No. S253593

IN THE SUPREME COURT OF CALIFORNIA

YAHOO! INC.,

Plaintiff and Petitioner,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Defendant and Respondent.

After a Certification Order by the United States Court of Appeals for the Ninth Circuit, Case No. 17-16452

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; *AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF PETITIONER YAHOO! INC.

HUNTON ANDREWS KURTH LLP
* Lorelie S. Masters (*pro hac vice* pending)
2200 Pennsylvania Ave., NW, Suite 900
Washington, DC 20037-1701
Tel: (202) 955-1500
Fax: (202) 861-3674
Email: lmasters@HuntonAK.com

Kevin V. Small (*pro hac vice* pending)
200 Park Ave, 52nd Floor
New York, NY 10166
Tel: (212) 309-1226
Fax: (212) 309-1100
Email: ksmall@HuntonAK.com

Alexandrea H. Young (Cal. Bar No. 233950)
550 S. Hope Street, Suite 2000
Los Angeles, California 90071-2627
Tel: (213) 532-2000
Fax: (213) 532-2020
Email: ayoung@HuntonAK.com

REED SMITH LLP
* Timothy P. Law (*pro hac vice* pending)
Three Logan Square, Suite 3100
Philadelphia, PA 19103
Tel: (215) 241-1262
Fax: (215) 851-1420
Email: tlaw@reedsmith.com

Andrew B. Breidenbach (Cal. Bar. No. 281586)
Three Logan Square
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
Tel: (215) 851-8100
Fax: (215) 851-1420
Email: abreidenbach@reedsmith.com

Attorneys for Amicus Curiae UNITED POLICYHOLDERS

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS

United Policyholders ("UP"), a non-profit entity that represents the interests of policyholders nationwide, respectfully applies for leave to file the accompanying *amicus curiae* brief under California Rules of Court, rule 8.520(f) in support of Petitioner Yahoo! Inc. This brief is timely under California Rules of Court, rule 8.520(f)(2), as it is filed within 30 days after the last reply brief was filed.

UP has been granted leave to file *amicus curiae* briefs in more than 400 cases throughout the United States. UP's *amicus curiae* efforts recently assisted this Court in *Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, and the Court cited favorably to UP's arguments in *Pitzer College v. Indian Harbor Insurance Company* (2019) 8 Cal.5th 93, *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, and *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815.

UP is a non-profit organization based in California that serves as a voice and information resource for insurance consumers across the country. The organization is tax-exempt under Internal Revenue Code section 501(c)(3). UP is funded by donations and grants and does not sell insurance or accept money from insurance companies. UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help for victims of wildfires, floods, and other disasters); *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness); and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms, and articles on commercial and personal lines insurance products, coverage, and the claims process at www.uphelp.org.

UP monitors the insurance sales, claims, and law sectors, and conducts surveys and hears from a diverse range of individual and business policyholders throughout California on a regular basis. The organization interfaces with state regulators in its capacity as an official consumer representative in the National Association of Insurance Commissioners. UP provides topical information to courts via the submission of *amicus curiae* briefs in cases involving insurance principles that matter to policyholders, both individuals and businesses.

UP seeks to fulfill the "classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." (*Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry State of Mont.* (9th Cir. 1982) 694 F.2d 203, 204.) This is an appropriate role for *amici curiae*. As commentators have stressed, an *amicus curiae* is often "in a superior position to inform the court of interests other than those represented by the parties, and to focus the court's attention on the broader implication of various possible rulings . . . ." Shapiro, et al., Supreme Court Practice (11th ed. 2019) The Briefs on the Merits, § 13.14, p. 13-45, quotation omitted.)

UP is familiar with the briefs that have been filed in this case. UP has experience with the legal issues of this case, and believes its experience will make its proposed brief of assistance to this Court in deciding the important certified question on which the Ninth Circuit sought guidance from this Court. UP believes that its explanation of insurance principles will assist the Court in its resolution of the certified question. UP can also certify, under California Rules of Court, rule 8.520(f)(4), that no person or entity authored the proposed amicus brief nor made a monetary contribution toward its preparation or submission, other than *amicus curiae* UP and its counsel.

UP therefore respectfully requests leave to file the attached *amicus curiae* brief presenting additional authorities and discussion in support of Petitioner's arguments.

November 18, 2019

HUNTON ANDREWS KURTH LLP
* Lorelie S. Masters
Kevin V. Small
Alexandrea H. Young

By: Alexandrea H. Young

- and -

REED SMITH LLP
* Timothy P. Law
Andrew B. Breidenbach

Attorneys for Amicus Curiae
UNITED POLICYHOLDERS

TABLE OF CONTENTS

I. Introduction 10

II. Argument 11

A. The "Right of Privacy" Is a Broad Term That Includes a Person's Interest in Seclusion 11

1. Grants of Insurance Coverage Are Construed Broadly 11

2. Insurance Companies Must Use Clear Language in Their Insurance Policies and Are Subject to the Rule of *Contra Proferentem* If They Do Not 12

3. Insurance Policies Are Construed Broadly to Promote the Protection of the Policyholder and the Public 14

B. The Court Should Apply the Rules of Policy Interpretation to the Standard-Form Terms at Issue to Find Coverage for Yahoo 15

1. The Rule of *Contra Proferentem* Applies to Construe All Ambiguities in Standard-Form Insurance Policy Language 15

2. The Standard-Form Language Used by National Union Provides Coverage for TCPA Claims, and It Is Separate and Distinct from the Standard-Form Language That Does Not Cover TCPA Claims 18

3. The Term "Right to Privacy" Is a Broad Term and Cannot Be Restricted to Solely the Right of Secrecy 22

III. Conclusion 27

TABLE OF AUTHORITIES

Page(s)

Cases

20th Century Ins. Co. v. Superior Court
(2001) 90 Cal.App.4th 1247 14

Addison Automatics, Inc. v. Hartford Casualty Insurance Company
(N.D.Ill. Mar. 31, 2015, No. 13-cv-1922) 2015 WL 1543216 21

AIU Ins. Co. v. Superior Court
(1990) 51 Cal.3d 807 ..... 15, 18

American Alternative Ins. Corp. v. Superior Court
(2006) 135 Cal.App.4th 1239 22

American Home Products Corp. v. Liberty Mut. Ins. Co.
(S.D.N.Y. 1983) 565 F.Supp. 1485 17

American States Ins. Co. v. Capital Associates Jackson County, Inc.
(7th Cir. 2004) 392 F.3d 939 20

Association of California Ins. Companies v. Jones
(2017) 2 Cal.5th 376 2

Bareno v. Employers Life Ins. Co.
(1972) 7 Cal.3d 875 12

Catsouras v. Department of California Highway Patrol
(2010) 181 Cal.App.4th 856 24

Columbia Cas. Co. v. HIAR Holding, L.L.C.
(Mo. 2013) 411 S.W.3d 258 17

Cynosure, Inc. v. St. Paul Fire and Marine Ins. Co.
(1st Cir. 2011) 645 F.3d 1 20

Desai v. Farmers Ins. Exchange
(1996) 47 Cal.App.4th 1110 22

E.M.M.I. Inc. v. Zurich American Ins. Co.
(2004) 32 Cal.4th 465 13

Fireman's Funds Ins. Co. v. Fibreboard Corp.
(1986) 182 Cal.App.3d 462 18

G.M. Sign, Inc. v. State Farm Fire and Cas. Co.
(Ill.App.Ct. 2014) 18 N.E.3d 70 21

Glickman v. New York Life Ins. Co.
(1940) 16 Cal.2d 626 ..... 11, 15

Hartford Fire Ins. Co. v. California
(1993) 509 U.S. 764 [113 S.Ct. 2891, 125 L.Ed.2d 612] 17

Hoechst Celanese Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania
(Del.Super. 1992) 623 A.2d 1128 17

Illinois Cas. Co. v. West Dundee China Palace Restaurant, Inc.
(Ill.Ct.App. 2015) 49 N.E.3d 420 21

Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group
(1996) 50 Cal.App.4th 548 22

M.G. v. Time Warner, Inc.
(2001) 89 Cal.App.4th 623 24

MacKinnon v. Truck Ins. Exchange
(2003) 31 Cal.4th 635 11

Martin Marietta Corp. v. Insurance Co. of North America
(1995) 40 Cal.App.4th 1113 18

Miller- Wohl Co., Inc. v. Commissioner of Labor and Industry State of Mont.
(9th Cir. 1982) 694 F.2d 203 3

Minkler v. Safeco Ins. Co. of America
(2010) 49 Cal.4th 315 14

Montrose Chemical Corp. v. Admiral Ins. Co.
(1995) 10 Cal.4th 645 17

Penzer v. Transportation Ins. Co.
(Fla. 2010) 29 So.3d 1000 17

Pitzer College v. Indian Harbor Ins. Co.
(2019) 8 Cal.5th 93 ..... 2, 11, 14

Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.
(4th Cir. 2005) 407 F.3d 631 20

Safeco Ins. Co. of America v. Robert S.
(2001) 26 Cal.4th 758 ..... 13, 21

Sanders v. American Broadcasting Companies, Inc.
(1999) 20 Cal.4th 907 23

Sawyer v. West Bend Mut. Ins. Co.
(Wisc.Ct.App. 2012) 821 N.W.2d 250 20

Shulman v. Group W Productions, Inc.
(1998) 18 Cal.4th 207 26

Steven v. Fidelity & Cas. Co. of New York
(1962) 58 Cal.2d 862 12

Terra Nova Ins. Co. v. Fray-Witzer
(Mass. 2007) 869 N.E.2d 565 17

TRB Investments, Inc. v. Fireman's Fund Ins. Co.
(2006) 40 Cal.4th 19 2

Valley Forge Ins. Co. v. Swiderski Electronics, Inc.
(Ill. 2006) 860 N.E.2d 307 20

Vandenberg v. Superior Court
(1999) 21 Cal.4th 815 2

Windmill Nursing Pavilion, Ltd. v. Cincinnati Ins. Co.
(Ill.App.Ct. 2013) 2 N.E.3d 582 21

Woods v. Insurance Co. of North America
(1974) 38 Cal.App.3d 144 22

Statutes

Civ. Code, § 1636 13

Civil Code, § 3344 24

Int.Rev. Code, § 501(c)(3) 2

Telephone Consumer Protection Act of 1991 ..... *passim*

Other Authorities

Cal. Rules of Court, rule 8.520 ..... 2, 3, 29

DeLuca, *The Hunt for Privacy Harms After Spokeo* (2018) 86 Fordham L.Rev. 2439 26

H.R.Rep. No. 102-317, 1st Sess. (1991) 26

In Re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (2003) 18 FCC Rcd. 14014 26

Masters & Stanzler, Insurance Coverage Litigation (2nd ed. 2000 & Supp. 2019) 16

Plitt, et al., Couch on Insurance (3d ed. 2019) 11

Restatement of Liability Insurance (2019) ..... *passim*

Shapiro, et al., Supreme Court Practice (11th ed. 2019) 3

S.Rep. No. 102-178, 1st Sess. (1991) 26

Stempel & Knutsen, Stempel & Knutsen on Insurance Coverage (4th ed. 2015) 14, 16

Web Site of the International Risk Management Institute, Inc. (IRMI) <https://www.irmi.com/term/insurance-definitions/standard-form-or-standard-policy> [as of Nov. 15, 2019] 16

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PETITIONER YAHOO! INC.

I. Introduction

National Union agreed to cover Yahoo's liability for its "oral or written publication, in any manner, of material that violates a person's right of privacy," using standard-form policy terms used in countless insurance policies sold to countless policyholders. Two lines of precedent across the nation address coverage for Telephone Consumer Protection Act of 1991 ("TCPA") liabilities: one considering the "publication" language at issue here, and another considering distinguishable "making known" language. Courts typically find coverage under the "publication" policy language, but not under the "making known" language. When applying the "publication" language, **every single high court to have considered the question has found coverage for TCPA claims**.

UP will explain why the Court should uphold coverage in this case using the principles of insurance policy interpretation applicable not only in California but in courts around the country. Courts require insurance companies, as drafters of the standard-form language in the insurance policies they sell, to use language that is clear; when insurers fail to do so and their standard-form terms are ambiguous, courts construe those terms in favor of coverage. Contrary to National Union's argument here, the terms at issue in Endorsement No. 1 in Yahoo's insurance policy are the same as those in the exclusion National Union deleted from the policy at Yahoo's request. There is no evidence here that the terms at issue are unique or differ from the standard-from terms construed in TCPA coverage cases around the country, or that Yahoo drafted those terms. The Court should uphold coverage, thus vindicating the rights of policyholders to the coverage they pay for and to language that is clear and supports insurance policies' dominant purpose of indemnity.

II. Argument

A. The "Right of Privacy" Is a Broad Term That Includes a Person's Interest in Seclusion

1. Grants of Insurance Coverage Are Construed Broadly

When interpreting an insurance policy, "exclusionary clauses are interpreted narrowly against the insurer" and coverage grants are "interpreted broadly so as to afford the greatest possible protection to the insured." (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648, internal citations and quotations omitted; *Glickman v. New York Life Ins. Co.* (1940) 16 Cal.2d 626, 635 ["[T]he object and purpose of insurance is to indemnify the insured in case of loss, and ordinarily such indemnity should be effectuated rather than defeated. To that end the law makes every rational intendment in order to give full protection to the interests of the insured," quoted approvingly in *Pitzer College v. Indian Harbor Insurance Company* (2019) 8 Cal.5th 93, 106-107 (*Pitzer College*)]; Plitt, et al., Couch on Insurance (3d ed. 2019) § 22:14 ["Ambiguous or doubtful language or terms, it is said, must be given the strongest interpretation against the insurer which they will reasonably bear, or, conversely, that the meaning of the words used that is most advantageous to the insured should be adopted," fn. omitted].) The "right of privacy" provision in general liability insurance is a grant of coverage, not an exclusion, so under well-established California law, the "right of privacy" coverage must be interpreted broadly. (See *MacKinnon v. Truck Ins. Exchange*, *supra*, 31 Cal.4th at p. 648.)

2. Insurance Companies Must Use Clear Language in Their Insurance Policies and Are Subject to the Rule of *Contra Proferentem* If They Do Not

National Union has the responsibility to use clear language in its insurance policy. California courts "insist that insurers draw clear policies or suffer adverse consequences":

> We think that the responsibility for writing clear and simple policies lies with the insurance industry, and that the tremendous growth of insurance in this country enhances the need for such policies . . . . [T]hese multitudes of insured persons and their beneficiaries, many of whom are unversed in the sophisticated ways of commerce, are utterly unable to decipher obscure and technical language. They are singularly dependent upon the good will and the good draftsmanship of the insurer . . . . *These considerations of public policy have long led courts to insist that insurers draw clear policies or suffer adverse consequences; we have consistently held that ambiguities in such documents must be resolved against the insurer.*

(*Bareno v. Employers Life Ins. Co.* (1972) 7 Cal.3d 875, 878, emphasis added.) Indeed, "[t]he policies are prepared by the experts of the [insurance] companies, they are highly technical in their phraseology, they are complicated and voluminous . . . and in their numerous conditions and stipulations furnishing what sometimes may be veritable traps for the unwary." (*Steven v. Fidelity & Cas. Co. of New York* (1962) 58 Cal.2d 862, 879.)

National Union argues at page 13 of its merits brief that its insurance policy covers liability for "injury caused by disseminating a person's private information to third parties" and at page 26 that "the policy covers only damages for publishing material that contains private information." However, the insurance policy does not say that, and it would have been

easy for National Union to *write those words in its policy* if that had been the intent. (See *Safeco Ins. Co. of America v. Robert S.* (2001) 26 Cal.4th 758 [refusing to construe a "*criminal act* exclusion" as "an *illegal act* exclusion," explaining: "Had Safeco wanted to exclude criminal acts from coverage, it could have easily done so. Insurers commonly insert an exclusion for criminal acts in their liability policies."].)

Alternatively, perhaps even more simply, the coverage could have used the phrase "right of secrecy" rather than "right of privacy" if coverage was to be limited solely to one limited type of privacy interest. However, in contrast to the "right of secrecy," the term "right of privacy" that National Union used in its policy form is exceedingly broad. Indeed, it is broader than the right of seclusion, broader than the right of secrecy, and even broader than the concept "invasion of privacy," which could conceivably be construed as being limited to that tort. The "right of privacy" is protected by statutes, regulations, tort precedent, the California Constitution, and the U.S. Constitution. As particularly relevant here, one such statute designed specifically to protect an individual's "right of privacy" is the TCPA.

"The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the 'mutual intention' of the parties." (*E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470, quoting Civ. Code, § 1636.) An insurance policy is ambiguous if it is subject to two or more reasonable interpretations. (See, e.g., *E.M.M.I. Inc. v. Zurich American Ins. Co., supra*, 32 Cal.4th at p. 470.) Any ambiguous terms are construed in the policyholder's favor, consistent with the policyholder's reasonable expectations. (*Ibid.* at pp. 470-471.) The rule that ambiguous policies must be construed in favor of coverage is intended to balance the uneven power insurers hold in the bargaining process, based on the "recognition that the

insurer generally drafted the policy and received premiums to provide the agreed protection." (*Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 321, internal quotations and citations omitted; see also *Pitzer College*, *supra*, 8 Cal.5th 93 at p. 103.) This longstanding tenet of California law, known commonly as *contra proferentem*, is applied in courts across the United States. (See, e.g., Stempel & Knutsen, Stempel & Knutsen on Insurance Coverage (4th ed. 2015) § 4.08.)

This Court's emphasis on the duty of insurance companies to draft policy terms that are clear and unambiguous is consistent with the broad interpretation of coverage provisions and with the construction of ambiguities against insurance companies. It is also consistent with the special role insurance plays in our society. (*Pitzer College*, *supra*, 8 Cal.5th at pp. 106-107.)

3. Insurance Policies Are Construed Broadly to Promote the Protection of the Policyholder and the Public

This Court has recognized that "the field of insurance so greatly affects the public interest that the industry is viewed as a 'quasi-public' business, in which the special relationship between the insurers and policyholders requires special considerations." (*Pitzer College*, *supra*, 8 Cal.5th at p. 106, internal quotations and alterations omitted.) The court in *20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, recognized the "significant public interest" in the special relationship between the policyholder and its insurer, further noting that this relationship distinguishes insurance contracts from other types of contracts. (*Ibid.* at p. 1266.)

Contracts of insurance are interpreted under traditional contract construction and interpretation principles but also "in light of applicable public policy, promoting the protection of the policyholder and the public at

large." (*Ibid.*) This Court aptly stated this sentiment in *Glickman v. New York Life Ins. Co.*, *supra*, 16 Cal.2d at p. 635:

> [T]he object and purpose of insurance is to indemnify the insured in case of loss, and ordinarily such indemnity should be effectuated rather than defeated. To that end the law makes every rational intendment in order to give full protection to the interests of the insured.

(Accord Rest., Liability Insurance (2019) § 2, com c., p. 11 ["*Objectives of liability-insurance-policy interpretation,*" which include "effecting the dominant protective purpose of insurance . . . ."].)

B. The Court Should Apply the Rules of Policy Interpretation to the Standard-Form Terms at Issue to Find Coverage for Yahoo

1. The Rule of *Contra Proferentem* Applies to Construe All Ambiguities in Standard-Form Insurance Policy Language

Contrary to National Union's argument, the *contra proferentem* rule cannot be ignored merely because Yahoo "negotiated" for the coverage provided by Endorsement No. 1. (National Union Br. at p. 60.) The fact that Yahoo sought to expand its coverage for specific liabilities that National Union agreed to cover should not, perversely, be used as a way to reduce coverage when just those liabilities arise. Courts should apply the rule of *contra proferentem* in all situations, including that here, where the standard-form policy terms used create ambiguities. For that reason, this Court held in *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 823-824, that the ordinary rules of insurance policy interpretation apply when a policyholder requests the addition of language to an insurance policy unless the insurer proves that the "provisions in question were actually negotiated or jointly drafted," which is not the case with National Union's

Endorsement No. 1, containing, as it does, standard-form policy terms used across the insurance industry.

Section 1(13) of the Restatement of Liability Insurance (2019) defines a "standard-form term" as "a term that appears in, or is taken from, an insurance-policy form (including an endorsement) that an insurer makes available for a non-predetermined number of transactions in the insurance market." As the Restatement explains, "a term that is a standard-form term in one insurance policy is a standard-form term in another policy"; a term, even one created by an insurance broker or other entity, "may become a standard-form term through sufficiently regular use in the market." (*Ibid.* at § 1(13), com. i, p. 5; see also Stempel & Knutsen, Stempel & Knutsen on Insurance Coverage (4th ed. 2015) § 4.06[C] [discussing insurance policy standardization and the advantages and disadvantages of such standardization for both insurers and policyholders] ("Stempel & Knutsen"); Rest., Liability Insurance (2019) § 2, com. d, p. 12; Web Site of the International Risk Management Institute, Inc. (IRMI) <https://www.irmi.com/term/insurance-definitions/standard-form-or-standard-policy> [as of Nov. 15, 2019] [providing definition of standard-form or standard-policy]; Masters & Stanzler, Insurance Coverage Litigation (2nd ed. 2000 & Supp. 2019) § 2.01(C) ("Masters & Stanzler").) Through offering consistent coverages and judicial interpretations, insurance companies are able to sell insurance policies on a mass basis, which permits "apples to apples" comparisons among risks and large-scale underwriting. (Stempel & Knutsen § 4.06[C]; see also Masters & Stanzler §§ 2.01(C), 1.04(A).)

The language in Endorsement No. 1 is standard-form language as National Union recognizes in its merits brief. (National Union Br. at 15-16.) Indeed, the relevant language included in Endorsement No. 1 – "Oral or written publication, in any manner, of material that violates a person's

right of privacy" – is simply re-packaged standard-form language from the policy form itself that National Union used in Endorsement No. 1 to accomplish the parties' objectives to add coverage for TCPA liabilities to the policy. (Compare ER052 with ER024, ¶ 26; ER102-03, § III(a) [in which the standard-form ISO[1] language is used in Endorsement No. 1].) Not only is the language the same as the language National Union used elsewhere in the Policy, it is the very same policy language that insurers across the country have used in their standard policy forms, as shown in the numerous cases to have considered its meaning. (See, e.g., *Penzer v. Transportation Ins. Co.* (Fla. 2010) 29 So.3d 1000, 1005 [construing "oral or written publication of material that violates a person's right to privacy"]; *Terra Nova Ins. Co. v. Fray-Witzer* (Mass. 2007) 869 N.E.2d 565, 568, fn. 3-4 [same]; see also *Columbia Cas. Co. v. HIAR Holding, L.L.C.* (Mo. 2013) 411 S.W.3d 258, 266 [noting the same language].)

Importantly, this language is not the product of *joint drafting with Yahoo*, which would have resulted in use of wholly unique language that is not consistent with the standard-form language at issue here.[2] Even where

---

[1] "ISO" refers to the Insurance Services Office, Inc., "an organization that collects statistical data, promulgates rating information, develops standard policy forms, and files information with state regulators on behalf of insurance companies that purchase its services." (*Hartford Fire Ins. Co. v. California* (1993) 509 U.S. 764, 772 [113 S.Ct. 2891, 125 L.Ed.2d 612]; see also *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 671, fn.13, opn. mod. on rehg. den. Aug. 31, 1995; *American Home Products Corp. v. Liberty Mut. Ins. Co.* (S.D.N.Y. 1983) 565 F.Supp. 1485, 1500-1503; *Hoechst Celanese Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania* (Del.Super. 1992) 623 A.2d 1128, 1129.)

[2] Cases refusing to apply the *contra proferentem* rule rest on a finding that the relevant policy language was *jointly drafted* by both the insurer and the

(footnote continued on next page)

a policyholder has "legal sophistication and substantial bargaining power," if the parties have not adopted a technical meaning "by specially crafting policy language," this Court has construed ambiguous language against the insurance company. (*Martin Marietta Corp. v. Insurance Co. of North America*, *supra*, 40 Cal.App.4th at pp. 1134–1135; *AIU Ins. Co. v. Superior Court*, *supra*, 51 Cal.3d at pp. 823-824.)

Here, the language in Endorsement No. 1 is simply the selection of standard-form language that has been construed by other courts across the country to provide coverage for TCPA claims and the deselection of a TCPA exclusions. Therefore, it is subject to the rule of *contra proferentem*.

2. The Standard-Form Language Used by National Union Provides Coverage for TCPA Claims, and It Is Separate and Distinct from the Standard-Form Language That Does Not Cover TCPA Claims

Standard-form insurance policy language, like that used in Endorsement No. 1, is subject to repeated judicial interpretation. Over time, insurance companies can use endorsements to clarify the intended coverage for a particular policyholder to the extent the provisions are inconsistent with judicial interpretations. Even in such cases, insurers use

---

(continued from previous page)

policyholder and does not use standard-form terms. (See, e.g., *Martin Marietta Corp. v. Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1134–1135; *Fireman's Fund Ins. Co. v. Fibreboard Corp.* (1986) 182 Cal.App.3d 462, 468.) Indeed, "merely showing that policy terms were negotiated, and that the insured had legal sophistication and substantial relative bargaining power is not enough" to render the doctrine inapplicable. (*Martin Marietta Corp. v. Insurance Co. of North America*, *supra*, 40 Cal.App.4th at pp. 1134–1135; *AIU Ins. Co. v. Superior Court*, *supra*, 51 Cal.3d at pp. 823-824.) Instead, terms are considered standard-form terms, and insurers are considered the drafters, unless the policyholder put pen to paper when drafting the provision with the insurer to help create a unique provision. (See *AIU Ins. Co. v. Superior Court*, *supra*, 51 Cal. 3d at pp. 823-824.)

standard-form terms so that they can underwrite and sell insurance policies for a wide variety of policyholders and capture loss statistics on an "apples to apples" basis across industries.

Comment d to Section 2 of the Restatement of Liability Insurance (2019) explains that courts should construe the same standard-form language consistently, where possible, to achieve the reasonable expectations of policyholders:

> *d. The importance of consistent meanings of standard-form insurance policy terms.* Insurance policies generally are standard-form contracts sold on a mass-market basis. This is universally the case for personal-lines insurance policies sold to individuals, such as personal-automobile and homeowner's insurance (the liability-coverage parts of which are the most widely distributed forms of liability insurance coverage in the United States*). Even in the commercial insurance market, the vast majority of insurance policies are standard-form contracts. A prospective policyholder generally is able to customize the coverage only by selecting among the forms offered by the insurer.* Adjudication of the meaning of a standard-form term in one case has consequences for the scope of the risks insured under all similar policies. *Interpretive rules that give the same meaning to an insurance policy term in all contexts facilitate the orderly operation of the insurance market and, accordingly, are preferred.* Although it is unlikely that most consumers are directly aware of the results of adjudication, those results inform insurers and insurance intermediaries in the pricing and marketing of insurance policies.

(Rest., Liability Insurance (2019) § 2, com. d., p. 12, emphases added.)

Courts across the country have repeatedly held that the standard-form "publication" term in the Personal and Advertising Injury Coverage

Part of the standard commercial general liability ("CGL") policy provides coverage for TCPA claims.[3] There is alternative standard-form insuring agreement language (not used in the Yahoo policy) that has repeatedly been held *not* to provide coverage (the "making known" language).[4] In addition, beginning more than a decade ago, the insurance industry started adding TCPA exclusions to their CGL insurance policies when they sought to exclude TCPA liabilities (which excluded claims "arising directly or indirectly out of any action or omission that violates or is alleged to violate: a. The Telephone Consumer Protection Act (TCPA) . . . .").[5]

---

[3] The Seventh Circuit issued an early, but incorrect, prediction of Illinois law under the publication language in *American States Ins. Co. v. Capital Associates Jackson County, Inc.* (7th Cir. 2004) 392 F.3d 939, which continues to be followed in the federal courts of the Seventh Circuit. Federal courts in two of the three states included in the Seventh Circuit (Illinois and Wisconsin) have explicitly rejected the Seventh Circuit's approach, while the third (Indiana) has no relevant state court precedent. (*Valley Forge Ins. Co. v. Swiderski Electronics, Inc.* (Ill. 2006) 860 N.E.2d 307; *Sawyer v. West Bend Mut. Ins. Co.* (Wisc.Ct.App. 2012) 821 N.W.2d 250.)

[4] See *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.* (4th Cir. 2005) 407 F.3d 631, 634 (considering the making-known language: "making known to any person or organization written or spoken material that violates a person's right of privacy"). The "making known" language has been found to be fundamentally different than the "publication" language at issue here, as exemplified by a case cited heavily by National Union in its merits brief: Justice Souter's opinion in *Cynosure, Inc. v. St. Paul Fire and Marine Ins. Co.* (1st Cir. 2011) 645 F.3d 1, 2-3. The First Circuit reasoned that "[t]he relative specificity of 'making known' thus distinguishes it from the more general verb 'publishing,' which can be used in either of two normal senses, to refer to revealing information or merely to the act of itself of conveying material considered apart from its content." (*Ibid.* at p. 4.)

[5] See, e.g., *Windmill Nursing Pavilion, Ltd. v. Cincinnati Ins. Co.* (Ill.App.Ct. 2013) 2 N.E.3d 582, 591 (quoting the terms of an endorsement excluding coverage for TCPA claims in a general liability policy).

Here, it is clear that National Union chose not to exclude coverage for TCPA liabilities. National Union specifically chose not to include a TCPA exclusion in the policy issued to Yahoo, even though TCPA exclusions have long been ubiquitous in the insurance marketplace and were contained in National Union's standard-from policy here – before the parties amended the policy to remove them.[6] When exclusionary or other terms that would have been clear are available in the insurance marketplace, insurance companies should use that language rather than language that is unclear. If they fail to do so, they suffer the adverse consequences of the resulting ambiguity. (See *Safeco Ins. Co. of America v. Robert S.*, *supra*, 26 Cal.4th at p. 763.) Courts should not rescue an insurance company by writing a better policy than the one the insurer issued (while simultaneously penalizing the policyholder by effectively rewriting the policy to provide less coverage than the one the policyholder purchased).

In discussing the standard-form exclusion for TCPA claims at pages 16-17 of its merits brief, National Union concedes that the TCPA exclusion included in the body of this policy form were rendered inoperative by Endorsement No. 1. Obviously, if National Union intended to exclude TCPA claims, it would have maintained the TCPA exclusion when issuing

---

[6] See, e.g., *Illinois Cas. Co. v. West Dundee China Palace Restaurant, Inc.* (Ill.Ct.App. 2015) 49 N.E.3d 420, 423 (excluding "[a]ny liability or legal obligation of any insured with respect to . . . 'property damage' arising out of . . . [t]he Telephone Consumer Protection Act (TCPA); or . . . any other similar statutes, ordinances, directives, orders or regulations."); *Addison Automatics, Inc. v. Hartford Casualty Insurance Company* (N.D.Ill. Mar. 31, 2015, No. 13-cv-1922) 2015 WL 1543216, *5-9 (exclusion barred coverage for "bodily injury," "property damage," or "personal or advertising injury" arising directly or indirectly out of any act or omission that violates or allegedly violates the TCPA); *G.M. Sign, Inc. v. State Farm Fire and Cas. Co.* (Ill.App.Ct. 2014) 18 N.E.3d 70, 78-83 (same).

Endorsement No. 1. (See, e.g., *American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1247 [purchase of an endorsement deleting exclusion "supports an objectively reasonable expectation of" coverage]; *Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group* (1996) 50 Cal.App.4th 548, 566 [same]; *Woods v. Insurance Co. of North America* (1974) 38 Cal.App.3d 144, 150 [elimination of exclusion has a broadening effect on coverage]; see also *Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1118 [interpreting the policy in favor of the policyholder since, based on the additional premium, the policyholder reasonably expected coverage].)

The "making known" language and various form TCPA exclusions were in common use in the insurance industry at the time the relevant policy was drafted. More to the point, although Yahoo's policy originally contained a TCPA exclusion, National Union chose not to use that exclusionary language in Endorsement No. 1. Having failed to include a TCPA exclusion, which was plainly available, any resulting ambiguity must be construed against National Union.

3. The Term "Right to Privacy" Is a Broad Term and Cannot Be Restricted to Solely the Right of Secrecy

Under a plain meaning reading, the revisions to the standard CGL policy form effected by Endorsement No. 1 support coverage for Yahoo here. Policyholders are entitled to the coverage they purchased. If there is any ambiguity in the policy terms here, that ambiguity is charged to National Union, the insurance company drafter of those standard-form terms, and the Court should construe the terms in favor of coverage.

The standard-form policy terms at issue refer generally to the "right to privacy." That term includes the right to be left alone, and where the publication of material violates that right of seclusion, coverage applies pursuant to the clear and explicit language of the National Union policy.

The plain meaning of "right of privacy" includes, at a minimum, all four privacy torts identified by Prosser – as well as any other privacy rights recognized by state and federal law. Beginning at page 24 of its merits brief, National Union acknowledges that California recognizes four types of privacy violations: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places the other in a false light. To the extent that the Court may have questions on that point, the policy language is ambiguous and, consistent with California's rules of policy interpretation discussed above, the standard-form terms should be construed in favor of coverage.

While arguing that its policy terms plainly preclude coverage, National Union acknowledges their ambiguity. At page 25 of its merits brief, for example, National Union argues that the "right of privacy . . . may refer to one or more of four categories of rights," and then (inexplicably) concludes that only the first and third categories are relevant here. National Union then asserts that the policy only covers one of them – the right of secrecy. Of course, that is wrong as a linguistic matter. The "right of privacy" includes all four of those rights, not just one of them. The natural conclusion from this argument is that the policy language is at least ambiguous.

Indeed, the policy language fits comfortably with each of the four categories of privacy rights acknowledged by National Union, which rebuts the notion that the policy language applies solely to the right of secrecy:

- Unwanted texts or faxes arguably involve the publication of material that constitutes an **unreasonable intrusion upon the seclusion of another**, as Yahoo explains in its brief (Yahoo Br. at pp. 26-27). Indeed, in *Sanders v. American Broadcasting*

Companies, Inc. (1999) 20 Cal.4th 907, which involved the recording and publication of material (a covert videotape), this Court found a viable intrusion of seclusion claim.

- The unauthorized distribution of a video showing Tom Hanks shouting "yahoo" at a charity rodeo could be found to involve the **publication of material that appropriates another's name or likeness** in violation of Civil Code § 3344 and tort law if it were distributed for a commercial purpose by Yahoo.

- *Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, which recounts how officers of the California Highway Patrol disseminated decapitation pictures from an auto accident to friends at Halloween, could be seen as the **publication of material that gave unreasonable publicity to a person's private life**.

- In *M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, the publication of a story about a coach convicted of child molestation contained the pictures of players and assistant coaches who were neither molested nor perpetrators, and the publication of that material may have constituted **publicity that unreasonably places the other in a false light**.

At page 28 of its brief, National Union concludes that "[t]he TCPA claims against Yahoo! would be covered only if the policy covered offenses based on the violations of the seclusion right of privacy." This is essentially a concession of coverage because the term "right to privacy" is broad and comprises all sorts of privacy rights – seclusion, secrecy, publicity, false light, etc. Indeed, this Court has recognized that intrusion

upon seclusion probably "best captures the common understanding of an 'invasion of privacy'":

> Of the four privacy torts identified by Prosser, the tort of intrusion into private places, conversations or matter is perhaps the one that best captures the common understanding of an "invasion of privacy." It encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying. (See Rest.2d Torts, § 652B, com. b., pp. 378-379, and illustrations.) It is in the intrusion cases that invasion of privacy is most clearly seen as an affront to individual dignity. "[A] measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversations may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant." (Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser* (1964) 39 N.Y.U. L.Rev. 962, 973-974, fn. omitted.)

(*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 230-231, emphasis added.) Thus, the publication of material that invades someone's seclusion, and violates the person's right to be let alone, is a quintessential violation of the right of privacy. The TCPA allegations at issue here assert that the text messages were unwanted and violated the TCPA, which (all

agree) protects the right to be let alone, the right to seclusion. The TCPA is a privacy statute. (See H.R.Rep. No. 102-317, 1st Sess., p. 5 (1991).) The purpose of the statute "is to protect residential telephone subscriber privacy rights by restricting certain commercial solicitation and advertising uses of the telephone and related telecommunications equipment." (*Ibid.*) It guards against invasions of "consumer privacy." (See, e.g., *In Re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (2003) 18 FCC Rcd. 14014, 14018.) The legislative history says so. (See S.Rep. No. 102-178, 1st Sess., p. 1 (1991) ["The purposes of the bill are to protect the privacy interests of residential telephone subscribers."]; see also DeLuca, *The Hunt for Privacy Harms After Spokeo* (2018) 86 Fordham L.Rev. 2439, 2447 ["Privacy statutes tend to be scattered and of limited scope. The small handful of federal statutes targets a range of specific privacy concerns and includes . . . the Telephone Consumer Protection Act of 1991 (TCPA)."].)

The plain and explicit meaning of the phrase "right to privacy" includes a right of seclusion. At the least, this standard-form term is broad enough to cover the right to seclusion, and any uncertainty – *i.e.* any ambiguity on that point – should be construed against the insurance company drafter. Accordingly, the language in the National Union policy unequivocally covers the alleged violations of a person's right of seclusion protected by the TCPA. To the extent National Union intended to limit its coverage to violations of the right to secrecy, it was required to say so clearly.[7] Having failed to do that, National Union should not now be permitted to retroactively amend the language in the policy.

---

[7] See Rest., Liability Insurance, § 4, com. k, p. 41 ("The easier it would be for the drafter to state the meaning more plainly, the more likely it is that the other party's proposed meaning is the meaning that a reasonable policyholder would give to the term.").

III. Conclusion

California is a leader in insurance law – a jurisdiction to which many other courts look when deciding cases and, perhaps equally important, a jurisdiction that insurance companies consider when deciding coverage positions all over the country. As a result, the decision this Court renders with respect to the interpretation of the standard-form policy language at issue will have implications far beyond California's borders, and for policyholders seeking all kinds of coverages. Accordingly, this Court should enforce the insurance policy issued to Yahoo, consistent with every other high court to have decided the question presented. At the least, the Court should find the language to be ambiguous and construe it in favor of coverage.

UP respectfully requests that the Court answer "yes" to the certified question and hold that coverage for the "oral or written publication, in any manner, of material that violates a person's right of privacy" covers TCPA claims.

November 18, 2019

HUNTON ANDREWS KURTH LLP
* Lorelie S. Masters
Kevin V. Small
Alexandrea H. Young

By: Alexandrea H. Young
Attorneys for Amicus Curiae
UNITED POLICYHOLDERS

- and -

REED SMITH LLP
* Timothy P. Law
Andrew B. Breidenbach

Attorneys for Amicus Curiae
UNITED POLICYHOLDERS

CERTIFICATE OF WORD COUNT

In compliance with California Rules of Court, rule 8.520(c)(1), I hereby certify that the foregoing *Amicus Curiae* Brief of United Policyholders in Support of Petitioner Yahoo! Inc. consists of 5,325 words, not including the cover sheet, the Application, the Tables of Contents, the Table of Authorities, the Certificate of Service, or this Certificate, as counted by the Microsoft Word computer program used to generate this Brief.

November 18, 2019

HUNTON ANDREWS KURTH LLP
* Lorelie S. Masters
Kevin V. Small
Alexandrea H. Young

By: Alexandrea H. Young
Attorneys for Amicus Curiae
UNITED POLICYHOLDERS

- and -

REED SMITH LLP
* Timothy P. Law
Andrew B. Breidenbach

Attorneys for Amicus Curiae
UNITED POLICYHOLDERS

CERTIFICATE OF SERVICE

Yahoo! Inc. v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania
Case No. S253593

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is 550 South Hope Street, Suite 2000, Los Angeles, California 90071-2627.

On November 18, 2019, I served true copies of the following document(s) described as:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; *AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF PETITIONER YAHOO! INC.

on the interested parties in this action as follows:

JASSY VICK CAROLAN LLP William T. Um 800 Wilshire Boulevard, Suite 800 Los Angeles, CA 90017 *Counsel for Plaintiff and Petitioner YAHOO! INC.*	Telephone: 310-870-7048 Facsimile: 310-870-7010 Email: vum@jassyvick.com
NICOLAIDES FINK THORPE MICHAELIDES SULLIVAN LLP Jodi S. Green 626 Wilshire Blvd., Suite 1000 Los Angeles, CA 90017 *Counsel for Defendant and Respondent National Union Fire Insurance Company of Pittsburgh, Pennsylvania*	Telephone: 213-402-1248 Facsimile: 213-402-1246 Email: jgreen@nicolaidesllp.com

NICOLAIDES FINK THORPE MICHAELIDES SULLIVAN LLP Richard H. Nicolaides, Jr. Daniel I. Graham, Jr. 10 South Wacker, 21st Floor Chicago, IL 60606 *Counsel for Defendant and Respondent National Union Fire Insurance Company of Pittsburgh, Pennsylvania*	Telephone: 312-585-1515 Facsimile: 312-585-1401 Email: rnikolaides@nikolaidesllp.com dgraham@nikolaidesllp.com
NICOLAIDES FINK THORPE MICHAELIDES SULLIVAN LLP Matthew C. Lovell 101 Montgomery St., Suite 2300 San Francisco, CA 94104 *Counsel for Defendant and Respondent National Union Fire Insurance Company of Pittsburgh, Pennsylvania*	Telephone: 415-745-3779 Facsimile: 415-745-3771 Email: mlovell@nikolaidesllp.com
HORVITZ & LEVY LLP Mitchell C. Tilner Steven S. Fleischman Emily V. Cuatto 3601 W. Olive Ave., 8th Floor Burbank, CA 91505 *Counsel for Defendant and Respondent National Union Fire Insurance Company of Pittsburgh, Pennsylvania*	Telephone: 818-995-0800 Facsimile: 844 497-6592 Email: mtilner@horvitzlevy.com sfleischman@horvitzlevy.com ecuatto@horvitzlevy.com
☒	**By OVERNIGHT MAIL:** by overnight courier, I arranged for the above-referenced document(s) to be delivered to an authorized overnight courier service for delivery to the addressee(s) above, in an envelope or package designated by the overnight courier service with delivery fees paid or provided for.

☒	**By ELECTRONIC MAIL:** by causing a true and correct copy thereof to be transmitted electronically to the attorney(s) of record at the e-mail address(es) indicated above.
UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA Hon. Nathanael M. Cousins San Jose Courthouse Courtroom 5 – 4th Floor 280 South 1st Street San Jose, CA 95113	*Case No. 5:17-cv-00447-NC*
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT James R. Browning Courthouse 95 7th Street San Francisco, CA 94103	*Case No. 17-16452*
☒	**By OVERNIGHT MAIL:** by overnight courier, I arranged for the above-referenced document(s) to be delivered to an authorized overnight courier service for delivery to the addressee(s) above, in an envelope or package designated by the overnight courier service with delivery fees paid or provided for.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 18, 2019, in Los Angeles, California.

Gordana V. Ognjanovic