
No. 09-2701

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 2009

ERIC CARTMAN,
PETITIONER,

v.

IKE BROFLOVSKI,
RESPONDENT.

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

BRIEF FOR RESPONDENT

Team No.218
Counsel for Respondent

QUESTIONS PRESENTED

- I. A publisher must disclose the identity of a confidential source if the source possesses evidence necessary to a defamation action because the First Amendment does not contain a qualified reporter's privilege. Must Petitioner reveal the identity of his source when he is the defendant in an online defamation claim, and is the only person with knowledge of the source's identity?

- II. Publishers are liable for negligent publication of defamatory falsehoods about private citizens. Mr. Broflovski did not voluntarily inject himself into a public controversy but was harmed by the defamatory falsehoods Petitioner published without investigating the truth of the content. May Mr. Broflovski recover damages based on petitioner's negligent actions?

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JURISDICTION STATEMENT

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

STATEMENT OF THE CASE

Ike Broflovski (“Mr. Broflovski”) was hired in 2006 as the Director of Research and Development for Citrus, a *Fortune 500* consumer electronics company headquartered in Silverado. (J.A. at 2-3). Mr. Broflovski’s hiring was announced at a “moderately attended” press conference held by his brother Kyle, the outspoken CEO of Citrus. (J.A. at 3). At the press conference, Kyle announced both Mr. Broflovski’s hiring and their plan to release a “new and exciting line of products,” telling the media that Mr. Broflovski was shy and to “pay no attention to the man behind the curtain.” (J.A. at 3). The subsequent news report focused on the new products and only mentioned Mr. Broflovski’s hiring briefly in the bottom paragraph. (J.A. at 3). Mr. Broflovski has given no interviews since then and is rarely seen in public. (J.A. at 3).

Petitioner Eric Cartman (“Petitioner”) is the owner of Cartman’s Computer World in the neighboring state of Washoe. (J.A. at 4). His business started to decline after a Citrus MegaStore opened across the street, so to generate additional income Petitioner started *The Sludge Report*, a muckraking blog with a current audience of more than 100,000 readers. (J.A. at 4). The blog focuses on celebrity gossip and politics, and provides a platform for Petitioner to voice his criticism of large companies. (J.A. at 4). Petitioner directs his harshest criticisms at Kyle Broflovski and Citrus, alleging that they engage in “the systematic oppression of the peoples of the Third World” and that they are driving him out of business. (J.A. at 4).

Petitioner frequently publishes information that he receives from anonymous readers. (J.A. at 5). On July 7, 2008, Petitioner received an email from a source who calls himself “Professor Chaos.” (J.A. at 5). Petitioner knows Professor Chaos personally, including his real name and contact information, and over the past two years has frequently posted information from him regarding the release of Citrus products. (J.A. at 5). Professor Chaos alleged that

Citrus was engaging in human rights violations at its manufacturing facilities located outside Mumbai, India. (J.A. at 5). He attached a digital photograph which appeared to be Mr. Broflovski yelling at the Citrus Mumbai factory workers. (J.A. at 5).

The next day, Petitioner published the photograph on the front page of *The Sludge Report* under the headline, “Citrus Engaging in Acts of Modern-Day Slavery?” (J.A. at 6). Petitioner added his own commentary, alleging that Mr. Broflovski, “the pawn of his evil older brother Kyle,” forced Citrus employees to work in “slave-like conditions” and might “have these poor Indians shackled to their stations at night.” (J.A. at 6). The blog entry was widely read and attracted mainstream media attention. (J.A. at 6). Keith McRiley, host of the top rated cable news show “The Countdown Factor,” named Mr. Broflovski the “Most Heinous Individual in the Galaxy” and urged his large audience to boycott Citrus products. (J.A. at 6). The next day, numerous large retailers pulled Citrus products from their shelves and Citrus’s stock dropped by more than twenty-five percent. (J.A. at 6-7). Mr. Broflovski became depressed after receiving death threats, and has not spoken publicly about the blog post since its publication. (J.A. at 7).

Forgery detection software later revealed that Mr. Broflovski’s image was superimposed on the photograph of the Citrus Mumbai factory workers. (J.A. at 7). Petitioner owns similar forgery detection software which he has previously used to verify photographs before posting them on his blog, but he did not test the photo of Mr. Broflovski before publishing it. (J.A. at 7). The record is unclear as to whether Mr. Broflovski has ever been inside the Citrus factory during his visits to Mumbai. (J.A. at 7). Mr. Broflovski were unable to determine the source of the photograph although he deposed several high ranking officials from the Mumbai factory and sent an e-mail to all Citrus employees requesting information on the source. (J.A. at 8).

On September 20, 2008 Mr. Broflovski filed a common law cause of action for defamation in the Superior Court for the State of Silverado against Petitioner, alleging that Petitioner negligently published defamatory falsehoods on his blog. (J.A. at 1). Petitioner removed the case to the United States District Court for the Western District of Silverado on diversity grounds. (J.A. at 1). Mr. Broflovski moved to compel discovery of the identity of Petitioner's confidential source. (J.A. at 1). Petitioner asserts that he is: (1) protected from compelled disclosure based on a qualified privilege under the First Amendment and (2) alleges that Mr. Broflovski is a public figure and has failed to adduce clear and convincing evidence of actual malice. (J.A. at 2). The District Court granted Petitioner's motion for summary judgment on both counts. (J.A. at 20). Mr. Broflovski appealed to the Court of Appeals for the Fifteenth Circuit, which reversed and remanded both issues. (J.A. at 32). This Court granted certiorari on August 24, 2009. (J.A. at 33).

SUMMARY OF THE ARGUMENT

Petitioner may not withhold the identity of his confidential source because he is not protected by a qualified reporter's privilege under the First Amendment. Testimonial privileges are considered an extraordinary exception to the long-standing rule that the public has a right to every person's evidence. Because a qualified reporter's privilege is not essential to ensuring effective newsgathering, and is unnecessary because of the alternative remedies available, this extraordinary exception should not be available to newsmen in civil suits. Alternatively, if the Court recognizes a qualified reporter's privilege it does not protect Petitioner. Petitioner's part-time blogging is not protected by the qualified privilege because extending the privilege to "blogging" would constitute an unreasonable expansion of the privilege's scope. If this Court determines that the First Amendment privilege protects "blogging," Petitioner is still not entitled

to shield the identity of his confidential source because the balancing of interests involved in this case favors compelled disclosure.

For purposes of this defamation suit, Mr. Broflovski is a private citizen because he did not voluntarily or affirmatively attempt to influence a public controversy. Because he is a private citizen, Petitioner is liable under a standard of simple negligence for publishing defamatory falsehoods that harmed Mr. Broflovski. Petitioner's failure to verify the confidential source's information prior to publication constituted at least negligence and the defamatory falsehoods he posted on *The Sludge Report* caused actual harm to Mr. Broflovski.

Even if this Court finds that Mr. Broflovski is a limited-purpose public figure, he may still recover damages because Petitioner published defamatory falsehoods about Mr. Broflovski with actual malice, or reckless disregard as to whether the information was true or not. The evidence examined as a whole shows that Petitioner's personal grudge against Mr. Broflovski coupled with his lack of adherence to journalistic standards of investigation is sufficient for this Court to find that the Petitioner acted with actual malice in publishing defamatory falsehoods about Mr. Broflovski and he should be held liable for the resulting harm.

ARGUMENT

The determination of the existence of a privilege asserted under Rule 26(b)(5) is a question of law and is a mixed question of law and fact subject to *de novo review*. See *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992). Further, a review of a grant of summary judgment on appeal is also subject to *de novo review*. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

I. PETITIONER IS NOT ENTITLED TO A QUALIFIED REPORTER'S PRIVILEGE TO WITHHOLD THE IDENTITY OF HIS SOURCE.

The First Amendment to the United States Constitution protects the free flow of information to the public by providing a general right to a free press. U.S. Const. amend. I. However, this right is not absolute; the First Amendment does not invalidate every incidental burdening of the press resulting from the enforcement of civil and criminal statutes, *See Branzburg v. Hayes*, 408 U.S. 665, 682 (1972), nor does it provide newsmen with a special privilege from the application of general laws. *Associated Press v. NLRB*, 301 U.S. 103, 132-133 (1937). This is especially true when the special privilege sought by a newsmen undermines the paramount public interest in the fair administration of justice. *Garland v. Torre*, 259 F.2d 545, 549 (2d Cir. 1958). The general duty of a citizen is to support the administration of justice by providing evidence and giving his testimony. *Blackmer v. U.S.*, 284 U.S. 421, 438 (1932). The privilege not to disclose relevant evidence constitutes an extraordinary exception to this general duty, and the tendency of courts is to restrict the classes to whom the privilege from disclosure is granted. *Mooney v. Sheriff of New York County*, 199 N.E. 415, 416 (1936). Moreover, no privilege is absolute; even when courts recognize a testimonial privilege rooted in the Constitution, it must give way in proper circumstances because “exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.” *U.S. v. Nixon*, 418 U.S. 683, 710 (1974).

Petitioner may not refuse to disclose the identity of his confidential source because he is not protected by a qualified reporter’s privilege under the First Amendment. Testimonial privileges are considered an “extraordinary” exception to the long-standing rule that the public has a right to every man’s evidence. *Garland*, 259 F.2d at 549. Because a qualified reporter’s

privilege is not essential to ensuring effective newsgathering, and is unnecessary because of the alternative remedies available, there is no justification for applying this extraordinary exception to newsmen in civil suits. Alternatively, if this Court recognizes a qualified reporter's privilege, it does not operate to protect Petitioner. Petitioner is not a reporter, he maintains a blog; extending a reporter's privilege to cover Petitioner's "blogging" would constitute an unreasonable expansion of the privilege's scope. If this Court determines that the First Amendment privilege protects "blogging," Petitioner is still not entitled to shield the identity of his confidential source because the balancing of interests involved in this case favors compelled disclosure. Therefore, the Court of Appeals decision should be affirmed, and Petitioner should be compelled to disclose the identity of his confidential source, Professor Chaos.

A. The First Amendment Does Not Create a Presumptive Qualified Reporter's Privilege.

In the seminal case of *Branzburg v. Hayes*, this Court held that absent evidence of harassment or an abuse of process, a newsmen was not entitled to invoke a qualified reporter's privilege to refuse to disclose confidentially obtained information in a grand jury proceeding. 408 U.S. at 699. Despite *Branzburg's* holding, several circuits have recognized a qualified privilege in civil suits by finding that Justice Powell's concurrence limits the majority's holding to the contexts of a criminal prosecution.¹ Here, Petitioner, a part-time internet "blogger," claims he is entitled to invoke a qualified reporter's privilege not to disclose his confidential source's identity based on these circuits' reasoning. (J.A. at 8). This mischaracterization of the *Branzburg* holding attempts to develop a "far-reaching interpretation of the First Amendment"

¹ *U.S. v. LaRouche Campaign*, 841 F.2d 1176, 1181-1182 (1st Cir. 1988); *Gonzales v. NBC*, 194 F.3d 29, 35 (2nd Cir. 1998); *In re Madden*, 151 F.3d 125, 128-129 (3d Cir. 1998); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977); *U.S. v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986). Other circuits have correctly interpreted Justice Powell's concurrence in criminal proceedings, but recognize a qualified privilege in civil cases. *U.S. v. Smith*, 135 F.3d 963, 969, 971-972 (5th Cir.1998); *In re Grand Jury Proceedings*, 5 F.3d 397, 402-403 (9th Cir. 1993); *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981).

that places reporters “above the law or beyond its reach.” *Branzburg*, 408 U.S. at 699. Because the First Amendment does not create a qualified reporter’s privilege, the Court of Appeals’ decision to compel Petitioner to disclose the identity of his confidential source is proper and should be upheld.

1. *A plain reading of Branzburg forecloses the idea of a qualified reporter’s privilege.*

In *Branzburg*, this Court considered whether newspaper reporters had a First Amendment right to refuse to testify before a grand jury regarding confidentially obtained information. 408 U.S. at 690-691. The reporters argued, as does Petitioner in this case, that compelled disclosure would inhibit their ability to gather news from confidential sources, and thus impinge on the free flow of information protected by the First Amendment. *Id.* at 679-680. Skeptical of these assertions, this Court found that the public’s interest in ensuring a fair and effective grand jury process outweighed any uncertain consequential burden on the media that would result from compelled disclosure. *Id.* at 690. This Court concluded that absent evidence of an abusive grand jury process, newsmen were not entitled to invoke a qualified reporter’s privilege under the First Amendment to refuse to disclose confidentially obtained information. *Id.* at 690, 707.

Mr. Broflovski acknowledges that one of the key factors in *Branzburg* warranting the denial of the qualified privilege—the importance of maintaining an effective grand jury process—is not implicated in the present dispute. Irrespective of this contextual difference, the majority’s skepticism of the privilege’s necessity and effectiveness suggests that creation of this “extraordinary” testimonial privilege in civil suits is also improper. *See Cary v. Hume*, 492 F.2d 631, 635-636 (D.C. Cir. 1972) (finding that, despite the differences between a civil libel suit and the criminal proceedings in *Branzburg*, the court could not “ignore the fact that the interests

asserted by the newsmen in . . . *Branzburg* . . . were not accorded determinative weight by five members of the Court.”).

a. The privilege is not essential to effective news reporting.

A primary reason the majority did not recognize the qualified privilege was the absence of credible evidence that showed it was necessary to ensure effective news reporting. *Branzburg*, 408 U.S. at 693-694 (evidence regarding the necessity of the privilege is widely divergent and speculative, and of doubtful credibility because of the “professional self-interest of the interviewees.”). Privileges recognized at common law protect from disclosure communications that are deemed essential to ensuring the professional can adequately serve his or her client’s interests. *Swindler & Berlin v. U.S.*, 524 U.S. 399 (1998) (attorney-client privilege encourages frank communication so that fully informed legal advice may be obtained and the facts essential to proper representation can be developed); *Jaffee v. Redmond*, 518 U.S. 1, 26-27 (1996) (privilege necessary for psychotherapy because psychotherapy “is completely dependent upon [the patients’] willingness and ability to talk freely.”). Unlike these privileges, a privilege preventing the disclosure of confidential sources is not essential to effective news reporting because journalism is not completely dependent upon confidential sources for the continuance of its daily newsgathering. *Lee v. Dep’t of Justice*, 401 F. Supp. 2d 123, 141 (D.C. 2005) (“Anonymous sources are not a *sine qua non* of journalism but only a . . . useful tool.”).

Further, it is highly questionable that without a privilege confidential sources would be deterred from coming forward with information for fear of being exposed. As this Court noted, the media’s success for hundreds of years without a privilege is at odds with this claim. *Branzburg*, 408 U.S. at 698-699. Also at odds with this claim is the fact that the determination of whether a reporter is entitled to invoke a qualified privilege is necessarily conducted on an ad

hoc basis—i.e., after the source has already come forward with the information. *Id.* at 702 (“If newsmen’s confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem.”). Nor can Petitioner point to evidence that suggests reporters would be prevented from effective news reporting by having to respond to discovery requests and subpoenas. While responding to discovery may take time away from reporting, the press are not differently situated from any other business that must take valuable time to disclose evidence relevant to a legal proceeding. *See Smith*, 135 F.3d at 970. This Court has consistently refused to exempt the media from the application of general laws simply because those laws might indirectly burden its newsgathering function. *Id.*²

- b. The privilege is unnecessary because alternative remedies adequately protect reporters.

The Constitution should not be misconstrued to develop a privilege because reporters are adequately protected by alternative remedies. Reporters who believe their requested testimony is meant to harass or to disrupt their relationships with confidential sources, or who believe the grand jury’s investigation is being conducted in bad faith, have access to the courts to file a motion to quash on First Amendment grounds. *Branzburg*, 408 U.S. at 707-708.³ Newspersons are also adequately protected through discovery rules and federal and state administrative agencies’ internal regulations which protect against unduly oppressive discovery requests. *See Fed. R. Civ. P. 26(c)* (barring discovery that is unduly cumulative, onerous, or wasteful, or when

² The press may not disobey copyright laws when publishing, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576-579 (1977); the media must obey the National Labor Relations Act, *Associated Press*, 301 U.S. at 103, and the Fair Labor Standards Act, *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-193 (1946); the press may not restrain trade in violation of the antitrust laws, *Associated Press v. U.S.*, 326 U.S. 1 (1945); and must pay non-discriminatory taxes, *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943).

³ While the majority extensively discussed the protections that were still available under the First Amendment, *id.* at 707, this discussion was not, as the District Court suggests, an implicit recognition that a qualified privilege is appropriate in civil suits. The District Court stated, “the majority itself seemed to suggest that, given appropriate circumstances, some privilege may be invoked against compulsory disclosure.” (J.A. at 10).

the party seeking discovery has not exhausted all other available means to obtain the information); *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (finding no need to create special evidentiary criteria for journalists because pursuing normal judicial review to ensure reasonableness was sufficient to protect reporters' First Amendment rights); *See* 28 C.F.R. § 50.10 (2007) (Department of Justice guidelines for subpoenaing reporters requires the information to be essential to the case, unavailable through non-media sources, published and associated, and the request must carefully avoid claims of harassment).

Here, the development of a qualified privilege, if any, should be left to Silverado's legislature. *See* James Thomas Tucker & Stephen Wemiel, *Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*, 57 Am. U.L. Rev. 1291, 1297-1298 (2008). For more than three decades, Congress has declined to pass a federal shield law for reporters. *Id.* at 1310-1311. More than one-hundred proposed federal shield laws were introduced in the six years following *Branzburg*, yet none passed. *Id.* As the Court of Appeals noted, the failure of Congress to pass a federal shield law is an implicit admission that "the privilege cannot be derived from the First Amendment alone." (J.A. at 25). Simply because Congress and the state of Silverado have chosen not to enact a "statutory shield law," (J.A. at 9, 25), does not sanction "fastening a nationwide privilege on courts, grand juries," and litigants alike. *Branzburg*, 408 U.S. at 699. While the majority of circuits and states have adopted a qualified privilege for civil suits, there exist fundamental differences over not only the privilege's scope, but also whether it is justified at all. *See* Tucker & Wemiel, *supra* at 1301-1310. Creating a federal qualified privilege then, as Justice Scalia suggested in a somewhat different context, would be analogous to "announcing a new, immediately applicable, federal

common law of torts, based on the States' 'unanimous judgment' that some form of tort law is appropriate. *Jaffee*, 518 U.S. at 26-27 (Scalia, J. dissenting).

Testimonial privileges are considered an "extraordinary" exception to the long-standing rule that the public has a right to every person's evidence. Because a qualified reporter's privilege is not essential to ensuring effective newsgathering, and is unnecessary because of the alternative remedies available, it cannot be said there is justification for applying this extraordinary exception to newsmen in civil suits. Therefore, the Court of Appeals' decision should be upheld and Petitioner should be compelled to disclose the identity of his confidential source.

2. *Justice Powell's concurrence neither limits the majority opinion's scope, nor creates grounds for a qualified privilege in civil suits*

Contrary to Petitioner's contention, Justice Powell's concurrence neither limits the majority opinion's scope, nor creates grounds for a qualified privilege in civil suits. Justice Powell, who joined the majority's finding that there is no qualified reporter's privilege under the First Amendment, filed a brief concurrence reiterating a point raised by the majority: under *Branzburg*, newsmen were still afforded First Amendment protections against unwarranted harassment. *Id.* at 709-710. Justice Powell's balancing "between freedom of the press and the obligations of all citizens to give relevant testimony" is only implicated when a grand jury is not conducted in good faith, when it does not involve a legitimate need of law enforcement, or when it is only remotely and tenuously related to the subject of the investigation. *Branzburg*, 810 F.2d at 710. Under these limited circumstances, Justice Powell recognized that a reporter has the protection of the court and may file a motion to quash on First Amendment grounds. *Id.*

Thus, Petitioner’s claim that Justice Powell’s concurrence sanctioned the re-balancing of interests in civil suits advocated by Justice Stewart’s dissent is legally unavailing.⁴ *See In re Grand Jury Proceedings*, 810 F. 2d at 585. Justice Powell explicitly discounts the use of Justice Stewart’s balancing test in *any circumstance*, because he recognized that such a rule would eviscerate any hope of a fair balancing of the interests at stake. *Branzburg*, 408 U.S. at 710, FN* (emphasis added). The majority of circuits recognize this as the proper way to interpret Justice Powell’s concurring opinion.⁵ Even Justice Stewart, who wrote the dissenting opinion in *Branzburg*, recognized that: “[w]hile Mr. Justice Powell’s enigmatic concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury.” 408 U.S. at 725 (Stewart, J., dissenting). Neither the majority opinion nor Justice Powell’s concurrence suggest that a qualified privilege is appropriate in civil suits; therefore, recognition of a qualified privilege in this case is improper.

B. Alternatively, the Qualified Reporter’s Privilege Does Not Protect Petitioner.

This Court has long recognized that the courts’ preservation of the administration of justice is severely harmed by contravention of “the fundamental principle that...the public...has

⁴ One of the root causes of this misconception is other circuits’ mischaracterization of the opinions filed in this case. *See Smith*, 135 F.3d at 968-969 (incorrectly finding that although the majority opinion was joined by five justices, Justice Powell’s concurrence transformed this majority into a plurality opinion). *See, e.g., U.S. v. Model Magazine Distrib. Inc.*, 955 F.2d 229, 232 (4th Cir. 1992); *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 8 n.9 (2d Cir. 1982). Justice Powell’s concurrence did not transform Justice White’s opinion into a plurality; Justice Powell fully signed on to Justice White’s opinion, which provided the fifth vote necessary to establish it as a majority opinion of the court. *See In re Grand Jury Proceedings*, 5 F.3d at 400. Therefore, any alleged discrepancies that exist between the majority opinion and Justice Powell’s are immaterial, for “the meaning of the majority opinion is to be found within the opinion itself; the gloss that an individual Justice chooses to place upon it is not authoritative.” *McKoy v. North Carolina*, 494 U.S. 433,448 n.3 (1990) (Blackmun, J., concurring).

⁵ While the Eighth Circuit is undecided, six other circuits, the Fourth, Fifth, Sixth, Seventh, Ninth and D.C. Circuits all recognize this as the proper way to interpret Justice Powell’s concurring opinion; thus making it the majority view. *See Smith*, 135 F.3d at 969; *In re Grand Jury Proceedings*, 5 F.3d at 401; *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992); *In re Grand Jury Proceedings*, 810 F.2d at 585-586; *In re Grand Jury Subpoena*, 397 F.3d 964, 968-972 (D.C. Cir.. 2005).

a right to every man's evidence." *Trammel v. United States*, 445 U.S. 40, 50 (1980).

Testimonial privileges, therefore, have not been "lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon*, 418 U.S. at 710. Even when a court determines a reporter is entitled to the privilege's protection, this protection is not absolute. When a reporter is a defendant in a libel suit and is the only person with knowledge of the source's identity, there is a presumption the privilege should be overcome. *Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (1972).

1. Blogging is not entitled to First Amendment protection.

The *Branzburg* majority did not create a qualified reporter's privilege in part because this Court recognized the problems that would arise from the application of an inherently restrictive testimonial privilege to the protection of the freedom of the press, which traditionally encompasses a large and indiscernible number of people. *Branzburg*, 408 U.S. at 703-704. The several courts that have attempted to define who qualifies as a journalist under the First Amendment, like the District Court below, have produced results that are patently inapposite with the limited scope of evidentiary privileges. Here, the District Court's "intent to disseminate" test⁶ enables a "stereotypical 'blogger,'" such as Petitioner, who is "sitting in his pajamas at his personal computer posting on the World Wide Web," to withhold valuable information from legal proceedings so long as he possessed the requisite intent. *In re Grand Jury Subpoena*, 397 F.3d at 976-980 (Sentelle, J., concurring). Recent studies suggest there are roughly 34.5 million blogs on the internet, with roughly one blog created every second.⁷ Such an expansive privilege would allow almost any blogger, political pollster, or dramatist to assert a

⁶ The "intent to disseminate" test utilized by the District Court recognizes a qualified reporter's privilege when the reporter (1) intends to use information from an anonymous source in the dissemination of news; and (2) such intent existed when the information was obtained. (J.A. at 11).

⁷ Posting of Dave Sifry to Technorati, *State of the Blogosphere, April 2006 Part I: Blogosphere Growth*, <http://www.tehnorati.com/weblog/2006/04/96.html> (April 17, 2006).

First Amendment right to withhold vital information from the courts, *Branzburg*, 408 U.S. at 705, a result which is clearly at odds with the long held belief that privileges are an “extraordinary exception to the general duty to testify.” *Garland*, 259 F.2d at 550; *See Lee*, 401 F. Supp. 2d 139-140 (refusing to recognize privilege in part due to the expansive nature of the privilege’s scope).

If a qualified reporter’s privilege is recognized, it should be limited to those engaging in actual journalism. Common law privileges for attorneys and doctors are limited by the restrictive nature of their respective professional field; only those licensed to practice law or medicine are entitled to assert the privilege in court. *Jaffee*, 518 U.S. at 20 (Scalia, J., dissenting). Congress recognized the need to limit the reporter’s privilege to only those engaged in acts of journalism for their “livelihood or for substantial financial gain,” in its most recent failed attempt to pass a federal reporter’s shield. Free Flow of Information Act, H.R. 2102, 110th Cong. (2007). This definition ensures that casual bloggers who do not meet a conventional definition of a journalist cannot avail themselves of the shield’s protection. *See Tucker & Wemiel, supra* at 1314. By profession, Petitioner is the sole proprietor of Cartman’s Computer World, an electronics sale and repair shop; simply because he updates his muckraking blog with links he finds on the Internet or receives from anonymous readers, and injects harsh and sometimes false commentary on his site, does not make him a professional journalist notwithstanding any profits he makes from advertisements. (J.A. at 4). Because the qualified privilege does not protect blogging, Petitioner must disclose Professor Chaos’ identity.

2. *The balancing test favors compelled disclosure.*

Even when a reporter may invoke a qualified privilege against revealing the identity of his confidential source, this privilege is qualified, not absolute. *Zerilli*, 656 F.2d at 713-714. The

party seeking disclosure may overcome the privilege by showing that: (1) the evidence suggests the challenged statement was published and is both factually untrue and defamatory; (2) reasonable efforts to discover the information from alternative sources were unsuccessful; and (3) there is a compelling need for the information sought.⁸ *Miller v. Transamerican Press Inc.*, 621 F.2d 721, 726 (5th Cir. 1980) *modified*, 628 F.2d 932 (5th Cir. 1980).

- a. The evidence suggests the photograph published on Petitioner's blog was both factually untrue and defamatory.

In citing the Eighth Circuit's decision in *Cervantes*, the *Miller* test emphasizes the necessity for pretrial discovery to reveal evidence that strongly suggests the story was unfounded. *Miller*, 628 F.2d 932. The *Cervantes* court favored compelled disclosure if pretrial discovery revealed "substantial evidence" which made the source's report "so inherently improbable" that it created strong reasons to doubt the truthfulness of the confidential source or the accuracy of his reports. 464 F.2d at 994 (finding no compelling need in part because *Time* magazine produced hundreds of documents verifying that, along with its "key personnel," it deployed one researcher, four editors and three lawyers who spent countless hours corroborating the truthfulness of the source; and not one of the depositions of the reporters involved in the case remotely suggested they doubted the story's truthfulness.).

Unlike *Cervantes*, where hundreds of documents verified the truthfulness of the defendant's story, the sole document provided here by Petitioner revealed the story's falsity: the purported photograph of Mr. Broflovski at the Mumbai factory was actually a result of a third party superimposing Mr. Broflovski's image onto the picture. (J.A. at 7). Further, in *Cervantes*,

⁸ Based on a review of opinions from different circuits, Mr. Broflovski respectfully submits that the differences between the tests utilized by the various circuits are in form, not in substance. All seem to derive from Justice Stewart's dissenting opinion in *Branzburg*, which calls for a similar test adopted by the *Miller* court; and all consider the same facts relevant despite the differing labels. See *Branzburg*, 408 U.S. at 743; *Gonzalez v. N.B.C.*, 194 F.3d 29, 31 (2d Cir. 1999); *Zerilli*, 656 F.2d at 713-714; *Miller*, 621 F.2d 726; *Silkwood*, 563 D.2d 433 at 438.

more than eight highly trained employees of *Time* magazine spent hundreds of hours over a period of many months corroborating the truthfulness of the source. 464 F.2d at 994. Here, one internet blogger spent no time or effort over less than one day to corroborate the truthfulness of his source’s information. (J.A. at 7). Given the highly defamatory nature of the allegations—that Mr. Broflovski was at the forefront of human rights violations—Petitioner should have performed due diligence to corroborate the report’s validity before posting it on a blog that had more than one hundred thousand readers. (J.A. at 4). However, Petitioner did not perform due diligence—he never called Mr. Broflovski for comment, never attempted to follow up with Professor Chaos for additional information, and never attempted to independently verify this information’s truth. *Id.* Moreover, Petitioner had software capable of determining whether the picture was in fact forged, a process he has used in the past to verify photographs he intended to post, but in this case he did not choose to verify the authenticity of the photograph. (J.A. at 7).

- b. Mr. Broflovski has exhausted all other reasonable alternatives to obtain the information.

Mr. Broflovski can also show that he exhausted all *reasonable* alternative sources of information. *Zerilli*, 656 F.2d at 713 (emphasis added). Several cases have illustrated the limits on what is meant by “exhausting all reasonable alternative sources.” In *Garland*, the court found the plaintiff met this burden by deposing three key executives of CBS who might have had knowledge of the information before she asked the journalist-defendant to reveal her sources. 259 F.2d at 547. In *Carey*, the court found that this standard did not require the plaintiff—a high ranking official of United Mine Workers for America (“UMWA”)—to depose every employee of the UMWA in order to determine the identity of the source. 492 F.2d at 639. Here, Mr. Broflovski deposed the manager of the Mumbai factory and several of his top engineers in an attempt to determine the origin of the photo and the identity of Petitioner’s source, before he

sought Professor Chaos' identity from Petitioner. (J.A. at 8); *Garland*, 259 F.2d at 547. Mr. Broflovski, who is Director of Research and Development at Citrus, not C.E.O., should not be required to depose every employee of a *Fortune 500* company, check "every nook and cranny" of the Mumbai factory, (J.A. at 8), nor perform a corporate "shake-down" to determine the identity of Professor Chaos. *Carey*, 492 F.2d at 639.

c. Mr. Broflovski has a compelling need for the information sought.

When determining whether there is a compelling need for the information, an initial consideration is whether the reporter is the defendant in the libel case. *Zerilli*, 656 F.2d at 714. Because successful invocation of the privilege would effectively shield the reporter from liability, there is a presumption that the plaintiff has a justifiable need for the information sought. *Id.*; *See also Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (1972). Further, if the information sought goes to "the heart of the plaintiff's claim," *Garland*, 259 F.2d at 550, that is, it is crucial to the resolution of his case, then plaintiff's argument that there is a compelling need for the information is relatively strong. *Zerilli*, 656 F.2d at 713. Here, Petitioner is a party to the litigation, and is the only person who has knowledge of the true identity of Professor Chaos. (J.A. at 26). Allowing Petitioner to invoke the privilege would, in essence, prevent Mr. Broflovski from establishing the fault element to his underlying defamation claim and allow Petitioner to shield himself from liability. Therefore, the presumption is that Mr. Broflovski has a justifiable need for the information sought. (J.A. at 26); *Carey*, 492 F.2d at 637. Moreover, as discussed *supra*, Mr. Broflovski respectfully submits that it would be improper to require him to seek this information through alternative means when those means—searching for the identity of one person employed by a *Fortune 500* company—amounts to searching for a needle in a haystack. (J.A. at 27.) Therefore, this Court should find that the identity of Petitioner's source,

Professor Chaos, goes to the heart of Mr. Broflovski’s claim because it is the only evidence he could use to establish Petitioner’s recklessness. Because Mr. Broflovski has satisfied all three elements of the *Miller* test, the appellate court’s decision should be upheld, and Petitioner should be compelled to disclose the identity of Professor Chaos.

II. MR. BROFLOVSKI IS A PRIVATE CITIZEN HARMED BY PETITIONER’S NEGLIGENT PUBLICATION OF DEFAMATORY FALSEHOODS.

The media’s right to communicate information of public interest is not unconditional. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 150 (1967). A publisher “has no special privilege to invade the rights and liberties of others. He must answer for libel.” *Id.* (quoting *Associated Press v. Labor Board*, 301 U.S. 103, 132-133 (1937)). In considering whether the constitutional standard for libel has been met, the Court must independently determine whether a publisher’s false statements deserve First Amendment protection, or whether they “are of such slight social value . . . that any benefit that may be derived from [these false utterances] is clearly outweighed by the social interest in order and morality.” *Gertz v. Welch, Inc.*, 418 U.S. 323, 341, 343 (1974); *Harte-Hanks v. Connaughton*, 491 U.S. 657, 688 (1989). When balancing the community’s need for the free flow of information with the private citizen’s interest in seeking compensation for harm done to his or her reputation, this Court limits the imposition of liability for libel to instances of misconduct by the publisher. *Curtis*, 388 U.S. at 153. This limitation avoids assigning the Court the undesirable task of evaluating the public value of the content of the publication. *Id.*

This Court defined two separate standards of fault based on the character of a libel plaintiff—private citizens must prove the Constitutional minimum of simple negligence, while public officials and public figures must prove a heightened standard of actual malice. *Gertz*, 418 U.S. at 341, 343. In *New York Times v. Sullivan*, this Court held that an actual malice standard

was required in defamation suits brought by public officials in order to protect the press from imposition of strict liability for false statements related to the official conduct of government officials. 376 U.S. 254 (1964). This Court later expanded the *New York Times* actual malice standard to apply to public figures, but they cautioned against blind application of the heightened standard and counseled that the facts of each case must be considered in light of its particular context. *Curtis*, 388 U.S. at 148. A private libel plaintiff must only establish that the publisher of defamatory content acted negligently whereas a public figure plaintiff must prove actual malice on the part of the publisher to recover damages.⁹ *Gertz*, 418 U.S. at 345; *Curtis*, 388 U.S. at 164 (Warren, C.J. concurring).

The lower courts acknowledged and Petitioner concedes that Mr. Broflovski is not a public official. (J.A. at 18, 28); *New York Times*, 376 U.S. at 279-280 (one who holds a public office or is a candidate for public office). It is also conceded that Mr. Broflovski is not a general purpose public figure. (J.A. at 18, 28); *Gertz*, 418 U.S. at 342, 345 (one who rises to general “celebrity” status and who occupies a position of pervasive fame, power, and influence). Mr. Broflovski is also not a limited purpose public figure in this action because he did not voluntarily or affirmatively seek to influence an existing public controversy. *Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 136-137 (2d Cir. 1984). Determining whether a plaintiff is a public figure or a private citizen is a question of law for the Court based on the circumstances considered as a whole through the eyes of a reasonable person. *Waldbaum v. Fairchild Publications, Inc.*, 627

⁹ In *Rosenbloom v. Metromedia, Inc.*, a plurality of the Court recognized a third category of libel cases of “public interest” which were subject to the *New York Times* actual malice standard. 403 U.S. 29 (1971). Any publication or broadcast about an issue of significant public interest, without regard to the position, fame or anonymity of the person defamed, was subject to the actual malice standard. *Id.* at 52. However, a majority of the Court never adopted this category and it was expressly rejected in *Gertz* where the court found that competing constitutional interests are better served by determining the standard of fault in a libel suit by considering only the character of the plaintiff and not the content of the defamatory publication. 418 U.S. at 343. Drawing the line at the consideration of a plaintiff’s character prevents the Court from venturing into dangerous ad hoc inquiries of what information may or may not be relevant to a democratic discussion. *Rosenbloom*, 403 U.S. at 79 (Marshall, J. and Stewart, J. dissenting).

F.2d 1287, 1293 (D.C. Cir. 1980). The court must consider the plaintiff's general notoriety and prior involvement in the controversy underlying the defamatory publication. *Id.* The Court of Appeals correctly found that, based on the limited nature and extent of his involvement in the controversy underlying the publication that gave rise to this action, Mr. Broflovski is a private citizen. (J.A. at 30). Therefore, Petitioner is liable for negligently publishing the false content that harmed Mr. Broflovski.

A. Mr. Broflovski did not voluntarily or affirmatively inject himself into a pre-existing public controversy in an attempt to influence its outcome.

The *New York Times* heightened standard of care also applies to limited-purpose public figures, or those who have: (1) successfully invited public attention in an attempt to influence the outcome of the pre-existing controversy underlying the defamatory publication; (2) voluntarily injected themselves into that controversy; (3) assumed a position of prominence in the controversy; and (4) continued to regularly seek media attention. *Lerman*, 745 F.2d at 136-137 (finding plaintiff-author's career was built on her success in seeking media attention for her controversial views on human sexuality, so she was a public figure in the defamation suit related to a publication about a sexually themed movie with which she was involved).

A public "controversy" is any issue about which large parts of society have different, strongly held views. *Id.* at 138. A general concern or interest will not suffice—the public must have been actually discussing the issue prior to the defamatory publication for it to qualify as a "controversy." *Waldbaum*, 627 F.2d at 1297. Although the underlying issue here—providing humane working conditions for foreign employees—may be an issue of general interest to the public, there is no evidence indicating that large parts of society were actually discussing the issue before Petitioner's blog posting. Even assuming that the underlying issue constitutes a "controversy," the question is whether Mr. Broflovski voluntarily and affirmatively inserted

himself into that controversy in an attempt to influence its outcome. *Id.* at 1295. The court must examine the entire record and consider the plaintiff's position prior to the defamatory publication to determine whether a plaintiff is a limited purpose public figure. *Id.* Publishers "charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson*, 443 U.S. at 135. Mr. Broflovski, unlike his well-known brother, was not himself a subject of media attention, nor did he seek to voluntarily inject himself into issues of public concern. (J.A. at 3). Petitioner's defamatory publication raised Mr. Broflovski's profile considerably, but Petitioner is barred from alleging that Mr. Broflovski is a public figure when he was in fact the catalyst that thrust Mr. Broflovski involuntarily into the limelight. *Hutchinson*, 443 U.S. at 135.

In *Time, Inc. v. Firestone*, a wealthy and socially prominent woman sued *Time* magazine for a defamatory publication relating to her widely publicized divorce proceedings. 424 U.S. 448, 452 (1976). Although the court acknowledged that the underlying controversy—marital difficulties of extremely wealthy individuals—was of some public interest, this Court held that the respondent was not a public figure for purposes of the defamation suit. *Id.* at 455. Although the respondent in *Firestone* voluntarily initiated divorce proceedings that attracted public interest, her intent was the legal resolution of a private matter and she did not "freely choose" to publicize her marital problems. *Id.* at 454. The Court found that the public's interest in the marital difficulties of extremely wealthy individuals did not satisfy the test for a limited purpose public figure, which requires a voluntary and affirmative insertion into a pre-existing public controversy. *Lerman*, 745 F.2d at 136-137. Here, despite the public's interest in the Citrus products he develops, Mr. Broflovski was not himself a subject of media attention prior to

Petitioner’s defamatory publication, nor did he freely choose to inject himself into the underlying controversy here—violation of the human rights of foreign workers.¹⁰ (J.A. at 3).

While the *Firestone* respondent held a few press conferences during the divorce proceedings to satisfy curious reporters, this did not convert her into a public figure for purposes of the defamation suit because there was no indication that the interviews had any effect on the outcome of the underlying controversy—the divorce proceedings. 424 U.S. at 455. Here, it was Petitioner’s defamatory publication, not any affirmative act by Mr. Broflovski, which raised his profile considerably in the eyes of the public. While Mr. Broflovski issued a statement through his attorney asserting the falsity of the photograph, he did not attempt to influence the outcome of the underlying controversy—alleged human rights violations. (J.A. at 7). As such, Petitioner is barred from alleging that Mr. Broflovski is a public figure when Petitioner himself thrust Mr. Broflovski involuntarily into the limelight. *Hutchinson*, 443 U.S. at 135.

Conversely, in *Waldbaum*, the D.C. Circuit found that the plaintiff, who was president of the second largest supermarket cooperative in the country, was a limited-purpose public figure in a defamation suit relating to his role as an activist supermarket president. 627 F.2d at 1290. Throughout his career, trade publications and *The Washington Post* published more than thirty articles about his public battle against traditional supermarket industry practices. *Id.* Here, Mr. Broflovski has received no media attention whatsoever since 2006 when he spoke briefly at a “moderately attended” press conference announcing his hiring at Citrus. (J.A. at 3). A subsequent article from the Associated Press primarily focused on a new line of Citrus products

¹⁰ Although it may be argued that if the information published by Petitioner is true then Mr. Broflovski’s own conduct towards the Citrus employees constituted a voluntary insertion into the controversy, this argument must fail based on the presumed falsity of the publication. In a defamation suit, truth is an affirmative defense that must be raised by the publisher of defamatory content. Restat.2d of Torts, § 581A (comment b), *infra*. Petitioner has not raised the defense of truth, nor has he presented any evidence proving that the photograph is based on truth.

and only briefly mentioned Mr. Broflovski's hiring in the bottom paragraph of the article, indicating that the media did not see him as an interesting subject for their readers. (J.A. at 3).

The notoriety of the plaintiff in *Waldbaum* resulted in large part from his voluntary and affirmative involvement in a public controversy regarding supermarket practices and his outspoken attempts to influence the controversy. *Id.* That same controversy led to the publication of defamatory content regarding his firing, which in turn led the plaintiff to file suit against the publisher. *Id.* The plaintiff's unique position within his industry and his voluntary involvement in the controversy that led to the defamation rendered him a public figure for purposes of the defamation suit. *Id.* at 1291. Here, Mr. Broflovski has not voluntarily attempted to speak out about a public controversy at any point during his career. Unlike the plaintiff in *Waldbaum*, Mr. Broflovski's aversion to the limelight and his affirmative avoidance of any attempt to influence the outcome of the underlying controversy which led to the defamatory publication at issue means that Mr. Broflovski is not a public figure for purposes of this defamation suit.

B. Petitioner's failure to investigate the truthfulness of the information constituted at least negligence.

Libel, or written defamation, is intended to protect against invasions by the press on the privacy of private citizens that cause "mental pain and distress, far greater than could be inflicted by mere bodily injury." *Lerman*, 745 F.2d at 129. A communication is defamatory if it harms the reputation of another in a way that lowers him in the estimation of the community or deters others from associating or doing business with him. Restat. 2d of Torts, § 559 (1977). "There is no constitutional value in false statements of fact," which do not add to robust public debate or assist the people in the task of self-governing. *Gertz*, 418 U.S. at 341, 343. Private citizens have not voluntarily exposed themselves to public comment or "relinquished [any] part of their

interest in protecting their own good names, and consequently have a more compelling call on the courts for redress of injury.” *Id.* at 345. States have a strong interest in safeguarding the right of private citizens to seek compensation for harm resulting from the publication of defamatory material and should retain substantial latitude in enforcing legal remedies against negligent publishers. *Id.* at 341, 343, 345.¹¹

To establish a cause of action for defamation, the plaintiff must prove: (a) a false and defamatory statement concerning another; (b) an unprivileged publication; (c) fault amounting to at least 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. Restat. 2d of Torts, § 558 (1977). Defamatory words are placed “in the same class with the use of explosives or the keeping of dangerous animals”—one who does not control something inherently dangerous will be liable to those whom it harms. *Curtis*, 388 U.S. at 152 (quoting William L. Prosser, *The Law of Torts* § 108, at 792 (1984)). The standard for negligence in a defamation action is whether the defendant acted as a reasonably prudent person under the circumstances. Restat 2d of Torts, § 283 (1965).

I. Falsity is presumed in a defamation action and Petitioner failed to raise the affirmative defense of truth, so truth is not at issue here.

The first element of a defamation claim is that of falsity. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 513 (1991). Falsity is presumed in a defamation action, and the burden is on the Petitioner to prove the truth of the publication. Restat. 2d of Torts, § 581A (comment b) (1977). The focus of the standard is “substantial truth”— a statement is false if it

¹¹ Protection of private citizens’ reputations is left to the States under the Ninth and Tenth Amendments, but is still recognized by the Court as an important part of the foundation of our Constitutional system. “[T]he individual’s right to protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.” *Gertz*, 418 U.S. at 341 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (concurring opinion)).

would have “a different effect on the mind of the reader from that which the pleaded truth would have produced.” *Masson*, 501 U.S. at 516-517. Here, because falsity is presumed in an action for defamation, and Petitioner failed to raise the affirmative defense of truth, truth is not at issue and falsity of the publication is presumed.

2. *Petitioner concedes that he created and published the defamatory content.*

Under federal statute regulating the publication of information on the internet, an "information content provider" is any person who creates or develops information provided on the Internet. 47 U.S.C. § 230 (f)(3) (2009). Petitioner concedes that he is an original “information content provider,” (J.A. at 14, FN1), because he created his own commentary and posted it with the photograph he received from Professor Chaos. (J.A. at 6); *See e.g., Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (noting that when a third party publisher posts original content, he becomes an "information content provider" and is no longer entitled to immunity with respect to the information in question). As an original content provider, Petitioner is not entitled to immunity from defamation claims under 47 U.S.C. § 230.

3. *Petitioner’s act of posting the defamatory content without confirming the validity of the information amounts to at least negligence.*

The publisher of defamatory material acted negligently if, based on an objective inquiry, he acted unreasonably in failing to verify the truth or to ascertain the defamatory character of the communication before publishing it. Restat. 2d of Torts, § 580B (comment g). Reasonableness is based on customs and industry standards—whether the publisher adhered to a duty to inquire and followed established journalistic procedures for fact checking and verifying the substance of the information. *See e.g., Lerman*, 745 F.2d at 140. Other factors include: (1) whether the issue was “hot news” that limited the amount of time the publisher could reasonably spend researching; (2) whether the interests being promoted were related to a matter of public concern

or mere gossip; and (3) the extent of damage to the subject's reputation if the publication turned out to be false. Restat. 2d of Torts, § 580B (comment h); *See e.g., Masson*, 501 U.S. 496.

In *Bressler v. Fortune Magazine*, *infra*, the Sixth Circuit found that the publisher of defamatory content was not liable to the plaintiff because he conducted extensive research and performed multiple fact-checks prior to publication. 971 F.2d 1226, 1233 (6th Cir. 1992). Here, Petitioner did not conduct any research or consult any additional independent sources to confirm the truth of the photograph, which was a reckless violation of accepted standards of reporting.¹² (J.A. at 5). The photograph sent by Professor Chaos did not qualify as “hot news.” Petitioner was not working under a tight deadline; rather, Petitioner was a self-employed, part-time blogger who seemingly posted information as he received it from his readers. (J.A. at 4-5). The photograph was not dated, and, even if it were a true representation of fact, could have been taken any time over the previous three years, so it was not “breaking news.” (J.A. at 5). Even if it is assumed there was an urgent public need to receive the news immediately, a fact Mr. Broflovski maintains is unfounded, there still was no justification for Petitioner's failure to verify the validity of the photograph, especially in light of the serious human rights allegations involved. Petitioner received the photograph allegedly depicting Mr. Broflovski engaging in egregious human rights violations on behalf of Citrus, the frequent recipient of Petitioner's “harshest criticism,” and contempt for nearly driving him out of business. (J.A. at 4). Petitioner published the photograph along with highly defamatory personal commentary the next day

¹² There is a movement among journalists to distinguish themselves from all the people on the Internet posing as journalists who lack established values, standards, mission and work practices of “the protected press.” Linda L. Berger, *Shielding the UnMedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 Hous. L. Rev., 1371, 1376 (2003). *See also*, Gloria Borger, *Matt Drudge is Not My Colleague*, Harv. Int'l J. Press/Pol., Summer 1998, at 132 (“Matt Drudge is the gossip you hear around the watercooler[,] . . . not what you're reading . . . on the front page of the New York Times.”); Janet Forgive, *Net a Fret: Cronkite Says That's Way It Is; Web Infested with People Pretending to be Journalists, Famed Newsmen Says*, Rocky Mtn. News, June 13, 2002, at 2B (reporting Walter Cronkite's contention that many Internet reporters only pretend to be journalists because they are not held to the same standards as other journalists nor do they face similar penalties for printing unsubstantiated rumors.”)

without attempting to verify the information. (J.A. at 5-6). The evidence suggests that Petitioner hastily seized what he saw as an opportunity to criticize Mr. Broflovski, “the pawn of his evil older brother, Kyle,” in an attempt to air his personal grievances. The evidence of Petitioner’s ill will towards Mr. Broflovski, together with his act of publishing what he knew to be a highly defamatory photograph the day after receiving it without attempting to verify the information amounted to at least negligence on the part of the Petitioner.

4. *Publication of the defamatory falsehoods caused Mr. Broflovski actual harm, so Petitioner is liable for compensatory damages.*

Traditionally, in a libel action the existence of injury is presumed from the fact of publication. *Gertz*, 418 U.S. at 349. Courts currently limit recovery for defamation plaintiffs who prove negligence on the part of the publisher to compensation for actual injury. *Id.* However, actual injury is not limited to out-of-pocket loss—actual harm inflicted by defamation may include “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” *Id.* at 350.

Within days after Petitioner published the defamatory content, Mr. Broflovski suffered substantial injury to his financial well-being and reputation. He was named the “Most Heinous Individual in the Galaxy” on the top-rated cable show *The Countdown Factor*. (J.A. at 7). His livelihood was threatened when Citrus products were boycotted by the public and pulled from the shelves of several major retailers. (J.A. at 7). As a result of the boycott, Citrus’ stock price plummeted by more than twenty-five percent in a single day and continued its downward spiral in anticipation of decreased sales. (J.A. at 7). Moreover, Mr. Broflovski suffered from depression after threats were made against his life. (J.A. at 7). Mr. Broflovski suffered measurable, actual harm so this case should be remanded for the determination of damages.

C. Alternatively, Petitioner published defamatory falsehoods about Mr. Broflovski with actual malice.

A public figure may recover damages from the publisher of defamatory falsehoods when the “gist” of the content was false and was published with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was true or not. *Masson*, 501 U.S. at 517; *New York Times*, 376 U.S. at 279-280; *Curtis*, 388 U.S. at 155. Reckless disregard for the truth has been equated with a “high degree of awareness of probable . . . falsity.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The inquiry is subjective, focusing on whether the defendant “in fact entertained serious doubts as to the truth of his publication.” *Harte-Hanks*, 491 U.S. at 688. The plaintiff must show actual malice on the part of the publisher by clear and convincing evidence. *Bressler*, 971 F.2d at 1229. The actual malice standard is a question of law and is based on an examination of the record in full. *Id.* The publisher’s state of mind can be inferred from his conduct and the context in which the defamatory content was published. *Id.*; *Lerman*, 745 F.2d at 140. Although actual malice may not be inferred solely from evidence of personal spite, ill will or intention to injure on the part of the publisher, a plaintiff is entitled to prove the defendant’s state of mind through circumstantial evidence. *Harte-Hanks*, 491 U.S. at 667-668.

In *Bressler*, the Sixth Circuit found that reporters who published defamatory content but relied on four separate investigations and conducted a pre-publication fact check did not act with actual malice. 971 F.2d at 1233. The reporters utilized a variety of mutually corroborative sources and materials from investigations conducted by reliable organizations. *Id.* Additionally, the pre-publication fact check did not reveal any inaccuracies. *Id.* While the court did not reach the issue of falsity, it indicated that even if portions of the publication were false, the reporters’

extensive research precluded a finding that they “entertained serious doubts as to the truth of the publication” or acted with reckless disregard of the falsity of the publication. *Id.*

The present case is distinguishable from *Bressler* because Petitioner failed to conduct even a minimal investigation into Professor Chaos’s serious accusations against Mr. Broflovski before publishing the information. (J.A. at 5). Petitioner says he knows Professor Chaos personally, but the record contains no other information about the source, other than indicating that he may be a Citrus employee. (J.A. at 5). Unlike the reporters in *Bressler*, who engaged in extensive research, Petitioner did not contact any outside sources to confirm the information from Professor Chaos, did not attempt to look for any corroborating evidence, did not interview anyone else within Citrus to check the accuracy of the photograph and did no fact-checking at any point before publishing the photograph. (J.A. at 5). Petitioner owns forgery detection software that he has used in the past to verify photographs before posting them to his blog. (J.A. at 7). However, when he received a defamatory photo that appeared to depict Mr. Broflovski engaging in human rights violations, he recklessly failed to use the software which would have shown the falsity of the photograph immediately. (J.A. at 7).

For four years, since his electronics store lost business to a competing Citrus MegaStore, Petitioner “has reserved his harshest criticism for Kyle Broflovski and Citrus, whom he holds in particular contempt” (J.A. at 4). Petitioner called Mr. Broflovski “the pawn of his evil older brother, Kyle,” which indicates that his motive in publishing the defamatory content was the spread of gossip or intent to harm rather than the furtherance of an important public discussion. (J.A. at 6). Petitioner also indicated that he was aware of the defamatory nature of the photograph and the harm it would cause Mr. Broflovski if it turned out to be false. He told his

readers, “the image . . . may shock you,” it may be “too harsh or graphic,” and he acknowledged that some people may want him to “keep [his] mouth shut.” (J.A. at 6).

Petitioner was well-aware of the shock value of the photograph and of the likelihood that it would greatly injure Mr. Broflovski’s personal and professional reputation. Given the unknown reliability of Professor Chaos, this Court can infer that Petitioner’s failure to verify the defamatory information before publishing it amounted to reckless disregard as to whether the information was true or not. The evidence examined as a whole shows that Petitioner’s personal grudge against Mr. Broflovski, coupled with his lack of adherence to journalistic standards of investigation, is sufficient for this Court to find that the Petitioner acted with actual malice in publishing defamatory falsehoods about Mr. Broflovski. Therefore, the Court of Appeals’ decision should be affirmed and Mr. Broflovski is entitled to recover damages from Petitioner.

CONCLUSION

The Court of Appeals correctly held that Petitioner is not protected by a qualified reporter’s privilege and must disclose the identity of Professor Chaos. The Court of Appeals also correctly found that Mr. Broflovski is a private citizen so Petitioner is liable for negligently publishing defamatory content about him. Mr. Broflovski suffered substantial actual harm, so the case should be Affirmed and Remanded for a determination of damages.

Respectfully submitted,

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