# S125171

# IN THE SUPREME COURT OF CALIFORNIA

**AMAANI LYLE,**
*Plaintiff and Appellant,*

*vs.*

**WARNER BROS. TELEVISION PRODUCTIONS, et al.,**
*Defendants and Respondents.*

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 7
CASE NO. B160528

**APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS; AMICI CURIAE BRIEF OF ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS, CENTER FOR INDIVIDUAL RIGHTS, THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, LOS ANGELES ADVERTISING AGENCIES ASSOCIATION, MOTION PICTURE ASSOCIATION OF AMERICA, INC., THE NATIONAL ASSOCIATION OF SCHOLARS, RUBIN POSTAER AND ASSOCIATES, AND THE STUDENT PRESS LAW CENTER INC. IN SUPPORT OF RESPONDENTS**

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## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

**Cases**

**Page**

**Page**



**Constitutions**



**Statutes**

**Page**

## Court Rules



## Miscellaneous

**Page**

**Miscellaneous (Con't)**

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**WARNER BROS. TELEVISION PRODUCTIONS, et al.,**
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## APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES:

Pursuant to California Rules of Court, rule 29.1(f), the Alliance of Motion Picture and Television Producers, Center for Individual Rights, the Foundation for Individual Rights in Education, Los Angeles Advertising Agencies Association, the Motion Picture Association of America, Inc., the National Association of Scholars, Rubin Postaer and Associates, and the Student Press Law Center Inc. respectfully request permission to file the accompanying amici curiae brief in support of respondents.

The Alliance of Motion Picture and Television Producers ("AMPTP") represents over 350 production companies and studios regarding labor issues, including negotiating collective bargaining agreements that cover writers.

The Center for Individual Rights ("CIR") is a non-profit public interest law firm. CIR was founded in 1989 to provide free legal representation to

deserving clients who cannot otherwise afford legal counsel. CIR has been counsel of record in many notable First Amendment cases, including *Rosenberger v. Rector & Visitors of the Univ. of Va.* (1995) 515 U.S. 819 [115 S.Ct. 2510, 132 L.Ed.2d 700]; *Iota Xi Chapter v. George Mason University* (4th Cir. 1993) 993 F.2d 386 and *Silva v. University of New Hampshire* (D.N.H. 1994) 888 F.Supp. 293 (*Silva*). CIR is one of the few public interest law firms that regularly represents students and professors whose First Amendment rights are infringed by administrators.

The mission of the Foundation for Individual Rights in Education ("FIRE") is to defend and sustain individual rights at America's increasingly partisan colleges and universities. These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience – the essential qualities of individual liberty and dignity. FIRE's core mission is to protect the unprotected and to educate the public and communities of concerned Americans about the threats to these rights on our campuses and about the means to preserve them.

With approximately 35 member agencies comprised of many of the larger and major agencies throughout the Los Angeles area, the Los Angeles Advertising Agencies Association ("LAAAA"), formed in 1947, is a trade association whose goal is to provide guidance, education and assistance to advertising agency leaders. The LAAAA sponsors roundtables, education and conferences focusing on issues of interest to its members, including creative, business and legal trends within the advertising business.

The Motion Picture Association of America, Inc. ("MPAA") is a not-for-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. The members of the MPAA include Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Warner Bros. Entertainment Inc., Twentieth

Century Fox Film Corporation, Universal City Studios LLLP, and an affiliate of The Walt Disney Company. MPAA's members produce and distribute entertainment in the worldwide theatrical market and the domestic television and home video markets. MPAA's members therefore have a substantial interest in any case that affects the production of such entertainment in communicative workplaces.

The National Association of Scholars ("NAS") is an organization comprising professors, graduate students, administrators, and trustees at accredited institutions of higher education throughout the United States. NAS has about 3,500 members, organized into 46 state affiliates, and includes within its ranks some of the nation's most distinguished and respected scholars in a wide range of academic disciplines. The purpose of NAS is to encourage, to foster, and to support rational and open discourse as the foundation of academic life. More particularly, NAS seeks, among other things, to support the freedom to teach and to learn in an environment without politicization or coercion, to nourish the free exchange of ideas and tolerance as essential to the pursuit of truth in education, to maintain the highest possible standards in research, teaching, and academic self-governance, and to foster educational policies that further the goal of liberal education.

Rubin Postaer and Associates ("RPA") is one of the largest independent advertising agencies in the United States. The company has designed category breaking advertising campaigns for some of the world's most recognized brands, including Honda, Acura, VH1, California Pizza Kitchen, Pioneer Electronics (USA), Inc., Morningstar, AM/PM, Bugle Boy Jean Company, and others. RPA employs more than 500 employees and has offices in eight locations throughout the country. It is the largest agency-based purchaser of broadcast television on the West Coast. RPA is a workplace in which

traditional boundaries do not exist and where independent thought is the norm. Free expression of ideas is a hallmark of RPA's work environment.

The Student Press Law Center Inc. ("SPLC") is the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment and supporting the student news media in their struggle to cover important issues free from censorship. The Center, a nonprofit, non-partisan corporation in operation since 1974, provides free legal advice and information as well as low-cost educational materials for student journalists on a wide variety of legal topics. Recognizing the essential roles freedoms of speech and press play in a democratic society, the Student Press Law Center is a champion for student voices, committed to nurturing and protecting those freedoms for young people.

Counsel for amici has reviewed the briefs filed by the parties to this appeal and is intimately familiar with the questions involved and the scope of their presentation. Amici believes the court would benefit from additional briefing on the question whether the free speech provisions of the United States Constitution and the California Constitution preclude imposition of liability for hostile work environment sexual harassment in a communicative workplace for undirected sexually themed speech.

For these reasons, amici respectfully request leave to file the accompanying brief as amici curiae in support of the respondents.

Dated: February 7, 2005

**HORVITZ & LEVY LLP**
FREDERIC D. COHEN

By: _____
Frederic D. Cohen

ATTORNEYS FOR AMICI CURIAE
**ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS, CENTER FOR INDIVIDUAL RIGHTS, THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, LOS ANGELES ADVERTISING AGENCIES ASSOCIATION, MOTION PICTURE ASSOCIATION OF AMERICA, INC., THE NATIONAL ASSOCIATION OF SCHOLARS, RUBIN POSTAER AND ASSOCIATES, AND THE STUDENT PRESS LAW CENTER INC.**

## AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS

## INTRODUCTION

This case presents a question of crucial importance for university educators and for all others who believe in academic freedom and the right to engage in robust discourse in academic settings. Its resolution will also affect the vitality of the creative process in "communicative workplaces"[1/] such as motion picture sets and advertising agencies.

If the Court of Appeal's ruling is allowed to stand, a single university employee – from janitor to sign language interpreter to teaching assistant to professor – will have veto power over the discussion of controversial topics in the classroom and elsewhere on campus. Similarly, a movie set stagehand or advertising agency "gofer" could prevent the creation and dissemination of expression fully protected by the First Amendment and the California Constitution.

The lower court's ruling gives an employee such power by conferring the right to sue for "hostile work environment" harassment under state law for *undirected* speech of a sexual, or racial, or religious nature which the employee may find offensive. To allow such suits to go forward in communicative workplaces such as writers' rooms, universities, motion picture sets, and advertising agencies, will inevitably chill speech about important, often political, topics.

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1/ "A 'communicative workplace'...produces or supports the production of expression that is itself ordinarily protected by the First Amendment," such as a museum, art gallery, newspaper, or concert hall. (McGowan, *Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment is Wrong* (2002) 19 Const. Commentary 391, 393 fns. omitted (hereafter McGowan).) Classrooms, motion picture sets, and advertising agencies naturally would be included in this list.

This Court should not countenance such a result, which violates the First Amendment to the United States Constitution and the free speech provision contained in Article I, section 2 of the California Constitution. The Court of Appeal's decision allows a *single individual* to stifle conversation on controversial topics and thereby prohibit the production of political, artistic, and creative expression at universities and at other workplaces that is indisputably protected by the state and federal constitutions.

Should a stagehand be able to prevent the staging of the "Vagina Monologues," an advertising agency "gofer" be able to prevent distribution of a sexually shocking advertisement aimed at preventing the spread of HIV/AIDS, a teaching assistant be able to prevent a classroom discussion on how pornography subjugates women, or a law clerk be able to prevent this Court from writing its opinion in this case simply because the employee is offended by certain sexually themed but indisputably workplace-related speech? How will it be possible to write, produce, film, or stage any work with sexual content – content that is fully protected by the First Amendment – without opening oneself up to a lawsuit for sexual harassment?

It is not just in the finished product (motion picture, advertisement, classroom lecture) that the impact of the lower court's decision will be felt. Many expressive works are composite works, the product of multiple discussions among many people who are involved in the creative process. These discussions may vary from "over the top" patently offensive comments to those that would satisfy even Casper Milquetoast. It is from this cauldron of conflicting expression of creativity that an expressive work is created. The decision of the lower court will send a chill through this cauldron of creativity and lower the quality of the final product.

The Court of Appeal's purported solution to the inevitable First Amendment chill created by its ruling is to leave it to juries to decide whether allegedly offensive speech in communicative workplaces was a "creative necessity." As we explain below, forcing employees in communicative workplaces to offer *post hoc* and out-of-context justifications in the course of litigation for each and every controversial sentence they may have uttered will inevitably lead to employee self-censorship, employer censorship, and the curtailing of the production of important speech protected by the First Amendment. Furthermore, because reviewing courts have a constitutional obligation to conduct a *de novo* review of the determination that speech is unprotected by the First Amendment, allowing courts to decide on summary judgment whether such speech is entitled to First Amendment protection makes administrative sense.

This Court should hold that undirected, sexually themed (or racial- or religious-themed) speech in a communicative workplace cannot constitutionally form the basis for a harassment claim under state law.[2/] Such a ruling does *not* give employers in communicative workplaces immunity from a harassment suit. Rather, offending sexually themed (or racial or religious) speech in a workplace that is directed at another person for the purpose of harassing that person or securing a sexual quid pro quo may well create liability for sexual harassment consistent with the First Amendment.

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2/ Alternatively, the Court should reverse the judgment of the Court of Appeal on the statutory grounds raised by Respondents. Courts have a duty to avoid construing statutes in ways that raise serious constitutional problems, and to adopt a narrower reading of the statute if it is plausible. (*DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const.* (1988) 485 U.S. 568, 574 [108 S.Ct. 1392, 1397, 99 L.Ed.2d 645, 654]; see also Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(E) [California's Fair Employment and Housing Commission has admonished that "[i]n applying [sexual harassment regulations], the rights of free speech and association shall be accommodated"].)

This brief proceeds as follows. We begin by demonstrating that Ms. Lyle is incorrect that this Court has already rejected a First Amendment challenge to hostile work environment claims for undirected sexually themed speech in communicative workplaces. Rather, neither this Court nor the United States Supreme Court has addressed the question.

We then explain why the Court of Appeal's holding violates the First Amendment by giving veto power to employees in communicative workplaces over the production of political, artistic, and other creative expression. The lower court's decision threatens to chill much protected expression at universities, advertising agencies and at motion picture production facilities.

Ms. Lyle defends imposition of liability for undirected sexually themed speech in communicative workplaces through the "captive audience" doctrine. No court has ever held that the captive audience doctrine applies to the workplace, and for good reason: if a court did so in the context of communicative workplaces, it would give employees veto power over the creation of political, artistic and other creative expression. For similar reasons, this Court should reject the argument of Professor Schauer that workplaces – in this case, communicative workplaces – should be viewed as zones completely unprotected by the First Amendment. And it should reject the Court of Appeal's creative necessity approach as insufficiently protective of the First Amendment.

We conclude by demonstrating that the California Constitution similarly prevents imposition of liability for undirected sexually themed (or religious or racial) speech in communicative workplaces.

## LEGAL DISCUSSION

### I.

### IMPOSITION OF LIABILITY FOR UNDIRECTED SEXUALLY THEMED SPEECH IN COMMUNICATIVE WORKPLACES SUCH AS WRITERS' ROOMS, UNIVERSITIES, MOTION PICTURE SETS, ADVERTISING AGENCIES, THEATERS, AND ART GALLERIES VIOLATES THE FREE SPEECH GUARANTEES OF THE FIRST AMENDMENT.

#### A. This case presents an issue of first impression. Neither this Court nor the United States Supreme Court has immunized anti-harassment laws from First Amendment challenge.

For over a decade, courts and scholars have noted that "hostile work environment" anti-harassment laws raise First Amendment concerns because such laws seek to regulate speech based upon its content.[3/] Cases in this area

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3/ The scholarly work includes: Balkin, *Free Speech and Hostile Environments* (1999) 99 Colum. L.Rev. 2295; Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment* (1991) 52 Ohio St. L.J. 481; Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment* (1997) 75 Tex. L.Rev. 687; Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark* (1994) 1994 Sup. Ct. Rev. 1 (hereafter Fallon); Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment* (1993) 68 Notre Dame L.Rev. 1003; McGowan, *supra* note 1; Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight* (1995) 47 Rutgers L.Rev. 461; Strauss, *Sexist Speech in the Workplace* (1990) 25 Harv. C.R.-C.L. L.Rev. 1; Volokh, *How Harassment Law Restricts Free Speech* (1995) 47 Rutgers L.Rev. 563; Volokh, Comment, *Freedom of*

invoke competing interests. On the one hand, laws limiting speech based upon content are subject to strict scrutiny and are usually struck down. (See *Texas v. Johnson* (1989) 491 U.S. 397, 414 [109 S.Ct. 2533, 2545, 105 L.Ed.2d 342, 360] ["If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"].) On the other hand, the government has a strong interest in eliminating discrimination on the basis of sex or race in the workplace

This case appears to be the first one raising a First Amendment challenge to a hostile work environment claim in the context of undirected sexually themed speech in a "communicative workplace." Not only has no court addressed this precise question;[4/] neither this Court nor the United States Supreme Court has given much guidance on how to address the First Amendment question more generally.

Ms. Lyle states that this court in *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121 (*Aguilar*) held "that the imposition of civil liability under FEHA for past instances of pure speech that create a hostile work environment does not offend the First Amendment." (Appellant Amaani Lyle's Answer Brief on the Merits, 59 (hereafter "Lyle Brief").) Not so. In

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*Speech and Workplace Harassment* (1992) 39 UCLA L.Rev. 1791 (hereafter Volokh Comment).

The cases include: *R.A.V. v. City of St. Paul, Minnesota* (1992) 505 U.S. 377 [112 S.Ct. 2538, 120 L.Ed.2d 305]; *DeAngelis v. El Paso Mun. Police Officers Ass'n* (5th Cir. 1995) 51 F.3d 591; *Saxe v. State College Area School Dist.* (3d Cir. 2001) 240 F.3d 200; *Robinson v. Jacksonville Shipyards, Inc.* (M.D.Fla. 1991) 760 F.Supp. 1486.

4/ *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142 raised the First Amendment question in the context of *directed* speech in a communicative workplace. The Court of Appeal (the same one deciding this case below) disposed of the First Amendment issue in a footnote.

*Aguilar*, this Court noted the "scholarly debate," but expressly did *not* reach the "broad" First Amendment question raised by hostile work environment claims because the defendants did not challenge the finding that their past conduct violated FEHA. (*Aguilar*, *supra*, 21 Cal.4th at p. 131, fn. 3; see also *id*. at p. 147 (conc. opn. Of Werdegar, J.) ("I write separately because the plurality opinion does not address . . . whether the First Amendment permits imposition of civil liability under FEHA for pure speech that creates a racially hostile or abusive work environment.").) The plurality opinion addressed only the propriety of an injunction barring future use of racial epithets against an argument that the injunction constituted an unconstitutional prior restraint of speech.

Few courts have faced the conflict between anti-harassment law and the First Amendment head-on. "The [United States] Supreme Court's offhand pronouncements are unilluminating." (*DeAngelis v. El Paso Mun. Police Officers Ass'n*, *supra*, 51 F.3d at p. 597; see also *Saxe v. State College Area School Dist.*, *supra*, 240 F.3d at pp. 208-209.)

The United States Supreme Court has indicated in dicta that a narrow type of sexual harassment claim is consistent with the First Amendment. In *R.A.V. v. City of St. Paul, Minnesota*, *supra*, 505 U.S. at pp. 389-390, the Court stated that Title VII's prohibition on sexual discrimination in employment practices is consistent with the First Amendment "[w]here the government does not target conduct on the basis of its expressive content." The *R.A.V.* Court gave the example of "sexually derogatory 'fighting words'" as unprotected by the First Amendment. (*Id*.) As the United States Court of Appeals for the Third Circuit explained in *Saxe v. State College Area School Dist.*, *supra*, 240 F.3d at p. 208, *R.A.V.* suggests that "government may constitutionally prohibit speech whose *non-expressive* qualities promote discrimination." (See also *id*. at p. 209 ["*R.A.V.* . . . does not necessarily mean

that anti-discrimination laws are categorically immune from First Amendment challenge when they are applied to prohibit speech solely on the basis of its expressive content"].) Beyond this narrow point, the Supreme Court has been silent.[5/]

**B. Imposition of liability for undirected sexually themed speech in communicative workplaces is unconstitutional because it will give employees a veto over the creation of political speech, art, motion pictures, and other creative expression protected by the First Amendment.**

In considering the balance between First Amendment rights of free speech and the state's interest in preventing harassment on the basis of gender in the workplace, some cases are easier than others. For example, even those commentators who are strong First Amendment advocates agree that the First Amendment should not protect a boss who, through speech, threatens to fire

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5/ In *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17 [114 S.Ct. 367, 126 L.Ed.2d 295] the Supreme Court failed to address the First Amendment issue in a sexual harassment case even though it was discussed in the parties' briefs. One commentator reads into that "nonstatement in *Harris*...a statement about the fact that for First Amendment as well as gender equality reasons hostile environment sexual harassment law is not an area in which First Amendment constraints are serious, but is rather an area almost entirely unrelated to the concerns and doctrines of the First Amendment." Schauer, *The Speech-ing of Sexual Harassment* (2004) in Directions in Sexual Harassment Law (MacKinnon and Siegel, eds. 2004) 347, 360. As Professor Browne notes, however, "[t]hose disagreeing with Schauer might take solace in the plurality's observation in *Waters v. Churchill* (1994) 511 U.S. 662, 678 [114 S.Ct. 1878, 1889, 128 L.Ed.2d 686, 701] that cases should not be read 'as foreclosing an argument that they never dealt with.'" (Browne, *The Silenced Workplace: Employer Censorship Under Title VII* (2004) in Directions in Sexual Harassment Law, *supra*, at pp. 399, 403, footnote omitted.)

a subordinate unless the subordinate engages in sex with the boss. (*See, e.g.,* Volokh Comment, *supra* note 3, 39 UCLA L.Rev. at p. 1846.) At the other extreme, it is hard to imagine anyone seriously defending the constitutionality of a state law that would, in the name of preventing harassment, impose liability on employers for allowing *any* discussion of a sexual nature in *any* workplace. (See Amicus Curiae Letter Opposing Petition for Review Filed by Defendants and Respondents, from California Women' Law Center et al., dated June 28, 2004, 8 ["Certainly some sexually explicit speech is not actionable in certain environments"].)

The most difficult cases fall between these extremes, such as whether the display of pornography by workers in an ordinary workplace, without more, can create a "hostile work environment" subjecting the workers' employer to a harassment claim. (See, e.g., Estlund, *supra* note 3, 75 Tex. L.Rev. at pp. 748-50 [discussing arguments on both sides of issue]; *cf. Robinson v. Jacksonville Shipyards, Inc.*, *supra*, 760 F.Supp. at 1522-23 [harassment case based not only on posting of pornography but also "incidents of directed sexual behavior"].)

Fortunately, this case presents one of the easier First Amendment issues and this Court need not reach the more difficult issues. If the First Amendment applies at all in the workplace – and it does[6/] – it must prohibit imposition of liability in this case, when (1) the sexually themed expression occurred in a "communicative workplace," where communications raising sexual issues were an integral part of employment on a television show that often featured sexual themes; and (2) the complained-of speech was not

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6/ In Part I.E infra, we address Professor Schauer's argument that the workplace is a First Amendment-free zone.

directed at the plaintiff nor was it spoken for the purpose of harassing or intimidating the plaintiff or securing a sexual quid pro quo.[7/]

To balance the interests here in favor of anti-harassment law and against the First Amendment would cast a chill over creative expression and protected speech at workplaces as diverse as theaters, motion picture sets, universities, bookstores, advertising agencies and even courts. And it would essentially give offended employees a veto over the creation of political, artistic or other creative expression, expression protected by the First Amendment. (See *U.S. v. X-Citement Video, Inc.* (1994) 513 U.S. 64, 72 [115 S.Ct. 464, 469, 130 L.Ed.2d 372, 381-382].)

This is an untenable result: How will it be possible to write, produce, film, or stage any work with sexual (or racial or religious) content–content that is fully protected by the First Amendment — without opening oneself up to a lawsuit for harassment? The issue is especially troubling because a great deal of entertainment with sexual content carries a political message as well, as viewers of the plays "Hair" or "The Vagina Monologues" can attest. Indeed, how would this Court itself be able to produce the opinion in this case in the face of a Court employee who may be offended by the sexually themed discussions in the record?

It is no wonder that even those scholars who generally support the imposition of liability for some hostile work environments against First Amendment challenge reject imposition of liability in communicative

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7/ Ms. Lyle points to a single instance of arguably directed speech: an alleged joke about a black woman and a tampon. (Lyle brief at p. 42; see also Ct. of Appeal typed opn., 36 [discussing joke in context of *racial*, not *sexual* discrimination].) Of course, Respondents' liability under a statute requiring proof of "severe or pervasive" harassment could not be based on a single *de minimis* comment. The gravamen of Lyle's complaint is for the *undirected* speech in the workplace.

workplaces.[8/] Professor McGowan, for example, contrasts the display of Playboy centerfolds at a shipyard (as in the *Robinson* case, *supra*) with a fictitious museum exhibit, "Imagining the Body – 1950-2000," that displays the same centerfolds:

"Can the museum guard sue for harassment because she has to look at these crude centerfolds all day long and listen to stupid, sexist, and lewd comments by patrons? Can she force the art museum to cease the exhibition or to monitor its patrons' comments for offensiveness?

"Even if the centerfolds are exactly the same, the museum has a significantly stronger First Amendment defense than the shipyard. Quite simply, the exhibition creates and facilitates public discourse in a way that the porn posted in the shipyard does not. The museum invites members of the public to its exhibit to engage the images critically. The shipyard does not. Furthermore, without security guards, the museum cannot hold exhibitions. To protect the dignitary interest of someone in the museum guard's position would neuter public discourse because such a person is necessary to the production of public discourse. A museum simply could not function as an art museum if guards' sexual harassment suits were sustained. The normative significance of the museum in public discourse implies rejection of such suits.

"The problem with hostile work environment suits over museum exhibits is quite simple. An art museum could not function as center for public discourse if it feared these suits based on its exhibits. Imagine a museum trying to vet the inoffensiveness of its displays. Not only would it be impossible – in a large and diverse workforce, someone could object to nearly any art object – but such vetting would undermine the very purpose of a

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8/ Although there are some scholars who take the position that the First Amendment is simply inapplicable in the workplace, see Part I.E *infra*, we are unaware of any scholarship that has specifically rejected the communicative workplace arguments of Professors McGowan and Estlund, discussed *infra*.

museum. At their best, museums expand visitors' knowledge, introduce visitors to new things and experiences--sometimes beautiful, sometimes uncomfortable – and challenge visitors' complacency. A museum that had to stage exhibitions in the shadow of potential liability to its employees could mount only the most banal exhibits of Impressionist landscapes – even Renoir nudes would be out. To preserve museums as places for public discourse, therefore, a guard must suspend civility norms relative to exhibits just as any other viewer must." (McGowan, *supra* note 1, 19 Const. Commentary at pp. 425-426, footnotes omitted.)

Professor Estlund has expressed similar views:

"Freedom of expression in the society as a whole depends on the existence of public fora such as streets, sidewalks, parks, and, increasingly, the 'information superhighway,' where freedom of expression is broadly protected. The system of freedom of expression also depends on the existence of autonomous and vital institutions such as universities, religious institutions, libraries, bookstores, the press and broadcast media, and publishers. These enterprises produce and distribute much of the expression that constitutes public discourse and that enjoys the highest levels of First Amendment protection. Yet these public fora and these enterprises are also places where people work. I have argued that while freedom of expression in the workplace is enormously important, it is also subject to constraints that would be impermissible in the core domain of public discourse. If these civilizing constraints on speech were permitted to limit, through the operation of Title VII, what can be said and written within the public forum, the university, or by authors or journalists, the core of public discourse would be threatened.

"Imagine library or book store employees complaining, under the aegis of Title VII, of being required to examine, shelve, or sell offensive books; editorial or clerical employees in a publishing house, a newspaper, or a

university complaining of being required to work on or discuss offensive manuscripts or articles; or museum employees complaining of sexually provocative works of art surrounding them at work. These are not imaginary incidents. According to journalist Mark Schapiro, as of 1994, '[i]n more than a dozen recent cases, allegations of sexual harassment have been used to force removal of artwork from classrooms, municipal buildings, and public art galleries.' Some of this material may be of a sort that, if displayed or pressed upon workers in an ordinary workplace, could contribute to harassment liability. Can such material contribute to liability of these employers – universities, publishers, newspapers – for a hostile work environment?

"The examples suggest an important qualification to the proposed First Amendment standard for discriminatory harassment: Where the employing enterprise is an institutional actor within the system of freedom of expression or where the workplace is part of a public forum, workplace speech restrictions should be scrutinized under the higher standards applicable in those realms. I do not suggest that all claims of verbal harassment in such workplaces must be subject to stricter First Amendment standards; the directed speech of a coworker or supervisor would obviously be a permissible basis for liability even in a public forum, library, or art gallery. But where the alleged harassment is part of public discourse in the public forum, or is part of what the employer produces for public or scholarly discourse--scholarly writings, journalism, books, art, or the like--the stricter scrutiny applicable to those fora and those institutions applies." (Estlund, *supra* note 3, 75 Tex. L.Rev. at pp. 769-771, footnotes omitted.)

Recognizing a First Amendment defense in communicative workplaces for undirected sexually themed comments would *not* create a liability-free zone for such institutions. (Cf. Letter to the Supreme Court in Opposition and Support of the Petitions for Review from the Legal Aid Society-Employment

Law Center, dated June 28, 2004, 12 [incorrectly stating that amici call for "law-free zones of open season on women and people of color" in communicative workplaces].) Offensive sexually themed speech in a workplace that is directed at another person for the purpose of harassing that person or securing a sexual quid pro quo may well create liability for sexual harassment consistent with the First Amendment.

### C. Free speech at universities, motion picture sets, and advertising agencies would be in serious danger if this Court affirms the Court of Appeal's decision.

#### 1. Free speech at universities.

The educator amici have a strong interest in the resolution of this case. The educators' most essential argument is this: universities and classrooms are workplaces too, for teaching assistants, staff, sign language interpreters, and others. All sorts of sexually themed (not to mention potentially religiously offensive or race-conscious) expression legitimately goes on in the classroom and at the university. If speech can be suppressed in writers' offices, it could be equally suppressed in classrooms, since both are equally communicative workplaces.

Courts have already held that the First Amendment limits application of racial and sexual harassment policies at universities precisely because such policies can chill protected expression. See, for example, *Cohen v. San Bernardino Valley College* (9th Cir. 1996) 92 F.3d 968 (*Cohen*) [college's sexual harassment policy unconstitutionally vague as applied to professor]; *Dambrot v. Central Michigan University* (6th Cir. 1995) 55 F.3d 1177, 1182-1184 [racial and ethnic anti-harassment policy at university unconstitutionally

overbroad]; *Iota Xi Chapter v. George Mason University*, *supra*, 993 F.2d at p. 386 [First Amendment bars punishing university students for "ugly woman contest"]; see also *Saxe v. State College Area School Dist.*, *supra*, 240 F.3d 200 [school district anti-harassment policy unconstitutionally over broad]; *Sypniewski v. Warren Hills Regional Bd. of Educ.* (3d Cir. 2002) 307 F.3d 243 [application of school district's racial harassment policy to punish student who wore Jeff Foxworthy "you might be a redneck sports fan" t-shirt would likely violate the First Amendment].

This Court should join those courts in protecting academic freedom and it should affirm unambiguously the First Amendment right to engage in undirected sexually themed speech on university campuses. Universities are of course paradigmatic communicative workplaces: they are "organized around the purpose of communicating an idea or message, sparking conversation, argument, or thought among [the academic community], [and] providing a place for [members of the academic community] to engage in conversation."[9/]

At the university, frank sexual discussion and sexual images can serve important pedagogic purposes. Consider, for example, university courses such as a feminist studies course criticizing pornography, a medical school class on human sexuality, a seminar on the art of Michelangelo, or a public health series on means of combating the spread of AIDS. In each of these classes, sexual content is academically appropriate and in some cases necessary; academic freedom requires that debate on these topics be robust and uninhibited. Yet under the Court of Appeal's ruling, discussion of a sexual nature in these classes — and in the halls and on the quads of universities — can be ended simply by the objection of a university employee to the speech.

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9/ *McGowan*, *supra* note 1, 19 Const. Commentary at p. 393.

Professors talking to 20-year-olds may well choose to give examples that relate to sex, or make jokes that relate to sex, just as a means of creating especially vivid scenarios, or keeping students' attention. (See *Cohen*, *supra*, 92 F.3d at p. 968, and *Silva v. University of New Hampshire* (1994) 888 F.Supp. 293 (*Silva*), for examples of professors arguably doing so). Some professors may choose not to use such examples, but some may want to – and surely the government should not be allowed to bar all professors at all universities (public or private) from using sexually themed humor or sexually themed examples.

Indeed, to the extent that the Unruh Civil Rights Act, Civil Code section 51, applies to universities (see *Davison v. Santa Barbara High School Dist.* (C.D.Cal. 1998) 48 F.Supp.2d 1225, 1232-1233), a *student*'s objection to the sexually themed speech will be enough to create the potential for liability.[10/] Because the Unruh Act bans discrimination even against "individuals who wear long hair or unconventional dress, . . . who are members of the John Birch Society, or who belong to the American Civil Liberties Union" (*In re Cox* (1970) 3 Cal.3d 205, 217-218), the chill could extend far beyond speech with sexual themes, or racial or religious themes, for many other persons may claim harassment based upon their personal characteristics.

And, of course, under the Court of Appeal's ruling, professors, staffers and others can sue over *student* speech and expression, creating a de facto mandatory speech code for all universities. (See *Herberg v. California*

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10/ Federal Titles VI and IX apply to almost all universities as well, and thus also make hostile racial or sexual atmospheres actionable by students. In this regard, cases such as *Cohen*, *supra*, 92 F.3d at p. 968 and *Silva*, *supra*, 888 F.Supp. at p. 293 have recognized the importance of First Amendment principles even where an instructor's speech is said to create a hostile atmosphere.

*Institute of the Arts* (2002) 101 Cal.App.4th 142 (*Herberg*) [treating a university as potentially liable for student speech].) Sexually themed student expression may occur not only in the classroom, but also in student newspapers, on leaflets posted on campuses, and, as we know from *Herberg*, in student art displayed at university galleries.

On top of all of this potential liability, professors, staffers, and others can sue for harassment over the speech of classroom guest speakers, and others (including, of course, students) on university property for pedagogic purposes, because of a recent amendment to FEHA enacted by the Legislature in 2003. Under Government Code section 12940(j)(1), "[a]n employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[11/]

Lyle's brief stresses that certain speech is actionable not just because its vulgarity offends people, but also because its *viewpoint* is offensive -- "sexist" (p. 14); "suggest[ing] that [women] were inferior" (p. 22), "disproportionately more offensive . . . to one sex" (p. 32), exhibiting "sex based animus" (p. 33), "misogynous" (p. 39, quoting the Court of Appeal), "paint[ing] women in sexually subservient and demeaning light" (p. 46), or expressed "because of . . . bigotry" (p. 62). But academic freedom means that professors, guest speakers, and students must be free even to express those viewpoints that university administrators disapprove of – whether sincerely, as devil's advocates, or while quoting the views of others. Likewise, they must be free

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11/ This Court has granted review in two cases considering the retroactivity of this amendment. *Adams v. Los Angeles Unified School District*, S127961, and *Carter v. Department of Veterans Affairs*, S127921.

to express views that are hostile to certain religions, or religions generally, hostile to certain sexual orientations, or even racist or disproportionately more offensive to one race or religion. Under appellant's argument, though, all these viewpoints must be censored by university administrators, lest they offend some university employees who might hear such views.

The First Amendment holds a "special concern" for academic freedom and free pursuit and exchange of scholarship and research. (E.g., *University of California Regents v. Bakke* (1978) 438 U.S. 265, 312 [98 S.Ct. 2733, 2759-2760, 57 L.Ed.2d 750, 785]; *Sweezy v. New Hampshire* (1957) 354 U.S. 234, 263 [77 S.Ct. 1203, 1218, 1 L.Ed.2d 1311, 1331-1332]; see also *Rust v. Sullivan* (1991) 500 U.S. 173, 200 [111 S.Ct. 1759, 1776, 114 L.Ed.2d 233, 260] [("the university is a traditional sphere of free expression . . . fundamental to the functioning of our society").) The United States Supreme Court has emphasized that fostering vigorous discussion of a multitude of ideas, perspectives, and opinions in the academy is important to the advancement of society generally. Thus, the Court has held that

> 'To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences where few, if any, principles are accepted as absolutes. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.'

(*Keyishian v. Board of Regents of New York* (1967) 385 U.S. 589, 603 [87 S.Ct. 675, 683, 17 L.Ed.2d 629, 641], quoting *Sweezy v. New Hampshire*, *supra*, 354 U.S. at p. 250.) Free and open discussion in the University is

valued not merely as an end in itself or as benefitting only university professors and their students. "[A]cademic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned." (*Ibid.*) "For society's good – if understanding be an essential need of society – inquiries into these problems [posed by the social sciences] must be left as unfettered as possible." (*Sweezy*, at p. 262 (conc. opn. of Frankfurter, J.).)

In order to preserve academic freedom, this Court should recognize a First Amendment defense in communicative workplaces such as universities for undirected sexually themed comments.

**2. Free speech on motion picture sets and at advertising agencies**.

From the perspective of the motion picture and advertising industry amici, the free speech issues on motion picture sets and at advertising agencies parallel the concern about squelching speech in television writers' rooms: placing limits on the creative process will simply stop the production of creative expression well within the protection of the First Amendment.

In the recent "cross-burning" case of *Virginia v. Black*, the United States Supreme Court noted that "[c]ross burnings have appeared in movies such as Mississippi Burning, and in plays such as the stage adaption of Sir Walter Scott's The Lady of the Lake." (*Virginia v. Black* (2003) 538 U.S. 343, 366 [123 S.Ct. 1536, 1551, 155 L.Ed.2d 535, 556].) Amici do not believe an offended stagehand on the set of *Mississippi Burning* should be able to bring a racial hostile work environment claim based upon the fictionalized cross-burning, or any discussion of the cross-burning occurring on the set. If such a case would be allowed to go to a jury, anti-harassment

law would essentially give the offended stagehand the right to shut down a production with serious artistic and political content.

Similarly, much modern advertising may contain provocative sexual, political, or other controversial messages. Sometimes an advertiser's very purpose is to shock a reader or listener, and such shocking can serve important social purposes.[12/] For example, a recent academic study conducted in the

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12/ As explained in Dahl et al., *Does It Pay to Shock? Reactions to Shocking and Nonshocking Advertising Content Among University Students* (Sept. 2003) 43 Journal of Advertising Research 268, 268-269:

> A shock advertising appeal is generally regarded as one that deliberately, rather than inadvertently, startles and offends its audience. [Citation.] Offense is elicited through the process of norm violation, encompassing transgressions of law or custom (e.g., indecent sexual references, obscenity), breaches of a moral or social code (e.g., profanity, vulgarity), or things that outrage the moral or physical senses (e.g., gratuitous violence, disgusting images). [¶] There is little doubt that some advertising purposely breaches social norms with the intent to shock. Probably the most widely publicized cases include the advertising campaigns produced by clothing makers Benetton and Calvin Klein. Over the years Benetton's advertisements have featured photographs of a slain soldier's bloodied uniform, a dying AIDS patient, and a white infant nursing at a black woman's breast. The advertisements have won awards for heightening public awareness of social issues but have also provoked public outrage and consumer complaints. [Citation.] Calvin Klein's advertisements, whose 'deliberately shocking graphics' [citation] are typically of a sexual nature, were targeted by government and political groups for their use of 'pornographic' images.
>
> Public health campaigns have also been the object of public scrutiny. [Citation.] An organization called The Breast Cancer Fund recently employed a poster campaign that mimics sexy lingerie advertisements, featuring attractive models in bras and panties, but with one difference—these women reveal mastectomy scars instead of breasts. [Citation.]

context of HIV/AIDS prevention examined the effectiveness of shock advertising in comparison to the commonly used appeals of fear and information. The authors found that shocking content in an advertisement significantly increases attention, benefits memory, and positively influences behavior among a group of university students. (Dahl, *supra* note 12, 43 Journal of Advertising Research at pp. 274-276.)

Yet, as in the university and motion picture set contexts, advertising agencies face the threat of an offended employee's veto that can prevent the creation and distribution of work protected by the First Amendment. An advertising agency employee offended by the sexually themed nature of a shocking HIV/AIDS prevention advertisement should not be able to scuttle its production.

These concerns are realistic. Consider a 1988 determination by the federal Equal Employment Opportunity Commission that an employer had racially harassed a Japanese-American employee by, among other things, creating an ad campaign that used images of samurai, kabuki and sumo wrestling in referring to its Japanese competition. (See Volokh Comment, *supra* note 3, 39 UCLA L.Rev. at p. 1795 & fn. 12.) If a company employee could claim harassment---and have the EEOC back him up---based on the company's advertising campaign, then surely someone who worked for the advertising agency, and may have been more directly exposed to the campaign, would have such a claim against the agency itself.

The continued vitality of the motion picture industry and leading edge advertising depends upon a creative process not hampered by concerns that the process itself creates significant risks of litigation. This Court should hold that the First Amendment bars such litigation.

### D. The "captive audience" doctrine cannot justify imposition of liability for undirected sexually themed speech in communicative workplaces.

Relying on Justice Werdegar's concurring opinion in *Aguilar*, *supra*, 21 Cal.4th at 159-62, Ms. Lyle argues briefly that "Ms. Lyle was a captive audience and this should be considered in any First Amendment analysis prioritizing her right to not be abused because of her sex." (Lyle Brief at p. 61.)

On the contrary, the government may not impose content-based speech restrictions aimed at shielding people from offensive speech, even if the speech is genuinely hard to avoid. (Volokh, *Harassment Law and Free Speech Doctrine* (1992) [posted at <www.law.ucla.edu/~volokh/harass/substanc.htm> [as of Dec. 22, 2004]. ) The only exceptions, as Professor Volokh points out, are when the speech reaches into the home, but even when the audience is in the home, the government is severely limited in its ability to impose content-based restrictions. (Compare, e.g., *Frisby v. Schultz* (1988) U.S. 474 [108 S.Ct. 2495, 101 L.Ed.2d 420] (upholding a content-neutral ban on residential picketing) with *Carey v. Brown* (1980) 447 U.S. 455 [100 S.Ct. 2286, 65 L.Ed.2d 263, ] (striking down a content-based ban on residential picketing);[13/]

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13/ See also, *Hill v. Colorado* (2000) 530 U.S. 703 [120 S.Ct. 2480, 147 L.Ed.2d 597] (upholding a ban on certain speech outside medical offices, but only because the statute aimed to "protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message (*whatever its content*) by physically approaching an individual at close range, i.e., within eight feet" (emphasis added), and stressing that "Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation"]).] There is no dispute here that the state anti-harassment law, as interpreted by Lyle, would regulate both the subject matter of employee speech (sexually, racially, or religiously themed speech) and its

see also Fallon, *supra* note 3, 1994 Sup. Ct. Rev. at p. 18 ["The captive audience argument is hard to assess, because the doctrine is inchoate."]; Balkin, *supra* note 3, 99 Colum. L.Rev. at pp. 2310-2311 ["Generally speaking, people are captive audiences for First Amendment purposes when they are unavoidably and unfairly coerced into listening. According to the Supreme Court, the paradigmatic case of a captive audience involves assaultive speech directed at the home"]. )

Extending the captive audience doctrine to the workplace, especially to the communicative workplace, would be harmful. For many Californians, the workplace is one of the only places where people engage in political or other protected speech. (*Aguilar*, *supra*, 21 Cal.4th at 185 (Kennard, J., dissenting) ["While it is true that during working hours an employee is not free to go elsewhere to avoid hearing a coworker's offensive speech, it is equally true that the coworker is not free to go elsewhere to express his or her views."].) Extending the captive audience doctrine to the workplace removes First Amendment protection, and, as we showed above, thereby creates an "offended employee's veto" for some controversial speech. (See Balkin, *supra* note 3, 99 Colum. L.Rev. at p. 2311 ["Without further theorization, captive audience doctrine can be a troublesome idea. A broad reading of the captive audience doctrine 'would effectively empower a majority to silence dissidents simply as a matter of personal predilections.' [*Cohen v. California* (1971) 403 U.S. 15, 21 [91 S.Ct. 1780, 1786, 29 L.Ed.2d 284, 291]. One could regulate offensive speech based on rather vague notions of captivity"]; Volokh Comment, *supra* note 3, 39 UCLA L.Rev. at pp. 1832-1843 [advancing

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view point ("misogynist" (AB 14) or "sexist" (AB 39) offensive speech). Thus, even under a broad reading of the "captive audience" doctrine, the state law, as (mis)interpreted by Lyle, violates the First Amendment.

sustained and detailed argument against application of captive audience doctrine to workplace].)

In her *Aguilar* concurrence, Justice Werdegar advocated extending the captive audience doctrine to the workplace, while candidly noting that most of the United States Supreme Court cases upholding regulation against First Amendment challenge on captive audience grounds "did not solely concern a captive audience" and that the issue is hotly debated by legal commentators. (21 Cal.4th at p. 161.)

For those like Justice Werdegar, and Professors Balkin and Fallon, the appeal of extending the captive audience doctrine to the workplace may rest on the idea of economic dependence: workers often are not free to leave their jobs to avoid harassing speech. (*Aguilar*, *supra*, 21 Cal.4th at p. 162 (conc. Opn. Of Werdegar, J.); Balkin, *supra* note 3, 99 Colum. L.Rev. at p. 2314 [Employees "are only captive audiences in the workplace with respect to certain forms of unjust coercion that use the employee's economic dependence as a springboard"]; Fallon, *supra* note 3, 1994 Sup. Ct. Rev. at pp. 43-44 ["Harassment frequently occurs within the structure of authority relationships; even when it does not, a victim may have little opportunity to respond effectively to those who dominate the environment," footnotes omitted].)

The more sensible solution to the economic dependency argument in some communicative workplace contexts is for the employer, if feasible, to provide a reasonable accommodation to an offended employee, such as a shifting of the employee to another part of the workplace. (Estlund, *supra* note 3, 75 Tex. L.Rev. at p. 770, fn. 315.) In that way, the employee often can be shielded from offensive speech without having the power to shut down a

museum, university course, art gallery, or courthouse.[14/]

This Court need not reach the broader question today whether the captive audience doctrine should be extended to workplaces *other than* communicative workplaces. In this case, which involves a communicative workplace, this Court should *not* extend the doctrine so as to allow for liability in the context of undirected sexually themed speech. To do so, as Part I.B, *supra,* explained in detail, essentially would give employees veto power over the production of work protected by the First Amendment. It would chill the production of protected expression severely. Labeling such censorship permissible under the "captive audience" doctrine adds nothing to the analysis.

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14/ Moreover, Professor Estlund notes: "I would highlight another problem as well with the captive audience and economic dependency arguments: They seem to suggest that the economic constraints of the employment relationship militate only and always for less speech. Yet critics of harassment doctrine have argued with some force that both the economic vulnerability of workers and their economically compelled presence in the workplace makes Title VII a particularly powerful and objectionable engine of censorship. Indeed, as Professor Greenawalt has pointed out '[T]he captive audience concern runs up against a countering "captive speaker" concern. When people are working, the only place they can express themselves is within the workplace.'" (Estlund, *supra* note 3, 75 Tex. L.Rev. at p. 717 (footnotes omitted).)

## E. Scholarly arguments that the First Amendment is simply inapplicable in the workplace cannot be applied to communicative workplaces without seriously chilling protected political speech, art, and other creative expression.

Going even further than those who would apply the captive audience doctrine to the workplace, Professor Schauer has argued that the workplace should be seen as essentially a First Amendment-free zone. (Schauer, *supra* note 5, *The Speech-ing of Sexual Harassment* at p. 347; see also Letter to the Supreme Court in Opposition and Support of the Petitions for Review from the Legal Aid Society-Employment Law Center, dated June 28, 2004, 11 [endorsing Professor Schauer's position].) He reaches this conclusion because of his belief that "hostile environment sexual harassment law ... is an area almost entirely unrelated to the concerns and doctrines of the First Amendment." (*Schauer*, *supra*, at p. 360; see also *id*. at p. 355 ["none of the plausible accounts of the purposes of the First Amendment appear pertinent" to hostile work environment settings].) The "posited purposes" of the First Amendment include "assisting the search for truth, encouraging dissent, checking abuses of power, facilitating democratic deliberation, and permitting individual self-expression." (*Id*. at p. 351.)

Whether or not Professor Schauer is right as a general matter that First Amendment law should not apply to the workplace and similar settings,[15/] he is indisputably wrong regarding harassment law in the context of communicative workplaces. These workplaces are the loci for the creation of

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15/ For a sustained contrary argument, see Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation Altering Utterances," and the Uncharted Zones*, 90 Cornell L.Rev (forthcoming 2005, draft available at <http://www1.law.ucla.edu/~volokh/conduct.pdf>[as of December 22, 2004].)

political, artistic and other expression protected by the First Amendment. Such expression may assist the search for truth and facilitate democratic deliberation, for instance when journalists, professors, teacher's assistants, or students express views that may be offensive to some religion, gender, or racial or ethnic group. It may check abuses of power and promote dissent, for instance when reporters, writers, or academics harshly criticize politicians, even by calling attention to the politician's religion, race, or sex in ways that understandably offend some listeners. And it may constitute artistic expression and social commentary, as when artists display potentially offensive paintings in an art college or writers say offensive things in the process of writing jokes about people's behavior and sexuality.

Yet, as shown in Part I.B., *supra*, allowing hostile work environment cases to go forward based on undirected speech in communicative workplaces gives offended workers a veto over the creation of such expression. The result would prevent the creation of work at the core of the First Amendment and lead to employee self-censorship and employer censorship as required by the government. Thus, this Court should reject Professor Schauer's argument as applied to undirected speech in communicative workplaces because the hostile work environment claims are *directly related* to the concerns of the First Amendment.

## F. The Court of Appeal's "creative necessity" approach does not cure the First Amendment defect.

Respondent's Opening Brief on the Merits at pages 57-60 explains in detail why the Court of Appeal's creative necessity approach would not cure the First Amendment defect created by applying hostile work environment law to undirected speech in communicative workplaces. Amici join that analysis.

The Court of Appeal's standard – which would allow a jury to determine after the fact whether each utterance "was within 'the scope of necessary job performance'" and "not engaged in for purely personal gratification or out of meanness or bigotry or other personal motives" (Ct. of Appeal typed opn., 34) – is vague (the court did not define "purely personal gratification" or "other personal motives"). It will cause employers to chill employee speech, and it will lead to self-censorship. It will stifle more speech than the First Amendment allows.

This point is illustrated by Ms. Lyle's analysis. On page 51 of her brief, Ms. Lyle argues that if no notes were taken of a particular joke during a writing session, then such a joke should not be considered "necessary" for the creative process. A jury could agree with such an argument, which would cast a severe chill over the creative process. Must a comedy writer think before speaking: "Should I say this potentially offensive thing, that might be funny enough to be part of the script, or will it be considered not good enough to be written down, thereby subjecting me, and my employer, to potential liability?"

*A court*, not a jury, should determine in a sexual harassment suit whether or not the suit is based primarily upon undirected comments in a communicative workplace. If so, the suit should be dismissed on First Amendment grounds. By leaving the responsibility to courts, employers and

employees in communicative workplaces will get a clear message as to which speech is constitutionally protected in their workplaces, so that they need not self-censor themselves to avoid the risk of liability.

Such a holding makes administrative sense. If the matter were left in the hands of the juries, reviewing courts would still have a constitutional obligation to conduct a *de novo* review of the determination that such speech was unprotected by the First Amendment. (See *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 505 104 S.Ct. 1949, 80 L.Ed.2d 502 [in cases involving the line between speech protected by the First Amendment and unprotected speech, reviewing courts have constitutional obligation to conduct "an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited."]; Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases* (1996) 90 Nw.U. L.Rev. 1009, 1020-21 [explaining that the *Bose* rule applies, and is "especially appropriate," in harassment cases given the vagueness problems that arise in defining the term "hostile environment"].)

## II.

## IMPOSITION OF LIABILITY FOR UNDIRECTED SEXUALLY THEMED SPEECH IN COMMUNICATIVE WORKPLACES SUCH AS WRITERS' ROOMS, UNIVERSITIES, MOTION PICTURE SETS, ADVERTISING AGENCIES, THEATERS, AND ART GALLERIES VIOLATES THE FREE SPEECH GUARANTEES OF THE CALIFORNIA CONSTITUTION.

Article I, section 2, subdivision (a) of the California Constitution provides that, "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for abuse of this right. A law may not restrain or abridge liberty of speech or press."

This Court has described this provision as "more definitive and inclusive than the First Amendment" (*Wilson v. Superior Court* (1975) 13 Cal.3d 652, 658) and as "'broader' and 'greater'" than the First Amendment (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 491 (*Gerawan I*)). "[A]rticle I's right to freedom of speech, unlike the First Amendment's, is 'unlimited' in scope. [Citations.] Whereas the First Amendment does not embrace all subjects, article I does indeed do so." (*Id*. at p. 493.)

No court decision of which we are aware has addressed the question whether imposition of liability for creating a hostile work environment for undirected sexually themed speech in a communicative workplace violates Article I, section 2 of the California Constitution.[16/] For reasons advanced in Parts I.B and I.C, *supra*, the important free speech interests at stake in this case

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16/ Although Respondents raised the issue below (Respondent's Brief in Court of Appeal 76-79; CT 1118-1120; 4237-4239), the Court of Appeal failed to address it in its opinion.

should lead this court to conclude that imposition of liability for such speech is unconstitutional under the California Constitution.

In reaching this conclusion, this Court may choose an independent path that is more speech-protective than is required by the relevant First Amendment precedents. A good illustration of this point is this Court's recent opinion in *Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1 (*Gerawan II*). In *Gerawan II*, this Court held that compelling an agricultural producer to participate in generic advertising about various agricultural products did not violate the First Amendment of the United States Constitution. But the Court, endorsing the dissent of Justice Souter in a recent United States Supreme Court case, unanimously adopted a more speech-protective standard under Article I, section 2 of the California Constitution for judging the constitutionality of the advertising program. This Court explained that adoption of this more speech-protective test was "supported by the fact that the right to free speech under the California Constitution is in some respects 'broader' and 'greater' than under the First Amendment." (*Gerawan II*, *supra*, 33 Cal.4th at p. 21.)

Justice Werdegar noted in her *Aguilar* concurrence that the California Constitution also provides protection against discrimination in the workplace, and that free speech claims under the California Constitution require a balancing of interests. (*Aguilar*, 21 Cal.4th at p. 167 [citing Article I, section 8 of the California Constitution] (conc. opn of Werdegar, J.).) While this case does require balancing of competing interests, the equation is much easier than under the facts of a case like *Aguilar*. That case involved *directed* racial epithets at a *non-communicative* workplace. In contrast, this case involves *undirected* sexually themed speech in a *communicative* workplace.

For the reasons set forth in Parts I.B and I.C, *supra*, this Court should conclude that the balance to be struck under the California Constitution should

protect the right of free speech in communicative workplaces, so as to insure that free expression may continue to flourish in settings such as writer's rooms, art galleries, museums, universities, motion picture sets, advertising agencies and courthouses. This Court can amply protect the right to be free of discrimination in the workplace in other ways, such as by upholding the imposition of liability for directed speech intended to harass an employee.

## CONCLUSION

For the foregoing reasons, this Court should reverse that portion of the Court of Appeal's judgment allowing Ms. Lyle's sexual harassment suit to go forward and hold that the First Amendment and the California Constitution bar liability for undirected sexually themed speech in communicative workplaces.

Dated: February 7, 2005

**HORVITZ & LEVY LLP**
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**CERTIFICATE OF WORD COUNT**

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Frederic D. Cohen