

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 No. 114
Counsel for Petitioner

QUESTIONS PRESENTED

- I. Whether the First Amendment protects a reporter from disclosing the identity of confidential sources in a civil investigation, and, if so, is Mr. Cartman, an online blogger with a subscriber base of 100,000, qualified as a reporter to claim the privilege?

- II. Whether Respondent, a top executive at a large and widely recognized company, is a limited-purpose public figure for comments concerning the company's activities; and if so, is posting a photograph, with no readily identifiable signs of tampering, that Mr. Cartman received from a known source, acting with reckless disregard for the truth of the matter published?

TABLE OF CONTENTS

QUESTIONS PRESENTED2

TABLE OF CONTENTS3

TABLE OF AUTHORITIES4

JURISDICTION STATEMENT6

STATEMENT OF THE CASE.....7

SUMMARY OF THE ARGUMENT11

ARGUMENT.....13

I. TO GUARD AGAINST THE CHILLING OF PUBLIC DEBATE, THE FIRST AMENDMENT PROTECTS MR. CARTMAN, A REPORTER, FROM DISCLOSING HIS CONFIDENTIAL SOURCE IN A CIVIL SUIT INVESTIGATION. 13

A. The Majority of Circuit Courts Have Correctly Limited *Branzburg* to Criminal Cases While Simultaneously Acknowledging the Existence of a Qualified Reporter’s Privilege in Civil Litigation. 14

B. Mr. Cartman, an Online Blogger with a Subscriber Base of 100,000 People, is Qualified to Invoke the Privilege Because He is a Reporter, and He Gathered the Information to Disseminate on His Website. 17

C. The Freedoms Guaranteed Mr. Cartman Under the First Amendment Are Not Outweighed By the Respondent’s Interest in Compelling Disclosure in this Civil Investigation. 20

1. While the identity of the source may be relevant to Respondent’s claim, there are other ways to prove those claims that do not burden Mr. Cartman’s First Amendment rights. 21

2. Defendant has made only negligible attempts to seek the information through alternative means available to him. 24

II. MR. CARTMAN SHOULD NOT BE HELD LIABLE FOR DEFAMATION BECAUSE RESPONDENT IS A LIMITED-PURPOSE PUBLIC FIGURE AND THE PHOTOGRAPH WAS NOT PUBLISHED WITH RECKLESS DISREGARD FOR ITS TRUTH. 26

A. Respondent Has Assumed a Role of Public Prominence as the Director of Research and Development for Citrus, One of the Nation’s Most Recognized Companies, Making Him a Limited-Purpose Public Figure. 27

1. <i>This Court Should adopt the Waldbaum test, which has been adopted by plurality of circuit courts, for determining limited-purpose public figure status because it is closely aligned with the principles espoused in Gertz.</i>	28
2. <i>Alleged human rights violations by a major company like Citrus are a matter of public controversy.</i>	30
3. <i>Respondent voluntary assumed the role of Director of Research and Development, thereby placing himself at the forefront of controversies concerning the company and granting himself significant media access to rebut those claims.</i>	31
4. <i>Mr. Cartman’s statements attacking the treatment of labor by Citrus were germane to the Respondent’s role in the controversy.</i>	33
B. Respondent, at the Very Least, Should Be Considered an Involuntary Limited-Purpose Public Figure With Respect to Controversies Surrounding the Company He Helps Direct.	34
C. Respondent Cannot Overcome the Heavy Burden of Proving Mr. Cartman Published the Photograph With Reckless Disregard for its Truth Whenever Mr. Cartman Obtained the Photograph from a Personally Known, Reliable Source and There was No Visible Indication the Photograph Had Been Altered.	35
CONCLUSION	37

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

<i>Associated Press v. NLRB</i> , 301 U.S. 103 (1937).	17
<i>Bose Corp. v. Consumers Union of U.S., Inc.</i> 466 U.S. 485 (1984).	35
<i>Branzburg v. Hayes</i> , 408 U.S. 655 (1972).	passim
<i>Curtis Publ’g Co. v. Butts</i> , 388 U.S. 130 (1967).	26, 27
<i>Edwards v. South Carolina</i> , 372 U.S. 229 (1963).	26
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974).	26, 28-29, 31
<i>Lovell v. Griffin</i> , 303 U.S. 444 (1938).	17, 18
<i>Masson v. New Yorker Magazine</i> , 501 U.S. 496 (1991).	36

<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964).	13, 23, 26, 33
<i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968).	36
<i>Time Inc., v. Firestone</i> 424 U.S. 448 (1976).	30
<i>Wolston v. Reader's Digest Assn., Inc.</i> 443 U.S. 157 (1979).	30

FEDERAL CASES

<i>Atlanta Journal-Constitution v. Jewell</i> , 555 S.E.2d 175 (Ga. Ct. App. 2001), <i>cert. denied</i> , (February 11, 2002).	33
<i>Bagley v. Iowa Beef Processor, Inc.</i> , 797 F.2d 632, (8th Cir. 1986), <i>reh'g en banc denied</i> , (Sept. 11, 1986).	29
<i>Baker v. F & F Inv.</i> , 470 F.2d 778 (2d Cir. 1972).	13
<i>Blumenthal v. Drudge</i> , 186 F.R.D. 236 (D.D.C. 1999).	20, 24, 25
<i>Carey v. Hume</i> , 492 F.2d 631 (D.D.C. 1972).	21-23
<i>Cervantes v. Time, Inc.</i> , 464 F.2d 986 (8th Cir. 1972), <i>reh'g denied</i> , (Aug. 17, 1972).	21-23
<i>Dameron v. Wash. Magazine, Inc.</i> 779 F.2d 736 (D.C. Cir. 1985).	34
<i>Flowers v. Carville</i> , 310 F.3d 1118 (9th Cir. 2002).	32
<i>Foretich v. Capital Cities/ABC, Inc.</i> , 37 F.3d 1541, 1559-60 (4th Cir. 1994).	32
<i>Fox v. Township of Jackson</i> , 64 Fed. App'x 338 (3d Cir. 2003) (unpublished opinion) <i>available at</i> 2003 WL 1971833 (3d. Cir. April 28, 2003).	16, 20
<i>Gonzales v. NBC</i> , 194 F.3d 29 (2d Cir. 1998).	15, 20
<i>In re Grand Jury Investigation</i> , 974 F.2d 1068 (9th Cir. 1992).	13
<i>In re Grand Jury Proceedings</i> , 810 F.2d 580-84 (6th Cir. 1987).	16, 17
<i>In re Madden</i> , 151 F.3d 125 (3d Cir. 1998).	16
<i>In re Special Proceedings</i> , 373 F.3d 37 (1st Cir. 2004).	16
<i>LaRouche v. NBC</i> , 780 F.2d 1134 (4th Cir. 1986), <i>cert. denied</i> , 479 U.S. 818 (1986).	16, 20
<i>Lerman v. Flynt Distrib. Co.</i> , 745 F.2d 123 (2d Cir. 1984).	28
<i>Long v. Cooper</i> , 848 F.2d 1202 (11th Cir. 1988).	29
<i>Marcone v. Penthouse Int'l Magazine</i> , 754 F.2d 1072 (3d Cir. 1985).	30
<i>McDowell v. Paiewonsky</i> , 769 F.2d 942 (3d Cir. 1985).	28

<i>McKevitt v. Pallasch</i> , 339 F.3d 530 (7th Cir. 2003).	16, 17
<i>Miller v. Transamerican Press, Inc.</i> , 621 F.2d 721 (5th Cir. 1980).	16
<i>Nat'l Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus</i> , 705 F.2d 98 (4th Cir. 1983).	29
<i>O' Donnell v. CBS, Inc.</i> , 782 F.2d 1414 (7th Cir. 1986).	29
<i>Partington v. Bugliosi</i> , 825 F. Supp. 906 (D. Haw. 1993).	28
<i>Riley v. City of Chester</i> , 612 F.2d 708 (3d Cir. 1979).	16
<i>Schoen v. Schoen</i> , 5 F.3d 1289 (9th Cir. 1993).	16, 20
<i>Silkwood v. Kerr-McGee Corp.</i> , 563 F.2d 433 (10th Cir. 1977).	15, 16, 19, 20
<i>Trotter v. Jack Anderson Enters.</i> , 818 F.2d 431 (5th Cir. 1987).	29
<i>von Bulow v. von Bulow</i> , 811 F.2d 136 (2d Cir. 1987), <i>cert. denied</i> , (Oct. 14, 2980).	18, 19
<i>Waldbaum v. Fairchild Publ'ns, Inc.</i> , 627 F.2d 1287 (D.C. Cir. 1980).	28-31, 33-35
<i>Zerilli v. Smith</i> , 656 F.2d 705 (D.C. Cir. 1981).	20, 24, 25

STATE CASES

<i>Bay View Packing Co., v. Taff</i> , 543 N.W.2d 522 (Wis. Ct. App. 1995).	34, 35
<i>Khawar v. Globe Int'l, Inc.</i> , 19 Cal. 4th 254 (Cal. 1998).	36

CONSTITUTIONAL PROVISIONS, STATUTES, and REGULATIONS

U.S. Const. amend. I.	13
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SECONDARY AUTHORITIES

<i>Protecting the New Media: Applications of the Journalist's Privilege to Bloggers</i> , 120 Harv. L. Rev. 996 (Feb. 2007).	18
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JURISDICTION STATEMENT

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

STATEMENT OF THE CASE

In June 2005, Mr. Eric Cartman began operating his blog, *The Sludge Report*, which comments on a wide-range of public issues, from “celebrity gossip to local and international politics.” (J.A. at 4.) In accord with his personal beliefs, Mr. Cartman has focused much of his criticism on the practices of large companies engaging in international trade. (J.A. at 4.) As the proprietor of a small electronic store, Mr. Cartman is often critical of conglomerate corporations that export jobs overseas, while simultaneously driving local competition out of business. (J.A. at 4.) Mr. Cartman is also concerned with human rights violations and has criticized many large-scale corporations for what he considers the “systematic oppression of the peoples of the Third World.” (J.A. at 4.) These views have generated significant debate, as evidenced by the rising popularity of *The Sludge Report*, which now has an audience of over 100,000 readers. (J.A. at 4.)

In order to broaden the topics discussed, Mr. Cartman allows subscribers to e-mail him directly with any “scoops . . . scandals . . . and other information” by providing a link to his email on the website. (J.A. at 5.) Mr. Cartman assures his sources confidentiality by stating that “all persons who send messages to the address with tips or other information will be treated as confidential unless otherwise requested.” (J.A. at 5.)

Through this method, Mr. Cartman received a photograph on July 7, 2008. (J.A. at 5.) The photograph was provided by “Professor Chaos,” a source Mr. Cartman personally knew and had received reliable information from on numerous occasions. (J.A. at 5.) The photograph depicted Respondent, Ike Broflovski, who is the Director of Research and Development at Citrus Electronics, Inc. (J.A. at 3.), walking through the Mumbai factory of Citrus (J.A. at 5).

Respondent seemed to be yelling at the workers, who were wearing surgical masks and appeared to be operating machinery with minimal protective gear. (J.A. at 5.)

Respondent became the Director of Research and Development in 2006 and was charged with overseeing the development of the ePlay Touche. (J.A. at 3.) The ePlay is Citrus' flagship product and has become an icon of popular culture, making Citrus a Fortune 500 company and one of the largest and most widely recognized electronics companies in the United States. (J.A. at 2.) Respondent's brother, Kyle, announced Respondent's hiring at a press conference on August 7, 2006. (J.A. at 3.) While the press conference was moderately attended, the buzz over the new product led the Associated Press to release a story on the conference, which included the statement from Respondent that he "looked forward to pushing Citrus, its employees, and its products to new heights." (J.A. at 3.) While Respondent generally prefers to stay out of the limelight, employees of Citrus Megastores have begun wearing "I Like Ike" buttons to celebrate his innovations. (J.A. at 4.)

On July 8, 2008, the day after Mr. Cartman received the photograph, he published the picture of Respondent on his website under the headline "Citrus Engaging in Acts of Modern-Day Slavery?" (J.A. at 5.) In the commentary following the photo, Mr. Cartman asserted that the men and women depicted in the photograph often work "16 hours a day, seven days a week, with few breaks." (J.A. at 6.) The blog sparked considerable interest from the public, and on August 19, 2008, Keith McRiley, host of the cable news show "the Countdown Factor," named Respondent the "Most Heinous Individual in the Galaxy" and urged his viewers to boycott Citrus products. (J.A. at 6.) Citrus' stocks dropped, and numerous retailers, unwilling to be associated with a company engaged in human rights violations, pulled Citrus products from their shelves.

(J.A. at 6-7.) Respondent was asked numerous times by the media to respond; however, he refused all of their requests. (J.A. at 7.) Instead, he instructed his attorney to make a public statement, declaring the photograph was a “total fabrication,” and a lawsuit was being pursued. (J.A. at 7.)

True to his word, Respondent filed a common law defamation suit in the Superior Court for the State of Silverado on September 20, 2008. (J.A. at 1.) Mr. Cartman removed the case to the United States District Court for the Western District of Silverado on October 14, 2008. (J.A. at 1.) Discovery began in the case, and it was revealed the photograph had likely doctored. (J.A. at 7.) The picture of Respondent had been superimposed onto a picture of the factory workers, but the modifications were only detectable through a scan by software and not to the naked eye. (J.A. at 7.) In an effort to identify the source of the photograph, Respondent deposed the manager of the Mumbai factory, along with top engineers, and sent an email to all Citrus employees. (J.A. at 8.) On January 8, 2009, Respondent moved the District Court to compel disclosure of the identity of Professor Chaos, pursuant to Fed. R. Civ. P. 37. (J.A. at 1.)

In his reply, Mr. Cartman opposed the disclosure based on a qualified reporter’s privilege and also moved for summary judgment, asserting that Respondent was a limited-purpose public figure unable to prove that Mr. Cartman had published the photograph with actual malice. The District Court agreed, finding that a qualified reporter’s privilege existed in the First Amendment (J.A. at 11), and Mr. Cartman was entitled to invoke it because Respondent’s interest in the disclosure did not outweigh Mr. Cartman’s guaranteed First Amendment right (J.A. at 13). The District Court denied Respondent’s motion to compel. (J.A. at 14.) Additionally, the District Court granted Mr. Cartman’s Motion for Summary Judgment, finding Respondent, as a top-tier

executive of a Fortune 500 company who is alleged to be engaged in human rights violations, was a limited-purpose public figure. (J.A. at 18.) Respondent then failed to prove Mr. Cartman had published the photograph with actual knowledge of falsity or reckless disregard of its truth. (J.A. at 20.)

Respondent appealed to the Circuit Court of Appeals for the Fifteenth Circuit on February 5, 2009, seeking reversal of the District Court's denial of the Motion to Compel and the granting of Mr. Cartman's Motion for Summary Judgment. (J.A. at 22.) The Fifteenth Circuit reversed, finding no qualified reporter's privilege existed under the First Amendment, and even if there was, a defendant in a defamation suit could almost never exercise it. (J.A. at 23-27.) Additionally, the Fifteenth Circuit held Respondent was a private figure, and Mr. Cartman had been negligent in publishing the photograph. (J.A. at 27-32.)

The case comes to this Court on Mr. Cartman's petition for a writ of certiorari from the Fifteenth Circuit's reversal of the District Court. (J.A. at 33.) Mr. Cartman asks this Court to determine whether a qualified reporter's privilege exists in the First Amendment, and whether Mr. Cartman, as an online blogger with a large subscriber base, is entitled to it. (J.A. at 33.) Second, Mr. Cartman asks this Court to determine whether Respondent, executive of Citrus, is a limited-purpose public figure; and if so, whether Mr. Cartman published the photograph with actual malice. (J.A. at 33.) Mr. Cartman has asked this Court to reverse the Fifteenth Circuit's rulings.

SUMMARY OF THE ARGUMENT

This Court has closely guarded the rights espoused in the First Amendment because an informed, intellectual debate over matters of public concern is essential to the functioning of a free society. However, at times these concerns conflict with other legitimate interests, such as the role of grand juries in investigating criminal conduct. In *Branzburg v. Hayes* this Court required a reporter subpoenaed by a grand jury to disclose an anonymous source. The scope of the decision was limited to criminal cases, as recognized by Justice Powell, whose concurring opinion has become the governing rule in defining a reporter's privilege.

The overwhelming majority of jurisdictions have agreed that a qualified reporter's privilege exists in the First Amendment. Mr. Cartman, an online blogger with an audience of over 100,000, qualifies for this privilege and should not be forced to disclose his confidential source because he is a reporter under the First Amendment, and he gathered the information with the intent of disseminating it to the public. Respondent's interest in compelling disclosure pales in comparison to the jealously guarded freedom of speech and the freedom of the press. This imbalance is especially true when the Respondent may prove his claim with information that does not inhibit these freedoms but has made negligible efforts to do so. For these reasons, the District Court's finding that the First Amendment encompasses a qualified reporter's privilege and that Mr. Cartman successfully invoked it should be affirmed.

Mr. Cartman is entitled to summary judgment on the defamation claim because Respondent is a limited-purpose public figure and cannot meet the heavy burden of establishing the photograph was published with actual malice. By assuming a powerful role as a top executive in one of the nation's most highly recognized companies, Respondent has voluntarily

assumed ranks at the forefront of controversies surrounding that company. This is particularly true, as evidence in this case, when the controversy surrounds areas of the company the Respondent has considerable influence and control over, such as the development of the company's flagship product. A large-scale American company engaging in human rights violations is a matter of significant public concern, as evidenced by the wide-spread attention Mr. Cartman's blog received. Respondent's high-power position at Citrus allowed him extensive access to the media to rebut the claims of Mr. Cartman, but Respondent has declined to take advantage of them. For these reasons, Respondent is a voluntary limited-purpose public figure.

Public figures must carry the heavy burden of proving actual malice to satisfy a defamation claim. This is a burden Respondent has failed to carry. Actual malice is satisfied when the publication was made with the knowledge the information was false, or the publisher acted with reckless disregard of its veracity. Mr. Cartman did not know the photograph had been altered, nor should he have, as there were no indications of tampering discernable to the naked eye. Mr. Cartman had received the picture from a reliable source who he personally knew, and who had provided accurate information about Citrus on numerous occasions. It is unlikely these actions constitute negligent behavior on the part of Mr. Cartman, much less reckless disregard of the publication's truth. For these reasons, the District Court's grant of summary judgment on the defamation claim should be affirmed.

ARGUMENT

I. TO GUARD AGAINST THE CHILLING OF PUBLIC DEBATE, THE FIRST AMENDMENT PROTECTS MR. CARTMAN, A REPORTER, FROM DISCLOSING HIS CONFIDENTIAL SOURCE IN A CIVIL SUIT INVESTIGATION.

First among the guarantees demanded by the people of our government is there shall be “no law . . . abridging the freedom of speech, or of the press.” U.S. Const. amend. I. As guardian of that fundamental pledge, this Court views burdens on those freedoms “against the background that debate on public issues should be uninhibited, robust, and wide-open” *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Critical to this commitment is a “vigorous, aggressive, and independent press” *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972). Therefore, government practices that encumber this right should only be allowed when absolutely necessary.

Requiring a reporter to disclose his confidential sources is detrimental to the establishment of a vigorous press because many informants would not supply critical information if they were not guaranteed anonymity. Some instances, such as the investigation of criminal conduct, that incorporate concerns over public safety do justify the intrusion. However, in the context of civil litigation, the majority of circuit courts have recognized that the court must balance the “freedom of the press and the obligation of all citizens to give relevant testimony.” *Branzburg v. Hayes*, 408 U.S. 655, 724 (Powell, J., concurring). Any privilege asserted under Rule 26(b)(5) is a mixed question of law and fact, thus the appropriate standard of review is *de novo*. *In re Grand Jury Investigations*, 974 F.2d 1068, 1071 (9th Cir. 1992). Given that Respondent may prove his claim in ways that do not infringe upon Mr. Cartman’s First Amendment rights and that he has failed to exhaust alternative means of obtaining the

information, Mr. Cartman respectfully urges this Court to reverse the Fifteenth Circuit and to affirm the District Court's order denying Respondent's motion to compel the identity of Mr. Cartman's confidential source.

A. The Majority of Circuit Courts Have Correctly Limited *Branzburg* to Criminal Cases While Simultaneously Acknowledging the Existence of a Qualified Reporter's Privilege in Civil Litigation.

This Court should affirm those circuit courts recognizing a qualified reporter's privilege encompassed in First Amendment doctrine, particularly since it has implicitly recognized the privilege before. In *Branzburg v. Hayes*, this Court faced the narrow question of, "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech?" 408 U.S. at 667 (noting the sole issue to be decided regarded grand jury subpoenas). It was the sole issue decided. *Id.* at 682. A reporter, who had published an article which showed a picture of two men making hashish, was subpoenaed in a grand jury proceeding and ordered to identify the sources. *Id.* at 667-79. To off-set the burden on newsgathering which would result if reporters could not assure their sources anonymity, the reporters argued that the government should have to survive some type of scrutiny when compelling disclosure of anonymous sources. *Id.* at 699.

Justice White, joined by three other Justices, rejected this argument on the basis that a grand jury proceeding's role in investigating criminal activity is such a compelling government interest, it always outweighs the reporter's interest in not disclosing his source. *Id.* at 687-90. Four Justices dissented in the opinion. *Id.* at 725. Writing for three of the Justices, Justice Stewart rejected Justice White's "crabbed" view of the First Amendment. *Id.* (Stewart, Brennan, Marshall, J.J., dissenting). Instead, Justice Stewart would have required the

government to pass a high level of scrutiny before requiring a newsman to disclose their source, even if it was a grand jury proceeding. *Id.* at 743 (laying out three step analysis).

Justice Powell's vote was the critical opinion in resolving the split. Ironically, Justice Powell balanced the competing interests espoused in the majority and dissent by proffering a balancing test that would consider, based on the facts of the case, whether the interest in testimony warranted burdening a newsman's First Amendment rights. *Id.* at 710-11 (Powell, J., concurring). Justice Powell did agree with the majority that the burden was warranted in grand jury subpoenas, but recognized the "limited nature" of the holding to cases involving criminal conduct. *Id.* at 709 (Powell, J., concurring). The *Branzburg* decision, at the very least, left it unclear whether there was a qualified reporter's privilege encompassed in the First Amendment. *See id.* at 725 (Stewart, Brennan, Marshall, J.J., dissenting) (noting the concurring opinion "gives some hope of a more flexible view in the future . . .").

The majority of circuit courts have acknowledged Justice Powell's balancing test as the governing rule for reporters asked to disclose sources in civil matters. Out of concern for the "paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters," *Baker*, 470 F.2d at 782, several circuit courts have recognized a qualified reporter's privilege. *See also Gonzales v. NBC*, 194 F.3d 29, 36 (2d Cir. 1998) (reaffirming the principles espoused in *Baker*). The Tenth Circuit emphasized that *both* the majority and the concurring opinions of *Branzburg* "recognize[ed] a privilege which protects information given in confidence to a reporter" *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977) (finding *Branzburg* to be the

“guiding light” in determining whether a documentary film-maker must reveal interviewees who provided information relevant to a civil proceeding).

Other circuit courts have followed suit. For example, the Third Circuit has repeatedly found a federal common law privilege allowing journalists, in some situations, to refuse to disclose their sources in a civil matter. See *Fox v. Township of Jackson*, 64 Fed. App’x 338, 340 (3d Cir. 2003) (unpublished opinion) (“We have imposed a heavy burden on parties wishing to overcome [a reporter’s] privilege and compel a newsperson to testify in a civil matter.”) available at 2003 WL 1971833; *In re Madden*, 151 F.3d 125, 128 (3d Cir. 1998); *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979). The First, Fourth, Fifth, Ninth, and D.C. Circuits have also recognized a qualified privilege when the freedoms guarded by the First Amendment outweigh developing testimony in a civil proceeding. *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004); *Schoen v. Schoen*, 5 F.3d 1289 (9th Cir. 1993); *LaRouche v. NBC*, 780 F.2d 1134 (4th Cir. 1986) (NBC did not have to disclose sources in defamation suit against it), *cert. denied*, 479 U.S. 818 (1986); *Zerelli v. Smith*, 656 F.2d 705, 711-12 (D.C. Cir. 1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980).

In reversing Mr. Cartman’s grant of summary judgment, the Fifteenth Circuit has charged these circuits with “build[ing] castles of privilege on the foundation of dicta and select lines from Justice Powell’s concurrence in *Branzburg*.” (J.A. at 24.) Instead, the Fifteenth Circuit chose to join the Sixth and Seventh Circuits in not recognizing any qualified reporter’s privilege. (J.A. at 24.) (referring to *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003); *In re Grand Jury Proceedings*, 810 F.2d 580-84 (6th Cir. 1987)). However, these cases could easily be decided within the holding of *Branzburg* because both arose in the context of criminal investigations.

McKevitt, 339 F.3d at 531 (prosecution in Ireland for membership in a banned organization and directing terrorism); *In re Grand Jury Proceedings*, 810 F.2d at 581-82 (concerning disclosure in grand jury testimony over videotapes related to two gang members' deaths). Because these cases involve the same compelling state interest found in *Branzburg*, they are highly distinguishable from the present case.

The Fifteenth Circuit court also erroneously interpreted this Court's decision in *Associated Press v. NLRB*, 301 U.S. 103 (1937) when it determined that no circumstances could ever warrant a reporter being granted a privilege that a layman would not. (J.A. at 23.) In that case, this Court stated that "[t]he publisher of a newspaper has no special immunity from the application of *general laws*." *Associated Press*, 301 U.S. at 133 (emphasis added). But, general laws that violate constitutional guarantees should not be relied upon, especially when there is not a compelling need for the burden on constitutional rights. Additionally, the Fifteenth Circuit paid little heed to the fact that this privilege is subject to many considerations; the recognized privilege is qualified and not absolute. In other words, not just anyone, even a reporter, can invoke it at any time.

B. Mr. Cartman, an Online Blogger with a Subscriber Base of 100,000 People, is Qualified to Invoke the Privilege Because He is a Reporter, and He Gathered the Information to Disseminate on His Website.

The First Amendment's pinnacle function, which is to foster public debate over matters of public concern, should not be pigeon-holed by out-dated definitions of what constitute *the press*. "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). As this Court has expressed, the "large metropolitan publisher" enjoys no more protection than the

“lonely pamphleteer who uses carbon paper” *Branzburg*, 408 U.S. at 705. An online blogger who comments on matters of public debate to thousands of subscribers is just as much a reporter as a reporter of the *New York Times*.

Traditionally courts have recognized the value of the “lonely pamphleteer” in a democratic society, and “trends in the application of the constitutional privilege to other nontraditional journalists suggest that bloggers will qualify for it as well.” *Protecting the New Media: Applications of the Journalist’s Privilege to Bloggers*, 120 Harv. L. Rev. 996 (Feb. 2007). This Court has recognized First Amendment protections of the press should be extended to non-traditional reporters and journalists, even those more akin to the lonely pamphleteer. *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (“The liberty of the press is not confined to newspapers and periodicals.”). The District Court correctly rejected a hierarchy of journalism when it held “a blogger with Internet access and a keyboard is every bit as much the ‘newsman’ as the White House correspondent with camera, microphone, and memo pad, at least as far as the First Amendment is concerned.” (J.A. at 11.) Online bloggers, like Eric Cartman, who publicly debate matters of societal interest with large subscriber bases, are the modern day pamphleteers, and their constitutional freedom should not be restricted because of their mode of dissemination.

As a reporter, Eric Cartman must still show that he sought, gathered, or received the information from his confidential source with the intent of disseminating it to the public and that this intent existed “at the inception of the newsgathering process.” *von Bulow v. von Bulow*, 811 F.2d 136, 142-44 (2d Cir. 1987). (finding information must be turned over because reporter failed to show an interest in keeping it confidential). The District Court adopted this two-part test. (J.A. at 11.) The method of dissemination has not influenced the courts that have addressed

this issue as long as the information is presented to the public in some appreciable way. For instance, a documentary film-maker who had engaged in an investigatory process to obtain confidential information for a film that would be released at an undisclosed date qualified to assert the privilege. *Silkwood*, 563 F.2d at 436. However, some circuits have required the reporter disseminate the material within a short amount of time of receiving it. *See von Bulow*, 811 F.2d at 144 (finding third party witness was not entitled to the privilege because she did not intend to immediately disseminate information to the public).

Mr. Cartman's newsgathering process of soliciting e-mails as tips expressly announces his intent to disseminate the information gathered. (J.A. at 5.) Notably, Mr. Cartman actually received the information from Professor Chaos through this process. (J.A. at 5.) Mr. Cartman promptly published the information the next day on his website. (J.A. at 5.) This timely publication not only evidences that he intended to disseminate the information to the public, but that he in fact *did* disseminate the information to the public as soon as he developed his commentary. In *Silkwood*, even the filmmaker who had not yet published his work qualified for the newsman's privilege. *Silkwood*, 563 F.2d at 436. The First Amendment does not foreclose its protections to those without formal titles. Mr. Cartman is a reporter for purposes of the First Amendment. Moreover, Mr. Cartman received the information with the intent to disseminate it to the public. Thus, the District Court was correct in holding Mr. Cartman was qualified to claim the reporter's privilege in this case.

C. The Freedoms Guaranteed Mr. Cartman Under the First Amendment Are Not Outweighed By the Respondent's Interest in Compelling Disclosure in This Civil Investigation.

The governing rule espoused by Justice Powell requires balancing the competing interest of protecting First Amendment freedoms against the need to compel testimony in investigations. *Branzburg*, 408 U.S. at 710-11 (Powell, J., concurring). The First Amendment's interest in facilitating the unhampered flow of information in a free society is roughly the same in every case. Less known is the weight to be afforded the interest of the seeker in obtaining the information. Lower courts have developed their own tests to determine the gravity of the seeker's interest in compelling disclosure of a confidential source. Generally, these tests look to the relevance of the information sought and the availability for the seeker to obtain the information elsewhere.

Each of the several circuit courts recognizing the qualified reporter's privilege has had to formulate its own guidelines for balancing the competing interests. *Fox v. Township of Jackson*, 64, Fed. App'x at 340; *Gonzales*, 194 F.3d at 36; *Schoen*, 5 F.3d at 1296; *LaRouche*, 780 F.2d at 1139; *Zerilli v. Smith*, 656 F.2d 705, 713-14 (D.C. Cir. 1981); *Silkwood*, 563 F.2d at 438. While these tests may vary slightly in some respects, they all are effectively concerned with the same thing: the relevance of the information and alternative means of obtaining it. In *Zerilli v. Smith*, the Second Circuit articulated the test as being (1) whether the information sought goes "to the heart of the matter," and (2) whether the seeker has "exhausted every reasonable alternative source of information." *Id.* at 713-14. Additionally, in order to overcome the burden imposed upon the reporter's First Amendment freedoms, the seeker must satisfy *both* prongs of the test. *Blumenthal v. Drudge*, 186 F.R.D. 236, 244 (D.D.C. 1999). Respondent has failed both prongs;

therefore, his interest in compelling the disclosure of Mr. Cartman's source is not great enough to overcome Mr. Cartman's recognized privilege.

- 1. *While the identity of the source may be relevant to Respondent's claim, there are other ways to prove those claims that do not burden Mr. Cartman's First Amendment rights.***

Investigations in civil litigation do not present the same compelling interests that led to *Branzburg's* denial of the reporter's privilege in criminal litigation. This led the *Zerelli* court to find that "in the ordinary [civil] case the civil litigant's interest in disclosure should yield to the journalist's privilege." *Zerelli*, 665 F.2d at 712. However, some courts have distinguished cases in which the one refusing to disclose a confidential source is the party in the action, holding it evidences a stronger interest in disclosure. *See Carey v. Hume*, 492 F.2d 631, 637 (D.D.C. 1972) (requiring disclosure by a defendant in a libel suit because it was relevant to determining actual malice). As in this case, defamation defendants can find themselves bearing the weight of this presumption. Contrary to the rationale of the Fifteenth Circuit, the reporter being a defendant in a defamation suit does not grant the seeker a "free pass" for disclosure.

In *Carey v. Hume*, the D.C. Circuit required a defendant in a libel case to disclose his confidential source because the identity of the source went to the heart of the plaintiff's establishment of "actual malice." 492 F.2d at 637. Identity was important because showing "that appellant in fact had no reliable sources, that he misrepresented the reports of his sources, or that reliance upon those particular sources was reckless" went to proving "reckless disregard." *Id.* The D.C. Circuit distinguished the case from *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), which had upheld the reporter's privilege for a defamation defendant, on two grounds. First, the *Carey* case did not involve a motion for summary judgment, and second, there was far

more evidence in *Cervantes* to conclude the plaintiffs would not have successfully demonstrated “actual malice” anyways. *Id.* at 637-38.

The present case is similarly distinguishable from the *Carey* decision. Like the *Cervantes* decision, this case urges this Court to overturn the Fifteenth Circuit’s order reversing the District Court’s grant of summary judgment to Mr. Cartman. (J.A. at 21-22.) For reasons more fully expressed in part II (C), *see supra* at 35, it is highly unlikely Ike Broflovski will be able to prove Mr. Cartman published the photograph with actual malice, making an intrusion upon his First Amendment rights unnecessary.

In *Cervantes*, *Life Magazine* had written an article that accused the mayor of St. Louis of maintaining “business and personal ties with the gangsters that operate in his city.” *Cervantes*, 464 F.2d at 988. The mayor sued the magazine’s parent company for libel and deposed the reporter who had gathered much of the information for the story. *Id.* The reporter refused to give the names of her informants. *Id.* at 988-89. The District Court granted summary judgment for the reporter based on the certainty the mayor would not have been able to satisfy the “actual malice” standard, given the magazine’s investigatory procedures into the matter. *Id.* at 990. On appeal, the Eighth Circuit found there was clear indication in the record that the *Time* Reporter had diligently investigated the matter, and *Time* personnel had taken extensive steps to evaluate and corroborate the data. *Id.* at 994. Since the mayor would not be able to prove actual malice, an invasion into the rights of a reporter to disclose confidential source was unwarranted. *Id.* 995 (explaining “there must be a showing of cognizable prejudice before the failure to permit examination of anonymous news sources can rise to the level of error.”).

Based on the facts of its case, the *Carey* court held that the “facts disclosed by the record before us at this time are inadequate to support a conclusion that appellee is so unlikely to meet the admittedly heavy Sullivan burden that no purpose would be served by disclosure of the identity of the sources.” *Carey*, 492 F.2d at 631. In *Carey*, a libel defendant had published a news article suggesting a public official had stolen records. *Id.* at 366. He had relied upon a source and had even verified a burglary complaint had indeed been filed; however, he did little else to verify the facts. *Id.* at 367. The stories published indicated the allegations were based on eye-witness observations, which the court considered in determining whether the source must be revealed. *Id.*

The present case is more in line with *Cervantes* than *Carey*. As stated above, the *New York Times* actual malice standard is a heavy burden, and Respondent should not prevail on the action. First, this was not mere data or speculation Mr. Cartman received; it was a photograph. Additionally, there was nothing identifiable to the naked eye which would indicate the photograph had been altered. (J.A. at 7.) It is not unreasonable to believe the Executive of Research and Development would visit the company’s overseas factories. There was simply nothing about the photograph that would cause Mr. Cartman to doubt its veracity, and he did not act with a reckless disregard for the truth in publishing it.

Additionally, as the District Court correctly noted when it granted Mr. Cartman’s Motion for Summary Judgment, there is more than one way to prove a reporter reasonably relied upon a source without knowing their identity. (J.A. at 13.) “[W]hile the identity of the source may be relevant to the claim, it is not always absolutely essential.” (J.A. at 13.) As the District Court suggested, Respondent could review the company’s own internal records to see who had access

to the factory or search the company's email servers. (J.A. at 14.) To hold, as the Fifteenth Circuit did, that a defamation defendant can never invoke their privilege would be to effectively rule the defendant has waived a First Amendment right (the privilege), by exercising a First Amendment right (freedom to speak on public matters), should a plaintiff choose to bring a libel suit against him. This paradoxical conclusion is not internally consistent. This is especially true, as demonstrated in this case, when the reliability of a source can be identified by alternative means.

2. Defendant has made only negligible attempts to seek the information through alternative means available to him.

Even if this Court were to hold that the identity of the source goes to the heart of the matter, Respondent has still failed to make reasonable efforts to obtain the information on his own. “Even when the information is crucial to a litigant’s case, reporters should be compelled to disclose their sources only *after* the litigant has shown that he has exhausted every reasonable alternative source of information.” *Zerelli*, 656 F.2d at 713 (emphasis added). As the District Court found, Respondent’s “failure to exhaust its own resources, which may provide the evidence it is requesting, requires that this Court deny its motion to compel discovery.” (J.A. at 14.)

While the Fifteenth Circuit maintains such investigation is requiring Respondent to “do too much,” (J.A. at 26) other courts have held otherwise. One such case, with facts strikingly analogous to the present case, is *Blumenthal v. Drudge*, 186 F.R.D 236 (D.D.C. 1999). A plaintiff sued an on-line reporter for defamation and subpoenaed information to determine the identity of confidential sources. *Id.* at 239. The *Drudge* court not only required the party to

consider alternative sources, but it also required the seeker to exhaust “every reasonable alternative source of information.” *Id.* at 244 (quoting *Zerilli*, 656 F.2d at 713). The seeker could not show the court they could not get the information from an alternative source. *Id.* The court held that because the seeker had not fulfilled their burden of showing that they could not get the information from alternative sources, the reporter’s privilege was upheld. *Id.*

Respondent has not exhausted every reasonable alternative source of information. The record suggests that the Respondent deposed the manager and some of the engineers at the plant where the photograph was taken. Respondent also sent an e-mail to Citrus employees asking for information about the leak. (J.A. at 8.). However, these efforts are far from exhaustive. Given the size of the company, a passive e-mail is not enough to reach all employees. Additionally, asking employees to generously conduct their investigation for them is not the same as investigating. As the District Court noted, Respondent could have conducted a sweep of email sent from user accounts. The record reflects that Respondent did not interview each employee at the plant where the picture was taken. (J.A. at 8.). Thus Respondent’s efforts cannot be characterized as exhaustive, and Respondent fails the second prong of the test.

Because Respondent has failed both prongs of the balancing test, and failure of just one is fatal to his claim, this Court should not find the Respondent’s individual interests overcome the reporter’s privilege.

II. MR. CARTMAN SHOULD NOT BE HELD LIABLE FOR DEFAMATION BECAUSE RESPONDENT IS A LIMITED-PURPOSE PUBLIC FIGURE AND THE PHOTOGRAPH WAS NOT PUBLISHED WITH RECKLESS DISREGARD FOR ITS TRUTH.

In a country founded on the notion that people should be free from tyrannical suppression, the right to speak, debate, and disagree is elemental. This freedom is so fundamental it is among the very first rights demanded by the people. It is no surprise then, such a vast constitutional demand will inadvertently conflict with other legitimate interests. Nowhere is this clearer than in the arena of defamation law. This Court, more than any other branch of government, has been instrumental in resolving the tension between “the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

In the seminal case of *New York Times Co. v. Sullivan*, this Court recognized the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” 376 U.S. 254, 270 (1964). It held that, in a libel suit, “public officials” must show actual malice in order to overcome the defendant’s First Amendment rights. *Id.* at 279-80. Three years later, the Court extended this rule to “public figures.” *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967). That standard may not apply whenever the plaintiff is considered “public” only in a limited way. *Gertz*, 418 U.S. at 352. Even then, public figures must overcome the heavy burden of proving the publication was made with knowledge of falsity or reckless disregard for the truth. *New York Times*, 376 U.S. at 279-80.

In reviewing questions of constitutional fact, this Court exercises *de novo* review and makes an “independent examination of the whole record.” *Edwards v. South Carolina*, 372 U.S.

229, 235 (1963). Respondent is a high-level executive of a company embroiled in controversy over the ethical treatment of its workers; and, the photograph published by Mr. Cartman, which had no visible signs of alteration, was given to him by a personally known and reliable source. Mr. Cartman respectfully urges this Court to overturn the Fifteenth Circuit's reversal of the District Court's order granting summary judgment.

A. Respondent Has Assumed a Role of Public Prominence as the Director of Research and Development for Citrus, One of the Nation's Most Recognized Companies, Making Him a Limited-Purpose Public Figure.

Because of his high position in one of the country's largest and most recognized companies, Citrus, Respondent has achieved celebrity-like status amongst an electronically savvy culture. In *Gertz*, this Court revisited the "public figure" status it had developed in *Curtis Publishing*. 418 U.S. 323 (1974). This Court elaborated that public figures, as people who "invite attention and comment," *id.* at 345, should have a higher burden in claiming defamation for two principle reasons. First, these individuals have "greater access to the media," which provides them their own self-help remedy of publicly refuting the claims. *Id.* at 344. Second, these individuals have assumed the risk they may receive unpleasant criticism or comment by the public, whenever they have voluntarily entered the public debate. *Id.* at 345. Essentially, the Court should not be required to turn down the burners whenever the plaintiff has voluntarily entered the kitchen.

This Court further divided public figures into two distinguishable groups: (1) the general public figure who enjoys nearly universal fame and notoriety; and (2) the limited-purpose public figure who has voluntarily injected himself or been drawn into a *particular* public controversy.

Id. at 351. Respondent, Ike Broflovski, is a limited-purpose public figure with respect to the controversy surrounding his role as a top-executive at Citrus.

- 1. This Court should adopt the Waldbaum test, which has been adopted by the plurality of circuit courts, for determining limited-purpose public figure status because it is closely aligned with the principles espoused in Gertz.***

This Court left the lower courts to develop their own test for determining who is a voluntary limited-purpose public figure. Circuit tests can be found on both ends of the spectrum, with some being very simple and easy for defendants to satisfy, while others are highly restrictive, requiring heightened proof of elements not found within *Gertz*. Compare *Partington v. Bugliosi*, 825 F. Supp. 906, 917 (D. Haw. 1993) (quoting *Gertz*, 418 U.S. at 352) (merely requiring proof of a public controversy and a determination of the plaintiff's involvement therein), *aff'd.*, 56 F.3d 1147 (9th Cir. 1995) and *McDowell v. Paiewonsky*, 769 F.2d 942, 948 (3d Cir. 1985), with *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-37 (2d Cir. 1984) (four prong test that is very narrow in defining limited-purpose public figure).

In reversing the District Court's grant of Summary Judgment, the Fifteenth Circuit adopted the Second Circuit's test, which is nearly insurmountable for any defendant to overcome and completely inconsistent with the principles espoused in *Gertz*. (J.A. at 29.) In *Gertz*, this Court held that the public figure question merely needed to "look[] to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Gertz*, 418 U.S. at 352. The Second Circuit's test effectively calls for the establishment of a "super plaintiff" by requiring he or she to: (1) *successfully* invite public attention *prior to the remarks litigated*; (2) *voluntarily* inject himself into the relevant public controversy; (3) be in a *position of*

prominence within the controversy; and (4) maintain *regular and continuing* access to the media. *Lerman*, 745 F.2d at 136-37.

Contrarily, *Gertz* says nothing about when the defamatory remarks are made, leaves open the possibility of involuntarily public figures, *Gertz*, 418 U.S. at 345 (plaintiff may be public figure “through no purposeful action of his own”), and requires only the media access needed to combat the defamatory remarks, *id.* at 344. This test simply does not accord the weight to First Amendment protections recognized in this Court’s precedent.

A better rule that is more in line with *Gertz* has been adopted by a plurality of circuit courts. *See generally Long v. Cooper*, 848 F.2d 1202 (11th Cir. 1988) (Eleventh Circuit); *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431 (5th Cir. 1987) (Fifth Circuit); *O’ Donnell v. CBS, Inc.*, 782 F.2d 1414 (7th Cir. 1986) (Seventh Circuit); *Bagley v. Iowa Beef Processor, Inc.*, 797 F.2d 632 (8th Cir. 1986) (Eighth Circuit); *Nat’l Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus*, 705 F.2d 98 (4th Cir. 1983) (Fourth Circuit). It was this test the District Court relied upon when it granted Petitioner’s Motion for Summary Judgment. (J.A. at 16.) The analysis was originally developed by the D.C. Circuit in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980). Under *Waldbaum*, the court determines whether the plaintiff is a limited-purpose public figure in a three step analysis: (1) isolate the public controversy; (2) analyze the plaintiff’s role in the controversy; and (3) determine whether the alleged defamation is germane to the plaintiff’s participation in the controversy. *Id.* at 1296-98.

This test is most appropriate because it marks a middle of the road approach. It is particularly consistent with the “assumption of the risk” rationale in *Gertz*, in that it demands a nexus between the controversy, the plaintiff, and the defendant’s remarks. This ensures a

plaintiff does not assume a risk that is outside of his limited-public purpose status. Additionally, the *Waldbaum* decision is closely analogous to the facts of the present case.

Eric Waldbaum acted as president and chief executive officer of Greenbelt Consumer Services, Inc. (the second largest cooperative in the country at the time), where he played an active role in both the management of the cooperative and in setting policies and standards within the supermarket industry. *Id.* at 1290. After he was fired from Greenbelt, an article ran that linked Waldbaum's leadership at Greenbelt to the company losing money and retrenching. *Id.* The *Waldbaum* court concluded that Waldbaum was at the forefront of controversies within the supermarket industry, attempted to influence their outcomes, and in the process assumed a greater risk of injury through publication. *Id.* at 1300. Applying the same test and logic to the facts of this case, Respondent, like Eric Waldbaum, is a limited-purpose public figure.

2. Alleged human rights violations by a major company like Citrus are a matter of public controversy.

The first step in the *Waldbaum* analysis is to “isolate the public controversy.” *Id.* at 1296. One indication a true public controversy exists is that its ramifications will be felt outside of the direct litigants in the case. *Id.*, see also *Marcone v. Penthouse Int'l Magazine*, 754 F.2d 1072, 1083 (3d Cir. 1985) (citing *Waldbaum*, 627 F.2d at 1296) (finding a public controversy “affects the general public or some segment of it.”). More than “mere newsworthiness” is required, and the Court has distinguished between public *interests* and public *controversies*. *Wolston v. Reader's Digest Assn.*, 443 U.S. 157, 167 (1979). A private matter, such as the contested divorce of a woman from one of the nation's wealthiest men, may be a matter of public interest, but is not a matter of public controversy. *Time Inc., v. Firestone*, 424 U.S. 448, 454-55 (1976). The resolution of the controversy must bear effect on people outside of the litigation.

As the District Court correctly noted, the “possible use of slave labor at a factory producing the most popular consumer electronics devices in the United States is unquestionably a matter of public concern.” (J.A. at 18.) Allegations of human rights abuse—especially when linked to a major electronics company like Citrus—are broad enough to fit into the category of public controversies envisioned under the spirit of *Gertz* and the direct language of *Waldbaum*. Such exploitation of human labor is no more a “private matter” for Citrus, than the traffic of blood diamonds is a private matter of large-scale jewelry chains. Every potential consumer is affected by severe ethical violations committed by large-scale corporations, and the executives who run them.

3. Respondent voluntarily assumed the role of Director of Research and Development, thereby placing himself at the forefront of controversies concerning the company and granting himself significant media access to rebut those claims.

Being an executive in a large company embroiled in a public controversy is not a *per se* rule for finding the plaintiff’s role in the controversy was significant. *Waldbaum*, 627 F.2d at 1297 (holding more than “trivial or tangential participation” is required). However, high-ranking executives are in a unique position to shape industry or corporate policies, and direct the activities involved in the controversy. For instance, a CEO of the second largest commodity in the United States was found to play a significant role in the debate over the decline of the commodity, due to his management of the business and his influence on the supermarket industry. *Id.* 1299-00. This logic is reflective of *Gertz*’s assertion that limited-purpose public figures include individuals who voluntarily place themselves on the frontlines of a controversy “in order to influence the resolution of the issues involved.” *Gertz*, 418 U.S. at 345. While not

automatic, it is not a stretch to assume when a company's practices evoke a public controversy, top-tiered executives are, at the least aware of them, and at the most, directing them.

Unlike a private individual, Respondent's position has also led to a significant amount of press coverage and access to the media in order to refute the claims. *See Flowers v. Carville*, 310 F.3d 1118, 1129 (9th Cir. 2002) (noting that a private citizen's ability to hold a press conference to corroborate the story of her affair with Governor Clinton evidenced her limited-purpose public figure status with respect to the controversy).

As Director of Research and Development for Citrus, Respondent oversaw the development of the ePlay Touche, a new version of Citrus' flagship product which has become a pop culture icon in the United States. (J.A. at 2-3.) A press conference was held to announce the hiring where Ike stated: "I look forward to pushing Citrus, its employees, and its products to new heights." (J.A. at 3.) Even though Respondent prefers to stay out of the limelight, his involvement in the production of such a widely anticipated product has sparked public curiosity, as evidenced by the Associated Press writing about the press conference. (J.A. at 3.) Additionally, Respondent has visited Mumbai, where the factory involved in the controversy is located. (J.A. at 6-7.) When Mr. Cartman broke the story about the conditions of the factory, Respondent refused many requests by the media to respond. (J.A. at 7.) While Respondent should not be penalized for refusing to comment, *see Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1559-60 (4th Cir. 1994), he cannot deny he had the opportunity to. Respondent plays an integral role in the activities of Citrus, and the development of its most prominent products. The controversy revolves around these activities, and Mr. Cartman's comments were tailored to Respondent's supervisory role in those activities.

4. Mr. Cartman's statements attacking the treatment of labor by Citrus were germane to the Respondent's role in the controversy.

Anything that is relevant to the controversy is considered to satisfy the third prong of the *Waldbaum* test. *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 185 (Ga. Ct. App. 2001) (citing *Waldbaum*, 627 F.2d at 1297). Comments regarding a public figure's credibility relating to a public controversy, including his "talents, education, experience, and motives" are necessarily relevant because they affect the public's decision to believe him. *Id.* at 185-86. For instance, in a case where the public controversy was the safety of Olympic Park, a newspaper's comments about the character of a security guard who had become associated with the bombing of the Olympic Games in Atlanta were significantly related to the controversy. *Id.* at 186. Only misstatements that are "wholly unrelated to the controversy" will not be afforded *New York Times* protection. *Waldbaum*, 627 F.2d at 1298. Every comment Mr. Cartman made in his blog related to the exploitation of human labor by Citrus, and Respondent's participation in it.

Statements that refer to men and woman working sixteen-hour days, seven days a week with few breaks (J.A. at 6) do not attack Respondent in any aspect of his life, except his role as a top-tier executive of the company accused of these practices. Mr. Cartman was simply drawing the public's attention to an area of legitimate interest and Respondent's name is at the epicenter of that controversy because he has the ability "to influence the resolution of the issues involved." *Gertz*, 483 U.S. at 345.

The peculiar circumstances of each case understandably affect the balance between freedom of speech and press and an individual's interest in his reputation. *Id.* at 343. Under the *Waldbaum* test, which has been adopted by a plurality of the circuit courts and is consistent with the rationales espoused in *Gertz*, Respondent is a voluntary limited-purpose public figure.

Human-rights violations by large American companies are inherently matters of public controversy that Respondent, as a top-tier executive with considerable influence, plays an integral role in. It is this involvement that Mr. Eric Cartman has publicly criticized. Respondent had access to the media to refute the claims, but has refused to do so. For these reasons, the Fifteenth Circuit erroneously held that Respondent was not a voluntary, limited-purpose public figure.

B. Respondent, at the Very Least, Should Be Considered an Involuntary Limited-Purpose Public Figure With Respect to Controversies Surround the Company He Helps Direct.

Even if this Court decides that Respondent did not voluntarily enter the public controversy under the *Waldbaum* analysis, Respondent may still be considered an *involuntary* limited-purpose public figure. “Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own.” *Gertz*, 418 U.S. at 345. Concededly, these cases are rare, *id.*, but they do exist. While the Fifteenth Circuit hung its analysis concerning “voluntariness” on the fact Respondent is “reclusive,” (J.A. at 30) courts have sometimes held an individual is a public figure whether they want to be or not.

The D.C. Circuit determined a plaintiff, an air-traffic controller who was the only one working during an airplane crash, was an involuntary public figure for the controversy surrounding the crash. *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 741 (D.C. Cir. 1985). The court explained that at times, “[p]ersons can become involved in controversies and affairs without their consent or will. Air-controller Dameron, who had the misfortune to have a tragedy occur on his watch, is such a person.” *Id.* In essence, instead of the plaintiff thrusting himself into the controversy, the controversy was thrust upon him. *See also Bay View Packing Co. v.*

Taff, 453 N.W.2d 522, 684 (Wis. Ct. App. 1995) (finding a packing company was an involuntary public figure in a controversy concerning the recommended recall of distributed food products).

Even though there is sufficient evidence to show Respondent has voluntarily thrust himself into the controversy, at the very least, this Court can find the controversy regarding Citrus' labor practices in overseas factories was thrust upon him as an executive of that company. Additionally, Respondent is in charge of overseeing the development of the very product that is being manufactured at the Mumbai factory, his face can be seen at Citrus MegaStores around the country, and he has enjoyed significant access to the media. (J.A. at 3-4.) He is therefore, in the very least, an involuntary limited-purpose public figure. Such a ruling would properly follow the *Waldbaum* analysis and thereby afford the proper "breathing space" that freedoms of expression need to survive. *New York Times*, 376 U.S. at 272.

C. Respondent Cannot Overcome the Heavy Burden of Proving Mr. Cartman Published the Photograph With Reckless Disregard for its Truth Whenever Mr. Cartman Obtained the Photograph from a Personally Known, Reliable Source and There was No Visible Indication the Photograph Had Been Altered.

Given the weight accorded First Amendment freedoms, limited-purpose public figures must show that defamatory statements were made with actual malice. *Gertz*, 418 U.S. at 351. To prove actual malice a plaintiff must show the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80. This Court has equated "reckless disregard" with "a subjective awareness of probable falsity." *Gertz*, 418 U.S. at 335, n. 6. On an appeal that challenges a finding of actual malice, the reviewing court must independently determine whether the record "establishes actual malice with convincing clarity." *Bose Corp. v. Consumers Union of U.S., Inc.* 466 U.S. 485, 514 (1984).

Publishing with reckless disregard for the truth can occur whenever stories are published that are fabricated, the product of the publisher's imagination, or based wholly on an unverified anonymous source. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (finding no actual malice when defendant read his source's affidavit on the air, concerning misconduct on the part of a public official and a union leader). This Court noted that a "[f]ailure to investigate does not in itself establish bad faith." *Id.* at 733 (citing *New York Times*, 376 U.S. at 287-88). It is not even enough to show that a publisher knew that a story was not completely and exactly accurate. *Masson v. New Yorker Magazine*, 501 U.S. 496, 516-17 (1991) (finding no actual malice when statements quoted in an article were not precise, but had substantially the same meaning).

In *St. Amant*, this Court found that the plaintiff had reasonably relied upon his source, when he had personally known the source for a long time, verified some aspects of the source's statements, and the source had stated he could substantiate his charges. *St. Amant*, 390 U.S. at 733. Eric Cartman has also reasonably relied on his source, Professor Chaos. The record reveals that "Professor Chaos" has provided Mr. Cartman with reliable information concerning Citrus on numerous occasions. (J.A. at 5.) Additionally, Mr. Cartman has personally known Professor Chaos for a number of years. (J.A. at 5.) Based on this Court's precedent, Mr. Cartman was reasonable in relying upon a well-known and credible source.

Publications that are so "inherently improbable only a reckless man would put them in circulation" are also deemed to be made with reckless disregard. *St. Amant*, 390 U.S. at 732. For instance, the Supreme Court of California found actual malice over a publication alleging the plaintiff was the real assassin of Robert Kennedy because it was "so in conflict with notorious and established facts." *Khawar v. Globe Int'l, Inc.*, 19 Cal. 4th 254, 276 (Cal. 1998). There is

nothing in this case which would make Mr. Cartman instantly suspect of the veracity of the photograph.

To begin with, any “doctoring” of the photograph, which showed Respondent walking in the Mumbai factory among workers exposed to hazardous conditions, was not detectable to the naked eye. (J.A. at 7.) After all, there is a Citrus factory in Mumbai, and Ike Respondent admitted in discovery he had traveled to Mumbai. (J.A. at 7.) It is not unreasonable to believe the Executive of Research and Development would visit their company’s overseas factories. Even though Mr. Cartman did not check the photograph with software that could have determined tampering (J.A. at 7) it is unlikely that would even be considered negligent, much less reckless disregard. Mr. Cartman simply had no reason to seriously doubt the veracity of his publication; therefore, Mr. Cartman did not publish his statements with actual malice.

Because Respondent is a limited-purpose public figure and cannot prove that Mr. Cartman acted with actual malice, Mr. Cartman respectfully urges this Court to overturn the Fifteenth Circuit’s ruling, and affirm the grant of summary judgment by the District Court.

CONCLUSION

Because Mr. Cartman is qualified to invoke the privilege from unnecessary disclosure of confident sources encompassed in the First Amendment, Mr. Cartman respectfully urges this Court to overrule the Fifteenth Circuit’s decision and affirm the District Court’s denial of Respondent’s Motion to Compel.

Additionally, because Respondent is a limited-purpose public figure, and is unable to show publication with actual malice, Mr. Cartman respectfully urges this Court to overrule the Fifteenth Circuit’s decision and affirm the District Court’s grant of Summary Judgment.