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September 28, 2020

Via TrueFiling

Chief Justice Cantil-Sakauye
& Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Request for Depublication of *King v. U.S. Bank National Association* (2020) 53 Cal.App.5th 675 by the Chamber of Commerce of the United States of America

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Pursuant to California Rules of Court, rule 8.1125(a), the Chamber of Commerce of the United States of America requests that if this court does not grant the petition for review in *King v. U.S. Bank National Association* (2020) 53 Cal.App.5th 675, it order instead that the opinion not be published.

The Court of Appeal's published opinion purports to apply this court's recent decision in *Conservatorship of O.B.* (2020) 9 Cal.5th 989, but does not appear to actually apply that standard. If permitted to remain published, the opinion will confuse the lower courts because it deprives this court's decision in *O.B.* of any practical effect.

The Chamber of Commerce of the United States of America has an interest in this issue because it is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country – including throughout California. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The jury in this case awarded punitive damages pursuant to Civil Code section 3294, which permits such an award "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud,

or malice . . . ." U.S. Bank argued that the jury's finding was not supported by clear and convincing evidence.

This court held in *Conservatorship of O.B.*, *supra*, 9 Cal.5th 989: "[W]hen reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable factfinder could have found it highly probable that the fact was true." (*Id.* at pp. 995-996.) *O.B.* was decided on July 27, 2020. The opinion below was filed the following day, on July 28, 2020, and quotes *O.B.* in stating the standard of review. (Opn., pp. 37-38.) But the remainder of the court's discussion of substantial evidence does not appear to apply that standard. By failing to give any effect to the clear-and-convincing-evidence standard, the published decision will at best cause confusion in the lower courts and at worst establish a precedent negating that standard.

The sentence following the quotation of *O.B.* concludes "there was substantial evidence from which the jury could have found McGovern . . . made the defamatory statements with malice . . . ." (Opn., p. 38.) But under *O.B.*, the question should have been whether the jury "could have found it highly probable that the fact was true." (9 Cal.5th at p. 996.) Although the Court of Appeal quoted this court's brand new "highly probable" standard, it does not appear that the court actually applied it.

The Court of Appeal again failed to apply the *O.B.* standard three paragraphs later. It quoted the correct language from *O.B.*, concluding that there was substantial evidence from which the jury could have found it "highly probable" that McGovern acted with malice. But the court below then explained its conclusion by stating that "[t]he jury reasonably could have concluded McGovern had reasons to believe the statements she made regarding her findings were false, she made them anyway . . . ." (Opn., p. 39.) The standard under *O.B.* is not that the jury reasonably could have concluded there was malice, but that the jury reasonably could have concluded it was highly probable there was malice. The court purported to apply the correct standard, but it does not appear that it did so.

The Court of Appeal repeated this pattern in the next paragraph, stating: "The jury reasonably could have inferred McGovern made the defamatory statements willfully and intentionally . . . ." (Opn., p. 39.) The correct question, however, is whether the jury reasonably could have found it

was highly probable that McGovern made the defamatory statement willfully and intentionally.

Consistently, the court below concluded "there was substantial evidence from which the jury could conclude McGovern was a managing agent." (Opn., p. 40.) The Court of Appeal did not explain whether there was substantial evidence from which the jury could have concluded it was highly probable that McGovern was a managing agent.

The published opinion in this case says one thing and then does another. Hence, if the court does not grant the petition for review, which the Chamber believes it should, the court should order that the Court of Appeal's opinion be depublished.

Respectfully Submitted,
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