S125171

IN THE
SUPREME COURT OF CALIFORNIA

AMAANI LYLE,
Plaintiff and Appellant,

vs.

WARNER BROS. TELEVISION PRODUCTIONS, et al.,

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S125171

IN THE
SUPREME COURT OF CALIFORNIA

AMAANI LYLE,
Plaintiff and Appellant,

vs.

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

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 (“FFs48.2c1.00000 0.00000 0.00000 1.00000 0.0000 0.0000 c[1able Fit

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 t

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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 controver

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*

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,

LEGAL DISCUSSION

I.

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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*

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* (199

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

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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.'" (Brown

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 [harass

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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

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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 exa

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 arises

the workplace

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

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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

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

11/ This Court has granted review in two cases considerihas

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

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

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. (D

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 TD0ET1.00000 0.00 u0 0.0000 i25395

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.

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).)

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 that0000 TD(l)TjET1.0

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

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 t(ribed th)Tj43.4400 01la.000PEEQ(b.060

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' t the Cali

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ifornia Constitution.

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
FREDERIC D. COHEN

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 29.1(c).)

The text of this brief consists of 8,978 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

DATED: February 7, 2005

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Frederic D. Cohen