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January 11, 2021

The Honorable Tani Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: ***Tilkey v. Allstate Insurance Company***
Case No. S265921
Amicus Curiae Letter in Support of Defendant's Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Under rule 8.500(g) of the California Rules of Court, the Chamber of Commerce of the United States of America (the Chamber) respectfully submits this letter as amicus curiae urging this Court to grant review of the above-entitled case.[1]

Allstate Insurance Company's petition for review correctly explains why the Court of Appeal's decision in *Tilkey v. Allstate Insurance Company* (2020) 56 Cal.App.5th 521 (*Tilkey*) should be reviewed and overturned.

First, the Court of Appeal endorsed a theory of compelled self-publication defamation that is inconsistent with the elements of defamation and has been consistently rejected by courts across the country. Recognition of this novel tort would harm both employers and employees by deterring employers from revealing the true reasons for terminating employees. It would also give employees a perverse incentive to repeat the alleged defamation instead of mitigating their damages. And it would upend California's doctrine of employment at will.

Second, the Court of Appeal exacerbated the dangers of embracing the novel tort of compelled self-publication defamation by permitting an employer to also be liable for punitive damages for a statement the employer never made to any third

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[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part, and no person or entity other than amicus curiae, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

party. This expansive potential liability further demonstrates the risks inherent in recognizing such a tort at all.

Finally, it is unsound policy to expose employers to defamation liability based on an employer's adherence to a mandatory federal regulatory scheme requiring the employer to explain why certain employees were fired. Such mandatory government disclosures are privileged and should continue to be so.

INTEREST OF AMICUS CURIAE

The Chamber is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents more than three million businesses, state and local chambers of commerce, and professional organizations. The Chamber regularly advocates for the interests of its members by filing amicus curiae briefs in cases like this one involving issues of significance to the business community.

LEGAL ARGUMENT

I. This Court should grant review and hold that there is no defamation liability under a theory of compelled self-publication.

A. A tort theory of compelled self-publication defamation should not be recognized because it does not require publication to a third party, a fundamental element of any defamation claim.

Defamation involves "the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damages." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645, citing Civ. Code, §§ 45, 46; see *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1200, fn. 5, 1214; see also 5 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 623.) "[I]t is an 'elementary principle of tort law' that a defamation claim requires publication to a third party." (*Gonsalves v. Nissan Motor in Hawai'i* (Hawii 2002) 58 P.3d 1196, 1218 (*Gonsalves*); see *Ringler Associates Inc. v. Maryland Cas. Co.* (2000) 80 Cal.App.4th 1165, 1179 (*Ringler*).) This is because defamation law "primarily protects only the interest in reputation." (Rest.2d, Torts, § 577, com. b.)

"[U]nless the defamatory matter is communicated to a third person there has been no loss of reputation, since reputation is the estimation in which one's character is held by his neighbors or associates." (Rest.2d, Torts, § 577, com. b; see

Note, *Developments in the Law: Defamation* (1956) 69 Harv. L.Rev. 875, 881, fn. omitted; Rest.2d, Torts, § 577, com. m; Annot., *Publication of allegedly defamatory matter by plaintiff ("self-publication") as sufficient to support defamation action* (1988) 62 A.L.R.4th 616; see also *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1474; *Ringler*, *supra*, 80 Cal.App.4th at p. 1179.) The Court of Appeal's opinion contravenes the purpose of defamation law by abandoning the requirement for actual publication by a defendant to a third party. (See *Tilkey*, *supra*, 56 Cal.App.5th at p. 542.)

B. Recognition of a tort of compelled self-publication defamation harms employees.

If the Court of Appeal's opinion remains the law of California, employers will have strong incentives not to communicate to their employees the true reasons for their dismissal. (See, e.g., Moul, *Defamation Publication Revisited: The Development of the Doctrine of Self-Publication* (1993) 54 Ohio State L.J. 1183, 1192; Mouser, *Self-Publication Defamation and the Employment Relationship* (1991) 13 Industrial Relations L.J. 241, 287; Shore, *Defamation and Employment Relationships: The New Meanings of Private Speech, Publication, and Privilege* (1989) 38 Emory L.J. 871, 873; 2 Smolla, Law of Defamation (2d ed. 2020) § 15:14.) This new legal regime would interfere with employers', employees', and "the public's interest in open communication about employment information and limiting the scope of defamation liability." (*Sullivan v. Baptist Memorial Hosp.* (Tenn. 1999) 995 S.W.2d 569, 573 (*Sullivan*); see *Layne v. Builders Plumbing Supply Co., Inc.* (Ill.App.Ct. 1991) 569 N.E.2d 1104, 1111 ["Both employers and employees have significant interest in open communication about job-related problems. Further, it is in the public interest that information regarding an employee's discharge be readily available to the discharged employee and to prospective employers."]; see also *Cweklinsky v. Mobil Chemical Co.* (Conn. 2004) 837 A.2d 759, 765 (*Cweklinsky*) [same]; Prentice & Winslett, *Employee References: Will a "No Comment" Policy Protect Employers Against Liability for Defamation?* (1987) 25 Am. Bus. L.J. 207, 234 [same].)

Employees benefit from open dialogue with their employers when termination is a possibility. "Beneath a dangling sword of defamation, employers are unlikely to provide employees with any reasons for employment decisions, including discharge, depriving employees of any opportunity to contest those decisions." (*White v. Blue Cross and Blue Shield of Mass.* (Mass. 2004) 809 N.E.2d 1034, 1038–1039 (*White*).) For example, "[e]mployees falsely accused of misconduct may be wrongfully terminated because they would never have a chance to rebut the

false accusations. Employees who may be able to improve substandard job performances may fail to do so because needed feedback is withheld." (Eble, *Self-Publication Defamation: Employee Right or Employee Burden?* (1995) 47 Baylor L.Rev. 745, 779–780.) Facing potential defamation liability every time an employee is terminated "would negatively affect grievance procedures intended to benefit the discharged employee." (*Sullivan*, *supra*, 995 S.W.2d at p. 573.) Moreover, discharged employees seeking future employment are better equipped to explain their prior terminations to prospective employers if they know why they were fired in the first place.

This risk of chilling workplace communications is neither hyperbolic nor hypothetical, as the answer to the petition for review suggests. (See APFR 43.) In the minority of states where courts have recognized a compelled self-publication tort theory, "human resources, legal and other employment advisors admonish employers to provide limited or no information when terminating employees" in order to prevent potential liability. (Cooper, *Between a Rock and a Hard Case: Time for a New Doctrine of Compelled Self-Publication* (1997) 72 Notre Dame L.Rev. 373, 432.) As a result, many employers have adopted a policy of releasing only nominal information to terminated employees. (See *id.* at pp. 432–433.) California should not join this failed experiment taken by a minority of jurisdictions.

C. Imposing defamation liability without publication risks exposing employers to nearly limitless future liability.

If compelled self-publication defamation were recognized, plaintiffs would have a "perverse incentive to not mitigate damages" (*Gonsalves*, *supra*, 58 P.3d at p. 1219; accord, *White*, *supra*, 809 N.E.2d at p. 1039) by having "too much control over the cause of action" (*Cweklinsky*, *supra*, 837 A.2d at p. 767). Because the statute of limitations begins to run from the date of publication (see Code Civ. Proc., § 340, subd. (c)) and a new cause of action can arise with each publication (see, e.g., Rest.2d, Torts, § 578, com. b), a plaintiff would have the ability to control the running of the statute of limitations *and* the number of causes of action which arise by repeating the employer's statement. (See *Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 105 [statutes of limitations serve an important purpose, namely, " 'to prevent the assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer fresh and witnesses are no longer available' "].)

This should not be the law: "a plaintiff need only apply for a job in order to create or renew a claim for 'compelled' self-publication. Consequently, the defendant employer could potentially be subject to liability throughout the

plaintiff's lifetime." (*Sullivan*, *supra*, 995 S.W.2d at p. 574; accord, *White*, *supra*, 809 N.E.2d at p. 1039; see Acevedo, *The Emerging Cause of Action for Compelled Self-Publication Defamation in the Employment Context: Should Connecticut Follow Suit?* (1998) 72 Conn. Bar J. 297, 315 [compelled self-publication defamation "could prove too easy to meet" because "dismissed employees in search of new employment inevitably will be 'compelled' to state the defamatory reasons for discharge as opposed to lying"]; *De Leon v. Saint Joseph Hosp., Inc.* (4th Cir. 1989) 871 F.2d 1229, 1237 [this tort theory allows "liability for defamation on every . . . employer each time a job applicant is rejected"].)

This scheme of open-ended liability also runs counter to the requirement that a plaintiff has a duty to mitigate damages. (See, e.g., 6 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 1798; *Olivieri v. Rodriguez* (7th Cir. 1997) 122 F.3d 406, 408 ["The doctrine [of self-published defamation] is inconsistent with the fundamental principle of mitigation of damages"]; see also *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 344 [94 S.Ct. 2997, 41 L.Ed.2d 789] ["The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation"], holding limited on another ground by *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18 [110 S.Ct. 2695, 111 L.Ed.2d 1].)

The Court of Appeal below concluded that the requirement of compulsion "contribute[s] to discouraging employees from simply repeating the defamatory information instead of mitigating their damages." (*Tilkey*, *supra*, 56 Cal.App.5th at p. 543.) Not so. While encouraging truthful dialogue during a job interview is desirable, it does not necessarily follow that the need for honesty negates the concern of a plaintiff's control of the statute of limitations and number of causes of action that can arise. In fact, compulsion, when defined as "the need to be truthful in a job interview, exists in every case in which a terminated employee has a job interview, and therefore provides little temperance at all." (*Cweklinsky*, *supra*, 837 A.2d at p. 768.) It is all but inevitable that a discharged employee will be asked to explain the circumstances of his or her discharge to a prospective employer.

D. Recognition of the tort of compelled self-publication defamation conflicts with the doctrine of at-will employment.

Employment at will presumes an employer "may terminate its employees at will, for any or no reason" and "may act peremptorily, arbitrarily, or inconsistently." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 350; see Lab. Code, § 2922.) Adoption of a compelled self-publication tort theory would "impose an obligation on an employer to conduct a sometimes costly and time-consuming investigation for every termination, no matter how irrefutable the evidence against the employee may be, so as to avoid potential liability for stating false grounds for termination." (*Cweklinsky*, *supra*, 837 A.2d at pp. 768–769, emphasis omitted.) Such an obligation " 'would significantly compromise [the] well-settled principles encompassed by the at-will employment doctrine.' " (*Gonsalves*, *supra*, 58 P.3d at p. 1219; see *Sullivan*, *supra*, 995 S.W.2d at p. 574.) Moreover, recognition of this tort "gives employees who regret not having negotiated an employment contract a tort surrogate for it." (*Rice v. Nova Biomedical Corp.* (7th Cir. 1994) 38 F.3d 909, 912, cert. den. (1995) 514 U.S. 111 [115 S.Ct. 1964, 131 L.Ed.2d 855].)

The facts here illustrate why the recognition of this novel tort is unwise. Tilkey pled guilty to a charge of disorderly conduct in a dispute with his then girlfriend. (See *Tilkey*, *supra*, 56 Cal.App.5th at p. 529.) Allstate proceeded to terminate his employment because the conduct Tilkey pled to undoubtedly violated Allstate's employment policy, which took a strong position against domestic violence. (See *id.* at p. 532.) Allstate, like any employer, should be afforded latitude to enforce its employment policies, including those that target domestic violence. Allstate should not have been required to engage in a separate and costly investigation to confirm the facts that Tilkey had already pled to in court. The Court of Appeal's opinion will discourage employers from enforcing anti-domestic violence and other similar policies because of the risk of compelled self-publication defamation liability. That should not be the law.

II. This Court should grant review and hold, at a minimum, that punitive damages are unavailable for compelled self-publication defamation because, when a defendant does not make any publication to a third party, there cannot be clear and convincing evidence of malice, oppression, or fraud.

To show entitlement to punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant acted with malice, oppression, or fraud. (Civ. Code, § 3294, subd. (a); *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725–726.) Malice is defined as "conduct which is *intended* by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1), emphasis added; see *Childers v. San Jose Mercury Printing & Pub. Co.* (1894) 105 Cal. 284, 288 ["wrongful act done *intentionally*" (emphasis added)].) Oppression is "despicable conduct that subjects a person to cruel and unjust hardship in *conscious* disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2), emphasis added.) Fraud requires "an *intentional* misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (*Id.*, § 3294, subd. (c)(3), emphasis added.)

Moreover, " '[d]efamation . . . is an intentional tort which requires proof that the defendant intended to publish the defamatory statement.' " (*Stellar v. State Farm General Ins. Co.* (2007) 157 Cal.App.4th 1498, 1505.) As this Court has recognized, "accidentally harmful conduct cannot provide the basis for punitive damages under our law." (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1181; see, e.g., *King v. U.S. Bank National Association* (2020) 53 Cal.App.5th 675, 712 [making "defamatory statements willfully and intentionally" is "behavior [that] justifies punitive liability"].) In defamation law, malice exists when "the *publication is made . . . with intent* to injure or defame." (*Taylor v. Hearst* (1895) 107 Cal. 262, 269, emphasis added; accord, *Davis v. Hearst* (1911) 160 Cal. 143, 156.)

Under the theory of compelled self-published defamation, tort liability for the defendant arises when the plaintiff recites to a third party the reasons for his or her termination. (See, e.g., *Dible v. Haight Ashbury Free Clinics, Inc.* (2009) 170 Cal.App.4th 843, 854–855.) Since a defendant never intentionally publishes anything to a third party under this tort theory, as a matter of law no defendant in such a case could have acted, by clear and convincing evidence, with malice,

oppression, or fraud. The Court of Appeal's contrary conclusion conflicts with every other opinion requiring defendants to have intentionally published defamatory material to a third party with clear and convincing evidence of malice, fraud, or oppression in order to incur liability for punitive damages.

III. This Court should grant review and hold that employers cannot be exposed to defamation liability based on their compliance with a mandatory regulatory scheme.

Federal regulations provide that a Uniform Termination Notice for Securities Industry Registration (Form U5) "*must be filed* when an individual leaves a [broker-dealer or investment adviser] firm for any reason." (*Form U5*, FINRA <https://www.finra.org/registration-exams-ce/broker-dealers/registration-forms/form-u5> [as of Jan. 5, 2021], emphasis added; see *Regulatory Notice 10-39: Obligation to Provide Timely, Complete and Accurate Information on Form U5*, FINRA <https://www.finra.org/rules-guidance/notices/10-39> [as of Jan. 5, 2021] ["Under Article V, Section 3 of the FINRA By-Laws, firms are required to file Form U5 no later than 30 days after terminating an associated person's registration"].) A firm "*must disclose* why an individual left the firm and other certain events." (*Form U5, supra*, FINRA, emphasis added.)

The events giving rise to Allstate's defamation liability stem from this mandatory regulatory scheme, as Allstate was required to provide the reason for the termination. (See *Tilkey*, *supra*, 56 Cal.App.5th at pp. 532–533.) It would be unwise as a policy matter, not to mention unjust, to expose employers to defamation liability based on their diligent compliance with federal regulations. (See, e.g., Ausness, *The Case For a "Strong" Regulatory Defense* (1996) 55 Md. L.Rev. 1210.) While this Court has acknowledged that "there is some room in tort law for a defense of statutory compliance," it has declined thus far to create a complete safe harbor. (See *Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 548). This case is the proper vehicle for this Court to recognize such a defense if it also recognizes the tort theory of compelled self-published defamation (which it should not do for the reasons set forth above in section I).

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court grant the petition for review and reverse the Court of Appeal's decision.

Respectfully Submitted,

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cc: See attached Proof of Service

PROOF OF SERVICE

TILKEY V. ALLSTATE INSURANCE COMPANY
Supreme Court Case No. S265921

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On January 11, 2021, I served true copies of the following document(s) described as **AMICUS CURIAE LETTER IN SUPPORT OF DEFENDANT'S PETITION FOR REVIEW** on the interested parties in this action as follows:

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BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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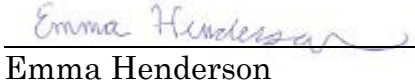
Executed on January 11, 2021, at Burbank, California.



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Supreme Court Case No. S265921

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