

No. 09-2701

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

October Term, 2009

ERIC CARTMAN,

Defendant-Petitioner,

- against -

IKE BROFLOVSKI,

Plaintiff-Respondent.

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

BRIEF FOR RESPONDENT

Team 228
Counsel for Respondent

QUESTIONS PRESENTED

- I. Whether Eric Cartman is protected by a qualified reporter's privilege against court-compelled disclosure of the identity of an anonymous source in an online defamation claim.
 - A. Whether the First Amendment creates a qualified reporter's privilege against the court-compelled discovery of sources.
 - B. If A is answered in the affirmative, whether Eric Cartman qualifies as a reporter for the purposes of this defamation suit and is, therefore, entitled to shield the identity of his anonymous source.

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

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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

Opinions Below

The decision of the United States Court of Appeals for the Fifteenth Circuit is recorded at *Ike Broflovski v. Eric Cartman*, No. 481-5162-342, slip op. (15th Cir. May 14, 2009), *cert. granted*, ___ U.S.L.W. ___ (U.S. Aug. 24, 2009) (No. 09-2701). The decision of the United States District Court for the Western District of Silverado appears in the Joint Appendix. (J.A. at 1-20.)

Standard of Review

Questions of constitutional law are reviewed *de novo*. *Loyd v. Ala. Dep't of Corr.*, 176 F.3d 1336, 1339 (11th Cir. 1999). Additionally, findings regarding actual malice are reviewed *de novo*. *Bose Corp. v. Consumer's Union of the United States, Inc.*, 466 U.S. 485, 498-511 (1994).

Statement of Facts

Ike Broflovski ("Respondent") is the newly appointed Director of Research and Development for Citrus Electronics, Inc. ("Citrus"), a consumer electronics company. He is also the twenty-three year-old brother to Kyle Broflovski, the Chief Executive Officer of Citrus. (J.A. at 2-3.) In his position, Respondent oversaw the development of the new digital music and movie player, the ePlay Touché ("ePlay"). (J.A. at 2-3.) On August 7, 2006, Kyle Broflovski held a "moderately attended" press conference to unveil Citrus' future in mobile touch screen

technology at which Respondent's hiring was noted. (J.A. at 3.) Respondent is shy and generally avoids publicity—he spoke only to thank his brother and express enthusiasm for his position. (J.A. at 3.) Consequently, the Associated Press published a story covering the unveiling of Citrus' future products and merely mentioned Respondent's hiring at the end of the article. (J.A. at 3.) Since the conference, the Respondent has not given any interviews and is seldom seen in public. (J.A. at 3.)

Eric Cartman ("Petitioner") is the sole proprietor of Cartman's Computer World, an electronics sales and repair shop. (J.A. at 4.) Additionally, Petitioner is a part-time blogger of "The Sludge Report" (the "Blog"). (J.A. at 4.) Petitioner updates the Blog with items he finds online and in print. (J.A. at 4.) The Blog has a decidedly populist and nationalist focus and criticizes companies that engage in international trade. (J.A. at 4.) Petitioner's great disdain for such companies stems from his belief that they export jobs overseas and engage in the "systematic oppression of the peoples of the Third World." (J.A. at 4.) Petitioner directs his "harshest criticism" at Citrus because he blames the company for nearly driving him out of business. (J.A. at 2, 4.)

The information contained on the Blog at issue in this case originated from a source by the name of "Professor Chaos." (J.A. at 5.) This information alleged that Respondent engaged in human rights violations in a Citrus manufacturing plant in Mumbai, India. (J.A. at 5.) The allegations originated from a fabricated photograph containing a superimposed image of Respondent. (J.A. at 7.) Although Respondent has visited Mumbai in the past, there are no facts indicating he ever visited the particular plant. (J.A. at 7.) On July 8, 2007, the next day after receiving the photograph, Petitioner posted a thread to the Blog titled: "Citrus Engaging in Acts of Modern-Day Slavery?" (J.A. at 5.) Throughout, Petitioner made gross accusations that Citrus

and Respondent were “slave drivers” who “shackled” workers, “engaged in capitalist oppression,” and were a “danger to humanity.” (J.A. at 6.)

After the posting of the Blog, Petitioner appeared on the show “The Countdown Factor” on August 19, 2008. (J.A. at 6.) During the show Respondent was deemed the “Most Heinous Individual in the Galaxy.” (J.A. at 6.) Following this damning publicity, Citrus experienced a 25% drop in stock price, which continued to sink thereafter. (J.A. at 6-7.) Finally, Respondent’s own personal life was tragically affected by repeated death threats and deep depression. (J.A. at 7.)

The Broflovskis have since made significant attempts to locate the source of the photograph—emailing all Citrus employees, and deposing the manager of the factory and several other top engineers. (J.A. at 8.) During discovery, through the use of Citrus’ PhotoWorks software, it was revealed that a third-party superimposed a head-shot of Respondent into the photograph. (J.A. at 7.) Petitioner owned similar software with the exact same capability of detecting this fabrication. (J.A. at 7.) While Petitioner used the software on photographs that he previously posted, he unfortunately did not use this software on the photograph at issue and it cost Respondent his health, reputation, and career success. (J.A. at 7.)

Procedural History

On September 20, 2008, Respondent filed suit for defamation in the Silverado Superior Court alleging that Petitioner’s statements were libelous and that those statements made the Respondent fearful for his life. (J.A. at 7.) On October 14, 2008, Petitioner removed the case to the United States District Court for the Western District of Silverado based on diversity jurisdiction. (J.A. at 7.) In response to Respondent’s request for interrogatories, Petitioner answered: “Defendant invokes a qualified privilege under the First Amendment, as a news

reporter, against the disclosure of his source.” (J.A. at 8.) On January 8, 2009, Respondent filed a motion to compel the Court to reveal Petitioner’s source. (J.A. at 8.) Petitioner countered with a motion for summary judgment, alleging that Respondent is a “public figure and has failed to provide clear and convincing evidence of actual malice.” (J.A. at 8.) The District Court found for Petitioner on January 27, 2008. (J.A. at 14, 20.)

On May 14, 2009, the United States Court of Appeals for the Fifteenth Circuit reversed. (J.A. at 32.) The court held that Petitioner could not invoke a qualified reporter’s privilege because the First Amendment does not create such a privilege. (J.A. at 25.) Moreover, the Court held that Respondent is a private person; therefore, Petitioner’s actions should be held to a negligence standard and given the facts presented, a jury could reasonably conclude that Petitioner’s statements were negligent and defamatory. (J.A. at 27.)

SUMMARY OF THE ARGUMENT

Petitioner is attempting to use the First Amendment to shield himself from liability for the damage that he caused Respondent. Petitioner is unable to invoke a qualified reporter’s privilege as no such privilege exists under the First Amendment. Instead, reporters are required to follow the same laws that govern ordinary citizens and are not entitled to special privileges. Additionally, substantive and procedural protections already exist thereby making a reporter’s privilege unnecessary. Even if this Court holds that a qualified reporter’s privilege exists, Petitioner cannot invoke it as a part-time blogger.

Because a qualified reporter’s privilege does not exist, Petitioner should be held liable for defamation based on a negligence standard as Respondent is a private person, not a limited-purpose public figure. This Court should adopt the Second Circuit’s test for determining whether an individual should be considered a limited-purpose public figure because it recognizes

the importance of intent. In contrast, under the test used by the District Court of Silverado, an individual's fate is determined by the controversy itself, regardless of intent, forcing that individual to satisfy a higher burden. Further, even if this Court holds that Respondent is a limited-purpose public figure, Petitioner is still liable for defamation under an actual malice standard as he acted intentionally and recklessly.

ARGUMENT

I. PETITIONER IS NOT PROTECTED BY A QUALIFIED REPORTER'S PRIVILEGE AGAINST COURT-COMPELLED DISCLOSURE OF THE IDENTITY OF HIS ANONYMOUS SOURCE IN THIS ONLINE DEFAMATION CLAIM.

Every limitation on the freedom of speech is not considered a violation of the Constitution. *See Assoc. Press v. NLRB*, 301 U.S. 103, 132-33 (1937); *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 192-93 (1946). Although the First Amendment is considered one of the great pillars of our nation, it has its limitations. *See Branzburg v. Hayes*, 408 U.S. 665, 682-83 (1972). The First Amendment has been used as a shield to protect those who wish to voice unpopular viewpoints. *See Assoc. Press*, 301 U.S. at 132-33. In contrast, Petitioner, under the guise of a legitimate news reporter, is attempting to use the First Amendment as a sword to defame an innocent, private person. This, the Constitution does not protect.

A. The First Amendment Does Not Create a Qualified Reporter's Privilege Against the Court-Compelled Discovery of Sources.

The phrases "freedom of speech" and "of the press" found in the First Amendment are known as the speech clause and press clause respectively. *See David A. Anderson, The Origins of the Press Clause*, 30 UCLA L. Rev. 455, 456 (1983). Since the adoption of the First Amendment, the speech clause and the press clause were interpreted as granting the same power: the power to speak. *See id.* Following the early 1970s, members of the media sought to carve out

special rights for themselves, such as a qualified reporter's privilege, by treating the press clause as separate from the speech clause. *Id.* However, there is no qualified reporter's privilege in the plain language of the First Amendment. *See* U.S. Const. amend. I. This Court bolsters this contention as it has never held that such a privilege exists. *See generally Branzburg*, 408 U.S. at 665. Additionally, a qualified reporter's privilege is unnecessary as there are both substantive and procedural protections currently in place that will protect reporters from compelled disclosure. *See* Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii), (c); Cal. Evid. Code § 1070 (West 1995).

i. No Qualified Reporter's Privilege Exists within the First Amendment.

The First Amendment protects the press from certain restraints on publication, but this protection does not extend to uninhibited news gathering. *See Near v. Minnesota*, 283 U.S. 697, 713 (1931). This Court should continue to interpret the First Amendment in a manner that properly restricts the press clause to its intended purpose—the right to publish without license or censorship. *Lovell v. City of Griffen*, 303 U.S. 444, 451 (1938). This would be consistent with the plain language of the clause itself, the legislative history, the motivating factors behind its enactment, and judicial precedent.

The First Amendment states in pertinent part: “Congress shall make no law . . . or abridg[e] the freedom of speech, or of the press” U.S. Const. amend. I. There is no mention of a qualified reporter's privilege of any kind; therefore, a qualified reporter's privilege cannot be implied under the First Amendment. Additionally, the lack of legislative history supports this contention. *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455, 475-84 (1983). Since the Senate proceedings were closed to the public and no commentary exists regarding the viewpoints from the Representatives of the House, the legislative history does not provide a clear picture of the intent of the Framers. *See id.* at 475-84. Therefore it is

illogical to conclude that there was intent to create or imply a qualified reporter's privilege in the First Amendment.

The motivations behind the Framers' enactment of the press clause serve as further reinforcement to support the contention that no such privilege exists. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 245-46 (1936). The Framers sought to prevent the censorship of the press from licensing systems similar to those enacted in England during the late sixteenth century. Paul Brewer, *The Fourth Estate and the Quest for a Double Edged Shield: Why a Federal Reporters' Shield Law Would Violate the First Amendment*, 36 U. Mem. L. Rev. 1073, 1080-81 (2006). After experiencing the effects of those restraints, the Framers became distrustful and thereby enacted the press clause. *Id.* at 1083. Certainly, the "history and circumstances" that serve as motivating factors center on the protection of the press from license and censure. *Lovell*, 303 U.S. at 451. Thus, the press clause is not limitless, but rather is bound within the confines of its purpose as a shield against restraints on publication. *See Near*, 283 U.S. at 713; *see also Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

This Court has never recognized any special press privilege created by the First Amendment. *See Herbert v. Lando*, 441 U.S. 153, 160 (1979) (denying an exemption from discovery of subjective thoughts of journalists); *Houchins v. KQED, Inc.*, 438 U.S. 1, 8-9 (1978) (denying reporters a special right of access to jail); *Zurcher v. Stanford Daily*, 436 U.S. 547, 563-67 (1978) (denying reporters an exemption from police search). Since this Court has never recognized any special press privilege created by the First Amendment, it is illogical to interpret that a qualified reporter's privilege exists. Per the holdings of this Court, Petitioner's claims are not valid as the First Amendment does not contain the privilege he asserts.

Petitioner cannot use the press clause to shield himself from divulging the identity of his source and thereby preventing Respondent from accessing a vital source of information that is essential to his case. Would-be journalists cannot defame another and hide behind the press clause to prevent liability. The press is required to obey the laws that every other citizen is required to abide by. *Associated Press*, 301 U.S. at 132-133. The plain language of the First Amendment, the legislative history, the motivating factors behind its enactment, and judicial precedent do not create an exception that provides Petitioner with a qualified reporter's privilege.

ii. No Proper Interpretation of *Branzburg v. Hayes* Establishes a Qualified Reporter's Privilege in the First Amendment.

Branzburg is the only case in which this Court addressed whether the First Amendment grants a privilege permitting reporters to keep their sources confidential. *See generally* 408 U.S. at 665. In *Branzburg*, this Court held that the petitioner news reporter had to testify before a grand jury concerning questions regarding confidential sources that were linked to the use, production, and sale of marihuana. *Id.* at 667-71. Although the case concerned a criminal trial involving a grand jury, no part of the holding limited it to such. *See generally id.* The *Branzburg* Court reasoned that the role of a judge is to uphold the law, not to make it, as only Congress has the power to determine whether such a privilege should be law. *Id.* at 706. In rendering its holding, the *Branzburg* Court recognized that the freedom of the press is not absolute. *Id.* at 683. The press is not free to publish everything it desires, such as "knowing or reckless falsehoods [that are] damaging to private reputation without subjecting itself to liability." *Id.* This Court was absolute in its assertions that no privilege should exist when it stated: "[w]e are asked to create another [privilege] 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.

Some courts have improperly interpreted *Branzburg* to create a qualified reporter's privilege under the First Amendment. *See, e.g., In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992); *United States v. La Rouché Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980). The common legal basis for this conclusion is an overly narrow interpretation of Justice Powell's concurrence. *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998). Traditionally, if five Justices do not consent, the holding cannot be considered binding precedent. Michael L. Eber, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 Emory L.J. 207, 216-17 (2008). Concurring opinions should be considered precedent only where the language is consistent with that of the majority; to interpret such concurrences as in *Branzburg* otherwise would create inconsistent interpretations of the opinion throughout the lower courts. Tristan C. Pelham-Webb, *Powelling for Precedent: "Binding" Concurrences+*, 64 N.Y.U. Ann. Surv. Am. L. 693, 713 (2009). Instead, as established by this Court, when interpreting plurality opinions, lower courts should scrutinize the majority and concurring opinions to find overlap in the rational. *Marks v. United States*, 430 U.S. 188 (1977). This approach has been called the "narrowest grounds approach." Tristan C. Pelham-Webb, *Powelling for Precedent: "Binding" Concurrences+*, 64 N.Y.U. Ann. Surv. Am. L. 693, 734 (2009). Per this approach, precedent should be established only from what all five concurring Justices would take into agreement. *Id.* Since no part of the majority's opinion stated that a qualified reporter's privilege exists in the First Amendment, no part of Justice Powell's concurrence that addresses such a privilege can be considered precedent.

Another method lower courts have used in finding a reporter's privilege under *Branzburg* is to limit its holding to the criminal context. *See, e.g., Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). Limiting *Branzburg* to criminal cases involving a grand jury would create a disparate

impact between civil and criminal suits thereby creating “practical and conceptual difficulties of a high order” that the *Branzburg* Court sought to avoid. 408 U.S. at 704. The Court reasoned that grand juries are essential in an investigation of a crime. *See id.* at 688. Testimony from reporters regarding essential elements of a plaintiff’s claim is equally as important in the civil context. In many cases, civil and criminal consequences can arise from the same action. *See, e.g., Waknin v. Chamberlain*, 653 N.W.2d 176, 180 (Mich. 2002) (holding that evidence of defendant's conviction for assault and battery could be used against him in a subsequent civil case). Although defendants in a criminal case risk penalization, plaintiffs in civil matters, like Respondent in this case, risk losing their reputation, career, and livelihood as a result of defamatory remarks. If *Branzburg* is interpreted to only pertain to criminal cases that involve a grand jury, a reporter in a grand jury proceeding would have to reveal the source of information, while the reporter in a subsequent civil suit could invoke the privilege and thus prevent essential pieces of evidence from being admitted. As this Court stated, “the public . . . has a right to every man's evidence.” *Branzburg*, 480 U.S. 688 (citing *United States v. Bryan*, 339 U.S. 323, 330 (1950)).

The proper interpretation of *Branzburg* does not establish a qualified reporter’s privilege from the First Amendment as asserted by Petitioner. Only a narrow interpretation with an excessive emphasis on a concurring opinion could lead to such a privilege. Moreover, limiting the *Branzburg* holding to the criminal context would adversely affect civil justice. “It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.” *Branzburg*, 408 U.S. at 682.

iii. A Qualified Reporter's Privilege is Unnecessary as the Press is Already Afforded Adequate Safeguards that Will Protect it from Compelled Disclosure of Sources.

Currently, reporters are afforded procedural and substantive protections from unwarranted compelled disclosure of their sources. Fed. R. Civ. P. 26(b)(2)(C), (c). Federal courts mirror these protections through qualified reporter's privilege balancing tests. *Compare* Fed. R. Civ. P. 26(b)(2)(C), with *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir. 1982). These balancing tests are unnecessary because the protections they seek to afford already exist in the Federal Rules of Civil Procedure and state shield laws.

Federal Rule of Civil Procedure 26(b)(2)(C) empowers reporters to keep sources confidential and serves as an assurance to those sources. Like any balancing test for a qualified reporter's privilege, the rule bars the admission of evidence that is duplicative or obtainable from other sources, or where the burden of discovery outweighs any benefit that might be obtained from it. Fed. R. Civ. P. 26(b)(2)(C). The rule utilizes similar avenues to protect reporters from harassment by parties seeking to gain a shortcut to information or to reveal the identity of the source where it is irrelevant to the lawsuit. Similarly, individual state shield laws substantively protect reporters from unwarranted disclosure of sources. 2 David M. Greenwald et al., *Testimonial Privileges* § 8:6 (3d ed. 2009). "Most of the statutes grant a privilege that is absolute in its terms; others, especially those adopted post-*Branzburg*, provide a conditional privilege" *Id.* As of 2007, over thirty states had enacted such shield laws. *Id.* Since Federal Rule of Civil Procedure 26(b)(2)(C) and numerous state shield laws sufficiently provide for reporter protection, it is unnecessary for this Court to establish a qualified reporter's privilege from the First Amendment.

B. Alternatively, if this Court finds that a Qualified Reporter's Privilege Exists, Petitioner Does Not Qualify as a Reporter for the Purposes of this Suit and, Therefore, is Not Entitled to Shield the Identity of His Anonymous Source.

Petitioner cannot be permitted to invoke a qualified reporter's privilege in his capacity as a part-time blogger. There is tremendous danger in classifying bloggers as reporters because they lack traditional news resources, do not employ a formal newsgathering process, and consist of a limitless internet population. In this case, Petitioner was a part-time blogger with no intent to use the information that he received from his source in the dissemination of news. Respondent's defamation claim supersedes any attempt by Petitioner to assert a qualified reporter's privilege.

i. Bloggers such as Petitioner Cannot be Afforded a Qualified Reporter's Privilege as the Consequences would Destroy the Essence of the Privilege.

Online bloggers like Petitioner who operate on a part-time basis and are not tied to any established form of institutional media should not be afforded a qualified reporter's privilege. Traditionally, this Court has only recognized the institutional media, such as broadcasters and newspaper reporters for the purpose of First Amendment protections. Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 906 (2000) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (applying the analysis for media defendants to the publisher of a newspaper); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 (1986) (same); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974) (limiting the First Amendment analysis to publishers and broadcasters). Moreover, state shield laws deal with the likely consequences of extending the privilege to a potentially unlimited number of people by explicitly limiting the protection of the privilege only to the institutional press. *See, e.g.*, D.C. Code § 16-4702 (2001) (providing protection to "any person who is or has been employed by the

news media in a news gathering or news disseminating capacity"); N.M. Stat. § 38-6-7 (1978) (strictly defining "journalist" as a person working for "a newspaper, magazine, news agency, news or feature syndicate, press association or wire service"); Cal. Evid. Code § 1070 (West 1995) ("A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service . . .").

Unlike institutional media, Petitioner as a part-time blogger, lacks the essential resources of broadcasters and reporters: formal editing processes, transparency in newsgathering, and resources to conduct thorough investigations. *Developments in the Law – The Law of Media:II. Protecting the New Media: Application of the Journalist’s Privilege to Bloggers*, 120 Harv. L. Rev. 996, 1007 (2007). Illustrating such shortcomings, Petitioner’s reliance on a single source led to the dissemination of a fabricated photograph. If Petitioner had access to resources available to more established news gatherers, he could have properly investigated the claims made by Professor Chaos and thereby avoided severe injury to Respondent.

If a qualified reporter’s privilege were extended to Petitioner, this Court would establish an unmanageable and overly broad scope for lower courts to define what constitutes a “blog.” Without a working definition and the constant evolution of online technology, anyone who posts information onto the internet would likely be covered by the privilege. For instance, one who posts daily “tweets” on Twitter could be covered since that person publishes frequently and has many individuals visiting their webpage.

The great weight of authority advocates for limitations on bloggers. “Does the privilege also protect . . . the stereotypical "blogger" sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his

way?” *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 979-80 (D.C. Cir. 2005). The answer is no—Petitioner’s lack of resources and any transparent, formal editorial process eliminated the possibility of disseminating accurate information.

ii. A Qualified Reporter’s Privilege Does Not apply here because Petitioner did not Intend to use the Information from his Anonymous Source in the Dissemination of News.

If bloggers are entitled to the qualified reporter’s privilege, Petitioner is not entitled to invoke it because at the time he acquired the information from Professor Chaos, he did not intend to use the information in the dissemination of news. In order to invoke the qualified reporter’s privilege, reporters need to meet two requirements at the time they acquire information: (1) the reporter intends to use information from an anonymous source in the dissemination of news and (2) such intent existed when the information was obtained. *See Gonzalez v. NBC*, 194 F.3d 29, 34 (2d. Cir. 1998); *Von Bulow v. Von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987). This test is proper as it limits the invocation of the privilege to those who intended on acting in a journalistic capacity upon acquiring the information. *See Gonzales*, 194 F.3d at 34. To qualify for the privilege, one must be “involved in activities traditionally associated with the gathering and dissemination of news” at the time the information is acquired. *Von Bulow*, 811 F.2d at 144.

This two-part test evolved from the holding in *Von Bulow*. *See Gonzalez*, 194 F.3d at 34. The items sought in *Von Bulow* concerned a manuscript prepared from sources whom the appellant promised would remain confidential. *Id.* at 145. Various individuals gave statements to the appellant as they felt she would be a proper recipient of information, but not for the purposes of publication. *Id.* at 147. Although the appellant did use the information contained in the manuscript for an unpublished book, at the time that it was compiled she had no such intention and therefore the court found it admissible. *Id.*

Similar to *Von Bulow*, Professor Chaos sought out Petitioner due to their mutual disdain for Citrus. Petitioner does not satisfy either part of the Second Circuit test because he (1) lacked the requisite intent to disseminate the information obtained from Professor Chaos as “news” in any traditional sense and (2) the requisite intent never existed at any time Petitioner was in possession of the information at issue. His intent was not to disseminate news per se, but to cherry-pick information for revengeful purposes to damage companies, particularly Citrus, that he felt nearly drove him out of business.

This contention is further bolstered by the fact that the Blog garnered “peak” attention on the day that Petitioner appeared on “The Countdown Factor,” at which time Respondent was dubbed the “Most Heinous Individual in the Galaxy.” (J.A. at 6.) Much like “The Countdown Factor,” Petitioner’s blog is not news, but only entertainment. Similar to Respondent’s “Most Heinous Individual in the Galaxy” award, Petitioner called Citrus the “enemy,” referencing “shackling,” “slave driv[ing],” and “capitalist oppression.” (J.A. at 6.) This terminology does not comport with what should be regarded as investigative journalism, only entertainment. *See, e.g.,* Society of Professional Journalists, Code of Ethics, <http://www.spj.org/ethicscode.asp> (last visited October 1, 2009) (stating that reporters should “[d]istinguish between advocacy and news reporting. Analysis and commentary should be labeled and not misrepresent fact or context.”).

Information used for entertainment purposes should not qualify as news for the purposes of this analysis as any entertainer who makes bold assertions would be subject to the privilege, whether true or not. The information that Petitioner posted to his blog should be labeled as entertainment and not news. Petitioner possessed no requisite journalistic intent to disseminate the information he received from Professor Chaos, but only sought to injure Citrus and the

Broflovskis. Therefore, Petitioner fails the Second Circuit test and cannot invoke a qualified reporter's privilege.

iii. Respondent's Defamation Claim Supersedes an Invocation of a Qualified Reporter's Privilege because the Need for the Information is Highly Relevant to Respondent's Case, Critical to its Maintenance, and Not Available from other Sources.

The District Court of Silverado adopted a reporter's privilege balancing test that is identical for all practical purposes to the test utilized by the Second Circuit in *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir. 1982). (J.A. at 12.) Under this standard, the qualified reporter's privilege can be overcome where the information being sought is: "(1) highly material and relevant, (2) necessary or critical to the maintenance of the claim, and (3) not obtainable from other available sources." *In re Petroleum*, 680 F.2d at 7; *see also Zerilli*, 656 F.2d at 713-15; *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977).

Because the identity of Professor Chaos would be highly material and critical to the maintenance of this defamation action, the first two prongs of the *In re Petroleum* test are satisfied. In a claim for defamation, negligence, recklessness, or knowledge of falsity must be shown and Respondent cannot do so without deposing Professor Chaos. *See* Restatement (Second) of Torts § 580(B) (1965). Without his testimony it is impossible to ascertain the circumstances in which the false information was conveyed as Petitioner can only testify on half of the story. The context in which Petitioner received that information is essential in proving that Petitioner was negligent or reckless in relying on it. Further, Professor Chaos' identity could be used to support a theory of defamation because if evidence shows that he was a blogger like Petitioner seeking to damage companies such as Citrus, Professor Chaos would likely not be considered a reliable news source.

Finally, because it is the actual identity of Professor Chaos itself that is sought and because his identity is not available from other sources, the third prong of the *In re Petroleum* test is satisfied. The Respondent has already deposed the manager of the Mumbai factory and several top engineers to no avail. (J.A. at 8.) Additionally, all Citrus employees received an email requesting the information regarding the source of the leak, which also turned up nothing. (J.A. at 8.) Respondent has already performed his due diligence in attempting to determine the source behind the photograph. He should have to look no further as he is a victim of defamation and should not be required to expend considerable resources in order to discover the source of a reporter who published false and misleading information. Since all three prongs of the *In re Petroleum* test are satisfied, Respondent's defamation claim supersedes Petitioner's attempt to invoke a qualified reporter's privilege.

II. PETITIONER SHOULD BE HELD LIABLE FOR DEFAMATION ON A NEGLIGENCE STANDARD ON GROUNDS THAT RESPONDENT IS NOT A LIMITED-PURPOSE PUBLIC FIGURE.

Libel, slander, and defamation are not afforded full constitutional protection. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Whether defamatory statements receive constitutional protection directly depends on the status of the figure targeted by the remarks. *Gertz*, 418 U.S. 345, 351. Persons considered limited-purpose public figures inject themselves into a particular public controversy and are only given public figure status for that controversy. *Id.* 351-52. Conversely, private persons are those individuals who do not voluntarily seek out public attention, but nonetheless are recipients of defamatory statements. *See* Restatement (Second) of Torts § 580(B) (1965). General-purpose public figures¹ and limited-purpose public figures must show actual malice, a higher burden than those deemed private persons who need only prove

¹ Petitioner concedes that Respondent is not a general-purpose public figure; therefore, this brief will not address the issue.

negligence to recover. *See Gertz*, 418 U.S. at 351-52. This Court has justified these differentiations by reasoning that persons who avail themselves to the public spotlight subject themselves to potential false allegations. *Id.* Here, Respondent is a private person as he did not invite public attention; therefore, Petitioner is liable on a negligence standard.

A. Negligence is the Standard in this Defamation Claim because Respondent is a Private Person, not a Limited-Purpose Public Figure.

Among the majority of Circuits, two tests exist for determining whether an otherwise private person is considered a limited-purpose public figure for a particular controversy. *Compare Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-37 (2d Cir. 1984), with *Waldbaum v. Fairchild Publ'ns*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980). While Respondent would qualify as a private person under either test, the *Lerman* test is the sounder of the two as it only elevates private persons to the status of limited-purpose public figures where those individuals intentionally sought out the public spotlight. *See* 745 F.2d at 136-37. In contrast, under the *Waldbaum* test, an individual may involuntarily be considered a limited-purpose public figure based solely on the public controversy. *See* 627 F.2d at 1296-98. Since Respondent is a private person, Petitioner is liable for defamation under a negligence standard.

i. Respondent Does Not Qualify as a Limited-Purpose Public Figure Under the Standard Adopted by the Second Circuit Court of Appeals.

Under the Second Circuit's test, an individual is considered a limited-purpose public figure where the person: (1) "successfully invited public attention" prior to the allegedly defamatory remarks, (2) "voluntarily injected himself" into the public controversy in question, (3) "assumed a position of prominence" in the controversy, and (4) maintained "regular and continuing access with the media." *Lerman*, 745 F.2d at 136-37. This Court should adopt this test because it shields individuals from meeting a higher burden when they did not intentionally

subject themselves to the public spotlight. *See id.* The four-factor approach ensures that those individuals who do not willfully seek the spotlight will not be forcefully and unjustly pushed into it without proper recourse. *See Time, Inc. v. Firestone*, 424 U.S. 448, 448 (1976).

The plaintiff in *Lerman* was a popular female novelist who published books with sexual themes. 745 F.2d at 137. The defendant publisher misidentified her in two photographs in which an actress was shown topless in one photo and in an “orgy” scene in the other. *Id.* at 127. The court found that the plaintiff was a limited-purpose public figure for controversies regarding the subject of sexuality as she voluntarily published on the issue, invited media attention through those publications, and thereby obtained prominence through the high profits she grossed through that work. *Id.* at 137-38.

Unlike the plaintiff in *Lerman*, Respondent does not meet any prong of the test. First, Respondent did not invite public attention as he avoids publicity and is rarely seen in public. (J.A. at 3.) Second, he did not voluntarily inject himself into this controversy because he was only involved in the development of the ePlay, not in the manufacturing of it. (J.A. at 3.) Further, no evidence exists that Respondent entered the Citrus plant itself. (J.A. at 7.) Third, he did not assume a position of prominence in the controversy because he did not personally respond to the allegations at any time. (J.A. at 7.) Finally, Respondent does not have regular and continuing access with the media as his position in the company does not afford him such privileges. (J.A. at 4.)

The Second Circuit’s test can be used as a shield to protect private persons from public attacks against character such as the attacks against Respondent in this case. Clearly, Respondent fails to satisfy any element of this test. Therefore, he is a private person for the purposes of this suit and Petitioner’s bad acts are evaluated under a negligence standard.

ii. If this Court were to adopt the Plurality Test utilized by the District Court of Silverado, Respondent is still not a Limited-Purpose Public Figure.

The District Court in this case adopted the plurality approach by combining tests from three circuits: the Eleventh, Fifth, and the D.C. Circuit. (J.A. at 16.) For all practical purposes, this test is laid out in its entirety by the D.C. Circuit in *Waldbaum v. Fairchild Publications*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980). In determining if the individual is a limited-purpose public figure, the *Waldbaum* test asks whether: (1) the issues surrounding the litigation are a matter of public controversy, (2) whether the plaintiff’s role in the controversy is “trivial or tangential,” and (3) the alleged defamation must be “germane to the plaintiff’s participation in the controversy.” *Id.* Contrary to the Second Circuit’s test, the *Waldbaum* test raises private persons to the level of limited-purpose public figures where those persons are drawn into the public spotlight by no initiative of their own. *See id.* This Court has rejected this principle, stating: “Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.” *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979).

In *Waldbaum*, the plaintiff ex-Chief Executive Officer sued the defendant trade publication for statements it made regarding his ousting. 627 F.2d at 1290. The court held that the plaintiff was a limited-purpose public figure. *Id.* at 1300. According to the *Waldbaum* court, a public controversy exists where the issue is “being debated publicly and if it ha[s] foreseeable and substantial ramifications for nonparticipants.” *Id.* at 1297. There was a public controversy because the supermarket industry practices advocated by the plaintiff were a “subject of public debate.” *Id.* To fulfill the second prong, “[t]he plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.” *Id.* As a “leading advocate of certain precedent-breaking policies,” plaintiff was trying to influence the outcome of the controversy. *Id.*

at 1299. Lastly, the defamation concerning plaintiff's "talents, education, experience, and motives" were germane to his attempts at influencing policy as CEO. *Id.* at 1298.

Unlike the plaintiff in *Waldbaum*, Respondent does not satisfy any of the three prongs. First, the alleged treatment of the workers at the plant does not constitute a matter of public controversy. Here, no facts exist that would show that the alleged human rights violations are being publicly debated before the fabricated photograph was posted on the Blog. Also, the only stated "news" program to discuss the treatment of the workers in Mumbai occurred on "The Countdown Factor," which resembles mere entertainment, not legitimate news.

Similar to the first prong, there is insufficient evidence to satisfy the second and third prongs. Respondent's role in the controversy cannot be considered more than trivial because no evidence exists that he exercised oversight on the factory in Mumbai, let alone ever set foot inside it. (J.A. at 7.) Further, since there is no connection between Respondent and the Mumbai factory, the statements made by Petitioner cannot be germane to the false allegation of participation. "Being an executive within a prominent and influential company does not by itself make one a public figure. In many cases, a corporate official is simply a conduit for announcing and administering company policies made by others." *Waldbaum*, 627 F.2d at 1299. Per this reasoning, Respondent does not even rise to the level of a conduit for administering policy because he had no connection to the manufacturing plant whatsoever. In sum, Respondent is a private person for purposes of this lawsuit as he does not satisfy any of the requirements of the *Waldbaum* test.

iii. Under a Negligence Standard, Petitioner is Liable for Defamation because he Failed to Act as a Reasonably Prudent Person in Posting the False Information to the Blog.

The standard for defamation is a determination that belongs to the states. *Gertz*, 418 U.S. at 347. The State of Silverado developed a negligence standard identical to that in the Second Restatement of Torts. (J.A. at 30.) Under the Restatement, a private person may recover where the publisher of the information “acts negligently in failing to ascertain” the false and defamatory nature of the published information. Restatement (Second) of Torts § 580(B) (1965). The determinative question hinges on “whether the defendant acted as a reasonable, prudent person under the circumstances in publishing the defamatory communication on the basis of his check or lack of check as to its accuracy and as to its defamatory character.” *Id.* § 580(B) cmt. h.

The Restatement lists three factors for gauging whether the publisher was negligent: (1) who the information was designed to target such as whether the information regarded an “important interest in democracy” or “mere gossip,” (2) the extent of potential injury to the targeted party if the information proves to be untrue, and (3) whether the content of the news warranted immediate dissemination to the public or whether there was time for investigation. *Id.* In consideration of these factors, a reasonably prudent person under the same or similar circumstances to that of Petitioner would have taken steps to verify the photograph’s accuracy prior to posting it.

First, Petitioner chose conclusory language lacking any factual support indicative of mere entertainment. Petitioner decided on language to injure Citrus and Respondent and not out of any genuine concern for the public or those factory workers in the photo in question. Statements alleging that Respondent was the “the pawn of his evil older brother Kyle,” comparing the workers in the factory to “cheap status toys,” and even referring to himself as a “loveable fuzz-

ball” shows that his blog was geared more towards entertainment purposes than any legitimate news reporting. Those statements made by Petitioner should be viewed as nothing more than “mere gossip” that has no real value to society. The facts of this case mirror those in *Blumenthal v. Drudge*, 992 F. Supp. 44, 57 (D.D.C. 1998), where the defendant posted defamatory information on his website regarding a White House staff person. The court held and the defendant himself admitted that he was nothing more than a “purveyor of gossip.” *Id.* at 57 n.18. Similar to the defendant in *Blumenthal*, Petitioner is no journalist—he is only a disseminator of gossip.

Second, the stakes in this case are high. The defamatory statements made by Petitioner put Respondent’s life at risk. As stated in the facts, Respondent became depressed and received death threats as a result of the defamation. (J.A. at 7.) Harm to Respondent was further exacerbated by the resulting drop in Citrus’ stock price and loss of profits caused by the removal of the ePlay from retailers’ shelves. (J.A. at 6-7.) Petitioner was cognizant of the potential harm and sought to ruin both Citrus and Respondent due to his vendetta against Citrus whom he felt damaged and nearly ruined his business.

Finally, the “news” in question did not require immediate dissemination to the public as no rational basis existed for posting the information in question the day after Petitioner received it. This “immediate dissemination” factor cited by the Restatement is otherwise referred to as “hot news.” Restatement (Second) of Torts §580(B) cmt. h (1965); *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 521 (1991). Circuits defining the hot news doctrine have stated that it pertains to the “competitive edge” component of the need to publish news. *See, e.g., Fin. Info., Inc. v. Moody's Investors Serv., Inc.*, 808 F.2d 204, 209 (2d Cir. 1986) (*citing Int'l News Serv. v. Assoc. Press*, 248 U.S. 215 (1918)); *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d

1102, 1105 (C.D. Cal. 2007) (citing *NBA v. Motorola*, 105 F.3d 841, 845 (2d Cir. 1997)). Not only is there a complete lack in evidence suggesting other news sources might have reported on the story before Petitioner, but also there is no showing that other news sources even conducted their own investigations into the alleged incident. Additionally, because Petitioner was under no deadline, the “news” he sought to be disseminated cannot be considered “hot.” *Masson*, 501 U.S. at 520. If in fact the “news” was hot, Petitioner would have sent it the very day he received it. Since Petitioner’s actions satisfy the elements of negligence and the “news” he posted on his blog was not “hot,” Petitioner is liable for defamation.

B. Alternatively, if this Court Finds that Respondent is a Limited-Purpose Public Figure, Petitioner is Still Liable for Defamation because his Actions Meet the Actual Malice Standard.

Under the Restatement Second of Torts, to recover for actual malice, a limited-purpose public figure must prove that the disseminator of the information (a) knew that the defamatory statement was false or (b) acted in “reckless disregard” in publishing the defamatory information. Restatement (Second) of Torts § 580(A) (1965). “Knowledge of falsity” is determined on a case-by-case basis by evaluating whether the defendant knowingly published false information. *See Silvester v. Am. Broad. Co.*, 650 F. Supp. 766, 778 (S.D. Fla. 1986). As stated by the *Silvester* court, the plaintiff must prove through circumstantial evidence that the defendant knew the information was false. *Id.* at 777-78. Alternatively, recklessness is determined by gauging whether the defendant “entertained serious doubts as to the truth of his publication” before disseminating the information. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). In cases such as this one involving an anonymous source, recklessness can be shown where “there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.” *Id.* at 732.

i. Petitioner is liable for Defaming Respondent under an Actual Malice Standard because Petitioner knew that the Information he Posted on the Blog was False.

This Court has recognized that if one publishes a falsehood intentionally, the utterance is not protected by the First Amendment. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), *overruled on other grounds by Curtis Publ'n Co. v. Butts*, 388 U.S. 130, 134 (1967). Instead, the societal interest of “order and morality” outweighs the expression of “calculated falsehoods.” *Garrison*, 379 U.S. at 75 (*citing Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

In this case, as shown by the circumstantial evidence, Petitioner knew that his assertions in the Blog were false as Petitioner intended to destroy Citrus. Petitioner holds companies that engage in international trade, such as Citrus, responsible for the “systematic oppression of the peoples of the Third World.” (J.A. at 4.) He specifically has a personal vendetta against Citrus, whom he feels nearly drove his company out of business. (J.A. at 4.) The use of phrases such as “enemy lines,” “fruit of a very poisonous tree,” and “pawn of his evil older brother” are all indicative of contempt.

Further proof of this can be found by comparing his accounts of the conditions in the factory with the description of the photograph itself. The photograph depicted Respondent yelling at workers while walking through the Mumbai factory with subordinates. (J.A. at 5.) In reference to the photograph, Petitioner made assertions such as “slave-like conditions,” treating the workers like “cheap status toys,” “shackling” the workers to their work areas, and accusing the Respondent of being a slave driver. These statements are a grossly inaccurate interpretation of the photograph itself. One cannot leap to such extreme conclusions based on this photograph. An image of a man yelling simply cannot elevate him to the status of “slave driver.”

ii. Additionally, Petitioner is Liable for Defaming Respondent under an Actual Malice Standard because Respondent Acted in ‘Reckless Disregard’ in Publishing the Defamatory Information.

A person is liable for defamation under an actual malice standard where that person disseminates false information while entertaining serious doubts to its accuracy. *Harte-Hanks Commc’n Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). Such doubts may pertain to the accuracy of the information or to the veracity of the individual providing the information. *St. Amant*, 390 U.S. at 732. Further, one cannot disregard those doubts by purposely avoiding the truth of the information in question prior to disseminating it. *Harte-Hanks*, 491 U.S. 692-93.

The language contained in Petitioner’s Blog is indicative that he entertained serious doubts regarding his own extreme assertions. The *St. Amant* Court held that a limited-purpose public figure may recover for defamation upon showing “sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” 390 U.S. at 731. The title of the Blog “Citrus Engaging in Acts of Modern-Day Slavery?” is a question in and of itself, demonstrating Petitioner’s doubt. These doubts continue in the first sentence of the Blog where Petitioner states that “*it appears* that that the obscene profits generated by . . . Citrus Electronics . . . are the fruit of a very poisonous tree.” (J.A. at 6.) (emphasis added). Even the caption to the photograph, “*where’s* the whip, Ike?” indicates Petitioner’s doubt of actual human rights abuse: (J.A. at 6) (emphasis added). Finally, the language that is most indicative of serious doubt is found towards the end of the Blog: “*If* the image I am showing you depicts what *I think* it does, then I’m telling you the truth, Ike Broflovski is nothing but a slave driver!” (J.A. at 6) (emphasis added). Petitioner’s posting of these damning allegations while entertaining such a high level of doubt is the essence of recklessness.

Additionally, the *Harte-Hanks* Court recognized the importance of conducting sound investigations to determine the factual accuracy of the information received from sources prior to dissemination. 491 U.S. at 692-93. In that case, the defendant newspaper was a supporter of an incumbent judge and alleged in a news story that the plaintiff used “dirty tricks” and bribery to sway a grand jury in indicting the incumbent judge’s director of court services. *Id.* at 660. This Court found “unmistakably” sufficient evidence that the defendant newspaper publisher acted with actual malice where it purposely avoided the truth in reviewing accessible information such as a key witness and tapes of an interview. *Id.* at 692. Inaction on the part of the defendant was a determinative factor in finding actual malice. *Id.*

Similarly to the defendant in *Harte-Hanks*, Petitioner acted with actual malice in failing to corroborate the assertions of Professor Chaos and thereby purposely avoided the truth. Per *Harte-Hanks*, any action at all on the part of Petitioner in attempting to gain a secondary perspective regarding the authenticity of the photograph or the accounts of Professor Chaos would have been sufficient; however, no such steps were taken. Petitioner could have taken the simple step of verifying the photograph using his PhotoWorks software, but even this he chose not to perform. Instead, Petitioner was more eager to damage Citrus and Respondent than check the reliability and accuracy of the photograph and accompanying depiction. Because Petitioner failed to take these basic steps to verify the accuracy of such damning information prior to disseminating it, his omission in purposely avoiding the truth constitutes blatant recklessness.

Petitioner is liable for defamation because his actions constitute actual malice. He acted reckless because he entertained serious doubts as to the truth of the photograph and purposely avoided that truth. Petitioner must be held accountable for such reckless acts that resulted in irreparable harm to Respondent.

CONCLUSION

Petitioner is not protected by a qualified reporter's privilege because the privilege does not exist within the First Amendment. Regardless, as a part-time blogger, Petitioner does not qualify for any such privilege because he is not a reporter. Furthermore, Respondent is a private person and Petitioner is liable for defamation under either a negligence or actual malice standard as his actions were intentional and reckless.

As Chief Justice Warren once stated, the “[f]reedom of the press under the First Amendment does not include absolute license to destroy lives or careers.” *Butts*, 388 U.S. at 170. For the foregoing reasons, Respondent respectfully requests this Honorable Court to affirm the decision of the Fifteenth Circuit Court of Appeals.

Respectfully Submitted,

October 2, 2009

Team 228