

CASE NO. 09-2701

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2009

ERIC CARTMAN,

Petitioner,

-against-

IKE BROFLOVSKI,

Respondent,

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

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

- I. Should this Court affirm the decision of the Court of Appeals for the Fifteenth Circuit granting Ike Broflovski's Rule 37 motion to compel Eric Cartman to disclose the identity of his anonymous source, Professor Chaos, whose photograph is the subject of this defamation suit because:
 - A. The First Amendment does not create a qualified reporters' privilege; and,
 - B. Even if there was a privilege, Cartman would not be protected because he did not engage in newsgathering or investigative reporting, and knowledge of Professor Chaos's identity is necessary for Broflovski to have a fair opportunity to prevail on his defamation claim?

- II. Should this Court affirm the decision of the Court of Appeals for the Fifteenth Circuit denying Cartman's motion for summary judgment on Broflovski's defamation claim because Broflovski is not any type of public figure and is therefore a public citizen?

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JURISDICTION STATEMENT

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

STATEMENT OF THE CASE

Ike Broflovski (“Broflovski” or “Ike” or “Respondent”) is the Director of Research and Development at Citrus. (J.A. at 3). Ike has only held this position for the past three years. Id. Citrus is a company that specializes in consumer electronic products. Id. at 2. The CEO and majority shareholder, Kyle Broflovski (“Kyle”), Ike’s brother, is the public face of the company. Id. When Ike was hired by Kyle in 2006, a moderately-attended a press conference held. Id. at 3. During the event, Ike made no comments, except for a brief thank you to his brother, which he expressed his excitement for working at Citrus. Id. At the press conference, Kyle emphasized that his brother is shy, and further stated not to pay any attention to the man behind the curtain. Id. Ike’s hiring was sparingly acknowledged by the media. Id. In fact, the Associated Press was the only media outlet to write a story. Id. The story focused on Kyle’s announcement of a “new and exciting line of products,” and secondarily mentioned Ike’s hiring in the bottom paragraph of the article. Id.

While Kyle likes to boast about his Ike’s fine work with Citrus, Ike maintains a very limited profile. Id. Since Ike’s hiring, he has not given a single interview to the press and is rarely seen in public. Id. The only information that is available about Ike, is the limited contact information that is provided on the Citrus website. Id. at 4. No biographical information is available. Id. All that is posted is his work telephone number, work e-mail, work mailing address, and a head shot. Id. Despite Ike’s shy demeanor and low profile, Citrus employees wear makeshift “I Like Ike” buttons to celebrate his innovations. Id. at 3-4.

Eric Cartman (“Cartman” or “Petitioner”) is the sole proprietor of Cartman’s Computer World, a declining business (J.A. at 4). After a Citrus store opened across the street from Cartman’s Computer World, Cartman decided to attempt to become a part-time blogger for profit to supplement his declining income. Id. Cartman began a blog entitled The Sludge Report

(“Sludge Report” or “Blog”) operated on the third party server, Bloggeroo. Id. The Sludge Report contains third party information attained from various internet sites and newspaper headlines. Id. The Sludge Report posts information on a wide variety of topics. Id. Cartman has a particular disdain for large companies, especially Citrus and its CEO Kyle whom he harshly criticizes. Id.

Some of the topics on the Sludge Report are sent to Cartman by readers of his Blog via his personal e-mail. Id. at 4-5. Cartman treats all individuals who send him e-mails as confidential sources. Id. at 5. On July 7, 2008, Cartman received an e-mail from “Professor Chaos.” Id. Cartman and Professor Chaos know each other personally as they met at an electronic trade show two years ago. Id. Professor Chaos has previously provided Cartman with information regarding the release of Citrus products. Id. In the July 7 e-mail, Professor Chaos alleged that Ike was engaging in human rights violations at a Citrus facility outside of Mumbai, India. Id. Attached to the e-mail was a digital photograph allegedly depicting workers wearing surgical masks while working on assembly machines with minimal protective gear. Id. During discovery the photograph was found likely to be doctored. Id.

Cartman, did not validate the authenticity of this photograph using his photo software with forgery detection capabilities. He has used this software on numerous occasions. Nevertheless, Cartman posted the photograph on the Sludge Report, the next day. Id. 5, 7. Accompanying the photograph was the headline: “Citrus Engaging in Acts of Modern-Day Slavery?” Id. at 5. Underneath the photograph Cartman added a disdainful post personally attacking Ike. Id. at 5-6. As a result of this post, Professor Chaos’s photograph found itself all over the mass media. Id. at 6. Also, Citrus’s stock dropped 25% and a number retailers pulled

its products from the shelves. Id. at 7. In response to this allegation, Ike did not say a word. Id. The only message released was done so indirectly, through his attorney. Id.

On September 20, 2008, Ike commenced a defamation suit against Cartman in Silverado Superior Court on the grounds that Cartman's statements were libelous. Id. On October 14, 2008, Cartman removed the case to federal court on diversity grounds. Id. During discovery, Ike attempted to determine the source of the photograph. Id. at 8. The manager and top engineers from the Mumbai facility were deposed and an e-mail was sent to every Citrus employee requesting information regarding the source of the leak. Id. After exhaustive discovery yielded few leads, Ike submitted an interrogatory to Cartman asking for the full name and any contact information of Professor Chaos. Id. On December 29, Cartman responded, invoking a qualified reporters' privilege under the First Amendment, as a news reporter against the disclosure of Professor Chaos. Id. Ike subsequently filed a motion to compel Cartman to reveal the identity of Professor Chaos pursuant to Federal Rules Civil Procedure 37. Id. Cartman filed an opposition to this motion on January 16, 2009 and concurrently filed a counter motion for summary judgment on the defamation claim. Id. The United States District Court for the Western District of Silverado denied Ike's motion to compel discovery and granted Cartman's summary judgment motion on Ike's defamation claim. Id. at 2. Ike timely appealed to the United States Court of Appeals for the Fifteenth Circuit, which reversed and remanded the matter. Id. at 32. Subsequently, this Court granted certiorari.

SUMMARY OF THE ARGUMENT

I. The Fifteenth Circuit properly determined that Ike Broflovski's Rule 37 motion to compel Eric Cartman to disclose the identity of Professor Chaos should be granted. The First Amendment's freedom of press clause does not support the finding of a qualified reporters' privilege. Moreover, the egalitarian nature of the freedom of the press clause evidenced by the First Amendment's text, its historical underpinnings, and Supreme Court precedent interpreting its meaning are inconsistent with such a finding. Further, this Court in Branzburg v. Hayes explicitly disavowed the judicial creation of a reporters' privilege. Finally, judicial creation of a reporters' privilege usurps the legislative function, infringes upon states rights, and is unnecessary as courts possess sufficient mechanisms to guard against discovery abuses.

Even if there was a qualified reporters' privilege, Cartman would not qualify for protection, and therefore he still must disclose the identity of Professor Chaos. By posting the photo from a third party, Cartman is merely acting as a passive conduit. He has not engaged in any investigative reporting or newsgathering. Moreover, the photo was posted to satisfy his personal vendetta against Citrus, not to promote the principles underlying the First Amendment.

In the event this Court finds Cartman is protected by a privilege, he still must disclose the identity of "Professor Chaos." Here, Broflovski's need for the evidence, society's interest in the fair administration of justice, and the bedrock principle that individuals must give testimony in court when properly summoned all outweigh Cartman's interest in non-disclosure. Also, the identity of Professor Chaos is absolutely crucial for Broflovski to prove the elements of malice or negligence for his defamation claim. Finally, Broflovski has exhausted all reasonable alternative sources of information throughout discovery in attempting to determine the identity of

Professor Chaos. As a result, the Fifteenth Circuit's decision granting Broflovski's Rule 37 motion must be affirmed.

II. This Court should affirm the decision of the Fifteenth Circuit Court of Appeals and find that Ike Broflovski is not a limited-purpose public figure and therefore is a private citizen. As a private citizen bringing a suit for defamation, Ike must only meet the standard of common law negligence as adopted by the State of Silverado. A jury would reasonably conclude that Eric Cartman's statements against Ike were negligent and defamatory. Additionally, if this Court decided to adopt any of the tests laid out by the Circuit Courts in order to help determine what constitutes a public figure, the results of this law suit would remain unchanged. Therefore, the holding of the Court of Appeals for the Fifteenth Circuit should be affirmed.

I. RESPONDENT MUST DISCLOSE THE IDENTITY OF PROFESSOR CHAOS AS THERE IS NO QUALIFIED REPORTERS' PRIVILEGE UNDER THE FIRST AMENDMENT, THE INFORMATION BROFLOVSKI REQUESTS IS DISCOVERABLE UNDER FEDERAL RULE OF CIVIL PROCEDURE § 26(b)(1), AND KNOWLEDGE OF PROFESSOR CHAOS'S IDENTITY IS NECESSARY FOR BROFLOVSKI TO BE GIVEN A FAIR OPPORTUNITY TO PROVE HIS DEFAMATION CLAIM.

The Fifteenth Circuit properly determined that Ike Broflovski's Rule 37 motion to compel discovery should be granted. (J.A. at 27); see Fed. R. Civ. P. § 37. No qualified reporter's privilege can be discerned from the First Amendment's text, its historical underpinnings, or the framers intent. Moreover, the plain meaning of this Court's holding in Branzburg v. Hayes is inconsistent with the creation of a qualified reporters' privilege. 408 U.S. 665 (1972). Additionally, even if this Court were to hold that the First Amendment implies a qualified reporters' privilege, Broflovski's motion still must be granted as Cartman is not engaged in investigative reporting or newsgathering, and therefore is not afforded protection. Finally, even if the privilege were applicable, disclosure is still required as Broflovski's need for the evidence outweighs Cartman's interest in non-disclosure.

A. The Egalitarian Nature Upon Which The Freedom Of The Press Clause Was Crafted, And This Court's Decision in Branzburg v. Hayes Are Inconsistent With The Creation Of A Qualified Reporters' Privilege.

The freedom of the press clause was not intended to grant the press "special immunity from the application of general laws." Associated Press v. NLRB, 301 U.S. 103, 132 (1937). As Branzburg made clear, the clause does not permit a newsman to undermine society's interest in the fair administration of justice. 408 U.S. at 686-687. The clause exists to promote self-governance and freedom of speech by facilitating the exchange of ideas. See Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); Pell v. Procumeir, 417 U.S. 817, 832 (1974).

1. The Text Of The Freedom Of The Press Clause, Its Historical Underpinnings, And Supreme Court Precedent Interpreting Its Meaning Are All Inconsistent With The Creation Of A Qualified Reporters Privilege.

The freedom of the press clause safeguards democracy through ensuring “uninhibited, robust, and wide-open debate on public issues.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (internal quotations omitted). As this Court has made clear, such is not furthered by “the intentional lie nor the careless error,” which is what is at issue here. Id. When construing the purpose of a constitutional provision, we are guided by the provision’s text, its historical underpinnings, including the framers intent, and Supreme Court precedent. Also, when assessing the existence of a privilege, Supreme Court precedent demands they not be lightly created because they contravene the fundamental tenet that “the public...has a right to every man’s evidence.” U.S. v. Bryan, 339 U.S. 323, 331 (1950); U.S. v. Nixon, 418 U.S. 683, 710 (1974). The freedom of the press clause, when examined in this light is inconsistent with a qualified reporters’ privilege.

In relevant part, the First Amendment reads “Congress shall make no law...abridging the freedom...of the press.” U.S. Const. amend. I. The Amendment’s structure and its plain meaning evidences the freedom of the press’s primary goal was to eliminate governmental imposition of arbitrary prior restraints upon the freedoms it intended to protect. When interpreting the Amendment, “we are guided by the principle that...the words and phrases were used in their normal and ordinary” meaning. Dist. of Columbia v. Heller, 128 S.Ct. 2783, 2788 (2008). Here, the prefatory clause, “Congress shall make no law...abridging,” and the operative clause, ‘freedom of the press’ were purposely placed one after another. U.S. Const. amend. I.

The logical import is that Congress cannot pass laws (prior restraints), that deprive, or reduce the scope of one's right to freedom of the press.

What constitutes an unconstitutional prior restraint on the freedom of the press is determined by examining the clauses historical underpinning. This Court, in Lovell v. City of Griffin, GA and Grosjean v. Am. Press Co., examined the scope of the clauses proscribed activities in reference to its historical exigencies. 303 U.S. 444 (1938); 297 U.S. 233 (1936). In Lovell, this Court described “[t]he struggle for the freedom of press [as] primarily directed against the power of the licensor. 303 U.S. at 451. Similarly, this Court in Grosjean, framed the liberty of the press in the context of “persistent effort[s] on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the agencies and operations of the government.” 297 U.S. at 245. The language and historical exigencies make clear that the freedom of the press clause was intended to prohibit Congress from passing prior restraints in the form of licenses and censorship laws that would inhibit the free flow of information. This interpretation is further supported by Supreme Court precedent interpreting the clause. See Lovell 303 U.S. at 451-452 citing Near v. Minn., 283 U.S. 697, 713-716 (1931) (reasoning that “the prevention of [prior] restraint was a leading purpose in the adoption of the constitutional provision”); Grosjean, 297 U.S. at 249 (concluding “that by the First Amendment it was meant to preclude the national government,...from adopting any form of previous restraint upon printed publications or their circulation”).

Any contention that requiring journalists to respond to proper discovery requests inhibits the free flow of information is mere speculation, anecdotal, an impediment to the administration of justice, and contrary to freedom of the press' egalitarian undertones. Branzburg, 408 U.S. at

693. The freedom of the press was intended to be universally and equally applicable to all citizens. The creation of a qualified reporters' privilege would undemocratically elevate a select group of peoples over the rest of society. Such is paramount to the same licensing the freedom of the press was intended to protect against. Consequently, the freedom of the press clause is inconsistent with the creation of a reporter's privilege. Reporters, just as regular citizens must comply with proper discovery requests and not obstruct the courts in the administration of justice.

2. This Court, In Branzburg v. Hayes Explicitly Disavowed The Judicial Creation Of A Qualified Reporters Privilege, As Contrary To The Freedom Of The Press.

In Branzburg, the Supreme Court re-affirmed the egalitarian nature of the freedom of the press clause. 408 U.S. at 704 (concluding that “[f]reedom of the press is a fundamental personal right which is not confined to newspapers and periodicals”). In discerning the meaning of judicial precedent we are guided by the scope of the court's holding and the text's plain meaning. Here, the scope of the Court's holding was narrow and does not reserve a special testimonial privilege for newsmen. Branzburg, 408 U.S. at 667 (holding that “requiring newsmen to appear and testify before state or federal grand juries” does not abridge the freedom of the press clause).

In addition to not rejecting a reporters' privilege, the Branzburg Court unequivocally stressed why recognizing a privilege is imprudent and constitutionally troublesome. In reference to the privilege, the Court stated:

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer...as of the large metropolitan publisher.

408 U.S. at 703-704 (internal quotations omitted). There, the Court was stressing the that articulation of a reporters' privilege would eviscerate the central tenet of the freedom of the press. A reporters' privilege would transform the freedom of the press from a universally applicable constitutional safeguard, to one reserved only for a select few. It would undemocratically elevate the voices of a few, at the expense of society as a whole.

Despite the Branzburg's Court's holding and stern warning, the majority of Circuit Courts have fabricated a qualified reporters' privilege, finding its origin in Branzburg, and in particular, Justice Powell's concurrence. See e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 595-597 (1st Cir. 1980); Zerili v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981); Gonzalez v. Nat'l Broadcasting Co., Inc., 194 F.3d 29, 30 (2d Cir. 1999).

In attempting to justify the subsistence of a qualified reporters' privilege, the D.C. Circuit in Zerili reasoned that the Branzburg Court, in recognizing that "newsgathering is essential to a free press...indicated that a qualified privilege would be available in some circumstances." 656 F.2d at 711. This is the same disingenuous logic and judicial activism engaged in by all the circuits that have discovered a qualified reporters' privilege despite Branzburg's clear and explicit text. Those circuits have disregarded the bedrock judicial principle of stare decisis by ignoring this Court's reasoning, findings, and concerns in Branzburg and supplanting them with those of the dissent. See In re Grand Jury Proceedings, 810 F.2d 580, 584 (6th Cir. 1987).

Other circuits have rested their creation of a reporters' privilege on Justice Powell's concurrence. See Baker v. F&F Inv., 470 F.2d 778, 784-785 (2d. Cir. 1972). However, Powell's concurrence is wholly consistent with the Court's holding and is critical of the dissent's endorsement of the same reporters' privilege fabricated by the circuits today. Branzburg, 408

U.S. at 724 (Powell, J. Concurring) (concluding that “the new constitutional rule endorsed by that dissenting opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated”).

The circuits that find a qualified reporters privilege in Powell’s concurrence rest their claim on his mere use of the word privilege. Id. at 725. Yet, as stated by the Sixth Circuit, semantics alone does “not warrant the rewriting of the majority opinion to grant a first amendment testimonial privilege to news reporters, especially when the...language is considered in the context of the language which precedes it.” In re Grand Jury Proceedings, 801 F.2d at 585. In the passage preceding his use of the word privilege, Powell simply restated the fact that if a reporter believed the grand jury investigation was being used as a tool to “annex the news media as an investigative arm of government,” he like any other citizen can file a motion to quash. Branzburg, 408 U.S. at 709 (Powell, J. Concurrence)

a. Judicial creation of a qualified reporters’ privilege breaches the doctrine of separation of powers and infringes upon states rights.

If the Court were to create a qualified reporters’ privilege, it would be “making a value judgment that a legislature had declined to make.” Branzburg, 408 U.S. at 706. Congress can, and in fact, has attempted to pass a qualified reporters’ privilege. See H.R. 2101. Such is a tacit admission that the freedom of the press clause does not provide a basis for a privilege. Cartman is raising a challenge in the improper arena and fighting a challenge in the courts that he already lost in Congress. Moreover, state legislatures are in the best position to craft a privilege in reference to local concerns, needs, and values. Branzburg, 408 U.S. at 706. Indeed, thirty-four states thus far have done so. The elected state legislatures and not the unelected judiciary are in the best position to balance society’s interest in disclosure versus the asserted reporters’

privilege. The judiciary's role is to uphold the law, not to make the law with creation of a qualified reporters' privilege.

- b. A qualified reporters' privilege is unnecessary as the federal judiciary already possesses sufficient mechanisms to guard against discovery abuses.

In the absence of a qualified reporters' privilege, reporters are still provided safeguards to ensure discovery is not being abused to disrupt their relationships with confidential sources. See In re Grand Jury Proceedings, 810 F.2d at 586. Just as any other citizen, a reporter can file a motion to quash his testimony at a grand jury proceeding, on the grounds of harassment, or file a motion pursuant to Federal Rule of Civil Procedure § 26(c)(1), on the grounds that the discovery sought "is unreasonably cumulative, duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. Pro. § 26(c)(1). The fabrication of a reporters' privilege is not only unnecessary, but also usurps the role of legislatures, is disavowed by this Court in Branzburg, and is inconsistent with the egalitarian tenets of the freedom of the press clause. Therefore, Cartman must disclose the identity of his source.

B. Even If This Court Were To Find A Qualified Reporters' Privilege, Cartman's Posting Of Professor Chaos's Picture Does Not Qualify For Protection And Therefore He Still Must Disclose The Identity Of His Anonymous Source.

If there is a reporters' privilege, Petitioner would not be protected because he operates a personal, vindictive blog on a third-party server and neither engages in investigative reporting or newsgathering. (J.A. at 4-5). The Second, Third, Ninth, and Tenth Circuit all adhere to the same test to determine whether someone is protected by a reporters' privilege. See Bulow v. Bulow, 811 F.2d 136, 142-143 (2d Cir. 1987); In re Madden, 151 F.3d 125, 131 (3d Cir. 1998); Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-

437 (10th Cir. 1977). Under this test, an “individual claiming the protection of the journalist’s privilege must demonstrate...that they 1) are engaged in investigative reporting; 2) are gathering news; and 3) possess the intent at the inception of the newsgathering process to disseminate this news to the public.” In re Madden, 151 F.3d at 131. Supreme Court precedent dictates that privileges are not to be “expansively construed, for they are in derogation of the search for truth.” Nixon, 418 U.S. at 710 (1974). More is required than merely the seeking, gathering, or receipt of information. In re Madden, 151 F.3d at 130. The gravamen of the inquiry is whether granting the privilege will further the core tenets behind the freedom of the press. Baker, 470 F.2d at 782. When applying this test to Petitioner, it is clear he does not satisfy this burden.

1. By Posting Professor Chaos’s Photo, Petitioner Is Merely Acting As A Passive Conduit And Is Not Engaged In Investigative Reporting Or Newsgathering.

Petitioner is merely acting as a passive conduit for the posting of third-party content. (J.A. at 4). Petitioner does not even possess his own uniform resource locator (“URL”), commonly referred to as a web address, but hosts his site on a third party server. Id. This illustrates that this is a mere hobby for Petitioner and not a professional endeavor. There is no evidence that Petitioner “spent considerable time and effort in obtaining facts and information.” Compare Silkwood, 563 F.2d at 436 (holding that individual claiming privilege is protected because he engaged in investigative reporting by obtaining facts and information to create documentary film). All Petitioner did was provide a link to his email address, check his email, receive a picture from Professor Chaos, and then post that photo (J.A. at 4-5).

Petitioner’s actions, or lack thereof, are similar to the individual asserting the reporters’ privilege in, In re Madden. There, the individual asserting the privilege, produced tape recorded commentaries for World Championship Wrestling. Id. at 126. The commentaries promoted

upcoming events, announced results, and discussed wrestlers' lives. Id. The Third Circuit held that he did not qualify for the privilege because he was an entertainer, received all his information from a third-party, and uncovered no story of his own, nor investigated anything. Id. at 130. Similarly, Petitioner is a gossip columnist (evidenced by the blog's title, Sludge Report), received all his information from a third-party (Professor Chaos), and uncovered no story of his own. (J.A. at 4-5). Therefore, even under the most liberal interpretation, Petitioner did not engage in any journalistic or investigative endeavor.

2. Petitioner Posted The Photograph To Satisfy His Own Vindictive Desires And Not To Promote Self-Governance Or The Marketplace Of Ideas.

Petitioner disseminated Professor Chaos's photograph to avenge for his declining business. It is indisputable that Petitioner disseminated the photograph to the public. However, more than the mere act of dissemination is required. As the Second Circuit explained, the dissemination must further the purposes underlying the freedom of the press. Baker, 470 F.2d at 782. Here, dissemination of the photo will have no deterrent effect on future investigative reporting or promote the marketplace of ideas. Id. The photograph was not disseminated for the public good, but was done so for personal vindictive reasons.

Prior to operating his blog, Petitioner was the sole proprietor of Cartman's Computer World. (J.A. at 4). He did not begin his blog until his business began declining upon an opening of a Citrus store across the street. Id. Respondent is the Director of Research and Development for Citrus and his brother is the CEO. Id. at 2-3. Since the blog's inception, Cartman has been highly critical of Citrus. Id. at 4. Moreover, Professor Chaos may be an employee of Citrus. Id. at 6. The photograph in question was not disseminated for the betterment of the public good, but rather to further the vendetta of Petitioner and Professor Chaos. The dissemination to the public

is collateral to their narcissistic quest for revenge. The core tenets of the freedom of the press clause are not served here. Petitioner is not engaging in newsgathering, investigative reporting, or disseminating information for the public good, and therefore is not protected by a qualified reporters' privilege.

C. Even If Petitioner Was Protected By A Qualified Reporters' Privilege, He Still Must Disclose The Identity Of Professor Chaos Because Broflovski's Need For The Evidence And Society's Interest In The Fair Administration Of Justice Outweighs Petitioner's Interest In Non-Disclosure.

Professor Chaos's identity is necessary for Broflovski to have a fair opportunity to prevail on his defamation claim. When determining whether a journalist's interest in non-disclosure must yield to the private interest in disclosure and the public interest in the fair administration of justice, courts generally apply a balancing test. Baker, 470 F.2d at 783; Zerili, 656 F.2d at 712; Cervantes v. Time, Inc., 464 F.2d 986, 993-994 (8th Cir. 1982). In conducting this balancing test, courts must be mindful that "one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving testimony whenever properly summoned." Blackmear v. U.S., 284 U.S. 421, 438 (1932). This duty "to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press." Garland v. Torre, 259 F.2d 545, 548 (2d Cir. 1958). Factors to consider when conducting the balancing test include the individual's "need for the information" sought (whether it is of central importance to the claim), "efforts made by the litigants to obtain the information from alternative sources," and whether "the reporter is a party, as in a libel action." Zerili, 656 F.2d at 713-714. When applying these factors, it is clear that Broflovski's interest in disclosure outweighs Cartman's interest in the confidentiality of the identity of Professor Chaos.

1. Irrespective Of Whether Broflovski Is Deemed A Limited-Purpose Public Figure, Knowledge Of The Identity Of ‘Professor Chaos’ Is Necessary For Broflovski To Have A Fair Opportunity To Prevail On His Defamation Claim.

If Petitioner were permitted to assert the privilege, it would essentially shield him from liability. Under such a scenario, “the equities weigh somewhat more heavily in favor of disclosure.” Id. at 714. A plaintiff’s burden of proof on a defamation claim is dependent upon whether or not he is a private citizen or public figure. See Herbert v. Lando, 441 U.S. 153, 160 (1979). A private citizen must only make a showing of negligence. Id. In contrast, a public figure must make a showing “that the statement was made with ‘actual malice’ – that is, knowledge that it was false or with reckless disregard of whether it was false or not.” New York Times v. Sullivan, 376 U.S. 254, 279-280 (1974).

If Broflovski is deemed a public figure, knowledge of Professor Chaos’s identity is essential, because Broflovski “will have to demonstrate that [Professor Chaos] was unreliable and that [Cartman] failed to take adequate steps to verify his story.” Zerili, 656 F.2d at 714. Broflovski can also prove malice by showing that Professor Chaos’s photo was misrepresented or that reliance on Professor Chaos was reckless. Carey v. Hume, 492 F.2d 631, 637 (D.C. Cir. 1972). Here, Professor Chaos may be an employee of Citrus. (J.A. at 6). Moreover, discovery revealed that the photograph of Broflovski is likely doctored and Cartman made no showing of an attempt to corroborate the story. Id. at 7. Revelation of ‘Professor Chaos’s’ identity is necessary to allow Broflovski to attempt to make a showing that reliance on the doctored photograph was reckless and that Professor Chaos is an unreliable source whose story should have been verified.

Similarly, if Broflovski is held to be a private citizen, knowledge of ‘Professor Chaos’s’ identity is still necessary as it raises issues of whether Cartman was negligent in failing to corroborate the story or verify the authenticity of the photograph. In determining the authenticity of the photograph, knowledge of whether Professor Chaos is actually a Citrus employee is crucial. If he is not an employee, Cartman’s purported duty in verifying the authenticity of the photograph would be greater. Failing to do so would certainly be negligent, if not reckless. Since this action is one in libel, knowledge of the identity of Professor Chaos is crucial to the success of Broflovski’s defamation claim.

2. Broflovski Has Exhausted All Other Reasonable Alternative Sources Of Information To Determine Professor Chaos’s Identity.

In an effort to determine the identity of ‘Professor Chaos,’ Broflovski deposed the manager and top engineers of Citrus’s facility where the photograph was taken and “sent an e-mail to all Citrus employees requesting information on the source of the leak.” (J.A. at 8). Broflovski’s efforts yielded few leads. *Id.* In the context of the instant case, these efforts are reasonable. Citrus, a Fortune 500 company, likely has hundreds, if not thousands of employees working at the facility where the picture was taken. Moreover, as the Fifteenth Circuit properly pointed out, the litigant in this matter is Ike Broflovski, not Citrus nor its CEO. *Id.* at 27. As a result, the human relations power and financial capability of Citrus cannot be imputed to Broflovski. *Id.* Under a similar scenario, the D.C. Circuit held that a plaintiff need not depose every employee of the United Mine Workers of America to determine the identity of an anonymous source. *Zerili*, 656 F.2d at 713. Also, this case is distinguishable from *Baker*, where the court denied disclosure because plaintiff did not exhaust reasonable alternative sources of information. 470 F.2d at 783. There, the court’s ruling rested on the facts that the underlying

suit was a class-action, the journalist was not a party, and that plaintiff should have deposed the sixty named defendants in an attempt to determine the identity of the anonymous source. Id. at 780. In the instant case, Broflovski has exhausted all reasonable alternative sources of information and was left with no avenue other than Rule 37 to compel disclosure of Cartman's anonymous source.

For the foregoing reasons, the decision of the Court of Appeals for the Fifteenth Circuit, granting Broflovski's Rule 37 motion to compel must be affirmed.

II. THE FIFTEENTH CIRCUIT COURT OF APPEALS' DECISION TO DENY CARTMAN'S MOTION FOR SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE BROFLOVSKI IS NOT ANY TYPE OF PUBLIC FIGURE AND A JURY COULD REASONABLY CONCLUDE THAT CARTMAN'S STATEMENTS WERE NEGLIGENT AND DEFAMATORY

The Court of Appeals for the Fifteenth Circuit was correct in holding that Ike Broflovski is not a limited-purpose public figure. He is therefore a private citizen. In regards to defamation law, there are two vastly different standards of proof depending on whether the plaintiff is a private citizen or some type of public official or public figure ("public figure"). See generally, Sullivan, 376 U.S. 254 (1964); Gertz, 418 U.S. 323 (1974).

Ike Broflovski is not any type of public figure. As a private citizen, a plaintiff bringing an action for defamation can look to what the state has decided for its level of proof in such suit. The State of Silverado has adopted a standard that is consistent with the Second Restatement of Torts. A private citizen must only prove simple negligence in order to support a cause of action for defamation. See generally Restatement (Second) of Torts (1977).

A public figure, however, must adhere to the higher standard of the First Amendment. To prove a cause of action for defamation, a plaintiff must "demonstrate not only that the defendant's third-party communication was unprivileged, false, and defamatory, but also that the

defendant did so with “actual malice.” Curtis Publ’g Co. v. Butts, 388 U.S. 130, 160 (1967). Actual malice, for the purposes of a defamation claim, consists of a false statement of fact with knowledge that the statement was false or with reckless disregard to whether or not it was true. Sullivan, 376 U.S. at 280.

There is no strict definition of a public figure. Courts have looked to the actions of the plaintiff in order to make such a determination.

Where a person has, however, *chosen* to engage in a profession which draws him regularly into regional and national view and leads to "fame and notoriety in the community," even if he has no ideological thesis to promulgate, he invites general public discussion. . . . If society chooses to direct massive public attention to a particular sphere of activity, those who enter that sphere inviting such attention must overcome the Times standard.

Chuy v. Phila. Eagles Football Club, 431 F. Supp 254, 267 (E.D.P.A. 1977).

Further, circuit courts have established several tests in order to determine what constitutes a limited-purpose public figure. If this Court adopts one of the tests formulated by the circuit courts, the result of this appeal would remain unchanged. Ike Broflovski has not satisfied the essential elements of any of these tests.

A. Broflovski Is Not A Limited-Purpose Public Figure Because He Did Not Voluntarily Inject Himself Into A Public Controversy.

A strict rule of law has not been put forth in order to determine who or what would constitute a limited-purpose public figure. This Court, however, provided the appropriate framework to properly make an analysis on a case by case basis in Gertz. There, the court conducted a fact intensive analysis based on the individual’s actions. In Gertz, the Court stated that public figures are generally those who “have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are

deemed public figures for all purposes.” Gertz, 418 U.S. at 345. More importantly, the Court added that “more commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.” Id.

Gertz involved a defamation suit brought by a prominent Chicago attorney whose reputation was attacked and slandered by a John Birch Society publication during his time representing the family of a young man that was killed by a police officer. 418 U.S. 323 (1974). Robert Gertz, the plaintiff, was ruled to be a private citizen even though he was at the center of a highly publicized trial because “he plainly did not thrust himself into the vortex of this public issue, nor did he engage the public’s attention in an attempt to influence its outcome.” Id. at 352. Ike Broflovski did neither of these. In order to properly determine the fact that Ike Broflovski is not a limited-purpose public figure, a close look at the record is needed.

1. The Record Makes Clear That Ike Is A Private Citizen Because Of His Limited Public Role.

Ike has consistently maintained a low profile in both his professional and private lives. From the second that Ike was introduced by his brother Kyle at the Citrus press conference to announce his hiring, it was immediately known what type of person Ike was. The record clearly states that Ike “does not enter the public limelight.” (J.A. at 3). Referring to his brother, Kyle made a point to specifically say “pay no attention to the man behind the curtain.” Id. The only words that Ike uttered the entire press conference were in thanks to his brother Kyle and he expressed excitement to work for Citrus. See id.

Petitioner has pointed to the Associated Press story that mentioned the hiring of Ike to somehow prove that he voluntarily injected himself into a public controversy. However, this

story ran to announce the exciting new product lines of Citrus and only mentions Ike at the bottom of the article. See id. Respondent urges this Court to consider the wide ranging breadth of media coverage today. If a major corporation announces any type of restructuring within their business, it will undoubtedly be reported. Moreover, the report on Ike was secondary to the announcement of a new product line. See id.

Ike's limited biographical information on the Citrus's website in no way demonstrates that he is a limited-purpose public figure. See id. at 4. In today's society, it would be considered odd, even suspect, if a publicly traded, Fortune 500 Company would not have a website running with contact information for employees within the company. Ike cannot be considered a limited-purpose public figure because of an article that mentioned his name and because his name and head shot are posted on the company's website.

Petitioner will further point to the buttons that employees of Citrus were wearing that contained the phrase "I like Ike." Id. These were not even created by Ike. See id. at 3-4. These were makeshift buttons that were created by employees of the company to generate buzz and profit for Citrus. See id. The record is silent as to whether Citrus customers were even aware of who the "Ike" in these buttons was referring to, or for that matter, whether they are even aware that the buttons exist. See id.

The public controversy was created by Eric Cartman. After Cartman posted the photo and verbal tirade against Ike, a media swarm ensued. See id. at 6. However, there is no evidence suggesting that Ike was part of any type of slave labor scandal. The only information on this topic is that he traveled to Mumbai, India on a few occasions. While the mainstream media had picked up the story and Citrus' reputation has surely taken a hit, Ike has done nothing whatsoever to put himself in the middle of the story. See id. at 6-7. The only statement he even

made in response to the photo posted on Sludge Report was done indirectly through Ike's attorney. See id. at 7. Ike has not given one single interview since he was hired by Citrus and he is rarely seen in public. See id. at 3.

2. Ike Has Not Voluntarily Thrust Himself Into The Limelight And Therefore He Is Not Any Type Of Public Figure.

Decisions by this Court determining whether someone should be deemed a public figure are based on whether that person had voluntarily and affirmatively thrust themselves into the limelight. Looking at this Court's precedent, Ike's actions are consistent with others who have been deemed private citizens as plaintiffs in defamation suits.

In Time Inc. v. Firestone, the wife of a wealthy socialite, Mrs. Firestone, was held to be a private citizen during the middle of her not-so-private divorce proceeding. 424 U.S. 448 (1976). This woman was frequently seen in the newspapers and even had a team assembled to keep track of her publicity. The Court stated that Mrs. Firestone "did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it." Id. at 453.

Unlike Mrs. Firestone, Ike even took affirmative steps to stay out of the public eye. See (J.A. at 3). Before Cartman published the photo on his website, there was only one article that merely mentioned Ike's hiring. See id. Firestone had people keeping people track of her publicity. Firestone, 424 U.S. at 485. Just as Firestone's divorce became a public spectacle, the allegations against Ike became a punching bag for nightly news pundits. See id.; (J.A. at 6). This was neither Firestone's nor Ike's choice.

In Wolston v. Reader's Digest Ass'n, a man who was convicted of contempt because he refused to testify before a grand jury investigating espionage by the Soviet Union was deemed a private citizen. 443 U.S. 157 (1979). This received extensive publicity on a national level. See id. at 163, 170-171. The court refrained from deeming Wolston a public figure because the plaintiff did not “voluntarily thrust” or “inject...himself into the forefront.” Id. at 166. The court further stated that “the simple fact that these events attracted media attention also is not conclusive of the public-figure issue. 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.” Id. at 167. Just as in Wolston, Ike “did not in any way seek to arouse public sentiment in his favor and against the investigation.” Id. at 168.

In Hutchinson v. Proxmire, the Court ruled that a man who received a “Golden Fleece of the Month” award from United States Senator William Proxmire was a private figure because Mr. Hutchinson “at no time. . . assumed any role of public prominence.” 443 U.S. 111, 135 (1979). Ike had never given an interview. See (J.A. at 3). The record is silent as to whether he is even known by the general public. See generally id. at 3-8.

Ike has done considerably less than these people. He has abstained from the newspapers, radio and television airwaves, and the internet. See id. at 3. This controversy was wholly the creation of Cartman. Broflovski did not inject himself into the center of the conflict as he choose not even to directly comment on it. See id. at 7. Further, Ike was not the subject of any significant public notoriety or scrutiny before the alleged defamatory remarks by Cartman. See generally id. at 3; McDowell v. Paiewonsky, 769 F.2d 942 (3d Cir. 1985). “A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which

affects the general public or some segment of it in an appreciable way.” Waldbaum v. Fairchild Publications, Inc. 627 F.2d 1287 (1980).

Although this Court has recognized that it is possible for individuals to become involuntary public figures, it is of the utmost rarest of circumstances, and this Court has yet to make such a determination about anyone. Gertz, 418 U.S. at 345. It would be inconsistent with Supreme Court precedent for this Court to deem Ike Broflovski an involuntary limited-purpose public figure.

B. A Jury Would Reasonably Conclude That Eric Cartman’s Statements Were Negligent and Defamatory Because By Not Verifying The Photograph’s Authenticity He Deviated From His Own Custom And Practice.

Ike Broflovski is a private citizen. Therefore, as a plaintiff in this type of suit, Ike must only meet the common law standard for defamation. Silverado’s standard for defamation, and fault in defamation, is identical with the standard enunciated in the Second Restatement of Torts. (J.A. at 14). As in other torts, the standard for negligence in a defamation action is whether the defendant acted as a reasonably prudent person in the circumstances.” Id. at 15; Restatement (Second) of Torts § 580(H).

Here, Cartman did not act as a reasonably prudent person under the circumstances. The record unambiguously evidences that Cartman normally uses his advanced photo software with forgery detection capabilities to check if a photo he receives is authentic. See id. at 7. He deviated from this common practice and posted the photo without any regard for its authenticity. See id. This is not what a reasonably prudent person would do in the same circumstance, as evidenced by Eric Cartman’s deviation from his own normal procedure.

In a defamation claim, a jury generally must look to the nature of what had been posted by the defendant. “In assessing negligence, a fact finder will look to the context of the

communication, including whether the topic at hand is urgent or hot news, efforts to corroborate sources, independent investigation into the truth of the matter and other relevant facts.” Id. at 30-31; Restatement (Second) of Torts § 580(B) cmt. c. While a story about human rights violations has considerable merit, it is unrealistic to categorize the report as hot news. Today’s society consists of much debate and controversy. The United States economy is in shambles, there is constant debate over the policies being put forth by President and Congress. Further, the press is continually consumed with the ongoing war on terror. Under such circumstances, a report about a human rights violation in another country, by a corporation cannot be viewed as a paramount issue

The record indicates that Cartman did not write this post on the Sludge Report out of any type of moral or ethical concern. See generally (J.A. at 4-7). The defamatory statements Cartman posted, along with the photo and Cartman’s public ridicule for Citrus, demonstrates that the post was constructed out of pure dislike for Ike and Citrus.

It is difficult for the Respondent to understand exactly how Cartman’s statements can be regarded as such a compelling matter to citizens of the United States, and not just another piece of “gotcha-journalism” gossip. “Informing the public as to a matter of public concern is an important interest in democracy; spreading of mere gossip is of less importance.” Restatement (Second) of Torts § 580(B) cmt. h.

C. If This Court Adopts One Of The Tests To determine What Constitutes A Limited Public Figure Laid Out By The Circuit Courts, The Results Of This Case Would Remain Unchanged

Several of the circuit courts have set forth their own tests in order to help make a determination of who should be categorized as a limited-purpose public figure. If this Court decided to adopt one of these tests, the results of this law suit would be the same.

A plurality of circuit courts has adopted a three-pronged test: A plaintiff is a limited-purpose public figure if (1) the relevant controversy is a matter of public concern; (2) the plaintiff plays more than a “trivial or tangential” role in the controversy; and (3) the defendant’s allegedly defamatory remarks are relevant to the public controversy. See (J.A. at 16); Silvester v. Am. Broad. Cos., 839 F.2d 1491, 1494 (11th Cir. 1988); Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 433-34 (5th Cir. 1987); Waldbaum, 627 F.2d at 1296-98.

Ike would fail this test. His role within the controversy has not been proven. Discovery has shown the photo of Ike to most likely be doctored. See (J.A. at 7). The record further indicates nothing to suggest that Ike was involved in any type of slave labor ring, let alone public controversy. See generally id. at 4-7.

A second test, adopted by the Third and Ninth Circuits includes: (1) the existence of a matter of public concern or controversy; and (2) a factual determination of the extent of the plaintiff’s participation in that matter. See (J.A. at 17); McDowell, 769 F.2d at 948; Partington v. Bugliosi, 825 F. Supp. 906, 917 (D. Haw. 1993) (quoting Gertz, 418 U.S. at 352, *aff’d.*, 56 F.3d 1147 (9th Cir. 1995)). Ike would also fail this test. As stated previously, there has been no factual determination of Ike’s participation in any type of violation of human rights violations. See generally (J.A. at 4-7). Ike’s mere visits to India, without any concrete evidence of his activities there prove nothing.

Lastly, the Second Circuit provides a test where, in order to be considered a limited-purpose public figure, the plaintiff must: (1) “successfully invite public attention” prior to the remarks litigated; (2) “voluntarily inject” himself into the relevant public controversy; (3) take on a “position of prominence” within the public controversy; and (4) maintain regular and

continuing access to the media in order to combat the defamatory remarks. See (J.A. at 29); Lerman v. Flynt Distrib. Co., 745 F.2d 123, 136-37 (2d Cir. 1984).

Ike is a private citizen because he has actively avoided the media and public limelight and has also remained silent regarding the defamatory photograph and remarks. See (J.A. at 3, 7). Therefore, Ike would fail this test as well. Accordingly, the decision of the Court of Appeals for Fifteenth Circuit denying Cartman's summary judgment motion must be affirmed.

CONCLUSION

For the foregoing reasons the decision of the Fifteenth Circuit granting Broflovski's Rule 37 motion and denying Cartman's motion for summary judgment on Broflovski's defamation claim must be affirmed.

RESPECTFULLY SUBMITTED
COUNSEL FOR RESPONDENT

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