

Docket No. 09-2701

In the

United States Supreme Court

October Term, 2009

ERIC CARTMAN, *Appellant*,

v.

IKE BROFLOVSKI, *Appellee*.

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

BRIEF FOR APPELLEE

Attorneys for Appellee

QUESTIONS PRESENTED

Issue I

Does the First Amendment create a qualified reporter's privilege against court-ordered discovery of anonymous sources?

Issue II

If the First Amendment creates a qualified reporter's privilege, does a part-time blogger qualify as a reporter for the purposes of the Press Clause of the First Amendment?

Issue III

Is a private businessman who is involuntarily thrust into the public eye a limited purpose public figure, so as to require him to prove actual malice in his defamation claim against a part-time blogger?

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iv

STATEMENT OF JURISDICTION..... vii

STATEMENT OF THE FACTS..... 1

SUMMARY OF THE ARGUMENTS..... 3

ARGUMENTS..... 4

I. The First Amendment does not create a qualified reporter’s privilege......4

A. The reasoning by the Court in *Branzburg* when it refused to recognize a qualified reporter’s privilege in the criminal context is applicable in the civil context......5

B. As advocated in *Branzburg*, the appropriate remedy here is through Congress and state legislatures......6

C. The proper approach to analyzing any possible reporter’s privilege must remain consistent with the majority’s opinion in *Branzburg*......7

D. A qualified reporter’s privilege is not necessary to protect the press......9

II. Even if the Court does find a qualified reporter’s privilege in the First Amendment, Appellant does not qualify as a reporter......11

A. Appellant’s lack of actual reporting and investigation demonstrates that he is not a reporter for purposes of First Amendment protection......12

B. Applying the test from the Third Circuit, Appellant still could not be considered a reporter without recognizing everyone as a reporter......13

III. Because Ike Broflovski is not a limited purpose public figure, negligence is the appropriate standard for his online defamation claim......14

 A. Ike Broflovski does not fit the Court’s definition of a limited purpose public figure......15

 1. Ike Broflovski has not voluntarily assumed the risk of defamation, but was forced into the public eye by Appellant......16

 2. Appellant, as a solitary blogger, cannot manufacture a public controversy.....19

 B. The protective purpose of the doctrine would be subverted by a finding that Ike Broflovski is a limited purpose public figure......20

 C. Because Ike Broflovski is not a limited purpose public figure, the actual malice standard is inapplicable......22

CONCLUSION.....24

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Brandenburg v. Ohio, 395 U.S. 444 (1969).....5

Branzburg v. Hayes, 408 U.S. 665 (1972).....passim

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).....5, 15

Curtis Publ’g. Co. v. Butts, 388 U.S. 130 (1967).....16, 22

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).....15, 16, 18, 20, 21, 22

Jaffee v. Redmond, 518 U.S. 1 (1996)9, 10

Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991).....23

Miller v. California, 413 U.S. 15 (1973).....5

New York Times v. Sullivan, 376 U.S. 254 (1964)passim

New York v. Ferber, 458 U.S. 747 (1982).....5, 21

Proxmire v. Hayes, 443 U.S. 111 (1979).....19, 20, 19

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).....21

Rosenblatt v. Baer, 383 U.S. 75 (1966)15

Rosenbloom v. Metromedia, 403 U.S. 29 (1971).....17

Time, Inc. v. Firestone, 424 U.S. 448 (1976).....16, 18, 17

United States v. Lopez, 514 U.S. 549 (1995)7

Wollston v. Reader’s Digest Ass’n, Inc., 443 U.S. 157 (1979).....19, 20

UNITED STATE COURT OF APPEALS CASES

Cusumano v. Microsoft Corp., 162 F.3d 708 (1st Cir. 1998)12

Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975)8

<i>Foretich v. Capital City/ABC Inc.</i> , 37 F.3d 1541 (4th Cir. 1994).....	18
<i>Garland v. Torre</i> , 259 F.2d 545 (2d Cir. 1958).....	6
<i>In re Grand Jury Proceedings</i> , 810 F.3d 580 (6th Cir. 1987)	7, 8
<i>In re Madden</i> , 151 F.3d 125 (3d Cir. 1998)	12, 13, 14
<i>Lerman v. Flynt Distrib. Co.</i> , 745 F.2d 123 (2d Cir. 1984)	17, 16
<i>McKevitt v. Pallasch</i> , 339 F.3d 530 (7th Cir. 2003)	7, 8
<i>Schoen v. Schoen</i> , 5 F.3d 1289 (9th Cir. 1993)	8, 12, 11
<i>Sylvester v. Am. Broad. Co., Inc.</i> , 839 F.2d 1491 (11th Cir. 1988)	17
<i>Taveoulareas v. Piro</i> , 817 F.2d 762 (D.C. Cir. 1987).....	18, 22
<i>von Bulow v. von Bulow</i> , 811 F.2d 136 (2d Cir. 1987)	8, 12, 11
<i>Waldbaum v. Fairchild Publ’g., Inc.</i> , 627 F.2d 1287 (D.C. Cir. 1980).....	20

STATE COURT CASES

<i>Gannet Co. v. Re</i> , 496 A.2d 553 (Del. 1986).....	19
---	----

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I.....	5, 15
---------------------------	-------

FEDERAL RULES

Fed. R. Civ. P. 26.....	9, 8
Fed. R. Civ. P. 30.....	9
Fed. R. Crim. P. 17(c).....	9
Fed. R. Evid. 501.....	9

OTHER AUTHORITIES

23 Charles Alan Wright & Kenneth Graham, *Federal Practice and Procedure* § 5436 (1980, Supp. 2007).....10, 9, 11

Free Flow of Information Act, H.R. 2101, 110th Congr. (2007).....11

Free Flow of Information Act, H.R. 985, 111th Congr. (2009).....11

James C. Goodale et. al., *Reporter’s Privilege*, 952 PLI/Pat 161 (2008)6, 12

James Tucker & Steven Wermiel, *Enacting a Federal Shield Law: A Response to Professors Clymer and Eliason*, 57 Am. U. L. Rev. 1291 (2008).....10

John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 16/35 (7th ed. 2004).....17

Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 Minn. L. Rev. 515 (2008).....13

Potter Stewart, *Or of the Press*, 26 Hastings L. J. 631 (1975).....14

Restatement (Second) of Torts § 580(B)(1977).....22

S. Rep. No. 93-1277 (1974).....10

STATEMENT OF JURISDICTION

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 FACTS

Appellee Ike Broflovski graduated with a Ph.D. from the Massachusetts Institute of Technology at the age of 23. (J.A. at 3.) Upon graduation, he went to work as the Research and Development Coordinator for Citrus, a *Fortune* 500 company owned by his brother, Kyle Broflovski. *Id.* Preferring to devote his time to research, Ike shied away from public attention as much as possible, even ducking out of a press conference announcing his new position at Citrus. *Id.* During his first few months with the company, Ike designed the e-play Touché, which became wildly popular. *Id.* The device was so successful that some Citrus employees began wearing homemade “I like Ike” buttons. (J.A. at 4.) Despite the acclaim, Ike remained reticent and shy, refusing to give interviews. (J.A. at 3.)

Appellant Eric Cartman is the sole proprietor of Cartman’s Computer World, a small computer repair store which was nearly put out of business when a Citrus Megastore opened across the street. (J.A. at 4.) Appellant supplements his income by publishing a daily blog called *The Sludge Report*. *Id.* The blog, which has garnered an audience of nearly 100,000 readers, discusses celebrity gossip, local and international politics, and other scandals. *Id.* The tone of the blog conveys a distinct disdain toward large, international companies. *Id.* Appellant’s harshest criticisms, however, are reserved for Citrus, and in particular, the Broflovski brothers. *Id.* Appellant has criticized Citrus for exporting jobs overseas, and has accused the company of “the systematic oppression of the peoples of the Third World.” *Id.*

On July 7, 2008, Appellant received a tip from a source who he refers to only as “Professor Chaos.” (J.A. at 5.) Appellant has met Professor Chaos in person and knows his

true identity. *Id.* He claims to have received reliable information from Professor Chaos in the past, although the tips were limited to product release dates. *Id.* In his tip, Professor Chaos accused Citrus of labor abuses at one of its Mumbai factories and attached a photo, purportedly of Ike Broflovski, which depicted him walking through the factory, shouting orders at workers. *Id.* Appellant posted the photograph on *The Sludge Report* along with a post in which he described Ike Broflovski as the “pawn of his evil older brother” and the conditions at the Citrus factory as “slave-like.” (J.A. at 6.) The post spread through the Internet, eventually catching the attention of the mainstream media. *Id.* Keith McRiley, host of “the Countdown Factor” named Ike the recipient of his nightly “Most Heinous Individual in the Galaxy” award. *Id.* In response, retailers pulled Citrus products from their shelves and stock prices dropped (J.A. at 7.)

On September 20, 2008, Ike Broflovski filed a defamation suit against Appellant. *Id.* Appellant removed the case to the federal district court for the District of Silverado on diversity grounds.¹ *Id.* During the course of discovery, it was revealed that the photograph was a fabrication, which could have been discovered through the use of forgery detection software. *Id.* Appellant owned such software and had used it on other occasions. *Id.* Appellant filed a motion for summary judgment on the defamation claim, which the District Court granted. (J.A. at 15.) The Court found that Ike Broflovski was a limited purpose public figure, and thus applied the actual malice standard to the defamation claim. *Id.* The Court of Appeals for the Fifteenth Circuit reversed the finding that Ike was a limited purpose public figure, but remanded for a

¹ Jurisdiction was predicated on diversity of citizenship, pursuant to 28 U.S.C. § 1332. (J.A. at 1-2.) The record is unclear as to whether the amount in controversy requirement of the statute was satisfied, but for the purposes of this appeal, Appellee presumes that damages exceed \$75,000.

determination as to whether Appellant was liable for defamation under a negligence standard. (J.A. at 32.) The parties appealed and the Court granted a writ of certiorari to determine whether Appellant should be held liable on an actual malice standard, on the grounds that Ike Broflovski is a limited purpose public figure.

SUMMARY OF THE ARGUMENT

I

The Supreme Court of the United States has already determined, in *Branzburg v. Hayes*, that the First Amendment does not create a qualified reporter's privilege in the criminal context. The Court's rationale and holding counsel against recognition of the privilege in the civil context as well. In response to *Branzburg*, Congress and many states have considered enacting a statutory privilege. Despite the absence of a federal statutory privilege, the Federal Rules and the nature of contemporary media safeguard the interests of the press.

II

Assuming, *arguendo*, that the First Amendment does create a qualified reporter's privilege, Appellant still falls outside the scope of its protections. Appellant does not qualify as a reporter because he engaged in no traditional journalistic activities as required by numerous federal circuit courts. Merely soliciting tips and posting them on the Internet does not qualify Appellant as a member of the press, deserving of First Amendment protection. Recognizing Appellant as a reporter would blur the distinction between the traditional doctrines of free speech and free press. Accordingly, the Court should preserve the integrity of these doctrines by refusing to recognize Appellant as a reporter.

III

The *Sullivan* actual malice standard is constrained to defamation claims brought by general or limited purpose public figures. This Court has reserved limited purpose public figure status for those who voluntarily assume an increased risk of defamation by inserting themselves into a matter of public controversy. Ike Broflovski does not qualify as a limited purpose public figure because he did not voluntarily seek the attention of the public, but rather took steps to avoid public attention. In this case, no public controversy exists, as the subject of the defamation does not affect the public as a whole. The nature of the Internet and extent of its audience also counsel in favor of narrow application of the doctrine. Accordingly, the appropriate standard for Mr. Broflovski's online defamation claim is negligence.

ARGUMENTS

I. The First Amendment does not create a qualified reporter's privilege

The United States Supreme Court has refused to recognize a qualified reporter's privilege that would protect reporters from disclosing confidential sources to grand juries. While the Court did not directly address the existence of a qualified reporter's privilege in the civil context, the language of the decision strongly indicates that no such privilege exists.

Additionally, the press has the power to effectively protect itself. In today's society the press has access to the public 24 hours a day, allowing grievances, abuses, and perceived injustices to be brought to immediate attention. Finally, the First Amendment is protected by the Federal Rules already in place. Federal Rules of Evidence, Criminal Procedure, and Civil Procedure

provide courts with power to quash subpoenas duces tecum.

A. The reasoning by the Court in *Branzburg* when it refused to recognize a qualified reporter's privilege in the criminal context is applicable in the civil context.

The First Amendment to the United States Constitution does not create a qualified reporter's privilege against court-compelled disclosure of a journalist's confidential sources. The First Amendment states, "Congress shall make no law...abridging the freedom of speech, or of the press[.]" U.S. Const. amend. I. The Court has limited this Constitutional provision numerous times, holding that certain types of speech are not protected. *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement of imminent lawless action). *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (obscenity, libel, fighting words);

In *Branzburg v. Hayes*, the Court rejected the assertion of an absolute reporter's privilege. 408 U.S. 665 (1972). The issue before the Court was whether the First Amendment provides a qualified reporter's privilege, thereby allowing a reporter to resist a grand jury subpoena to testify. *Id.* at 667. The Court held that there is no privilege within the First Amendment that protects a journalist from testifying before and disclosing confidential sources when properly subpoenaed by grand juries. *Id.*

The main argument in support of a qualified reporter's privilege was that forcing reporters to disclose confidential sources created a burden that outweighed the "public interest" in acquiring the information. *Id.* at 681. The Court, however, rejected this argument, noting that grand jury proceedings are required by the Constitution and are considered immensely important,

and made clear that some “incidental burdening of the press” is permitted. *Id.* at 682.

Furthermore, the Court was uneasy about interpreting the First Amendment to grant a privilege that would not be enjoyed by ordinary citizens. *Id.* at 689-90.

Indeed, at common law, no qualified reporter’s privilege was recognized. *Id.* at 684-87.

This refusal to recognize a privilege was rooted in the importance of the grand jury system. “The concept that it is the duty of a witness 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) (as discussed in *Branzburg*). The *Branzburg* Court recognized this principle, noting that the “right to speak and publish does not carry with it the unrestrained right to gather information.” *Branzburg*, 408 U.S. at 684. Accordingly, the Court “reaffirm[ed] the prior common law and constitutional rule regarding the testimonial obligations of a newsman.” *Id.* at 693.

B. As advocated in *Branzburg*, the appropriate remedy here is through Congress and state legislatures.

The Court in *Branzburg* invited Congress and state legislatures to “fashion standards and rules as narrowly or broadly” as they see fit. *Id.* at 706. To date, 34 states have taken the Court’s invitation. James C. Goodale et. al., *Reporter’s Privilege*, 952 PLI/Pat 161, 170 (2008).

Allowing the legislatures to craft their own standards has an important advantage. It protects the Court from having to begin a journey that “would present practical and conceptual difficulties of a high order.” *Branzburg*, 408 U.S. at 703-04. If the Court engaged in the process of fashioning standards and rules now, the progress made by the states would be undermined. The Court has

recognized that federalism permits “the States [to] perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.” *United States v. Lopez*, 514 U.S. 549, 581 (1995) (reasoning that a federal gun free school zone law was unnecessary as 40 states had enacted similar legislation on their own). The Court would have to rule on every aspect of the qualified reporter’s privilege. The Court would have to determine when the privilege applies, to whom it applies, what sources are covered, whether the privilege could be overcome, and many other difficult questions. If there were any ambiguities, the Court would have to re-evaluate each one on a separate basis, which would cause more confusion and uncertainty.

Congress and the legislatures of each state are in a better position to solve problems that arise from implementing a reporter’s privilege via legislative action. Notably, with no common law privilege for the Court to rely on, it would be difficult to craft any qualified reporter’s privilege. Additionally, Congress and legislatures have already taken up this issue and have begun to formulate their own solutions. This process is much more effective than any rule the Court could create.

C. The proper approach to analyzing any possible reporter’s privilege must remain consistent with the majority’s opinion in *Branzburg*.

The Sixth and Seventh Circuit Courts of Appeal have approached the issue of a qualified reporter’s privilege in a manner consistent with the *Branzburg* opinion. *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003); *In re Grand Jury Proceedings*, 810 F.3d 580, (6th Cir. 1987).

Because these decisions are rooted in the rationale of *Branzburg*, they represent the proper test to be applied.

In the present case, the District Court incorrectly interpreted the *Branzburg* opinion as the “genesis” for the creation of a qualified reporter’s privilege. (J.A. at 10.) The District Court treated the majority opinion as though it were a mere plurality, and placed undue weight on Justice Powell’s three-paragraph concurrence. (J.A. at 10.) Other courts have rejected this reasoning, interpreting Justice Powell’s concurrence as a response to Justice Stewart’s “unwarranted characterization” of the majority’s opinion. For example, the *McKevitt* Court stated, “Some cases that recognize the privilege...essentially ignore *Branzburg*...; some treat the majority opinion in *Branzburg* as actually just a plurality opinion...; some audaciously declare *Branzburg* actually created a reporter’s privilege.” 339 F.3d at 532 (citing *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987); *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975)).

The Court should follow the Seventh Circuit’s view that there is no need for special criteria merely because the possessor of the evidence sought is a journalist. *McKevitt*, 339 F.3d at 533. The Seventh Circuit argues that subpoenas duces tecum should be governed by the same “general criterion for judicial review of subpoenas.” *Id.* See also *In re Grand Jury Proceeding*, 810 F.2d at 586. As the Fifteenth Circuit Court of Appeals noted, “Rather than erecting a novel constitutional barrier . . . the duty of the federal courts should be to protect against pretrial abuses of discovery and to police against harassment and unduly burdensome requests.” (J.A. at 24.) By following this approach, the Supreme Court will stay consistent with its decision in

Branzburg and still allow states and Congress to control their own destiny. With the existing protections and remedies in the law, the Court should not recognize a qualified reporter's privilege against the disclosure of confidential sources.

D. A qualified reporter's privilege is not necessary to protect the press.

The Federal Rules of Civil Procedure and Criminal Procedure adequately protect reporters. *See generally*, Fed R. Civ. P. 26 and 30; Fed. R. Crim. P. 17(c). The mainstream media has the means and access to the public to safeguard it against any perceived injustices. The drafters of Federal Rule of Evidence 501 considered and rejected a reporter's privilege. The majority of state jurisdictions have addressed these concerns. Consequently, the recognition of a federal reporter's privilege is unnecessary.

Reporters may seek protection in the federal rules of Civil and Criminal Procedure. Federal Rule of Civil Procedure 26(c)(1) allows "a party or any person from whom discovery is sought" to petition the court for a protective order. Furthermore, Federal Rule of Civil Procedure 26(b)(2)(C) grants courts power to limit the extent or frequency of discovery. These rules provide a reporter subpoenaed with a variety of options. For example, an exception stated in Federal Rule of Civil Procedure 26(b)(2)(C)(iii) allows the court to limit discovery when the burden outweighs the benefit. The media remains free to prove that it would be burdened by participating in discovery; these determinations are within the discretion of the trial court.

Federal Rule of Evidence 501 was meant to address testimonial privileges. In *Jaffee v. Redmond*, the Court explained, "Rule 501...authorizes federal courts to define new privileges by interpreting 'common law principles...in the light of reason and experience.'" 518 U.S. 1, 8

(1996). The drafters of Rule 501 intended that the recognition of a “privilege based on a confidential relationship” should be considered in each individual case. *Id.* at 8 (quoting S. Rep. No. 93-1277, 13 (1974)). Two years earlier, in *Branzburg*, Justice Powell suggested that the question of a reporter’s privilege should be considered on a “case-by-case” basis,” where reporters sought to resist subpoenas. 408 U.S. at 710 (Powell, J., concurring). 23 Charles Alan Wright & Kenneth Graham, *Federal Practice and Procedure* § 5426 (1980, Supp. 2007) (arguing that the *Branzburg* opinion indicates Congress is the appropriate entity to fashion a privilege). In adopting Federal Rule 501, Congress rejected nine specific privileges listed in the proposed rules, opting for “Rule 501’s general mandate” instead. *Jaffee*, 518 U.S. at n.7. The advisory committee specifically considered and subsequently rejected a reporter’s privilege. Wright & Graham, *supra*, § 5426. Accordingly, this Court should defer to Congressional intent.

Congress has never chosen to create a federal reporter’s privilege. The Fifteenth Circuit Court of Appeals considered this, noting that Congress’s failure to do so is a “tacit admission” that such a privilege is unneeded. (J.A. at 25.) “Approximately one hundred bills to create a shield law were introduced by 1978. None of the bills made it to a floor vote. Despite the acknowledged need for Congressional action, no federal reporter’s shield law has been enacted for thirty-five years after *Branzburg*.” James Tucker & Stephen Wermiel, *Enacting a Federal Shield Law: A Reply to Professors Clymer and Eliason*, 57 Am. U. L. Rev. 1291, 1310-11 (2008). These facts support the Fifteenth Circuit’s refusal to recognize a qualified reporter’s privilege.

The *Branzburg* Court was uneasy about giving a “newsman a testimonial privilege that other citizens do not enjoy.” 408 U.S. at 690. Such a privilege would give journalists the exclusive power to decide whether to disclose confidential sources. This concern is particularly prescient, given the press’s unique ability to defend its own interests.

The press has “flourished” without any such protection of informants. *Id.* at 698-99. This principle holds true today, especially considering the twenty-four hour news cycle. The public has unceasing access to information provided by the media. Any perceived “harassment” or “abuse” can be readily and immediately brought to light. Finally, the press continues to publish and report despite the lack of any federal legislation passed in this area or federal recognition of a qualified reporter’s privilege. *See* Free Flow of Information Act, H.R. 985, 111th Cong. (2009); Free Flow of Information Act, H.R. 2102, 110th Cong. (2007). Together, these protections render recognition of a federal privilege unnecessary.

II. Even if the Court does find a qualified reporter’s privilege in the First Amendment, Appellant does not qualify as a reporter.

The photograph provided by Professor Chaos and Appellant’s subsequent comments are merely common speech. Appellant conducted no investigative reporting and made no attempt to verify the accuracy of the information. The comments posted by Appellant are strictly opinions, and cannot constitute the work of a reporter. Additionally, if Appellant is eligible for a qualified reporter’s privilege, then the difference between the freedom of speech and press would become meaningless. Every citizen could claim a reporter’s privilege in every situation. The line between the speech and press clauses would be blurred beyond recognition.

A. Appellant's lack of actual reporting and investigation demonstrates that he is not a reporter for purposes of First Amendment protection.

The difficulty in defining who qualifies as a reporter was one of the primary reasons the *Branzburg* Court decided against a qualified privilege. 408 U.S. at 704. One of the struggles was how a reporter's mode of transmission of their information affected their status as a reporter. *Id.* Subsequently, the Third, Second and Ninth Circuits held that the mode of transmission is irrelevant and have included all mediums of reporting to have the right to a qualified reporter's privilege. *See von Bulow*, 811 F.2d at 142-43; *In re Madden*, 151 F.3d 125, 129-20 (3d Cir. 1998); *Shoen*, 5 F.3d at 1293. These circuits focus on the activity and intent of the individual gathering the information. *See generally, Madden*, 151 F.3d at 129-30; *Shoen*, 5 F.3d at 1293; *von Bulow*, 811 F.2d at 142-43. Nonetheless, the issue of whether the medium is protected and whether the individual is a qualified reporter go hand in hand. One commentary points out,

While some argue that it is logical that the reporter's privilege should be expanded to encompass individuals outside the traditional media who nonetheless perform important news functions, others assert that because bloggers do not have access to the editorial and newsgathering infrastructure of traditional news organizations, they are not practicing journalism as understood under reporter's privilege analysis.

Goodale et al., supra, at 186. Furthermore, individuals should only be protected if, from the outset of newsgathering, the overall intent is to disseminate the information to the public. *See Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998); *Madden*, 151 F.3d at 129-30 (a reporter's privilege should only protect persons engaging in traditional news gathering for public dissemination).

Commentary advocating an absolute right that would cover everyone is a “rather radical approach.” Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 Minn. L. Rev. 515, 585 (2007). In the present case, the only research Appellant did was scan the Internet for “various news items he [found] on the Internet and the headlines of major newspapers.” (J.A. at 4.) Appellant only provided a link to his personal e-mail account so individuals could leave him “scoops on protests, scandals in local and state governments, and other information.” (J.A. at 5.) In fact, Appellant did not engage in “investigative reporting” on the photo Professor Chaos sent him. (J.A. at 7.) Appellant simply posted the photo on his website and added commentary. (J.A. at 5-7.) This cannot be called journalism or reporting. Posting the picture in a “no questions asked” manner only provided a venue for the unsubstantiated accusations made by Professor Chaos. This act is nothing more than shouting an opinion on the street corner.

B. Applying the test from the Third Circuit, Appellant still could not be considered a reporter without recognizing everyone as a reporter.

Appellant is not a member of the press within the meaning of the First Amendment. Even looking to a circuit that does recognize a reporter’s privilege, Appellant does not pass the first criteria. In *Madden*, the Third Circuit held there are three elements an individual must meet before qualifying for the reporter’s privilege. 151 F.3d at 131. To qualify for the privilege, reporters 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.” *Id.*

Here, Appellant did no investigating. The posting of an e-mail address in hopes of someone providing him with “scoops” on various activities is nothing more than mere solicitation. Under the *Madden* test, such activity fails to qualify as “investigative reporting.” *Id.* Furthermore, nothing in the record suggests Appellant provides for any of his own content on his blog except for his own editorial comments, which should be characterized as speech, not press. (J.A. at 5-6.) Appellant checked his e-mail, did not take any actions investigating or verifying the photo’s authenticity, and posted it on his blog. *Id.* This action amounts to nothing more than placing a photo on MySpace or Facebook, not investigative journalism.

This conduct cannot be considered protected activity under the press clause of the First Amendment, which is distinct from the speech clause. As Justice Stewart noted, “[t]he publishing business is . . . the only organized private business that is given constitutional protection.” Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 633 (1975). If the Framers intended for there to be no meaningful difference between a speaker and the press, they would not have explicitly singled out the established press for protection in the First Amendment.

Therefore, Appellant does not qualify as a reporter for the purposes of entitlement to First Amendment protection. Appellant’s posting of the picture and his comments are simply speech and do not qualify as press. Maintaining a webpage with material from other sources and posting photos do not make Appellant an investigative reporter as required by the Third Circuit test or a member of the press as required by the First Amendment.

III. Because Ike Broflovski is not a limited purpose public figure, negligence is the appropriate standard for his online defamation claim.

The First Amendment to the U.S. Constitution provides: “Congress shall make no law infringing upon . . . the freedom of the press.” However, this protection is not absolute. The Constitution does not shield libelous statements. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. Consequently, the First Amendment permits members of the press to be held liable for defamation.

The gravamen of a defamation claim is the individual’s right to safeguard his good name. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J. concurring). “The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty.” *Id.* This basic premise may conflict with the First Amendment’s guarantee of free expression and of public debate. Since its decision in *New York Times v. Sullivan*, the Supreme Court of the United States has struggled to create an equilibrium between the interests of the public, the media, and individuals. 376 U.S. 254 (1964). A finding that Ike Broflovski is a limited purpose public figure subject to the actual malice standard subverts this equilibrium.

A. Ike Broflovski does not fit the Court’s definition of a limited purpose public figure.

The Court created the limited purpose public figure classification in its ongoing attempt to “define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974). This was the culmination of the Court’s decade-long struggle to delineate the appropriate Constitutional boundaries for defamation actions. In *Sullivan*, the Court instituted a demanding

standard, which required defamed public officials to demonstrate a statement had been made with actual malice. 376 U.S. at 279-80. To prove actual malice, a claimant must show the defamer had “knowledge that [the statement] was false, or [acted] with reckless disregard of whether it was false or not.” *Id.* Three years later, in *Curtis Publishing Co. v. Butts*, the Court extended this requirement to “public figures.” 388 U.S. 130, 162 (1967). However, in *Gertz*, the Court limited the public figure doctrine, noting that normally “an individual should not be deemed a public personality for all aspects of his life.” 418 U.S. at 352. “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,” thus becoming public figures solely for a “limited range of issues.” *Id.* at 351.

1. Ike Broflovski has not voluntarily assumed the risk of defamation, but was forced into the public eye by Appellant.

Voluntary assumption of the increased risk of defamation is central to the determination that an individual is a limited purpose public figure. *See, e.g., Gertz*, 418 U.S. at 345; *Time, Inc. v. Firestone*, 424 U.S. 448, 455 (1976). The Court of Appeals for the Fifteenth Circuit correctly recognized the centrality of the voluntariness requirement of the public figure doctrine. “The public figure doctrine is meant to elevate the standard of fault for those who voluntarily thrust themselves into the public fire, not for those who are merely standing too close to them when they burn ablaze.” (J. A. at 28.) This decision upholds the delicate balance the Court struck between the interests of the public, press, and individual.

The federal circuits have promulgated a number of tests for determining public figure status. In the present case, the Fifteenth Circuit adopted the test established in the Second

Circuit. This four-part test most closely tracks with the Court's precedent and reasoning, and is accordingly the appropriate standard. In order for a plaintiff in a defamation suit to be considered a limited purpose public figure, he 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." *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-37 (2d Cir. 1984). The elements of this test are directly derived from this Court's decisions in *Gertz* and its progeny.

Conversely, Appellant urges the application of the plurality test, which holds that an individual 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 *Silvester v. Am. Broad. Co. Inc.*, 839 F.2d 1491, 1494 (11th Cir. 1988). This test disregards the importance of voluntariness in the public figure doctrine. At one time, a plurality of the Court espoused the view that the *Sullivan* standard should apply to private citizens involuntarily caught up in events of public interest. See *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971). However, this view was firmly rejected with the Court's decision in *Gertz*, which mandated that individuals voluntarily inject themselves into the controversy to be considered limited purpose public figures. John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 16.35 at 1271 (7th ed. 2004). Since the *Gertz* decision, it is patent that voluntariness is central to public figure status.

The Court has conceded that there may be limited exceptions. However, in *Gertz*, the Court qualified these exceptions, stating “[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.” *Gertz*, 418 U.S. at 345. Ike Broflovski is not that rare case.

The majority of the public attention that Citrus has received has been sought by Kyle Broflovski, Ike’s brother. (J.A. at 3.) This relationship does not render Ike Broflovski a public figure. In *Firestone*, the Court rejected the contention that a relative of a prominent person may become a public figure solely through that relationship. 424 U.S. at 45. Mary Alice Firestone, in seeking a divorce from her prominent husband, had “done nothing to thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.” *Id.* Similarly, Ike Broflovski has taken no affirmative action to influence Citrus’s policy on labor conditions. Mr. Broflovski is the Director of Research and Development at Citrus; he is not involved in labor or management decisions, which are the subject of the story on *The Sludge Report*. (J.A. at 3, 6.) He merely works at his brother’s company, avoiding the limelight. (J. A. at 3-4.) His participation is no more than “standard business practice, not the act of an individual seeking to draw public attention to himself.” (J. A. at 29.) Nor is Mr. Broflovski’s own position at Citrus sufficient to qualify him as a public figure, unless he affirmatively seeks the limelight. *See Taveoulaareas v. Piro*, 817 F.2d 762, 773 (D.C. Cir. 1987) (position as an executive at a prominent company alone is insufficient to give rise to

public figure status); *Gannet Co. v. Re*, 496 A.2d 553, 556-57 (Del. 1985) (inventor was not a limited purpose public figure).

The majority of the public attention Mr. Broflovski has received is a direct result of the defamatory story published on Appellant's blog. (J.A. at 5-6.) In *Proxmire v. Hayes*, the Court rejected the contention that libel defendants could "through their own conduct, create their own defense by making the claimant a public figure." 443 U.S. 111, 135 (1979); *accord. Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167-68 (1979). The record in this case establishes that the only significant public attention Mr. Broflovski received was due to the defamatory story. In fact, the story published by *The Sludge Report* and Mr. Broflovski's ensuing receipt of the "Most Heinous Individual in the Galaxy Award" were the only news reports to center around Ike Broflovski. (J. A. at 5-6.) Mr. Broflovski had been briefly mentioned at the end of an article describing new products and had attended only one press conference. (J. A. at 3.) In *Proxmire*, the researcher who received the "Golden Fleece" award was well-known within the scientific community, published extensively, and written about in local newspapers. 443 U.S. at 135. His writings only became part of a "public controversy" as a result of the award itself. *Id.* Even assuming that Mr. Broflovski is part of a public controversy, it is solely as a result of the defamation.² Accordingly, precedent establishes that Mr. Broflovski is not a limited purpose public figure.

2. Appellant, as a solitary blogger, cannot manufacture a public controversy.

² While Mr. Broflovski did exercise his common law right of reply, it was done through his attorney. This does not render him a limited purpose public figure for defamation purposes. *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1559-60 (4th Cir. 1994).

The second touchstone of the public figure doctrine is the existence of a “public controversy.” *Gertz*, U.S. at 345. There is a distinction between matters of public concern and public controversy. *Proxmire*, 443 U.S. at 134. While labor conditions in companies owned by Americans are a public concern, they are not a public controversy. “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 Publ’n, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980). Labor conditions at a Mumbai factory owned by a U.S. company do not affect the general public in any appreciable way. To extend the public controversy requirement that far renders virtually every issue any solitary commentator finds interesting a public controversy. Just as a libel defendant may not create his own defense by rendering the claimant a public figure, a defendant may not manufacture a public controversy. *See Wolston*, 443 U.S. at 167-68.

The U.S. Supreme Court has rejected contentions that general concerns constitute public controversies. *Proxmire*, 443 U.S. at 134 (rejecting the contention that a generalized concern about public expenditures constituted a public controversy). Furthermore, “a libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *[Sullivan]*.” *Wolston*, 443 U.S. at 167. While the story Appellant published on his blog was arguably newsworthy, it does not constitute a public controversy.

B. The protective purpose of the doctrine would be subverted by a finding that Ike Broflovski is a limited purpose public figure.

The limited purpose public figure doctrine seeks to protect individuals. *Gertz*, 418 U.S. at 325. To hold that Ike Broflovski is a limited purpose public figure under these facts would undermine the protective purpose of the doctrine. Mr. Broflovski did not seek public attention, nor did he create this issue. (J.A. at 3-4.) To allow a lone blogger in the possession of a doctored photograph to undermine an individual's ability to protect his name and reputation would be to obliterate the balance the Court struck with its decision in *Gertz*.

These concerns are magnified by the ease and speed with which information is disseminated on the Internet. The "lonely pamphleteer" now has a magnificently powerful medium at his disposal. See *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972). Through the Internet, any individual can become "a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997). This Court has recognized that information disseminated on the Internet is available to a large audience, with no geographic limitations. *Id.* at 853. The Court has described the Internet as "a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." *Id.* Once a defamatory statement is published on the Internet, it remains there indefinitely, causing continuing harm to the defamation victim. *Cf. New York v. Ferber*, 458 U.S. 747, 761 (1982) (analogizing the multiple viewings of child pornography to a defamatory statement, in that the victim is re-victimized with each viewing). These policy concerns counsel in favor of a narrow application of the limited purpose public figure doctrine.

A decision holding that Ike Broflovski is a limited purpose public figure would effectively eliminate the distinction between a private citizen and a public figure. Mr. Broflovski

has not sought to influence the outcome of public events by inserting himself into the spotlight.

(J. A. at 2-3.) He has not even commented on the defamation itself, except through his attorney.

Id. A determination that Mr. Broflovski is a limited purpose public figure is a determination that any individual who achieves career success is a limited purpose public figure, regardless of his or her own conduct. Courts have rejected this as a basis for public figure status. *See, e.g., Taveoulaareas*, 817 F.2d at 773. The distinction between a private figure and a limited purpose public figure must remain meaningful, if individual dignity is to be protected, rather than perverted.

C. Because Mr. Broflovski is not a limited purpose public figure, the actual malice standard is inapplicable.

Because Mr. Broflovski is not a limited purpose public figure, the *Sullivan* actual malice standard should not apply. Precedent establishes that for the actual malice standard to apply, the claimant must be either a general or limited purpose public figure. *Gertz*, 418 U.S. at 325; *Curtis Pub. Co.*, 388 U.S. at 162; *Sullivan*, 376 U.S. at 284. Mr. Broflovski is neither. Accordingly, the Court of Appeals for the Fifteenth Circuit correctly applied the State of Silverado's standard of fault for defamation, which is negligence. (J.A. at 30.)

The standard for negligence is whether the defendant acted as a reasonably prudent person would have under the circumstances. Restatement (Second) of Torts § 580(B) (1977). The Restatement directs a factfinder to consider the circumstances surrounding the communication, including whether the story is "hot news," attempts to verify sources, independent investigation, and other relevant facts. *Id.* at cmt. h. There is an important

distinction between providing information essential to the functioning of a democracy and between speculative conclusions as to conditions at a solitary factory. The Fifteenth Circuit correctly concluded that the purported labor abuses at Citrus's Mumbai factory were not "hot news." (J.A. at 31.) Thus, it would have been reasonable for Appellant to engage in more investigation and fact-checking, even conceding that "Professor Chaos" had previously provided accurate information. (J.A. at 5.)

The character of the information Appellant's source had previously provided was markedly different, relating solely to product release dates, not to management practices, labor conditions, or suspected human rights abuses. *Id.* Professor Chaos had never given *The Sludge Report* a tip of an international nature before. *Id.* Given the gravity of the source's allegations, and the character of the story, a reasonably prudent person would have conducted more investigation. *Cf. Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 521 (1991) (a reporter not working under a tight deadline was not handling "hot news" and should have verified his sources). As it turns out, the photograph provided by Professor Chaos had been doctored, suggesting that more investigation should have been conducted. (J.A. at 7.) Appellant had the technology available to him to verify the accuracy of the photograph and had used forgery detection measures on other photographs he posted. *Id.* These facts demonstrate the inherent danger in according "press" status to solitary bloggers, who lack the institutional resources, internal oversight, and professional ethics of traditional media which serve as checks on their conduct. *See supra*, Part. II.B. Appellant's actions, coupled with his admitted personal animus towards Citrus and the Broflovski brothers, demonstrate that sufficient facts exist to proceed to trial on Mr. Broflovski's defamation claim.

CONCLUSION

Because recognition of a federal reporter's privilege would be inconsistent with *Branzburg* and its progeny, would undermine the progress states have made in the area, and such a privilege is unnecessary to protect the interests of the press, Respondent requests that the Court affirm the decision of the Court of Appeals for the Fifteenth Circuit. Should the Court recognize a qualified reporter's privilege, Ike Broflovski respectfully asks that the order mandating that the Appellant disclose his confidential source be affirmed because Appellant falls outside the scope of any qualified reporter's privilege.

The Court has maintained a delicate balance between an individual's interest in safeguarding his good name, the press's interest in pursuing issues of public interest, and the public's interest in the truth since its decision in *Gertz*. Ike Broflovski asks the Court to sustain that delicate balance, by holding that he is not a limited purpose public figure subject to the actual malice standard. Accordingly, the ruling of the Fifteenth Circuit Court of Appeals that negligence is the appropriate standard should be affirmed and the case should be remanded for trial.

Respectfully Submitted,

Attorneys for the Appellee