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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 RESPONDENT

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Team No. 226

COUNSEL FOR RESPONDENT

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## QUESTIONS PRESENTED

- I. Whether the First Amendment implicitly creates a qualified reporter's privilege against the disclosure of confidential news sources and, if so, whether a part-time blogger is entitled to assert the privilege.
- II. Whether a private individual who is involuntarily associated with a matter that attracts public attention is converted into a limited-purpose public figure in a defamation action as a consequence of the public attention garnered by defamatory allegations concerning him when no public controversy existed prior to the publication and he did not attempt to influence the controversy by discussing the allegations with the media.

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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

This case involves a defamation action brought by a private individual against a part-time blogger. Ike Broflovski sued Eric Cartman for publishing false information on his weblog accusing Ike, and his employer Citrus Electronics, Inc., of human rights violations at a Citrus manufacturing plant in India. (J.A. at 5–6.)

*The “Man Behind the Curtain.”* Citrus Electronics, Inc. (“Citrus”) is a *Fortune* 500 company in the state of Silverado which rose to the top of the consumer electronics industry with its release of the ePlay portable digital music player in 2001. (J.A. at 2.) As quickly as the ePlay became a status symbol, Kyle Broflovski, CEO of Citrus, became famous with his image dominating billboards and television commercials. (J.A. at 2, 6.)

In 2006, Kyle hired his younger brother, Ike Broflovski (“Ike” or “Broflovski”), to serve as Director of Research & Development at Citrus. (J.A. at 3.) Ike, an introverted graduate of the Massachusetts Institute of Technology, was shy and avoided public attention as much as possible. (J.A. at 3.) To celebrate his innovations, some employees at the Citrus MegaStores took it upon themselves to wear makeshift “I Like Ike” buttons. (J.A. at 3.) Like other executives, Ike’s contact information and head shot were posted on the company’s website. (J.A. at 3.) Unlike Kyle, whose face was seen on television and in magazines, Ike never gave a single interview and was rarely seen in public. (J.A. at 3.) In fact, the extent of Ike’s publicity came in August 2006 when Kyle announced his hiring at the end of a moderately attended press conference. (J.A. at 3.) Ike’s fame was short-lived as the few newspapers releasing stories on the press conference focused on Kyle and his announcement that Citrus would be releasing a new line of products including the brand new ePlay Touché, an updated version of the already popular ePlay. (J.A. at 3.)

Thus, while Kyle was the man on center stage promoting Citrus, Ike was “the man behind the curtain” overseeing the development of the ePlay Touché, which promised to permanently entrench the ePlay as the premier product on the market. (J.A. at 3.)

***The “Muckraking” Blogger.*** Eric Cartman (“Cartman”) is the owner of an electronics sales and repair shop in the state of Washoe. (J.A. at 4.) In June 2005, when Cartman’s business decreased due to the opening of a Citrus MegaStore across the street from his store, Cartman became a part-time blogger for profit to supplement his income. (J.A. at 4.) Streaming advertisements on the weblog generate revenue proportional to the daily number of hits the blog receives. (J.A. at 4.) To attract more hits and thereby generate more revenue, Cartman started a muckraking blog, *The Sludge Report*. (J.A. at 4.) Each night, he updates his blog with content that he takes from other Internet websites and headlines from major newspapers. (J.A. at 4.) He mainly posts celebrity gossip, his views on local and international politics, and his antipathy for large companies like Citrus. (J.A. at 4.) Since nearly driving him out of business, Cartman has reserved his harshest criticism for Citrus. (J.A. at 4.)

As any other blog, *The Sludge Report* is open for comments and e-mails that go directly to Cartman, the blog’s administrator. (J.A. at 5.) Any information that readers provide to him is treated as confidential unless otherwise requested. (J.A. at 5.) Generally, Cartman does not have any personal information about the users who send in e-mails, unless those users disclose the information. (J.A. at 5.)

***The Fabricated Photograph.*** In July 2008, Cartman received an email from “Professor Chaos,” an individual who Cartman knew personally. (J.A. at 5.) The email alleged Citrus, at the direction of Ike Broflovski, was responsible for human rights abuses at a Citrus facility in India. (J.A. at 5.) Attached to the email was a doctored photograph which appeared to depict Ike

yelling at workers assembling the ePlay Touché. (J.A. at 5, 7.) Without substantiating the authenticity of the photograph or the veracity of the information, Cartman hastily published the photograph on the front page of *The Sludge Report* in a post entitled “Citrus Engaging in Acts of Modern-Day Slavery?” (J.A. at 5.) The caption underlying the picture read: “Ike Broflovski surveys his minions . . . but where’s the whip, Ike?” (J.A. at 6.) The post went on to state that the photograph was taken by a “dear friend” who works at Citrus and the workers depicted in the photograph work 16 hour days, seven days a week, with few breaks and under “slave-like conditions.” (J.A. at 6.) The commentary emphatically concluded: “I’m telling you the truth, Ike Broflovski is nothing but a slave driver!”

***The Aftermath.*** Within days, Cartman’s defamatory publication spread rapidly throughout the Internet and attracted the attention of the mainstream press. (J.A. at 6.) On August 19, 2008, the attention peaked when Keith McRiley, host of a top-rated cable news show, named Ike the recipient of his nightly “Most Heinous Individual in the Galaxy” award, crediting Cartman for the information. (J.A. at 6.) The very next day, Citrus’s stock plummeted 25% and continued to fall thereafter. (J.A. at 6–7.) Retailers pulled Citrus products from their shelves and Ike began receiving threats on his life. (J.A. at 6–7.) Despite numerous demands from the press to comment on the allegations, Ike declined to do so except for a single, limited statement delivered by his attorney: “The photograph posted on that site is a total fabrication, and Ike Broflovski will soon seek civil justice against its authors in a court of law.” (J.A. at 7.)

***The District Court.*** On September 20, 2008, Ike filed a defamation suit against Cartman in Silverado Superior Court, which was removed on diversity grounds to the United States District Court for the Western District of Silverado. (J.A. at 1, 7.) Through the course of discovery, several relevant facts emerged. (J.A. at 7.) Not only did the parties learn that there was no

evidence showing that Broflovski ever visited the Citrus facility in India, discovery also revealed that Broflovski's image had been superimposed onto the photograph. (J.A. at 7.) Additionally, Citrus learned that Cartman had recently installed photo software on his computer capable of detecting whether the photograph had been forged. (J.A. at 7.) While Cartman had used the software on several other photographs that he posted on *The Sludge Report*, he neglected to test Professor Chaos' photograph with the software. (J.A. at 7.)

In an effort to determine the source of the photograph, Broflovski deposed several employees at the Mumbai facility, including the manager and the top engineers. (J.A. at 8.) Moreover, an email was sent out by Kyle Broflovski to all Citrus employees requesting information on the source. (J.A. at 8.) After these attempts failed to uncover the source, Broflovski submitted an interrogatory to Cartman requesting that he identify the full name and any contact information of "Professor Chaos." (J.A. at 8.) Cartman responded to the discovery request by invoking a qualified reporter's privilege against disclosure of confidential sources. (J.A. at 8.) Thereafter, Broflovski filed a motion to compel discovery under Fed. R. Civ. P. 37. (J.A. at 8.) Cartman responded by filing a motion in opposition and a counter motion for summary judgment alleging that Broflovski was a public figure and had failed to provide evidence that the photograph and commentary were published with actual malice. (J.A. at 8.)

The district court denied Broflovski's motion to compel discovery, finding that the First Amendment recognized a qualified reporter's privilege against disclosure of confidential sources. (J.A. at 9, 20.) Simultaneously, the district court granted Cartman's motion for summary judgment, finding that Broflovski was a limited-purpose public figure and had failed to present evidence of actual malice. (J.A. at 20.)

*The Court of Appeals.* On appeal, the court of appeals reversed the district court's denial of Broflovski's motion to compel discovery, finding that the First Amendment did not implicitly recognize a qualified reporter's privilege, and even if it did, such a privilege would not protect Cartman against discovery of his news source. (J.A. at 23.) The court of appeals also reversed the district court's grant of summary judgment, finding that it evaluated Broflovski's defamation claim under the wrong standard of liability. (J.A. at 28.) The district court's mistake hinged on its determination that Broflovski was a public figure and, as a result, had to meet the actual malice standard. (J.A. at 28.) The court of appeals held that Broflovski was not a limited-purpose public figure for purposes of his defamation claim. (J.A. at 28.)

## **SUMMARY OF THE ARGUMENT**

### **I.**

The court of appeals correctly held that the First Amendment does not recognize a qualified reporter's privilege against disclosure of confidential sources. Though acknowledging that other circuits have recognized the existence of such a privilege, the appellate court found that a plain reading of *Branzburg* foreclosed the idea of a reporter's privilege implicit in the First Amendment. Heeding the well-established principle that the First Amendment does not grant newsmen special privileges that other citizens do not enjoy, and recognizing that the responsibility of creating privileges has traditionally been left to the states, the appellate court concluded that the Framers did not intend to plant a reporter's privilege within the First Amendment. Thus, Cartman was not entitled to assert a privilege in response to Broflovski's discovery request.

Even if the First Amendment does create a qualified reporter's privilege, the appellate court held that it would not protect Cartman. The qualified privilege only protects those who engage

in investigative reporting and newsgathering with the intent to disseminate the news at the inception of the newsgathering process. Cartman cannot overcome the burden of proving that he is a journalist because none of the postings on his weblog are the result of his own newsgathering or independent investigation. Rather, the only content on his blog is material that has been lifted from other news sources. Consequently, he cannot establish that he had the required intent at the inception of the newsgathering process to disseminate the content he posts on his weblog. As such, a qualified reporter's privilege would not protect Cartman.

This Court should affirm and hold that Cartman was not entitled to assert a qualified reporter's privilege in response to Broflovski's discovery request.

## II.

The court of appeals correctly held that Broflovski did not qualify as a limited-purpose public figure for purposes of this defamation action. Under *Gertz*, limited-purpose public figures are those individuals who have voluntarily thrust themselves into the public spotlight in an effort to influence the resolution of a particular public controversy. Although Broflovski received some limited public attention associated with his position at Citrus, this was insufficient to transform him into a public figure. Prior to Cartman's defamatory publication, no public controversy existed concerning the possible use of slave labor at Citrus. It was not until Cartman published the defamatory falsehood that Broflovski was cast into the public fire. Thus, because Broflovski did not voluntarily invite public attention prior to the defamatory allegations, and he did not subsequently discuss the allegations with the press, he does not qualify as a limited-purpose public figure under the holdings of *Gertz* and its progeny.

To establish consistency in this area of the law and to confine the public figure doctrine to its intended scope, the Court should adopt the public figure test fashioned by the Second Circuit

as it is most consistent with the Court’s restrictive view of the public figure doctrine. The tests adopted by the D.C., Third and Ninth Circuits have all been criticized for straying from the original intentions articulated in *Gertz* because each focuses more on the public interest in a controversy than on whether the plaintiff has voluntarily assumed a role in the controversy. By focusing more on the public interest in an event, each of these tests allow an individual who has not voluntarily invited public attention to be deemed a public figure simply because the media has chosen to include him in its news coverage. Regardless of which test this Court chooses to adopt, Broflovski does not qualify as a public figure under any them.

This Court should affirm and hold that Broflovski does not qualify as a limited-purpose purpose figure.

### **ARGUMENT**

The district court resolved this case by simultaneously denying Broflovski’s motion to compel discovery and granting Cartman’s summary judgment motion. (J.A. at 20.) Generally, a district court’s ruling on a motion to compel discovery is reviewed for abuse of discretion. *See, e.g., Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 929 (4th Cir. 1995). However, in cases such as this, where the ruling turns on the existence of a privilege, the decision is reviewed de novo. *See Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999) (“We review the district court’s decision that certain documents are subject to privilege *de novo*, since it involves a mixed question of law and fact.”); *see also Adkins v. Christie*, 488 F.3d 1324, 1328 (11th Cir. 2007) (“[T]he decision to recognize a privilege is a mixed question of law and fact, which we review *de novo*.”). Similarly, a district court’s grant of summary judgment is reviewed de novo, construing all facts and inferences in the light most favorable to the non-

moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Seneca Nation of Indians v. New York*, 382 F.3d 245, 258 (2d Cir. 2004).

**I. THE COURT OF APPEALS CORRECTLY HELD THAT CARTMAN COULD NOT ASSERT A QUALIFIED REPORTER’S PRIVILEGE AGAINST DISCLOSURE OF CONFIDENTIAL SOURCES.**

The court of appeals reversed the denial of Broflovski’s motion to compel discovery, finding that the district court erred in ruling that Cartman was entitled to assert a privilege in response to Broflovski’s discovery request. (J.A. at 23.) The district court’s error rested upon its determination that the First Amendment recognizes a qualified reporter’s privilege against disclosure of confidential sources. (J.A. at 23, 27.) Notwithstanding its own concession that the State of Silverado, Congress and this Court have all declined to create a reporter’s privilege, the district court, nonetheless, held that the First Amendment implied such a privilege. (J.A. at 9–10.) Finding that the district court’s ruling “ignored sound jurisprudence,” the appellate court properly reversed the denial of Broflovski’s motion to compel and held that the First Amendment does not create a “constitutional barrier to the discovery of relevant evidence in the course of litigation.” (J.A. at 24.) Thus, the resolution of Broflovski’s motion to compel discovery hinges on whether the First Amendment creates a qualified reporter’s privilege against court-compelled discovery of confidential sources.

The First Amendment provides in pertinent part that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. Const. amend. I. While the plain language of the First Amendment appears to confer these rights without limitation, it is well-established that neither the freedom of speech, nor the freedom of press is “absolute at all times and under all circumstances.” *Texas v. Johnson*, 491 U.S. 397, 430 (1989); *see also Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (holding “the press is not free to publish with impunity everything and anything it desires to publish.”). This case does not involve the government

regulating free speech, restricting what the press may publish or forbidding the press from using confidential sources. Rather, this case concerns the obligation of newsmen sued for defamation to respond to discovery requests in the course of litigation as other citizens must and to disclose relevant evidence. Thus, the ultimate question before the Court is whether the press should be held to the same standard as other litigants when it is sued for publishing defamatory falsehoods about a private individual.

**A. The First Amendment Does Not Recognize a Qualified Reporter’s Privilege.**

In *Branzburg v. Hayes*, this Court addressed the issue of whether the First Amendment provided reporters a testimonial privilege against disclosure of confidential information pursuant to a subpoena. 408 U.S. 665 at 689–91. To reach its holding, the Court analyzed the common law rules regarding testimonial privileges, its own First Amendment precedent, and the policy considerations underlying the recognition of such a privilege. Ultimately, a five-member majority of the Court rejected the existence of either an absolute or qualified testimonial privilege implicit in the First Amendment. *Id.* at 691. Justice White, writing for the majority, stated:

Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.

*Id.* at 690–91.

**1. At common law, courts refused to recognize the existence of a reporter’s privilege.**

The Court is permitted to recognize an evidentiary privilege when it determines that such a privilege is warranted under “the principles of the common law as they may be interpreted . . . in light of reason and experience.” *Univ. of Pa. v. EEOC*, 493 U.S. 182, 188 (1990). Cartman, in

asking the Court to recognize a qualified reporter's privilege, ignores the common law presumption against the recognition of privileges and this Court's view that "privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'" *Trammel v. United States*, 445 U.S. 40, 51 (1980). "At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury." *Branzburg*, 408 U.S. at 685–86. Indeed, the common law courts adhered to the "primary assumption that there is a general duty to give what testimony one is capable of giving," *United States v. Bryan*, 339 U.S. 323, 331 (1950), as "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." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Recognizing a qualified reporter's privilege would not only ignore the well-established presumption against the recognition of such privileges, it would create a constitutional barrier behind which defamation "may go undetected and unpunished." *Herbert v. Lando*, 441 U.S. 153, 158 (1979). Neither the Constitution nor common law warrants creating the exception sought in this case.

**2. The First Amendment should not be construed to afford reporters special privileges not enjoyed by the general public.**

This Court has repeatedly and consistently refused to grant the press special exemptions from the application of general laws that ordinary citizens do not enjoy. *See, e.g., Branzburg*, 408 U.S. at 683 (finding the First Amendment does not exempt newsmen from the general obligation to appear and provide testimony in response to a grand jury subpoena); *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 139 (1969) (finding newspapers may be subjected to generally applicable anti-trust laws without violating First Amendment); *Breard v. Alexandria*, 341 U.S. 622 (1951) (finding newspapers, like other businesses, may be subjected to generally

applicable prohibition of door-to-door solicitation). 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; *see also Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 581–83 (1983) (holding generally applicable laws 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). No qualified reporter’s privilege should be recognized here because the Federal Rules of Civil Procedure impose a general duty on all litigants to disclose evidence “relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). Without access to relevant evidence, the harm inflicted on an individual’s reputation, could not be redressed. To grant reporter’s a privilege against disclosing relevant evidence in defamation cases such as this would afford newsmen special immunity from liability which ordinary citizens do not enjoy.

### **3. Public policy interests weigh against the recognition of a reporter’s privilege.**

In evaluating whether the First Amendment recognizes a reporter’s privilege, various public policy considerations weigh against such a privilege. Specifically, the Court should consider the competing public interests underlying the recognition of the privilege, the practical and conceptual difficulties in administering the privilege, and the available protections already in place which render the privilege unnecessary. *See Branzburg*, 408 U.S. at 681–710.

#### ***a. The public interest in the search for truth outweighs any interests the reporter has in protecting confidential sources of information.***

At the heart of this matter lie two competing interests: the public interest in the free flow of information protected by the First Amendment and the public interest in the fair administration of justice. *See id.* at 681. In support of the privilege, reporters contend that the

dissemination of news would be inhibited by compelling members of the press to disclose confidential sources. *See id.* at 694. This concern, however, has not carried much weight with this Court:

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument [for the creation of a reporter's privilege] was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.

*Id.* at 698–99. Since *Branzburg*, these historical lessons have not changed. The press has continued to flourish despite the non-recognition of a constitutional reporter's privilege. Thus, any incremental effect on First Amendment interests which would result from subjecting newsmen to the general obligation of a citizen to provide relevant evidence in response to a discovery request does not justify the creation of a reporter's privilege. *See id.* This conclusion “[re]iterate[s] the importance of th[e] public duty [to provide testimony] . . . when properly summoned” and confirms the proper weight to be given to the “public interest in the search for truth.” *United States v. Bryan*, 339 U.S. at 331; *Blair v. United States*, 250 U.S. 273, 281 (1919); *Blackmer v. United States*, 284 U.S. 421, 438 (1932). Additionally, such a conclusion reaffirms this Court's holding that the First Amendment does not “grant newsmen a testimonial privilege that other citizens do not enjoy.” *Branzburg*, 408 U.S. at 686, 690.

***b. Administering a qualified reporter's privilege would present practical and conceptual difficulties.***

In addition to there being no legal support furthering the recognition of a reporter's privilege under the common law or under First Amendment jurisprudence, the administration of such a privilege “would present practical and conceptual difficulties of a high order.” *Id.* at 705.

The administration of a constitutional reporter's privilege presents two primary difficulties. First, there is the practical difficulty in developing a case-by-case approach under the reporters' suggested test because such an approach would embroil the courts "in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance."<sup>1</sup> *Id.* at 706. Additionally, such an approach would undermine the effectiveness of the privilege because it would make it difficult to predict those situations in which judges would order disclosure. *Id.* at 702 n.39 (explaining such a qualified privilege offers no predictability "since the decision [to order disclosure] will turn on the judge's ad hoc assessment in different fact settings.").

Second, there is the conceptual difficulty of defining "those categories of newsmen who qualified for the privilege." *Id.* at 704. There are two foreseeable problems in attempting to categorize those persons qualified to assert the privilege. *See id.* at 698–705. Foremost, if the Court defined "the press" consistent with its own First Amendment jurisprudence, it would create a "virtually impenetrable constitutional shield" to a seemingly limitless category of persons or entities. *Id.* at 698, 705. The other problem is that, if the Court were to limit the "privilege to some organs of communication but not to others, [it] would inevitably be discriminating on the basis of content," which the First Amendment prohibits. *Id.* at 705 n.40.

Thus, due to the practical and conceptual difficulties in administering a qualified reporter's privilege, the Court should decline "to embark the judiciary on a long and difficult journey to such an uncertain destination." *Id.* at 705. Instead, the Court should defer the balancing of

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<sup>1</sup> The reporters in *Branzburg*, as well as Justice Stewart in his dissenting opinion, argued that before a newsman is asked to appear before a grand jury and reveal confidences, the government must show (1) probable cause to believe that the newsman has information clearly relevant to a specific probable violation of law, (2) that the information cannot be obtained by alternative means less destructive of First Amendment rights, and (3) a compelling and overriding interest in the information. *See* 408 U.S. at 713 n.1.

conflicting interests of this type to Congress. *Id.* at 706 (concluding that determining whether a reporter’s privilege is “necessary and desirable” is a task best left to Congress and the states.).

*c. There are adequate remedies available which render the creation of a reporter’s privilege unnecessary.*

The Federal Rules of Civil Procedure protect reporters from wholesale disclosure of their confidential sources. Federal Rule of Civil Procedure 26(b)(1) provides: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). While Rule 26(b) entitles parties to broad discovery, Rule 26(c) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of Rule 26(b). *See* Fed. R. Civ. P. 26(c); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). In every case, the district court has the discretion, in the interests of justice, to prevent excessive or burdensome discovery. *See* Fed. R. Civ. P. 26(b)(2), (c). Thus, discovery requests seeking confidential sources from reporters are subject to limits imposed by the judicial process and must be issued in good faith and not for harassment of journalists. *Branzburg*, 408 U.S. at 708. Where it is shown that a subpoena was issued other than in good faith or undertaken to disrupt a reporter’s relationship with his news sources, a reporter may seek protection from the court. *Id.* at 707–08. Accordingly, so long as the discovery request is issued in good faith and the information sought is relevant to the underlying matter, the Constitution does not exempt reporters from performing the obligation shared by all citizens to provide evidence when properly summoned. *See id.* at 710 (Powell, J., concurring).

**B. Even Assuming the First Amendment Does Recognize a Qualified Reporter’s Privilege, It Would Not Protect Cartman.**

Assuming, *arguendo*, that the First Amendment does create a qualified reporter’s privilege, it would not protect Cartman. The threshold “question in determining if a person falls within the

class of persons protected by the journalist's privilege is whether the person, at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation." *von Bulow v. von Bulow*, 811 F.2d 136, 143 (2d Cir. 1987) (citing *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972)). The party claiming the privilege bears the initial burden of proving, through competent evidence, his right to its protections. *von Bulow*, 811 F.2d at 144. Cartman cannot satisfy the burden of showing that he was (1) engaged in investigative reporting; (2) gathered news; and (3) possessed the intent at the inception of the newsgathering process to disseminate the news to the public. *In re Madden*, 151 F.3d 125, 131 (3d Cir. 1998); *von Bulow*, 811 F.2d at 142–43; *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993).

Cartman cannot satisfy the threshold burden of showing he falls within the class of persons protected by the reporter's privilege. While Cartman proclaims himself to be a "news reporter," "self-proclamation will not suffice as proof that an individual is a reporter." (J.A. at 8); *In re Madden*, 151 F.3d at 130. By his own admission, Cartman is not engaged in investigative reporting or newsgathering, nor does he uncover any story on his own. Indeed, the record reveals that all of the content posted on Cartman's weblog is lifted from other Internet websites, taken from major newspapers, or handed-over to him directly from third parties. (J.A. at 4–6.) Similarly, Cartman did not actively gather or investigate the information made the basis of this defamation suit. Rather, Cartman received an unsolicited photograph from a third party; he did not independently investigate the content of the photograph; and he did not uncover any story on his own. (J.A. at 4–6.) Therefore, he could not have had, at the inception of the investigatory process, the intent to disseminate to the public the information obtained through an investigation, because Cartman did not conduct any investigation. *See von Bulow*, 811 F.2d at 143. Like all

the other content on Cartman’s weblog, he merely posted and commented on the fruits of someone else’s labor. *See id.* Cartman, therefore, cannot benefit from any alleged privilege inasmuch as the photograph and accompanying statements contain no information arising from his own investigative reporting or newsgathering, but instead merely recites content provided, uncovered, or in this case, fabricated by a third party. *See In re Madden*, 151 F.3d at 130 (refusing to recognize privilege where party claiming privilege merely relied upon another party for information, did not independently investigate any of the acquired information and uncovered no story on his own).

**II. THE COURT OF APPEALS CORRECTLY HELD THAT BROFLOVSKI DID NOT QUALIFY AS A PUBLIC FIGURE FOR PURPOSES OF HIS DEFAMATION ACTION.**

The court of appeals reversed the grant of summary judgment in favor of Cartman, finding that the district court evaluated Broflovski’s defamation claim under the wrong standard of liability. The district court’s mistake centered around its determination that Broflovski was a public figure and, as a result, he had to prove that Cartman published the defamatory photograph and commentary with “actual malice”—that is, with knowledge of their falsity or with reckless disregard for the truth. (J.A. at 18.) Though acknowledging there was evidence tending to prove the publications were false, the district court granted summary judgment in favor of Cartman based on the lack of proof showing Cartman intentionally or recklessly published the defamatory statements. (J.A. at 19–20.) The appellate court, however, properly held that Broflovski did not qualify as a public figure and consequently he only had to meet a simple negligence standard to support his defamation action. (J.A. at 23.) Because sufficient evidence supported the claim that Cartman was negligent in publishing the defamatory statements, the court of appeals reversed the district court’s grant of summary judgment. (J.A. at 32.) Thus, both lower courts’ decisions turned on the public figure determination and the resulting standard of proof.

The public figure doctrine defines the appropriate standard of proof in a defamation action based on the plaintiff's status as a public or private figure. *See generally Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). If the plaintiff is a public official or public figure, he cannot recover damages for the harm done to his reputation by false, defamatory publications unless he proves with convincing clarity that the defamatory statements were published with actual malice. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162–65 (1967) (public figures); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (public officials). However, if the plaintiff is a private figure, like Broflovski, he may recover damages upon a showing of mere negligence. *See Gertz*, 418 U.S. at 347; *see also* Restatement (Second) of Torts § 558 (1977). Requiring public figures to satisfy a higher standard of liability is justified on two grounds. First, public figures are less vulnerable to injury from defamatory publications because they “enjoy significantly greater access to the channels of effective communication” and consequently “have a more realistic opportunity to counteract false statements” through the “self-help remedy of rebuttal.” *Gertz*, 418 U.S. at 344 n.9. Second, and more important, is the notion that “public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood” by assuming “roles of special prominence in the affairs of society.” *Id.* at 345–46. Accordingly, the determination of whether a plaintiff is a public or private figure is essential to the outcome of a defamation action.

In *Gertz v. Robert Welch, Inc.*, this Court developed a status-based approach for determining whether a plaintiff is a public figure. *See id.* at 345–52. Justice Powell, writing for the majority, divided public figures into two main categories: general-purpose and limited-

purpose public figures.<sup>2</sup> *See id.* The first category encompasses an individual who “achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.” *Id.* at 352. The secondary category includes “an individual [who] 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 352. In this second category of public figures, the Court emphasized that “it is 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.* at 352. Under either category, the Court explained, public figures are those who “invite attention and comment.” *Id.* at 345. In sum, the touchstone of the public figure analysis is whether the plaintiff has “thrust [himself] to the forefront of [a] particular public controvers[y] in order to influence the resolution of the issues involved.” *Id.*

While *Gertz* “la[id] down broad rules of general application” concerning the public figure doctrine, the Court narrowed these rules in three subsequent decisions. *Id.* at 343–44; *see generally* Rodney A. Smolla, *Law of Defamation* § 2.08, at 2–23 (1993) (noting in the cases following *Gertz*, “the Court undertook a series of refinements to the ‘limited’ public figure [doctrine],” consistently restricting its scope) (citing *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157 (1979); *Time, Inc. v. Firestone*, 424 U.S.

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<sup>2</sup> In dictum, Justice Powell theorized that individuals might become public figures “through no purposeful action of their own,” but cautioned that “the instances of truly involuntary public figures must be exceedingly rare.” *Gertz*, 418 U.S. at 346. However, the existence of an involuntary public figure beyond the hypothetical has never been recognized by this Court. Specifically, the cases following *Gertz*, *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), and *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157 (1979), make no reference to the possibility of an involuntary public figure. Indeed, *Wolston* explicitly points to only “two ways in which a person may become a public figure for purposes of the First Amendment”—the general-purpose and limited-purpose categories. 443 U.S. at 164.

448 (1976)). These cases emphasize that a “private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.” *Wolston*, 443 U.S. at 167; *see also Firestone*, 424 U.S. at 454 (refusing “to equate ‘public controversy’ with all controversies of interest to the public”). Thus, these opinions reaffirm *Gertz*’s admonition that defamation plaintiffs do not become public figures merely by engaging in conduct that draws publicity; indeed, the plaintiffs must voluntarily “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 (emphasis added); *see also Firestone*, 424 U.S. at 457 (“There appears little reason why [private] individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them” simply because they were “drawn into” a public controversy.).

**A. This Court Should Adopt the Public Figure Test Fashioned by the Second Circuit.**

In an effort to synthesize the holdings of *Gertz* and its progeny into a single framework, lower courts have adopted various multi-factored tests for determining the status of a defamation plaintiff. For instance, the Second Circuit fashioned a four-part test requiring proof that the plaintiff (1) successfully invited public attention to his views in an effort to influence others prior to the defamatory publication; (2) voluntarily injected himself into a public controversy; (3) assumed a position of prominence in the controversy; and (4) maintained regular and continuing access to the media. *See Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136–37 (2d Cir. 1984). Further, under the D.C. Circuit’s three-part test a court must (1) isolate a public controversy; (2) ascertain that the plaintiff played a sufficiently central role in that controversy; and (3) find that the alleged defamation was germane to the plaintiff’s involvement in the controversy. *See Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 741 (D.C. Cir. 1985) (modifying test set forth

in *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), “to accommodate the possibility of a potentially *involuntary* limited-purpose public figure”). Additionally, the Third and Ninth Circuits adopted a two-part inquiry considering (1) whether the defamation concerns a public controversy; and (2) the nature and extent of the plaintiff’s involvement in that controversy. See *Partington v. Bugliosi*, 825 F. Supp. 906, 917 (D. Haw. 1993), *aff’d*, 56 F.3d 1147 (9th Cir. 1995); *McDowell v. Paiewonsky*, 769 F.2d 942, 948 (3d Cir. 1985).

These courts nominally agree that the limited-purpose public figure inquiry turns on the nature and extent of the plaintiff’s involvement in a particular controversy; however, in applying their respective tests, some courts have extended the public figure doctrine beyond the letter and spirit of *Gertz*. Consequently, even under the same or similar sets of facts, the determination of whether a defamation plaintiff is a public figure varies from circuit to circuit. Compare *Foretich v. Advance Magazine Publishers*, 765 F. Supp. 1099, 1107–08 (D.D.C. 1991) (finding plaintiff, Doris Foretich, a public figure under D.C. Circuit test because she was a “central figure” in a public dispute and her defensive response to the controversy was “a course of conduct that was likely to attract substantial attention”), with *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1554 (4th Cir. 1994) (finding plaintiff, Doris Foretich, was not a public figure under Fourth Circuit test because her public statements and actions were limited to defending herself against the defamatory allegations). Thus, as indicated in the present case, a private individual risks being stripped of the protections which the law of defamation would otherwise afford simply because a court employs one test over another. Compare (J.A. at 16–18) (district court found Broflovski was a public figure under the D.C. Circuit test) with (J.A. at 29–30) (appellate court found Broflovski was a private figure under the Second Circuit test).

To establish consistency in this area of the law and to confine the public figure doctrine to its intended scope, this Court should adopt the public figure test fashioned by the Second Circuit. *See Lerman*, 745 F.2d at 136–37. The Second Circuit’s test emulates this Court’s restrictive view of the public figure doctrine by limiting what constitutes a public controversy and channeling the focus of the analysis to plaintiff’s voluntary actions. *See also* Mark D. Walton, *The Public Figure Doctrine: A Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations*, 16 N. Ill. U. L. Rev. 141, 173 nn.115 & 140 (1995) (noting the public controversy definition is “consistent with . . . *Wolston*” and first three factors articulate the concerns under *Gertz* and *Hutchinson* that plaintiff must voluntarily thrust himself into a controversy to engage the public’s attention and influence its outcome); Erik Walker, Comment, *Defamation Law: Public Figures—Who Are They?*, 45 Baylor L. Rev. 955, 983 n.114 (1993) (noting fourth factor under Second Circuit test is “[c]onsistent with *Hutchinson*”). *See generally* Christopher Russell Smith, Note, *Dragged into the Vortex: Reclaiming Private Plaintiffs’ Interests in Limited Purpose Public Figure Doctrine*, 89 Iowa L. Rev. 1419, 1450 (2004) (noting that to adhere to *Gertz*, courts should “narrowly define the concept of ‘public controversy’” and then “require significant voluntary participation by the plaintiff in that controversy before limiting defamation claims”). Unlike the other tests, the Second Circuit’s approach hinges entirely on the conduct which the plaintiff has the ability to control—his own voluntary action. *See Lerman*, 745 F.2d at 136–37. The hallmark of the Second Circuit’s test is its methodical consideration of the separate components of the status-based approach developed under the *Gertz* analysis; therefore, this Court should adopt the Second Circuit’s test as the official test for determining whether a defamation plaintiff qualifies as a public figure.

The tests adopted by the D.C., Third and Ninth Circuits have been disparaged by commentators for straying from the original intentions articulated in *Gertz* and its progeny because each focuses more on the public interest in a controversy than on whether the plaintiff has voluntarily assumed a role in the controversy.<sup>3</sup> See, e.g., Smith, *supra*, at 1452–53 (stating these approaches “de-emphasiz[e], or completely ignor[e], the integral role voluntary action plays in the *Gertz* analysis, while at the same time allowing the media defendant’s coverage of an event to determine the scope of the defendant’s own constitutional protections”). The thrust of the criticism stems from the fact that each of these approaches adopts the minority view recognizing the existence of the involuntary public figure.<sup>4</sup> See David A. Elder, *Defamation: A Lawyer’s Guide* § 5:8, at 57 (1993) (“[C]ase law and majoritarian view of the commentators correctly view [the involuntary public figure] category as not merely ‘exceedingly rare’ but extinct.”). Accordingly, this Court should reject the tests adopted by the D.C., Third and Ninth Circuits because each suggests an approach that allows a person to lose his privacy protection by being exposed to the public through the media. Such an approach cannot be reconciled with this Court’s holdings or the principles underlying the public figure doctrine.

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<sup>3</sup> The reasoning for why this Court should reject the D.C. Circuit’s test applies equally to the Fifth and Eleventh Circuits’ tests because both have adopted the D.C. Circuit’s test. See *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 436 (5th Cir. 1987) (adopting D.C. Circuit’s test); *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1494 (11th Cir. 1988) (same).

<sup>4</sup> This Court should also reject the Fourth Circuit’s test because it too recognizes the existence of the involuntary public figure. See *Wells v. Liddy*, 186 F.3d 505, 540 (4th Cir. 1999); see generally Aureliano Sanchez-Arango, Note, *The Elusive “Involuntary Limited Purpose Public Figure:” Why the Fourth Circuit Got It Wrong in Wells v. Liddy*, 9 Geo. Mason L. Rev. 211 (2000) (discussing the flaws in the Fourth Circuit’s test).

**B. Under the Second Circuit’s Test, Broflovski Does Not Qualify as a Limited-Purpose Public Figure.**

The court of appeals correctly held that Broflovski did not qualify as a limited-purpose public figure under the Second Circuit’s test. (*See* J.A. at 27–30.) Under this test, Cartman had to prove that Broflovski “(1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.” *Lerman*, 745 F.2d at 136–37. Cartman did not meet this burden.

The limited public attention that Broflovski received prior to Cartman’s defamatory to publication is insufficient to satisfy the first prong. The record reflects that prior to Cartman’s publication Broflovski made only one public comment at the end of a modestly attended press conference. (*See* J.A. at 3, 29.) The only other attention he received was in connection with buttons worn by Citrus employees which bore the phrase “I Like Ike.” *See id.* at 3–4. The record makes clear that Broflovski did not promote the buttons. *See id.* at 4. Importantly, the evidence shows that Broflovski did not give any interviews to the press and was rarely seen in public. *Id.* at 3. As such, the minimal attention he did receive stemmed from his position at Citrus which is insufficient to qualify Broflovski as a public figure. *Tavoulaareas v. Piro*, 817 F.2d 762, 773 (D.C. Cir. 1987). Accordingly, these actions were not “calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue.” *Wolston*, 443 U.S. at 168.

Broflovski’s conduct after Cartman published the defamatory statements was even more reclusive than before the publications. Indeed, Broflovski did not go on record, grant interviews, make appearances in the media, or give his opinion or version of the story. He declined to

participate in the media's discussion of the controversy except to issue a statement through his attorney in response to the media's demands. (J.A. at 7, 30.) Identical to the published responses in *Wolston* and *Hutchinson*, Broflovski's brief response was "limited . . . to that necessary to defend himself against" the allegations published by Cartman. *Wolston*, 443 U.S. at 166 (refusing to find plaintiff voluntarily injected himself into a controversy when he "never discussed this matter with the press and limited his involvement to that necessary to defend himself"); see *Hutchinson*, 443 U.S. at 136 (holding plaintiff "did not have the regular and continuing access to the media" to qualify as a public figure where his "access was limited to responding to the [defamatory publication]"). Broflovski's brief statement in response to Cartman's allegations does not warrant a finding that he voluntarily injected himself into a controversy, assumed a position of prominence therein or maintained continuing access to the media during the alleged controversy. Thus, Cartman cannot satisfy the second, third and fourth prongs of the Second Circuit's test.

A "public controversy" under the Second Circuit's test is "any topic upon which sizeable segments of society have different, strongly held views." *Lerman*, 745 F.2d at 136-37. Like the general public concern about wasteful government spending asserted in *Hutchinson*, a general concern about the possible use of slave labor is too general a statement to be the axis of debate because "various groups [do not] have vastly divergent views on the propriety of [using slave labor]." *Lerman*, 745 F.2d at 138. Certainly, all responsible citizens share the same opposition to the possible use of slave labor and consequently it does not constitute a public controversy. See *Hutchinson*, 443 U.S. at 135 (general public concern about wasteful government spending "is shared by most and relates to most public expenditures; it is not sufficient to make *Hutchinson* a public figure."); cf. *Wolston*, 443 U.S. at 166 n.8 ("Certainly, there was no public

controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States; all responsible . . . citizens understandably were and are opposed to it.”). Though these allegations may be “newsworthy” or “interest[ing] to some portion of the reading public,” public interest alone does not create a public controversy, nor does it create a public figure. *See Wolston*, 443 U.S. at 167; *Firestone*, 424 U.S. at 454.

Accordingly, Cartman cannot meet his burden of proving that Broflovski qualifies as a limited-purpose public figure under the Second Circuit’s test.

**C. Even Under the Alternative Tests Adopted by the D.C., Third and Ninth Circuits, Broflovski Does Not Qualify as a Limited-Purpose Public Figure.**

Even if this Court decides not to employ the public figure test fashioned by the Second Circuit, Broflovski does not qualify as a limited-purpose public figure under the alternative tests adopted by the D.C., Third and Ninth Circuits. An analysis under these approaches, though detached from the holdings in *Gertz* and its progeny, yield the same results.

**1. Under the D.C. Circuit’s test, Broflovski does not qualify as a limited-purpose public figure.**

The district court, in a decision remarkable for its lack of any meaningful discussion of the public figure analysis under *Gertz* and its failure to even mention, much less discuss, this Court’s decisions in *Firestone*, *Hutchinson*, and *Wolston*, employed the D.C. Circuit’s test to find that Broflovski was a limited-purpose public figure. (*See* J.A. at 18.) Under the D.C. Circuit’s test, Cartman had to prove (1) that a public controversy existed prior to his defamatory publications; (2) Broflovski played a sufficiently central role in that controversy; and (3) that the alleged defamation was germane to Broflovski’s involvement in the controversy. *See Dameron*, 779 F.2d at 741. Cartman failed to satisfy this burden.

Foremost, no public controversy existed prior to Cartman’s defamatory publication, a threshold requirement under the D.C. Circuit’s test. *See Waldbaum*, 627 F.2d at 1297 (explaining that courts must “determine whether a controversy indeed existed” prior to assessing the plaintiff’s role in such controversy). Notably, if the district court had properly employed the test, it would have found that neither the public nor the media was discussing the possible use of slave labor at Citrus prior to Cartman’s defamatory publication. *See id.* (explaining that, to determine whether a controversy existed, a court should consider “whether persons actually were discussing some specific question,” and whether “the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment”). Here, just as in *Hutchinson*, the alleged controversy only developed as a consequence of Cartman’s defamatory publication and McRiley’s publicized award. *See Hutchinson*, 443 U.S. at 135 (“To the extent the subject of [Hutchinson’s] published writings became a matter of controversy, it was a consequence of the Golden Fleece Award.”). Thus, not only was the district court’s analysis improper in failing to isolate an existing controversy, it ignored this Court’s warning that “those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.” *Id.* The record is completely silent as to either a general or specific controversy concerning slave labor existing prior to Cartman’s publication. Thus, Cartman cannot meet the threshold requirement of the D.C. Circuit’s test.

Even assuming, *arguendo*, that a controversy existed, the district court failed to assess Broflovski’s voluntary participation in the alleged controversy. *Waldbaum*, 627 F.2d at 1297 (“Once the court has defined the controversy, it must analyze the plaintiff’s role in it.”). Had the district court properly applied this test, it would have found that Broflovski’s past conduct, the

press coverage, nor the public reaction to his statements warranted a finding that Broflovski was a public figure. *See id.* (explaining that to assess plaintiff’s role in the controversy, courts should “look to the plaintiff’s past conduct, the extent of press coverage, and the public reaction to his conduct and statements”). Again, the limited public attention Broflovski received prior to this litigation was unrelated to the alleged controversy and the only statement he made in connection to the controversy was limited to that necessary to defend himself against the defamatory allegations. (*See* J.A. at 3–4, 7.) Both the D.C. Circuit and this Court agree that “[c]orrecting inaccurate media reports about oneself does not by itself prove access or public-figure status.” *Waldbaum*, 627 F.2d at 1298 n.34 (citing *Firestone*, 424 U.S. at 454 n.3). Thus, Broflovski’s limited interaction with the media does not satisfy the voluntary action requirement under this approach. Accordingly, even under the D.C. Circuit’s test, Broflovski is not a limited-purpose public figure.

**2. Under the tests adopted by the Third and Ninth Circuits, Broflovski does not qualify as a limited-purpose public figure.**

Similarly, Cartman cannot satisfy the tests adopted by the Third and Ninth Circuits. Under this standard, the Court must consider (1) whether the defamation concerns a public controversy; and (2) the nature and extent of Broflovski’s involvement in that controversy. *See Partington*, 825 F. Supp. at 917; *McDowell*, 769 F.2d at 948. Cartman cannot meet this standard either.

First, no public controversy existed prior to Cartman’s defamatory statements. *See McDowell*, 769 F.2d at 949 (requiring public controversy to exist prior to defamatory publication); *see also Marcone v. Penthouse Int’l Magazine for Men*, 754 F.2d 1072, 1083 (3d Cir. 1985) (adopting same definition as that enunciated by D.C. Circuit—a public controversy is “a real dispute, the outcome of which affects the general public or some segment of it”). Thus,

for the same reasons stated in section II.C.1 *supra*, Cartman cannot establish that a public controversy pre-existed his defamatory publication.

Second, even assuming that a controversy existed, Cartman cannot satisfy the next consideration under this test because Broflovski did not voluntarily thrust himself into the alleged controversy. *See Partington*, 825 F. Supp. at 917 (to assess the “nature and extent” of the plaintiff’s involvement in the alleged controversy, a court considers whether the participation was voluntary; whether the plaintiff had “access to channels of effective communication in order to counteract false statements;” and whether the plaintiff assumed a prominent role in the public controversy); *see McDowell*, 769 F.2d at 950. Broflovski’s involvement in the controversy was not voluntary; rather, like the plaintiff in *Wolston*, Broflovski was “dragged unwillingly into the controversy” after Cartman published the defamatory statements. 443 U.S. at 166–68 (notwithstanding plaintiff’s voluntary refusal “to respond to the grand jury’s subpoena,” the substantial publicity he received and the subsequent media response to defendant’s allegations, Court found plaintiff did not voluntarily involve himself in controversy).

Third, the limited media attention that Broflovski received due to his position at Citrus prior to the defamation and the brief defensive response to the demands of the press following the defamation, does not demonstrate that Broflovski had sufficient access to the media to counteract false statements. *Hutchinson*, 443 U.S. at 135 (notwithstanding newspaper reports of plaintiff’s successful application for federal funds, the reports in local newspapers of the federal grants, his published writings in science journals, and his published response to the defendant’s announcement of the “Golden Fleece” award, Court found plaintiff did not have regular and continuing access to media).

Finally, Broflovski's minimal public attention does not show that he assumed a prominent role in the alleged controversy. *Firestone*, 424 U.S. at 455 & n.3 (notwithstanding plaintiff's involvement in a highly publicized divorce, her voluntary participation in press conferences during the divorce proceedings, and her prominence as Palm Beach socialite, Court found plaintiff did not assume any role of public prominence in any controversy); *Gertz*, 418 U.S. at 352 (notwithstanding plaintiff's voluntary association with a case certain to attract media attention, Court found plaintiff did not assume any role of public prominence in the controversy).

Accordingly, even under the test adopted by the Third and Ninth Circuits, Broflovski does not qualify as a limited-purpose public figure.

### **CONCLUSION**

This Court should AFFIRM the judgment of the United States Court of Appeals for the Fifteenth Circuit in all respects.

Respectfully submitted,

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