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January 6, 2011

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: *Overhill Farms v. Nativo Lopez,* Supreme Court No. XXX (Ct. of App. No. G042984)

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Court:

Pursuant to Rule 8.500(g) of the California Rules of Court, the National Day Laborer Organizing Network (NDLON) submits this letter urging the Court to grant review of the court of appeal's decision in *Overhill Farms v. Nativo Lopez*, --- Cal.Rptr.3d ----, 2010 WL 4619906 (Nov. 15, 2010).

NDLON is a non-profit organization that works to improve the lives of day laborers in the United States, many of whom are Latino immigrants. NDLON has 42 member organizations throughout the country. NDLON works to unify and strengthen its member organizations to be more strategic and effective in their efforts to develop leadership, mobilize, and organize day laborers in order to protect and expand their civil, labor and human rights. NDLON fosters safer more humane environments for day laborers, both men and women, to earn a living, contribute to society, and integrate into the community.

NDLON submits this letter to impress upon the Court the significant chilling effect that the court of appeal's decision, if allowed to stand, will have on low-income, immigrant workers' ability to stand up for their rights. We will not repeat the arguments made in the Petition for Review or in Justice Fybel's powerful dissent, except to emphasize that the court of appeal's decision takes an unprecedented – and unjustifiable – leap in holding that an accusation of "racist firings" constitutes actionable defamation, despite the court's own recognition of the loose, imprecise nature of the term "racist" and the heated context in which the statements were made. *See Cafeteria Employees Union, Local 302, v. Angelos*, 320 U.S. 293, 295 (1943) ("[T]o use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts."); *Linn v. United Plant Guard Workers*, Local 114, 383 U.S. 53, 58 (1966) ("Labor disputes are ordinarily heated affairs. . . . Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language."). Instead, we urge the Court to recognize the ways in which the court of appeal's opinion curtails the rights of a large and already vulnerable class of immigrant workers.

Immigrant workers face unique threats in the workplace, and unique challenges in

standing up to those threats. By law, core labor standards, including minimum wages, health and safety protections, and the rights to organize and to be free from discrimination, cover all workers, regardless of immigration status. *See, e.g., Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (holding that undocumented immigrants are "employees" under the National Labor Relations Act; *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) (holding that federal employment discrimination laws cover undocumented workers). Nonetheless, in practice, immigrant workers, both documented and undocumented, experience disproportionately high rates of workplace abuses. *See, e.g.,* AFL-CIO, Immigrant Workers at Risk (Aug. 2005); AFL-CIO, American Rights at Work and National Employment Law Project, ICED Out: How Immigration Enforcement has Interfered with Workers' Rights (Oct. 2009).

Like other workers, immigrant workers whose labor rights are violated often organize to defend themselves. When they do, the resulting confrontations, like any labor disputes, regularly involve heated language. *See Linn*, 383 U.S. at 58. In some ways, however, disputes between immigrant workers and their employers can be even more tense and heated than disputes involving primarily non-immigrant workforces. This is, in part, because of the role that immigration status plays in labor disputes involving immigrant workers. Although immigration status is legally irrelevant to workers' core labor rights, in practice, employers regularly achieve virtual impunity for violations of undocumented workers' labor rights by threatening workers with immigration consequences. *See* AFL-CIO, American Rights at Work and National Employment Law Project, ICED Out: How Immigration Enforcement has Interfered with Workers' Rights (Oct. 2009). Such threats, whether explicit or implicit, significantly chill immigrant workers' efforts to stand up for their labor rights.

When immigrant workers organize despite the significant challenges they face, the resulting disputes are, as stated, often heated. And, as relevant here, they also often raise issues of race. When race-related issues are raised, the same loose, rhetorical language common to other aspects of labor disputes is often employed. Now, however, in light of the court of appeals decision, such language raises the specter of legal liability. This places an additional, unwarranted chill on immigrant workers' already-compromised ability to stand up for the labor rights to which they are legally entitled.

Under the court of appeals' decision, any accusation by workers that their employer engaged in racist conduct may be interpreted as a concrete, factual allegation that the employer engaged in the conduct *because of* race. This decision is legally and logically untenable given the loose and imprecise nature of the term racist, particularly when used in the context of a heated public dispute.[1] It also places a disproportionate burden on immigrant workers.

The court of appeals' opinion is legally unsupportable and practically harmful to a large and vulnerable class of immigrant workers. NDLON thus urges this Court to grant the Petition for Review and reverse the court of appeals in this case.

Respectfully submitted,

Chris Newman
Legal Director
National Day Laborer Organizing Network

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[1] The body of law interpreting the Equal Protection Clause and Title VII evidences the varied possible meanings of the term racist even as a legal matter. *See* Eang L. Ngo, War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest, 42 Loy. U. Chi. L.J. 1 (2010) (comparing the disparate impact theory of discrimination to intentional discrimination). The ongoing scholarly and legal debate on this issue reflects its complexity, and further underscores the error in the court of appeals' simplistic and absolutist approach.