
No. 09-2701

In the Supreme Court of the United States

ERIC CARTMAN
PETITIONER,

v.

IKE BROFLOVSKI
RESPONDENT.

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

BRIEF FOR THE RESPONDENT

Team No. 230
Counsel for the Respondent

QUESTIONS PRESENTED

- A. Whether Eric Cartman is correct in asserting that he, a part time blogger, qualifies as a reporter engaged in the dissemination of news, such that he enjoys a qualified reporter's privilege under the First Amendment, despite this Court having renounced the existence of such a privilege.

- B. Whether Ike Broflovski, a corporate employee who has never spoken publicly about his employer's overseas employment practices and who has gone to significant efforts to preserve his privacy, is transformed into a limited purpose public figure merely by being the subject of the false blog posting accusing him and his employer of illegal overseas employment practices.

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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

I. SUMMARY OF FACTS

In 2006, Ike Broflovski accepted a position as Director of Research & Development at Citrus, a consumer electronics company operated under the leadership of his brother, Kyle Broflovski. (J.A. at 2-3.) On August 7, 2006, Kyle Broflovski held a moderately-attended press conference announcing Ike Broflovski's hiring. (J.A. at 3.) At this press conference, Kyle Broflovski expressed his enthusiasm over Ike's hire, praising his ability to expand Citrus' business, but characterizing Ike as "a little shy," and "the man behind the curtain." (J.A. at 3.) Ike Broflovski attended the press conference, but made only one statement, saying "Thank you for the warm welcome, Kyle, and I look forward to pushing Citrus, its employees, and its products to new heights." (J.A. at 3.) The Associated Press released a story on the press conference, which was printed in several newspapers. (J.A. at 3.) Since this press conference, Ike Broflovski has not given any interviews and is rarely seen in public, although his brother occasionally praises his work in interviews with the media. (J.A. at 3.)

Eric Cartman is the sole proprietor of an electronic sales and repair shop in the state of Washoe. (J.A. at 4.) Three-and-one-half years ago, Cartman created a blog that covers celebrity gossip and politics, which he operates on a part-time basis to supplement his income. (J.A. at 4.) He maintains the blog, which has accumulated an audience of approximately 100,000 readers, on a third-party server, Bloggeroo. (J.A. at 4.) On July 8, 2008, Cartman published a story on his blog, *The Sludge Report*, accusing Ike Broflovski and Citrus of forcing employees in Citrus' Mumbai, India, factory to work sixteen hours per day, seven days per week, in "slave-like conditions." (J.A. at 5-6.) Cartman also posted a picture seemingly depicting Broflovski walking through the factory yelling at workers. (J.A. at 5.) Although Cartman had access to

software used to detect photographic forgeries, he did not use this software to scan the photograph before publishing it on his blog. (J.A. at 7.) Subsequent discovery during the course of litigation produced evidence that this photograph was likely doctored. (J.A. at 7.)

Cartman received this information and photograph on July 7, 2008, in an email sent by an anonymous source he cited as “Professor Chaos.” (J.A. at 5.) The email was sent to Cartman’s personal email address, which Cartman provided on his blog, inviting readers to send messages with tips and information. (J.A. at 5.) On his blog, Cartman states that all persons who send information to this email address “will be treated as confidential sources unless otherwise requested.” (J.A. at 5.) Although Cartman cited his source anonymously as “Professor Chaos,” Cartman knew the informant personally, and had received information from him in the past. (J.A. at 5.)

After Cartman’s “story” broke, it quickly attracted the attention of the mainstream media. (J.A. at 6.) Keith McRiley, the host of a cable news show, covered the story and named Broflovski the recipient of his nightly “Most Heinous Individual in the Galaxy” award. (J.A. at 6.) McRiley also encouraged his viewers to boycott Citrus. (J.A. at 6.) Citrus’ stock dropped by 25%, and numerous retailers pulled Citrus products from their shelves. (J.A. at 6-7.) Broflovski responded to the allegations through his attorney, who told the media, “The photograph posted on that site is a total fabrication, and Ike Broflovski will soon seek civil justice against its authors in a court of law.” (J.A. at 7.)

II. PROCEDURAL HISTORY

On September 20, 2008, Ike Broflovski filed suit against Eric Cartman in Superior Court for the State of Silverado, alleging that Cartman’s publication of false information accusing Broflovski and his employer of human rights violations defamed Broflovski. (J.A. at 1.)

Cartman removed the case to the United States District Court for the Western District of Silverado. (J.A. at 1.) After removal to the District Court, the parties engaged in discovery, and Broflovski deposed the manager of the Mumbai factory and several of his top engineers. (J.A. at 8.) Broflovski also emailed all Citrus employees to request information regarding the identity of Cartman's source, but his attempt was unsuccessful. (J.A. at 8.) Broflovski moved the District Court to compel discovery, requesting that Cartman be required to disclose the identity of the anonymous source who provided Cartman with the false information upon which Cartman based his published allegations. (J.A. at 1.) Cartman opposed disclosure and moved for summary judgment. (J.A. at 2.) On January 27, 2009, the District Court denied Broflovski's motion to compel discovery and granted Cartman's motion for summary judgment. (J.A. at 2.)

On February 5, 2009, Broflovski filed a timely notice of appeal to the Court of Appeals for the Fifteenth Circuit. (J.A. at 22.) On May 14, 2009, the Court of Appeals held that the District Court erred, both in denying Broflovski's motion to compel discovery and in granting Cartman's motion for summary judgment. (J.A. at 32.) The Court of Appeals reversed the District Court's judgment, and remanded the case for further proceedings. (J.A. at 32.) Cartman petitioned for a writ of certiorari, which was granted by the United States Supreme Court on August 24, 2009. (J.A. at 33.)

SUMMARY OF ARGUMENT

In his attempt to avoid disclosing the identity of his anonymous source, Cartman attempts to redefine Supreme Court precedent holding that a qualified reporter's privilege does not exist under the First Amendment. Cartman bases his argument on a faulty interpretation to limit a well-established rule. This Court should not follow Cartman's faulty logic and should affirm the ruling of the Court of Appeals.

However, even if this Court agrees that a qualified reporter's privilege exists under the First Amendment, the Court should reject Cartman's attempt to broaden the definition of a journalist to include the vague, amorphous status of blogger. Blogging has never been considered journalism by a court of law because doing so would create serious practical problems in determining who has standing to assert a privilege.

Even if blogging is considered journalism, there are still further requirements to qualify for the privilege, which Cartman cannot satisfy. Cartman is only a part-time blogger, operating on an unpredictable third party server, with a relatively small number of readers. His conduct does not satisfy the conduct requirement to establish a reporter's right to protection because he did not have preexisting intent to publish news when he received Professor Chaos' email.

Finally, even if Cartman is considered a reporter entitled to a qualified privilege, Ike Broflovski has shown good cause to overcome this privilege. The identity of Cartman's confidential source is both relevant and essential to Broflovski's defamation claim. Additionally, Broflovski has exhausted all other reasonable means of alternative discovery and compelled disclosure is appropriate.

Further, this Court should affirm the Court of Appeals' ruling that Broflovski is not a limited purpose public figure, and accordingly, need not to prove actual malice to support his

defamation claim against Cartman. Under this Court's precedents, the most central consideration in determining whether an individual is a public figure or limited purpose public figure is that individual's own purposeful actions thrusting himself into the public eye.

Broflovski has never purposely injected himself into the public for any purpose. Although he accepted gainful employment, and as a result, posted his name and picture on his employer's website, Broflovski is shy and reclusive. Unlike his brother, who has used the media from time to time to publicize Citrus' business developments, Broflovski has never affirmatively reached out through the media to express his opinions on any topic, much less his corporate employer's overseas employment practices. The only time Broflovski has ever spoken publicly was at a press conference his brother conducted to announce his hire. At that press conference, Broflovski limited his remarks to a single sentence, thanking his brother for his kind words of introduction. Cartman cannot transform the reclusive Broflovski into a public figure simply by shining a false light on this entirely private individual.

Broflovski also meets the additional elements of the test to determine a litigant's public or private status set out by the Second Circuit Court of Appeals. The Second Circuit's test, which faithfully articulates Supreme Court precedent, compels the conclusion that Broflovski is a private citizen. He did not invite attention to himself, nor did he attempt to influence the public. And before Cartman published his defamatory blog posting, there was no controversy regarding Broflovski or Citrus' employment practices in Mumbai, India. Further, an individual must take some affirmative action to "assume" a position of prominence. Broflovski's reclusive lifestyle forecloses the possibility that he is a public figure. Accordingly, this Court should affirm the decision of the Fifteenth Circuit Court of Appeals.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DECISION OF THE COURT OF APPEALS AND REQUIRE CARTMAN TO DISCLOSE THE IDENTITY OF HIS SOURCE BECAUSE THE FIRST AMENDMENT DOES NOT CREATE A QUALIFIED REPORTER'S PRIVILEGE, AND EVEN IF IT DID, CARTMAN DOES NOT QUALIFY AS A REPORTER.

Cartman, a part-time blogger, claims that he is protected by a qualified reporter's privilege under the First Amendment and that he may refuse to comply with the court-ordered disclosure of Professor Chaos' identity. However, it is well-established that no such privilege exists under the First Amendment. Assuming, *arguendo*, that the First Amendment includes such a privilege, Cartman does not qualify as a reporter and was not engaged in the dissemination of news. Finally, assuming Cartman is a reporter with qualified immunity, Broflovski has shown that good cause exists to overcome this presumption of immunity.

A. Because the United States Supreme Court Has Held That the First Amendment Does Not Provide a Qualified Immunity to Reporters, Cartman's Attempt to Manufacture Such Immunity Fails.

Cartman attempts to ignore the majority opinion in *Branzburg v. Hayes*, 408 U.S. 665 (1972), and uses a tenuous interpretation of Justice Powell's concurring opinion to narrow the majority's holding and set a precedent this Court never intended. *Id.* at 709. The District Court accepted this flawed reasoning and agreed that *Branzburg* is limited to criminal proceedings and affords qualified immunity to reporters in civil actions. This interpretation fails, first because it diverges from the majority's opinion, and second, because it incorrectly characterizes Justice Powell's concurrence.

The Court in *Branzburg* considered whether a reporter has an obligation to respond to grand jury subpoenas and answer questions in the same manner as a private citizen. *Id.* at 682. The reporter in *Branzburg* argued that his First Amendment rights would be infringed if he was

forced to disclose the identity of a confidential source. *Id.* at 680. The Court held that “the Constitution does not, and never has, exempt the newsman from performing the citizen’s normal duty.” *Id.* at 691. The First Amendment does not grant reporters a special testimonial privilege. *Id.* at 690. Lower courts have consistently applied this holding and have refused to grant reporters such a testimonial privilege. *See, e.g., In re Farber*, 394 A.2d 330, 333 (N.J. 1978); *McKevitt v. Pallasch*, 339 F.3d 530, 531-532 (7th Cir. 2003); *In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987).

In one of the first judicial reactions to the *Branzburg* decision, the Supreme Court of New Jersey found that the *Branzburg* holding clearly rejected a First Amendment right for reporters to claim privilege when courts compel discovery. *In re Farber*, 394 A.2d at 333. United States Circuit Courts of Appeals have also closely followed *Branzburg*. The Seventh Circuit declined to recognize the existence of a First Amendment privilege for reporters, and chastised the suggestion that the First Amendment created a qualified reporter’s privilege as “audacious.” *McKevitt*, 339 F.3d at 531-32. The Sixth Circuit has also refused to abrogate from the holding in *Branzburg*. *See In re Grand Jury Proceedings*, 810 F.2d at 584 (holding a television journalist must comply with a court order to release video tapes for identification of confidential sources). Moreover, an understanding that *Branzburg* expressly rejected a privilege for reporters based in the First Amendment is not limited to the judicial branch.

Congress has also recognized that the Court rejected an interpretation of the First Amendment which would provide a qualified immunity for reporters. In reaction to this judicial pronouncement, Congress has attempted to create a federal shield law. *See, e.g., Free Flow of Information Act*, H.R. 985, 111th Cong. (2009); *Free Flow of Information Act*, H.R. 2102, 110th Cong. (2007). Senator Arlen Specter introduced the Free Flow of Information Act (“FFIA”),

demonstrating a Congressional recognition that the Constitution does not provide journalists immunity from court compelled discovery. Senator Spector, Introduction of FFIA to the Senate (Feb. 13, 2009). Implicit in these Congressional attempts to manufacture a reporter's privilege is an understanding that there is no qualified immunity for reporters based on the First Amendment.

Both Cartman and the District Court base their assertion that *Branzburg* established a First Amendment qualified reporter's immunity on the concurring opinion of Justice Powell. (J.A. at 10.) Their defective interpretation posits that Justice Powell's concurrence limited the *Branzburg* holding to criminal proceedings. (J.A. at 10.) But this interpretation fails because the concurring opinion carries no weight, and also because it misinterprets the language of Justice Powell's concurrence. As the Sixth Circuit recognized, "Justice Powell's concurring opinion is entirely consistent with the majority opinion, and neither limits nor expands upon its holding." *In re Grand Jury Proceedings*, 810 F.2d at 585. Justice Powell did not differentiate between criminal and civil cases; he merely indicated that reporters are not without constitutional rights. *Branzburg*, 408 U.S. at 709. Moreover, the majority opinion unambiguously held that the First Amendment would not serve as protection for reporters who claim to be burdened by the enforcement of civil statutes. *Id.* at 682. The decision in *Branzburg* was a reiteration and an affirmation of the Court's holding in *Associated Press v. Nat'l Labor Relations Bd.*, 301 U.S. 103 (1937), which held that a newspaper publisher had no special immunity for civil proceedings. *Id.* at 132-133. Justice Powell's concurrence in *Branzburg* merely illustrates the importance of protecting reporters from investigations conducted in bad faith. *Branzburg*, 408 U.S. at 707-708, 710. The Court in *Branzburg* went on to say that states are free to respond with interpretations of their own state constitutions and to create state shield laws. *Id.* at 706.

As of November, 2008, thirty-four states had enacted shield statutes protecting reporters. James C. Goodale et. Al., *Reporter's Privilege*, 925 PLI/Pat 160, 170 (2008). Washoe, the state where Cartman lives and publishes his blog, has not enacted a shield statute. (J.A. at 4, 25.) In addition to state shield laws, there are several other protections already established for reporters. Goodale, *supra*, at 170-71. For example, both the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure include protections for reporters. *See* Fed. R. Crim. P. 17(c) (limiting the types of materials that are subject to subpoenas); Fed. R. Civ. P 26(c), (d) (giving courts the discretion to deny or limit discovery if it is determined to be unreasonable, overly inconvenient, or able to be obtained elsewhere). Additionally, the Fifth and Sixth Amendments, U.S. Const. amend. V; U.S. Const. amend. VI, protect against self incrimination and provide individuals with the right to a fair trial. These remedies are more than sufficient to protect reporters.

To serve his own means, Cartman falsely interprets and erroneously gives weight to Justice Powell's concurrence in *Branzburg*. It is well-established that the First Amendment does not provide a qualified reporter's privilege. Furthermore, with all the remedies and protections already available to genuine reporters, a First Amendment right is unnecessary. Cartman must not be allowed to subvert Supreme Court jurisprudence and reinterpret the Constitution.

B. Even If the First Amendment Provided a Qualified Privilege to Reporters, Cartman Is Not a Reporter and His Actions Do Not Warrant Protection.

While the definition of journalist is constantly evolving, bloggers have never been included in that definition. Furthermore, Cartman's lacked the intent to disseminate of news, which is required for the privilege to attach.

i. Cartman, as a Blogger, is Not a Reporter Warranting Constitutional Protection.

After brashly presuming the Court's willingness to abandon its holding in *Branzburg*, Cartman alleges that his status as a blogger qualifies him as a reporter. He further asserts that he was engaged in the dissemination of news, entitling him to First Amendment protection. However, the term "reporter" should not be applied to bloggers without imposing specific guidelines, which Cartman could not meet. The District Court held that journalists outside the traditional forms of media should be protected by the First Amendment. (J.A. at 11, citing *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)). Although some expansion of the definition of a news reporter may be warranted in light of the expansion of traditional media, extending the definition of reporter to include bloggers is inappropriate, and raises serious Constitutional concerns.

As the way information is shared continues to change, it becomes increasingly difficult to define "journalist." See Stephanie J. Frazee, *Bloggers as Reporter: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 Vand. J. Ent. & Tech. L. 609, 627 (2006). The evolution of information technology is one reason behind the multiple failures in passing a federal shield statute. Free Flow of Information Act, HR 985, 111th Cong. (2009). To date, there are no published cases deciding whether a blogger is a reporter. Cydney Tune & Marley Degner, *Blogging and Social Networking: Current Legal Issues*, 961 PLI/Pat 113, 129 (2009).

One California court has outlined certain factors to consider when deciding whether an internet journalist should be afforded the same protections as traditional print and broadcast journalists. See Joseph S. Alonzo, *Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press*, 9 N.Y.U. J. Legis. & Pub. Pol'y 751 (2006) (discussing *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006), and the factors required to fall under California's shield law). Although the court in *O'Grady* did not specifically address

bloggers, the court suggested three factors to consider when determining whether a blogger is a reporter: (1) the number of articles published per week; (2) the presence of a permanent address; and (3) the number of visitors to the blog. *O’Grady*, 44 Cal. Rptr. 3d at 99-105; *see also* Carol J. Toland, *Internet Journalists and the Reporter’s Privilege: Providing Protection for Online Periodicals*, 57 U. Kan. L. Rev. 461, 485 (2009) (discussing the *O’Grady* factors).

In *O’Grady*, the petitioners operated what they declared to be an “online news magazine,” where they published news and information relating to Apple computers and software. 44 Cal. Rptr. 3d at 77. The petitioners updated their site on a daily basis, and published fifteen to twenty items per week for eleven years. *Id.* The petitioners operated their site at their own web address for four years and had an average of 300,000 unique visitors each month. *Id.* The court in *O’Grady* held that petitioner’s online publication met the necessary criteria to warrant protection of a shield statute. *Id.* at 105.

The facts that supported a judicial determination that the petitioners were journalists in *O’Grady* contrast starkly with those in the case at bar. Although Cartman updates his blog every evening, the record is silent as to the number of items he publishes per week. Further, while the petitioners in *O’Grady* had been in operation for eleven years, Carman’s blog has only been active for three and one-half years. (J.A. at 4.) Also unlike the petitioners in *O’Grady*, who operated their own server, and thus could guarantee its continued operation, Cartman operates his blog on a third-party server run by Bloggeroo. (J.A. at 4.) There is nothing to indicate that this is a permanent server that can guarantee Cartman’s continued operation. Finally, the petitioners in *O’Grady* received 300,000 unique visitors per month, while Cartman has only accumulated 100,000 readers over the past three-and-one-half years. (J.A. at 4.) Based on these

differences, Cartman's blog should not be afforded the same protection as the online news magazine in *O'Grady* because it would not qualify for protection under California's shield law.

In addition to failing the test set out by the *O'Grady* court, Cartman fails to meet the requirements for protection under the proposed FFIA. The FFIA defines a "covered person" as one who regularly gathers and reports information for a substantial portion of their livelihood or substantial financial gain. Free Flow of Information Act of 2009, §4(2). Cartman is merely a part-time blogger who operates *The Sludge Report* to supplement his primary source of income as a sole proprietor of an electronic sales and repair shop. (J.A. at 4.) Consequently, Cartman would not be protected even if the FFIA had been enacted.

ii. Even If Bloggers Are Considered Reporters, Cartman Was Not Engaged in the Dissemination of News, Therefore, He is Ineligible to Assert a Reporter's Privilege.

Assuming that some bloggers might be reporters who are entitled to specialized First Amendment protection, these reporters must still meet certain requirements with respect to their conduct before protection is warranted. As the District Court noted, the qualified reporter's privilege applies only when the reporter intends to use information from an anonymous source in the disseminations of news, and such intent existed at the time the information was obtained. (J.A. at 12, citing *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 35 (2d Cir. 1998); *Cf. Von Bulow v. Von Bulow*, 811 F.2d 136, 142-43 (2d Cir. 1987). Cartman cannot satisfy these requirements.

Cartman cannot reasonably argue that he intended to disseminate information as news when he received Professor Chaos' email. On his blog, Cartman provided a link to his personal e-mail address, where he received the correspondence from Professor Chaos. (J.A. at 5.) It would be absurd to believe Cartman has a predetermined intent to publish every email he receives in his personal account. Furthermore, the material Cartman disseminates through his

blog cannot be considered news. Celebrity gossip is mere entertainment, not news, and as such, should not be afforded the protection of a reporter's privilege. *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998). The record indicates that Cartman's blog focused, at least in part, on celebrity gossip sent to him by his readers. (J.A. at 4-5.) Because Cartman is aware of the influx of reader contributions, and the possibility that they relate to celebrity gossip, he cannot form the intent to disseminate *news* at the point of receipt of each email. *In re Madden*, 151 F.3d at 130. Cartman's contention that he is a reporter is meritless, because "hyperbolic self-proclamation will not suffice as proof that an individual is a journalist." *Id.*

In conclusion, blogging is too vague a category to warrant Constitutional protection. Toland, *supra*, at 482. Endowing bloggers with special protections would allow "anyone with access to the internet to become part of the press." *Id.* As a blogger, Cartman does not qualify as a reporter for protection under the First Amendment. But even if bloggers were protected, Cartman's conduct does not warrant the reporter's privilege because he lacked the intent to publish news when he first received Professor Chaos' email.

C. If Cartman Is Found to be a Reporter Protected Under the First Amendment, Broflovski Has Shown that Good Cause Exists to Overcome this Privilege.

As the Court of Appeals correctly noted, Broflovski has met the burden needed to overcome any potential qualified immunity. The District Court agreed that the identity of Professor Chaos was *relevant* to Broflovski's claim. (J.A. at 13.) However, the District Court did not agree that Professor Chaos' identity was *essential* to the claim, or that Broflovski had exhausted all other sources of discovery. (J.A. at 13-14.) Because the District Court's determinations were in error, Cartman should be compelled to disclose the identity of his source.

Broflovski's burden is not as onerous as the District Court concluded. Generally, courts are less protective over representatives of the media in defamation actions when the

representative is the defendant. Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 Ariz. L. Rev. 815, 854 (1984). When courts apply the reporter's privilege in civil actions, the majority use a balancing test to determine when the privilege should be overcome. *See, e.g., In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7-8 (2d Cir. 1982); *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981); *Riley v. City of Chester*, 612 F.2d 708, 716-17 (3d Cir. 1979.). This balancing test has its origin in the pre-*Branzburg* case, *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958). *Id.* at 548. This test consists of three prongs which the moving party must satisfy before a court will compel discovery. The moving party must show that: (1) the information sought is highly material and relevant to the claim; (2) the information is necessary or critical to the claim; and (3) the moving party has exhausted all other means and the sought-after information is unavailable from alternative sources. *See Carey v. Hume*, 492 F.2d 631, 636-38 (D.C. Cir. 1974) (discussing the implications of *Garland*).

Broflovski has satisfied all three prongs of this test. First, Professor Chaos' identity is extremely relevant to Broflovski's defamation claim because it is indicative of the level of care necessary under the circumstances. As the court in *Carey* recognized, "knowledge of the identity of the alleged sources would logically be an initial element in the proof of any [libel or defamation action]." *Carey*, 492 F.2d at 637 (compelling disclosure of an anonymous source in a libel action). The court understood that it would be extremely difficult to provide evidence beyond what was known to a plaintiff. *Id.* In libel and defamation cases it is often important to show that the defendant misreported what his source provided or that the source itself should not have been relied upon. *Id.*

To evaluate the second factor, courts weigh the interests served by the disclosure of the source's identity against the interest in maintaining confidentiality. *Id.* Courts often draw a distinction in civil cases where a journalist is a party to the action. *See, e.g., Zerilli*, 656 F.2d at 714; *Carey*, 492 F.2d at 635-36. In these cases, the balance tips in favor of disclosure. *Zerilli*, 656 F.2d at 714; *Carey*, 492 F.2d at 635-36. In defamation cases, courts find the interests of professional reputation, financial impact of the statements, and implications on career stability to carry great weight. *See, e.g., Carey*, 492 F.2d at 632-33; *Garland*, 259 F.2d at 547. Under this interest-balancing test, Broflovski prevails.

Like the plaintiffs in *Carey* and *Garland*, Broflovski's professional reputation has been attacked, the financial impact on Citrus and its stockholders is ominous, and Broflovski, along with all Citrus employees, is forced to wonder whether future employment exists. Following Cartman's blog entry and the subsequent coverage on Keith McRiley's cable news show, Citrus' stock dropped 25%, numerous retailers pulled Citrus products from their shelves, and Citrus' image was quite possibly irrevocably damaged. (J.A. at 6-7.)

Finally, Broflovski satisfies the third prong of the *Garland* test. Although the District Court found that Broflovski had not exhausted *all* sources of alternative discovery, this is not dispositive. (J.A. at 13.) While courts have found in favor of non-moving parties when no attempts at alternative discovery have been made, and against a moving party that argues alternative discovery would be futile, costly, and time consuming, these can be distinguished from the case at bar. *See Zerilli*, 656 F.2d at 714; *Goodale, supra*, at 190. In *Zerilli*, the court found that there were only four possible sources of information and because the appellants had made no attempt to conduct dispositions on any of them, the court ruled in favor of the non-moving party. 656 F.2d at 125-26. Alternatively, in *Carey*, the court held that when the

alternative sources of discovery are numerous it was not necessary to exhaust *all* other methods. 492 F.2d at 632 (suggesting that if the alternative sources number less than sixty, depositions might be a prerequisite to compelled discovery). In *Carey*, the individual seeking disclosure was an upper-level employee of the United Mine Workers of America (“UWMA”) who was accused in a newspaper article of engaging in inappropriate conduct. *Id.* The employee sued the journalist for libel. The journalist refused to disclose identity of his source, but admitted that his source was an employee of the UWMA. *Id.* at 633. The court held that even though it might be possible for an employer to track down a source within their own company, it was not necessary when there were a substantial number of employees that would have to be addressed, creating an imposing discovery burden. *Id.* at 638-39. Broflovski’s case is more like *Carey* than *Zerilli*.

Unlike in the plaintiff in *Zerilli*, Broflovski conducted several depositions and sent out a company-wide email in an attempt to determine the identity of Cartman’s source. (J.A. at 8.) Like the employer in *Carey*, whose employees were too numerous to question individually, Broflovski has made significant attempts to discover the identity of Cartman’s source, and should not be required to make any further showing. Following the reasoning in *Carey*, while it may be *possible* to ascertain the identity of the source without compelling Cartman’s disclosure, because this poses such a great burden, Broflovski’s previous unsuccessful attempts at discovery through depositions and e-mail inquiries are sufficient to satisfy the exhaustion requirement.

Broflovski has shown, and the Court of Appeals agreed, that even if Cartman is protected by a First Amendment qualified reporter’s privilege, there is good cause to overcome it. Broflovski, as the moving party, has met the burden to support a finding in favor of court-compelled discovery.

II. THIS COURT SHOULD AFFIRM THE DECISION OF THE COURT OF APPEALS BECAUSE BROFLOVSKI HAS NEITHER INVITED PUBLIC

ATTENTION, ATTEMPTED TO INFLUENCE OTHERS, VOLUNTARILY INJECTED HIMSELF INTO A PUBLIC CONTROVERSY, NOR MAINTAINED CONTINUING ACCESS TO THE MEDIA, AND ACCORDINGLY, CANNOT BE CONSIDERED A PUBLIC FIGURE.

In a landmark decision, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court announced the dawning of a new era in free speech law. Defining the limits of constitutional protections for speech and the press in certain defamation actions, the Court held that public officials must prove that the allegedly defamatory statement was made with actual malice, not mere negligence. *Id.* at 279-80. In the years since the *New York Times* decision, this rule has become more nuanced and has expanded to include public figures and limited purpose public figures, providing greater protection for speech and the press while recognizing the constitutional importance of privacy and preservation of reputation for private individuals. *See, e.g., Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Welch*, 418 U.S. 323 (1974); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966). This body of case law, as further developed by Circuit Courts of Appeals, compels the conclusion that Broflovski is not a limited purpose public figure with respect to the events underlying his claim, and should not be forced to satisfy the “actual malice” standard of proof.

A. Although the Supreme Court has Not Articulated a Precise Test for Determining the Public or Private Status of a Litigant, the Court’s Emphasis on the Importance of Voluntary Participation in a Public Controversy and Access to the Media Forecloses the Possibility that Broflovski is a Public Figure.

The Supreme Court has consistently emphasized the importance of protecting speech and ensuring that the press enjoys sufficient “breathing space” to enable the efficient dissemination of information to the public, but it has also recognized that “[t]he need to avoid self-censorship by the news media is . . . not the only societal value at issue,” in defamation cases. *Gertz*, 418 U.S. at 341; *see also New York Times*, 376 U.S. at 301 (Goldberg, J., concurring) (recognizing

that because the “[p]urely private defendant has little to do with the political ends of a self-governing society,” the Constitution does not insulate defamatory statements directed against “the private conduct of a public official or private citizen”). In *Curtis*, the Court underscored the traditional importance of weighing the plaintiff’s own acts in determining his or her status as a public or private actor. 388 U.S. at 154. The Court instructed that a plaintiff’s own actions influence this determination, requiring courts to investigate “whether [the plaintiff] has a legitimate call upon the court for protection *in light of his prior activities and means of self defense.*” *Id.* (emphasis added) (citations omitted).

In *Gertz*, the Court considered whether an attorney who represented the family of a murder victim in a civil suit should be considered a public figure for purposes of a defamation suit brought by the attorney after a publisher printed an article defaming the attorney. 418 U.S. at 332. To reach their conclusion that the attorney was not a public figure despite having acquired some notoriety and public recognition, the Court engaged in two inquiries. First, the Court considered whether the victim of the alleged defamation could remedy the injury by taking advantage of “available opportunities to contradict the lie or correct the error and thereby . . . minimize [the falsehood’s] adverse impact on reputation.” *Id.* at 344. The Court noted that public officials and public figures “usually enjoy significantly greater access to the channels of effective communication,” while private individuals are “more vulnerable to injury,” and thus, require the greater protection against defamation found in the traditional negligence standard. *Id.* Second, and more importantly, the court recognized “a compelling normative consideration underlying the distinction between public and private defamation plaintiffs.” *Id.* The Court reasoned that public figures, who “thrust themselves to the forefront of particular public controversies in order to influence [the public]” are less deserving of protection from defamation.

Id. at 345. While the Court hypothesized that “it might be possible for someone to become a public figure through no purposeful action of his own,” the Court cautioned that these “involuntary public figures must be *exceedingly* rare.” *Id.* (emphasis added).

Similarly, in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Court held that a researcher who received federal funding to support his work and was subsequently singled out as a recipient of the “Golden Fleece of the Month Award” by a senator attempting to publicize what he perceived to be wasteful government funding, was not a limited purpose public figure. *Id.* at 135-36. The senator argued that the researcher should be considered a limited purpose public figure because the researcher’s receipt of public funds was documented in local newspapers, and because he used the media to defend himself in response to the announcement of the “Golden Fleece Award.” *Id.* at 134. But the Court rejected this argument, reasoning that the researcher “did not thrust himself or his views into public purpose to influence others.” *Id.* at 135. Additionally, characterizing the public controversy as concern over public expenditures, the Court noted that the researcher “at no time assumed any role of public prominence.” *Id.* Finally, the Court stated that the researcher’s limited connection to the media, both in news articles noting his receipt of federal funds and in press coverage of his response to the award, did not warrant classification as a public figure. *Id.*

Applying the Court’s suggestion that a plaintiff’s public or private status can be determined by looking at the individual’s access to and use of effective channels of communication and his choice to inject himself into a public controversy, it is clear that Broflovski is not a public figure. The District Court found that Broflovski was “shy and [did] not enter the limelight.” (J.A. at 3.) Unlike the attorney in *Gertz*, who knowingly chose to represent a client who might attract negative attention, Broflovski has never taken any steps to

purposely increase his public visibility. Even when his brother held a “moderately-attended” press conference to announce Broflovski’s hiring with Citrus in 2006, Broflovski simply thanked his brother for the introduction and said that he “look[ed] forward to pushing Citrus, its employees, and its products to new heights.” (J.A. at 3.) This press conference is strikingly similar to the limited press coverage the researcher received when the local press announced his receipt of federal funding to support his work. In both instances, the press coverage each plaintiff received prior to the defamatory remarks was minimal, merely announcing a recent development in each plaintiff’s career. And as the Court instructed in *Hutchinson*, a smattering of negative publicity upon an otherwise private person does not transform him into a public figure. Instead, he must take some affirmative action to warrant his loss of private status.

In the nearly three years between the date of the Citrus press conference and the date of Cartman’s defamatory publication, Broflovski never gave interviews to the press, and was rarely seen in public. (J.A. at 3.) The only purposeful action Broflovski has taken to expose himself to the public stems from his posting of contact information, “including [his] telephone, e-mail, mailing address, and a head shot photograph” on the Citrus corporation’s website, along with other executives. (J.A. at 4.) As the Court of Appeals correctly noted, this is standard business practice. (J.A. at 29.) Because Broflovski has never called a press conference or given interviews to the press before or after the defamatory remarks were published, it can hardly be claimed that Broflovski enjoyed or made use of effective channels of communication. And even after Cartman’s defamatory blog posting, Broflovski valued his privacy to such an extent that he chose not to personally appear in the media, but spoke through his lawyer. (J.A. at 30.) This makes him less visible to the public than the researcher in *Hutchinson* who personally spoke with the press but was still deemed to have preserved his status as a private figure. While his brother

occupied a position of prominence in the media, Broflovski made a deliberate choice to preserve his privacy, and accordingly, Cartman cannot satisfy the first inquiry suggested by the *Gertz* Court, a showing that the plaintiff enjoyed significant access to the media.

However, the Court in *Gertz* noted that the second inquiry, whether a plaintiff has invited public attention by thrusting himself into the forefront of a public issue, is the more important issue. Broflovski has never engaged in *any* discussion with the general public. Unlike the researcher in *Hutchinson* who interacted with the public to a limited extent because he published his findings, or the attorney in *Gertz* who had long been involved in community affairs, Broflovski has kept himself largely hidden from the public, and has not invited the public into his life, opinions, or actions. While public officials and public figures voluntarily expose themselves to a greater risk of defamation in exchange for their position of influence over the public, Broflovski has done nothing to jeopardize his private status. And although the *Gertz* Court theorized that it might be *possible* for an individual to become a public figure against his will, the Court recognized that this is extremely rare, and did not provide guidance as to how one might become an involuntary public figure. Broflovski has taken greater care to shield himself from the prying eye of the public than either of the plaintiffs in *Gertz* or *Hutchinson*, and under the Supreme Court's instructions, he should not be forced to meet the heightened burden of the actual malice standard, which is more appropriate for those who seek out the power, prestige, and influence that comes to public officials and public figures.

B. Because Broflovski Lives His Life in an Entirely Private Manner, He Is Not a Limited Purpose Public Figure Under the Most Faithful Iteration of the Supreme Court's Guiding Principles, the Test Advanced by the Second Circuit Court of Appeals.

Although the various Circuit Courts of Appeals have relied on *New York Times* and its progeny to create different tests to determine the public/private status of defamation plaintiffs,

the test advanced by the Second Circuit, which closely resembles the test from the Fourth Circuit, *see Naantaanbuu v. Abernathy*, 816 F. Supp. 218, 224 (S.D.N.Y. 1993) (recognizing similarity between the Second and Fourth Circuits' tests), lays its foundation most solidly in the Supreme Court's precedents. Recognizing that the Supreme Court's decisions "provide a frame to determine what constitutes a 'limited purpose public figure,'" the Second Circuit created a four-part test that requires a defendant in a defamation case to prove that the plaintiff has

(1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.

Lerman v. Flynt Distrib. Co., Inc., 745 F.2d 123, 136-37 (2d Cir. 1984). The language of the *Lerman* test draws directly from the Supreme Court's foundational First Amendment cases. *See, e.g., Curtis*, 388 U.S. at 155 (analyzing public/private status by considering whether plaintiff engaged in "purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy"); *Gertz*, 418 U.S. at 345 (considering whether plaintiff "thrust [himself] to the forefront of a particular public controversy," or "voluntarily exposed [himself]," to a greater risk of defamatory falsehood); *Hutchinson*, 443 U.S. at 135 (asking whether plaintiff "thrust himself or his views into public controversy to influence other," "assumed any role of public prominence," in the controversy or enjoyed "regular and continuing access to the media"); *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157, 167 (1979) (considering whether plaintiff "engaged the attention of the public in an attempt to influence the resolution" of an issue of public controversy). Thus, each prong of this test demonstrates unequivocally that Broflovski cannot be considered a limited purpose public figure with respect to the issue at stake in this litigation.

i. *Broflovski Has Neither Invited Attention to Himself Nor Attempted to Influence Others.*

The first element of the *Lerman* test requires the defendant to prove that the plaintiff successfully *invited* public attention to his or her views in an attempt to influence others. *See Naantaanbuu*, 816 F. Supp. at 225 (recognizing that voluntariness “as it relates to a public figure requires a fairly high degree of affirmative conduct on the part of a plaintiff”). In *Lerman*, the plaintiff was found to satisfy this element, because she wrote controversial books discussing sexual inequality and urged her readers to confront sexual double-standards. 745 F.2d at 137. The court noted that the plaintiff successfully “[sought] publicity both for herself and her books [as] part and parcel of her professional endeavors . . . to call attention to her writings and disseminate her views on current sexual standards.” *Id.* To further her career as a writer and to advance her ideological position on gender roles, the plaintiff in *Lerman* “purposely surrendered part of what would have been her protectable privacy rights.” *Id.*

Cartman cannot demonstrate that Broflovski ever invited attention to himself, or attempted to influence others, either before or after the incident described in Cartman’s defamatory writings. Unlike the plaintiff in *Lerman*, who actively sought out publicity to generate interest in herself and her books, Broflovski has purposely avoided speaking to the public. (J.A. at 3.) Broflovski’s own brother referred to him as “the man behind the curtain,” (J.A. at 3), indicating that Broflovski worked behind the scenes and did not play a visible role in Citrus’ operations. And because Broflovski has never spoken publicly on *any* issues, much less issues of public concern, he cannot be considered to have invited attention to himself or attempted to sway public opinion or influence others.

ii. *Because There Was No Public Controversy Involving Broflovski or Citrus’ Mumbai Factory Prior to Cartman’s Defamatory Posting,*

Broflovski Cannot be Considered to Have Injected Himself into Such a Controversy.

A public controversy is defined as “any topic upon which sizeable segments of society have different, strongly held views.” *Lerman*, 745 F.2d at 138. But the existence of a broad controversy that did not involve the particular defamation plaintiff prior to the publication of the allegedly defamatory remarks will not support a finding of a public controversy. *See, e.g., Calvin Klein Trademark Trust v. Wachner*, 129 F. Supp. 2d 248 (S.D.N.Y. 2001); *Cummins v. Suntrust Capital Mkts., Inc.*, No. 07 Civ. 4633, 2009 WL 2569127 (2d Cir. Aug. 20, 2009). In *Cummins*, the court considered whether the Chief Executive Officer of an electronics company was a public figure with respect to certain stock option grants. *Id.* at *1. The court noted that at the time the allegedly defamatory remarks were printed, approximately twenty news stories involving many different corporations had been published discussing improper option grants and other illegal stock practices. *Id.* at *11. But none of these stories specifically involved the plaintiff or his company. *Id.* When the court considered whether a public controversy involving the plaintiff existed, the court reasoned that “[t]he existence of a broad public controversy concerning stock options practices that was never tied to the plaintiff or [his corporation] prior to the publication of the [allegedly defamatory remarks] would not sufficiently implicate the plaintiff for purposes of considering him a limited purpose public figure.” *Id.* at *12.

Similarly, in *Calvin Klein*, the court framed the public controversy inquiry narrowly, asking whether there was a public controversy specifically concerning the defamation counterclaimant’s conduct, rather than whether there was any general controversy about conduct of that nature. 129 F. Supp. 2d at 252. The court found that there was not a public controversy concerning the content of the defamatory statements, which related to counterfeit goods, because

prior to the publication of the allegedly defamatory statements, the only preexisting controversy related to design and distribution practices. *Id.*

Although Cartman occasionally commented about Citrus and Kyle Broflovski in his blog prior to his publication of the defamatory remarks at issue in this litigation, no public controversy existed before the July 8th post. Through his blog, Cartman has attempted to draw attention to large companies engaging in international trade. (J.A. at 4.) To further this goal, Cartman sometimes posted stories about Kyle Broflovski and Citrus. (J.A. at 4.) But this type of generalized controversy cannot support a finding of a public controversy. Just as the preexisting generalized controversy about stock option policies at issue in *Cummins* was insufficient to show that a public controversy existed with respect to the specific plaintiff and his corporation accused of engaging in illegal stock option activities, Cartman's general disdain for corporations operating abroad cannot support a finding that a public controversy involving Citrus existed prior to Carman's July 8th blog posting.

Additionally before the July 8th post, Cartman's blog occasionally posted stories about Kyle Broflovski, but not Ike. (J.A. at 4.) As the court in *Calvin Klein* instructed, the preexistence of a different controversy, involving different people and issues, cannot be used to support a finding of a public controversy. Thus, *even if* any controversy existed about Kyle Broflovski or American corporations and their employment practices abroad, neither Ike Broflovski nor Citrus' employment practices in Mumbai, India were ever in controversy before this posting. Further, because Cartman knew that many of his readers would not recognize Ike Broflovski—because he had not been a player in any previous discussion or controversy—he took pains to identify Ike Broflovski for his readers. (J.A. at 6.) If Ike Broflovski was a public figure or was involved in any preexisting public controversy, this type of introduction would

have been unnecessary. But because Cartman’s previous commentary about Citrus focused on Kyle Broflovski, there was no public controversy involving Ike Broflovski or his involvement in Citrus’ employment practices in Mumbai, India. Accordingly, Cartman cannot satisfy the second element of the *Lerman* test, that Broflovski voluntarily injected himself into a public controversy related to the subject of the litigation.

iii. *Broflovski Has Not Assumed a Position of Prominence in Any Aspect of His Life, Including Any Potential Controversy Related to Citrus’ Overseas Employment Practices.*

Because Broflovski has consistently shunned fame and notoriety, and prior to this litigation, was a largely unknown figure outside of the Citrus world, Cartman cannot show that Broflovski assumed a position of prominence in any potential public controversy. Individuals who have been found to have assumed positions of prominence were typically well-known within their limited community before the events described in the allegedly defamatory publication. *See, e.g., Wolston*, 443 U.S. at 167 (refusing to classify an individual as a public figure when he was merely “involved in or associated with a matter that attract[ed] public attention” and was “dragged unwillingly into the controversy”); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 709 (4th Cir. 1991) (plaintiff self-described as “eminent in his field”); *Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612, 618 (2d Cir. 1988) (plaintiffs self-described as “celebrities, almost household words”); *Alder v. Conde Nast Publ’ns, Inc.*, 643 F. Supp. 1558, 1565 (S.D.N.Y. 1986) (relying on “[plaintiff]’s very stature in the journalistic community” to conclude that she held a position of prominence).

Unlike celebrities or individuals with such stature in their field that their every move may create a public sensation, Broflovski was widely unknown before Cartman’s defamatory posting. While an unwelcome spotlight was shone on Broflovski after Cartman’s posting, even after the

posting was made public Broflovski cannot be characterized as having assumed a position of prominence because he continued to take steps to preserve his anonymity. The very phrase “assumed a position of prominence” implies a willingness or purposeful taking-on of notoriety and fame. *See Merriam Webster’s Collegiate Dictionary* 70 (10th ed. 1997) (defining the verb “assume” as “to take to or upon oneself,” or to “put on, don”). Because Broflovski was never active in any discussion about American corporations’ employment practices generally, or Citrus’ operations in Mumbai, he did not voluntarily assume any prominence with respect to this issue. If a reporter could artificially manufacture an individual’s prominence within a controversy simply by publishing a false and misleading news article about them, then anyone and everyone could be considered a public figure.

iv. *Broflovski Has Never Enjoyed Regular Access to the Media, and Has Not Personally Used the Media Throughout the Pendency of the Controversy Created By Cartman’s Defamatory Posting.*

As previously discussed, Broflovski has never made regular use of the media to publicize himself or his beliefs. (J.A. at 3.) Prior to Cartman’s defamatory blog posting, Broflovski had never sought out the media, and did not enjoy regular access to the media. Even after the remarks were published and the media requested a response, Broflovski did not personally access the media, instead, he delivered a one sentence message through his attorney, denying the validity of the photograph, and announcing that he would seek civil justice to clear his name. (J.A. at 7.) His decision to respond in this manner injected himself less into the public eye than the researcher in *Hutchinson*, who chose to respond personally.

Furthermore, courts have differentiated between a defamation plaintiff’s proactive use of the media to promote himself or his views, and use of the media to respond and rebut the defamatory claim. In *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541 (4th Cir. 1994), the

court considered whether two defamation plaintiffs had exercised access to effective channels of communication such that they might be considered limited purpose public figures when they gave interviews to the press, attended press conferences, and spoke on television shows defending themselves and their son against allegations of child abuse. *Id.* at 1545. The court reasoned that an individual who uses the media to make “reasonable public replies to [the defamatory allegations,” is not transformed into a public figure. *Id.* at 1558; *see also Calvin Klein*, 129 F. Supp. 2d at 252 (“An individual does not forfeit the protections against defamation and libel accorded to private persons simply because he or she is forced to respond publicly to the allegedly defamatory or libelous statements themselves.”). Because Broflovski’s use of the media was far more limited than the plaintiffs’ in *Foretich* or *Hutchinson*, and Broflovski responded through his attorney, further deescalating his access to media, Cartman cannot satisfy the final *Lerman* factor.

C. Although He Should Not be Required to Meet the Actual Malice Standard of Proof, Broflovski Can Demonstrate that Cartman Published the Blog Posting in Reckless Disregard of its Falsity, Satisfying this Element of His Claim.

As the Court of Appeals correctly noted, there is at least enough evidence to support a finding of Cartman’s negligence with respect to his July 8th, 2008 blog posting. (J.A. at 30.) While Broflovski can undoubtedly make a showing of negligence on the facts in this case, which would entitle him to relief if this Court affirms the Court of Appeals’ finding that he is a private individual, a reasonable jury might also conclude that these facts demonstrate that Cartman acted with reckless disregard for the falsity of Professor Chaos’ information.

In *New York Times*, the Court held that the record showed, “at most a finding of negligence in failing to discover the misstatements” in an advertisement submitted to the paper. 376 U.S. at 288. The defendant in *New York Times* received an advertisement for print that made

false claims about a Southern politician's record dealing with racial integration. *Id.* at 256.

Although the Times had previously printed stories that included facts which tended to contradict claims made in the advertisement, the paper published the story without checking its contents against their files. *Id.* at 287. The Court explained that “[t]he mere presence of the stories in the files does not, of course, establish that the Times ‘knew’ the advertisement was false.” *Id.* The individuals responsible for checking the factual assertions in the advertisement “relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon [a] letter from [a well-known newspaper executive,] known to them as a responsible individual.” *Id.*

Unlike the plaintiff in *New York Times*, who premised his argument on facts that could only potentially support a finding of negligence, here, Broflovski can likely show that Cartman acted in reckless disregard of the truth. First, in the early 1960's, when the advertisement at issue in *New York Times* was published, reporters worked without access to the computer databases, making fact-verification and searches of earlier news stories much more difficult. The Times' failure to verify the accuracy of the advertisement by comparing it with the paper's own previous publications is much less egregious than Cartman's failure to run a simple software application which would have demonstrated that the photograph in question was likely falsified. Cartman had access to this type of software, but chose to close his eyes to the likelihood that his information was wrong. (J.A. at 7.) The sheer bulk of news the Times reported coupled with a lack of technology to enable easy searches of prior publications excuses their error, and underscores Cartman's blatant, willful desire to blindly publish whatever information he could use to further his own opinions in reckless disregard for its truth.

Moreover, the employees tasked with verifying the accuracy of the advertisement at issue in *New York Times* relied on the certification of numerous well-known figures, including A. Philip Randolph and more than sixty-four others, that the statements were accurate. But Cartman relied on a single source, Professor Chaos, whose credibility is unknown to the world. Even if Professor Chaos were a credible person upon whose word Cartman could rely, his decision to place his faith in a single individual's word smacks of an indifference to, and a desire to remain blissfully ignorant of, the truth. In short, Cartman's actions were far more egregious than the publisher in *New York Times*, and contrast sharply with the level of care that should be expected from professionals. This could allow a jury to conclude that Cartman's decision not to dig deeper into the allegations against Broflovski was not mere negligence, but instead, a reckless decision to publish information he knew or should have known was likely untrue.

CONCLUSION

For the aforementioned reasons, Ike Broflovski respectfully requests that this Court affirm the decision of the Fifteenth Circuit Court of Appeals.

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Respectfully submitted,

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