The News Media Engagement Principle: Why Social Media Has Not Actually Overrun the Limited Purpose Public Figure Category

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The News Media Engagement Principle: Why Social Media Has Not Actually Overrun the Limited Purpose Public Figure Category

ZACHARY R. CORMIER*

Has the rise of social media ruined the limited purpose public figure category of the First Amendment’s actual malice privilege? Justice Gorsuch believes so—and he has recently invited courts to get rid of it. He argues that the category now includes vast numbers of otherwise private citizens that have “become ‘public figures’ on social media overnight.” With so many people qualifying as limited purpose public figures (and having to overcome the actual malice standard to prevail on a defamation claim), he claims that the category has evolved to provide an unjustified shield for the masses of misinformation-peddlers on social media.

In reality, however, the current state of limited purpose public figure jurisprudence is not so grim. This Article will explain how an extensive review of published opinions issued over the last fifteen years demonstrates that the limited purpose public figure category has not provided a refuge for large numbers of social media fraudsters as Justice Gorsuch suggests. To the contrary, it has been rare for courts to find

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that an otherwise private figure has become a limited purpose public figure by posting on social media alone. This is not the result of some new or modified social media/online test for the limited purpose public figure, but rather largely due to a commitment to the original (and fundamental) role of legitimate news organizations in the analysis.

The Supreme Court cases that established the limited purpose public figure category indicated that the key decision which transforms a person from private figure to limited purpose public figure is engagement with the news media. It is that signature action which demonstrates that such person has “thrust” herself “to the forefront” of the public controversy in order to actually “influence the resolution of the issues involved.” This Article will: (1) survey the fundamental role that the news media engagement principle played in the limited purpose public figure framework established by the Supreme Court; (2) provide an extensive review of modern case law which demonstrates how courts have prevented an overextension of the limited purpose public figure category through a commitment to the news media engagement principle; and (3) argue why courts should maintain application of the actual malice privilege to statements about limited purpose public figures (even amidst social media’s continued rise) to preserve free speech and free press rights for news and debate about non-governmental persons with influence over important public issues.
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INTRODUCTION

We have a misinformation problem. Social media has brought us many wonderful things: quick access to legitimate news; connections with people, cultures, and social movements across the globe; even cats in blues-styled sunglasses playing Bruce Springsteen tunes on the piano. However, the modern surge of social media has also brought along with it a wave of misinformation, rumor mongering, and “fake news” that is staggering in its pervasiveness within public discussion of important social and political issues. Such a byproduct is not altogether surprising given that journalists are so vastly outnumbered online by the random persons, interest groups, and even bots that fill the feeds and screens which have captivated the public’s attention. There is, however, a very real concern about how such massive amounts of false information are impacting the democratic process, which has drawn responses from leaders in...
news\(^5\) and education,\(^6\) and now the United States Supreme Court ("Supreme Court").\(^7\)

Many from the news and education fields have engaged in the important practical work of promoting awareness about the prevalence of false information and the need for personal responsibility in how people evaluate online sources.\(^8\) They have offered a variety of objective methods and tools to help people with this evaluation process.\(^9\) The law is, however, a much blunter tool. Courts have begun to consider how the law might remove potential legal shields which enable those that spread misinformation online.\(^10\) One prime example of this is the actual malice privilege, which has drawn sharp criticism from some members of the Supreme Court recently,\(^11\) leaving the future contours of the privilege in more doubt than at any time since its adoption in the landmark case of *New York Times v. Sullivan* in 1964.\(^12\)


\(^7\) See Berisha v. Lawson, 141 S. Ct. 2424, 2428 (2021) (drawing attention to the impacts of misinformation).

\(^8\) See, e.g., Strauss, *supra* note 5.

\(^9\) See, e.g., NEWS LITERACY PROJECT, *supra* note 5.


\(^11\) See *Berisha*, 141 S. Ct. at 2428.

\(^12\) Sullivan, 376 U.S. at 279–80.
The actual malice privilege was established by the Supreme Court to safeguard good faith discussion and reporting about government officials and public figures from the chilling effect of potential damages from a defamation or libel lawsuit. In this way, the privilege is meant to encourage the exercise of free speech and free press rights under the First Amendment with respect to discussion about those persons that have the greatest influence on public issues. The privilege accomplishes this by requiring a higher burden of proof for defamation or libel claims brought by government officials and public figures. A defamation or libel claim in most all states requires only that a plaintiff establish by a preponderance of the evidence that the defendant acted negligently in publishing the false statement. In contrast, the privilege requires that a government official or public figure demonstrate by clear and convincing evidence that the defendant acted with the more culpable “actual malice” state-of-mind in order to receive damages.

“Actual malice” means that the defendant published the false statement either with (1) knowledge that the statement was false; or (2) reckless disregard as to whether the statement was false. In order to prove such reckless disregard, the government official or public figure must show that the defendant “in fact entertained serious doubts as to the truth of his publication” or otherwise acted with a

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14 See id.
15 See id.; see also Masson v. New Yorker Mag., Inc., 501 U.S. 496, 510 (1991) (emphasizing that “[w]hen . . . the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice . . . ”).
16 Brown v. Kelly Broad. Co., 771 P.2d 406, 424–25 (Cal. 1989) (en banc) (providing a survey of defamation requirements amongst the states and determining that the “near unanimous” rule is that a private figure only needs to prove negligence in support of a defamation claim) (citations omitted)); see also Pendleton v. Haverhill, 156 F.3d 57, 66 (1st Cir. 1998) (“Under the taxonomy developed by the Supreme Court, private plaintiffs can succeed in defamation actions on a state-set standard of proof (typically, negligence), whereas the Constitution imposes a higher hurdle for public figures and requires them to prove actual malice.”) (citations omitted).
17 Masson, 501 U.S. at 510.
18 Id. (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964)).
“high degree of awareness” of “probable falsity.” Actual malice is “quite purposefully” a “difficult standard to meet.” The Supreme Court has “emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.” The result of such protection is that government officials and public figures are much more likely to lose defamation and libel claims, even if the statements at issue were inaccurate and harmful.

In Gertz v. Robert Welch, Inc., the Supreme Court settled an early debate about the scope of the privilege in holding that public interest alone does not dictate its applicability. Instead, the privilege is meant to address speech about specific categories of persons. The Gertz Court established four categories of potential “figures,” and explained that applicability of the privilege will depend upon which of these categories the plaintiff fits within: (1) government officials (sometimes referred to as public officials); (2) pervasively famous public figures (sometimes referred to as all-purpose public figures or general purpose figures); (3) limited purpose public figures; or (4) private figures. The actual malice privilege will usually apply to statements about government officials and pervasively famous public figures, and never to statements about private figures. The more complicated analysis (both then and afterwards) is

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19 Id. (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).
21 St. Amant, 390 U.S. at 731–32.
22 Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (explaining that the privilege “administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander” such that even some “deserving plaintiffs” will be unable to overcome its intentionally high standard); see also St. Amant, 390 U.S. at 731–32.
23 Gertz, 418 U.S. at 345–47.
24 Id.
25 Id. at 343–48, 351–52.
26 Id. at 343–45, 351–52.
27 Id. at 345–48; see also e.g., Talley v. Time, Inc., 923 F.3d 878, 898 n.20 (10th Cir. 2019) (the Supreme Court held in Gertz that “the actual malice standard applies to public figures but does not apply in cases brought by private-figure plaintiffs.”).
applicability of the privilege to statements about a potential limited purpose public figure.28

The Gertz Court defined a limited purpose public figure as someone who, though not famous in a general sense, has achieved significant public attention in relation to a particular public controversy because she has “thrust” herself “to the forefront” of the controversy “in order to influence the resolution of the issues involved.”29 The privilege does not apply to “all aspects” of a limited purpose public figure’s life as it would to a pervasively famous public figure, but rather only to statements that are relevant to her participation in the controversy.30 Importantly, the limited purpose public figure determination is a legal question which is decided by the court (not the jury) in each case.31

The limited purpose public figure category finds itself at the center of the Supreme Court’s current criticism of the privilege.32 The Supreme Court recently denied a petition for certiorari in a case involving application of the actual malice privilege to a potential limited purpose public figure in Berisha v. Lawson.33 Both Justice Thomas and Justice Gorsuch, however, published dissenting opinions in the order of denial.34 Justice Thomas argued that the privilege should be repealed, at least as to all non-government persons, primarily because he believes it has no relationship to the original

28 See id. at 345–47.
29 Gertz, 418 U.S. at 345.
30 See id. at 351–52; see also Waldbaum v. Fairchild Publ’ns, Inc., 627 F.2d 1287, 1298 (D.C. Cir. 1980).
31 See, e.g., Jankovic v. Int’l Crisis Grp., 822 F.3d 576, 585 (D.C. Cir. 2016) (“Whether [the plaintiff] is a limited-purpose public figure or is a private figure is a ‘matter of law for the court to decide.’”) (citation omitted); Tharp v. Media Gen., Inc., 987 F. Supp. 2d 673, 679 (D.S.C. 2013) (“Whether the Plaintiff is a public figure, limited-purpose public figure, or a private figure plaintiff is a question of law for the Court to decide.”); Thompson v. Nat’l Catholic Rep. Publ’g Co., 4 F. Supp. 2d 833, 837–38 (E.D. Wis. 1998) (“Therefore, the court will focus on whether the plaintiff is a limited purpose public figure. This threshold issue is resolved by the court as a matter of law, not by a jury as a question of fact.”) (citation omitted)).
33 See generally Berisha, 141 S. Ct. at 2424.
34 See id. at 2424–25.
intent or understanding of the First Amendment.\textsuperscript{35} Though Justice Gorsuch also led his analysis with skepticism about the privilege’s relationship to the “Constitution’s original public meaning,” he devoted much greater discussion to the current misinformation problem throughout the online media landscape, and to otherwise express substantial concern about whether the privilege is now doing more harm than good by incentivizing reckless speech.\textsuperscript{36} In the midst of listing other Justices that have raised questions about the privilege in the past, Justice Gorsuch referenced a prior article written by Justice Kagan from 1993, in which she expressed many similar principled concerns (which may now have only deepened given the evolution of online media).\textsuperscript{37} By “adding [his] voice to theirs,” Justice Gorsuch has set the stage for reconsideration of the privilege.\textsuperscript{38}

At a minimum, Justice Gorsuch has invited courts to reexamine the boundaries of the limited purpose public figure category.\textsuperscript{39} The Supreme Court cases that established the framework to determine who qualifies as a limited purpose public figure were all decided in a five-year span in the 1970s: \textit{Gertz v. Robert Welch, Inc.} (1974);\textsuperscript{40} \textit{Time, Inc. v. Firestone} (1976);\textsuperscript{41} \textit{Wolston v. Reader’s Digest Ass’n} (1979);\textsuperscript{42} and \textit{Hutchinson v. Proxmire} (1979),\textsuperscript{43} with the contours

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\textsuperscript{35} \textit{Id.} at 2425 (Thomas, J., dissenting) (quoting \textit{Tah v. Glob. Witness Publ’g, Inc.}, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting)) (arguing that the Supreme Court’s “pronouncement that the First Amendment requires public figures to establish actual malice bears ‘no relation to the text, history, or structure of the Constitution.’”). Justice Thomas has expressed similar arguments challenging the validity of the actual malice privilege in other recent denials of certiorari from the Supreme Court. \textit{See generally Coral Ridge}, 142 S. Ct. at 2454 (Thomas, J., dissenting); \textit{McKee}, 139 S. Ct. at 676 (Thomas, J., concurring) (concurring in the denial of certiorari but encouraging reconsideration of the actual malice privilege in a case with more “appropriate” factual circumstances).\textsuperscript{36} \textit{Berisha}, 141 S. Ct. at 2426–30 (Gorsuch, J., dissenting).\textsuperscript{37} \textit{Id.} at 2428 (citing Elena Kagan, \textit{A Libel Story: Sullivan Then and Now}, 18 L. & SOC. INQUIRY 197, 207 (1993)).\textsuperscript{38} \textit{Id.} at 2430.\textsuperscript{39} \textit{See id.} at 2429–30.\textsuperscript{40} \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 345 (1974).\textsuperscript{41} \textit{Time, Inc. v. Firestone}, 424 U.S. 448, 453–54 (1976).\textsuperscript{42} \textit{Wolston v. Reader’s Dig. Ass’n, Inc.}, 433 U.S. 157, 161 (1979).\textsuperscript{43} \textit{Hutchinson v. Proxmire}, 443 U.S. 111, 136 (1979).
and nuances of the category left thereafter for the circuits to refine.44 Though Justice Gorsuch raised more than a few “questions” in his opinion, two of his core concerns were: (1) the prevalence of misinformation across social media; and (2) what he perceived as the corresponding evolution of the limited purpose public figure category to allow far more people to qualify than was originally anticipated by the Supreme Court.45

Justice Gorsuch emphasized the reach and speed of information on social media: With more than four billion active social media users worldwide, “revolutions in technology” have made it so that “virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world.”46 He paired this observation with reference to a “study of one social network” that had “reportedly found that ‘falsehood and rumor dominated truth by every metric, reaching more people, penetrating deeper . . . and doing so more quickly than accurate statements.’”47 In other words, the reach of social media is enormous, and false statements outnumber truth across the playing field. But how does this relate to the actual malice privilege? Certainly, such a vast landscape is not populated to a large extent by qualifying limited purpose public figures.

Justice Gorsuch believes it might be, at least according to how he understands the evolution of limited purpose public figure jurisprudence: “Now, private citizens can become ‘public figures’ on social media overnight. Individuals can be deemed ‘famous’ because

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44 See Jankovic v. Int’l Crisis Grp., 822 F.3d 576, 585 (D.C. Cir. 2016) (explaining that “Gertz ultimately controls the resolution” of the limited purpose public figure determination); Biro v. Conde Nast, 963 F. Supp. 2d 255, 270 (S.D.N.Y. 2013) (noting that “Gertz remains the leading Supreme Court on the contours of the public figure designation”); Anaya v. CBS Broad. Inc., 626 F. Supp. 2d 1158, 1191 (D.N.M. 2009) (“Hutchinson v. Proxmire and Wolston v. Reader’s Digest Association represent the most recent Supreme Court pronouncements on what constitutes a public figure. The Supreme Court issued those opinions in 1979. In other words, the Supreme Court has not elaborated further on the public-figure question in nearly thirty years.”).


46 Id. at 2427 (citing David A. Logan, Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan, 81 Ohio St. L. J. 759, 803 (2020)).

47 Id. (citing Logan, supra note 46, at 804; Vosoughi et al., supra note 1, at 1146–51).
of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most.” 

The limited purpose public figure test seems to him something that is “increasingly malleable and even archaic when almost anyone can attract some degree of public notoriety in some media segment.” 

Justice Gorsuch suggested that “the doctrine” has both “evolved into a subsidy for published falsehoods on a scale no one could have foreseen” and has “come to leave far more people without redress than anyone could have predicted.” 

It is “unclear” to Justice Gorsuch how well these suggested “modern developments serve Sullivan’s original purposes.” 

Justice Gorsuch has not been alone in his worries about how the limited purpose public figure framework fits with the modern transition to a social media world. Throughout the last fifteen years, some scholars have also expressed similar concerns that social media has the ability to transform large numbers of otherwise private figures into limited purpose public figures under the Gertz framework if applied liberally. Indeed, at the beginning of this discussion in 2010, one scholar notes that the California Court of Appeals indicated concern that applying the privilege to the social media plaintiff’s claim in that case could “convert millions of teenagers

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48 Id. at 2429 (citing Hibdon v. Grabowski, 195 S.W.3d 48, 59, 62 (Tenn. Ct. App. 2005)).
49 Id.
50 Id.
51 Id.
52 See, e.g., Matthew Lafferman, Do Facebook and Twitter Make You a Public Figure?: How to Apply the Gertz Public Figure Doctrine to Social Media, 29 SANTA CLARA COMPUT. & HIGH TECH. L.J. 199, 206 (2012) (expressing concern that a broad approach to the voluntary nature of public posts on social media “would convert millions of users into public figures in one fell swoop . . . .”); see also Timothy Boman, Defamation, Social Media, and the Limited Purpose Public Figure Doctrine, 61 S. TEX. L. REV. 233, 247 (2021) (“The public nature of social media makes it easy to argue that a person has taken some sort of step to ‘thrust himself into the vortex of [a given] public issue’ mentioned in Gertz and moving one step closer to the actual malice standard.”); Ashley Messenger & Kevin Delaney, In the Future, Will We All Be Limited-Purpose Public Figures?, 30 COMM. LAW. 4, 8 (2014) (“If the posts were to go viral, however, there is a better argument that the Facebook user—even if otherwise ‘average’ in terms of reach and audience—has now taken a place at the forefront of the controversy.”).
into public figures through their use of social media sites such as Myspace, Facebook, and YouTube.\textsuperscript{53}

In reality, the current state of limited purpose public figure jurisprudence is not so grim. This Article will explain how an extensive review of published opinions issued over the last fifteen years demonstrates that the limited purpose public figure category has not become a refuge for large numbers of social media fraudsters as Justice Gorsuch suggests.\textsuperscript{54} Moreover, such review demonstrates that the category has not actually swept up most any private figure that wishes to share a message of public concern on social media so as to discourage them from pursuing a defamation/libel claim thereafter.\textsuperscript{55} To the contrary, it has been rare for courts to find that an otherwise private figure has become a limited purpose public figure by posting on social media alone.\textsuperscript{56} This is not the result of some new or modified social media or online test for the limited purpose public figure, but rather largely due to a commitment to the original (and fundamental) role of legitimate news organizations in the analysis.\textsuperscript{57}

Though some have also grown skeptical of professional news organizations in recent times—Justice Gorsuch included\textsuperscript{58}—news organizations and journalists have largely anchored limited purpose public figure jurisprudence to its original purposes amidst the riptide of falsity that runs through social media.\textsuperscript{59}

The Supreme Court cases that established the limited purpose public figure category indicated that the core action which takes a person from private figure to limited purpose public figure is engagement with the news media.\textsuperscript{60} It is that signature action which demonstrates that such person has “thrust” herself “to the forefront”

\textsuperscript{53} Cory Batza, Trending Now: The Role of Defamation Law in Remediing Harm from Social Media Backlash, 44 PEPP. L. REV. 429, 471 (2017) (citing D.C. v. R.R., 106 Cal. Rptr. 3d 399, 428 (Ct. App. 2010)).

\textsuperscript{54} See infra Section I.B.

\textsuperscript{55} See id.

\textsuperscript{56} See id.

\textsuperscript{57} See id.

\textsuperscript{58} See Berisha v. Lawson, 141 S. Ct. 2424, 2427–28 (2021) (Gorsuch, J., dissenting).

\textsuperscript{59} See infra Section I.B.

\textsuperscript{60} See infra Section I.A.
(or “vortex”) of the public controversy in order to actually “influence the resolution of the issues involved.” Engagement with the news media also largely justifies application of the privilege to the otherwise private figure in establishing both: (1) sufficient access to the news media as a measure of “self-help” against defamation or libel (hereafter referred to at times as the “self-help component”); and (2) acceptance of an “assumed role” in a controversy which invites “closer” public comment (hereafter referred to at times as the “assumed-role component”).

It is critical for future courts to acknowledge how modern courts have continued to consistently apply the news media engagement principle when evaluating Justice Gorsuch’s invitation to remove (or substantially limit) application of the privilege to statements about limited purpose public figures. Since the limited purpose public figure category has not actually provided a safe haven for the vast majority of social media misinformation, or threatened to transform most private persons into public figures because they posted about a political or public issue, such limitation or removal would cost the public profoundly important free speech and free press protection without any real benefit.

This Article will: (1) survey the fundamental role that the news media engagement principle played in the limited purpose public figure framework established by the Supreme Court; (2) examine an extensive review of case law which demonstrates how courts have prevented an overextension of the limited purpose public figure category over the past fifteen years largely through a commitment to the news media engagement principle; and (3) argue why courts should maintain application of the actual malice privilege to statements about limited purpose public figures (even amidst social media’s continued rise) to preserve free speech and free press rights for news and debate about non-governmental persons with influence over important public issues.

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62 Id. at 344–45.
I. ANALYSIS

A. The Supreme Court Established the News Media Engagement Principle as a Fundamental Component of Its Limited Purpose Public Figure Framework

1. NEW YORK TIMES v. SULLIVAN: ADOPTION OF THE ACTUAL MALICE PRIVILEGE AS A CONSTITUTIONAL REQUIREMENT FOR GOOD FAITH SPEECH AND REPORTING ABOUT GOVERNMENT OFFICIALS

The Supreme Court initially adopted the actual malice privilege in 1964 to only provide protection for good faith public discussion and reporting about government officials.\(^\text{63}\) In New York Times v. Sullivan, the Commissioner of Public Affairs for Montgomery, Alabama (head of the police department) brought libel claims against the publisher of The New York Times newspaper and several civil rights leaders.\(^\text{64}\) The Commissioner claimed that a full page advertisement taken out by the civil rights leaders in The New York Times falsely accused him of threats, intimidation, and violence against Dr. Martin Luther King Jr.\(^\text{65}\) Though a showing of actual malice was technically required for punitive damages under Alabama law, the trial judge refused to instruct the jury that it must be “convinced” of an actual intent to harm or recklessness.\(^\text{66}\) This murky actual malice standard turned out to be irrelevant anyhow, as the trial judge refused to require that the verdict for the Commissioner be “convinced” of an actual intent to harm or recklessness.\(^\text{66}\) This murky actual malice standard turned out to be irrelevant anyhow, as the trial judge refused to require that the verdict for the Commissioner mean to provide for compensatory damages (which did not require a showing of actual malice) or punitive damages.\(^\text{67}\) The jury found in favor of the Commissioner and awarded him the full $500,000 he had requested, even though he failed to provide evidence of monetary loss.\(^\text{68}\)

The Supreme Court considered the case “against the background of a profound national commitment to the principle that debate on


\(^{64}\) *Id.* at 256.

\(^{65}\) *Id.* at 256–58.

\(^{66}\) *See id.* at 262.

\(^{67}\) *Id.*

\(^{68}\) *Id.* at 256, 263.
public issues should be uninhibited, robust, and wide-open.” Such public debate may (and perhaps at times should) “include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” The Court made the critical observation that an “erroneous statement is inevitable” in an environment of free public debate. As such, if “the freedoms of expression” guaranteed by the Constitution are to have any practical meaning, good faith erroneous statements must also be protected to some degree in order to provide such freedoms with the “breathing space” they need to survive. The Court found that the Alabama rule on damages for defamation and libel actions was “constitutionally deficient” because it failed to provide necessary “safeguards” to protect free speech and free press rights related to government officials. These constitutional protections required:

[A] federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

2. EXPANSION OF THE PRIVILEGE TO SPEECH AND REPORTING ABOUT “PUBLIC FIGURES:” FIRST THOUGHTS ABOUT THE POTENTIAL LIMITED PURPOSE PUBLIC FIGURE

The actual malice privilege was almost immediately extended by the Supreme Court to non-governmental officials in 1967. In Time, Inc. v. Hill, the Court found that the actual malice privilege should also apply to a false light claim brought by a private figure

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69 Sullivan, 376 U.S. at 270 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).
70 See id. at 270.
71 Id. at 271.
72 Id. at 271–72 (citing NAACP v. Button, 371 U.S. 415, 433 (1963); Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942), cert. denied, 317 U.S. 678 (1943)).
73 See id. at 264.
74 Id. at 279–80.
when the subject of the false light claim was a matter of public interest. The Court then explained in *Curtis Publishing Co. v. Butts* (a plurality opinion deciding two consolidated appeals) that the privilege should also apply in libel cases when the plaintiff is a “public figure.” The opinions in *Butts* explored the potential types of “public figures” that could qualify for application of the privilege.

Justice Harlan explained that a “public figure” should be someone who: (1) commanded public interest; and (2) had sufficient access to the news media to address alleged defamatory statements in “self-defense.” He noted that the two plaintiffs at issue in the consolidated appeal achieved public figure status by different means. The first, an athletic director at the University of Georgia accused of fixing a college football game, attained that status by virtue of his position alone. The second, General Edwin Walker, an Army officer who retired to pursue “political activity,” had achieved such status “by his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy . . . .” Walker had previously made several statements opposing federal intervention to enforce the desegregation of public universities, which had received wide publicity. The news report at issue for the underlying libel case detailed Walker’s efforts to lead a violent crowd against federal marshals who attempted to enforce a court order to allow for the enrollment of an African American student at the University of Mississippi. These public figure distinctions outlined by Justice Harlan would become important for the limited purpose public figure category later established in *Gertz*—including Walker’s relationship with the news media to gain public attention for his views.

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76 *See Hill*, 385 U.S. at 380–91.
77 *See Curtis Publ’g Co.*, 388 U.S. at 154–55.
78 *Id.; id.* at 163–64 (Warren, C.J., concurring).
79 *See id.* at 154–55 (majority opinion).
80 *Id.* at 134–35.
81 *See id.* at 135–36.
82 *Id.* at 155.
83 *Curtis Publ’g Co.*, 388 U.S. at 140.
84 *Id.* at 155.
85 *Id.* at 140.
86 *Id.*
87 *Id.* at 159 n.22.
Chief Justice Warren explained in his own concurring opinion that several famous persons from the private sector had gained powerful influence over public opinion in the two decades since the Great Depression and World War II.\(^88\) Importantly, Chief Justice Warren noted that “as a class these ‘public figures’ have as ready access as ‘public officials’ to mass media of communication, both to influence policy and to counter criticism of their views and activities.”\(^89\) Because of this access to news media (the legitimate ability to influence public opinion), the public has a “substantial interest in the conduct of such persons . . . .”\(^90\) Such potential for influence also confirms that the news media’s “freedom” to “engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of ‘public officials.’”\(^91\)

The fast evolution of a figure-based privilege then briefly broke down four years later in *Rosenbloom v. Metromedia*, wherein a plurality opinion authored by Justice Brennan attempted to broaden the privilege’s application to include any statements related to a matter of public interest.\(^92\) It did not matter who the statements at issue were about.\(^93\) Justice Brennan argued that “[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved.”\(^94\) For a brief time, any private person might have to overcome the privilege if the defamatory statements related to a public matter.\(^95\)

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88 Id. at 163–64 (Warren, C.J., concurring).
89 *Curtis Publ’g Co.*, 388 U.S. at 164 (Warren, C.J., concurring).
90 Id.
91 Id.
93 Id. at 43–44.
94 Id. at 43.
95 Id. at 44.
3. **The News Media Engagement Principle Established as a Fixture for the Limited Purpose Public Figure Framework**

   i. **Gertz v. Robert Welch, Inc.: The Founding Limited Purpose Public Figure Analysis Was Decided Entirely by Whether the Plaintiff Engaged with News Media About the Controversy**

   *Rosenbloom* was overturned just three years later in 1974 by *Gertz v. Robert Welch, Inc.* Elmer Gertz was a lawyer that represented a family in their civil lawsuit against the Chicago police officer who had shot and killed their son. Separate criminal charges were pending against the police officer. While both of these cases attracted attention from the news media, Gertz did not discuss them with reporters.

   Robert Welch, Inc. (“RWI”) published a monthly magazine titled the “American Opinion.” RWI published a number of articles that warned of a national conspiracy to discredit law enforcement authorities in support of a Communist takeover of the United States. RWI published an article in this series which falsely claimed that Gertz had been the “architect” behind a plot to “frame” the police officer for the shooting as “part of the Communist campaign against the police.” The article also falsely stated that Gertz had a lengthy criminal record and had ties to several “Leninist” and “Communist” groups.

   Gertz filed a libel suit against RWI. The jury returned a verdict in favor of Gertz, which did not include an application of the actual malice privilege because Gertz had not been deemed a public figure. The district court, however, issued a judgment in favor of RWI notwithstanding the verdict, holding that the actual malice

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97 Id. at 325.
98 Id.
99 Id. at 325–26.
100 Id. at 325.
101 Id. at 325–26.
103 Id. at 326.
104 Id. at 327.
105 Id. at 327–29.
privilege should have applied to Gertz regardless of his status as a public figure because RWI’s article related to an issue of public concern.\textsuperscript{106}

On appeal, a majority of the Supreme Court now held that the $Rosenbloom$ plurality had incorrectly “abjured” the “distinction between public officials and public figures on the one hand and private individuals on the other.”\textsuperscript{107} At the core of the case was the Court’s fundamental disagreement with the inevitable result of the $Rosenbloom$ rule: “[A] private citizen involuntarily associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the $[Sullivan]$ test.”\textsuperscript{108} The Court affirmed application of the actual malice privilege to public officials and public persons.\textsuperscript{109} However, the Court held that the First and Fourteenth Amendments do not similarly require application of the privilege (an actual malice standard) to defamation or libel claims brought by truly private figures.\textsuperscript{110}

The Court removed the required application of the privilege to claims brought by private figures for two reasons.\textsuperscript{111} First, government officials and public figures have a realistic chance at “self-help” since they “usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy” (the self-help component).\textsuperscript{112} Second, “there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs” in that government officials and public figures have voluntarily “assumed roles of especial prominence in the affairs of society” which invite public comment, whereas private persons have not (the assumed-role component).\textsuperscript{113} The government official or public figure “runs the risk of closer public scrutiny than might otherwise be the case.”\textsuperscript{114}

\textsuperscript{106} Id. at 329.
\textsuperscript{107} Id. at 337.
\textsuperscript{108} $Gertz$, 418 U.S. at 337 (emphasis added).
\textsuperscript{109} Id. at 342.
\textsuperscript{111} $Gertz$, 418 U.S. at 343.
\textsuperscript{112} Id. at 344.
\textsuperscript{113} Id. at 344–45.
\textsuperscript{114} Id. at 344.
Importantly, the Court also outlined the remaining three categories of persons to which the actual malice privilege would apply: (1) the government official; (2) the pervasively famous public figure; and (3) the limited purpose public figure.\textsuperscript{115} The privilege applies broadly to government officials.\textsuperscript{116} Those who decide “to seek governmental office must accept certain necessary consequences of that involvement in public affairs.”\textsuperscript{117} One of these consequences is that the government official “runs the risk” of heightened public scrutiny and discussion.\textsuperscript{118}

The Court explained that “public figures stand in a similar position.”\textsuperscript{119} Importantly, however, there are two different types of public figures.\textsuperscript{120} “Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”\textsuperscript{121} These are the pervasively famous public figures.\textsuperscript{122} “More commonly” however, “those classed as public figures” are otherwise private figures that “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”\textsuperscript{123} These are limited purpose public figures.\textsuperscript{124} Both of these types of public figures “invite attention and comment,” just to a different degree, requiring a different application of the privilege to their lives.\textsuperscript{125} Whereas a pervasively famous public figure is a public figure “for all purposes and in all contexts,”\textsuperscript{126} a limited purpose public figure is only a public figure for “a limited range of issues” related to the particular controversy into which she has voluntarily injected herself.\textsuperscript{127}

\begin{thebibliography}{99}
\bibitem{115} \textit{Id.} at 343–45, 351–52.
\bibitem{116} \textit{Id.} at 344–45.
\bibitem{117} \textit{Gertz}, 418 U.S. at 344.
\bibitem{118} \textit{Id.}
\bibitem{119} \textit{Id.} at 345.
\bibitem{120} \textit{Id.}
\bibitem{121} \textit{Id.}
\bibitem{122} \textit{Id.} at 351.
\bibitem{123} \textit{Gertz}, 418 U.S. at 351.
\bibitem{124} \textit{Id.}
\bibitem{125} \textit{Id.} at 344–45.
\bibitem{126} \textit{Id.} at 351.
\bibitem{127} \textit{Id.}
\end{thebibliography}
Though Gertz had published articles and books on legal subjects, and had otherwise served in positions in local civil service and professional groups, Gertz “had achieved no general fame or notoriety in the community.”\(^\text{128}\) None of the prospective jurors for the trial had even heard of Gertz.\(^\text{129}\) Gertz was not famous enough to be considered a pervasively famous public figure.\(^\text{130}\)

The Court offered only one point of analysis in determining whether Gertz otherwise qualified as a limited purpose public figure—did he engage with the news media about the public controversy at issue?\(^\text{131}\) No, Gertz “never discussed either the criminal or civil litigation with the press and was never quoted as having done so,”\(^\text{132}\) Though Gertz was involved in a matter that was newsworthy, he “plainly did not thrust himself into the vortex of this public issue” and did not “engage the public’s attention in an attempt to influence its outcome” specifically because he did not attempt to engage with the news media about such issues.\(^\text{133}\) Gertz was not a limited purpose public figure.\(^\text{134}\) The actual malice privilege did not apply for his libel claim against RWI.\(^\text{135}\)

**ii. Time, Inc. v. Firestone: Distinguishing Non-Public Issues and Required Participation in a Newsworthy Legal Proceeding**

Mary Firestone and Russell Firestone (heir to the Firestone tire fortune) separated in 1964.\(^\text{136}\) Mary Firestone filed a complaint in a Florida state court for separate maintenance against Russell Firestone, to which Russell Firestone counterclaimed for divorce based upon Mary Firestone’s alleged “extreme cruelty and adultery.”\(^\text{137}\) Given the fame of the Firestone family and the rather scandalous nature of the allegations involved (at least for that era, though maybe

\(^{128}\) Id. at 351–52.

\(^{129}\) *Gertz*, 418 U.S. at 352.

\(^{130}\) Id.

\(^{131}\) Id.

\(^{132}\) Id.

\(^{133}\) Id.

\(^{134}\) Id.

\(^{135}\) *Gertz*, 418 U.S. at 352.


\(^{137}\) Id.
for any era), the divorce proceeding drew widespread public attention, which the Supreme Court of Florida would later describe as a “‘veritable cause célèbre in social circles across the country.’”\textsuperscript{138}

Testimony was offered at trial against Mary Firestone which accused her of “extramarital escapades” of such a “bizarre” and “amatory nature” that they “would have made Dr. Freud’s hair curl.”\textsuperscript{139} Not to be outdone, testimony was also offered against Russell Firestone that claimed he “was guilty of bounding from one bedpartner to another with the erotic zest of a satyr.”\textsuperscript{140} Mary Firestone held “a few press conferences” in an “attempt to satisfy inquiring reporters” during the proceedings.\textsuperscript{141} The Supreme Court of Florida later explained that it did not believe that Mrs. Firestone was “seeking public patronage” from such press conferences, though perhaps maybe some measure of “publicity” or “sympathy.”\textsuperscript{142} The trial court discounted such salacious testimony, but still held that the marriage should be dissolved because neither party had shown “the least susceptibility to domestication.”\textsuperscript{143}

Defendant Time, Inc. (“Time”) published a short report in its magazine one week after the trial court’s order:

\begin{quote}
DIVORCED. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, “to make Dr. Freud’s hair curl.”\textsuperscript{144}
\end{quote}

Understandably, Mary Firestone disagreed with the report’s description of the final grounds for the divorce order since the trial judge did not find anything to substantiate the “extreme cruelty” or

\textsuperscript{138} \textit{Id.} at 485 (Marshall, J., dissenting).
\textsuperscript{139} \textit{Id.} at 450 (majority opinion).
\textsuperscript{140} \textit{Id.} at 450–51.
\textsuperscript{141} \textit{Id.} at 454 n.3.
\textsuperscript{142} Firestone, 424 U.S. at 488 n.1 (Marshall, J., dissenting).
\textsuperscript{143} \textit{Id.} at 451 (majority opinion).
\textsuperscript{144} \textit{Id.} at 452.
“adultery” claims made by Russell Firestone. She filed a libel action against Time. The jury returned a verdict in her favor in the amount of $100,000, which was upheld on appeal by both the Florida District Court of Appeal and the Supreme Court of Florida. Each of these courts affirmed that Mary Firestone was not a public figure who was required to prove actual malice in support of her libel claim.

The Supreme Court also agreed. Though Time conceded that Mary Firestone was not a pervasively famous public figure, Time argued that she had become a limited purpose public figure because the divorce proceeding she had initiated became a “cause célèbre.” The Court rejected this argument for two reasons. First, Gertz had overruled the notion that the public notoriety of the proceeding itself could determine whether the actual malice privilege applied. Second, Mary Firestone’s act of seeking legal relief through the court did not equate to her “freely” choosing to publicize issues about her marriage in the way contemplated by a limited purpose public figure. “She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony.” Since she could only obtain her legal relief by initiating a judicial proceeding, her decision to initiate such proceeding was “no more voluntary in a realistic sense than that of the defendant called upon to defend [her] interests in court.”

There was, however, the issue of the press conferences. The Court further explained that “the fact that [she] may have held a few press conferences during the divorce proceedings in an attempt to satisfy inquiring reporters” did not convert her “into a ‘public figure.”

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145 See id. at 458.
146 Id. at 452.
147 Id.
148 Firestone, 424 U.S. at 454; see also id. at 484 (White, J., dissenting).
149 Id. at 455 (majority opinion).
150 Id. at 454.
151 Id. at 454–55.
152 Id. at 454.
153 Id.
154 Firestone, 424 U.S. at 454.
156 Id. at 454 n.3.
Court’s reliance upon news media engagement as linchpin for the limited purpose public figure analysis.157 The distinction for Mary Firestone was that the Court did not believe her press conferences were intended to (or were otherwise able to) affect the trial court’s decision regarding the legal merits of the pending divorce proceeding.158 The Court’s treatment of Mary Firestone’s press conferences can really only be interpreted as a commitment to limiting the potential public controversy at stake to the actual adjudication of the formal legal claims themselves (even if the news media and public were very interested in the conduct of the Firestones beyond how the divorce proceeding was decided).159 But perhaps even more fundamentally, the Court also explained that a celebrity divorce proceeding was not the type of “public controversy” that the Court was prepared to acknowledge under the new Gertz rule (at least at that time).160 Accordingly, the Court was careful not to diminish the news media engagement principle in its finding that Mary Firestone was not a limited purpose public figure.161

iii. Wolston v. Reader’s Digest Ass’n: A Person That Is “Dragged” into a Required Legal Proceeding Has Not Become a Limited Purpose Public Figure (So Long as She Does Not Engage with the News Media About the Controversy)

Reader’s Digest Association, Inc. (“Reader’s Digest”) published a book in 1974 titled “KGB, the Secret Work of Soviet Agents” (the “KGB Book”) which claimed to detail the Soviet KGB’s known espionage efforts since World War II.162 The KGB Book listed Ilya Wolston (“Wolston”) as a Soviet agent working in the United States.163 Wolston’s inclusion in the KGB Book related to his involvement in a special federal grand jury investigation of Soviet espionage in the late 1950s.164 Wolston failed to respond to a grand

158 Firestone, 424 U.S. at 454 n.3.
159 See id. at 455 (declining to extend the New York Times privilege to all reports of judicial proceedings).
160 Id. at 454.
161 Id. at 454–55.
163 Id.
164 Id. at 161–62.
jury subpoena that required his testimony, which resulted in the district court issuing an order to show cause as to why Wolston should not be held in contempt of court. This attracted news media attention, which included at least seven published reports.

Wolston attended the hearing set by the district court’s order to show cause. He offered to testify before the grand jury, but the offer was refused; instead, the court began a hearing in relation to the contempt charges. Wolston’s pregnant wife was called to testify regarding Wolston’s mental condition during the timeframe of the grand jury’s subpoena, as Wolston had claimed that he did not attend the hearing because of his mental depression. She “became hysterical on the witness stand,” which seems to have caused Wolston to plead guilty to the contempt charge to end the hearing.

Wolston was given a one-year suspended sentence and three years of probation with the condition that he cooperate with the grand jury. Wolston was, however, not indicted for espionage. Though news media further reported on the contempt hearing, Wolston did not engage with any reporters throughout the ordeal.

Wolston sued Reader’s Digest and the KGB Book author for libel related to the KGB Book’s false identification of him as a Soviet spy. The determinative issue became whether Wolston was a public figure for purposes of the privilege. Both the district court and the D.C. Circuit found that Wolston qualified as a limited purpose public figure because he should have known that his decision to not appear for testimony before the grand jury would attract news media attention.

165 Id. at 162.
166 Id.
167 Id.
168 Wolston, 443 U.S. at 162–63.
169 Id.
170 Id. at 163.
171 Id.
172 Id.
173 Id.
174 Wolston, 443 U.S. at 159–60.
175 See id. at 164–67 (analyzing whether Wolston should be classified as a limited purpose public figure).
176 Id. at 160, 165.
The Supreme Court reversed, rejecting the notion that Wolston had become a limited purpose public figure simply because he had decided to not appear before the grand jury. The Court emphasized that a primary lesson from Gertz was that “a court must focus on the ‘nature and extent of an individual’s participation in the particular controversy . . . .’” Wolston had not “thrust” or “‘injected’ himself into the forefront of the public controversy surrounding the investigation of Soviet espionage . . . .” To the contrary, “[i]t would be more accurate to say that [he] was dragged unwillingly into the controversy” by the grand jury. The key determination was whether Wolston took such action specifically to influence the public’s opinion with respect to the controversy. The Court referenced the news media engagement principle from Gertz and emphasized that Wolston “never discussed this matter with the press and limited his involvement to that necessary to defend himself against the contempt charge.” As such, Wolston’s actions did not make him “a public figure for purposes of comment on the investigation of Soviet espionage.”

iv. Hutchinson v. Proxmire: A Limited Holding Because of an Overly Generalized Public Controversy

Dr. Ronald Hutchinson (“Dr. Hutchinson”) was a behavioral scientist performing research in the early 1970s. He studied patterns in animals to determine “an objective measure of aggression,” such as monitoring “the clenching of jaws” at times when animals were exposed to stress triggers. He received funding for his research from state and federal agencies interested in how such research might relate to people operating in stressful environments.

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177 Id. at 161, 166–68.
178 Id. at 167 (emphasis added) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974)).
179 Id. at 166 (citing Time, Inc. v. Firestone, 424 U.S. 448, 453–54 (1976); Gertz, 418 U.S. at 352; Curtis Publ’g Co. v. Butts, 388 U.S. 130, 155 (1967)).
180 Wolston, 443 U.S. at 166.
181 Id. at 167–68.
182 Id. at 167.
183 Id.
185 Id. at 115.
186 Id.
U.S. Senator William Proxmire established his Golden Fleece of the Month Award (the “Golden Fleece Award”) to publicly ridicule what he thought to be “the most egregious examples of wasteful governmental spending.”\textsuperscript{187} Senator Proxmire and his staff identified Dr. Hutchinson’s research (and funding) and publicized Dr. Hutchinson as a winner of the mock-award through a press release to 275 members of the news media and a speech to the U.S. Senate.\textsuperscript{188} These communications contained several disparaging comments (and several monkey-business puns), which characterized Dr. Hutchinson’s research as a worthless study of “jaw-grinding and biting by angry or hard-drinking monkeys . . . .”\textsuperscript{189} For good measure, Senator Proxmire also distributed a newsletter to 100,000 people that repeated these characterizations.\textsuperscript{190}

Dr. Hutchinson filed a lawsuit against Senator Proxmire in federal district court for defamation and libel.\textsuperscript{191} The district court granted summary judgment in favor of Senator Proxmire based largely upon immunity under the Speech or Debate Clause of Article I, Section 6 of the U.S. Constitution.\textsuperscript{192} The district court alternatively found that Dr. Hutchinson was a limited purpose public figure and granted summary judgment in favor of Senator Proxmire because there was insufficient evidence of actual malice.\textsuperscript{193} The Seventh Circuit affirmed,\textsuperscript{194} finding that Dr. Hutchinson qualified as a limited purpose public figure in part because he “had sufficient access to the media to rebut any defamatory falsehood” since “Hutchinson’s answering press release was quoted in detail in the same stories which initially reported the Golden Fleece Award.”\textsuperscript{195}

\begin{footnotes}
\textsuperscript{187} Id. at 114.
\textsuperscript{188} Id. at 115–16.
\textsuperscript{189} Id. at 116.
\textsuperscript{190} Hutchinson, 443 U.S. at 117.
\textsuperscript{191} Id. at 114, 118.
\textsuperscript{192} Id. at 118–19.
\textsuperscript{193} Id. at 119–20.
\textsuperscript{194} See id. at 120–21 (“The Court of Appeals also rejected Hutchinson’s argument that the District Court had erred in granting summary judgment.”).
\textsuperscript{195} Hutchinson v. Proxmire, 579 F.2d 1027, 1035 (7th Cir. 1978), rev’d 443 U.S. 111 (1979).
\end{footnotes}
The Supreme Court reversed in an opinion issued on the very same day that it issued its opinion in the *Wolston* case. Unlike its analysis in *Wolston*, the Court’s opinion in *Hutchinson* was dominated by analysis of the Speech and Debate Clause component, with far less analysis devoted to the actual malice issue at the end of the opinion. As for the limited purpose public figure issue, the Court summarized the lower courts’ holdings as having been premised upon two factors: (1) Dr. Hutchinson’s “successful application for federal funds and the reports in local newspapers of the federal grants;” and (2) Dr. Hutchinson’s “access to the media, as demonstrated by the fact that some newspapers and wire services reported his response to the announcement of the Golden Fleece Award.”

The Court began its analysis with concern that these conclusions did not establish that Dr. Hutchinson was a public figure before the controversy caused by the Golden Fleece Award. Dr. Hutchinson’s “activities and public profile” were previously limited to a “small category of professionals concerned with research in human behavior.” Citing *Wolston*, the Court said that “[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.” The Court moved on from this preliminary concern about timing, however, to apply the *Gertz* limited purpose public figure framework.

The Court held that Dr. Hutchinson had not “thrust himself or his views into public controversy to influence others.” It is critical to recognize that this conclusion was based upon Senator Proxmire having framed the potential “public controversy” at issue during argument as public funding in general and not the more specific controversy that had arisen regarding the public funding of Dr.

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196 *Hutchinson*, 443 U.S. at 111, 136; see also *Wolston* v. Reader’s Dig. Ass’n, Inc., 443 U.S. 157, 157 (1979). Both cases were decided on June 26, 1979.
197 Compare *Hutchinson*, 443 U.S. at 122–33 (section of opinion relating to Speech or Debate Clause analysis), with *id.* at 133–36 (section of opinion analyzing actual malice privilege).
198 *Id.* at 134.
199 *Id.* at 134–35.
200 *Id.* at 135.
201 *Id.* at 135 (citing *Wolston*, 443 U.S. at 167–68).
202 *Id.* at 135–36.
203 *Hutchinson*, 443 U.S. at 135.
Hutchinson’s research. Dr. Hutchinson had not discussed policy related to public funding in such a general manner with the news media.

The Court was also not persuaded “that Hutchinson had such access to the media that he should be classified as a public figure.” This conclusion was also entirely based upon a framing of the potential controversy as a generalized concern about public funding, as the Court held that Dr. Hutchinson’s “access was limited to responding to the announcement of the Golden Fleece Award.”

Finally, the Court ruled Dr. Hutchinson out from being considered a pervasively famous public figure by virtue of the amount of access that Dr. Hutchinson had received on this more specific issue in holding that Dr. Hutchinson did not have the “regular and continuing access to the media that is one of the accouterments of having become a public figure.”

In effect, while the Court acknowledged the central place of the news media engagement principle from *Gertz*, *Firestone*, and *Wolston*, the Court avoided its decisive application to Dr. Hutchinson by framing the public controversy so as to take it out of reach of Dr. Hutchinson’s relevant news media engagement. Senator Proxmire, a rather unsympathetic plaintiff, had proffered this overgeneralized “public expenditures” framing of the controversy, and the Court held him to it. The Court rather easily found that Dr. Hutchinson had not engaged the news media to influence the generalized debate about public funding in a broader sense, and was therefore not a limited purpose public figure.

4. **Conclusion on the Supreme Court’s News Media Engagement Principle**

So, how does a person thrust herself into the forefront/vortex of a particular public controversy to influence public opinion? In *Gertz*,

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204 *Id.*
205 See *id.* (“Hutchinson at no time assumed any role of public prominence in the broad question of concern about expenditures.”).
206 *Id.* at 136.
207 *Id.*
208 *Id.*
209 *Hutchinson*, 443 U.S. at 135.
210 *Id.* at 135–36.
211 *Id.* at 136.
the only analysis on this point was that Gertz had not spoken with the news media about the police officer’s cases.212 In Wolston, the Court emphasized that Wolston had also not spoken with the news media about the public controversy surrounding his refusal to appear for testimony before the grand jury.213 And even before Gertz, the Butts Court confirmed that General Walker had achieved public figure status by publicizing his opposition of the federal government’s intervention efforts in desegregation.214 According to the Supreme Court, a person thrusts herself into the forefront of a public controversy to influence opinion by engagement with the news media about the controversy.215

Indeed, the only reason that Mary Firestone had not qualified as a limited purpose public figure by virtue of her press conferences in Firestone was that the Court found that the celebrity divorce was not a public controversy capable of even invoking the privilege, and otherwise, that such controversy was limited to the actual adjudication of the divorce proceeding (which Mary Firestone could not influence by virtue of a press conference).216 Dr. Hutchinson had not qualified as a limited purpose public figure by his engagement with the news media in response to the Golden Fleece Award because the Court had accepted a different public controversy for the analysis, which rendered Dr. Hutchinson’s engagement irrelevant.217

The Supreme Court has not readdressed the limited purpose public figure framework since this formative period from 1967 to 1979,218 and as such, has not changed its controlling focus upon the

214 Curtis Publ’g Co. v. Butts, 388 U.S. 130, 140, 155 (1967).
215 Gertz, 418 U.S. at 345.
218 See Jankovic v. Int’l Crisis Grp., 822 F.3d 576, 585 (D.C. Cir. 2016) (explaining that “Gertz ultimately controls the resolution” of the limited purpose public figure determination); Biro v. Condé Nast, 963 F. Supp. 2d 255, 270 (S.D.N.Y. 2013) (noting that “Gertz remains the leading Supreme Court case on the contours of the public figure designation.”); Anaya v. CBS Broad. Inc., 626 F. Supp. 2d 1158, 1191 (D.N.M. 2009) (“Hutchinson v. Proxmire and Wolston v. Reader’s Digest Association represent the most recent Supreme Court pronouncements on what constitutes a public figure. The Supreme Court issued those opinions in 1979. In other words, the Supreme Court has not elaborated further on the public-figure question in nearly thirty years.”).
news media engagement principle as the central method by which someone qualifies as a limited purpose public figure. The question, however, has become whether the evolution of the Internet and social media during the forty-year gap since these cases has functionally rendered the news media engagement principle an archaic point of analysis for lower courts. Was the news media engagement principle only a product of bygone times? How do lower courts determine how a person thrusts herself into the forefront/vortex of a particular public controversy to influence public opinion today?

The answer is fundamental to the evaluation of Justice Gorsuch’s invitation to remove (or substantially limit) the limited purpose public figure category. As Justice Gorsuch claims, “[n]ow, private citizens can become ‘public figures’ on social media overnight.” If the billions of otherwise-private persons on social media are indeed able to obtain limited purpose public figure status by posting on social media alone, then the category has grown far beyond its original purposes to become a vast shield for misinformation peddlers on social media.

B. Review of the Modern Commitment to the News Media Engagement Principle

1. Overview: Social Media Has Not Overrun the News Media Engagement Principle

An extensive review of published opinions issued by courts over the last fifteen years yields four important conclusions for the modern state of the limited purpose public figure doctrine as it relates to social media. First, contrary to the suggestion of Justice Gorsuch and the concerns of some past actual malice privilege scholars, it is rare for a person to qualify as a limited purpose public figure by virtue of social media activity alone. A person’s decision to post about a public controversy on social media has certainly become a part of the limited purpose public figure calculus for courts. However, in cases where social media activity was a factor in the court’s

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219 Jankovic, 822 F.3d at 585, 587–89.
221 See infra notes 223–25.
222 See id.
holding that a plaintiff qualified as a limited purpose public figure, the plaintiff had, in the vast majority of cases, also engaged with news media about the controversy (the “Majority News Media Engagement Category”). Only a very small minority of cases have

223 See Planet Aid, Inc. v. Reveal, 44 F.4th 918, 926–27 (9th Cir. 2022) (the plaintiff charity group qualified by a “course of conduct” which included both “regularly engaging with the press in an effort to cultivate a public image” and also “publicizing itself to thousands of followers through social media.”); Cahill v. Edalat, No. 8:16-cv-00686-AG-DFM, 2021 WL 2850588, at *4 (9th Cir. July 8, 2021) (simply tagging the university in the allegedly defamatory online posts did not establish that the plaintiff had voluntarily injected himself into the controversy); McCafferty v. Newsweek Media Grp., Ltd., 955 F.3d 352, 355–56, 359 (3d Cir. 2020) (plaintiff qualified by agreeing to interviews with several news media outlets and by posting videos on social media that got hundreds of thousands of views); Bostic v. The Daily Dot, LLC, 1:22-CV-158, 2023 WL 2317789, at *5–7 (W.D. Tex. Mar. 1, 2023) (holding that plaintiff had injected himself into the controversy by an agreement to promote his documentary at “major conservative news conference” and also by posting to a “relatively large number” of Twitter followers); Kelly v. Daily Beast Co., No. 1:22-cv-482, 2022 WL 17546616, at *5 (W.D. Mich. Dec. 9, 2022) (plaintiff qualified because she posted her video advocating against mask mandates on social media, took dozens of interviews with news media, and testified before state legislators); Franchini v. Bangor Pub’l’g Co., 560 F. Supp. 3d 312, 325–26, 328–30 (D. Me. 2021) (plaintiff qualified by: (1) accepting employment in a position that would attract great public attention; (2) meeting with the defendant reporter that had authored an article in USA Today to dispute the report; (3) engaging with the author of another local news article; (4) online blogging; and (5) pro se legal filings); Flynn v. Cable News Network, Inc., No. 21 Civ. 258, 2021 WL 6290046, slip op. at *10–11 (S.D.N.Y. Oct. 22, 2021) (holding that plaintiff did not qualify by tweeting about QAnon three times, especially because the plaintiff had not otherwise engaged with news media), rejected in part by 2021 WL 5964129 (S.D.N.Y. Dec. 16, 2021); Nelsen v. S. Poverty Law Ctr., 513 F. Supp. 3d 1101, 1107–11 (W.D. Mo. 2021) (plaintiff qualified through a history of numerous news media interviews, social media posts, and website about the controversy); Safex Found., Inc. v. Safeth, Ltd., 531 F. Supp. 3d 285, 304 (D.D.C. 2021) (emphasis added) (finding that plaintiff had thrust himself to the forefront of the controversy by issuing a “stream of social media posts and press releases,” and otherwise by speaking as an “expert” at conferences); Edwards v. Schwartz, 378 F. Supp. 3d 468, 506–07 (W.D. Va. 2019) (holding that the plaintiff had achieved limited purpose public figure status by: (1) “pervasive media coverage of his work by national newspapers”; (2) “numerous recognitions” from “large national magazines” such as Time Magazine; and (3) his operation and contribution to “various social media platforms and websites”); Gilmore v. Jones, 370 F. Supp. 3d 630, 641–42, 667–69 (W.D. Va. 2019) (plaintiff qualified by uploading cell phone video of a deadly attack during a protest to his Twitter account and then taking interviews with
attributed a plaintiff’s limited purpose public figure status only to social media activity (the “Minority Social Media Activity Alone Category”). And there have only been a few other cases that have held that social media activity—along with some other major public action or assumed-role (that was not engagement with the news media)—qualified the plaintiff as a limited purpose public figure (the CNN, NBC, and The New York Times, as well as authoring an editorial for Politico); Nguyen v. Hoang, No. H-17-2060, 2019 WL 1317790, at *3–4 (S.D. Tex. Mar. 22, 2019) (plaintiff qualified by sending letters to news organizations and posting on Facebook (5,000 followers), YouTube (3,800 subscribers), and a blog); Ayyadurai v. Floor64, Inc., 270 F. Supp. 3d 343, 357 (D. Mass. 2017) (plaintiff qualified by publishing books, participating in interviews, and posting on his own website); Hibdon v. Grabowski, 195 S.W.3d 48, 59–60, 62 (Tenn. Ct. App. 2005) (plaintiff qualified by promoting jet ski modification services on an internet news/chat group and by agreeing to multiple interviews, and at least one cover feature, with a national jet ski magazine). Cf. Makaeff v. Trump Univ., LLC, 715 F.3d 254, 268–69 (9th Cir. 2013) (Trump University qualified by an “aggressive advertising campaign” that included “online, social media, local and national newspaper, and radio advertisements for free introductory seminars”); D.C. v. R.R., 106 Cal. Rptr. 3d 399, 426, 428 (Cal. Ct. App. 2010) (rejecting argument that plaintiff was a “limited public figure” under California’s anti-SLAPP statute and explaining that “[m]illions of teenagers use MySpace, Facebook, and YouTube to display their interests and talents, but the posting of that information hardly makes them celebrities.”).

224 See Broughty v. Bouzy, No. 22-6458, 2023 WL 5013654, at *5 (D.N.J. Aug. 7, 2023) (plaintiff qualified by “creating YouTube and Twitter content on matters of public interest,” including videos on YouTube “to make law more accessible to people” that had been viewed more than 27 million times); Couch v. Verizon Commc’ns, Inc., No. 20-2151, 2021 WL 4476698, at *3, n. 7 (D.D.C. Sept. 30, 2021) (plaintiff qualified because of the substantial following on his blog and social media, and because he had become one of the most well-known private investigators trying to uncover the truth about an infamous murder case); Grishin v. Sulkess, No. CV 18-10179, 2019 WL 4418543, at *6 (C.D. Cal. May 31, 2019) (plaintiff qualified by “creating public websites and social media accounts involving the marital disputes with his wife as well as revealing aspects of her personal life to a widespread public social media following”). Cf. Nunes v. Lizza, 486 F. Supp. 3d 1267, 1296 n. 7 (N.D. Iowa 2020) (observing in dicta that “access to the media in the traditional sense the Supreme Court contemplated in Sullivan or even Gertz may be an outdated concept with the advent of social media through which private people can reach millions,” though noting that the court could not apply such principle in the case because the plaintiffs had not responded through the internet or social media) (citing Jeffrey Omar Usman, Finding the Lost Involuntary Public Figure, 2014 UTAH L. REV. 951, 986–93 (2014)).
“Minority Social Media-Plus-Other-Action Category”) (the two minority categories referred to collectively as the “Minority Categories”).225 In sum, modern courts have not held that private figures become “‘public figures’ on social media overnight.”226

Second, the news media engagement principle has not become a secondary consideration to social media activity within the Majority News Media Engagement Category; to the contrary, the news media engagement principle was a larger point of emphasis than social media activity for many of these cases.227 For the remaining cases in the Majority News Media Engagement Category, the news media engagement principle was (at a minimum) on equal footing with social media activity in terms of influence within the limited purpose public figure analysis.228 As such, the limited purpose public figure category has not wandered from its origins in the Gertz line of cases because it is still largely premised upon the news media engagement principle.

225 See Immanuel v. Cable News Network, Inc., 618 F. Supp. 3d 557, 561, 566 (S.D. Tex. 2022) (plaintiff qualified by giving a speech on the steps of the Supreme Court and by posting several internet and social media videos); Wigington v. MacMartin, No. 2:21-cv-02355, 2022 WL 3999887, at *1–2, 6 (E.D. Cal. 2022) (plaintiff qualified by creating a documentary and posting it on YouTube and Facebook, getting over 150,000 views in two weeks, as well as presenting his theories through his website, social media, and in-person and on-air presentations); Amor v. Conover, 635 F. Supp. 3d 363, 369–70 (E.D. Pa. 2022) (finding that the plaintiff had invited public attention as a limited purpose public figure only by virtue of accepting roles of performance directors of the renaissance fair, but also holding that plaintiff had sufficient ability of “self-help” because of his “considerable social media following” and “high profile [presence] on numerous Internet sites”); Austin v. Preston Cnty. Comm’n, No. 1:13CV135, 2014 WL 5148581, at *16–17 (N.D. W. Va. Oct. 14, 2014) (a former director of an animal shelter qualified as a limited purpose public figure by sending a group email to ten recipients regarding the controversy and also by posting about shelter conditions on her Facebook page).

226 Berisha v. Lawson, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting) (citing e.g., Hibdon, 195 S.W.3d at 59, 62).


228 See, e.g., Planet Aid, 44 F.4th at 926–27; McCafferty, 955 F.3d at 355–56; Nelsen, 513 F. Supp. 3d at 1107–11; Safex, 531 F. Supp. 3d at 304–05; Nguyen, 2019 WL 1317790 at *3–4; Ayyadurai, 270 F. Supp. 3d at 357.
Third, it is not typical for an otherwise private figure to be “deemed ‘famous’ because of their notoriety in certain channels of our now highly segmented media even as they remain unknown in most.”229 The plaintiffs in the Majority News Media Engagement Category cases largely qualified as limited purpose public figures by engagement with news leaders like CNN, NBC, *The New York Times*, *Politico*, *Philadelphia* magazine, *Time* magazine, *Fortune* magazine, *USA Today*, and *The Daily Beast*, as well as traditional local newspapers and television stations (both domestic and abroad).230

Fourth, even those cases from the Minority Categories have not substantively cut against the importance or modern relevance of the news media engagement principle.231 The court opinions that comprise the Minority Categories have not articulated either: (1) a greater influence or relevance for social media activity in the modern limited purpose public figure analysis; or (2) a negative perspective about the continued role of the news media engagement principle.232 Moreover, though the courts in these cases held that the plaintiff qualified as a limited purpose public figure without engaging with the news media, the analysis in many of these opinions still lends support to the continued relevance of the news media engagement principle generally.233

2. THE MAJORITY NEWS MEDIA ENGAGEMENT CATEGORY

i. Social Media Activity Often Leads to the News Media Engagement That Qualifies the Plaintiff as a Limited Purpose Public Figure

In many instances, it was the social media posting(s) which attracted the news media engagement that would qualify the plaintiff as a limited purpose public figure.234 For example, in *Gilmore v. Berisha,* 141 S. Ct. at 2429 (Gorsuch, J., dissenting) (citing e.g., *Hibdon,* 195 S.W.3d at 59, 62).

229 *Berisha,* 141 S. Ct. at 2429 (Gorsuch, J., dissenting) (citing e.g., *Hibdon,* 195 S.W.3d at 59, 62).

230 *See infra* Section II.B.2.iv.

231 *See* cases cited *supra* notes 224–25.

232 *See infra* Section II.B.3.

233 *See* id.

Jones, plaintiff Brennan Gilmore participated in the public protest of a white supremacist rally in Charlottesville, Virginia.\textsuperscript{235} Gilmore captured footage of a man who drove his car into a crowd of protesters, killing one woman and injuring thirty-six other people.\textsuperscript{236} Gilmore posted the video on his Twitter account, which quickly went viral.\textsuperscript{237} Though Gilmore did not solicit media interviews, several news media members sought him out because of the video he posted.\textsuperscript{238} Gilmore agreed to interviews with CNN, NBC, and The New York Times, and eventually wrote an online editorial for Politico which both described and analyzed what he witnessed.\textsuperscript{239} Gilmore later brought a defamation suit against Alex Jones and other defendants who claimed that Gilmore was some kind of operative that had attended the rally to orchestrate violence for political purposes.\textsuperscript{240} In determining that Gilmore qualified as a limited purpose public figure for his claims, the district court emphasized that it was Gilmore’s engagement with the national news media about the rally which demonstrated his decision to place himself at the forefront of the public controversy.\textsuperscript{241}

Similarly, in Kelly v. The Daily Beast, plaintiff Kristen Kelly (a “senior industrial hygienist” in the private sector) posted a video on social media of her opposition to a local school board’s mask mandate during a public meeting.\textsuperscript{242} The video caught the attention of a journalist at The Daily Beast, who interviewed Kelly about her efforts to oppose mask mandates at various places across the country.\textsuperscript{243} The Daily Beast published an article which described Kelly’s interactions at the school board meeting (along with Kelly’s other efforts to testify before state legislators regarding anti-mask policies) and compared her anti-mask mandate views with others in the

\textsuperscript{235} Gilmore, 370 F. Supp. 3d at 641–42.
\textsuperscript{236} Id. at 642.
\textsuperscript{237} Id.
\textsuperscript{238} Id. at 668.
\textsuperscript{239} Id. at 668–69.
\textsuperscript{240} Id. at 642–44.
\textsuperscript{241} Gilmore, 370 F. Supp. 3d at 667–69.
\textsuperscript{243} Id. at *1–2.
field of industrial hygiene. The article also questioned Kelly’s expertise to some degree and noted past discrepancies with some points in her message.

Kelly sued The Daily Beast for defamation. The district court found that Kelly qualified as a limited purpose public figure for purposes of the mask-mandate debate. Though the district court mentioned that Kelly had thousands of TikTok followers, the district court devoted greater emphasis to the fact that Kelly had engaged with The Daily Beast about her video, and that Kelly had otherwise been interviewed dozens of other times by media in the past about mask issues. The district court found it to be a close call specifically because “the press” had not “clamored to interview” Kelly, but still found that such media engagement weighed in favor of finding Kelly to be a limited purpose public figure. Kelly’s testimony before state legislators on the mask-mandate issue would further cement such finding.

Another good example is McCafferty v. Newsweek Media Group, Ltd., wherein plaintiff Brian McCafferty (a twelve-year-old) first garnered thousands of views on social media by posting videos of him supporting President Trump and otherwise blasting other politicians and public figures. These videos drew attention from numerous news media outlets ranging from “Russian television stations to Philadelphia magazine.” McCafferty accepted requests for news media interviews, which drove expanded public attention. McCafferty eventually sued Newsweek for defamation related to an article which claimed that, among other things, McCafferty had defended “raw racism and sexual abuse.” The Third Circuit affirmed that McCafferty qualified as a limited purpose public figure.

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244 Id.
245 Id. at *2.
246 Id. at *3.
247 Id. at *5.
248 Kelly, 2022 WL 17546616, at *5.
249 Id.
250 Id.
252 Id. at 355.
253 Id. at 355–56.
254 Id. at 356.
figure because he had “‘voluntarily inject[ed] himself’ into the political controversies surrounding President Trump” and because he “enjoys ‘significantly greater access to the channels of effective communication’ than his peers.”

As part of this analysis, the Third Circuit noted that “news outlets both here and abroad have sought him out to discuss his political exploits” and that one particular video from McCafferty had now “been watched hundreds of thousands of times . . . .”

Justice Gorsuch actually cited a 2005 case in his Berisha opinion which followed this same progression. In Hibdon v. Grabowski, plaintiff Kerry Hibdon operated a jet ski modification business that made jet skis much faster. Hibdon boasted about how fast he was able to make jet skis on an internet news/chat website devoted to jet ski talk and news. These posts drew the attention of an editor from SPLASH Magazine, a national magazine for the jet ski industry at that time. Hibdon agreed to interviews with the magazine, tests of his modified jet skis which led to one article, two additional editorial pieces, and at least one additional feature story and cover photo for the magazine. The SPLASH Magazine coverage dramatically increased Hibdon’s business. When Hibdon later sued a jet ski competitor for defamation, the Tennessee Court of Appeals affirmed that Hibdon qualified as a limited purpose public figure both by voluntarily “boasting about his jet ski modifications” on the internet news/chat group and by engaging with SPLASH Magazine. The parenthetical description of the Hibdon case in Justice Gorsuch’s citation mentioned the internet news/chat group posting, but did not

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255 Id. at 359 (citing Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa., 923 A.2d 389, 401 (Pa. 2007)).
256 Id.
258 Hibdon, 195 S.W.3d at 53.
259 Id. at 53, 59–60.
260 Id. at 59.
261 Id.
262 Id.
263 Id. at 52, 59–62.
reference the important role that Hibdon’s engagement with the national magazine also played in his qualification as a limited purpose public figure.264

ii. Achieving a Separate News Media Engagement Campaign in Addition to Social Media Efforts Qualifies a Plaintiff as a Limited Purpose Public Figure

In other cases within the Majority News Media Engagement Category, it was the plaintiff that had sought news media for engagement about an issue that he or she was otherwise separately discussing in posts on social media.265 In Franchini v. Bangor Publishing Co., the district court found that a podiatrist for the U.S. Department of Veterans Affairs “voluntarily achieved limited figure status” in part because he had both contacted multiple journalists that wrote articles about poor care at his facility, and because he had separately blogged about such issue online.266 In Bostic v. The Daily Dot, the plaintiff documentary filmmaker qualified as a limited purpose public figure regarding debate about election integrity because of an agreement to promote his documentary at a “major conservative news conference” (the 2021 Conservative Political Action Conference) and by separate posts about his “activities” to “a relatively large number of [Twitter] users that follow his account.”267

Similarly, in Planet Aid, Inc. v. Reveal, the Ninth Circuit held that a charity should be considered a limited purpose public figure because of a “course of conduct” that included both “regularly engaging with the press in an effort to cultivate a public image” and also separately “publicizing itself to thousands of followers through social media.”268 A cryptocurrency executive and his company qualified as limited purpose public figures in Safex Foundation, Inc. v.

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264 Berisha v. Lawson, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting) (citing e.g., Hibdon, 195 S.W.3d at 59, 62).
266 Franchini, 560 F. Supp. 3d at 319, 330.
268 Planet Aid, 44 F.4th at 927.
Safeth, Ltd. by issuing a “stream of social media posts and press releases” which promoted the safety of the company’s cryptocurrency (in addition to also speaking “as an expert at conferences on blockchain and cryptocurrency”). And in Edwards v. Schwartz, a professor that helped to expose the water contamination crisis in Flint, Michigan was deemed a limited purpose public figure because of widespread news media coverage and accolades for his work, and also separately by his “operation of and/or contribution to various social media platforms and websites.”

iii. Courts in the Majority News Media Engagement Category Have Rejected Attacks on Gertz and the News Media Engagement Principle

Though most of these courts in the Majority News Media Engagement Category simply apply the news media engagement principle without the need for reaffirmation or defense, given its role in the Gertz line of cases, some courts have rejected specific attacks on Gertz and the greater news media engagement principle. Bostic argued that the public figure doctrine is categorically “outdated.” Because the Gertz line of cases remains unaltered by the Supreme Court, it is no surprise that the district court rejected this argument in finding that the plaintiff did “not explain why cases from the 1970s are inapplicable here . . . .” Moreover, the district court did not see why the substance of the limited purpose public figure framework was somehow obsolete, as Bostic had also not explained “how the advent of social media should somehow moot the doctrine.” The district court further defended the news media engagement principle by rejecting one of Bostic’s attempted case analogies, explaining that the cited district court opinion did not “stand for the

269 Safex, 531 F. Supp. 3d at 304–05.
273 Id.
274 Id.
proposition that appearing on national media outlets is insufficient to support public figure status.”

Similarly, the district court in *Flynn v. Cable News Network, Inc.* specifically rejected defendant CNN’s argument that the plaintiff should qualify as a limited purpose public figure by virtue of his Twitter posts without additional evidence of news media engagement. Plaintiff Jack Flynn was a private seafood factory worker who appeared (with other family members) in a video taken by his brother during a barbeque at the Flynn’s home. Flynn’s brother, Lt. General (Ret.) Michael Flynn, happened to be a former National Security Advisor to President Donald Trump. In this video, Flynn and family members repeated the oath to the United States Constitution with their hands raised. Flynn’s brother then said “where we go one, we go all,” which Flynn and other family members also repeated. Flynn’s brother posted the video on Twitter. Flynn subsequently posted three separate tweets on his own account that mentioned or discussed the QAnon movement. CNN later published the video from the Flynns’ barbeque to accompany reports which Flynn claimed had falsely associated him with QAnon. Flynn and his wife Leslie sued CNN for defamation and false light.

CNN argued that Flynn should be considered a limited purpose public figure because of his “substantial social media following” on Twitter. The district court rejected the notion that such social media following alone qualified Flynn as a limited purpose public figure, noting that CNN had provided no evidence that Flynn ever provided any statement to the news media or otherwise agreed to any

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277 Id. at *2.
278 Id.
279 Id.
280 Id.
281 Id.
283 Id. at *3–4.
284 Id. at *1.
285 Id. at *11.
interview with the news media. The district court declined “to find that an otherwise private individual who makes statements on Twitter could thereby eliminate the heightened protections the law affords his or her reputation.”

iv. The News Media Involved in the Majority News Media Engagement Category Cases Have Not Been Obscure or Highly Segmented

Justice Gorsuch’s other related concern in *Berisha* was that “[i]ndividuals can be deemed ‘famous’ because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most.” This characterization also does not find support in the Majority News Media Engagement Category cases. The plaintiffs in those cases did not engage with some obscure or “highly segmented” kind of news media organization. Rather, such plaintiffs largely qualified as limited purpose public figures by engaging with news leaders like CNN, NBC, *The New York Times*, Politico, *Philadelphia* magazine, *Time* magazine, *Fortune* magazine, *USA Today* and *The Daily Beast*, as well as traditional local newspapers and television stations (both domestic and abroad). Even in the *Hibdon* case, which involved engagement with *SPLASH Magazine* (a jet ski industry trade magazine),

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286 Id.
287 Id. (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)).
290 Id.
295 Id.
the magazine had a national circulation which substantially im-
pacted Hibdon’s business.299

3. THE MINORITY CATEGORIES HAVE NOT CUT AGAINST THE
CONTINUED IMPORTANCE OF THE NEWS MEDIA ENGAGEMENT
PRINCIPLE

It is noteworthy that the court opinions which comprise the Mi-
nority Categories have not articulated either: (1) a greater influence
or relevance for social media activity in the modern limited purpose
public figure analysis; or (2) a negative perspective about the con-
tinued role of the news media engagement principle.300 In fact,
though courts in these cases held that the plaintiff qualified as a lim-
ited purpose public figure without engaging with the news media,
the analysis in many of these cases still lends support to the contin-
ued relevance of the news media engagement principle.301

i. The Minority Social Media-Plus-Other-Action
Category

In Immanuel v. Cable News Network, Inc., plaintiff Dr. Stella
Immanuel joined a group of physicians (calling themselves “Amer-
ica’s Frontline Doctors”) during the COVID-19 pandemic to “pub-
licly advocate the use of hydroxychloroquine . . . to treat COVI-
D-19.”302 Dr. Immanuel gathered with these physicians on the steps of
the Supreme Court and made a speech about her theory of treatment
for COVID-19, which “went viral on the Internet” and became the
subject of a tweet by then-President Trump.303 Dr. Immanuel later
sued CNN for defamation related to an article which criticized her
views on the treatment of COVID-19, as well as other statements
that Dr. Immanuel had made in prior “sermon” videos she posted on
YouTube for her church (which expressed views on vaccines and

300 See discussion infra Section II(B)(3)(i)–(ii).
301 See discussion infra Section II(B)(3)(i)–(ii).
303 Id.
medical treatments). Though the district court noted that Dr. Immanuel’s decision to post prior videos (sermons) related to medical treatment was a factor, the district court emphasized that it was Dr. Immanuel’s decision to make a speech on the steps of the Supreme Court which drew the widespread public attention that largely qualified her as a limited purpose public figure on the COVID-19 treatment controversy.305

The district court explained that “Dr. Immanuel ‘engage[d] in activities that involved increased public exposure and media scrutiny.’”306 The news media was therefore still very relevant to the district court’s consideration because Dr. Immanuel had invited probable news media coverage by making her speech on the Supreme Court steps.307 The district court concluded that it was “[b]ecause Dr. Immanuel chose to participate in activities that were bound to invite attention and comment” that she was “a limited purpose public figure.”308

In Amor v. Conover, Plaintiffs Dr. James Amor and his wife Patricia Amor were performance directors for the Pittsburgh Renaissance Festival (as well as at other similar festivals in other states).309 The Amors also played the roles of “King” and “Queen” of the festival, which featured them in photographs that appeared in a national magazine and on Facebook (the festival’s Facebook page had 30,000 “likes,” and the Amors’ personal page had approximately 1,000 followers).310 The lawsuit involved the Amors’ defamation claim against a patron of the festival who claimed the Amors “refused to take seriously allegations that renaissance festival cast members/employees under their supervision committed sexual mis-

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304 Id. at 561–63; Veronica Stracqualursi, Trump Promotes a Doctor Who has Claimed Alien DNA was Used in Medical Treatments, CNN (July 29, 2020), https://www.cnn.com/2020/07/29/politics/stella-immanuel-trump-doctor/index.html.
305 See Immanuel, 618 F. Supp. 3d at 564, 566.
306 Id. at 566 (emphasis added) (quoting Mohamed v. Ctr. for Sec. Pol’y, 554 S.W.3d 767, 775 (Tex. Ct. App. 2018)).
307 See id. at 566.
310 Id. at 366.
conduct against other renaissance festival cast members/employees . . . " The district court began the limited purpose public figure determination for the Amors by outlining the “dual considerations behind the distinction between private individuals and limited purpose public figures: the ‘rationale of self-help’ and, more importantly, ‘the notion of assumption of the risk.’”

As for the self-help component, the Amors argued that “[t]here is no media involvement in this case.” The district court noted that the record did not demonstrate that the Amors had “direct access to news media,” or that they had “issued a press release,” which indicated that the court still considered the news media to be the primary modern mechanism to satisfy such component. The district court, however, explained that the Amors’ “considerable social media following, along with [the Amors’] own assertion that Dr. Amor has ‘a high profile on numerous Internet sites,’ militates toward a finding that [the Amors] have at least somewhat of a ‘greater access to channels of effective communication’ than purely private individuals.”

This additional language also indicated that the Amors’ social media presence was less influential than actual news media engagement in the typical limited purpose public figure analysis, though the Amors’ social media presence still provided them “somewhat” greater self-help abilities than the usual private figure using social media.

As for the “assumption of risk” prong (otherwise referred to in this Article as the assumed-role component), the district court greatly emphasized the Amors’ decision to take on the performance director roles for the renaissance festivals, as well as the highly public “King” and “Queen” roles for the Pittsburgh and West Virginia festivals.

The Amors’ own social media activity was not the determinative issue. These roles brought the public’s attention to the Amors via features in a national magazine, “Internet sites,” a local

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311 Id. at 365.
312 Id. at 369 (emphasis added) (quoting McDowell v. Paiewonsky, 769 F. 2d 942, 947–48 (3d Cir. 1985)).
313 See Amor, 635 F. Supp. 3d at 369.
314 See id.
315 Id. (emphasis added) (citing Gertz, 418 U.S. at 344).
316 See id.
317 Id. at 370.
318 See id.
parade, and social media. “By assuming high-profile leadership positions for a public event that gave them authority to direct and lead cast members, as well as to exert influence in personnel decisions, [the Amors] assumed the risk of public comment about their performance and execution of these responsibilities.” The district court’s reliance on the assumed roles of the Amors, over any particular social media posting by the Amors, further demonstrates that social media activity has not taken on a primary (or dispositive) role of influence.

In *Austin v. Preston*, plaintiff Courtney Austin was the manager of a county animal shelter. Austin created a Facebook page for the shelter under her personal account. Austin drew the ire of some of her county commissioner supervisors through two posts on this page, one celebrating a sixty-day period of no euthanasia cases (and encouraging likes to “SHOW EVERYONE THERE ARE OTHER OPTIONS”), and another asking for help to transport animals because the heating had gone out in the shelter. The commissioners forbid Austin from posting on her Facebook page for the shelter without prior commissioner review and approval, and otherwise instructed Austin to disclose her username and password for the Facebook page to a county IT professional (or change the password to one designated by the county). When Austin refused, she was suspended and later terminated at a commissioner meeting.

During the brief period in between the commissioners’ Facebook restriction and Austin’s suspension, Austin sent a group email from her county account to ten recipients “affiliated with animal organizations or shelters,” many of which were “community members concerned with animal safety and welfare:”

> I have not been fired but am under what feels like restriction. . . . I am not allowed to post on Facebook without the [c]ommission approval of post first. The

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320 *Id.* at 370.
322 *Id.*
323 *Id.* at *1–2.
324 *Id.* at *2–3.
325 *Id.* at *3.*
commissioners are very upset with what info I have shared about the furnace situation, even though they knew we hadn’t had heat since Sept., in those areas. You guys know how screwed up our commissioners are, and how much they really don’t care about animals in general. The only Commissioner that didn’t jump down my back was Dave Price. . . . I’m not the type of person to wait for change, if you want something to happen, remember, you have to be the force to make a difference and see the change. That being said, I have to keep a low profile and play it cool for a while, so I’m going to keep a low profile. We still have plenty of work and improvements to make up here, and we are going to keep doing that.326

This riled up the email group.327 One recipient from Pet Helpers Inc. “responded that the [c]ommissioners wouldn’t look bad ‘[i]f they were doing their job . . .’ because then ‘the furnace would not be an issue.’”328 Others began discussing ways in which they could get the word out about the shelter, including ways that the commissioners could not see.329 Austin’s friends and family also created a separate Facebook page, “Support Courtney Austin,” and later attended the commissioner meeting (in which Austin was terminated) to speak out in her support.330 One of the commissioners provided an interview to the local newspaper and a television station regarding the controversy at the shelter.331 The journalist that had authored the newspaper article also reached out to Austin for comment, but she declined to provide a response.332

Austin sued the county commission for defamation related to statements made during the public meeting and afterwards to the newspaper and television station.333 The district court found that

326 Id. at *16.
327 Austin, 2014 WL 5148581, at *16.
328 Id.
329 Id.
330 Id. at *17.
331 Id. at *3, *13–15, *17.
332 Id. at *17.
333 Austin, 2014 WL 5148581, at *12.
Austin qualified as a limited purpose public figure for the controversy about conditions at the shelter by posting on her Facebook page, but also largely by “furthering the debate” in the email string with the ten animal care representatives.\(^{334}\) Though Austin chose not to engage with the news media, the district court held that she “had access to channels of communication to rebut” the commissioners’ allegedly defamatory statements, because she could have contacted the newspaper “or other news media” that had covered the shelter issues “to provide her side of the story.”\(^{335}\) The district court found it particularly relevant that Austin refused to comment when contacted by the newspaper.\(^{336}\) So, even in a case where the district court had qualified the plaintiff as a limited purpose public figure through social media activity and grassroots email efforts, the court still distinguished the plaintiff from the average private social media poster because of the tangible opportunity for news media engagement.\(^{337}\)

In *Wigington v. MacMartin*, plaintiff Dane Wigington (owner of GeoEngineering Watch) investigated and published his theories about “solar radiation management” issues through his website, social media, and presentations made both in-person and on-air.\(^{338}\) As part of these ongoing efforts, Wigington created a documentary about his theory that there had been an “intentional effort to dim direct sunlight through aircraft-dispersed particles” and posted it on YouTube and Facebook.\(^{339}\) The documentary received over 150,000 views in just two weeks.\(^{340}\) Wigington later sued defendant Douglas MacMartin (a Facebook fact checker), who published a review that claimed to “debunk” the documentary’s theories.\(^{341}\) The district court found that Wigington qualified as a limited purpose public figure (which Wigington did not dispute) “because he has ‘voluntarily inject[ed] himself . . . into a particular public controversy’ by ardently promoting his theory about solar radiation management and

\(^{334}\) See *id.* at *17.
\(^{335}\) *Id.*
\(^{336}\) See *id.*
\(^{337}\) See *id.*
\(^{339}\) *Id.* at *1–2.
\(^{340}\) *Id.* at *2.*
\(^{341}\) *Id.*
aircraft condensation trails.” 342 The district court provided no emphasis on the social media activity factor. 343 Rather, it was just one aspect of the comprehensive public efforts of Wigington, which included many presentations on such issues. 344

ii. The Minority Social Media-Activity-Alone Category

In Grishin v. Sulkess, the district court found that plaintiff Sergey Grishin qualified as a limited purpose public figure for purposes of California’s anti-SLAPP statute based solely on social media activity. 345 However, it would be difficult to analogize the social media activity in that case to common social media posters in future cases. Grishin was an internationally famous Russian billionaire oligarch (known as the “Scarface Oligarch”) who had created the websites and social media accounts at issue to further publicize his marital disputes with his soon-to-be ex-wife in an attempt to influence related legal proceedings against his ex-wife. 346 Grishin could have likely qualified as a pervasively famous public figure, but at a minimum, the district court could have (and perhaps impliedly did) consider Grishin to have otherwise assumed a public role through his high-profile business dealings, which added great weight to his social media activity. 347 Notably, the district court did not provide any commentary to support a primary or heightened influence for social media in the limited purpose public figure analysis and otherwise did not make any statement that could be said to cut against the modern relevance of the news media engagement principle generally. 348

342 Id. at *6 (quoting Reader’s Dig. Ass’n v. Superior Ct., 690 P.2d 610, 615 (Cal. 1984)) (citing Planet Aid, Inc. v. Reveal, 44 F.4th 918 (9th Cir. 2022)).
344 See id. at *1–2, *6.
348 See id. at *6.
In *Couch v. Verizon Communications Inc.*, plaintiff Matthew Couch was a private true crime investigator who had devoted himself to investigating the murder of Democratic National Committee staffer Seth Rich in 2016.\(^{349}\) When Couch sued the defendants involved with the YahooNews! podcast *Conspiracyland* for criticisms of Couch and his investigation, he did not dispute that he had become a limited purpose public figure related to the Rich investigation.\(^{350}\) The district court explained in a footnote that, even if Couch had not agreed, the court would have found that he qualified as a limited purpose public figure because of the “substantial following on his blog and social media,” in addition to the fact that Couch had achieved status as “one of the foremost, and perhaps most widely known, independent investigators seeking to uncover the truth . . . .”\(^{351}\) It is unclear if the district court would have also considered evidence of news media engagement in a more complete analysis had Couch challenged the limited purpose public figure designation. Regardless, like the *Grishin* case, the district court in *Couch* did not provide any substantive discussion that could be said to emphasize social media in the modern limited purpose public figure determination or to otherwise cast a negative light on the continued relevance or importance of news media engagement within such framework.\(^{352}\)

II. **CONCLUSION: COURTS SHOULD PRESERVE APPLICATION OF THE ACTUAL MALICE PRIVILEGE TO STATEMENTS ABOUT LIMITED PURPOSE PUBLIC FIGURES, WITH A CONTINUED COMMITMENT TO THE NEWS MEDIA ENGAGEMENT PRINCIPLE**

A. **Social Media Has Not Yet Created a Need to Remove or Limit Application of the Actual Malice Privilege for Statements About Limited Purpose Public Figures**

The overarching conclusion to be drawn from the caselaw review in the previous section is that there is no need (much less an

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\(^{350}\) *Id.* at *2, *3 n. 7.

\(^{351}\) *Id.* at *3 n. 7.

\(^{352}\) *See id.*
urgent need) to remove or limit the limited purpose public figure category. Social media has not overrun, or warped, the category’s fundamental framework.353 Because the vast majority of courts have remained committed to requiring some news media engagement in order for a plaintiff to qualify as a limited purpose public figure (or, at a minimum, some other significant assumed public role or action beyond social media activity), there is no strong evidence that the limited purpose public figure category has become a vast shield for individuals that pedal misinformation on social media.354 In this same way, there is no strong evidence to suggest that private figures who wish to simply convey their opinions on social media about public issues should fear that they would be considered limited purpose public figures (who must satisfy the actual malice standard) in prosecuting a subsequent defamation suit.355 Justice Gorsuch’s invitation to remove or limit application of the actual malice privilege to the limited purpose public figure category is not justified by the current state of caselaw.

B. The Cost: Removal (or Substantial Limitation) of the Limited Purpose Public Figure Category Would Nullify Most of the Actual Malice Privilege’s Application to Speech About Non-Governmental Persons with Influence over Public Controversies/Issues

Justice Gorsuch’s invitation is not worth the cost. It is important to stress again that the actual malice privilege protects only good faith error in statements about limited purpose public figures, not intentional falsity or highly reckless statements.356 As the Supreme Court reemphasized in Gertz, although “the erroneous statement of fact” may not in a vacuum be “worthy of constitutional protection, it is nevertheless inevitable in free debate.”357 A rule that flatly punishes any “error” made in a news report or public statement—without consideration for its broader consequences—therefore “runs the

353 See cases cited supra notes 223–28.
354 See cases cited supra notes 223–28.
355 See discussion supra Sections II.B.2.d, II.B.3.
risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.”358 Indeed, absence of the privilege would allow for “a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions,” which of course “may lead to intolerable self-censorship.”359

Though it is not without some acknowledged hardship on those public officials and public figures that are the subject of protected good faith erroneous statements, it is difficult to avoid the recognition that “[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.”360 It is this fundamental observation that motivated the Supreme Court to adopt the privilege and thereafter maintain its applicability while remaining “especially anxious to assure to the freedoms of speech and press that ‘breathing space’ essential to their fruitful exercise.”361

Removal (or substantial limitation) of the limited purpose public figure category would nullify most of the actual malice privilege’s application to speech about non-governmental persons with influence over public controversies and issues.362 Indeed, this would only leave the privilege for statements about pervasively famous public figures.363 By design, the pervasively famous public figure is a “rare creature”364 that “is much less common than a ‘limited purpose’ public figure.”365 The Gertz Court warned that courts should “not

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358 Id.
359 Id.
360 Id. at 341.
361 Id. at 342 (citing NAACP v. Button, 371 U.S. 415, 433 (1963)).
362 Id. at 340–41.
363 Gertz, 418 U.S. at 351.
lightly assume that a citizen’s participation in community and professional affairs rendered him a public figure for all purposes.”366 To ensure such caution, the Gertz Court set a very high threshold for qualification as a pervasive public figure: “Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.”367 Instead, if there is to be a public figure finding at all, the presumption is for the limited purpose public figure: “It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.”368

Removal (or substantial limitation) of the limited purpose public figure category would therefore rekindle a tangible risk for “intolerable self-censorship” by the news media and general public with respect to most non-governmental news and public debate.369 Both the news media and the public would operate within the non-governmental news environment with drastically less “breathing space” needed for any reporting or public debate to bear “fruit.”370 Out of fear that the limited purpose public figure doctrine allows for social media misinformation to run unchecked by defamation laws (which is unsupported by case law to date), removal of the limited purpose public figure category would undoubtedly abandon protection for a great deal of “speech that matters.”371

C. Courts Should Continue to Maintain a Commitment to the News Media Engagement Principle from the Gertz Line of Cases

In each of the cases within the Majority News Media Engagement Category, it was the eventual news media engagement factor that transformed the plaintiff from a relatively common type of social media poster—spreading her message or information in random public figures are ‘rare creature[s],’ but the latter type of public figure—a ‘limited-purpose public figure’—is more common.” (citation omitted)).

366 Gertz, 418 U.S. at 352.
367 Id.
368 Id.
369 See id. at 340.
370 See id. at 342.
371 See id. at 341.
segments amongst the clutter of social media—to someone whose
message or information about the issue was now being considered
by the public from the elevated platform of a professional news me-
dia organization.372 The news media engagement principle should
still be recognized by courts to provide both: (1) a “fair” threshold
for would-be limited purpose public figures; and (2) a proven barrier
that functionally protects the limited purpose public category from
mass dilution and abuse from social media posters.

Such “fairness” comes from the fact that news media coverage
is still the forefront/vortex of public debate.373 The Supreme Court
did not establish the limited purpose public figure category in Gertz
merely upon a person’s intent to become a part of the public de-
bate.374 A limited purpose public figure is distinguished from a pri-
ivate figure because she has demonstrated an intent to “thrust” her-
sel to the very “forefront”/”vortex” of the debate in order to influ-
ence public opinion.375 News media coverage should still be consid-
ered the forefront/vortex of public debate because it still maintains
a much greater perceived legitimacy than social media.376 A recent
study published by the Pew Research Center in October of 2022
demonstrated that seventy-one percent of adults in the United States
trusted information from local news organizations and that sixty-one
percent of adults in the United States trusted information from na-
tional news organizations.377 By contrast, only thirty-three percent
of adults in the United States trusted information from social me-
dia.378 Similarly, a survey published in February of 2023 by Statista
and the Morning Consult also demonstrated that adults in the United
States still trusted traditional news media platforms much more than
social media: Radio (sixty-four percent); Newspapers (sixty-one
percent); Network news (fifty-nine percent); Cable news networks

372 See discussion supra Section I.B.2.
373 See Gertz, 418 U.S. at 345, 352.
374 See id.
375 See id.
376 See Jacob Liedke & Jeffrey Gottfried, U.S. Adults Under 30 Now Trust
Information from Social Media Almost as Much as from National News Outlets,
2022/10/27/u-s-adults-under-30-now-trust-information-from-social-media-al-
most-as-much-as-from-national-news-outlets/.
377 Id.
378 Id.
(fifty-four percent); Online-only news sites (fifty-two percent); and Social media (thirty-four percent).  

The news media engagement principle therefore provides a “fair” threshold for the would-be limited purpose public figure because an individual who engages with the news media about her message or information intends to add a perceived legitimacy to the influence of her message or information that would not come from a social media post. Additionally, by engaging with the news media, she has invited heightened professional and public scrutiny of her message or information that does not exist in the normal social media post environment alone. Communication of a person’s message or information through news media coverage therefore more closely tracks with the “normative” assumed-role component from Gertz, as a person certainly “runs the risk of closer public scrutiny” stemming from news media coverage “than might otherwise be the case” with a post on social media.

The news media engagement principle also provides a proven barrier to functionally protect the limited purpose public category from mass dilution and abuse from social media posters. The fact that a news media organization would find the social media poster’s message or information to be newsworthy, even if only to criticize or debunk such message or information, sets such individual apart from the masses operating on social media. The importance of this is not just that it demonstrates some inherent value for the public’s consideration of the social media poster’s message or information, but also that the selectivity limits the application of the actual malice privilege to a very small percentage of those persons that are active on social media. Again, by virtue of the news media engagement, these select few social media posters end up at the “forefront” of the public debate/consideration. In using the Hibdon case referenced by Justice Gorsuch as an example, it is the

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381 See id. at 345.

382 See id.

383 See id.

384 See id.
difference between the limited purpose public figure doctrine allowing *every* person that posted on the internet jet ski news/chat group to qualify (which was the impression left by Justice Gorsuch’s parenthetical) versus the more complete holding from the case, which would only qualify Hibdon because his posts led to multiple features in a national magazine, which vastly improved the legitimacy of Hibdon’s messages/claims.\footnote{\textit{See Hibdon v. Grabowski, 195 S.W.3d 48, 59–61 (Tenn. Ct. App. 2005).}}