at the Citrus factory in Mumbai were a public controversy, based on public discourse and the impact of the controversy’s resolution on uninvolved parties.

The measure of whether or not a controversy is one of public concern does not rely solely on the public’s perception and reaction to the controversy. Equally important as the public’s discourse is the requirement that people other than the immediate participants in the controversy are likely to feel the impact of its resolution. *See Waldbaum*, 627 F.2d 1287; *Silvester v. Am. Broad. Cos., Inc.*, 839 F.2d 1491 (11th Cir. 1988). *Trotter* was decided in 1987, and the court there focused on the previous decade of turmoil in Central America, indicating that those countries had become a focus of national concern, especially where a United States company is implicated. *Trotter*, 818 F.2d at 434. In the past decade, the United States has seen great social and political turmoil regarding domestic relations, especially with Middle Eastern and South Asian countries. Additionally, the extensive debate over Guantanamo Bay has brought human rights violations to the forefront of public controversy. Resolution of these types of issues affects

all humans and are inherently public, as opposed to the resolution of a private concern, such as divorce proceedings. *See, e.g., Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

To determine whether a public controversy exists, the courts have also analyzed whether people were actually aware of the event and entertaining a public discourse. The court can entertain evidence of whether the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment. *Waldbaum* 627 F.2d at 1297. The labor violence at issue in *Trotter* garnered the attention of a wide variety of media outlets, just like the potential human rights violations at issue in Eric Cartman’s case. *Trotter*, 818 F.2d at 434. The record reveals that Eric Cartman’s blog entry spread so rapidly through the channels that little more than a month later, the allegations were featured on the top-rated news show, “The Countdown Factor.” (J.A. at 6.) The host awarded Ike Broflovski with the “Most Heinous Individual in the Galaxy” award, and as a result Citrus’s stock dropped by twenty-five percent in one day, (J.A. at 6), and numerous retailers pulled Citrus products from their shelves. (J.A. at 7.) The record makes clear that it was not Eric Cartman’s article that caused the press coverage, but the allegations of such a violation by a top American company on foreign soil.

2. Ike Broflovski’s role in the public controversy over Citrus’s Mumbai factory was neither trivial nor tangential because he played a significant role in shaping it.

The second prong of the *Waldbaum* test analyzes the extent to which the plaintiff is involved in the public controversy. “Trivial or tangential participation is not enough.” *Waldbaum*, 627 F.2d at 1297. To fulfill the second prong, the plaintiff either (1) must “purposely [try] to influence the outcome” of the public controversy, or (2) “could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.” *Id.* This

Trotter,

818 F.2d at 436 (citing *Rosanova v. Playboy Enters., Inc.*, 580 F.2d 859 (5th Cir. 1978)). The *Trotter* court was more concerned with the relationship between Trotter's control over labor policy and the fact that anti-union labor violence was occurring during his tenure. Ike Broflovski is similarly situated in that he is the Director of Research and Development, a position that encompasses manufacturing as part of the process that brings a new product to the market. He has admitted to making several trips to Mumbai, and though the evidence does not reveal that he visited the Mumbai factory, mere coincidence is not likely. (J.A. at 7.) While Ike Broflovski's presence in the photograph of the Mumbai factory may be fabricated, (J.A. at 7.), the quality of the work conditions was real, and existed under Broflovski's leadership. Therefore, Ike Broflovski's position of power at Citrus is intertwined with the allegation of human rights violations such that he would realistically have been expected to have an impact on the controversy's resolution.

The Supreme Court has considered significant involvement in public controversies as the more important element for the second prong of the *Waldbaum* test, but it still considers the plaintiff's media access as a factor in the public figure analysis. *Gertz*, 418 U.S. at 344. The plaintiff in *Trotter* and Ike Broflovski differ in this respect, because Trotter did not take advantage of any media access and did not appear frequently in the press. Ike Broflovski was in attendance and spoke at a press conference concerning his appointment at Citrus, an event that

was subsequently covered by the Associated Press and featured in many newspapers, including Ike Broflovski's name and quoted statement. (J.A. at 3.) Additionally, Ike Broflovski's brother Kyle, CEO of Citrus, has gone out of his way to praise Ike's work in television and magazine interviews. (J.A. at 3.) Ike Broflovski's contact information also appears on the Citrus website. (J.A. at 4.) The record shows that in addition to being in a position that would merit impact on the controversy's outcome, Ike Broflovski possessed and took advantage of access to the media.

3. Ike Broflovski's participation in the human rights controversy is germane to the alleged defamation because his actions were the focus of both the photograph and Eric Cartman's accompanying commentary.

The third requirement of the public figure analysis is that the alleged defamation was germane to the plaintiff's role in the controversy. *Waldbaum*, 627 F.2d at 1298. "Misstatements wholly unrelated to the controversy, however, do not receive the *N.Y. Times* [constitutional] protection." *Id.* The *Trotter* court dealt easily with the third prong by stating that even the allegation that Trotter was responsible for the anti-union violence was the same as describing his role in the controversy. *Trotter*, 818 F.2d at 436. Similarly, the record in this case makes clear that both the photo published on *The Sludge Report* and the commentary written by Eric Cartman were related to and focused directly on Ike Broflovski's role as Director of Research and Development in the human rights controversy. (J.A. at 5–6.)

C. Ike Broflovski Cannot Prove Actual Malice In This Case Because Eric Cartman Relied On A Trusted Source When Publishing The Photograph On His Blog.

Ike Broflovski's status as a limited-purpose public figure has been established and, therefore, Eric Cartman's actions as an allegedly defamatory blogger are held to an actual malice standard. Actual malice exists when the defendant publishes a defamatory statement with knowledge that it was false or with reckless disregard of whether it was false or not. *Jones v. New Haven Register, Inc.*, 763 A.2d 1097, 1105 (Super. Ct. 2000). The inquiry is a subjective

one as to the defendant's attitude toward the truth or falsity of the statement, rather than the defendant's attitude toward the plaintiff. *Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 289 (Mass. 2000). Proof of personal animosity alone is insufficient to meet the actual malice standard. *Kessler v. Zekman*, 620 N.E.2d 1249, 1261 (Ill. App. Ct. 1993). It is conceded that Eric Cartman holds Citrus in particular contempt for exporting jobs, engaging in questionable employment practices, and nearly driving him out of business. (J.A. at 4.) However, absent proof of a knowing dissemination of a falsity or reckless disregard for the truth in doing so, the actual malice standard cannot be met.

Evidence of personal animosity would be enough only when coupled with facts that indicate that the publisher doubted the source of its information. As long as the sources of libelous information appeared reliable, and the defendant had no doubts about its accuracy, the evidence of malice is insufficient to support a jury verdict, even if a more thorough investigation might have prevented the admitted error. *Ryan v. Brooks*, 634 F.2d 726, 734 (4th Cir. 1980). Actual malice may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his or her reports. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). Nothing in the record of the case at hand indicates that Eric Cartman entertained any doubts as to the reliability of his source, Professor Chaos; in fact, it suggests just the opposite. Unlike most other informants, Eric Cartman knows Professor Chaos personally through business and possesses his real contact information. (J.A. at 5.) Professor Chaos has also previously provided Eric Cartman with reliable information about various Citrus products, which Eric Cartman has incorporated into a number of articles on his blog. (J.A. at 5.) There is nothing about this information to indicate that Eric Cartman should or would have hesitated to disseminate any information he received from Professor Chaos.

Opposing counsel may ask this Honorable Court to consider as evidence of recklessness the fact that Eric Cartman possessed the means by which to investigate the veracity of the photo, but failed to utilize it. Eric Cartman does indeed possess photo software with forgery detection capabilities, but did not test Professor Chaos's photo. (J.A. at 7.) Failure to investigate does not in itself establish bad faith, without the aforementioned awareness of probable falsity. *St. Amant*, 390 U.S. at 732. The fact that the defendant could have been more diligent in his research, does not rise to the level of reckless disregard, which is required to satisfy the actual malice standard. *Buendorf v. Nat'l Pub. Radio, Inc.*, 822 F. Supp. 6, 11 (D.D.C. 1993). Even a conscious decision not to inquire into the truth of a matter does not prove malice. *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 717 (4th Cir. 1991). The record shows that Eric Cartman has really only used the software on a handful of photos posted to his website. (J.A. at 7.) The probability that Professor Chaos's photo would be added to that random few, coupled with the confidence Eric Cartman had in Professor Chaos as a reliable and verifiable source indicates that Eric Cartman neither acted with knowledge of a falsity, nor acted with reckless disregard for the truth. Therefore, there is no genuine issue of material fact with which to satisfy the actual malice standard and Eric Cartman was improperly denied summary judgment by the court below.

CONCLUSION

Inherent in the First Amendment is the qualified reporter’s privilege, which is necessary to uphold the freedom of the press. Eric Cartman is an internet journalist who engages in the routine activities of any typical journalist and, therefore, is afforded the protections of this privilege, which Ike Broflovski has failed to defeat. Moreover, Ike Broflovski is a limited-purpose public figure, therefore, the actual malice standard of liability applies. However, Eric Cartman is not liable, because he published the photograph without knowledge of falsity or reckless disregard for potential falsity.

For the reasons set forth above, Eric Cartman, Petitioner, respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fifteenth Circuit, thereby upholding Eric Cartman’s First Amendment rights under the United States Constitution and protecting the freedom of the press.

Respectfully Submitted,

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