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Honorable Chief Justice and
Associate Justices of the
Supreme Court of New Jersey
P.O. Box 970
Trenton, New Jersey 08625

Re: Cutler v Dorn, et al

DOCKET NO.: 60,785

Appellate Division Docket No.: A-5512-02T1

SAT BELOW:

Hon. Joseph F. Lisa, Hon. Stephen Skillman,

Hon. Jan Grall

LETTER BRIEF OF *AMICI CURIAE*
ANTI-DEFAMATION LEAGUE, AMERICAN JEWISH COMMITTEE AND JEWISH
COMMUNITY RELATIONS COUNCIL OF SOUTHERN NEW JERSEY
URGING GRANT OF CERTIFICATION AND IN SUPPORT OF PLAINTIFF-
PETITIONER ON THE MERITS

Dear Chief Justice and Associate Justices of the Supreme Court of
New Jersey:

Pursuant to New Jersey Supreme Court Rule 2:6-2(b), please
accept this *amicus curiae* letter brief in this matter. Our motion
for leave to file as *amicus curiae* is attached and is simultaneously
filed herewith.

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INTRODUCTION

We write in support of the Plaintiff-Petitioner's petition for certification and urge this Court to reverse that part of the decision below, Cutler v. Dorn, 390 N.J. Super. 238 (App. Div. 2007), which characterized certain vicious anti-Semitic comments made by plaintiff-petitioner's supervisor and co-workers as "mere teasing" as a matter of law. Whatever the totality of the circumstances in *Cutler* may be and whatever conclusion this Court may draw about whether there was any violation of the New Jersey Law Against Discrimination, N.J.S.A.10:5-1, et seq. (NJLAD), the deeply offensive anti-Semitism directed against the plaintiff-petitioner was not "mere teasing." "Teasing" fails to capture the true harm these remarks were meant to convey. These statements were bigoted, relied on long-standing anti-Semitic canards and were calculated to isolate the Plaintiff based on his religious heritage. In short, the remarks at issue may not *ipso facto* have created a hostile work environment, but they should not have been dismissed as simple or mere teasing.

In addition, the holding of Cutler, taken together with another Appellate Division case, Heitzman v. Monmouth County, 321 N.J. Super. 133 (App. Div. 1999), and in light of this Court's decision in Taylor v. Metzger, 152 N.J. 490, 495 (1998), implies that certain instances of anti-Semitism will be dismissed as

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"teasing" as a matter of law. We urge the Court to correct that implication and find that the comments in Heitzman and Cutler are not dismissible as a matter of law.

STATEMENT OF INTEREST OF AMICI

The Anti-Defamation League

The Anti-Defamation League ("ADL"), founded in 1913, is one of the world's leading organizations fighting anti-Semitism through programs and services that counteract hatred, prejudice and bigotry. ADL's acknowledged expertise and advocacy surrounding issues of anti-Semitism stems from its founding, which was partially in response to the virulent anti-Semitism surrounding the Atlanta trial of Leo Frank, see Frank v. Mangum, 237 U.S. 309, 349-50 (1915) (Holmes & Hughes, JJ., dissenting). Throughout its history, the Anti-Defamation League has sought, as its charter prescribes, "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." The Anti-Defamation League remains vitally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under the law regardless of his or her race, religion, or ethnic origin.

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The American Jewish Committee

The American Jewish Committee ("AJC") was founded in 1906, in the aftermath of the Kishinev pogroms in Russia, to defend the rights and freedoms of Jews and, ultimately, of all Americans. With over 175,000 members and supporters, AJC, throughout its history, has used advocacy, diplomacy, and education to combat anti-Semitism around the world, paying particular attention to how institutions, governments, universities, and the media respond to anti-Semitism. AJC works to spread the message that while anti-Semitism may start with the Jews, it never ends there, and that the very fabric of democratic societies is threatened by those who promote hate. Over the past century, AJC has filed *amicus curiae* briefs in state and federal courts, including the U.S. Supreme Court, reaffirming our core belief that the surest way to combat bigotry and secure the civil and religious rights of Jews is to safeguard the civil and religious rights of all Americans.

Both the Anti-Defamation League and the American Jewish Committee are national organizations that maintain active offices in New Jersey. In support of these objectives, the Anti-Defamation League and ADL have for several decades filed *amicus curiae* in courts nationwide, including the United States Supreme Court and this Court. See State v. Mortimer, 135 N.J. 517 (1994); Ran-Dav's County Kosher, Inc. v. State, 129 N.J. 141 (1992); Frank v. Ivy

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Club, 120 N.J. 73 (1990); Abbott v. Burke, 119 N.J. 287 (1990) and 100 N.J. 269 (1985); Matter of Rulemaking, N.J.A.C. 10:82-1.2, 117 N.J. 311 (1989); Lige v. Town of Montclair, 72 N.J. 5 (1976); Jackson v. Concord Co., 54 N.J. 113 (1969); Seawell v. MacWithey, 2 N.J. 563 (1949).

The Jewish Community Relations Council of Southern New Jersey

The Jewish Community Relations Council is the public policy and human relations agency of the Jewish Federation and the Jewish community of Southern New Jersey, covering Camden, Burlington and Gloucester Counties. It has as its constituency all of the Jewish religious, social welfare and fraternal organizations and agencies in the tri-county region. Among its areas of concern are enhancing positive intergroup relations and combating bigotry, stereotyping and hatred toward any faith, nationality or other minority in the community. The Jewish Community Relations Council is an active member in the county Human Relations Commission and various interfaith groups to advance community harmony and understanding.

LEGAL ARGUMENT

THIS COURT SHOULD GRANT CERTIFICATION AND REVERSE THAT PART OF THE DECISION BELOW WHICH CHARACTERIZED CERTAIN ANTI-SEMITIC COMMENTS AS "MERE TEASING" AS A MATTER OF LAW

We take the Appellate Division's statement of fact as correct and will not burden the Court with a repetition of it here. Whether or not the conduct complained of rose to the level of a violation of the New Jersey Law Against Discrimination, N.J.S.A.10:5-1, et seq. (NJLAD), the Appellate Division improperly dismissed the anti-Semitic-based epithets directed at the plaintiff-petitioner as "mere teasing." This Court may or may not agree with the Appellate Division that the remarks made to Cutler were not severe or pervasive enough to constitute a hostile work environment, but it should not condone their dismissal as mere teasing.

In dismissing Cutler's claim, the Appellate Division chose to focus on what it called the "teasing" nature of the remarks directed at Cutler, stating that:

Nor do we find Shreve's comment [calling plaintiff "dirty jew" or saying "let's get rid of" Jews], along with the various additional comments and incidents complained of, sufficient in the aggregate to support plaintiff's claim. **The comments allegedly made by plaintiff's supervisors about plaintiff's Jewish nose or that Jews "make all the money" or Jews being good at math fall into the category of teasing.** The anonymous placing of an Israeli flag on plaintiff's locker also smacked of teasing and, objectively, was an item of which plaintiff might well be proud. [390 N.J.Super. at 255 (emphasis supplied)]

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The Appellate Division's decision in Cutler echoes a similar decision in Heitzman v. Monmouth County, 321 N.J.Super. 133 (App. Div., 1999), which held that a supervisor's inquiries about an employee's dietary habits and reference to his vacation destination as the "Jewish Alps" were, at worst, teasing remarks.

In Heitzman, like Cutler, the Appellate Division dismissed comments made by the plaintiff's supervisor – including inquiries into what the plaintiff would be doing on a Friday night; whether he ate pork, bacon or ham; and a reference to the plaintiff's vacation destination as the "Jewish Alps" – as "teasing" remarks insufficiently extreme to create a hostile or abusive environment. Id. at 143, 148. Consequently, the Appellate Division concluded that they did not rise to the level required to demonstrate a hostile work environment. Id. See also Mandel v. UBS/PaineWebber, Inc., 373 N.J.Super. 55, 68, 72-73 (App. Div. 2004) (dismissing comments such as "[t]his is the gentiles against the Jews and the plaque should never hang in anybody's office that doesn't celebrate Christmas" and "Jew bitch" as "simple teasing.")

Understandably, mere teasing, offhand comments and isolated incidents cannot form the basis of a NJLAD or Title VII harassment claim. Shepherd v. Hunterdon Developmental Ctr., 336 N.J.Super. 395, 416, (App. Div. 2001) (simple teasing, off-hand comments and isolated incidents, unless extremely serious, will not amount to

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discriminatory changes in the overall terms and conditions of employment); aff'd in part and rev'd in part, 174 N.J. 1 (2001). Further, victim participation in any alleged harassment may contribute to the harassing conduct, and deem it "not unwelcome." However, it is inappropriate for a court to dismiss the deeply offensive and harmful stereotypes present in this case (and in Heitzman) as mere teasing in order to reach the conclusion that an environment is not sufficiently hostile or abusive in light of "all the circumstances" present in a case.

Whatever the totality of the circumstances may have been in these particular cases, the comments at issue in Cutler and in Heitzman cannot be fairly dismissed as mere teasing. They are bigoted, offensive and anti-Semitic, nothing less. Indeed, the defendant conceded his remarks were "incredibly insensitive" (see 390 N.J. Super. at 345) and the jury obviously agreed.

The strikingly offensive phrase "dirty Jew" has been socially unacceptable for decades and after the Nazi effort to exterminate the Jews during World War Two became even more repugnant, especially when coupled with a phrase like "let's get rid of" or "let's kill." It is hard to remember that the law permitted Jews to be discriminated against in ways unimaginable now. For instance, in McCarter v. Davis, 202 A.D. 519, 194 N.Y.S. 688 (App. Div. 1922), the court did not question that a lease could properly

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prohibit subleasing to Jews but ruled that the landlord did not waive additional rights by telling the tenant "My dear sir, this house is yours for the next three years, and you can do anything you please with it only promise me that you won't rent it to a nasty, dirty Jew." See 202 A.D. at 522. In other reported judicial decisions regarding this specific type of verbal discrimination we can see rulings from more enlightened courts clearly disturbed by this vile expression of anti-Semitism. See Colker v. Connecticut Fire Ins Co., 7 S.W.2d 502 (Ky. Ct. App. 1928) (reversible error for defense counsel to argue to jury that plaintiff was trying to cheat fire insurance companies by "a dirty Jew trick"); Williams v. City of Newport, 18 S.W.2d 283 (Ky. Ct. App. 1929) (disciplinary charges against police lieutenant upheld for among other things referring to a Jewish police officer as a "God damn dirty Jew").

Based on our years of experience in dealing with the victims of anti-Semitism, we can say with confidence that these comments are clearly and patently anti-Semitic and that there is great danger in dismissing remarks such as "those dirty Jews" as mere teasing, even in an employment setting in which derogatory humor and mutual recriminations was, unfortunately, the norm. The comments of the supervisors and colleagues in Cutler and Heitzman are derived from the basest anti-Semitic canards¹ and are

¹For example, the comment by the Plaintiff-Appellant's supervisor about Jews and money is an anti-Semitic stereotype that has its

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are derived from the basest anti-Semitic canards¹ and are calculated to challenge the feeling of safety, security and sense of belonging of any Jewish-American.

Perhaps one of the reasons the Appellate Division was quick to dismiss the epithets in question as teasing was that it failed to account for the continued existence of anti-Semitic bigotry in New Jersey. After all, as the Appellate Division noted (but did not cite), social context matters:

The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing ..., and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998) [390 N.J.Super. at 254]

¹For example, the comment by the Plaintiff-Appellant's supervisor about Jews and money is an anti-Semitic stereotype that has its historical roots in 13th century Europe when the Church did not allow Christians to loan money for profit and Jews were generally not allowed to own land. As a consequence, money lending became one of the few ways in which Jews could earn money legally. Once they became associated with the trade of usury, stereotypes evolved in which Jews were accused of being money hungry - a stereotype that has contributed to two millennia of persecution against the Jewish people. See Richard Levy, ed., 2 *Anti-Semitism: A Historical Encyclopedia of Prejudice and Persecution* 727- 29 (ABC Clio 2005). The comment about Jewish Noses related to a stereotype dating back to the 17th century, but which reached its apex in the NAZI-era, when the NAZIs widely publicized such stereotypes in its publications, including most famously *Der Stürmer* ("the Stormer") and in countless other newspapers, comic books and films. See Richard Levy, ed., 1 *Anti-Semitism: A Historical Encyclopedia of Prejudice and Persecution* 102- 06 (ABC Clio 2005).

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Based on ADL and AJC's respective and vast experience in, and expertise on, the subject of anti-Semitism, amici can assure the Court that the social context of these comments is a stark and harsh one: while much progress has been made, anti-Semitism persists in New Jersey and in America. As a consequence, the potency of these remarks, especially those made by supervisors, cannot be easily dismissed.

Even a quick review of ADL's annual audit of anti-Semitic incidents reveals that year in and year out, comments such as the ones presented in this case, Heitzman and Mandel are used against Jews.² In New Jersey, a total of 244 anti-Semitic incidents were reported to ADL in 2006, with 166 incidents of vandalism and 78 incidents of harassment. New Jersey ranked second in the nation in anti-Semitic incidents last year, behind only New York State. Some examples of the incidents involved include:

- A professor at Ramapo College found swastikas and hate graffiti, "Die Jew Bitch," written on her white-board.
- A Jewish cemetery in Lyndhurst was defaced with swastikas and anti-Semitic slogans.
- "F*** Jews" was written on a menorah holiday display in a Cedar Grove high school.
- A 2 foot by 2 foot swastika was carved into the floor of the boys' bathroom at a middle school in East Windsor.
- The living residence for a Yeshiva (Jewish school) in Roosevelt was sprayed with over 60 paint gun pellets.

² http://www.adl.org/PresRele/ASUS_12/4993-12.htm (viewed 7/19/07).

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- A student at an Ocean County high school shouted "F*** you, you F***ing Jew" at a member of the school administration.

Nationally, of the 1,405 victims of an anti-religion hate crime reported by the Federal Bureau of Investigation in 2005 (the most recent year for which statistics are available), 848, or 69.5 percent, were against Jewish-Americans.³ Moreover, ADL's most recent *Survey of American Attitudes Towards Jews in America*, found that 14 % of Americans - or nearly 35 million adults - hold views about Jews that are "unquestionably anti-Semitic."⁴ The Appellate Division's seemingly casual dismissal of anti-Semitic language as mere teasing is a troubling failure to take the "constellation of surrounding circumstance" seriously.

Finally, in Taylor v. Metzger, 152 N.J. 490, 495 (1998), this Court addressed whether a single slur, the use of the term "Jungle Bunny" against an African-American subordinate, was actionable. In concluding that it was, this Court wrote:

Therefore, the fact that defendant uttered only one slur toward plaintiff does not, as a matter of law, preclude his conduct from being extreme and outrageous. A single event, under the right circumstances, may be extreme and outrageous. Defendant's conduct in this case may present those unusual circumstances. In the presence of Undersheriff Isham, defendant, the Sheriff of Burlington County, referred to plaintiff, who had been a sheriff's officer for twenty years, as a "jungle bunny." In light of the potency of racial slurs and defendant's authority

³ <http://www.fbi.gov/ucr/hc2005/index.html> (viewed 7/19/2007).

⁴ http://www.adl.org/anti_semitism/anti_semitic_attitudes.pdf (viewed 7/19/2007).

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as sheriff, a jury could reasonably determine that defendant's conduct was extreme and outrageous. [Id. at 512-13 (citation and quotation marks omitted)]

We do not believe that it is fruitful or appropriate for courts to compare slurs. However, we are very concerned that one reading of Cutler (especially in light of Heitzman) is that if Cutler, Heitzman, and Taylor had been more similarly situated (for example, if Cutler had "clean hands"), the Appellate Division would not have found for the Plaintiff. We urge the Court to clarify that it is the impact of a bigoted remark on a reasonable employee's terms and conditions of employment which is the sole touchstone of a court's analysis, not the plaintiff's race or religion.

In short, the Court must make it clear that if the plaintiffs were otherwise similarly situated, the Appellate Division could not have rationally made a distinction between a supervisor's use of the deeply offensive "jungle bunny" epithet and Cutler's supervisor's anti-Semitic remarks about Cutler's Jewish nose or that Jews "make all the money" in the totality of the circumstances presented here.

CONCLUSION

Whatever the totality of the circumstances in Cutler may be, it is wrong to call the anti-Semitism present in the Haddonfield Police Department "mere teasing." There was no basis for setting

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aside the jury's conclusion that the plaintiff was subjected to a hostile work environment on the ground that certain statements are not offensive enough as a matter of law, and the reversal by the Appellate Division dramatically undercuts the true harm these remarks were meant to convey to any Jewish American. They are bigoted, rely on long-standing anti-Semitic canards and are calculated to isolate the Plaintiff based on his religious heritage.

We urge this Court to use its supervisory powers over the lower Courts to modify Cutler to determine that the anti-Semitism remarks present in the facts of the case, do not, as a matter of law, constitute "mere teasing."

Respectfully Submitted,

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