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January 7, 2011

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Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Overhill Farms, Inc. v. Nativo Lopez, et al.*
Court of Appeal Case No. G042984, filed Nov. 15, 2010
Letter in Support of Petition to Review (Cal. Rule of Court No. 8.500(g))

Dear Honorable Chief Justice and Associate Justices:

We write on behalf of the Teamsters Joint Council No. 7 and its approximately 50,000 members living and working within the State of California. We submit this letter as *amicus curiae*, to respectfully request your Honors to grant the petition for review filed by Nativo Lopez and his co-defendants with respect to the Fourth Appellate District's decision in the above-referenced matter ("*Overhill*").

This letter is submitted pursuant to Rule 8.500(g) of the California Rules of Court. Review of the Court of Appeals' decision is warranted pursuant to 8.500(b)(1) and (2). While we have reviewed the Petition, its Answer, and the briefs submitted to the court below, we respectfully submit this letter to bring additional points and authorities to your Honors' attention and to respectfully urge your review.

1. Description of Requesting Party's Interest

Teamsters Joint Council No. 7 is a labor organization comprised of local unions located throughout Northern California, California's Central Valley and its Central Coast. The Joint Council and its affiliated local unions represent members in various industries throughout these regions. Often, as the case may be, employment disputes arise. In such instances union members resort to peaceful protest, including petitioning, picketing and other constitutionally-protected activity. The purpose of such protests is to forward the employees' view to the community, media and larger society and, often, to generate opprobrium towards the employer for actions that, in the employees' view, are unjust or unfair.

Teamsters Joint Council No. 7 views the *Overhill* decision as an affront to the right of its members to express themselves, vehemently and without mincing words, as is typical and accepted in the context of a labor dispute. Such a right is a cherished and necessary right that has been substantially undermined by the publication of the *Overhill* decision.

For the reasons set forth below, which in the main are intended to supplement rather than repeat the letters and arguments already on file, we request your Honors to review the Court of Appeals' decision.

2. The Term "Racist Firing" Is Not Defamatory

The Court of Appeals has held that a former employee who accuses his or her former employer of a "racist firing" may be liable for defamation. The holding is predicated on the finding that such an allegation is a "provably false fact." (Slip Op. at p. 16). The Court of Appeals reached this conclusion by reference to the Fair Employment and Housing Act, noting that "[i]ndeed, that very fact is subject to proof in wrongful termination claims on a regular basis" and "[i]f we were to conclude that an employer's racist motivation for terminating an employee's job were not 'provable,' it would come as a great shock to the Fair Employment and Housing Administration [*sic*[1]]" (*Id.*). In reaching this conclusion, the Court of Appeals has inappropriately elevated an idiom of speech to encompassing and incorporating a legal standard applicable to the assessment of civil liability for actionable wrongful termination. Although the Court of Appeals may have the right to interpret and apply FEHA, it has no authority to redefine a common and vague idiom by incorporating the level of proof and standards required under FEHA or Title VII.

By way of analogy, the holding is equivalent to requiring one who publicly calls another a "dangerous" or "lousy" driver as subject to damages unless he can establish that the target of the accusation has, in fact, committed a tort involving the operation of a vehicle.

Of more concern is the Court's misapprehension and outmoded understanding of the nature of 'racism' and human cognition. In that vein, it is well-recognized that FEHA and Title VII, as applied by the Courts, prohibit only a fraction of 'racist' conduct, and only the most blatant and observable. This is because under these statutes courts require plaintiffs to establish through record evidence that their employer objectively exhibited race-based animus. Simply, the Court of Appeals reached the faulty conclusion that an employer, or an employer's action, can not be "racist" unless the employer has violated FEHA or Title VII.

Numerous scholars recognize the fallacy of such a construction. For example, scholars recognize racist employment practices as encompassing "preferential inclusion," under which "an employer prefers one employee over another on the basis of problematic terms" which are often "linked to assumptions about the kind of worker the employee is likely to be." *See After Inclusion*, D. Carbado, C. Fisk & M. Gulati, Annual Review of Law and Society, 2008, 4:83 at 84. Scholars have further noted that "[s]uch an employer might prefer hiring recent Latina/o immigrants, especially those who have an ingrained fear of immigration authorities." *Id.*, discussing Saucedo L.

[1] We presume the Court of Appeals intended to refer to the Department of Fair Employment and Housing or the Fair Employment and Housing Commission, as no such "Fair Employment and Housing Administration" exists.

(2006) "*The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace,*" Ohio State Law J. 67:961–1022; Rodriguez C. (2006) "*Language Diversity in the Workplace,*" Northwestern University Law Review, 100:1689–774. And yet this type of "racism" is not redressable under FEHA or Title VII. Thus, while the Court of Appeals contends that it was defamatory to call a firing "racist" without also disclosing the immigration context of the firings, such a formulation is myopic as it fails to consider overriding race-based dynamics that have shaped and defined the employment relationship. The Court of Appeals also failed to consider the problem of the counterfactual, that is, had Overhill hired from a different racial, cultural or ethnic group than Latina/o migrants, would it have responded to the no-match revelations in the same way? And to what extent can the racial category of its employees be divorced from the immigration context and their treatment under the law and by their employer? Because such questions can not be redressed or answered under a FEHA or Title VII rubric, but nevertheless implicate various types of "racist" conduct, they are not "provable" as that term is generally understood in the defamation context.

For example, in *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity,* (1995) Stanford Law Review, Vol. 47, No. 6, pp 1161-1248, Professor Linda Kreiger notes that Title VII's requirement of purposeful discriminatory intent is out of step and incompatible with scientifically-established principles of cognitive bias that occur on an unconscious level. Examples of such subconscious racism include the activation of social schema, schematic expectancies, distinctiveness-based distortions in perception and judgment and a resulting bifurcation of perception from judgment. *Id.* at 1190-1216. See also Freeman A. 1990, "*Antidiscrimination law: the view from 1989*" Tulane Law Rev. 64:1407–42.

The Court of Appeals' standard is problematic because scholars have found that the vast bulk of racist conduct in employment is simply left unchallenged and unremedied under these statutes. For example, in *Negligent Discrimination,* (1993) University of Pennsylvania Law Review, Vol. 141, No. 3 pp. 899-972, professor David Oppenheimer digests decades of research indicating that "racist acts often appear to be the product of unconscious bias" and that "the theory that racial discrimination is frequently the result of negligent as opposed to intentional, behavior, finds considerable support in the work of social psychologists and sociologists." *Id.* at pp. 902-03. Nonetheless, Professor Oppenheimer notes, Title VII as applied by the courts does not provide redress for such types of racism, and argues in favor of an additional 'negligent discrimination' standard under the statute.

Where employees feel the effects of such subconscious racism, they should be permitted to publicly declaim it without being subjected to defamation unless they meet the exacting evidentiary standards established under FEHA or Title VII. Indeed, psychologists agree that most cases of employment discrimination are the product of "subconscious or unconscious biases" that "are beyond our conscious awareness." See Carbado, et al. at p. 90 (citing Krieger (1995) and Oppenheimer (1993).) Therefore, the Court of Appeals insistence that a charge of "racist firing" is a "provable fact" is contradicted by this "incomplete consciousness" critique of FEHA and Title II doctrine. *Id.* While psychologists have verified the existence of subconscious discrimination as a social and motivational force, such bias is not reached by the intent-based paradigm developed

under FEHA and Title VII. (e.g. Kang, J & Banji, M. (2006) "*Fair Measures: A Behavioral Realist Revision of Affirmative Action*," California Law Review, 94:1063–118).

Finally, the Court of Appeals' decision begs, but then rejects, the question of whether an employer can be racist, or implement "racist firings" even if in its view such firings are required by law. Assuming *arguendo* the terminations were required by law, it cannot be said that legal or even mandated firings can not also be "racist." Borrowing from Constitutional "disparate impact" doctrine, legal scholars have argued that where a law disparately impacts a nonwhite group it should be unconstitutional if that disparate impact reflects and entrenches negative social or cultural meanings about the nonwhite group. (Lawrence C., 1987, "*The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*" Stanford Law Review, 39:317–88). Thus, a justified or legally-mandated firing can still be "racist" even if the question of agency is muddied by federal law or policy.

Unfortunately, by denying the defendants' anti-SLAPP motion to strike, the Court of Appeals ensures these issues will be discussed only in academia, and will no longer be publicly debated by lay-people as the issues arise in the context of their own lives. In this way, and as noted by Justice Fybel in his dissent, the Court of Appeals' decision chills public debate on this topic and is therefore contrary to established First Amendment jurisprudence.

Whether an allegation of racism or racist behavior is "reasonably interpreted as stating actual facts" and if so, whether such facts under the surrounding circumstances "are still entitled to constitutional protection," *Moyer v. Amador Valley High School Dist.* (1990) 225 Cal.App.3d 720, 724, 275 Cal.Rptr. 494, is easily answered when properly placed in context. The "dispositive question" for the Court is "whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion" (*Id.* at p. 724). Clearly a charge of racism encompasses a multifaceted and still-developing array of behavior which can not be answered simply by resort to FEHA and Title VII jurisprudence. Review should be granted to reverse this error.

3. The Court of Appeals Failed to Properly Consider the "Totality of the Circumstances"

It has long been settled that in order to determine whether a statement is worthy of constitutional protection from a charge of defamation, a "totality of the circumstances" test is applied to separate defamation from hyperbole. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260.) "Where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." (Id. at 260).

The Court of Appeals, resting on its finding that the term "racist firing" was a "provable fact" made recklessly, gave no weight to the totality of the circumstances. Rather, by failing to seriously consider and properly apply the totality of the circumstances, the court abdicated its role as a protector of constitutional values and First Amendment rights. The arguments set forth in

Justice Fybel's dissent, by Petitioner and other letters from *amici* in support of review fully address the Court of Appeals' error on this point.

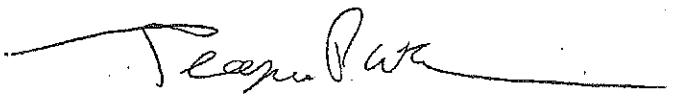
It must be noted, however, that the Court of Appeals' incorrect contention that the employees' dispute was not a 'labor dispute' -- as that term is applied in First Amendment jurisprudence -- is emblematic of its lack of attention to the totality of circumstances surrounding the dispute. The record of the proceedings below reflect that the dispute related to a large number of workers, who were publicly protesting their wholesale termination of employment. Because the Court of Appeals found that the record on appeal did not reflect direct involvement by the employees' union, the Court of Appeals found, the dispute was not a "labor dispute" entitled to a heightened constitutional deference. (*See* Slip. Op. at n. 6). In truth, the employees' conduct falls squarely within the definition of "mutual aid and protection" under the National Labor Relations Act (29 U.S.C. section 157), as well as California's own labor relations acts, such as the Meyers-Milias-Brown Act and the Agricultural Labor Relations Act. Indeed, Labor Code section 923, which establishes California's labor policy, specifically encompasses and encourages "self-organization or [] other concerted activities for the purpose of... mutual aid or protection." In other words, where a group of employees band together to achieve a common goal, and such goal is disputed by their employer, their activity is understood as a "labor dispute" and as protected labor-related activity, whether or not a union is involved.

Recognition of this fact is crucial, because where a debate takes place in the public, and involves a community, a group of employees and/or an issue that is of interest to members of the public, such circumstances give rise to hyperbolic assertions and require greater constitutional protection. As noted by Justice Fybel in his dissent, "Overhill is perfectly capable of ably presenting its side of the story in the public forum and has done so" and, quoting justice Brandeis in *Whitney v. California* (1927) 274, US 357, 377, the "remedy to be applied is more speech, not enforced silence." When a correct and full formulation of First Amendment jurisprudence is applied, as Petitioner, other *amici* supporting review, and Justice Fybel have done, it is clear that Overhill's lawsuit is a paradigmatic SLAPP subject to strike.

4. Conclusion

For the reasons set forth in the Petition for Review, the letters of *amici* encouraging review, and the reasons set forth above, Teamsters Joint Council No. 7 respectfully urges your Honors to grant the Petition for Review.

Very truly yours,



Teague P. Paterson

TPP:tg

cc: All Counsel of Record

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Beeson, Tayer & Bodine, 1404 Franklin Street, Fifth Floor, Oakland, California 94612-3208. On this day, I served the foregoing Document(s):

LETTER IN SUPPORT OF PETITION TO REVIEW

☒ By Mail to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Beeson, Tayer & Bodine, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business in a United States mailbox in the City of Oakland, California.

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I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, January 7, 2011.

Tanya Gatt