Honorable Ronald M. George, Chief Justice
Honorable Tani Cantil-Sakauye, Chief Justice Elect
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Overhill Farms, Inc. v. Nativo Lopez, et al.
Court of Appeal No. G042984, filed November 15, 2010
Amicus Curiae Letter in Support of Petition for Review
(Cal. Rule of Court 8.500(g))

Dear Chief Justice George, Chief Justice Elect Cantil-Sakauye and Associate Justices:

We are the attorneys for United Food and Commercial Workers Union, Local No. 324 ("Local 324"); United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, District 12 ("USW"); Studio Transportation Drivers, Local Union No. 399 ("Local 399") of the International Brotherhood of Teamsters and more than two score of other labor unions. On behalf of our many clients, we write as amici curiae in support of the Petition for Review of Overhill Farms, Inc. v. Nativo Lopez, et al. (Cal.App. 4 Dist. 2010) --- Cal.App.4th ----, 2010 WL 4619906. Our clients' reason for why review should be granted is that, in Overhill Farms, the majority significantly erred when it concluded that "the evidence produced by Overhill in this case was sufficient to meet even the heightened standards applicable to a claim of defamation made in the context of a classic labor dispute." Slip Op. at 19.

I. The Interest of Amici Curiae

Since it was founded by the late Robert W. Gilbert in 1945, Gilbert & Sackman has specialized in representing private and public sector labor unions. In all, Gilbert & Sackman currently represents more than fifty international and local labor unions. As noted above, among our longstanding clients is Local 324, a sister local of UFCW Local 770, which was not a party to the Overhill Farms case, but whose role therein (or, more accurately, whose absence) seemingly influenced the Court of Appeal to arrive at its erroneous conclusion that Overhill had met its burden in spite of the heightened scrutiny required by federal labor law. See Slip Op. at 19 fn 6 (noting that the dispute "did not involve the union which actually represented Overhill's employees").

Gilbert & Sackman's many clients often are involved in what the majority referred to as "classic 'labor dispute[s].'" Slip Op. at 19. In these disputes, our clients often distribute leaflets and other publications using "language that . . . might well be deemed actionable per se in some state jurisdictions. Indeed, [their publications] are frequently characterized by bitter and extreme charges, countercharges, unfounded

rumors, vituperations, personal accusations, misrepresentations and distortions. [Our clients] often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." Linn v. Plant Guard Workers (1966) 383 U.S. 53, 58. Unless reversed, our clients will be exposed to monetary damages and injunctive relief (if this Court agrees with the Court of Appeal in Ralphs Grocery Company v. United Food and Commercial Workers Local 8, Sup. Ct. Case No. S185544) every time one of their leaflets or other publications contains such "imprecatory language," which the majority has now determined is actionable.

II. Why Review Should Be Granted

In its majority opinion, the Court of Appeal essentially ignored the long line of federal cases it purported to apply. As the United States Supreme Court has expressly held, "the freedom of speech . . . has long been a basic tenet of federal labor policy." Old Dominion Branch No. 496 v. Austin (1974) 418 U.S. 264, 270. That freedom has now been jeopardized by the majority's opinion.

A. Overhill Farms' Claims Arose in the Midst of a "Labor Dispute."

Although the majority refused to reach the issue of whether or not the case before it arose in the context of a "labor dispute," Slip Op. at 19, its damaging statement that "the evidence produced by Overhill in this case was sufficient" to create liability in such a dispute (id.) is clearly erroneous. But before addressing that issue, we think it appropriate to first address the issue which the majority refused to decide.

In its opinion, the majority observed,

> While tactics employed by defendants to make their point are similar to those traditionally employed in a labor dispute governed by the National Labor Relations Act (see 29 U.S.C. § 152), we note the dispute itself was closer to a wrongful termination case – it did not involve the union which actually represented Overhill's employees, was unrelated to the existing collective bargaining agreement, and did not include efforts to negotiate or approve a new collective bargaining agreement or to change a policy affecting all employees equally. It was, in the main, an effort to force an employer to rescind an adverse employment decision based upon the individual conduct of the employees involved.

Slip Op. at 19 fn 6 (emphasis in original).

However, like the Supreme Court, amici curiae first note that federal preemption of a defamation claim "cannot depend on some abstract notion of what constitutes a 'labor dispute'; rather, application of [preemption] must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to the protection for freedom of speech are significantly implicated." Austin, 418 U.S. at 279 (emphasis added). Here, as the majority observed, the context in which the defamatory statements were made was, in the main, an effort by some discharged

employees, albeit without their union (UFCW Local 770), "to rescind an adverse employment decision" that affected all of them.

Amici curiae understand that defendants also were protesting issues related to Overhill's payment of wages and "other conditions of employment." However, it is sufficient for our analysis if defendants were only protesting the "adverse employment decision." That is a "labor dispute" under well settled federal law.

Section 2(9) of the National Labor Relations Act, as amended, defines a "labor dispute" as including "any controversy concerning terms, tenure or conditions of employment, . . . regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 152(9) (emphasis added). Given this broad definition, the National Labor Relations Board and the United States Supreme Court have determined a labor dispute to exist in circumstances very similar to those in the instant case, albeit not one related to "tenure . . . of employment."

In Emporium Capwell Co. v. Western Addition Community Organization (1975) 420 U.S. 50, after protesting to their exclusive bargaining representative about allegedly racially-discriminatory employment practices, a group of dissident employees rejected the offer of union officials to participate in the recognized grievance-arbitration procedure and instead held a press conference at which they denounced their employer's policies as "racist," demanded a meeting with top management to discuss the concerns of "minority" employees, and announced their intent to establish a picket line and to ask the public to boycott the employer. Approximately ten days later, four members of the group began picketing at the entrance of the employer's premises and distributed handbills urging the public to boycott the employer for its "racist" policies. Although the union and the employer both urged the picketers to rely on the collectively-bargained grievance process, they refused to cease their picketing or calls for a boycott. A week later, two of the picketers were issued written warnings informing them that they would be discharged if they persisted in their picketing and public accusations that the employer engaged in racially discriminatory employment practices. One week later, the two were fired when they again engaged in the proscribed conduct in violation of the written warnings. Emporium Capwell Co., supra, 420 U.S. at 55-56.

On behalf of the discharged employees, a community organization (much like the one run by defendant Nativo Lopez) filed an unfair labor practice charge with the National Labor Relations Board. A Trial Examiner found, and the Board affirmed, that the employees were discharged for attempting to bargain with the employer over the terms and conditions of employment as they affected racial minorities. 420 U.S. at 60-61. Thus, the employees were engaged in a "classic 'labor dispute'" within the meaning of the Act, as their "controversy" clearly concerned terms and conditions of employment and the representation of persons in negotiating, fixing, changing or seeking to arrange terms and conditions of employment, most particularly those affecting themselves and their coworkers of color.

Despite the urging of the employer, the Court of Appeals for the District of Columbia declined to set aside the finding of the Board that the employees were engaged in a "labor dispute" and subsequent proceedings in the case focused instead

on whether, under the circumstances, the discharged employees were protected by Section 7 of the Act while engaged in that dispute. Emporium Capwell, Co., supra, 420 U.S. at 60-61. Although the Supreme Court concluded that the employees' conduct was not protected, it, like the D.C. Circuit Court of Appeals, expressly declined to reverse the Board's finding that the employees were engaged in a "labor dispute" within the meaning of the Act at the time they were discharged. Id.

Since 1975, when the Supreme Court handed down its decision in Emporium Capwell, it has returned to the case only five times (a total of nine times if one counts dissenting opinions), the most recent of which was in 14 Penn Plaza LLC v. Pyett (2009) 129 S.Ct. 1456, 1460. In none of these opinions has the Court ever suggested that it has reconsidered the wisdom of the Board's finding in Emporium Capwell that the discharged employees were engaged in a "labor dispute," nor that any subsequent developments in labor relations would dictate a different finding if similar facts were presented to the Board today.

Here, although the dispute arguably did not involve terms and conditions of employment such as wages, hours and benefits,

As noted above, amici curiae understand that defendants also were protesting issues related to Overhill's payment of wages. It most certainly involved the "tenure . . . of employment" for the protesters. 29 U.S.C. § 152(9) (emphasis added). As such, the defamatory statements were "made in a context where the policies of the federal labor laws leading to the protection for freedom of speech," Austin, 418 U.S. at 279, even though UFCW Local 770 was not involved.

B. The Statements Were Protected Free Speech.

In its majority opinion, the Court of Appeal correctly observed that it had to "apply the totality of the circumstances test [to hold defendants liable for defamation]. . . . 'Under the totality of the circumstances test, "[f]irst, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense . . . . [¶] Next, the context in which the statement was made must be considered."'" Slip Op. at 13 (citations omitted). Unfortunately, in reaching its conclusion that "a claim of racially motivated employment termination is a provably false fact," Slip Op. at 16 (emphasis added), the majority simply misapplied the test.

For purposes of its argument, amici curiae will assume that defendants' statements that "Overhill Farms was a 'Racist Employer,'" their "leaflets stating that Overhill Farms inflicted 'racist and discriminatory abuse' on its workforce," their "flyers stating Overhill was 'abusive and racist' and 'discriminates against Latinos,'" their "handbills generally referring to 'unjust terminations and discriminatory treatment by Overhill,'" and their "press release stating in part that 'IMMIGRANT WORKERS PROTEST RACIST FIRINGS BY OVERHILL FARMS'" (Slip Op. at 14) were all false. The question then becomes, were they "understood in a defamatory sense," especially given "the context in which the statement[s were] made."

In Old Dominion Branch No. 496 v. Austin, supra, the Supreme Court reversed a $165,000 judgment against a union, holding that certain statements, made during an

internal union organizing drive in which the employer was not involved, were made in the course of a "labor dispute" and were protected free speech. As the Court first observed:

> "Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language."

Austin, supra, 418 U.S. at 272 (quoting Linn v. Plant Guard Workers (1966) 383 U.S. 53, 58).

The Court then held that "[t]his freewheeling use of the written and spoken work . . . has been expressly fostered by Congress," and "found it necessary to impose substantive restrictions on the state libel laws to be applied to defamatory statements in labor disputes in order to prevent 'unwarranted intrusion upon free discussion.'" Austin, 418 U.S. 272 (quoting Linn v. Plant Guard Workers, 383 U.S. at 65). To this end, the Court "held that libel actions under state law were preempted by the federal labor laws to the extent that the State sought to make actionable defamatory statements in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth." Id. at 273.

Admittedly, in Overhill Farms, the majority concluded that "Overhill provided substantial evidence defendants either knew, or recklessly disregarded" the truth. Slip Op. at 20. Amici curiae also understand that an issue on appeal is whether the trial court properly excluded subjective declaration testimony of the defendants' state of mind concerning the truth of the statements.

However, in labor disputes such as this one, the inquiry does not stop there. "'[E]pithets such as "scab," "unfair," and "liar" are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7, even though the statements are erroneous and defame one of the parties to the dispute." Austin, 418 U.S. at 278 (quoting Linn v. Plant Guard Workers, 383 U.S. at 60-61). The same is true of the epithet "racist." See Emporium Capwell Co., supra, 420 U.S. at 55-56. And as the dissent point out, "The statements describe Overhill Farms, Inc.'s (Overhill), firing of a large number of Hispanic and female employees as 'racist' and 'discriminatory' in the context of vigorous public protests." Dissent Slip Op. at 1 (Fybel, J., Dissenting).

In Austin, the defendant union called the plaintiff a "scab" in a union publication, and also published Jack London's following definition of a scab to underscore its point:

> After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which he made a scab.
>
> A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.
>
> When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.
>
> No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.
>
> Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.
>
> Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

418 U.S. at 268.

Much as the majority in Overhill sought to distinguish the general use of the term "racist" by pointing to the other words with which it was used, so in Austin, the plaintiff sought to distinguish the general use of the term "scab" by arguing

> . . . that the publication here may be actionable under state law, basing their claiming on the newsletter's publication of Jack London's "definition of a scab." Appellees contend that this can be read to charge them with having "rotten principles," with lacking "character," and with being "traitor(s)"; that these charges are untrue; and that appellants knew they were untrue. The Supreme Court of Virginia upheld the damages awards here on the basis of these charges.

418 U.S. at 283.

Nevertheless, the Supreme Court observed that "[t]he definition's use of words like 'traitor' cannot be construed as representations of fact." 418 U.S. at 284.

Indeed, the court concluded that, given its context, it would be "impossible to believe that any reader of the [union publication] would have understood the newsletter to be charging the appellees with committing the criminal offense of treason." Id. at 285. Put simply, defendants' description of their discharges as "racist" "is merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by" defendants for their former employer. Id. Or as the dissent in Overhill so eloquently put it, "[t]he audience to which the press release was addressed and to whom the leaflets were distributed outside Overhill's plants and a Panda Express store would reasonably understand from the context that the use of the term 'racist' as attributed to Overhill and its conduct constituted rhetorical hyperbole. This hyperbole reflected the demonstrators' contempt, frustration, and desperation in connection with their employment situation." Dissent Slip Op. at 6 (Fybel, J., Dissenting).

If there were any doubt as to the breadth of the Supreme Court's holding in Austin, one need only read Justice Powell's dissent:

> It is true, of course, that appellees were identified by name as "scabs" in the union newsletter, but it is also true that the use of the word "scab" was explicated by a long and vituperative article appearing immediately above appellees' names. The only fair way to read this article is to substitute each appellee's name for the word "scab" whenever it appears. So construed, the plain meaning and import of this publication was that appellees lacked character, that they had "rotten principles," and that they were traitors to their God, their country, their families, and their friends. Appellants make no attempt to prove the truth of these accusations, contending instead that they were mere hyperbole involving no statement of fact. The majority accepts this argument, in my view erroneously.

418 U.S. at 296-97 (emphasis added).

III. Conclusion

In sum, given the context and the wide latitude required for a labor dispute under Austin and its progeny, defendants' admittedly intemperate depictions of Overhill Farms are not actionable under California's defamation laws. Accordingly, the Petition for Review should be granted.

Respectfully yours,
Gilbert & Sackman, a Law Corporation

By:_____
Robert A. Cantore

cc: All Counsel of Record