
No. 09-2701

In the Supreme Court of the United States

ERIC CARTMAN,
Petitioner

v.

IKE BROFLOVSKI,
Respondent.

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

ERIC CARTMAN
PETITIONER'S BRIEF

Team 115
Counsel for Petitioner

QUESTIONS PRESENTED

- I. Whether this Court can compel Eric Cartman to disclose the identity of his confidential source in a defamation suit when the First Amendment implies a qualified reporter's privilege, he is protected as a citizen journalist, and Broflovski failed to exhaust all alternative means to uncover the protected information.

- II. Whether Eric Cartman, author of the Internet blog, *The Sludge Report*, should be held liable on an actual malice standard, in an online defamation claim, brought by Ike Broflovski on the grounds that Broflovski is a limited-purpose public figure.

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.

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STATEMENT OF THE CASE

Eric Cartman (“Cartman”) owns Cartman’s Computer World and also generates income from his blog, *The Sludge Report*. (J.A. at 4). Cartman’s blog focuses on a wide range of news items he finds on the Internet and in major newspapers. (J.A. at 4). *The Sludge Report* has grown in popularity since Cartman first began in June 2005. (J.A. at 4). With the increase in popularity, Cartman began receiving emails, through the email address he provides on his website, from various individuals who had tips on things going on in local and state government. (J.A. at 5). Cartman emphasizes that those individuals will remain confidential. (J.A. at 5). Cartman does not possess any personal information about the individuals who disclose information unless they give it to him in the email or through some other means. (J.A. at 5).

On July 7, 2008, Cartman received an email from one of his sources containing a disturbing photograph that depicted Ike Broflovski (“Broflovski”) going through a manufacturing facility, outside of Mumbai, India, screaming at the workers. (J.A. at 5).

Broflovski is Director of Research & Development for Citrus, a consumer electronic company. (J.A. at 4-5). He was hired in 2006 to oversee the development of the ePlay Touché. (J.A. at 3). His hiring became newsworthy when it was announced at a moderately-attended press conference on August 7, 2006. (J.A. at 3). Broflovski spoke at this press conference and the announcement was released by the Associated Press and printed in numerous newspapers. (J.A. at 3). His photo and all of his contact information, including telephone, email, and mailing address is posted on the Citrus Website. (J.A. at 4).

Because of the success of Broflovski’s innovations, his work has been praised in television and magazine interviews. (J.A. at 3). Subsequently, employees at Citrus Megastores

throughout the United States celebrate Broflovski by wearing makeshift “I Like Ike” buttons. (J.A. at 3-4).

The day after Cartman received the email and photograph from his source, he added a story to *The Sludge Report*. (J.A. at 5). The headline was, “Citrus Engaging in Acts of Modern Day Slavery?”. (J.A. at 5). Cartman also included the photograph with the story, so that the public would be informed about what was going on. (J.A. at 6).

This story gained national attention, including the attention of the host of the top-rated cable news show, on August 19, 2008. (J.A. at 6). Because of the national attention, Broflovski was questioned by the media but choose not the address the issue. (J.A. at 7).

On September 20, 2008, Broflovski filed suit in the Superior Court for the State of Silverado against Cartman for defamation. (J.A. at 7). Additionally, he alleges that Cartman’s comments caused him to suffer from depression. (J.A. at 7). During discovery, Broflovski stipulated that he made numerous visits to the factory in Mumbai. (J.A. at 7). Broflovski also ran a test on the photograph, and alleged that it was doctored, but it is undetectable to the naked eye. (J.A. at 7). Although Cartman recently installed forgery detection software, it was not used on this particular photograph. (J.A. at 7).

On December 15, 2008, Broflovski sent an interrogatory to Cartman requesting the source of the information and photograph he received. (J.A. at 7). Cartman replied stating that he wished to invoke the qualified privilege under the First Amendment. (J.A. at 8). On January 8, 2009, Broflovski filed a motion to compel Cartman to reveal the identity of his source. (J.A. at 8). On January 16, 2009, Cartman filed a motion in opposition and filed a counter motion for summary judgment on the defamation claim. (J.A. at 8). The United States District Court for the

Western District of Silverado denied Broflovski's motion to compel discovery, and granted Cartman's motion for summary judgment. (J.A. at 20).

Broflovski appealed the decision to the United States Court of Appeals for the Fifteenth Circuit. (J.A. at 21). The Court of Appeals reversed the decisions of the District Court on both issues and remanded the case for further proceedings. (J.A. at 32). Subsequently, this court granted certiorari, for both issues. (J.A. at 33).

SUMMARY OF THE ARGUMENT

The First Amendment of the United States Constitution implies a qualified reporter's privilege to protect journalists from compelled disclosure of confidential sources. Additionally, the privilege covers "citizen journalists," such as Cartman, when their intent, at the inception of the information gathering process, is to disseminate information to the public. Finally, Broflovski failed to demonstrate a sufficiently compelling need for the journalistic materials; thus, Cartman is protected by the First Amendment reporter's privilege.

The qualified reporter's privilege allows a reporter to resist disclosure of confidential sources, though the privilege is not absolute. In *Branzburg v. Hayes*, the Supreme Court recognized a qualified reporter's privilege in civil cases, while holding the privilege is obsolete in criminal cases. Following the Supreme Court decision, the circuits have not come to a consensus as to whether *Branzburg* created a qualified reporter's privilege. However, the First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits have all interpreted the decision as establishing some sort of qualified privilege in civil cases. The Ninth Circuit went so far as to say that the reporter's privilege is rooted in the First Amendment, demonstrating the pressing need for a journalistic privilege to resist disclosure of confidential sources.

Additionally, the qualified reporter's privilege protects "newspaper journalists" and "citizen journalists" alike. To determine who the qualified reporter's privilege covers, the Tenth Circuit developed the "intent to disseminate" test. With this, the qualified reporter's privilege protects any reporter who had the intent, at the time of the information gathering process, to disseminate the information to the public. Applying the test to the present case, this Court should find that Cartman had the intent to disseminate the information to the public at the time he

gathered the information because it was a common practice for him to receive information from his sources and post it on the internet immediately.

Even with Cartman being protected as a citizen journalist, Broflovski cannot compel Cartman to disclose his source because Broflovski did not exhaust every reasonable alternative source of information. To overcome the qualified privilege and compel disclosure, the litigant must make a clear and convincing showing that the information sought is 1) highly material and relevant to the underlying claim; 2) necessary or critical to the maintenance of the claim, or the “heart of the claim requirement;” and 3) unavailable from alternative sources, or the exhaustion requirement. Presently, Broflovski’s cursory investigation failed to meet the requirements of the test because he failed to exhaust all of his alternative sources by not deposing any other Citrus employees and not checking his internet server for the identity of individuals who could have provided the photograph.

Thus, this Court should reverse the decision of the Court of Appeals and find that Cartman is protected from compelled disclosure.

Furthermore, Broflovski is a limited purpose public figure and therefore required to prove that Cartman acted with actual malice when he published the photograph and caption on his internet blog. Broflovski did not prove that Cartman acted with actual malice and therefore summary judgment should be granted in favor of Cartman.

First, Broflovski is a limited purpose public figure because he is involved in a public controversy. The alleged human rights abuses at Citrus’ manufacturing facility in Mumbai, India is a public controversy because it is a matter of public concern that affects more than the people involved in the controversy. Because Citrus is the leader in the consumer electronic industry, the controversies within the company have the ability to affect people not directly involved in the

controversy. Individuals outside of the controversy will feel the ramifications of it, and therefore this is a public controversy.

Second, Broflovski's role in that controversy is more than trivial or tangential. Broflovski is the Director of Research & Development for Citrus. As Director, he has influence over the development of Citrus' products, including the ePlay Touché, which is manufactured at the facility in Mumbai, India. Although Broflovski did not frequent the media or solicit media attention, the lack of public attention does not change Broflovski's status as a limited purpose public figure, because he still had significant influence through his management position.

Lastly, the alleged defamatory statement made by Cartman is directly related to the public controversy. The photograph and caption published by Cartman on his internet blog depicted Broflovski yelling at the workers at a factory in Mumbai. This is the same factory that produces many of Citrus' products. The caption is directly related to Citrus being involved the human rights violation. Therefore, the alleged defamatory statements are related to the public controversy.

For the aforementioned reasons, Broflovski is a limited purpose public figure, and therefore must prove that Cartman acted with actual malice when he published the photograph and caption. Broflovski did not prove that Cartman acted with actual malice.

Actual malice requires that Broflovski prove that Cartman knew the information was false or acted with a reckless disregard for the truth. Although Cartman did not verify the authenticity of the photograph, that alone does not prove a reckless disregard for the truth. Cartman had no reason to question the reliability of his source. Therefore, Cartman did not act with a reckless disregard for the truth and Broflovski failed to prove that Cartman acted with actual malice.

This court should reverse the decision of the Court of Appeals and grant summary judgment in favor of the petitioner, Eric Cartman.

ARGUMENT

When reviewing a ruling on a Rule 37 motion to compel discovery, courts typically are subjected to the deferential abuse of discretion standard. *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 817 (5th Cir. 2004). However, when a court determines the existence of a privilege under Rule 26(b)(5), the court is addressing a question of law. Thus, when reviewing a claim of privilege as a mixed question of law and fact, this Court should apply the *de novo* review standard. *See In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992).

Additionally, rule 56 of the Federal Rules of Civil Procedure states that summary judgment is appropriate when there are no genuine issues of material facts and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Review of the appellate court's denial of summary judgment as a matter of law is subject to a *de novo* review. *Wolfe v. Barnhart*, 446 F.3d 1096, 1100 (10th Cir. 2006).

I. THE APPELLATE COURT'S RULING SHOULD BE OVERTURNED BECAUSE CARTMAN IS PROTECTED AGAINST COMPELLED DISCLOSURE UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

The First Amendment of the United States Constitution guarantees freedom of the press. U.S. Const. amend. I. The Constitution provides this freedom to ensure the free flow of information to the public. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). To allow for the free flow of information, reporters possess a qualified privilege to resist disclosure of confidential sources, though the privilege is not absolute. *Id.* Additionally, the reporter's privilege applies to non-traditional newsgatherers such as "citizen journalists" when they are acting with the intent to disseminate investigative news to the public. *von Bulow v. von Bulow*, 811 F.2d 136, 143 (2d Cir. 1986). To overcome this privilege, the requesting party must demonstrate a sufficiently compelling need for the journalistic materials. *Shoen v. Shoen*, 5 F.3d 1289, 1296 (9th Cir.

1992). Thus, the First Amendment provides a qualified reporter's privilege, and at a minimum it requires the requesting party to exhaust all alternative sources before they may overcome the privilege and seek discovery. *Id.*

A. The First Amendment Implies a Qualified Reporters Privilege Against the Court Compelled Disclosure of Sources.

The First Amendment guarantees a free press because it is the most vital source of public information. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting). To maintain the free flow of information to the public, many courts have interpreted the First Amendment to imply a journalistic privilege not to reveal their confidential sources. *Branzburg*, 408 U.S. at 681. The policy behind this privilege is that “without an unfettered press, citizens would be far less able to make informed political, social, and economic choices...and compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability.” *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981).

The Supreme Court recognized the constitutional existence of a qualified reporter's privilege in *Branzburg v. Hayes*, stating that the newsgathering and editorial processes are entitled to protection under the First Amendment. 408 U.S. at 681. The Court further explained that “without some protections for seeking out the news, freedom of the press could be eviscerated.” *Id.* While this Court held that the reporters may be compelled to reveal sources to a grand jury in criminal cases, this Court also stated that “news gathering is not without its First Amendment protections...We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.” *Id.* at 707-708.

Presently, courts have limited the scope of *Branzburg* to criminal cases and applied a qualified privilege in civil cases. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436 (10th Cir. 1977) (explaining that the Supreme Court's limited holding has no bearing on a qualified

reporter's privilege in civil cases). Some circuits have held that *Branzburg* is not controlling where the public interest in effective law enforcement is absent. *Id.* Furthermore, every circuit that has considered this question has ruled that a privilege should be available in civil cases. *Zerilli*, 656 F.2d at 712.

Even after the decision in *Branzburg*, and interpretations from the circuits, a clear consensus is still lacking amongst the circuits as to whether or not the Supreme Court established a qualified reporter's privilege. *Id.* To combat the confusion, many states have taken legislative action to create "shield laws" that protect the journalists and provide protection against compelled disclosure. *See* James C. Goodale et. al., *Reporter's Privilege*, 952 PLI/Pat 161, 170 (2008) (indicating that thirty-four states and the District of Columbia have shield laws creating a qualified privilege in civil litigation). Although never passed, Congress has introduced many federal "shield law" bills that would statutorily create this qualified privilege. *See, e.g.*, Free Flow of Information Act, H.R. 2012, 110th Cong. (2007). Most recently, the House of Representatives passed H.R. 985, which mirrors the 2007 Free Flow of Information Act, and a federal qualified reporter's privilege now rests in the hands of the Senate. *See, e.g.*, Free Flow of Information Act, H.R. 985, 111th Cong. (2009).

Without a federal statute, courts repeatedly acknowledge the chilling effect that compelled disclosure of anonymous sources would have on the gathering and reporting of news. *See, e.g.*, *Shoen*, 5 F.3d at 1292 (explaining that society has a great interest in protecting the integrity of the newsgathering process). Thus, the First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits have all interpreted *Branzburg* as establishing some sort of qualified privilege under the First Amendment for civil cases. *See, e.g.*, *Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70 (2d

Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *LaRouche v. NBC*, 780 F.2d 1134 (4th Cir. 1986); *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir. 1980); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Silkwood*, 563 F.2d 433; *Zerilli*, 656 F.2d 705.

The Ninth Circuit further explained that the reporter’s privilege is rooted in the First Amendment and insuring the free flow of information to the public is an interest “of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.” *Shoen*, 5 F.3d at 1292. The court went on to explain that the reporter’s privilege is a “partial First Amendment shield” that protects journalists against compelled disclosure in all judicial proceedings. Furthermore, the Tenth Circuit held that the existence of a qualified reporter’s privilege “is no longer in doubt.” *Silkwood*, 563 F.2d at 437. It further held that if a reporter must respond to a subpoena, the Court is merely saying that he should appear and testify. *Id.* However, the reporter’s privilege still applies, and the reporter does not need to address any questions with regard to the relationship with his source. *Id.* Therefore, this Court should reverse the decision from the United States Court of Appeals, follow the overwhelming support of the Appellate Circuits, and find that the First Amendment implies a qualified reporter’s privilege.

B. The Qualified Reporter’s Privilege Covers Cartman for the Purpose of this Defamation Suit and Allows Him to Shield the Identity of His Anonymous Source.

The qualified reporter’s privilege does not simply apply to newspaper journalists. *Branzburg*, 408 U.S. at 681. To invoke the privilege and shield oneself from compelled disclosure, the individual must have the intent, at the inception of the information gathering process, to disseminate information to the public. *von Bulow*, 811 F.2d at 143. Additionally,

compelled disclosure from a journalist must be a “last resort after pursuit of other opportunities have failed.” *Zerilli*, 656 F.2d at 713. Thus, a citizen journalist is entitled to the qualified reporter’s privilege as long as they meet the “intent to disseminate” test and their opposition has exhausted all opportunities to gain the same information.

1. The Privilege Protects “Citizen Journalists” from Compelled Disclosure.

The freedom of the press is not limited to “the large metropolitan publisher” but “necessarily embraces pamphlets and leaflets” and “every sort of publication which affords a vehicle of information and opinion.” *Branzburg*, 408 U.S. at 704. Following this analysis, the reporter’s privilege applies to persons who have the intent at the beginning of the information gathering process to disseminate information to the public. *von Bulow*, 811 F.2d at 143. Additionally, the privilege is “designed to protect investigative reporting, regardless of the medium used to report the news to the public.” *Shoen*, 5 F.3d at 1293.

Recently, a highly controversial issue has developed concerning whether internet bloggers, or “citizen journalists,” are covered by the qualified reporter’s privilege. Some courts have addressed the issue directly and determined that the First Amendment protections cover “citizen journalists.” *See, e.g., O’Grady v. Superior Court of Santa Clara County*, 2005 WL 1048371 (Cal. App. 6 Dist.) (allowing bloggers to invoke the privilege if they demonstrate that their activities “constituted the gathering and dissemination of news”). Additionally, some state legislatures have enacted shield laws that include “citizen journalists” within the qualified protections. *See, e.g., 2008 Hi. ALS 210* (Approved by governor, July 2, 2008)

Some may argue that “citizen journalists” should not be covered by the reporter’s privilege because they have no journalistic training or experience, and instead only need computer access and a desire to start a blog. Mary-Rose Papandrea, *Citizen Journalism and the*

Reporter's Privilege, 91 Minn. L. Rev. 515, 530-531 (2007). However, today many mainstream media journalists now turn to the world of blogs. *Id.* at 531. Media titans such as Newsweek and the New York Times have recently launched daily blogs to keep up with the fast pace dissemination of news. *Id.* Thus, "citizen journalists" have somewhat replaced the traditional news reporter. Without protection to these bloggers, an estimated 8 million citizen journalists would be without constitutional protection. *Id.* This Court should look at bloggers on a case by case basis in order to determine whether they qualify to invoke the reporter's privilege and protect them from compelled disclosure.

To determine who the qualified reporter's privilege covers, this Court should look at the "intent to disseminate" test provided in *von Bulow*. 811 F.2d at 143. The test applies the First Amendment privilege to any reporter who had the intent, at the time of the information gathering process, to disseminate the information to the public. *Id.* The court held that the journalistic privilege is not solely to protect newspaper or television reporters, but to protect the activity of "investigative reporting" more generally. *Id.* at 142-143. The court said it makes no difference whether "[t]he intended manner of dissemination was by newspaper, magazine, book, public or private broadcast medium, or handbill" because "the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Id.* at 144. Thus, to invoke the reporter's privilege an individual must have 1) the intent to use the materials gathered to disseminate to the public and 2) the intent must have existed at the inception of the newsgathering process. *Id.*

In *Shoen*, the Ninth Circuit utilized the "intent to disseminate" test and found that an investigative author, while working on his forthcoming book, could not be compelled to testify about interviews with a source. 5 F.3d at 1294; *See also Silkwood*, 563 F.2d at 437 (holding that

a filmmaker partaking in investigative journalism is able to utilize the qualified reporter's privilege). The confidential source provided the author with inside information about a family murder. *Shoen*, 5 F.3d at 1290. As a part of the investigation, the court subpoenaed the author and ordered him to produce any notes, documents or electronic recordings relating to the death. *Id.* The court held that the author should not be compelled to disclose his confidential sources and found that "it was uncontroverted that he undertook his present research with the intention of writing a book about the topic discussed with the confidential source." *Id.* at 1294.

Presently, this Court should find the "intent to disseminate" test persuasive and use it to determine whether the reporter's privilege is available to Cartman. At the time Cartman received the confidential information from the source, his intent was to disseminate the photograph to the public. (J.A. at 5). Furthermore, as a "citizen journalist," Cartman relies on these confidential sources and consistently disseminates their information to the public upon receipt, which he has repeatedly done with his sources' tips. (J.A. at 5). Furthermore, the record indicates that Cartman published the information one day after receiving it from his source. (J.A. at 5). Based on the "intent to disseminate" test, this would clearly fall within the realm of investigative reporting considering Cartman received the photograph from a confidential source, which he immediately published to his readers. (J.A. at 5). Thus, Cartman, as a citizen journalist, should be protected under the qualified reporter's privilege because he intended to disseminate the photograph to the public upon receipt of the confidential information.

2. Cartman Cannot be Compelled to Disclose his Sources when Broflovski did not Exhaust all Alternative Means of Discovery.

Even when the information is crucial to a litigant's case, reporters should only be compelled to disclose their sources after the litigant has shown that he has exhausted every reasonable alternative source of information. *Zerilli*, 656 F.2d at 714. To overcome the qualified

reporter's privilege and obtain compelled disclosure, the litigant must make a clear showing that the information sought is 1) highly material and relevant to the underlying claim; 2) necessary or critical to the maintenance of the claim, or the "heart of the claim requirement;" and 3) unavailable from alternative sources, or the "exhaustion requirement." *See generally Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958) (application of test is still binding even though decided prior to *Branzburg*). If a party seeking discovery fails to satisfy any one of the factors, the privilege is upheld and discovery is denied. *Id.* While the information sought by Broflovski may meet the first two parts, he has failed to exhaust all alternative sources. Thus, this Court should not compel discovery because Broflovski failed meet all of the requirements for disclosure.

In *Zerilli*, the D.C. Circuit explained that before disclosure may be ordered, the requesting party must demonstrate that he has exhausted all reasonable alternative means for obtaining the information. 656 F.2d at 713. Additionally, litigants "cannot escape their obligation to exhaust alternative sources simply because they feared that deposing [numerous] employees would be time consuming, costly, and unproductive." *Id.* at 715. The court properly stressed the importance of deposing other individuals to find information and determine the source of the leaked information. *Id.* To exhaust all reasonable means, the court reasoned, the litigant must depose all obvious possible alternative witnesses even if that requires dozens or even hundreds of depositions or interviews. *Id.*; *See also e.g., In re Petroleum Products Antitrust Lit.*, 680 F.2d 5 (2d Cir. 1982); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1972).

In the case at bar, this Court should recognize that Broflovski did not exhaust all alternative resources with his cursory investigation. Broflovski merely deposed a factory manager, sent out a mass email to Citrus employees, and submitted an interrogatory to Cartman. This cursory investigation cannot be exhaustive when certain employees within Citrus would

likely have been obvious alternative witness and the law indicates that he should depose them all. The fact is Broflovski only did a cursory investigation, which demonstrates that he failed to discover any additional alternative sources. If Broflovski completed a proper investigation, obvious alternative sources would likely surface. Quite possibly, Broflovski did not want to take the time to depose any other employees, which *Zerilli* explains he cannot escape. Alternatively, the record fails to reveal any attempts by Broflovski to scan his company servers in an attempt to unveil the source of the picture. Thus, this Court should find that Broflovski failed to meet the “exhaustion requirement” because among other things, he obviously did not take the time to depose all possible alternative witnesses.

Conversely, some will argue that since Cartman is a party, and successful assertion of the privilege will effectively shield him from liability, the equities should weigh somewhat more heavily in favor of disclosure. Courts require a heightened standard when plaintiffs must prove that the alleged defamatory publications were false, and made with actual malice. *Zerilli*, 656 F.2d at 713. In this situation, courts tend to favor disclosure. *Id.* However, this does not create automatic disclosure when relevant factors suggest that disclosure is inappropriate. *Id.* at 714. Thus, to overcome this hurdle and determine whether the privilege applies, courts should look to the facts of each case, weighing the public interest in protecting the reporter’s sources against the private interest in compelling disclosure. *Id.* at 712.

In *Cervantes*, the Eighth Circuit articulated a test for determining when a defendant journalist may be compelled to disclose confidential sources in a libel suit prior to a summary judgment ruling. 464 F.2d at 994 The court concluded that a plaintiff in a libel action must first show “cognizable prejudice” before a court will compel disclosure of a journalist’s sources. *Id.* (explaining that an article questioning the abilities of a Mayor did not rise to the level of

cognizable prejudice because there was no reason to doubt the veracity of the source). Cognizable prejudice exists, and compulsory disclosure is appropriate, when a plaintiff discovers evidence showing that the allegedly defamatory statements are “so inherently improbable that there are strong reasons to doubt the veracity of the defendant’s source or the accuracy of his reports.” *Id.* Additionally, cognizable prejudice can also exist when the plaintiff uncovers evidence indicating that the defendant entertained serious doubts about the truth of his statements. *Id.* However, when the plaintiff cannot demonstrate cognizable prejudice, the defendant journalist cannot be compelled to disclose the confidential source. *Id.*

This Court should adopt the test laid out by the Eighth Circuit and hold that Cartman should not be compelled to disclose his confidential source because Broflovski did not demonstrate “cognizable prejudice.” First, Broflovski never uncovered any evidence that would create doubt as to the veracity of Cartman’s source. In fact, the record is silent as to Broflovski finding any evidence that would put into question the accuracy of the photo. Additionally, the record never mentions anything regarding Cartman entertaining serious doubts as to the truth of the picture. With the lack of information that would create doubt as to the veracity of the source, or the accuracy of the photo, Broflovski has failed to demonstrate cognizable prejudice. Since Broflovski failed the test laid out by the Eighth Circuit, this Court should not compel Cartman to disclose his confidential source because there was a lack of cognizable prejudice.

II. SUMMARY JUDGMENT IN FAVOR OF ERIC CARTMAN IS APPROPRIATE BECAUSE BROFLOVSKI IS A LIMITED PURPOSE PUBLIC FIGURE AND THEREFORE REQUIRED TO PROVE THAT CARTMAN’S STATEMENTS WERE MADE WITH ACTUAL MALICE.

Defamation exists when there has been a false statement, either written (libel) or oral (slander) made to a third party injuring the reputation of another. Black’s Law Dictionary 479 (9th ed. 2009). States have the ability to define the appropriate standard of liability for a

publisher or broadcaster defaming a *private individual*, as long as they do not impose liability without fault. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (emphasis added). This Court established that a “public official” seeking recovery for a defamatory statement must prove that the statement was made with actual malice. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964). Additionally, this Court expounded on the definition in *Curtis Publ’g Co. v. Butts* by including “public figures” as those required to prove actual malice for recovery of a defamatory statement. 388 U.S. 130, 155 (1967).

Public figures are those individuals who command a substantial amount of public interest and thrust themselves into an important public controversy. *Curtis*, 376 U.S. at 154-155. *Gertz* held that there are two different types of public figures. 418 U.S. at 351. First, there is a general purpose public figure (“GPPF”), which is an individual who has achieved such fame and notoriety that they have become a public figure for all purposes and in all contexts. *Id.* These individuals are often seen as a “well-known celebrity” or a household name. *Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C. Cir. 1987), *citing Waldbaum v. Fairchild Publ’n, Inc.*, 627 F.2d 1287, 1294 (D.C. Cir. 1980). Second, there is a limited purpose public figure (“LPPF”), which is an individual who becomes a public figure for a limited range of purposes because he is drawn into a public controversy. *Id.*

A public official, GPPF, or LPPF, must prove that a defamatory statement was made with actual malice in order to recover for the injuries sustained. *N.Y. Times*, 376 U.S. at 279-280; *Curtis Publ’g Co.*, 388 U.S. at 155; *Gertz*, 418 U.S. at 351. An individual acts with actual malice when he publishes a statement that he knows to be false or made with reckless disregard for the truth. *N.Y. Times*, 376 U.S. at 279-280.

A. Broflovski is a Limited Purpose Public Figure Because He is Significantly Involved in a Human Rights Violation and the Alleged Defamatory Statements are Related to His Involvement in the Controversy.

An individual becomes a public figure when he thrusts himself into a public controversy. *Curtis*, 376 U.S. at 154-155. Determining the status of a public or private figure is a question of law. *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 708 (4th Cir. 1991). Furthermore, determining an individual's status as a LPPF is also a question of law. *Carr v. Forbes, Inc.*, 259 F.3d 273, 278 (4th Cir. 2001). Here, Cartman concedes that Broflovski does not qualify as a GPPF. (J.A. at 18).

Presently, the Supreme Court has not developed a test to further define the different types of public figures. *Waldbaum*, 627 F.2d at 1292. While there lacks a clear consensus¹, the D.C. Circuit established a three prong test to determine whether a person is a LPPF. *Id.* at 1296-1298. Under this test an individual becomes a LPPF when (1) the public controversy is a real dispute which affects the general public; (2) the plaintiff's role in the controversy is more than trivial or tangential; and (3) the alleged defamation is related to the plaintiff's participation in the controversy. *Id.* Both the Eleventh Circuit and the Fifth Circuit have adopted this test. *Silvester v. Am. Broad. Co.*, 839 F.2d 1491, 1494 (11th Cir. 1988); *Trotter v. Jack Anderson Enter., Inc.*, 818 F.2d 431, 433-434 (5th Cir. 1987).

This Court should adopt the test developed by the D.C. Circuit as it furthers its public policies. By adopting this test, this Court will have a framework that not only determines when a person qualifies as a LPPF, but also a structure that does not disturb the policies set forth by this

¹ The Second Circuit developed a stricter standard for determining if an individual is a LPPF. *See generally Lerman v. Flynt Distrib. Co., Inc.*, 745 F.2d 123 (2d Cir. 1984). This test provides that, "a defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject matter of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media." *Id.* The Third Circuit developed a simplified version of both test which requires the court to determine whether the defamation involves a public controversy and the plaintiff's extent of involvement in the controversy. *McDowell v. Paiewonsky*, 769 F.2d 942, 948 (3d Cir. 1985).

Court over forty years ago. The first step of the test looks at whether the public controversy is a real dispute that affects the general public. *Waldbaum*, 627 F.2d at 1296. Similarly, this Court stated, “occasional injury to the reputations of individuals must yield to the public welfare.” *N.Y. Times Co.*, 376 U.S. at 281. The second and third steps take an in-depth look into the plaintiff’s role in the controversy. *Waldbaum*, 627 F.2d at 1297. This Court noted in *Gertz*, “if a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved.” 418 U.S. at 337.

1. Human Rights Violations are a Public Controversy.

The first step in the *Waldbaum* test is to determine whether a public controversy exists. 627 F.2d at 1296. A matter is not a public controversy simply because it attracts media attention. *Id.* However, creating a public issue is not the same as revealing one. *Trotter*, 828 F.2d at 434. A public controversy is a real dispute in which persons who are not involved in the controversy will feel the ramifications. *Id.* In most circumstances domestic disputes are not public controversies, even if they are of interest to some portion of the public. *See Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976). However, in some situations the public policy concerns associated with domestic disputes will make the situation a genuine public controversy. *See Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1554-1555 (4th Cir. 1994).

When the outcome of a dispute will affect the general public or some segment of the general public in an appreciable way, then becomes a public controversy. *Waldbaum*, 627 F.2d at 1296. The plaintiff in *Waldbaum* was the president and chief executive officer (“CEO”) of the second largest cooperative in the country. *Id.* at 1290. The plaintiff had an active role in management and setting policies within the supermarket industry. *Id.* Five years after obtaining

the position of president and CEO, the board of directors dismissed the plaintiff and news of his dismissal was run in a publication owned by the defendant. *Id.* The article stated that the company had been losing money for the past year and was retrenching. *Id.* The court held that this was a public controversy because the debate would affect consumers and retailers in the Washington area. *Id.* at 1299. The court reasoned that as the second largest cooperative in the nation, the marketing policies, unit pricing, etc. would be the subject of public debate within the supermarket industry and therefore would affect some segment of the general public in an appreciable way. *Id.*

Similarly, the alleged use of slave labor in Mumbai, India is a matter of public concern because the outcome of the controversy will affect some portion of the public in an appreciable way. Directly analogous to the company in *Waldbaum*, which is the second largest cooperative in the nation, Citrus is the leader in the consumer electronic industry. (J.A. at 2). Likewise, the plaintiff in *Waldbaum*, who holds a position of management in his company and influences the policies of the company, Broflovski is the Director of Research & Development for Citrus and oversees the development of the premier portable music player on the market. (J.A. at 3). As the court in *Waldbaum* correctly pointed out, when a company is a leader in specific industry, the controversies within that company have the ability to affect people that are not directly involved in the controversy. 627 F.2d at 1299. Because Citrus is a leader in the consumer electronic market and Broflovski has an influence in the development of its products, the use of slave labor is a matter of public concern because the marketing and development practices would be the subject of public debate within the electronic industry. Therefore, this is a public controversy because it would affect some portion of the general public in an appreciable way.

Additionally, to establish whether there is a public controversy, the court determines whether the public is discussing the issue and whether people other than the immediate participants will feel the impact of the resolution. *Trotter*, 818 F.2d at 433. The defamed individual in *Trotter* was the president of a Guatemalan soft drink bottling company. *Id.* at 432. Two articles were published regarding anti-union violence at the bottling plant and listed the president as one of the orchestrators of the violence. *Id.* The violence attracted the attention of the media, political leaders, human-rights organizations, labor unions, and company shareholders. *Id.* at 434. The president of the company argued that the defamatory article turned him into a public figure. *Id.* The court held that this was a matter of public concern because the violence was widely reported in the media and viewed as a significant foreign policy issue. *Id.* at 435. The court also noted that the purpose of investigative reporting is to reveal public issues and creating a public issue is different from revealing one. *Id.* at 434.

The human rights abuses at the Citrus manufacturing facility is a matter of public concern because the public is discussing it and people other than the immediate participants will feel the impact of the resolution. Like the defamed individual in *Trotter*, who argued that he became a public figure because of the defamatory articles, Broflovski is likely to argue that he became a public figure because of the internet posting. The court in *Trotter* precisely noted that, “Creating a public issue, however, is not the same as revealing one.” 818 F.2d at 434. Also analogous to *Trotter*, Broflovski’s human rights violation has attracted mainstream media attention. (J.A. at 6). The present controversy has also attracted the attention of stockholders and retailers. (J.A. at 6). As the court in *Trotter* correctly held, this Court should hold that the human rights abuses in Mumbai, India are a public controversy because it attracted media attention and is a significant foreign policy issue.

This Court stated that because an issue may be of some interest to the public does not mean that it is a public controversy. *Time, Inc.*, 424 U.S. at 454. However, many public policy issues raised by situation that would not normally be a public controversy could make this a genuine matter of public concern. *Foretich*, 37 F.3d at 1555. In *Time, Inc.*, the respondent married into one of America's wealthier industrial families and the couple was going through a divorce that attracted substantial media attention. 424 U.S. at 450. In *Foretich*, the grandparents were accused of being abusers of their grandchild. 37 F.3d at 1543. The parents of the child were going through a divorce and the child-custody battle was highly publicized including the alleged abuse by the grandparents. *Id.* The court held that the divorce of the couple in *Time, Inc.* was not a matter of public concern because the respondent did not assume any role of especial prominence in the affairs of society and did not thrust herself to the forefront of any particular controversy and therefore the respondent was a private individual and not a LPPF. 424 U.S. at 454-455. However, the court in *Foretich* concluded that the domestic dispute was a matter of public concern because of the public policy reasons associated with the child custody case and how the courts can protect a child's interest during a custody battle. 37 F.3d at 1555.

Human rights violations or the possible use of slave labor must be a public controversy because of the public policy issues raised. While the cause of action in *Foretich* differs from the present situation, there are still public policy issues raised. In *Foretich*, the public policy issues raised were related to child abuse and the court's role in child custody cases, which the court properly concluded were matters of public concern. 37 F.3d at 1555. In the present case, the public policy issues are regarding human rights violations and slave labor, therefore this Court should conclude that this is a matter of public concern because of the policy issues raised.

Because the present situation involves a matter in which the ramifications of the outcome will be felt by more than the participants and it involves public policy concerns, this Court should find that the alleged human rights violation is a public controversy.

2. Broflovski's Role in the Human Rights Violation Was More Than Trivial or Tangential.

The second element of the *Waldbaum* test analyzes the plaintiff's role in the controversy. 627 F.2d at 1297. The plaintiff must play more than a trivial or tangential role in the controversy. *Id.* The court looks at 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 Fifth Circuit noted in *Trotter* that simply because an individual maintains a low profile or limits his public comments does not mean that he erases his status as a public figure. 818 F.2d at 436.

The determination of whether the plaintiff "thrusts [himself] to the forefront of the controversy," as established by this Court in *Gertz*, requires that the court determine whether the plaintiff's role in the controversy is significant. *Waldbaum*, 627 F.2d at 1297. In *Waldbaum*, people knew the plaintiff as the leading advocate of certain policies coming to the cooperative. *Id.* at 1299. The plaintiff made the cooperative a leader in unit pricing and open dating. *Id.* at 1300. Although the plaintiff was not a frequent subject of news articles, he did have prior dealings with the media. *Id.* The court held that he was a LPPF because to a reasonable person it would appear that he thrust himself into the public controversy concerning the cooperative policies in order to influence the outcome. *Id.* The court also reasoned that he was an LPPF because he had prior dealings with the media. *Id.*

Broflovski is a LPPF because he had a significant role in the controversy. Directly analogous to the plaintiff in *Waldbaum*, who was the leading advocate in certain policies and made the cooperative a leader within the industry, Broflovski has also made Citrus the leader in

the consumer electronic industry because of his role in the development of the ePlay Touché. (J.A. at 2-3). In *Waldbaum*, the plaintiff did not frequent the media; likewise, Broflovski did not give many interviews to the public but he did have prior dealings with the media. (J.A. at 3). Because of the similarities between *Waldbaum* and the present case, this court should find that Broflovski is a LPPF just as the court found in *Waldbaum*.

In order to effectively establish the second prong of the test, the court must look at whether the plaintiff has more than a “trivial or tangential role in the controversy.” *Trotter*, 818 F.2d at 435. In *Trotter*, the plaintiff served as president of the stockholders, which is the equivalent of being chairman of the board of a Texas corporation. *Id.* Although the plaintiff argues that he had minimal involvement in the day to day activities of the Guatemalan bottling company, he had primary responsibility for the overall policies. *Id.* The plaintiff further argues that he cannot be a public figure because he did not engage the public’s attention and his name was rarely in the press. *Id.* The court held that the plaintiff was a LPPF regardless of the quantity of his public statements. *Id.* at 436. The court reasoned that the plaintiff still had a significant role in the controversy even though he maintained a low profile and was rarely in the press. *Id.*

Broflovski is a LPPF even though he maintained a low public profile. Broflovski is the Director of Research & Development for Citrus and made very few public statements and was rarely in the media. (J.A. at 3). This is indistinguishable from *Trotter*, where the plaintiff made limited public comments and was rarely in the press. 818 F.2d at 435. Furthermore, like the plaintiff in *Trotter*, who had management responsibilities within the company, Broflovski was in charge of overseeing the development of a new line of Citrus products, including the ePlay Touché. (J.A. at 3). The alleged defamatory internet posting depicted Broflovski yelling at the workers in the factor in Mumbai to assemble the ePlay Touché. (J.A. at 5). This Court should

hold that Broflovski is a LPPF because his role in the development and manufacturing of Citrus products was significant. Finally, as the court reasoned in *Trotter*, simply because one limits their public access does not mean that they are not a public figure. 818 F.2d at 436.

3. The Photograph and Statements Published by Cartman Relate to Broflovski's Participation in the Human Rights Controversy.

The last prong of the *Waldbaum* test that must be proven is that the defamatory statement relates to the plaintiff's participation in the controversy. 627 F.2d at 1298. The controversy is regarding the alleged slave practices and human rights violations by Citrus and Broflovski in Mumbai, India. (J.A. at 5-6). The picture and caption of the alleged defamatory statements are in direct relation to these alleged practices. (J.A. at 5-6). Therefore, the defamatory statements are related to the plaintiff's participation in the controversy.

The human rights controversy in Mumbai is a public controversy; Broflovski had a significant role in the controversy; and the alleged defamatory publication is related to his role within the controversy. Thus, Broflovski is a LPPF and must prove that Cartman acted with actual malice when he published the photograph and caption.

B. Broflovski Failed to Prove That Cartman Acted With Actual Malice Because Cartman did not Act with A Reckless Disregard for the Truth.

As a LPPF, Broflovski is required to prove that Cartman posted the statements with actual malice. *See Gertz*, 418 U.S. at 323. Actual malice requires *clear and convincing* evidence. *Hatfill v. N.Y. Times Co.*, 532 F.3d 312, 324 (4th Cir. 2008) (emphasis added). A statement is made with actual malice when there is knowledge that it was false or made with a reckless disregard for the truth. *N.Y. Times Co.*, 376 U.S. at 279-280. A "reckless disregard for the truth" means that the defendant made the defamatory statement with a high degree of awareness that the statement was false. *Cobb v. Time, Inc.*, 278 F.3d 629, 637 (6th Cir. 2002) (citing *Garrison v. Louisiana* 379 U.S. 64, 74 (1964)). The question of whether the evidence supports a finding of

actual malice is a question of law. *Harte-Hanks Commc'n, Inc. v. Connaughton*, 491 U.S. 657, 687 (1989).

To prove actual malice, the plaintiff must show by clear and convincing evidence that the statement was made with a high degree of awareness of the probable falsity. *Hatfill*, 532 F.2d at 324. In *Hatfill*, the defendant published an article alleging that the plaintiff was the anthrax mailer, and therefore was a terrorist who committed murder. *Id.* The defendant was aware of the plaintiff's extensive knowledge about anthrax's use as a weapon; that the defendant had spoken freely about bioterrorism; and that he had been identified by the FBI as a suspect. *Id.* at 324-325. The court held that the plaintiff did not meet his burden and did not prove with clear and convincing evidence that the defendant acted with actual malice. *Id.* The court reasoned that the record indicated that the defendant actually believed that the plaintiff was the prime suspect. *Id.* at 324. The court stated that all the evidence revealed was that the defendant did not know whether or not the plaintiff was actually a suspect. *Id.* at 325. Lack of knowledge does not constitute a high degree of awareness that the statement was false. *Id.*

Broflovski did not prove that Cartman acted with actual malice when he published the photo and caption on his internet blog. Broflovski must show that Cartman acted with a high degree of awareness that the internet posting was false when he published the photo and statement to his blog. Like the plaintiff in *Hatfill*, who had information that would allow him to believe that the statements he made were true, Cartman also had information which would cause him to believe the information he published was true. The source who Cartman received the photo from had previously sent him reliable information. (J.A. at 5). Additionally, the source claimed to be an employee of Citrus. (J.A. at 1). Although the information published by Cartman could be false, this does not establish that Cartman acted with a high degree of probability that

the information he published was false. Like the plaintiff in *Hatfill*, there is evidence in the record demonstrating that Cartman thought the information he published was true. Therefore, Broflovski cannot prove that Cartman acted with actual malice.

The decision not to verify the truth or falsity does not prove actual malice. *Reuber*, 925 F.2d at 716. Furthermore, failure to investigate does not in itself establish bad faith. *Id.* (citing *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)) In *Reuber*, the plaintiff received a reprimand letter and unbeknownst to the court, the letter got into the hands of the defendant. *Id.* at 707. The defendant made the conscious decision not to inquire into the truth or falsity of the letter. *Id.* at 716. The reprimand letter was published in a newsletter which was read by approximately 1,300 subscribers. *Id.* The court held that the plaintiff was a LPPF and therefore had to prove actual malice. *Id.* at 708. The plaintiff failed to prove actual malice because failure to verify information does not constitute a reckless disregard for the truth and therefore does not meet the actual malice standard. *Id.* at 716.

Cartman did not act with actual malice simply because he did not confirm whether or not the photograph was accurate. Again, failure to verify is not sufficient to establish actual malice. *Reuber*, 925 F.2d at 716. This case is virtually identical to *Reuber* because the defamatory information and photograph in question came from a source where the plaintiff allegedly worked. (J.A. at 1). Broflovski will likely argue that Cartman had the ability to determine if the photograph was altered, which would arguably create actual malice. However, the fact that he did not verify the photograph is not sufficient to establish actual malice. Therefore this Court should hold that Broflovski has not met his burden of proving that Cartman acted with actual malice.

Broflovski further alleged emotional distress in his complaint. (J.A. at 7). This Court held that a public figure may not recover for emotional distress in a defamation suit without proving that the defamatory statements were made with actual malice. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). Because Broflovski failed to prove actual malice, he cannot recover for his emotional distress.

Summary judgment should be granted in favor of Cartman because Broflovski is a LPPF and therefore required to prove that Cartman acted with actual malice when he published the photograph and statements. Broflovski has not proven that Cartman acted with actual malice and therefore this Court should reverse the decision of the Court of Appeals and grant summary judgment in favor of the petitioner, Eric Cartman.

CONCLUSION

For the aforementioned reasons, Eric Cartman, Petitioner, respectfully request that this Court reverse the decision of the United States Court of Appeals for the Fifteenth Circuit, denying Respondent's motion to compel discovery and grant the Petitioner's motion for summary judgment.

Respectfully Submitted,

Team 115
Counsel for Petitioner