No. 12-0522

In The Supreme Court of Texas

WASTE MANAGEMENT OF TEXAS, INC.,

Petitioner,

vs.

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,

Respondents.

On Petition for Review from the Court of Appeals
for the Third District of Texas, Austin
No. 03-10-00826-CV

Brief of *Amici Curiae* Media Organizations in Support of Waste Management of Texas

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE

Belo Corp., Dow Jones & Company, Inc., Fox Television Stations, Inc., NBCUniversal Media LLC, News Corp, Reporters Committee for Freedom of the Press, Reuters America, Scripps Media, Inc., and Texas Association of Broadcasters ("Amici") respectfully submit this brief of Amici Curiae in support of Petitioner Waste Management of Texas, Inc. In compliance with Rule 11(c) of the Texas Rules of Appellate Procedure, Amici state that no fee was charged or paid for the preparation of this brief.

Amici are media organizations that have a heightened interest in ensuring that tort suits not be used to chill speech. Amici are keenly aware of the burdens that the doctrines of libel *per se* and presumed damages place on their ability to report on matters of public concern. Amici also advocate for a free press and robust public debate, knowing the invaluable role the media play in maintaining a well-informed citizenry capable of meaningful participation in democratic government.

Belo Corp. is headquartered in Dallas, Texas, and is one of the nation's largest pure-play, publicly traded television station companies. From its beginnings as a Texas newspaper company in 1842 through the modern digital era, Belo Corp. attributes its success to its close community ties, strong journalistic reputation, and intense regional focus. Belo Corp. owns and operates 20 television stations and their related websites, four of which are in Texas: WFAA-TV in Dallas, KHOU-

TV in Houston, KENS-TV in San Antonio and KVUE-TV in Austin. Belo Corp. also created the 24-hour regional cable channel Texas Cable News, Inc. ("TXCN").

Dow Jones & Company, Inc., a global provider of news and business information, is the publisher of *The Wall Street Journal*, *Barron's*, MarketWatch, Dow Jones Newswires, and other publications. Dow Jones maintains one of the world's largest newsgathering operations, with approximately 2,000 journalists in more than fifty countries publishing news in several different languages. Dow Jones also provides information services, including DJX, Factiva, Dow Jones Risk & Compliance, and Dow Jones VentureSource. Dow Jones is an indirect subsidiary of News Corporation, a publicly held company. No other publicly held company owns ten percent or more of News Corporation stock.

Directly and through affiliated companies, Fox Television Stations, Inc., owns and operates 28 local television stations throughout the United States, including five television stations in the State of Texas. The Texas stations are KRIV and KTXH in Houston, KDFW and KDFI in Dallas-Fort Worth (operated by NW Communications of Texas, Inc.) and KTBC in Austin (operated by NW Communications of Austin, Inc.). The 28 stations have a collective market reach of 37.28% percent of U.S. households. Each of the 28 stations also operates Internet websites offering news and information for its local market, including

MyFoxHouston.com, My20Houston.com, MyFoxDFW.com, WatchMy27.com, and MyFoxAustin.com. Fox Television Stations, Inc., NW Communications of Texas, Inc. and NW Communications of Austin, Inc., are all indirect subsidiaries of Twenty-First Century Fox, Inc., a publicly held company. No other publicly held company owns 10% or more of the stock of Twenty-First Century Fox, Inc.

NBCUniversal Media, LLC is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC Television Network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming, including KXAS in Ft. Worth, Texas, KXTX in Dallas, Texas and KTMD in Houston, Texas. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline NBC" and "Meet the Press." Comcast Corporation owns 100% of the common equity interests of NBCUniversal Media, LLC.

News Corporation is a diversified media and information services company focused on creating and distributing authoritative and engaging content to consumers throughout the world. The company comprises leading businesses

across a range of media, including news and information services, digital real estate services, book publishing, digital education, sports programming, and pay-television distribution. News Corp has no parent company and no publicly held company owns more than 10 percent of its shares.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Reuters, the world's largest international news agency, is a leading provider of real-time multi-media news and information services to newspapers, television and cable networks, radio stations and websites around the world. Through Reuters.com, affiliated websites and multiple online and mobile platforms, more than a billion professionals, news organizations and consumers rely on Reuters every day. Its text newswires provide newsrooms with source material and ready-to-publish news stories in twenty languages and, through Reuters Pictures and Video, global video content and up to 1,600 photographs a day covering international news, sports, entertainment, and business. In addition, Reuters publishes authoritative and unbiased market data and intelligence to business and finance consumers, including investment banking and private equity professionals.

Reuters America LLC is an indirect wholly-owned subsidiary of Thomson Reuters Corporation, a publicly held company. No publicly held company owns 10% or more of the stock of Thomson Reuters Corporation.

Scripps Media, Inc., owns local broadcast television stations and daily newspapers in 26 markets, including newspapers in Abilene, Corpus Christi, San Angelo, and Wichita Falls. Scripps also serves its communities through independent web sites that provide news and information, a national news bureau in Washington, D.C., and enriches the lives and vocabularies of students through the Scripps National Spelling Bee.

The Texas Association of Broadcasters is a non-profit organization that represents more than 1,300 free, over-the-air television and radio broadcast stations licensed by the Federal Communications Commission to serve local communities throughout Texas. The Texas Association of Broadcasters was founded in 1951 and incorporated one year later and performs numerous services on behalf of its members, including but not limited to legislative advocacy involving Open Government and publication of guidebooks on legal issues such as access to public information.

PRELIMINARY STATEMENT

Amici agree with, and will not repeat here, Petitioner Waste Management's Statement of the Case, Statement of Jurisdiction, Issues Presented, and Statement of Facts.

SUMMARY OF THE ARGUMENT

This Court should join several other state courts of last resort in abandoning the distinctions between defamation *per se* and defamation *per quod* and in requiring defamation plaintiffs to plead and prove actual damages in all cases or, at the least, this Court should limit presumed damages to nominal damages. Because those distinctions are no longer logically supportable, their continued presence causes confusion in application and unfairness in outcomes. By contrast, requiring all plaintiffs to prove actual damages strikes the appropriate balance between protecting free speech and compensating individuals for reputational injury, and it is consistent with the State's public policy in regulating other kinds of tortious conduct. Because the Court of Appeals permitted Texas Disposal to obtain a multi-million dollar judgment without proving injury to its reputation, its decision should be reversed, and this Court should remand the case for further proceedings.

ARGUMENT

I. This Court Should Abolish the Anachronistic and Troublesome Distinctions Between Defamation *Per Se* and *Per Quod*, Ending Confusion Among the Lower Courts and Preventing Unfair Results for Plaintiffs and Defendants Alike.

"No concept in the law of defamation has created more confusion" than that of libel *per se* or slander *per se*. Robert D. Sack, Sack on Defamation § 2.8.1 (4th ed. 2013). And confusion is not the only problem. The law's antiquated distinctions produce absurd results, making outcomes turn on facts that are unrelated to plaintiffs' injuries. As this Court observed in *Hancock v. Variyam*—its most recent in-depth discussion of defamation *per se* in over 70 years—"the damages a defamation *per se* plaintiff may recover is an issue 'courts have not resolved . . . in an entirely consistent manner.'" 400 S.W.3d 59, 64 (Tex. 2013) (quoting *Salinas v. Salinas*, 365 S.W.3d 318, 320 n.2 (Tex. 2012)). Although *Hancock* took an important step by clarifying "a longstanding distinction between defamation [*per quod*] and defamation *per se* in the context of statements that relate to one's profession," *id.* at 62, this case gives the Court a much-needed opportunity to reexamine those doctrines in their entirety.

A. The history of the torts of slander and libel demonstrates that the categories *per se* and *per quod* serve no useful purpose today.

At common law, slander and libel were distinct torts. *See* William L. Prosser, Law of Torts 738 (4th ed. 1971). In general, slander was spoken, and libel was written. *Id.* at 737. Each tort was divided into two categories: *per se* and *per*

quod. *See Salinas v. Salinas*, No. 13-09-00421-CV, 2012 WL 4023331, at *3 (Tex. App.—Corpus Christi, Sept. 13, 2012, no pet.) (mem. op.) (distinguishing between slander *per se* and slander *per quod*); Sack, *supra*, § 2.8.3 (distinguishing between libel *per se* and libel *per quod*). Thus, a defamatory statement could be classified in one of four ways: slander *per se*, slander *per quod*, libel *per se*, or libel *per quod*. Although courts applied the labels *per se* and *per quod* to both slander and libel, the meanings of those labels differed, depending on the tort to which they were attached.

With slander, the label *per se* was definitional. Spoken statements were slander *per se* if they fell into one of four categories: (1) allegations that a plaintiff had committed a crime, (2) allegations that a plaintiff had contracted a loathsome disease, (3) allegations of serious sexual misconduct, and (4) allegations that would tend to injure a plaintiff in the plaintiff's business, trade, profession, or office. *Salinas*, 2012 WL 4023331, at *3; *Downing v. Burns*, 348 S.W.3d 415, 424 (Tex. App.—Houston [14th Dist.] 2011, no pet.); RESTATEMENT (SECOND) OF TORTS § 570 (1977). In such cases, plaintiffs were not required to plead and prove special damages. *See Downing*, 348 S.W.3d at 424. Instead, general damages were presumed. *See Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002); *Graham v. Mary Kay, Inc.*, 25 S.W.3d 749, 756 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Although some authorities state that the inherently defamatory nature of

such statements justified the rule of presumed damages, *see, e.g.*, *Sw. Tel. & Tel. Co. v. Long*, 183 S.W. 421, 428 (Tex. Civ. App.—Austin, 1915, no pet.), others consider the categories arbitrary and the rationale for these categories "murky at best," Sack, *supra*, § 2.8.2.

Slander that did not fall into one of the four *per se* categories was called slander *per quod*. *See Salinas*, 2012 WL 4023331, at *3. In such cases, plaintiffs were required to plead and prove special damages. *Id.* The requirement of special damages was not a limitation on the type of damages recoverable but a prerequisite to bringing a case for slander *per quod*. David A. Anderson, *Defamation and the First Amendment: New Perspectives: Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 748 (1984).

Libel *per se* and libel *per quod* meant something entirely different from slander *per se* and slander *per quod*. In libel law, *per se* meant that the defamatory nature of a statement was apparent on the face of the publication. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 308 (Mo. 1993) (en banc). And libel *per quod* referred to defamatory publications that required extrinsic evidence—called "inducement"—to explain the publication's defamatory meaning—called "innuendo." *Id.*; Sack, *supra*, § 2.8.3 [A] (defining "inducement" and "innuendo").

At one time, all libelous statements were actionable without proof of special damages. *See* William L. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 842 (1960).

But eventually only libel *per se* was actionable without proof of special damages, and libel *per quod*, by analogy to slander *per quod*, required proof of special damages. *Nazeri*, 860 S.W.2d at 308. Adding to the confusion, some courts permitted libel *per quod* to be actionable without proof of special damages if it imputed a matter that would constitute slander *per se* if spoken. *Id.*

The aforementioned distinctions between *per se* and *per quod* causes of action arose from the ancient conflict of jurisdiction between the royal and the ecclesiastical courts of England. *Id.*; *see also Smith v. Durden*, 276 P.3d 943, 945 (N.M. 2012); *Carter v. Willert Home Products*, 714 S.W.2d 506, 509 (Mo. 1986); *Libel Per Quod*, *supra*, at 841. Whereas the ecclesiastical courts addressed spiritual injury with spiritual solutions, the royal courts addressed claims for temporal injury and could award money damages. *See Nazeri*, 860 S.W.2d at 308; *Durden*, 276 P.3d at 945. Early on, slander fell within the exclusive jurisdiction of the ecclesiastical courts, *see Nazeri*, 860 S.W.2d at 308; *Carter*, 714 S.W.2d at 509, which regarded it as a sin and punished it with penance, *Libel Per Quod*, *supra*, at 841. But eventually the royal courts would exercise jurisdiction over certain actions for slander: actions alleging slander *per se*, because the courts would presume damages, and actions alleging slander *per quod*, when plaintiffs could prove pecuniary loss. *See Carter*, 714 S.W.2d at 509; *Libel Per Quod*, *supra*, at 841; *see also* Restatement, *supra*, § 568 cmt. b.

With the demise of the ecclesiastical courts, the justification for distinguishing between actions *per se* and *per quod* evaporated. *Id.* Yet the distinction lingers in the law of defamation, leading to unfair results for both plaintiffs and defendants. *Id.*

B. Texas courts of appeals are confused about the distinction between defamation *per se* and defamation *per quod* and its effect on presumed damages.

Texas courts routinely refer to slander and libel (or both) simply as "defamation." *See, e.g.*, *Klein & Assocs. Political Relations v. Port Arthur Indep. Sch. Dist.*, 92 S.W.3d 889, 892, 896–97 (Tex. App.—Beaumont 2002, pet. denied); *Einhorn v. LaChance*, 823 S.W.2d 405, 408–09 (Tex. App.—Houston [1st Dist.] 1992, no pet.) When they add the labels *per se* and *per quod*, confusion results because, as explained above, the historical meaning of those labels depends on whether they are applied to slander or libel.

Some courts define defamation *per se* as statements that fall into one of the four traditional categories of slander *per se*. *See, e.g.*, *Hancock*, 400 S.W.3d at 62 n.1 (citing, in a libel case, RESTATEMENT, *supra*, § 573, which addresses slander that injures a person in her business, trade, profession or office); *Memon v. Shaikh*, 401 S.W.3d 407, 421 (Tex. App.—Houston [14th Dist.] 2013, no pet. h.); *Zepeda v. Indus. Site Servs.*, No. 13-07-00579-CV, 2008 WL 4822205, at *4 (Tex. App.—Corpus Christi, Nov. 6, 2008, no pet.) (mem. op.). Other courts use the alternative

definition of *per se*, drawing on the law of libel, and consider a statement to be defamatory *per se* if its meaning is defamatory on its face and, thus, requires no extrinsic proof of its defamatory meaning. *See, e.g.*, *Collins v. Sunrise Senior Living Mgmt., Inc.*, No. 01-10-01000-CV, 2012 WL 1067953 (Tex. App.—Houston [1st Dist.] Mar. 29, 2012, no pet.) (mem. op.). Still other courts blend the two definitions together, distorting their original common law meanings, *see, e.g.*, *Morrill v. Cisek*, 226 S.W.3d 545, 549 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Main v. Royall*, 348 S.W.3d 381, 390 (Tex. App.—Dallas 2011, no pet.), and some even change or omit some of the four traditional categories, *see Cullum v. White*, 399 S.W.3d 173, 183 (Tex. App.—San Antonio 2011, pet. denied); *Main*, 348 S.W.3d at 390.

Lower courts are also confused about whether a statement is defamatory *per se*—in the sense that its defamatory meaning is facially apparent—is a question of law for the court to decide or a question of fact for the jury. Some treat it as a question of law. *See Downing*, 348 S.W.3d at 425 ("In most cases, the question of whether a statement is defamatory *per se* or defamatory *per quod* is instead a matter of law to be decided by the court."); *Taylor v. Houston Chronicle Publ'g Co.*, 473 S.W.2d 550, 554 (Tex. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.) ("It was the duty of the trial court to determine whether [an alleged defamatory statement] was libelous or not."). But others state that it is a question of law yet

simultaneously conclude that, if a statement is ambiguous, then a jury may decide whether it is defamatory *per se*. *See, e.g.*, *Cecil v. Frost*, 14 S.W.3d 414, 417 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd); *Einhorn*, 823 S.W.2d at 411. Thus, some courts permit juries to decide that ambiguous statements are defamatory *per se* in direct contradiction to the common law meaning of *per se* in that context—that the defamatory meaning is apparent and does not require extrinsic proof.

Courts also differ in the effect they give to the presumption of damages in cases of libel *per se* or slander *per se*. Some hold that, when a statement is defamatory *per se*, the plaintiff need not plead or prove special damages. *See, e.g.*, *Kelly v. Diocese of Corpus Christi*, 832 S.W.2d 88, 91 (Tex. App.—Corpus Christi 1992, writ dism'd) ("Slander per se is actionable on its face, while slander per quod is actionable only upon pleading and proof of special damages."); *Bayoud v. Sigler*, 555 S.W.2d 913, 915 (Tex. Civ. App.—Beaumont 1977, writ dism'd) ("Defamatory language may be actionable per se, that is, in itself, or it may be actionable per quod, that is, only on allegation and proof of special damages."). But others, although recognizing the distinction between general damages and special damages, nonetheless appear to hold that a plaintiff in a defamation *per se* case has no obligation to plead or prove any damages. *See, e.g.*, *Main*, 348 S.W.3d at 390 ("A written defamatory statement is libel per se if the words in and of themselves are so obviously hurtful to the person aggrieved by them that they

require no proof of injury."); *Morrill*, 226 S.W.3d at 550 ("In the recovery on a claim of defamation per se, the law presumes actual damages and no independent proof of damages to reputation or of mental anguish is required." (quoting *Knox v. Taylor*, 992 S.W.2d 40, 60 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (internal quotation marks omitted)); *Exxon Mobil Corp. v. Hines*, 252 S.W.3d 496, 501 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) ("[S]uch an action can be sustained even without specific proof of the existence and amount of harm."); *Moore v. Waldrop*, 166 S.W.3d 380, 386 (Tex. App.—Waco 2005, no pet.) ("[A]ll proof of damages may be dispensed with.").

Relatedly, courts differ on the issue of whether the presumption of damages is rebuttable or conclusive. Some hold that the presumption is rebuttable, which leaves a jury free to award nothing. *See, e.g.*, *Swate v. Schiffers*, 975 S.W.2d 70, 74 (Tex. App.—San Antonio 1998, pet. denied) ("Although courts have been willing to presume injury to reputation as the result of libel per se, the defendants rebutted any such presumption in this case." (citation omitted)); *Adolph Coors Co. v. Rodriguez*, 780 S.W.2d 477, 488 (Tex. App.—Corpus Christi 1989, writ denied) ("[L]ibel per se merely allows the aggrieved party to go to the jury without the requirement of specific proof of the injurious character of the libelous statement. It does not require the jury actually to find any amount of damages . . . ." (citation omitted)); *see also Snead v. Redland Aggregates, Ltd.*, 998 F.2d 1325, 1332 (5th

Cir. 1993) ("Under Texas law, . . . the district court is allowed to find that Snead committed a libel per se, yet choose to award no presumed damages."); *cf. Doubleday & Co., Inc. v. Rogers*, 674 S.W.2d 751, 753–54 (Tex. 1984) (approving a jury verdict that found no actual damages, even though the jury had been instructed that it could presume damages without proof, and holding that punitive damages are not recoverable in the absence of actual damages).

But other courts hold or strongly imply that a presumption of damages is conclusive and requires a jury to award at least nominal damages. *See, e.g.*, *Miranda v. Byles*, 390 S.W.3d 543, 555 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) ("Our law presumes that statements that are defamatory per se injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish. At a minimum, the plaintiff is entitled to a nominal sum, but is not limited to that amount, and the jury may choose to award damages that are substantial." (citations and internal quotation marks omitted)); *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 581 (Tex. App.—Austin 2007, pet. denied) (*Waste Management I*) ("[I]f the alleged statements have been classified as defamatory per se, general damages are

presumed without requiring specific evidence of harm to the plaintiff's reputation thereby entitling the plaintiff to recover, at a minimum, nominal damages.").[1]

C. Courts in other states are moving away from both the distinction between defamation *per se* and defamation *per quod* and the doctrine of presumed damages.

Courts in other states are abandoning the distinction between slander or libel *per se* or *per quod* because of the unfair results that follow. For example, in *Nazeri*, 860 S.W.2d at 312, the Supreme Court of Missouri recognized that "attempts to characterize [defamatory statements] as *per se* or *per quod* appear more artificial than real." The court lamented, "Unfortunately, the result of the classifications may have a very real impact more far-reaching than justified. In one case the jury is free to presume damages. In the other the jury is precluded from awarding actual damages unless special damages are proven." *Id.* at 312–13. It concluded that "this rule of the past creates unjustifiable inequities for plaintiffs and defendants alike." *Id.* at 313. Thus, the court held that the categories of *per se* and *per quod* no longer apply and that plaintiffs must prove actual damages in all cases. *Id.*

The Supreme Court of Arkansas has agreed that presuming damages "creates unjustifiable inequities for plaintiffs and defendants alike." *United Ins. Co. v. Murphy*, 961 S.W.2d 752, 756 (Ark. 1998) (quoting *Nazeri*, 860 S.W.2d at 313).

[1] This Court appears to have assumed but not decided that a presumption of damages entitles a plaintiff to nominal damages but does not require more. *See Salinas*, 365 S.W.3d at 320 ("[E]ven if some mental anguish can be presumed in cases of defamation per se, . . . the law does not presume any particular amount of damages beyond nominal damages.").

That court also identified "a number of evils [that] flow from the anomaly of presumed damages," including "the absence of criteria given juries to measure the amount the injured party ought to recover, the danger of juries considering impermissible factors such as the defendant's wealth or unpopularity, and the lack of control on the part of trial judges over the size of jury verdicts." *Id.* (alteration, citation, and internal quotation marks omitted). Therefore, the court held that defamation plaintiffs "must prove reputational injury in order to recover damages." *Id.*; *see also Dodson v. Allstate Ins. Co.*, 47 S.W.3d 866, 875 (Ark. 2001).

The Supreme Court of New Mexico has also moved "toward a concept of defamation law that both minimizes unnecessary discrepancies and provides adequate safeguards against encroachment on constitutionally protected free speech." *Durden*, 276 P.3d at 947. In *Newberry v. Allied Stores, Inc.*, 773 P.2d 1231, 1236 (N.M. 1989), the court discarded the distinction between defamation *per se* and *per quod*. *See Durden*, 276 P.3d at 948 ("The common law distinctions between defamation per se and defamation per quod were also recognized as essentially obsolete in light of modern defamation jurisprudence."). Then, more recently, the *Durden* court "further clarif[ied] the state of defamation law in New Mexico" and held that "actual injury to reputation must be shown as part of a plaintiff's prima facie case in order to establish liability for defamation." *Id.* at 948–49.

The Supreme Court of New Jersey has restricted the doctrine of presumed damages. In *W.J.A. v. D.A.*, 43 A.3d 1148, 1150, 1159–60 (N.J. 2012), the court held that compensatory damages for defamation "require proof of actual damage to reputation." Presumed damages retain "present-day vitality" merely for the limited purpose of permitting private figure plaintiffs alleging defamation on matters of private concern to obtain nominal damages and thereby vindicate their reputations. The court reasoned that, although presuming damages presents the problem of "unguided jury evaluation" of damages, restricting presumed damages to nominal damages adequately addresses that problem and preserves a forum for the vindication of reputation. *W.J.A.*, 43 A.3d at 1160.

Still other courts have discarded the *per se/per quod* distinction or limited or abandoned the doctrine of presumed damages. *See Gobin v. Globe Publ'g Co.*, 649 P.2d 1239, 1242 (Kan. 1982) ("Damages recoverable for defamation may no longer be presumed; they must be established by proof, no matter what the character of the libel."); *Metromedia, Inc. v. Hillman*, 400 A.2d 1117, 1119 (Md. 1979) ("Since nominal or presumed damages no longer exist, in all libel actions Maryland pleading principles require the same type of pleading as to damages as was formerly necessary in libel per quod."); *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978) ("We hold, therefore, that the per se/per quod distinction is no longer a viable one. The plaintiff must plead and prove injury

from the alleged defamatory words, whether their defamatory meaning be obvious or not."); *cf. Mid-Florida Television Corp. v. Boyles*, 467 So.2d 282, 284 (Fla. 1985) (Ehrlich, J., concurring) ("Libel per se is dead, and let no one read from this decision that this ghost which we find still persists, lingers in any form other than as a shorthand term.").[2]

II. This Court Should Abandon the Doctrine of Presumed Damages and Require Proof of Actual Damages in All Defamation Cases or, at the Least, Limit Presumed Damages to Nominal Damages.

A. The First Amendment sharply limits the discretion of states to protect the reputation of persons through actions for money damages.

Constitutional limits on actions for defamation derive from balancing the weighty interest in protecting the free flow of ideas against states' legitimate interest in protecting persons from reputational injury. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985) (balancing "the State's

[2] The Texas Constitution's express guarantee of the right to bring reputational torts need not prevent this Court from joining the courts mentioned above in abandoning or limiting the doctrine of presumed damages. *See* TEX. CONST. art. I, § 8 ("Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege."); *id.* § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."). In fact, many of those other states have substantially similar constitutional provisions. *See* MO. CONST. art. I, § 8 ("[E]very person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty."); *id.* § 14 ("[T]he courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character . . . ."); *see also, e.g.*, ARK. CONST. art. II, §§ 6, 13; FLA. CONST., art. I, § 4; KAN. CONST., bill of rights, § 11; MD. CONST., decl. of rights, art. 40; N.J. CONST. art. I, § 6; N.M. CONST. art. II, § 17; TENN. CONST., art. I., §§ 17, 19. Further, the right to a remedy for reputational injury does not guarantee a right to presumed damages. Nothing in the Texas Constitution requires this Court to permit presumed damages for defamation plaintiffs.

interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting" statements that "involve no issue of public concern"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (recognizing the "competing value[s]" of "effective exercise of First Amendment freedoms" and "the compensation of individuals for the harm inflicted on them by defamatory falsehood").

The United States Supreme Court has held that the appropriate balance changes, depending on (a) whether the defamation plaintiff is a public figure or a private figure and (b) whether the alleged defamatory statements address matters of public or private concern. *See Dun & Bradstreet*, 472 U.S. at 761 (striking a balance more favorable to defamation plaintiffs when defamatory falsehoods involve matters of private concern "in light of the reduced constitutional value of speech involving no matters of public concern"); *Gertz*, 418 U.S. at 344–46 (explaining that a state has a stronger interest in protecting private-figure plaintiffs than public-figure plaintiffs because private-figure plaintiffs have less access to effective channels of communication that would enable them to counteract defamatory falsehoods and because they have not thrust themselves to the forefront of public controversies).

In *New York Times Co. v. Sullivan*, 376 U.S. 272, 279–80 (1964), the Supreme Court held that a public official may not recover damages for defamatory

falsehood relating to her official conduct unless she can prove that the statement was made with actual malice—that is, with knowledge that the statement was false or with reckless disregard of whether it was false. Three years later, in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court extended the *New York Times* test to cover public figures as well as public officials. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14 (1990).

Then, in *Gertz*, the Court held that, so long as they do not impose liability without fault, states may define for themselves the appropriate standard of liability for defamation of private individuals that involves a matter of public concern. *Gertz*, 418 U.S. at 346–47. But, because the states' interest in protecting individuals' reputations "extends no further than compensation for actual injury," the Court further held that states may not permit recovery of presumed or punitive damages, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349. Finally, in *Dun & Bradstreet*, the Court held that states may permit recovery of presumed and punitive damages in cases involving defamation of private individuals on matters of private concern, even absent a showing of actual malice. *Dun & Bradstreet*, 472 U.S. at 761.

Thus, in some circumstances, the Constitution permits states to allow presumed damages. But the permissibility of presumed damages does not mean that they are required, nor does it make them desirable. Rather, awarding actual

damages strikes a better balance between First Amendment interests and the states' interest in protecting persons from reputational injury, because a state has "no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages." *Gertz*, 418 U.S. at 349. In fact, a state's interest in compensating persons for injury to reputation "extends no further than compensation for actual injury." *Id.* Thus, permitting recovery of only actual damages fully addresses the interest in reputational protection. And it avoids the unnecessary inhibition of "the vigorous exercise of First Amendment freedoms" that results from "[t]he largely uncontrolled discretion of juries to award damages where there is no loss." *Id.*

Moreover, presumed damages are even more undesirable in defamation cases like the instant one that involve matters of public concern. In cases like this one, the First Amendment interests at stake are more substantial than those at stake in cases involving matters of private concern, because "speech on matters of public concern . . . is at the heart of the First Amendment's protection." *Dun & Bradstreet*, 472 U.S. at 758–59 (internal quotation marks omitted). Thus, with matters of public concern, the balance tips heavily in favor of protecting First Amendment interests, which makes presumed damages especially inappropriate.

B. Public policy supports the abandonment of presumed damages.

The Texas Legislature has expressed three important policies that weigh in favor of abandoning the doctrine of presumed damages and requiring defamation

plaintiffs to prove actual injury. First, a plaintiff is not entitled to an award of damages that far exceeds any injury. Second, a defendant should be liable only for the injury that defendant caused. And third, a plaintiff with a legitimate claim should be fairly compensated for her injury.

The legislature evinced those policies in The Medical Malpractice and Tort Reform Act of 2003. *See* Act of June 11, 2003, ch. 204, 2003 Tex. Gen. Laws 847 (codified in sections of Tex. Civ. Prac. & Rem. Code Ann.). As the legislature expressly stated, one of its goals was to "ensure that awards are rationally related to actual damages" without "unduly restrict[ing] a claimant's rights." *Id.* § 10.11(b)(2)–(3). Moreover, the statute enacted many reforms, including requiring that only defendants who cause harm pay damages—and then only to the extent of their own fault—and limiting out-of-pocket damages to expenses a plaintiff actually incurred. *See* Tex. Civ. Prac. & Rem. Code Ann. § 82.003 (absolving retailers from products liability when a manufacturer's fault causes injury); *id.* § 33.013(a) (limiting a defendant's liability to the percentage of damages for which that defendant has been found to be responsible); *id.* § 41.0105 (limiting recovery of medical expenses "to the amount actually paid or incurred by or on behalf of the claimant"). These reforms further the policies identified above because they align any damages award with a plaintiff's actual injury caused by a defendant.

Similarly, abandoning presumed damages and requiring that defamation plaintiffs prove actual injury would further the public policy of Texas by precluding plaintiffs from receiving "gratuitous awards of money damages far in excess of any actual injury," *Gertz*, 418 U.S. at 349, by holding defendants liable for only the injury they cause, and by fully compensating plaintiffs for injury actually suffered.

C. Requiring defamation plaintiffs to plead and prove actual damages in all cases will bring the law of defamation in line with modern tort law, which seeks, except in egregious circumstances not present here, to compensate plaintiffs for injury actually suffered and no more.

"The genius of modern tort law is its emphasis on injury." Anderson, *supra*, at 747. Although tort law began as an "adjunct of criminal law" that "focused not on injury, but on wrong," its focus "[g]radually . . . shifted from wrong to injury." *Id.* Thus, modern tort law became "a body of law which is directed toward the compensation of individuals . . . for losses which they have suffered." Law of Torts, *supra*, at 6.

Against that background, the United States Supreme Court has referred to defamation as "an oddity of tort law" because the old common law rules "allow[] recovery of purportedly compensatory damages without evidence of actual loss." *Gertz*, 418 U.S. at 349. Thus "[j]uries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm

actually occurred." Further, the "doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact." *Id.*

By abandoning presumed damages and requiring defamation plaintiffs to prove actual damages in all cases, this Court has the opportunity to harmonize defamation law with Texas tort law and to eliminate the problems with presumed damages that the Supreme Court has identified.

D. Even if there is some value in retaining the doctrine of presumed damages, presumed damages should be limited to nominal damages with the limited purpose of providing defamation plaintiffs a forum for vindication of their reputations.

Whatever value remains in presuming damages in defamation cases is limited to vindicating defamation plaintiffs' reputations through awards of nominal damages. Limiting presumed damages to nominal damages would permit courts to "vindicate the dignitary and peace-of-mind interest in [a person's] reputation." *W.J.A.*, 43 A.3d at 1160. And it still solves the problems that flow from presumed damages: the "largely uncontrolled discretion of juries to award damages where there is no loss" and the punishment of unpopular opinion in place of compensation for plaintiffs' actual injuries. *Gertz*, 418 U.S. at 349. Further, this Court has recently recognized that nominal damages are appropriate when, as in this case, "there is no proof that serious harm has resulted from the defendant's attack upon the plaintiff's character and reputation." *Hancock*, 400 S.W.3d at 65

(internal quotation marks omitted). Therefore, if this Court retains the doctrine of presumed damages, it should limit that doctrine to permit recovery of only nominal damages.

III. The Decision Below Illustrates the Harm in Maintaining Both the *Per Se/Per Quod* Distinction and the Doctrine of Presumed Damages, Because Texas Disposal Obtained a Multi-Million Dollar Judgment Even Though It Suffered Little, if Any, Actual Injury.

A. The Court of Appeals confused libel *per se* with slander *per se*, and the resulting error in the jury instructions permitted the jury to presume damages when Texas Disposal should have had to prove its actual injury.

Waste Management's Action Alert was not libel *per se*. A written statement is libel *per se* when its defamatory meaning is apparent on the statement's face without resort to extrinsic facts. *See supra* Section I.A; *Nazeri*, 860 S.W.2d at 308. But the alleged defamatory meaning of the Action Alert was not facially apparent. Rather, to determine whether the Action Alert was defamatory, the jury needed to hear testimony about topics such as leachate collection systems, synthetic liners, and Environmental Protection Agency regulations. *See Waste Management I*, 219 S.W.3d at 577. Because the jury had to resort to extrinsic facts, the Action Alert, if defamatory, could be only defamation *per quod*. *Nazeri*, 860 S.W.2d at 308.

The Court of Appeals classified the Action Alert as defamation *per se* because it wrongly imported a category of statements that are slander *per se*—statements that injure a person in her business or occupation—into a libel case. *See*

Waste Management of Texas, Inc. v. Texas Disposal Sys. Landfill, Inc., 2012 WL 1810215, at *2 (Tex. App.—Austin, May 18, 2012, pet. granted) (*Waste Management II*); *see also Salinas*, 2012 WL 4023331, at *3 (identifying "injury to a person's office, business, profession, or calling" as one of the categories of slander *per se*). Thus, the jury was permitted to find that the Action Alert was defamation *per se* and presume general damages.

In addition to being incorrect, that approach is especially illogical as applied to a corporation, because every libelous statement about a corporation may tend to injure it in its business. Pet'r's Br. on the Merits 58–61. If that is the law, then every defamation case brought by a corporation will be defamation *per se*, and juries will always be permitted to presume general damages. *Cf. Hancock*, 400 S.W.3d at 67 (explaining that, if a statement charging a doctor with lack of veracity were defamatory *per se*, then such statements "would likewise be defamatory *per se* for other trades, businesses, and professions that rely on human interaction.").

Had the trial court properly classified the claimed libelous statements as libel *per quod*—because their alleged defamatory meaning was not facially apparent—then Texas Disposal would have had to plead and prove special damages. But even if the Action Alert were defamatory on its face (libel *per se*), the trial court still should have required Texas Disposal to plead and prove actual damages, because there is no principled reason to presume damages in cases of facially apparent libel

but to require special damages in cases of libel that require proof of extrinsic facts. In all cases, plaintiffs should be required to prove their actual damages, making it unnecessary to distinguish between defamation *per se* and defamation *per quod*.

B. By permitting a jury to assess millions of dollars of damages without proof of those damages, the decision below demonstrates the abuses that the United States Supreme Court tried to curb when it recognized constitutional limitations on actions for defamation.

The United States Supreme Court has stated that the "largely uncontrolled discretion of juries to award damages where there is no loss" threatens to "inhibit the vigorous exercise of First Amendment freedoms." *Gertz*, 418 U.S. at 349. And it has recognized that the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate for actual injury. *Id.*

Here, the facts strongly suggest that the damages award was meant to punish the defendant rather than to compensate for actual injury. Not only did the first jury find that Texas Disposal had suffered no actual damages, *Waste Management I*, 219 S.W.3d at 574, the second jury found that it suffered no lost profits, *Waste Management II*, 2012 WL 1810215, at *2. Even though the second jury also found $5,000,000 in reputational damages, that finding resulted from the erroneous instruction that the jury could presume damages and needed no proof to support the amount assessed. *See id.* at *2–*3.

The damages award below also threatens to chill speech on matters of public concern, such as environmental safety, because it imposes millions of dollars of liability for an alleged defamatory statement that caused no lost profits and may not have caused any actual injury.

CONCLUSION

The distinctions between libel or slander *per se* or *per quod* have outlived their usefulness. They confuse courts and lead to unpredictable and unfair results for both plaintiffs and defendants. This Court should abandon these distinctions and require defamation plaintiffs to plead and to prove actual injury in all cases or, at the least, it should limit presumed damages to nominal damages. Because the decision below permits Texas Disposal to obtain millions of dollars without proof of injury, this Court should reverse the Court of Appeals and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), the undersigned hereby certifies that this Petition for Review complies with the applicable word count limitation because it contains 7,008 words, excluding the parts exempted by Tex. R. App. P. 9.4(i)(1). In making this certification, the undersigned has relied on the word-count function in Microsoft Word 2010, which was used to prepare the Brief of *Amici Curiae* Media Organizations in Support of Waste Management of Texas's Brief on the Merits.

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CERTIFICATE OF SERVICE

I certify that on the 26th day of November, 2013, a true and correct copy of the foregoing Brief of *Amici Curiae* Media Organizations in Support of Waste Management of Texas's Brief on the Merits was served on all counsel of record by e-filing or facsimile.

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