

NO: 09-2701

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 2009

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ERIC CARTMAN,

*Petitioner,*

v.

IKE BROFLOVSKI,

*Respondent.*

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

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BRIEF FOR THE RESPONDENT

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## **QUESTIONS PRESENTED**

I. Whether the First Amendment creates a qualified reporter's privilege against the court-compelled disclosure of the identity of an anonymous source; and if so, whether the Petitioner qualifies as a reporter and is entitled to such privilege when disclosure is necessary to prove liability in the underlying online defamation claim.

II. Whether Petitioner should be held liable on an actual malice standard in the online defamation claim brought against him by Ike Broflovski on the grounds that he is a limited-purpose public figure, when Broflovski did not (1) invite any public attention to his points of view, (2) inject himself into any public controversy, (3) take on a position of prominence within any controversy, or (4) maintain regular and continuing access to the media regarding any controversy.

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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.

## **OPINIONS BELOW**

The order of the District Court for the Western District of Silverado simultaneously denied Respondent's motion to compel discovery and granted Petitioner's motion for summary judgment. (J.A. at 21.) The United States Court of Appeals for the Fifteenth Circuit reversed the District Court's opinion and remanded the case for further proceedings. (J.A. at 32.)

## **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

The following Constitutional provision and statute is relevant and referenced in the Brief:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. I.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1) (2000).

## STATEMENT OF THE CASE

### A. Facts

Ike Broflovski (“Ike”) is the Director of Research & Development at the very successful Citrus Electronics, Inc. (“Citrus”), a consumer electronics company headquartered in Parque del Sur, Silverado. (J.A. at 2-3.) Ike’s brother, Kyle Broflovski (“Kyle”), is the CEO and majority shareholder of Citrus. (J.A. at 2.) The company’s flagship product, the ePlay,<sup>1</sup> is a staple among teenagers and persons in their twenties. Id. After such great success with the ePlay, Citrus has charged Ike with overseeing the development of the new ePlay Touché. (J.A. at 2-3.)

Eric Cartman (“Petitioner”) is the sole proprietor of an electronics sales and repair shop located in the state of Washoe. (J.A. at 4.) Petitioner’s business has substantially declined after the opening of a Citrus MegaStore across the street from his store. Id. Because of the financial hardship he was facing, Petitioner became a part-time blogger for profit in June 2005. Petitioner posts his blog, *The Sludge Report*, on the third-party server run by the popular blogging site, Bloggeroo. Id. The streaming advertisers on Petitioner’s website pay him proportional to the daily number of hits his page receives. Id. On *The Sludge Report*, Petitioner shares his opinions on the celebrity gossip and local and international politics he finds on the Internet and major newspaper headlines. Id. Petitioner shows particular hatred for large companies which engage in international trade, particularly Citrus, for which he reserves his harshest criticism. Id. This disdain stems from the fact that Citrus has nearly driven him out of business. Id.

Those who visit *The Sludge Report* send e-mails about current scandals to Petitioner’s personal e-mail address provided on the site. (J.A. at 5.) Petitioner states that all persons who send him e-mails “will be treated as confidential sources unless otherwise requested,” primarily

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<sup>1</sup> The ePlay is a portable digital music player that was released in 2001.

because neither he nor Bloggeroo have any way of accessing the readers' personal information unless it is provided to them by the readers themselves. See Id. Professor Chaos is one such reader who frequently e-mails the Petitioner; however, the Petitioner and Professor Chaos actually met at an electronics tradeshow years ago and have had a personal relationship<sup>2</sup> since then. Id.

On July 7, 2008, Professor Chaos sent the Petitioner an e-mail as he normally would from time to time. (J.A. at 5.) In this e-mail, Professor Chaos alleged that Citrus, under the direction of Ike, was engaging in human rights abuses at its Mumbai, India, manufacturing factory, and he attached a digital photograph of what appeared to be Ike walking through the facility with subordinates in tow and yelling at the workers assembling the ePlay Touché. Id. Although Ike has made a number of visits to Mumbai, it has since been discovered that the picture sent by Professor Chaos was doctored, a fact that Petitioner would have been aware of had he used the photo forgery detection software he owned. (J.A. at 7.)

On the next day, Petitioner posted on his website the picture he received, along with the following commentary: "Citrus Engaging in Acts of Modern-Day Slavery? Ike Broflovski surveys his minions . . . but where's the whip, Ike?" (J.A. at 5.) Underneath the photograph, Petitioner posted his remarks. In this post, Petitioner admits that Professor Chaos, a "dear friend," sent him this "exclusive" photograph which he purportedly obtained as a Citrus employee. (J.A. at 6.) Petitioner comments that, "[a]ccording to Professor Chaos, the men and women depicted in this photograph often work 16 hours a day, seven days a week, with few breaks" and "are forced to work in slave-like conditions . . . ." Id. However, Petitioner later conceded that the "only information provided by Professor Chaos that made its way to *The*

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<sup>2</sup> Petitioner knows Professor Chaos's real name and e-mail address.

*Sludge Report* was the photograph.” (J.A. at 14, n.1.) Petitioner even admits within the actual post that he is not very sure that the picture depicts what he purports. (J.A. at 6.) At the conclusion of the post, Petitioner states, “If the image I am showing you depicts what I think it does, then I’m telling you the truth, Ike Broflovski is nothing but a slave driver!”

Before this controversy began, Ike gave no interviews to the press and was rarely seen in public.<sup>3</sup> (J.A. at 3.) Ike has only been present at the one moderately-attended press conference held to announce a new line of products at the Citrus Campus in 2006. Id. At this conference, Kyle remarked that Ike was a “little shy” and that the media and customers should “pay no attention to the man behind the curtain.” Id. At the meeting, Ike briefly thanked Kyle for the warm welcome and expressed his desire to “[push] Citrus, its employees, and its products to new heights.”<sup>4</sup> Id. However, since Petitioner’s web post, Ike’s reputation has been severely tarnished and assaulted by the mainstream media.

Within days, Petitioner’s blog post spread through word of mouth and eventually attracted the attention of Keith McRiley, host of the top-rated cable news show, “The Countdown Factor,” who then named Ike as the recipient of his nightly “Most Heinous Individual in the Galaxy” award. (J.A. at 6.) McRiley also urged his audience to boycott Citrus, resulting in a 25% decrease in the company’s stock the very next day. Id. The stock then continued to fall in anticipation of decreased sales, and numerous retailers pulled Citrus products from their shelves. (J.A. at 7.) As a result of Petitioner’s libelous web post, Ike has suffered from depression due to threats on his life. Ike’s only response to the demands made by the media has been a message

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<sup>3</sup> The only information regarding Ike that is available to the public is the contact information located on Citrus’s website, along with that of the other executives. (J.A. at 4.)

<sup>4</sup> The Associated Press released a story regarding the press conference; however, the main topic was the new line of Citrus products. Ike’s hiring and statement were briefly mentioned at the very bottom of the article. (J.A. at 3.)

delivered through his attorney, which stated that the photograph posted by Petitioner was fabricated and that Ike would soon seek justice against the Petitioner.

## B. Procedural Background

Ike initially filed a common law defamation suit in the Superior Court for the State of Silverado, against Petitioner for the defamatory statements published on his website. (J.A. at 1.) On October 14, 2008, Petitioner subsequently removed the case to the United States District Court for the Western District of Silverado on diversity grounds. (J.A. at 1.) On January 8, 2009, Ike filed a motion to compel discovery under Fed. R. Civ. P. 37, asking that the court require the Petitioner to disclose the identity of the anonymous source claiming to be a Citrus employee who relayed the information Petitioner posted on his website. (J.A. at 1.)

Petitioner replied by filing a motion on January 16, 2009, to oppose disclosure and move the court to enter summary judgment, asserting that (1) as a blogger he is a journalist entitled to the qualified reporter's privilege found in the First Amendment and (2) Ike must prove actual malice to sustain a cause of action because he is a limited purpose public figure. (J.A. at 2.) On January 27, 2009, the court denied Ike's motion to compel and granted Petitioner's motion for summary judgment. (J.A. at 20.)

Ike filed a notice of appeal with the United States Court of Appeals for the Fifteenth Circuit on February 5, 2009. (J.A. at 22.) The court held that (1) the First Amendment "does not recognize a qualified reporter's privilege against the disclosure of sources," (2) Ike is "not a public figure for defamation purposes, (3) the appropriate standard of care is that of common law negligence, and (4) a reasonable fact finder could conclude that Petitioner was negligent." (J.A. at 22-23.) Petitioner subsequently filed a petition for a writ of certiorari with this Court, which was granted on August 24, 2009. (J.A. at 33.)

## SUMMARY OF THE ARGUMENT

This Court should affirm the Fifteenth Circuit's ruling and hold that (1) the Petitioner is not protected by a qualified reporter's privilege that is created by the First Amendment and, even if he were, Ike's need for disclosure in order to prove the underlying defamation claim substantially outweighs any privilege Petitioner may have as a matter of law; and (2) that Petitioner should be held liable in the online defamation claim brought against him by Ike under a simple negligence standard on the grounds that Ike is a private person.

First, this Court's precedent shows that the First Amendment does not create a qualified reporter's privilege. The freedom of the press protects against restraint, restriction, or imposition of what may be published. Branzburg v. Hayes, et al., 408 U.S. 665, 681 (1972). Anonymous sources are not a product of the protection, but instead, are useful tools in the newsgathering process. See Id. at 681-82; Lee v. Dep't of Justice, 401 F. Supp. 2d 123, 141 (D.D.C. 2005). Therefore, this Court should affirm its previous decisions, and allow the states to determine whether they wish to grant more rights by establishing a statutory qualified privilege, instead of manipulating the First Amendment to create one.

In the event that this Court were to decide not to follow its own precedent, the Petitioner is still not entitled to protection from the purported privilege because he cannot be considered a "reporter." Petitioner is neither engaged in investigative reporting nor involved in the dissemination of news. Instead, Petitioner is more akin to an entertainer. Furthermore, even if this Court were to find that the Petitioner is entitled to protection under the privilege, Petitioner must still disclose the identity of the anonymous source as a matter of law because the disclosure is relevant, material, and necessary for the defamation claim to survive, and as the Fifteenth Circuit noted, the facts show that alternate sources of the information are not available to Ike.

Second, this Court should hold Petitioner liable in the online defamation claim brought against him by Ike under a simple negligence standard on the grounds that Ike is a private person. Private persons are those who have “not accepted public office,” or who have no influential roles “in ordering society.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974); Curtis Publ’g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result). A private person “has relinquished no part of his interest in the protection of his own good name, and consequently has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.” Gertz, 418 U.S. at 345. Because Petitioner is considered a “private person” as a matter of law, a simple negligence standard must be applied to determine liability in the online defamation claim.

### **ARGUMENT**

This case is about the Petitioner, a man who despises the company created by Ike’s brother, and who is claiming that he is a reporter entitled to a constitutional privilege that does not exist, in order to avoid civil liability for the damages caused as a result of the defamatory statements he published on his website. This Court should affirm the Fifteenth Circuit’s holding, and find that (1) the First Amendment does not create a qualified reporter’s privilege, (2) that, in any event, Petitioner would not be entitled to a purported privilege because he is not a reporter, and (3) that Petitioner is liable under a simple negligence standard because Ike is a private person and not a limited purpose public figure under existing law.

Because this court will be addressing constitutional issues, the standard of review is de novo. United States v. Brandon, 158 F.3d 947, 953 (6th Cir. 1998).

**I. THIS COURT SHOULD FIND THAT PETITIONER IS SUBJECT TO COURT-COMPELLED DISCLOSURE OF HIS SOURCE BECAUSE (1) THE FIRST AMENDMENT DOES NOT CREATE A QUALIFIED REPORTER'S PRIVILEGE, (2) EVEN IF SUCH A PRIVILEGE EXISTED, THE PETITIONER WOULD NOT BE PROTECTED, AND (3) IN ANY EVENT, ANY SUCH PRIVILEGE COULD BE OVERCOME.**

This Court should find that the Petitioner is not exempt from court-ordered disclosure of his source for three reasons. First, the First Amendment does not create a qualified reporter's privilege that would shield a reporter from liability when he negligently or recklessly publishes defamatory information. Second, even if this Court were to erroneously find that such a privilege existed, the Petitioner would not fall within its purview. Third, even if the Petitioner were shielded from disclosure, Ike still defeats the privilege as a matter of law because the need for disclosure in the defamation suit substantially outweighs any interest Petitioner may have in the purported privilege. Therefore, this Court should find that the Petitioner must disclose the true identity of Professor Chaos, his source.

The qualified reporter's privilege emerged from Justice Powell's concurrence in Branzburg v. Hayes, et al., 408 U.S. 665 (1972). Although the majority held that no such privilege could be derived from the First Amendment, many of the federal circuits feel that Justice Powell's concurrence combined with the three dissenting opinions created a qualified reporter's privilege, at least in the realm of civil litigation. See In re Grand Jury Proceedings (Storer Commc'ns, Inc. v. Giovan), 810 F.2d 580, 584 (6th Cir. 1987). Many have justified this interpretation by narrowly restricting the holding in Branzburg to apply only in criminal grand jury proceedings. However, even in the jurisdictions that narrowly construe this Court's holding in Branzburg, a qualified reporter's privilege is applied in the criminal context as well. See, e.g., In re Grand Jury Subpoena, 750 F.2d 223, 224 (2d Cir. 1984).

To date, Congress has refused to enact any statutes creating a federal statutory reporter's privilege. See, e.g., Free Flow of Information Act, H.R. 2102, 110th Cong. (2007). Similarly, the State of Silverado has not enacted such a statute. (J.A. at 9.) Therefore, in order for the Petitioner to avoid court compelled-disclosure of his anonymous source, not only must he establish that such a privilege is derived from the First Amendment, but he must also prove that this purported privilege would apply to him. This Court should reaffirm its majority opinion in Branzburg and find that a qualified reporter's privilege cannot be derived from the First Amendment. However, even if this Court were to reverse its previous holding, it should still find that the Petitioner is not entitled to protection because (1) he is not a "reporter" or "journalist" for purposes of the purported privilege, and (2) in any event, Ike meets the elements necessary to overcome the privilege as a matter of law. Therefore, this Court should compel Petitioner to disclose the true identity of his anonymous source.

**A. This Court's Precedent Clearly Explains That The First Amendment Does Not Create A Qualified Reporter's Privilege Against Court-Compelled Discovery Of Sources.**

This Court should uphold its precedent and find that the First Amendment does not create a qualified reporter's privilege in both criminal and civil contexts. In Branzburg, 408 U.S. at 689, this Court refused to "create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy." In that case, a newspaper staff reporter was required to appear before a grand jury to answer questions regarding the anonymous source for an article he published. Id. at 667. The Court held that there would not be a significant constriction of the flow of news to the public by reaffirming the prior common law and constitutional rule regarding testimonial obligations of newspaper reporters. Id. at 690-91.

Although the holding in Branzburg related to grand jury proceedings, much of this Court's rationale expressed general notions of the First Amendment and the protection it affords to reporters, which transcends the holding of that case. This Court clearly stated "that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of **civil** or criminal statutes of general applicability." Branzburg, 408 U.S. at 682 (emphasis added). The First Amendment protects the press from intrusions upon speech or assembly, restrictions on what may be published, express or implied commands that the press publish what it prefers to withhold, and the publishing of its sources. See Id. at 681-82.

It is well settled that "[laws of general applicability] do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991). Therefore, enforcement of general laws against the press is not subject to stricter scrutiny. Id. at 670. As this Court noted, "[t]he [F]irst Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons." Branzburg, 408 U.S. at 691-92. Furthermore, this Court has also acknowledged that although the press has the right to state and discuss public things, this right, "as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing." The press is not free to publish everything and anything it so desires. Id. at 683.

An agency of the press "has no special privilege to invade the rights and liberties of others" and "must answer for libel." Associated Press v. Nat'l Labor Relations Bd., 301 U.S. 103, 132-33 (1937). It is also well settled that "the press may not circulate knowing or reckless falsehoods damaging to **private** reputation without subjecting itself to **liability for damages**,

including punitive damages . . . .” Branzburg, 408 U.S. at 683 (emphasis added). This language clearly references the realm of civil liability, and shows that this Court has in fact recognized that the protections afforded to reporters must also be limited in the civil context. Therefore, although many of the federal circuits have narrowly interpreted this Court’s decision in Branzburg as only applying to criminal grand jury proceedings, the language this Court used to rationalize its decision not to recognize a First Amendment qualified reporter’s privilege does in fact encompass the realm of civil liability.

This Court has subsequently addressed the issue of disclosure and the First Amendment only once in a slightly different context. In Univ. of Pa. v. Equal Employment Opportunity Comm’n, 493 U.S. 182, 189 (1990), the University asked this Court “to recognize an expanded right of academic freedom to protect confidential peer review information from disclosure” to the Equal Employment Opportunity Commission, subsequent to a subpoena in an action under Title VII of the Civil Rights Act of 1964. This Court noted the vast similarities that case had with Branzburg. Id. at 201. Just as in Branzburg, the University claimed that requiring disclosure of information collected in confidence would inhibit the free flow of information, thereby infringing on First Amendment principles. Id. This Court again rejected that argument, now in a civil context, stating, “[w]e were unwilling then, as we are today, ‘to embark the judiciary on a long and difficult journey to . . . an uncertain destination.’” Id. at 201-02 (citing Branzburg, 408 U.S. at 703). That case should clearly indicate that this Court did not intend to restrict its holding in Branzburg to criminal proceedings.<sup>5</sup>

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<sup>5</sup> In fact, in support of its holding, this Court reiterated that “the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of **civil** or criminal statutes of general applicability.” Univ. of Pa., 493 U.S. at 201-02 (emphasis added).

Following the decision in Branzburg, the Sixth Circuit rejected a claim of constitutional privilege asserted in the context of a grand jury investigation.<sup>6</sup> In re Grand Jury Proceedings, 810 F.2d at 583. That case arose when a journalist was held in contempt for failing to comply with a subpoena issued by the grand jury, which directed him to produce video tapes compiled in the course of his reporting. Id. at 581. That court declined to recognize that the First Amendment created a reporter’s privilege because to do so would go against the holding in Branzburg, which did not recognize a First Amendment testimonial privilege. Id. at 583. More importantly, that court asserted that Justice Powell’s concurring opinion “[did] not warrant the rewriting of the majority opinion to grant a First Amendment testimonial privilege to news reporters.” Id. at 585. Consequently, the Sixth Circuit “decline[d] to join some other circuit courts, to the extent that they have . . . adopted the qualified privilege . . . urged by the three Branzburg dissenters and rejected by the majority.” Id. at 584.

Just as this Court held in Branzburg, Associated Press, and Univ. of Pa., the freedom of the press granted by the First Amendment does not give immunity to reporters. If a reporter, such as the Petitioner, circulates knowing or reckless falsehoods that damage a person’s reputation, he must and will be held liable for damages. Our society promotes the free dissemination of news; however, if the news lacked any and all truth, it would undermine the very purpose behind freedom of speech. Requiring Petitioner to disclose his source in order to show credibility, or lack thereof, would actually promote this purpose by prompting the press to assess the veracity of the information it publishes.

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<sup>6</sup> The Seventh Circuit has also rejected the notion that a qualified reporter’s privilege exists under the First Amendment, noting its surprise that a large number of cases conclude there is a privilege in light of Branzburg. McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003), *reh’g denied*, 2003 U.S. App. LEXIS 21057 (7th Cir. 2003)(noting that some circuits “essentially ignore Branzburg,” while others “audaciously declare that Branzburg actually created a reporter’s privilege”).

Petitioner would argue that after Branzburg, many of the federal circuits recognized a qualified reporter's privilege. However, this Court should find that the federal circuits have erroneously relied on Justice Powell's concurring opinion in that case, while ignoring the language of the majority opinion as provided above. See McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003), *reh'g denied*, 2003 U.S. App. LEXIS 21057 (7th Cir. 2003). More specifically, in rationalizing its decision to find that a reporter's privilege did not exist in the grand jury context, the majority cited to Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958), where the Second Circuit denied a news gatherer's assertion that the First Amendment exempted confidential information from public disclosure pursuant to a subpoena issued in a civil suit. Branzburg, 408 U.S. at 685-86. Therefore, although the issue in Branzburg concerned disclosure in a grand jury proceeding, it appears from the rationale that, had the same issue been presented in the context of a civil case, this Court would have still held that such a privilege cannot be found under the First Amendment.

Not only does the First Amendment not create a qualified reporter's privilege, but it is also important to note that in the past, this Court has been extremely "reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." Univ. of Pa., 493 U.S. at 189 (citing Branzburg, 408 U.S. at 706). This is because "the task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths." Branzburg, 408 U.S. at 706. In recent years, several bills have been introduced in Congress proposing to create a statutory reporter's privilege at the federal level; however, Congress has refused to enact such a statute. (J.A. at 9.) Therefore, this Court should follow its precedent and defer to Congress's decision not to create a federal statutory privilege, but instead, to allow the

state legislatures to decide whether they wish to afford more rights to their citizens. Although some states have enacted statutes creating a qualified reporter's privilege, the State of Silverado has opted not to, and this decision should be respected. (J.A. at 9.)

It is also important to note that the District Court for the Western District of Silverado misconstrued this Court's statement in Branzburg when it stated that the majority "suggest[ed] that . . . some privilege may be invoked against compulsory disclosure." (J.A. at 10.) Instead, what this Court stated was that "official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." Branzburg, 408 U.S. at 707-08. In the present case, we have neither harassment of the press nor any action meant to disrupt a reporter's relationship with his sources. Instead, Respondent simply asks that this Court reaffirm the notion that the First Amendment does not create a qualified reporter's privilege in any context, whether criminal or civil. If a State wishes to grant its reporter's more rights, it should enact a statutory reporter's privilege as some states have done; however, this is a determination that should be left up to the states.

For the aforementioned reasons, this Court should find that the First Amendment does not create a qualified reporter's privilege. The First Amendment protects reporters from government interference in what can be reported and the expression of opinions. It is not meant to create a constitutional bar through which reporters may claim immunity from the ordinary duties that apply to all citizens, including the duty of a witness to testify in court.

**B. In The Event This Court Were To Recognize A Qualified Reporter's Privilege, Petitioner Is Not Entitled To Protection Because He (1) Is Not Engaged In Investigative Reporting, (2) Did Not Intend To Use The Information Sought In The Dissemination Of News Because His Blog Is Considered Entertainment, And (3) Did Not Have The Requisite Intent At The Time The Information Was Obtained.**

In the alternative, this Court should still find that the Petitioner must disclose his source because he is not considered a "reporter" for purposes of the privilege's protection. In the

federal circuits that recognize a qualified reporter's privilege under the First Amendment, the privilege applies if the individual claiming the protection (1) intended to use the information from an anonymous source in the dissemination of news, and (2) such intent existed when the information was obtained. See Gonzales v. NBC, 194 F.3d 29, 34 (2d Cir. 1998); von Bulow v. von Bulow, 811 F.2d 136, 145 (2d Cir. 1987), *cert. denied*, 481 U.S. 1015 (1987). However, at least five jurisdictions have either directly or indirectly added a third element: that the individual claiming the privilege be engaged in investigative reporting. In re Madden, 151 F.3d 125, 131 (3d Cir. 1998); see Cusumano v. Microsoft Corp., 162 F.3d 708, 714 (1st Cir. 1998); see Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993) (indicating that the journalist's privilege was designed to protect "the activity of investigative reporting"); see von Bulow, 811 F.2d at 143; see Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-37 (10th Cir. 1977) (rationalizing that a documentary filmmaker was entitled to the qualified reporter's privilege because "his mission in [the] case was to carry out investigative reporting for use in the preparation of a documentary film"). The party claiming this protection has the burden of proving these essential elements "through competent evidence." von Bulow, 811 F.2d at 144.

In von Bulow, 811 F.2d at 146, the Second Circuit found that Reynolds, the individual claiming the qualified reporter's privilege, was not entitled to protection because she did not meet the necessary elements. That court found that Reynolds did not intend to use the reports to disseminate information to the public because, at the time they were commissioned, her primary concern was vindicating" the individual who was the subject of the subpoenaed writings. Id. at 145. Furthermore, her manuscript was not privileged under the argument that it was based on confidential sources because she testified that her relationship with those confidential sources "stemmed from before [she] was writing the book." Id. at 146.

The Third Circuit has found that the von Bulow and Shoen cases, above, correctly pronounce the appropriate test to use in determining who qualifies as a “journalist.” In re Madden, 151 F.3d at 130. However, in reaching its decision that Madden was not a “journalist,” that court forewarned that the von Bulow decision should not be read “too expansively” so as to “[elide] the requirement that the individual be engaged in the activity of news gathering” or, in other words, “investigative reporting.” Id. The “test does not grant [a privileged] status to any person with a manuscript, a web page or a film, but requires an intent at the inception of the newsgathering process to disseminate investigative news to the public.” Id. at 129.

In that case, Madden was a nonparty witness who was employed by WCW to produce tape-recorded commentaries which were replayed to callers on a hotline. In re Madden, 151 F.3d at 126. The Third Circuit found that Madden’s activities could not be considered “investigative reporting” for three reasons: (1) “he is an entertainer, not a reporter, disseminating hype, not news;” (2) he did “[not] independently investigate any of the information given to him by WCW executives,” his confidential sources; (3) he was not gathering investigative “news” because he was commenting on “fictional wrestling characters,” and (4) “he had no intention at the start of his information gathering process to disseminate the information he acquired.” Id. at 130. The Court also noted that “[e]ven if Madden’s efforts could be considered as ‘newsgathering,’ his claim of privilege would still fail” for the other reasons provided. Id. at 130.

In the event that this court were to find that a qualified reporter’s privilege exists, it should adopt the three-prong test<sup>7</sup> as explained in In re Madden, von Bulow, Shoen, and Silkwood. As the court in In re Madden noted, such a test would ensure that not every person with a web page, for example, would automatically be granted a privileged status. If that were

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<sup>7</sup> To recap, that the individual claiming the privilege (1) is engaged in investigative reporting, (2) intended to use the information from the anonymous source in the dissemination of news, and (3) such intent existed when the information was obtained. In re Madden, 151 F.3d at 131.

the case, it would undermine the purpose for the privilege because there would cease to be any distinction. It would create a slippery slope under which those individuals with a personal webpage, such as on Facebook, who frequently post gossip and news headlines could then argue that they, too, are entitled to the qualified reporter's privilege.

However, even if this Court were to employ a two-prong test and eliminate the "investigative reporting" requirement, Petitioner is still not entitled to the privilege because, as will be demonstrated, he has failed to prove that he intended to use the information in the dissemination of news and that such intent existed when the information was obtained. Both tests are conjunctive; therefore, even if this Court were to find that the Petitioner fails to meet only one prong, he is still not entitled to protection.

In the present case, this Court should find that Petitioner is not a "reporter" or "journalist" for purposes of the qualified reporter's privilege because he does not meet the three prong test. First, Petitioner was not involved in the act of investigative reporting. Just as in In re Madden, Petitioner did not independently investigate any of the information given to him by readers of *The Sludge Report*, including Professor Chaos. (See J.A. at 4-5.) For the most part, all Petitioner did was find celebrity gossip and current events to post from other internet websites and the headlines of major newspapers. (J.A. at 4.) Furthermore, it should be apparent from the facts that before posting the defamatory headline at issue, Petitioner did not conduct his own research to ascertain the credibility of the information. (See J.A. at 5.) He did not even use the software he had, and had previously used, to determine whether the picture was legitimate. (J.A. at 7.) Therefore, this Court should find that Petitioner was not engaged in investigative reporting.

Second, the Petitioner fails to meet the second prong because he was not involved in the dissemination of news. As in In re Madden, Petitioner is more of an entertainer, rather than a reporter, and he is involved in the dissemination of “hype,” not news. Petitioner’s blog contains celebrity gossip and those current events found on headlines of major newspapers only. (J.A. at 4.) In fact, Petitioner created *The Sludge Report* to compensate for the business losses he suffered as a result of the company Ike works for. (J.A. at 4.) The more “hits”<sup>8</sup> Petitioner gets, the more revenue he receives from companies advertising on his page. (J.A. at 4.) Therefore, it is certainly in the Petitioner’s best interest to promote *The Sludge Report* and make it entertaining, which he has in this case by fabricating the commentary posted alongside the photograph he was given by Professor Chaos.<sup>9</sup> In this respect Petitioner is very much like Madden from In re Madden who was not considered a “reporter” for purposes of the privilege because he commented on “fictional wrestling characters,” just as Petitioner is commenting on fictional events. Therefore, no matter what test is employed, this Court should find that Petitioner is not entitled to the privilege because he is not involved in the dissemination of news.

Third, even if this Court finds that Petitioner was involved in the dissemination of news, he is still not entitled to the privilege because such intent did not exist when the information was obtained. It couldn’t have possibly existed because he was not looking for this information or even investigating Citrus at the time he received the e-mail from Professor Chaos. The plain meaning of the word “obtained,” is “to succeed in gaining possession of as the result of planning or endeavor.” The American Heritage Dictionary (4th ed. 2009). It is apparent from the facts that it was only after the Petitioner received the e-mail with the image in question that he had any

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<sup>8</sup> This term is used to describe the number of times a person views a particular web page. (See J.A. at 4.)

<sup>9</sup> The e-mail sent by Professor Chaos “alleged that Citrus, at the direction of Ike Broflovski was engaging in human rights abuses at its manufacturing facility outside of Mumbai, India.” (J.A. at 5.) Furthermore, Petitioner conceded that he “actively added his own commentary to the photograph,” and “the only information provided by Professor Chaos that made its way to *The Sludge Report* was the photograph.” (J.A. at 14.)

intent to post the picture on his blog. (See J.A. at 5.) The Petitioner neither “planned” nor “endeavored” to receive the information sent by Professor Chaos. Therefore, Petitioner does not fall within the purview of the qualified reporter’s privilege.

Finally, like in von Bulow, Petitioner’s relationship with his “confidential source,” Professor Chaos, existed long before *The Sludge Report* headline in question was ever posted on Petitioner’s blog. (J.A. at 5.) The two met at an electronics trade show two years prior, and in Petitioner’s own words, Professor Chaos is a “dear friend.” (J.A. at 6.) Therefore, just as the court in von Bulow found that the privilege could not apply when Reynolds had an already existing relationship with her confidential sources, Petitioner should not be granted the privilege based on his pre-existing relationship with Professor Chaos.

For the aforementioned reasons, this Court should find that the Petitioner is not entitled to protection under the purported qualified reporter’s privilege as a matter of law.

**C. Even If This Court Were To Find That Petitioner Is Protected Under The First Amendment, Petitioner Would Still Be Subject To Disclosure Because The Information Sought Is (1) Relevant And Material To The Defamation Claim, (2) Necessary For The Claim To Survive, And (3) Not Readily Obtainable From Other Sources.**

Even if this Court were to recognize a qualified reporter’s privilege that applied to the Petitioner, he would still be compelled to disclose the identity of Professor Chaos for three reasons. First, the identity of the source is relevant and material to the defamation claim because the source provided Petitioner with the defamatory material that is the subject of the underlying claim. Second, in order for Ike to prove that the Petitioner relied on an untrustworthy source disclosure is necessary. Third, it would be unduly burdensome for Ike to filter through thousands upon thousands of corporate e-mails and depose a vast number of employees to possibly discover the source of the defamatory material.

After Branzburg, and contrary to this Court’s majority opinion in that case, several federal circuits took the position that a qualified First Amendment privilege does exist in all civil actions and in certain phases of criminal prosecutions. However, most of the federal circuits have created a multi-factor test under which the privilege may be overcome, by a “clear and specific 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,<sup>10</sup> and (3) not obtainable from alternative sources.<sup>11</sup> Gonzales v. NBC, Inc., 194 F.3d 29, 33 (2d Cir. 1998).

Courts have acknowledged that there are certain circumstances under which the claim of privilege tends to be weaker, such as when the subpoena seeks testimony only, when the questioning is narrowly tailored, and when the journalist is a libel defendant. See Sec. and Exch. Comm’n v. Seahawk Deep Ocean Tech., Inc., 166 F.R.D. 268, 271 (D. Conn. 1996); United States v. Markiewicz, 732 F. Supp. 316, 319 (N.D.N.Y. 1990), *cert. denied*, 506 U.S. 1086 (1993); Zerilli v. Smith, 656 F.2d 705, 713-14 (D.C. Cir 1981). Particularly in cases where the journalist is a libel defendant, courts have favored disclosure because the information sought goes directly to the heart of the claim. Garland, 259 F.2d at 550; Zerilli, 656 F.2d at 714.

The first element is met because the identity of Professor Chaos is material and relevant to the underlying defamation claim. In Sec. and Exch. Comm’n, 166 F.R.D. at 271, the SEC sought the testimony of a journalist claiming the privilege in order to confirm the accuracy of his news article which recounted efforts by the defendant to recover treasure from sunken vessels off the Florida coast. That court found that the testimony sought was directly relevant to the security fraud claims in the underlying action because it would corroborate that the defendant made false statements to reporters in order to manipulate the price of its stock. Id. at 271-72. Similarly, in

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<sup>10</sup> This element is also referred to as “the heart of the claim” or the “necessity or criticality” requirement.

<sup>11</sup> This element is also referred to as the “exhaustion” requirement.

this case the source of the information is highly relevant to the defamation case because it will allow Ike to prove that the Petitioner posted defamatory information from an individual who was neither credible nor trustworthy. Like in Sec. and Exch. Comm'n, the identity of Professor Chaos will also allow Ike to show that the commentary posted on *The Sludge Report* with the picture at issue was false information created by the Petitioner.

The second element necessary to overcome the privilege is present in this case because Professor Chaos's identity is necessary for the maintenance of the defamation claim. The Second Circuit has found that in a liable case where learning the identity of the confidential source was key to establishing liability, the "heart of the claim" standard was satisfied and disclosure was ordered. Garland, 259 F.2d at 550. Similarly, in a defamation case the D.C. Circuit found that the confidential source in question was the one who provided the defendant the ammunition with which to defame and therefore should be disclosed. See Carey v. Hume, 492 F.2d 631, 637 (D.C. Cir. 1974), *cert. dismissed*, 417 U.S. 938 (1974). The Carey court also noted that in most cases the identity of the source will provide some evidence of his or her trustworthiness. See Carey, 492 F.2d at 637.

As the Fifteenth Circuit noted in this case, "the source of information . . . is of paramount relevance to the level of care a defendant exercised in making those comments." (J.A. at 26.) Without the identity of Professor Chaos, Ike will be unable to prove that the Petitioner posted defamatory information from an individual who was neither credible nor trustworthy. This, coupled with the fact that Petitioner did not make any attempts to assure himself that the picture was not doctored, would allow Ike to prove Petitioner's liability in the underlying defamation suit; therefore, this information is necessary for the maintenance of the defamation claim.

Lastly, the third and final element is met because the identity of Professor Chaos is not obtainable from alternate sources available to Ike. The D.C. Circuit has made it clear that litigants must not be made to carry wide-ranging and onerous discovery burdens when confronted with a case where the plaintiff would have been required to depose a substantial number of employees at a corporation's office because any employee could have made the observations in question. See Carey, 492 F.2d at 639. It has also asserted "that the number of depositions necessary for exhaustion must be determined on a case-by-case basis" and that prior cases, including Zerilli, contain "no reference to any required number of witnesses as being necessary to constitute exhaustion." Lee v. Dep't of Justice, 413 F.3d 53, 60-61 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1187 (2006). In Zerilli, 656 F.2d at 714, the D.C. Circuit found that the qualified reporter's privilege applied when appellants had not exhausted possible alternative sources of information by deposing the four individuals named as likely sources of the leak. Zerilli is distinguishable from this case because Ike deposed the manager of the Mumbai factory and several of his top engineers. The CEO of Citrus also sent an e-mail to all employees requesting information regarding the source of the picture, but this yielded few leads. (J.A. at 8.) This case is also like Carey because Citrus employs a very substantial number of employees, all of whom could be the source.

The Fifteenth Circuit also noted that the information Ike seeks is not otherwise obtainable from alternate sources. (See J.A. at 26-27.) It is absolutely ludicrous to require Ike "to filter through thousands upon thousands of corporate e-mails, to interrogate every Citrus employee, and to check every nook and cranny of the Mumbai factory to see who had access." (J.A. at 26-27.) Furthermore, Ike, as Director of Research and Development at Citrus, does not wield the same authority and human relations power within the company as we would expect that his

brother has as the CEO. (J.A. at 27.) This is a public corporation; as much as the CEO may wish to help his brother, Ike, he will likely be unable to as the company is not a litigant in the suit. The Board of Directors, managing members, and shareholders would be hard pressed to expend such resources when the company is not liable. For the foregoing reasons, the identity of Professor Chaos is not available through alternate sources, thus the final element is met.

Therefore, even if this Court were to afford Petitioner the protection of a qualified reporter's privilege, Ike's need for disclosure substantially outweighs the Petitioner's interest in concealing his source as a matter of law; thus, this Court should still compel the Petitioner to disclose the identity of his source.

**II. PETITIONER, ERIC CARTMAN, THE AUTHOR OF THE INTERNET BLOG *THE SLUDGE REPORT*, SHOULD BE HELD LIABLE IN THE ONLINE DEFAMATION CLAIM BROUGHT AGAINST HIM BY IKE UNDER A SIMPLE NEGLIGENCE STANDARD ON THE GROUNDS THAT IKE IS A PRIVATE CITIZEN AND NOT A LIMITED PURPOSE PUBLIC FIGURE UNDER EXISTING LAW.**

This Court should apply a simple negligence standard and find that Petitioner, the author of the Internet blog *The Sludge Report*, is liable in the online defamation claim brought against him by Ike on the grounds that Ike is a private citizen and not a limited-purpose public figure under existing law.

The tort action for defamation exists to redress injury made to a plaintiff's reputation by statements that are defamatory and false. Milkovich v. Lorain Journal Co., 497 U.S. 1, 11 (1990). Defamation can occur in one of two forms: libel or slander. "Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words." Restatement (Second) of Torts § 568(1) (1977). "Slander consists of the publication of defamatory matter by spoken words, transitory gestures or

by any form of communication other than those stated in Subsection (1).” Restatement (Second) of Torts § 568(2) (1977).

The Supreme Court of the State of Silverado has adopted a standard of defamation that mirrors the one found in the Second Restatement of Torts. For a defendant to be found guilty in a defamation suit, the plaintiff must prove (a) “a false and defamatory statement concerning another;” (b) “an unprivileged publication to a third a party;” (c) “fault amounting at least to negligence on the part of the publisher;” and (d) “either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” Restatement (Second) of Torts § 558 (1977). Because this case was brought before a federal court by way of diversity grounds, this Court must apply the substantive law of the forum State. See Eerie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

Statements are defamatory if they “tend so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” Restatement (Second) of Torts § 559 (1977). They are considered “published” if communicated “intentionally or by a negligent act to one other than the person defamed.” Restatement (Second) of Torts § 577(1) (1977). If the defamatory statement concerns a public official or a public figure, the person who publishes the defamatory communication is liable only if “he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters.” Restatement (Second) of Torts § 580(A) (1977). This is the same “actual malice” standard enunciated by this Court in New York Times, Co. v. Sullivan, 376 U.S. 254 (1964). If, instead, the defamatory statement concerns a private person, the person who publishes the statement will be liable only if “he (a) knows that the statement is false and it

defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them.” Restatement (Second) of Torts § 580(B) (1977).

Because of policy reasons, “Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others.” Blumenthal v. Drudge, 992 F. Supp. 44, 49 (D.D.C. 1998). Under the Communications Decency Act of 1996 (“CDA”), “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1) (2000).

This Court should apply the rule promulgated by the Second Circuit in order to determine whether Ike is a public person, a private person, or a limited-purpose public figure for purposes of the defamation suit against Petitioner. Under the rule, in order for a plaintiff to be considered a limited-purpose public figure he or she must: (1) successfully invite public attention to his or her “views in an effort to influence others prior to the incident that is the subject of litigation,” (2) voluntarily inject himself or herself into the relevant controversy, (3) take on a position of prominence within the public controversy, and (4) maintain “regular and continuing access to the media” to be able to address the defamatory remarks made about him or her. Lerman v. Flynt Distrib. Co., Inc., 745 F.2d 123, 136-137 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

Public persons are “[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures” along with “those who hold governmental office.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). Public figures are also those who “have assumed roles of special prominence in the affairs of society,” who “occupy positions of such persuasive power and

influence that they are deemed public figures for all purposes,” or who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” Id. at 345. While the media is free to act on the assumption that these types of persons “have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them,” the media cannot make that same justified assumption regarding private individuals. Id.

Private persons are those who have “not accepted public office,” or who have no influential roles “in ordering society.” Gertz, 418 U.S. at 345; Curtis Publ’g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result). A private person “has relinquished no part of his interest in the protection of his own good name, and consequently has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.” Gertz, 418 U.S. at 345. Because public officials and public figures have better access to different channels of communication, they are better able to respond to false statements than private individuals; this makes private individuals “more vulnerable to injury,” and creates a greater state interest in protecting them. Id. at 344. Petitioner will undoubtedly argue that it is possible for a private citizen to “become a public figure through no purposeful action” of his own; however, this Court has already recognized that possibility and has stated that “instances of truly involuntary public figures must be exceedingly rare.” Id. at 345.

In regards to limited-purpose public figures, this Court has also recognized that there may be instances when an individual “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” Id. at 351. However, “[p]articipation in community and professional affairs” is not enough to render an individual “a public figure for all purpose.” Id. at 352. This Court has stated that it is instead

“preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.” Id.

The United States Court of Appeals for the DC Circuit addressed the issue of limited-purpose public figures in Tavoulaareas v. The Washington Post Co., 817 F.2d 762 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 870 (1987). The court held that the president of an oil company was a limited-purpose public figure for purposes of a controversy involving the oil industry because he “attempted to ‘thrust [Mobil and himself] to the forefront’ of the national controversy over the state of the oil industry.” Id. at 773. He and Mobil “played substantial roles in spearheading a public counterattack on the movement for reform of the oil industry.” Id. The court also found that he was a limited-purpose public figure for purposes of a controversy over whether he used “his influence as president of Mobil Corporation to ‘set up’” his son “as a partner in a shipping firm whose business included a multi-million dollar” contract with Mobil. Id. at 774. In response to inquiries about the controversy surrounding him and his son, Tavoulaareas wrote a letter to Mobil shareholders that “reached an audience of more than a quarter-million people, a group larger than the circulation of most daily newspapers.” Id. at 775. The court also found that prior to the Washington Post article, people were already discussing Tavoulaareas’s involvement in the controversy surrounding his son’s appointment, and that “a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution.” Id.

Likewise, in Trotter v. Jack Anderson Enterprises, Inc., 818 F.2d 431 (5th Cir. 1987), the Fifth Circuit held that the president of a Coca-Cola bottling company in Guatemala was a limited-purpose public figure for purposes of the defamation action he brought against a

newspaper columnist. The court found that the labor violence at the bottling company in Guatemala was a public controversy because it had captured the attention of “the media, political leaders, human-rights organizations, labor unions, and Coca-Cola shareholders.” Trotter, 818 F.2d at 434. Trotter argued that much of the press coverage was irrelevant because it came after the articles were published, and Anderson could not “invoke the public-figure defense if the allegedly defamatory articles themselves turned him into a public figure.” Id. The court responded by stating that creating a public issue “is not the same as revealing one.” Id. The court found that Trotter played more than just a trivial or tangential role in the controversy because he served as the president of the stockholders; had major responsibility for the bottling company’s labor policy; and “undertook important efforts to influence the resolution of the shareholders’ protests.” Id. at 435.

This Court in Wolston v. Reader’s Digest Ass’n, Inc., 443 U.S. 157 (1979), reversed the lower court's holdings and held that petitioner did not fall within the category of limited-purpose public figures who have “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” Gertz, 418 U.S. at 345. “Neither the mere fact that petitioner voluntarily chose not to appear before the grand jury, knowing that this might be attended by publicity, the citation for contempt, nor the simple fact that his failure to appear and the contempt citation attracted media attention, rendered him such a public figure.” Wolston, 443 U.S. at 158. The Court further stated that the plaintiff’s failure to appear was not for purposes of drawing attention to himself “in order to invite public comment or influence the public with respect to any issue.” Id. There was also no evidence to suggest that “his failure to appear was intended to have, or did in fact have, any effect on any issue of public concern.” Id.

The Supreme Court of Oregon, in Bank of Oregon v. Indep. News, Inc., 693 P.2d 35 (1985), *cert. denied*, 474 U.S. 826 (1985), affirmed the decision of the Oregon Court of Appeals reversing the trial court's finding that a bank and its president were public figures for purposes of the defamation suit they brought against a newspaper. The controversy revolved around a defamatory article published by the newspaper regarding the bank's engagement in allegedly "numerous wrongful acts." Bank of Oregon, 693 P.2d at 37. That court stated that the public controversies into which plaintiffs may thrust themselves into have to pre-exist the defendant's defamatory publication. Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979). The court further stated that the controversy "cannot be created by the publication." Bank of Oregon, 693 P.2d at 41. The court concluded that since neither of the plaintiffs was a public figure, they only had to "prove that the false and defamatory statements were made negligently," meaning "without due care to ascertain whether they were true." Id. at 43.

This Court in Time, Inc. v. Firestone, 424 U.S. 448 (1976), held that the plaintiff, a socialite and former wife of a member of one of America's wealthiest families was not a "public figure" because she "did not assume any role of special prominence in the affairs of society," and she did not "thrust herself to the forefront of any particular controversy in order to influence the resolution of the issues involved in it." Time, Inc., 424 U.S. at 453. The Court stated that not every controversy that may be of interest to the public may be considered a "public controversy" for purposes of a defamation action; if that were the case then the New York Times privilege would apply to any defamatory statement regarding a private person as long as it concerned any matter of general or public interest. Id. at 454. The Court further asserted that the fact that the plaintiff held press conferences in an attempt to answer questions from reporters did not convert

her into a “public figure,” and there was no proof that she used the press conferences as a means “to thrust herself to the forefront of some unrelated controversy.” Id. at 455 n.3.

This case is distinguishable from Tavoulaareas and Trotter, and analogous to Wolston, Bank of Oregon, and Time, Inc. for several reasons. In this case, there is nothing in the record to show that Ike invited public attention to his views on any controversy that pre-existed the controversy that is the subject of this litigation. Instead, the “controversy” involved in this case was created by the publication of defamatory statements by Petitioner on his website. This also proves that Ike did not voluntarily inject himself into the controversy. Petitioner may try to argue that Ike has taken on a position of prominence within this particular controversy, but under this Court’s precedent the argument will fail because Ike has instead refused to address the demands made by the media to respond to the defamatory allegations. Although he issued a statement through his attorney stating that the photograph was a total fabrication, but this alone is not sufficient to prove that he has maintained regular and continuing access to the media in order to address the defamatory remarks made by Petitioner. There is also no proof that he has done anything for the purposes of drawing attention to himself in order to invite public comment or influence the public with respect to any issue.

Because Respondent does not meet any of the prongs under the four-prong rule developed by the Second Circuit for purposes of determining whether an individual is a limited-purpose public figure in a defamation suit, this Court should find that the actual malice standard does not apply and that Petitioner is liable under a simple negligence standard.

### **CONCLUSION**

For the reasons stated above, the Respondent respectfully requests that this Court affirm the Fifteenth Circuit’s decision. As demonstrated, this Court’s precedent has shown that the First

Amendment does not create a qualified reporter's privilege. Because no constitutional privilege exists, the states should decide individually whether to grant more rights. Furthermore, even if this Court were to reverse and find that a qualified reporter's privilege exists, the Petitioner is not protected because he is not a "reporter" for purposes of the privilege's protection. In any event, if this Court does find that Petitioner is entitled to such a privilege, Ike's need for disclosure substantially outweighs the Petitioner's interest in concealing his source as a matter of law.

Furthermore, this Court should hold Petitioner liable in the online defamation claim brought against him by Ike under a simple negligence standard on the grounds that Ike is a private person. At no time did Ike invite public attention to his views in an effort to influence others prior to the controversy that is the subject of this litigation, nor did he voluntarily inject himself into any controversy. While it could be argued that he has taken on a position of prominence within this particular case, this controversy did not pre-exist the publication of the defamatory remarks. Instead, it was the publication of the defamatory remarks that created the controversy. Lastly, Ike has not maintained regular and continuing access to the media in order to respond to the defamatory remarks made about him. Lastly, his only contact with the media was through a statement released by his attorney on his behalf. For these reasons, Ike, a private person, is not a limited-purpose public figure; therefore, the proper standard is not actual malice but, instead, simple negligence.

Respectfully Submitted,

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