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January 12, 2011

VIA OVERNIGHT MAIL

The Hon. Tani Cantil-Sakauye, Chief Justice
and the Associate Justices of the Supreme Court
c/o Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: ***Overhill Farms, Inc. v. Nativo Lopez, et al.*, No. S189293**
Letter in Support of Petition of Review of Decision of the Court of Appeal for the Fourth Appellate District in Case No. G042984, filed Nov. 15, 2010

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

On behalf of United Service Workers West, SEIU ("USWW") and United Food & Commercial Workers, Local Union No. 5 ("UFCW Local 5"), we submit this amicus curiae letter in support of the petition for review, pursuant to California Rule of Court, Rule 8.550(g).

These two labor organizations believe that Supreme Court review of the decision of the Court of Appeal for the Fourth Appellate District in *Overhill Farms, Inc. v. Lopez* ("*Overhill Farms*"), 2010 Cal. App. LEXIS 2109 (filed Nov. 15, 2010), is urgently needed to correct serious errors in the court's analysis of what constitutes a "labor dispute" under federal and state law. In this case, the mistake resulted in the lower court's giving an employer a free hand to intimidate low-wage immigrant workers with a crushing retaliatory lawsuit for having exercised their rights to protest a mass dismissal of hundreds of their co-workers. If left uncorrected, the court of appeal's erroneous concepts will threaten many more workers with SLAPP suits for engaging in activities which have hitherto been recognized as protected labor speech.

Statement of Interest

Weinberg, Roger & Rosenfeld is one of the largest union-side labor law firms in the State of California. Currently it engages 43 lawyers exclusively representing labor organizations and their related institutions, including employee benefit plans established pursuant to collective bargaining agreements. The law firm, including its predecessors, has existed for more than 50 years and has litigated defamation cases arising during labor disputes for this entire half century.

USWW and UFCW Local 5 are two of our many clients who represent immigrant workers like those whose mass termination underlies the protest activity at the heart of this case.

USWW is a labor organization representing over 40,000 janitorial workers throughout California. UFCW Local 5 is a labor organization representing 37,000 food industry workers throughout Northern California. Both organizations have actively fought many legal battles to support the rights of immigrant workers who make up a substantial portion of the workforce in their respective industries. USWW's predecessor, Local 1877, represented the workers whose termination prompted the grievance arbitration at issue in *Aramark Facility Services v. Service Employees Int'l Union, Local 1877* (9th Cir. 2008) 530 F.3d 817, in which the United States Court of Appeals for the Ninth Circuit confirmed an arbitration award requiring Aramark Facility Services to reinstate 33 janitors that it fired after receiving no-match letters from the Social Security Administration and giving the workers only a few days to correct the discrepancy. USWW often engages in protected concerted activity, including picketing, similar to the underlying conduct at issue in *Overhill Farms*. UFCW Local 5 has also represented members who have been terminated over disputes involving immigration status.

Both Local 1877 and Local 5 believe that Supreme Court review of *Overhill Farms* is necessary to uphold the traditional broad definition of what constitutes a labor dispute and to avert expanded use of injunctions and defamation suits like the one Overhill Farms brought against appellants in this matter to chill labor organizing and speech.

This Court Should Grant Review Because the Court Below Failed To Understand This Dispute Over the Termination of a Large Group of Employees Was a Classic Labor Dispute

We write this letter because the decision of the Court of Appeal is fundamentally wrong with respect to its application of the concept of a "labor dispute." Its analysis demonstrates a misunderstanding of basic labor law provisions and this Court must grant review to avoid the propagation of an erroneously narrow definition of "labor dispute" that is likely to mislead California courts for years to come. Unfortunately, both the majority and the dissent have misstated the concept of "labor dispute" as it has been well understood in federal and state labor law. This misunderstanding of the nature of a labor dispute so infects the decision that it cannot possibly stand.

In this letter, we do not address the proper application of the *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 malice standard to defamation arising out labor disputes. That issue is addressed head-on by the Petition for Review and others. Rather, we address the single threshold issue that the court got glaringly wrong in this opinion and that is the court's misapprehension of the concept of "labor dispute."

The target of the employer's lawsuit here was vigorous protest of the discharge of over 200 employees. Former employees who had been terminated picketed and boycotted Overhill Farms to seek reinstatement and protest the termination of a large number of co-workers. Nothing more need be said about the nature of the dispute to establish that this is a classic "labor dispute" within our nation's and California's legal traditions. It is a classic "labor dispute" even though the workers acted independently of any union and even though, to the distaste of the majority, they publicly condemned the decision to terminate them as "racist."

The majority stated it had grave doubt that this was a "labor dispute" in a footnote:

> Whether this case does arise out of a "labor dispute" for purposes of applying a higher standard of proof to the defamation claim is not an issue we need to decide, as we conclude the evidence produced by Overhill was sufficient to satisfy even the heightened standard claimed by defendants. 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.

Overhill Farms, Inc. v. Lopez, Slip op. at p. 19.

The dissent, while correct in much of its analysis, committed the same error. The dissent stated:

> Although the demonstrations and protests in the instant case did not involve a union and thus might not constitute a "labor dispute" in the traditional use of the phrase, the context is similar. n2.
>
> n2 The National Labor Relations Act defines the term "labor dispute" as "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." (29 U.S.C. § 152(9).) In *Sutter Health v. UNITE HERE*, supra, 186 Cal.App.4th at page 1207, the appellate court stated, " ' "[w]here the union acts for some arguably job-related reason, and not out of pure social or political concerns, a 'labor dispute' exists." ' "

Slip op. at pp. 5-6.

Both the majority and the dissent would have done better to begin with the statutory definition of "labor dispute" set forth in the National Labor Relations Act:

> The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 152(9); see also Code Civ. Proc. § 527.3, subd. b(4)(iii) [same].

A similar broad definition of "labor dispute" appears in the Norris La Guardia Act enacted in 1932. See 29 U.S.C. § 113, subd. c. The Norris La Guardia Act greatly restricted the previously commonplace use of federal court injunctions to suppress labor activity in the half century before its enactment. The Act provided that, in determining whether a person or association was entitled to protection under the Act, a court should not inquire whether he or it stood in a direct relationship to a particular employer or its employees:

> A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry or has a direct or indirect interest therein....

29 U.S.C. § 113, subd. d; see also Code Civ. Proc. § 527.3, subd. b(4)(ii) [same].

Although the majority and the dissent in this case both expressed doubt a labor dispute existed, the majority cited a host of reasons including the lack of involvement of the union, the lack of connection to the collective bargaining agreement, and the lack of efforts to negotiate or approve a new collective bargaining agreement or to change a policy that would "affect all employees equally." Further, the protest was, in the majority's view, "an effort to force an employer to rescind an adverse employment decision based upon the individual conduct of the employees involved." The dissent's doubt appears to be based on the single factor that the protest "did not involve a union."

These rationales are dead wrong.

The notion shared by the majority and the dissent that a union must be involved in order for a controversy between a group of employees and their employer to be recognized as a labor dispute has been rejected in both federal and California law.

The National Labor Relations Act protects the right of workers to engage in what is called "concerted activity." Such activities are protected by section 7 of the National Labor Relations Act, 29 U.SC. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

The heart of the section with which we are concerned is its protection of the right to engage in "other concerted activities for the purpose of . . . mutual aid or protection."

This language has been interpreted very broadly by the United States Supreme Court and does not leave room for courts to adopt their own contrary definitions of what constitutes labor activity. It is well-settled that the NLRA protects "concerted activities" even where no union is involved. In *NLRB v. Washington Aluminum Co.* (1962) 370 U.S. 9, seven employees walked off their job without permission because they claimed that it was too cold to work in their shop.

They made no demand on the employer, but simply walked out and were fired for abandoning their jobs. The Supreme Court had no trouble finding that this was concerted activity, even though there was absolutely no union involved and not even a demand for action by the employer. The employer was ordered to reinstate the terminated employees with back pay. Activities by workers protesting employment conditions constitute quintessential concerted activity and transform their protest into a labor dispute. See, e.g., *North Carolina License Plate Agency # 18*, 346 NLRB 293, enf'd, 243 F.Appx. 771 (4th Cir. 2006); *Los Angeles Airport Hilton Hotel and Towers*, 354 NLRB No. 17 (2009); *White Oak Manor*, 353 NLRB 795 (2009), reaff'd at 355 NLRB No. 211 (2010).)

Employees' protest may be "concerted activity" under section 7 even when their action is in opposition to their union. The statute expressly protects the right of employees "to refrain" from section 7 activities and this encompasses the right to oppose an incumbent union or to take action which is an opposition to their incumbent union. See, e.g., *NLRB v. Magnavox* (1974) 415 U.S. 322 [union employer cannot waive the right of employees to engage in protected section 7 activity in opposition to the union].

Workers have the right to protest racist activity by their employer. Such protest is concerted activity under section 7 (and, therefore, a labor dispute under federal labor law), although it may not be protected if it conflicts with other provisions of the NLRA. *Emporium Capwell Co. v. Western Addition Community Organization* (1975) 420 U.S. 50. In *Emporium Capwell*, employees picketed to protest what they believed to be racist actions of their employer and demanded that the company meet with them. The individuals were discharged. The Supreme Court found that their activity was a labor dispute but held that because they were seeking to force the company to bargain with them directly in derogation of the exclusive bargaining rights of their union, the activity was not protected. This of course illustrates precisely our point here: the action of these large groups of workers in protesting their termination was certainly concerted activity and certainly at heart a labor dispute over their termination. See also *Tanner Motor Livery, Ltd.* (9th Cir. 1969).419 F.2d 216.

Indeed, the law is also clear that collective disputes over immigration issues are also labor disputes. See *Ashley Furniture Indus. Inc.*, 353 NLRB 645 (2008); *Kaiser Engineers*, 213 NLRB 752 (1974), enf'd, 538 F.2d 1379 (9th Cir. 1976); and the National Labor Relations Board General Counsel's Guideline Memorandum concerning Unfair Labor Practice Charges Involving Political Advocacy available at http://www.nlrb.gov/shared_files/GC Memo/2008/GC 08-10 Guideline Memorandum Concerning ULP Charges Involving Political Advocacy.pdf (discussing protests over immigration policy, including demonstrations independent of unions).

In summary, there is no doubt that the conduct of these workers in protesting their termination and accusing of their employer of racist activity was concerted activity and thus a "labor dispute."

We believe that the majority in this case misunderstood and misapplied this concept. If it felt wholeheartedly that this was a "labor dispute," it would have understood the protesters' reference to racism as a reference to the collective impact of conduct by Overhill Farms. As the dissent properly pointed out, the employer's termination of a large group of Latino employees had a

racial impact. And by collectively protesting the racism of the employer's course of conduct, the workers were expressing a group opinion, not an individual statement of fact, about the net effect of the employer's actions. The employer terminated a large group of Latinos, an act which the workers understood was not required by our immigration laws and would have an adverse impact upon one group identified by national origin.

Many have argued that our nation's immigration laws are effectively racist. That has been a historical argument since this nation has debated immigration laws. Every decision involving immigrants is almost always a decision that has an impact on race. See John Higham "Strangers in a Strange Land" (1955); Bill Ong Hing, "Defining America Through Immigration Policy" (2004); Kevin Johnson, "The 'Huddled Masses' Myth: Immigration and Civil Rights" (2004); Patrick Weil, "Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865-1965)," 15 Geo. Immigr. L.J. 625 (2001). If numerous scholars identify racism as the central theme of our nation's immigration policy, it is disturbing to see a court reduce a grievance by a group of Latino workers that an employment decision based on immigration status is racist to a mere statement of fact that can be readily proved or disproved by applying the formula for civil liability derived from anti-discrimination lawsuits. The majority's view that Title VII and FEHA define the outer limits of racist conduct, and that use of the term beyond those bounds is barred by our defamation laws, is not only parochial, it endangers the freedom of expression essential to public examination of workplace issues.

The workers here engaged in collective protest of what they saw as a racist decision to terminate hundreds of employees on the basis of suspected immigration violations. Whether or not their view of the employer's motives was accurate is irrelevant. They engaged in a labor dispute and sought through group activity, known in the labor laws as "concerted activity," to persuade their employer to reinstate them. Reinstatement might not have been possible for some, given their immigration status, but the employees were certainly free under our labor laws to band together to present their demands and appeal to the community for support.

The Court's Misunderstanding of the Concept of a "Labor Dispute" Poses the Risk of Substantial Confusion in the Lower Courts

Although numerous cases provide a robust understanding of the concept of labor disputes, this decision will encourage retaliatory lawsuits against workers involved in labor disputes whenever the case can be made that no union is involved or the dispute lacks a direct relationship to the enforcement or negotiation of a collective bargaining agreement.

In addition to discouraging the application of California's anti-SLAPP statute, as here, the court's misunderstanding of the concept of a labor dispute is also likely to have substantial impact upon enforcement of a number of statutes which incorporate the definition of labor dispute in California. Code of Civil Procedure section 527.3 and Labor Code sections 1138 and 1138.1 are statutes designed to limit injunctions in labor disputes. The breadth of those statutes is pending before this Court in *Ralph's Grocery Co. v. United Food and Commercial Workers Union Local 8*, Case No. S185544. The term "labor dispute" is also found in other statutes. (See, e.g., Lab. Code § 1140, subd. h; Unemp. Ins.Code § 1259; and Civil Code § 51.7.). The

very narrow and mistaken definition of labor dispute used by the court below will impact the interpretation of these statutes which use the same term.

This Court Should Grant Review

The opinion of the court rests on a badly mistaken concept of labor dispute. There was plainly a labor dispute where workers sought to protest their termination and did so in a concerted manner. They thought their employer's conduct was racist and expressed that view in public. This Court should grant review so it can clarify and restate the key labor principles that should govern this and many similar cases.

Respectfully Submitted,

David A. Rosenfeld

Theodore Franklin

DAR/jys
opeiu 3 afl-cio(1)

cc: All counsel of record

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PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On January 13, 2011, I served upon the following parties in this action:

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copies of the document(s) described as:

LETTER IN SUPPORT OF PETITION FOR REVIEW

[X] **BY MAIL** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

I certify under penalty of perjury that the above is true and correct.

Executed at Alameda, California, on January 13, 2011.

Karen Scott

Karen Scott

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