No. S125171

IN THE

SUPREME COURT OF CALIFORNIA

AMAANI LYLE,

Plaintiff and Appellant,

v.

WARNER BROS. TELEVISION PRODUCTIONS, ET AL.,

Defendants and Respondents.

After a Decision by the Court of Appeal
Second Appellate District, Division Seven
Case No. B160528

APPLICATION TO FILE AMICI CURIAE BRIEFAND AMICI CURIAE BRIEF OF INDIVIDUAL RIGHTS FOUNDATION, REASON FOUNDATION, AND LIBERTARIAN LAW COUNCIL IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE, AND ASSOCIATE JUSTICES:

The Individual Rights Foundation ("IRF"), Reason Foundation, and Libertarian Law Council ("LLC") respectfully request permission to file an amici curiae brief in support of the defendants and respondents in this case, Warner Brothers Television Productions, et al.

Amici have a strong interest in the First Amendment issues raised in this case. IRF is a public-interest law firm focused on civil rights and First Amendment cases. In addition to litigating cases, it files amicus briefs in appellate cases like this one that raise significant free speech and civil rights issues. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Curran v. Mt. Diablo Council of the Boy Scouts*, 17 Cal. 4th 670 (1998). LLC is a Los Angeles-based organization of attorneys and judges that works to advance individual liberty and limited government. Reason Foundation is a public policy research organization that promotes the rule of law, individual choice and competition, and private property rights. Both the LLC and Reason Foundation also file briefs amicus curiae in cases raising significant constitutional issues.

Counsel for amici has reviewed the briefs of the parties. We are familiar with the issues in this case and the scope of their presentation. We believe we can assist this court by providing additional briefing on the relevance of constitutional free speech guarantees to workplace harassment

laws, and how they reinforce a properly limited interpretation of the elements of the hostile-work environment cause of action. The brief we have attached beneath explores these issues and also illustrates the adverse policy consequences that would likely result from Appellant's proposed restrictions on free speech and the Court of Appeal's unduly expansive construction of the Fair Employment and Housing Act.

We respectfully request permission to file with this Court the concurrently submitted amici curiae brief.

DATED: February 7, 2005

LAW OFFICES OF MANUEL S. KLAUSNER, P.C.

By: 

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This brief is submitted in support of the appeal of the decision below in *Lyle v. Warner Bros. Television Prod.*, 117 Cal. App. 4th 1164, 12 Cal. Rptr. 3d 511 (2004) by Warner Brothers Television Productions and its co-respondents..

INTERESTS OF AMICI CURIAE

Founded in 1993, the Individual Rights Foundation litigates civil rights and First Amendment issues and educates the public about the importance of the First Amendment's free speech and associational guarantees. To further its goals, the IRF both represents parties to litigation and files amicus curiae briefs in cases involving significant civil rights, First Amendment speech and associational rights issues. *See, e.g., Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The IRF is committed to the principle of equality of rights for all persons, and to protecting the civil rights and First Amendment rights of all individuals.

Reason Foundation is a public policy research and educational organization that explores and promotes the values of rationality and liberty as the basic underpinnings of a good society, and it seeks to foster an understanding of and appreciation for the limits of conscious planning in complex social systems. Founded in 1978, it supports the rule of law, private property, and limited government, and promotes individual responsibility in social and economic interactions, relying on choice and

competition to achieve the best outcomes. It is a not-for-profit corporation and has participated as Amicus Curiae in significant cases involving individual rights and the rule of law.

The Libertarian Law Council is an organization of lawyers, judges and other individuals interested in liberty and the rule of law. Based in Los Angeles, the LLC was founded in 1974 to foster an understanding of the principles of limited government and individual liberty, and it has filed amicus briefs in cases involving significant constitutional issues.

ARGUMENT

In its decision in *Lyle v. Warner Bros. Television Prod.*, the Court of Appeal needlessly interpreted sexual harassment law in an overly broad way that menaces free speech and artistic freedom. The Court held that sexual harassment claims can be based on speech that is job-related, such as the comments made in producing and airing a situation comedy, *Id.*, 12 Cal. Rptr. 3d at 518; that "artistic necessity" is not a defense to a claim that speech is sexual harassment (as even the plaintiff concedes it is, *see* Answer Brief at 62), but merely a factor a juror may consider, *id*, and that sexual harassment claims can be based on speech not even directed at anyone (much less the plaintiff) on the basis of sex. *Id.* at 515 (defendants liable even if plaintiff was "treated just like one of the guys"); *Id.* at 518 n.3 (First Amendment no defense).

The decision below is wrong on both statutory and constitutional grounds and would likely have a pernicious impact on the entertainment industry and society in general. It is wrong on statutory grounds because it eliminates the express statutory requirement that harassment be "because of" sex and assumes that sexually offensive speech overheard by a female employee is, *ipso facto*, sex discrimination.

It is wrong on constitutional grounds because it allows a single offended employee to prevent the dissemination of information to society at large, in violation of the First Amendment. Its equation of sexually offensive speech with sexual harassment rests on the stereotyped assumption – which the Equal Protection Clause has been held to forbid – that women are in need of special protection from rough talk and vulgar language. That gender-based double-standard will discourage employers from hiring women for traditionally male jobs, especially among small employers covered by sexual harassment law but exempt from statutory provisions banning sex discrimination in hiring.

It also creates a new threat of liability for movie theaters and other public accommodations, which are, like workplaces, schools, and apartment complexes, covered by state laws against sexual harassment. Prior to the decision below, few would have thought to sue a movie theater for showing a sexually explicit movie or racially or religiously-charged movie, in light of the constitutional protection for artistic freedom and the fact that it is often artistically necessary to explore controversial or offensive themes in

motion pictures. Moreover, however offensive a movie is, it is not aimed at any particular patron "because of" her sex or religion.

The decision below removes those protections by rejecting both the "artistic necessity" defense and the defense that the complained-of conduct did not occur because of the plaintiff's sex. Accordingly, its holding could be extended to allow a patron to sue a movie theater for showing a movie she finds offensive on the grounds that the movie itself constitutes sexual harassment. And since some precedents have held that less offensive speech or conduct is required for such a public-accommodations claim than a workplace harassment claim, some such suits will likely be successful, having a powerful chilling effect on the production of movies that explore controversial or unsettling themes. That will deprive both female and male consumers of information they seek about sexual and other topics.

It is also likely to have broad ramifications outside the area of sexual harassment. State law forbids discrimination based on race, religion, sexual orientation, disability and (in the context of public accommodations) any personal characteristic (to use the examples cited by this Court in *In re Cox*, 3 Cal. 3d 205, 217-18 (1970), being a John Birch Society member, an ACLU member, or a man with long hair). All of these groups are protected from harassment under state law and will now be able to rely on the decision below as a heckler's veto over speech they do not like, under the theory that speech that offends them is harassment.

Contrary to plaintiff's claims, *see* Answer Brief at 60-61, the defendants' speech cannot be punished under the theory that the plaintiff was a captive audience. Plaintiff was no more captive, and far less vulnerable, than many other listeners that the courts have held must tolerate offensive speech as the price of free speech. Moreover, restrictions on speech to protect a captive audience must be content and viewpoint-neutral to be constitutional, something plaintiff's expansive interpretation of harassment law as prohibiting "sexually course and vulgar language" and messages that are "disproportionately more offensive or demeaning to one sex" manifestly is not. *See* Answer Brief at 32, 55.

I. OVERLY BROAD DEFINITIONS OF HARASSMENT, LIKE THAT ESPOUSED BY THE COURT OF APPEAL, HAVE HAD A CHILLING EFFECT ON FREE SPEECH IN COMMUNICATIVE WORKPLACES

Overly broad definitions of harassment have had a negative effect on artistic freedom. Fearing harassment liability, California college instructors have excised elements of their curriculum. Melissa Balmain, Readers: This Column Might Offend You, Orange County Register, Dec. 7, 1994, Metro 1. The drawing of nude models has diminished; photos of Michelangelo's "David" are shown from the waist up; and a professor at California State University at Northridge was fired for asking students to make nude sketches. *Id.* Artistic expression in California schools has attracted lawsuits. A teenager sued a school district near Sacramento after her

English teacher showed a movie based on Edgar Alan Poe's classic short story "The Pit and the Pendulum," which she perceived as sexually humiliating. *Nevermore for Poe Film, Lawsuit Says*, S.F. Examiner, Aug. 30, 1994, at A2.

Many art censorship cases now result from sexual harassment charges. E.g., 2 People for the American Way, *Artistic Freedom Under Attack* 7, 50, 92, 111, 121, 156, 197, 208, 214 (1994). (Most of these cases involved artwork by female artists. *See id.* at 50, 92, 121, 156, 208, 214). For example, an exhibition on loan from the Museum of Modern Art, Nudes, was removed from Colgate University's Picker Art Gallery after administrators claimed it contributed to a hostile work environment for employees. *Id.* at 156. Classical nude paintings are among the most common targets of this form of censorship. E.g., Nat Hentoff, *Sexually Harassed by Francisco Goya*, Wash. Post, Dec. 27, 1991, at A21 (painting removed from classroom where it had hung for years after professor said it harassed her).

What all of these baseless sexual harassment charges had in common was a failure to comply with the most essential of the elements of a sexual harassment claim: that the conduct complained of occur because of the complainant's sex. Sadly, those charges now have new life under the decision of the Court of Appeal, which dispenses with the requirement that a plaintiff show harassment occurred because of her sex.

II. THE DECISION BELOW CONFLICTS WITH SETTLED HARASSMENT PRECEDENTS, WHICH REQUIRE THAT HARASSMENT OCCUR BECAUSE OF THE PLAINTIFF'S SEX TO BE ACTIONABLE

It is settled law that to recover for sexual harassment, a plaintiff must show five elements, one of which is that the harassment was based on sex; it is not enough for the plaintiff to merely show the existence of harassment or a hostile environment, since those are additional requirements for recovery. See *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 608, 613 (1989) ("The elements [of a hostile environment sexual harassment claim] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior"; holding that plaintiff's "allegations are simply not sufficient to establish a cause of action for environmental sexual harassment since none of the acts were directed at [the plaintiff]")

Remarkably, the Court of Appeal held that it did not matter that plaintiff's male co-workers had not treated her any differently from her male peers, but rather "just like one of the guys.'" *Lyle*, 12 Cal. Rptr. 3d at 515. It held that the plaintiff satisfied "the 'based on sex' element of a harassment cause of action" simply by establishing "that she personally

witnessed [sexually] harassing conduct and that it was in her immediate work environment," i.e., that it contributed to a hostile work environment. *Id.* By treating any speech that contributed to a sexually hostile environment as ipso facto discrimination, it was able to classify all of the conduct she alleged (such as "crude sex-related jokes" and employees "pretend [ing] to masturbate in her presence," *Id.* at 515) as being based on her sex ("this barrage of gender denigrating conduct," *Id.*), regardless of the fact that much of this conduct (for example, the simulated masturbation) could have been equally offensive to both men and women. In essence, it read the fourth element of a harassment claim (effect on working environment) as duplicating the third (based on sex).

For a long time, many federal courts shared the same fallacy as the Court of Appeal: that any sexual insults or speech on sexual topics which are offensive enough to create a hostile work environment automatically constituted sex discrimination in violation of the civil rights laws. *See Doe v. City of Belleville*, 119 F.3d 563, 576 (7th Cir. 1997) (proof of gender bias is not "needed when the harassment has explicit sexual overtones," and "the issue in sexual harassment cases is *not* whether the employer has harassed the employee on the basis of gender") (emphasis in original), *vacated*, 523 U.S. 1001 (1998).

The Supreme Court rejected this argument in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998) (rejecting cases that

"suggest that workplace harassment that is sexual in content is always actionable, regardless of the harasser's motivations. *See Doe v. Belleville*, 119 F.3d 563 (CA7 1997) . . . We have never held that workplace harassment, even harassment between men and women, is automatically harassment because of sex merely because the words used have sexual content or connotations") ("California courts have adopted the same standard" for harassment claims as the federal courts. See *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th 121, 130 (1999), citing Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 608 (1989)).

Federal courts have repeatedly relied on the *Oncale* decision to throw out sexual harassment cases where the hostile environment was not motivated by the plaintiff's sex. For example, *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001), held that a woman who had been subjected to a sexually degrading parody of herself and other offensive behavior could not recover for sexual harassment since it did not occur because of her sex. *Scusa v. Nestle U.S.A.*, 181 F.3d 958, 965 (8th Cir. 1998), rejected a harassment claim based on vulgar remarks made to both sexes. *Gallant v. Board. of Trustees*, 997 F. Supp. 1231, 1232, 1234-35 (N.D. Cal. 1998), dismissed a claim based on a supervisor's graphic, demeaning descriptions of his sex life with his wife, since there was no evidence that he "would not have acted in exactly the same way to a student who happened to be male." And *Pieszak v. Glendale Adventist Med. Ctr.*, 112 F. Supp. 2d 920 (C.D.

Cal. 2000), dismissed sexual harassment suits based on a senior resident's crude sexual jokes about patients' gynecological anatomies and graphic sexual remarks about his own sex life. See also *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 262 (4th Cir. 2001) (antidiscrimination law "does not provide relief against the . . . harasser who treats both sexes the same (albeit badly)"); *Holman v. Indiana*, 211 F.3d 399, 404 (7th Cir. 2000) (no claim where plaintiff deliberately sexually harassed both plaintiffs, husband and wife); *Rivera v. Puerto Rico Aqueduct & Sewers Auth.*, 331 F.3d 183, 189-90 (1st Cir. 2003) (dismissing religious harassment claim for failure to show discriminatory "animus"; under *Oncale*, "the plaintiff must establish that . . . the offending conduct was because of her religion . . . the question is not whether a religious person could find the song offensive; it is whether religious animus prompted [the harasser] to sing it to her"); *see also* Respondents' Opening Brief at 34-35; Reply Brief at 11.

Even prior to the *Oncale* decision, the requirement that harassment occur on the basis of the complainant's sex to be actionable was emphasized by many courts. See Respondents' Opening Brief at 21-22, 29, 34-36; Brown v. Smith, 55 Cal. App. 4th 767, 783 (1997) (elements of claim for sexual harassment include "that the offensive act would not have occurred but for" plaintiff's sex); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) ("to prove a claim of abusive work environment premised on sexual harassment, a plaintiff must demonstrate

that she would not have been the object of harassment but for her sex"), *cert. denied*, 481 U.S. 1041 (1987); *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) ("In proving a claim for a hostile work environment due to sexual harassment . . . , the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment"); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1248 n.5 (11th Cir. 1999) (en banc) (stating that the plaintiff "must show that but for the fact of her sex, she would not have been the object of the harassment," quoting *Henson*); *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) ("the question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender").

In short, "it is 'axiomatic' that in order to establish a sex-based hostile work environment under Title VII, a plaintiff must demonstrate that the conduct occurred because her sex," *Alfano v. Costello*, 294 F.3d 365, 373 (2d Cir. 2002), and to recover in a sexual harassment case, "[i]n addition to meeting the 'severe or pervasive' standard, a plaintiff . . . must also show that the severe or pervasive harassment was because of gender or one of the other Title VII protected categories." *Lee-Crespo v. Schering Plough*, 354 F.3d 34, 38 n.5 (1st Cir. 2003) (recovery hinged on whether "motivation" of the harasser was discriminatory).

The Court of Appeal attempted to get around this principle by noting that "FEHA . . . is not a fault-based tort scheme law," and "unlawful sexual

harassment can occur even when the harassers do not realize the offensive nature of their conduct or intend to harass the victim." *Lyle*, 12 Cal. Rptr. 3d at 515, citing *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991). In so doing, the court confused specific intent to harass (which it rightly observed is not required to establish a harassment claim, see *UAW v. Johnson Controls*, 499 U.S. 187, 199 (1991) (it does not matter why an employer discriminates, or whether it has good intentions for doing so, as long as it treats men and women differently)) with a requirement that the harasser treat men and women differently because of their gender (which *Oncale* shows is required). The fact that a harasser cannot claim immunity merely because he deludedly believes that women enjoy being targeted by his gender-based sexual propositions hardly means that someone who does not aim his conduct at women at all is liable for harassment.

Oncale and its progeny clearly define harassment as a form of intentional discrimination (*see* Respondents' Opening Brief at 33 n.11 (citing cases)), i.e., disparate treatment, not disparate impact. See, e.g., *Holman v. Indiana*, 211 F.3d 399, 402 (7th Cir. 2000) ("purpose" of sexual harassment prohibition "is to prevent 'disparate treatment of men and women'"), quoting *Oncale*, 523 U.S. at 78, quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986)); Ronald Turner, *The Unenvisaged Case, Interpretive Progression, and the Justiciability of Title VII Same-Sex Sexual Harassment Claims*, 7 Duke J. Gender L. & Pol'y 57, 78 (2000) (noting

that the Supreme Court treated *Oncale's* hostile environment claims "as a disparate treatment case"); Rebecca Hanner White, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 Wm. & Mary Bill Rts. J. 725, 734-35 (1999) (stating that after *Oncale* "[t]he question, as in other sex-based disparate treatment claims, is whether the plaintiff experienced the conduct because of her sex"); Ramona L. Paetzold, *Same-Sex Sexual Harassment, Revisited: The Aftermath of Oncale v. Sundowner Offshore Services, Inc.*, 3 Employee Rts. & Emp. Pol'y J. 251, 262-63 (1999) (referring to the Oncale Court's "attempt[ ] to fit hostile environment sexual harassment claims within a well-known model of discrimination law, the disparate treatment model").

Sexual harassment has been characterized as a form of disparate treatment ever since the Supreme Court's first harassment decision. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64, 66 (1986) (employer is liable "when a supervisor sexually harasses a subordinate because of the subordinate's sex," since such conduct falls within the "spectrum of disparate treatment of men and women in employment"") (emphasis added). As a result, "[h]arassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate treatment, is not actionable." *Pasqua v. Metropolitan Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996). This requirement of disparate treatment has received renewed emphasis since *Oncale*. See, e.g., *Holman*

v. Indiana, 211 F.3d 399, 404 (7th Cir. 2000) (*Oncale* "underscored that the touchstone [of sexual harassment] is, of course, discrimination or disparate treatment"); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1254 n.3 (11th Cir. 1999) (Edmonson, J., concurring) ("[a] claim of sexual harassment is a claim of disparate treatment").

Even if harassment could be shown without any discriminatory intent, the decision below is plainly erroneous. FEHA is an anti-discrimination statute, not a civility code, and even unintentional discrimination still requires a showing of discrimination, or "disparate impact," between men and women. *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 986, 995 (1988) (unintentional discrimination actionable when it produces "statistical disparities" between sexes or races that are so "substantial" as to be "functionally equivalent to intentional discrimination"); *Harris v. Civil Service Comm'n*, 65 Cal. App. 4th 1356, 1365 (1998) (under state and federal law, "proscribed discrimination comes in two forms," "disparate treatment" or intentional discrimination, and "disparate impact"), citing *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977 (1988); Cal. Admin. Code, tit. 2, § 7286.7(b). The decision below never contends, much less explains why, most of the conduct witnessed by the plaintiff (i.e., the "crude sex-related jokes" and offensive gestures) would not be equally offensive to a similarly-situated male employee. As we explain below, many people of both sexes like coarse sexual humor. If

a practice equally harms both men and women – or has a disproportionate impact on one gender, but not to a statistically significant extent – then there is no discrimination, even under a disparate impact theory. *Watson*, 487 U.S. at 995. And laws predicated on the assumption that women need special protection from sexual language have been held to violate the Equal Protection Clause's ban on sexual stereotyping.

The Court of Appeal wisely did not attempt to argue that the plaintiff's claim could satisfy the elements of a disparate impact claim. Plaintiff never pled a disparate impact claim. See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49, 53 (2003) (plaintiff failed to timely raise disparate impact claim); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000) (same).

Moreover, it is blackletter law that a showing of job-relatedness or business necessity is a complete defense to a disparate impact claim. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991, 997-98 (1998); Cal. Code Regs., tit. 2, § 7286.7(b); see also *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1171 (1991) (employer prevails unless its "business justification [for the conduct] is insubstantial"); *Marks v. Loral Corp.*, 57 Cal. App. 4th 30, 62 (1997) ("Disparate impact discrimination by definition involves a requirement or criterion which does not have a business justification") abrogated in part on other grounds by Cal. Gov't

Code § 12941.1. By contrast, the decision below expressly holds that "artistic necessity is not a defense" to liability.

Finally, a disparate impact claim could not be based on gender-based generalizations about how the average man or woman would react to the sexual humor that occurred during the production of "Friends." Instead, the relevant comparison would be between men and women working in the relevant labor pool – those involved in producing sitcoms in the entertainment industry – who are no doubt accustomed to politically incorrect humor. See *Watson*, 487 U.S. at 995; *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1171 (1997) ("qualified population"), citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989); *Jackson v. Harvard University*, 721 F. Supp. 1397, 1430 (D. Mass. 1989) ("qualified labor market"), *aff'd*, 900 F.2d 464 (1st Cir. 1990); see Christopher Noxon, *Television Without Pity*, New York Times, Oct. 17, 2004, § 2 at 1 (discussing how gross sexual humor similar to that alleged in this case is common among Hollywood sitcom writers of both sexes; "'I can get just as bawdy as the guys,' said [prominent sitcom writer] Eileen Conn, whose credits include 'Just Shoot Me' and 'Mad About You.' 'My partner used to joke that I'd be the first person slapped with a sexual harassment suit.'"); cf. Lyle, 12 Cal. Rptr. 3d at 519-20 (conceding that "[i]t is well-settled [under *Oncale* and *Fisher* that] the context in which the alleged harassment occurred is relevant in determining whether the defendants' conduct is

sufficiently severe or pervasive to be actionable"). Any allegation of disparate impact would have to be based on proof, not conjecture (much less stereotyped assumptions about the reactions of men and women). *See Ibarba v. Regents of Univ. of California*, 191 Cal. App. 3d 1318, 1320 (1987) (to defeat summary judgment, disparate impact must be proven, not merely supported with logical inferences of the sort sufficient in an intentional discrimination case). The record is barren of any such evidence. And it is not enough that the plaintiff herself is adversely affected by the challenged practice – it must adversely affect female employees as a class.[1]

III. THE COURT OF APPEAL'S ABOLITION OF THE DEFENSE OF LACK OF DISCRIMINATORY INTENT CONFLICTS WITH COURTS' DUTY TO CONSTRUE STATUTES SO AS TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS

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. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 458 U.S. 568, 574 (1988), citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501 (1979); *Myers v. Philip Morris Cos.*, 28 Cal. 4th 828, 846-47 (2000), citing *Curran v. Mt. Diablo*

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[1] *See Coe v. Yellow Freight System*, 646 F.2d 444, 451 (10th Cir. 1981); *Reidt v. County of Trempealeau*, 975 F.2d 1336, 1341 (7th Cir.1992); *Aramburu v. Boeing Co.*, 885 F. Supp. 1434, 1443-44 (D. Kan. 1995); *Stambaugh v. Kansas Dep't of Corrections*, 151 F.R.D. 664, 668 (D. Kan. 1993); *Wynn v. Columbus Mun. Sch. Dist.*, 692 F. Supp. 672, 684 (N.D. Miss. 1988).

Council of the Boy Scouts, 17 Cal. 4th 670, 728 (1998) (Kennard, J., concurring) (construing the Unruh Civil Rights Act narrowly to avoid potential First Amendment issues); *Haney v. University of Illinois*, No. 1993SP0431, 1994 WL 880339 (Ill. Hum. Rts. Com.) (declining to interpret Illinois civil rights law so as to permit lawsuits by Native American patrons alleging that the displays of the University's Chief Illiniwek mascot was disproportionately offensive to their race, in light of constitutional problems). This duty is apparently conceded by the Fair Employment and Housing Commission, which is charged with administering state sexual harassment laws, since it has admonished that "[i]n applying [sexual harassment regulations], the rights of free speech and association shall be accommodated." Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(E).

The Court of Appeal neglected to follow that rule. It created a serious constitutional issue by holding, in contrast to many federal courts, that a harassment plaintiff need not show that remarks were made out of a discriminatory motive. *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 U.C.L.A. L. Rev. 1791, 1846 (1992) (although harassment law is generally constitutional, it cannot be applied to speech which does not target women based on their sex); Charles R. Calleros, *Title VII and the First Amendment: Content-Neutral Regulation, Disparate*

Impact, and the "Reasonable Person," 58 Ohio State. L. J. 1217, 1217 (1997) ("difficult constitutional questions arise when liability rests on the disparate impact of undirected speech, because such liability must be based on the content of speech").[2]

A. The Court of Appeal's decision raises serious First Amendment problems.

Sexual harassment law, like any speech restriction, is constitutional only as long as it is narrowly tailored to promoting an important

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[2] *Accord* Charles R. Calleros, *Title VII and Free Speech: The First Amendment Is Not Hostile to A Content-Neutral Hostile-Environment Theory*, 1996 Utah L. Rev. 227, 262 ("undirected speech [that has a disparate impact] raises difficult questions not only concerning the First Amendment, but also about whether such speech can be said to selectively target members of a protected class, as [is] statutorily required"); *Id.* at 227-28 ("properly interpreted, Title VII regulates speech and conduct not so much on the basis of ideas expressed as on the harasser's selection of targets for harassment. . . Under a selection-of-target interpretation, hostile-environment theory can more easily be applied to the workplace consistent with guarantees of freedom of speech"); Charles R. Calleros, *Same-Sex Harassment, Textualism, Free Speech, and Oncale: Laying the Groundwork for a Coherent and Constitutional Theory of Sexual Harassment Liability*, 7 Geo. Mason. L. Rev. 1, 24-25 (1998) ("Title VII will most likely avoid serious conflict with the First Amendment if it is interpreted and applied to prohibit discrimination on the basis of the harasser's selectively directing unwelcome abuse to one or more members of a protected class because of their membership in that class"); Steven L. Willborn, *Taking Discrimination Seriously: Oncale and the Fate of Exceptionalism in Sexual Harassment Law*, 7 Wm. & Mary Bill of Rights J. 677, 722-23 (1999) ("A discrimination-centered model" of harassment law, under which "discrimination exists when women are treated differently because of their sex," "avoids the First Amendment issue," by excluding from its reach non-directed speech such as "a picture of Goya's 'Naked Maja' painting"); *Id.* at 688 (sexual harassment requires a showing of "disparate treatment").

government interest. *See Sable Communications v. FCC*, 492 U.S. 115, 126, 131 (1989) (content-based speech restrictions must be narrowly-tailored to a compelling interest); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (even content-neutral speech restrictions must be narrowly-tailored to a substantial government interest); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995) (harassment law is a "content-based, viewpoint-discriminatory" speech restriction); *Metro Display Advertising v. Victorville*, 143 F.3d 1191, 1195 (9th Cir. 1998) ("private property affords the strongest protection to free speech"). The interest underlying sexual harassment law is in eradicating discrimination.

Defining sexual harassment to include sexual speech that lacks discriminatory motivation – as the decision below has – renders the definition unconstitutionally overbroad in relation to that interest. *See Hurley v. Irish American Gay Group of Boston*, 515 U.S. 557 (1995) (while a state's antidiscrimination law promoted valid interests, it could not constitutionally be applied to prevent parade organizers from excluding a gay rights contingent, since that went beyond the state's legitimate interest in preventing discriminatory acts to regulating the parade organizers' speech).

Society cannot ban speech just because it is sexually offensive. *See Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) (overturning the

Communications Decency Act, which restricted "patently offensive" speech, and observing that much important speech is sexually offensive, including discussions of birth control, homosexuality, and prison rape; "the fact that society may find speech offensive is not a sufficient reason for suppressing it"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("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").

The Court of Appeal's definition of harassment to include speech not even directed at a plaintiff is overbroad because it punishes speech between consenting speakers and listeners (the individual defendants and their colleagues) merely to shield the sensibilities of a single individual (the plaintiff) who overheard it. *See United States v. Playboy Entertainment Group*, 529 U.S. 803, 813 (2000) (dissemination of indecent speech to willing adult listeners could not be prevented to protect child bystanders who might witness such speech; "Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists."); *cf. Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (overturning discipline for sexually offensive skit which created a "hostile and distracting learning environment" for minority students who learned about it).

Nor can the defendants be held liable based on the premise that the speech in this case was disproportionately offensive to women, or had a disparate impact. Plaintiff argues that a harassment claim can be based on speech that is "disproportionately more offensive or demeaning to one sex." Answer Brief at 32, citing *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991). But society does not have a legitimate interest, much less an important one, in restricting speech merely because it has a disparate impact on, or is demeaning to, certain groups. "The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis." *Hurley v. Irish-American Gay Group*, 515 U.S. 557, 569 (1995); cf. *People Who Care v. Rockford Board of Education*, 111 F.3d 528, 534 (7th Cir. 1997) (while state has compelling interest in remedying intentional discrimination, it generally does not have a compelling interest in remedying disparate impact); *Haney v. University of Illinois*, No. 1993SP0431, 1994 WL 880339 (Ill. Hum. Rts. Com.) (declining to interpret Illinois civil rights law so as to permit lawsuits by Native American patrons alleging that the displays of the University's Chief Illiniwek mascot was disproportionately offensive to their race, in light of constitutional problems). Many commonplace political views, such

as support for or opposition to affirmative action, abortion rights, or gay marriage, are disproportionately offensive to members of different racial, religious, or sexual groups covered by the civil rights laws, but those differences are a reason to foster debate, not to silence it.[3]

When fundamental elements limiting a sexual harassment claim, such as the "because of sex" requirement, are eliminated, that renders the definition overbroad. *See Saxe v. State College Area School Dist.*, 240 F.3d 200 (2d Cir. 2001) (harassment policy was overbroad, especially because it permitted discipline without requiring that the speech met the elements of federal sexual harassment law, such as that the speech be "severe or pervasive" enough to create an objectively hostile learning environment); *Meltebeke v. Bureau of Labor & Industries*, 903 P.2d 351 (Or. 1995) (Unis

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[3] *See* Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 Tex. L. Rev. 687, 723 (1997) ("criticizing real or perceived quotas, preferences, or affirmative action efforts based on race and gender are likely to offend some workers and may contribute to a discriminatory hostile environment" if intent to discriminate is not required, even though such speech is central to the "democratic process" and thus ought to be protected); *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), *rev'd on other grounds*, (noting that certain minority groups overwhelmingly voted against California's Proposition 209, which curtailed affirmative action, while whites voted in favor), *rev'd on other grounds*, 122 F.3d 692 (9th Cir. 1997); Richard Ek, *College Drops Harassment Ban*, S.F. Chron., Dec. 4, 1993, at A18 (professor found guilty of racial harassment for sharply criticizing affirmative action policies at Chico State; penalty later rescinded after First Amendment lawsuit threatened); *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1093-94 (D. Md. 1993) (finding "hostile racial" learning environment sufficient to support racial preference based partly on school

J., concurring) (state's harassment rule violated free speech clause because it did not include element requiring showing that the speech created a subjectively hostile environment). Yet here, the Court of Appeals has done just that, effectively eliminating the "because of sex" requirement, and thus needlessly creating a constitutional problem.

B. The decision raises equal protection problems

Statutes giving women greater protection than men from offensive language violate the Equal Protection Clause. *In the Interest of Joseph T.*, 430 S.E.2d 523 (S.C. 1993) (statute banning indecent speech directed towards women, but not men, violated equal protection by assuming women were more vulnerable than men; laws reflecting idea that women need special protection from "rough talk" and vulgarity impermissibly rest upon archaic gender stereotypes). The decision below effectively converts sexual harassment law into such a law, by holding that sexual speech in the workplace which is "degrading" enough to create a hostile environment constitutes sexual harassment of a female employee, even it is not aimed at her, and she has been treated "just like one of the boys." *Lyle*, 12 Cal. Rptr. 3d at 515.

It is true that the Equal Protection Clause does not forbid all gender-classifications. For example, "it does not mean that the physiological

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paper's "commentary and letters highlighting . . . preferential treatment" of

differences between men and women must be disregarded." *Michael M. v. Superior Court*, 450 U.S. 464, 478, 481 (1981) (Stewart, J., concurring); see *State v. Gurganus*, 250 S.E.2d 668, 672-73 (N.C. 1979) (upholding higher penalties for assaults against women given their greater physical vulnerability); cf. *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d at 609 (whether gender-based sexual advances are severe enough to create a hostile work environment must be evaluated based on how they would affect a reasonable employee of the same sex as the complainant).

But it is simply false to assume that all women are offended by sexually explicit or vulgar speech and men are not. Women as well as men like sexual humor. E.g., *A.M. Johnson, Sex Differences in the Jokes of College Students*, 68 Psychological Reports 851-54 (1991) (men and women generally did not differ in their propensity to tell sexual jokes); J. Hassett & J. Houlihan, *Different Jokes for Different Folks*, 12 Psychology Today 64-71 (1979) (in survey of 14,000 readers of Psychology Today, sexual jokes were the most popular category of joke for both sexes); *Those Bawdy E-Mails Were Good for a Laugh – Until the Ax Fell*, Wall Street Journal, Feb. 4, 2000, at A1 (22 people fired, many of them women, for exchanging e-mails containing sexual humor in a Virginia workplace). Many even like sexist humor. *See* J.R. Cantor, *What Is Funny To Whom? The Role of Gender*, 26 Journal of Communication 164-172 (1976)

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black students); *rev'd on other grounds*, 38 F.3d 147 (4th Cir. 1994).

(finding that both men and women find jokes aimed at women funnier than jokes aimed at men); D. Zillmann & S.H. Stocking, *Putdown Humor*, 26 Journal of Communications 154-163 (1976) (same).

Similarly, while women may once have been more reserved than men in talking about sex, there is little sign that that today's emancipated women are any more averse to hearing sexual anecdotes or humor than their male counterparts. *See* April Witt, *Blog Interrupted*, Washington Post, Aug. 15, 2004, at W12 (quoting a 25-year-old California writer who concedes that "Women our age do talk about sex like men, and we do treat sex like men. It's not a terrible thing. That's what people our age do," a professional woman who disapproves of casual sex and "has never had a one-night stand" but concedes that "'Women love to talk about sex . . . That's what we do when we get together and drink. If I was in a relationship with someone I cared about and I was concerned about my performance, I'd talk about it in graphic detail with my friends. I've learned most of my sex tips from girlfriends,'" and University of Washington researcher, Pepper Schwartz, who notes that "women are becoming more like men" in their openness towards sex). Female writers also discussed sexuality as part of the creative process of *Friends*. CT 4123-4125; see also CT 802-804 (Lyle claims she was harassed by female writers' use of coarse language).

Even if there were a proven statistical disparity between men and women in terms of their reactions to sexual speech, that would not be enough to justify the gender-based generalization involved in treating sexual speech not aimed at a woman as sexual harassment. *See Craig v. Boren*, 420 U.S. 190, 204 (1976) (statistical disparities were not enough to justify rule prohibiting conduct only by men); *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (mere statistical disparities were not enough to support gender-based preference for women).

Moreover, creating a gender-based standard for harassment claims, based on women's purportedly greater sensitivity to vulgarity, would also set a dangerous precedent for racial minorities, such as the plaintiff, since minorities, like men, are frequently depicted as having a greater tolerance for vulgarity. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 776 (1978) (Brennan, J., dissenting) (arguing that obscenities on the radio should be protected because "'[w]ords generally considered obscene like 'bullshit' and 'fuck' are considered neither obscene nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations,'" quoting C. Bins, "*Toward an Ethnography of Contemporary African American Oral Poetry*," Language and Linguistics Working Papers No. 5, p. 82 (1972)). We reject such demeaning stereotypes. But even if they had some basis in reality, it would be wrong to base a plaintiff's ability to recover on her sex or race.

IV. THE DECISION BELOW CONFLICTS WITH COURT DECISIONS PROTECTING JOB-RELATED SPEECH FROM LIABILITY

The Court of Appeal's decision to deny job-related speech protection from harassment liability is inconsistent not only with both the disparate impact theory on which plaintiff's claim rests — which recognizes "job-relatedness" or "business necessity" as a complete defense to liability for discrimination, not merely as a factor that the defendant may argue to a jury, *see Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1998) (employer may adopt hiring practices that have a disparate impact on women and minorities, if it has a job-related justification for doing so) -- but also the rulings of other courts recognizing that the job-relatedness of "harassing" speech is a defense. E.g., *Stanley v. Lawson Co.*, 1997 WL 835480 (N.D. Ohio Feb. 26, 1997) (rejecting on First Amendment grounds lawsuit based on job requirement that plaintiff sell sexually oriented magazines, since they were part of her employer's business); *DeRochemont v. D&M Printing*, No. EM-93-7247 (Minn. Dist. Ct. Nov. 1, 1993) (dismissing harassment claim against copy shop based in part on sexually explicit copy orders handled by it; First Amendment barred liability for such speech), aff'd on other grounds, see Respondents' Opening Brief at 47-48 (collecting cases). The decision below also is inconsistent both with commentators, who agree that the general constitutionality of harassment law does not mean that it can be applied to job-related speech, see

Respondents' Petition for Review at 25-26 n.3; *see also* Harvey Silverglate, *What Would Rachel Say?*, Wall Street Journal, Aug. 4, 2004 (criticizing the Court of Appeal's decision for allowing harassment claims to be based on speech that is "central to the professional mission of an enterprise"), and this Court's observation that harassment does not include conduct within "the scope of necessary job performance." *Reno v. Baird*, 18 Cal.4th 640, 646 (1998).

V. WBTV'S DETERMINATION THAT UNINHIBITED DISCUSSION OF SEXUAL THEMES IS NECESSARY TO PRODUCE ITS ADULT-ORIENTED SITCOM IS ENTITLED TO DEFERENCE UNDER THE FIRST AMENDMENT

Plaintiff is wrong to claim that an unguided jury can decide whether the defendants' speech was in fact necessary for the development of their scripts. Such editorial decisions should be made by studios and writers, not randomly selected jurors. A court "must give deference to an [expressive entity's] view of what would impair its expression." *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000) (ruling on First Amendment grounds that the Boy Scouts had the right to exclude a gay scoutmaster, and finding as a matter of law that requiring them to admit a gay scoutmaster, as required by the New Jersey Law Against Discrimination, would impair their ability to disseminate a message against homosexuality). Since the defendants have provided a plausible explanation for why many of their challenged sexual comments and jokes helped foster an atmosphere of creativity for the

writing of an adult-oriented sitcom, this Court should hold as a matter of law that such speech was job-related, and dismiss the plaintiff's claims for damages. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982) (damage award cannot be based even in part on protected speech); *Street v. New York*, 394 U.S. 576, 586 (1969) (conviction may not be based even in part on protected speech).

VI. THE DECISION WILL HAVE A VAST CHILLING EFFECT ON SPEECH OUTSIDE THE WORKPLACE

Harassment is not forbidden simply in workplaces. It's also forbidden in schools, *Davis v. Monroe County School Bd.*, 526 U.S. 629 (1999). apartment buildings, Neudecker v. Boisclare, 351 F.3d 361 (8th Cir. 2003), and public accommodations. E.g., *Department of Fair Employment & Housing v. University of California*, 1993 WL 726830 *14 (Cal. F.E.H.C.); *Davison v. Santa Barbara Unified School Dist.*, 48 F. Supp. 2d 1225, 1232-33 (C.D. Cal. 1998); *Nicole M. v. Martinez Unified School Dist.*, 964 F. Supp. 1369 (N.D. Cal. 1997); but see *Brown v. Smith*, 55 Cal. App. 4th 767, 787-88 (1997), citing *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142 (1991). Moreover, it covers not only race, *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th (1999), religion, *Brown Transp. Corp. v. Commonwealth*, 578 A.2d 555, 562 (Pa. Cmmw. 1990). sexual orientation, *Leibert v. Transworld Sys. Inc.*, 32 Cal. App. 4th 1693 (1995), and disability, *Neudecker v. Boisclare Corp.*, 351 F.3d 361 (8th Cir. 2003),

but also (in the context of public accommodations) those "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*, 3 Cal. 3d 205, 217-18 (1970) (construing the Unruh Act).

So if the Court of Appeal is right that harassment claims can be stated without any showing of discriminatory intent, merely because words have the unintended effect of creating a hostile environment for a member of a protected group, all of these groups will be able to sue over speech that offends them (no doubt, an extremely broad category for an opinionated Bircher or ACLU member). *Cf. Nevermore for Poe Film, Lawsuit Says*, S.F. Examiner, Aug. 30, 1994, at A2 (female student sued over offensive movie).

Moreover, suits against movie theaters and other public accommodations will be much harder to dispose of on grounds of insubstantiality than workplace harassment claims since public accommodations are used for shorter periods of time than "ongoing employment relationships," and thus are rendered harassing more quickly by even a "single incident" of offensive speech or conduct. *King v. Greyhound Lines, Inc.*, 656 P.2d 349, 351 n.6 (Or. App. 1982); *In re Craig*, 1995 WL 907560, *7 (Chi. Hum. Rel. Comm.).

So a ban on vulgar language cannot be limited to the workplace; it will also broadly apply to public accommodations, such as movie theaters.

Many movies and plays are extremely offensive to members of particular racial or sexual groups. The "Birth of a Nation" is offensive to blacks, Shakespeare's "Merchant of Venice" is offensive to Jews, his "Taming of the Shrew" is offensive to women, and the "Vagina Monologues" is offensive to men. Moreover, most "adult" movies contain scenes more graphic than any depiction commonly alleged in a workplace sexual harassment lawsuit. All of these forms of entertainment could lead to liability under an extension of the decision below, which does not require that the plaintiff show that the offensive speech occur because of the plaintiff's sex, race, or religion.

It is doubtful that the California legislature – with its sensitivity to protecting the dissemination of ideas and opinions by the entertainment industry – ever intended to open the door to such a result. Interpreting sexual harassment law so expansively conflicts with the traditional canon of statutory construction that a statute will not be interpreted to prohibit a vast array of previously lawful conduct unless the legislature makes its intent to do so clear in the statute. *See Haney v. University of Illinois*, No. 1993SP0431, 1994 WL 880339 (in which the Illinois Human Rights Commission relied on the canon to avoid finding liability for displays which allegedly had a disparate impact on Native Americans).

VII. THE COURT OF APPEAL'S DEFINITION OF HARASSMENT THREATENS TO DENY WOMEN AND MEN ALIKE ACCESS TO PROGRAMMING AND INFORMATION THEY SEEK

In the somber surroundings of a jury box or the bench, few would admit to liking sexual humor or discussing sexual topics. But the typical consumer, including the typical female consumer, does seek access to such information. *See* Glamour, July 1999 Cover ("Orgasm Dos and Don'ts Survey"); Cosmopolitan, November 1998 Cover ("Orgasms Guaranteed: 7 Secrets to a Toe-Clenching Bed-Rocking Climax"); Cosmopolitan, March 1999 Cover ("His G-Spot"); Cosmopolitan, October 1998 Cover ("His Secret Sexual Moan Zones"). And, as noted above, studies show that women as well as men like sexual humor.

Under the decision below, the fact that a jury considers speech offensive or degrading is enough for liability, even if it is not aimed at the plaintiff based on her sex. Thus, Warner Bros. could be prevented from producing adult-oriented sitcoms just because they offend a single employee. Similarly, a library about sexual problems, or a forum discussing topics such as date rape, could trigger harassment liability. As a result, an institution could be prevented from disseminating knowledge on sexual issues, or sexually-themed programs, simply because a single employee cannot tolerate exposure to such themes. The Constitution does not permit that result. E.g., *Sable v. FCC*, 492 U.S. 115, 127, 130 (1989) (striking down statute banning indecent commercial telephone messages

available to adults, merely because "a few . . . young people" would be exposed to them in the process; such a ban would be like "burning the house to roast the pig"), quoting *Butler v. Michigan*, 357 U.S. 380, 383 (1957) (state cannot prohibit adult-oriented reading materials in order to protect children); *see* Professor Jonathan Turley, *So Two Persons Go Into a Bar*, Los Angeles Times, Oct. 7, 2004 (criticizing the decision below on First Amendment grounds for unrealistically expecting adult-oriented sitcoms to be produced through a process of "immaculate conception"); Robyn Blumner, *Keep Your Laws Off My Sex Jokes*, St. Petersburg Times, July 18, 2004 (former ACLU leader criticizes the decision below for "handcuff[ing] the artistic process").

VIII. THE COURT OF APPEAL'S RATIONALE WOULD ENCOURAGE HIRING DISCRIMINATION AGAINST WOMEN

One of the ironic effects of the Court of Appeal's decision is that independent film-makers, as well as small museums, art galleries, and law firms handling sexual issues, now may literally be required not to hire women if they wish to avoid liability under FEHA, since a female employee can sue them for speech on graphic or controversial sexual topics, even if that speech is an integral part of her job or the employer's business. *Lyle*, 12 Cal. Rptr. 3d at 515, 518 (no defense that speech was job-related or even an "artistic necessity," since that is just one factor for

the jury to consider); *see* Professor David Bernstein, *Hostile Work Environment at Friends?*, Orange County Register, Aug. 13, 2004 ("if the [Court of Appeal's] Lyle opinion is allowed to stand, any Californian whose job involves dealing with controversial matters that raise issues potentially offensive to some people," such as "AIDS education" or "affirmative action," "will be at risk of a harassment lawsuit").

Indeed, the decision provides an incentive for small employers of all kinds to hire men rather than women, since they can be sued by a female employee even if she was "treated just like one of the guys," *Lyle*, 12 Cal. Rptr. 3d at 515. Whereas such small employers can be held liable for sexual harassment, FEHA, Cal. Gov't Code § 12940(j)(4)(A)[4], those that employ less than 5 employees may lawfully discriminate in connection with hiring decisions. *See* FEHA, Cal. Gov't Code § 12926(d) (exempting employers with less than 5 regular employees). Accordingly, the safest path for a small employer is to refuse to hire women, perpetuating sex-based segregation and discouraging the entry of women into non-traditional jobs. The decision below will thus have economic effects similar to a tax on the hiring of women. Cf. James N. Dertouzos & Lynn A. Karoly, *Labor Market Responses to Employer Liability* (Rand Institute for Civil Justice,

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[4] *See also Burris v. City of Phoenix*, 875 P.2d 1340, 1348 (Ariz. App. 1993) ("We have found no state or federal court that has recognized the tort of wrongful failure to hire even though states prohibit discrimination in

1992) (employer liability is linked to reduced hiring far in excess of direct litigation costs).

IX. THE COURT OF APPEAL WRONGLY RELIED ON THE AGUILAR CASE TO REJECT DEFENDANTS' FIRST AMENDMENT DEFENSE.

The Court of Appeal summarily rejected Warner Brothers Television's First Amendment defense, *Lyle*, 12 Cal.Rptr.3d at 518 n.3, citing *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th 121 (1999), in which this Court affirmed an injunction preventing a car rental company manager from using racial epithets or offensive touching to continue his practice of obstinately harassing Hispanic employees. But that injunction included the very "because of sex/race" limitation rejected by the Court of Appeal, since it only prohibited the harasser "from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc." *Aguilar*, 21 Cal. 4th at 128 (emphasis added).

This Court noted that it dealt only with whether injunctive relief was a proper remedy for what the defendants admitted was unprotected harassment, and repeatedly expressly reserved how far harassment law could extend to speech not directed at a plaintiff because of her sex or race. *See Aguilar*, 21 Cal. 4th 121, 131 n.3, 137 n.5 (1999); Petition for Review

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hiring on the basis of such factors as race, national origin, sex, or handicap").

at 17-18. It emphasized that while "there is considerable academic debate concerning the extent to which sexually and racially discriminatory speech may be regulated consistent with the First Amendment," and one such position was that "'[l]iability could be imposed . . . only for speech that is directed at an employee because of her race [or] sex,'" "we have no occasion to address the issue." *Id.* at 137 n.5, quoting Volokh, *Freedom of Speech and Workplace Harassment*, 39 U.C.L.A. L. Rev. 1791, 1846 (1992).

Moreover, *Aguilar* involved targeted racial epithets, which have been recognized as unprotected from civil liability for decades. E.g., *Alcorn v. Anbro Eng'g*, 2 Cal. 3d 493, 498-99 (1970) (supervisor properly held liable for calling subordinate racial epithets to humiliate him). *Aguilar* did not involve what is alleged in this case: untargeted vulgarity, which has been recognized as protected speech by the U.S. Supreme Court. See *Cohen v. California*, 403 U.S. 15 (1971) ("Fuck the Draft" T-shirt worn in courthouse was protected; vulgarity is protected because "one man's vulgarity is another man's lyric").

X. PLAINTIFF CANNOT RELY ON A "CAPTIVE AUDIENCE" THEORY TO RESTRICT THE DEFENDANTS' SPEECH.

Plaintiff argues that the defendants can be prevented from exercising their free speech rights around her because she, as an employee, is a "captive audience." Answer Brief at 60-61. However captive employees may seem,

the Courts have repeatedly held workplace speech protected even when it offends or upsets an employee. See, e.g., *Rankin v. McPherson*, 483 U.S. 378, 380, 400 (1987) (sheriff's department could not fire an employee for applauding an assassination attempt on President Reagan with the words "if they go for him again, I hope they get him," even though a captain "was very upset" by the remark); *Roper Corp. v. NLRB*, 712 F.2d 306, 311 (7th Cir. 1983) (employer had right to deride union favored by many employees); *Sheet Metal Workers Int'l Ass'n v. Burlington N.R.R. Co.*, 736 F.2d 1250, 1253 (8th Cir. 1984) (anti-union speech); *Dow Chemical Corp. v. NLRB*, 660 F.2d 637, 644-45 (5th Cir. 1981) (same); *NLRB v. Douglas Division*, 570 F.2d 742, 747 (8th Cir. 1975) (same).

Courts have applied the captive audience doctrine to limit speech only in two circumstances: (1) to protect the privacy of the home, and (2) prevent verbal assaults targeted at a vulnerable complainant who cannot easily escape them, by regulating the distance or manner in which the speaker addresses the listener. The Supreme Court has never applied the captive audience doctrine to punish speakers for comments overheard by offended listeners, or to restrict speech because of its viewpoint (as plaintiff effectively seeks to do here by banning sexually offensive or sexist speech). Moreover, the doctrine has never been applied to punish communication by a speaker who is equally captive to the workplace, or lacks ample

alternative venues for the communication, as is the case for the individual writer defendants.

C. Employees are not a captive audience.

The "captive audience" doctrine is a very narrow exception to general First Amendment law that was devised to protect the "privacy of the home." *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (indecent broadcasts, such as George Carlin's monologue on the seven dirty words, may be restricted to certain hours); see also *Rowan v. Post Office*, 397 U.S. 728, 736, 738 (1970) (homeowners may direct post office not to deliver sexually oriented publications). The courts have resisted extending the doctrine to other settings, even in cases where it is difficult for those exposed to the speech to avoid it, because extending the doctrine would undermine the vitality of debate on matters of public concern. For example, in *Cohen v. California*, 403 U.S. 15, 21 (1971), the Court overturned *Cohen's* conviction for wearing a "Fuck the Draft" jacket in a courthouse. The state argued that *Cohen's* jacket would be offensive to unwilling viewers, who would have to leave *Cohen's* presence to avoid his message, but the Court distinguished *Rowan*, saying that While this Court has recognized that government may . . . prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, e.g., [*Rowan*], we have at the same time

consistently stressed that "we are too often captives outside the home and subject to objectionable speech."[5]

The Supreme Court has never found employees to be a captive audience, and attempts to restrict speech on that basis ignore the fact that workplace speakers are as captive as listeners. *See* Reply Brief at 19. The notion that speech to employees can be restricted to shield a captive audience is refuted by a long line of cases holding that unionists have a First Amendment right to continually picket a workplace over the objections of workers employed within, although it would be difficult to imagine an audience more captive than workers who must cross a picket line every day on their way to work, *AFL v. Swing*, 312 U.S. 321, 326 (1941) (First Amendment barred suit by non-union employees and their employer seeking end to union picketing against them); Thornhill v. Alabama, 310 U.S. 88, 94 (1940) (picketing "twenty-four hours a day"); cf. *Georgia Kraft Co. v. N.L.R.B.*, 696 F.2d 931, 939 (11th Cir. 1983) (striker's pattern of "crude and obscene remarks directed at a female management

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[5] The case sometimes cited as approving restrictions on offensive speech to protect captive audiences outside the home, *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), in fact did not do so. In *Lehman*, a splintered court voted 5-to-4 to uphold a bar on political ads on city buses. Only Justice Douglas would have relied on the captive audience doctrine to uphold the policy (he would have banned *all* ads, not simply ads of a particular content). *See Id.* at 305-08. Lower courts have recognized that *Lehman* does not allow the government to restrict speech on city buses to shield a "captive audience." *See, e.g., AIDS Action Committee v. MBTA*, 42 F.3d 1 (1st Cir. 1994) (ban on "sexually explicit, patently offensive" speech violated free speech).

executive as she crossed the picket line" were protected by federal labor law's "free speech provisions").

Similarly, the Supreme Court overturned a man's conviction for using the adjective "mother fucking" four times at a school board meeting to attack the board and its teachers. *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972). The Court refused to apply the captive audience doctrine, even though the audience could escape his ranting only by leaving the room and forfeiting their chance to participate in an importance government function, and even though his speech was "a verbal assault on an unwilling audience." *Id.* at 904 (Powell, J., dissenting).

Outside the home, the Supreme Court has applied a captive-audience rationale in only one case, *Hill v. Colorado*, 530 U.S. 703, 723-25 (2000), which held that anti-abortion protestors could be kept at least eight feet away from patients entering a women's clinic to protect their health and privacy rights. The statute did not prevent the protestors from sharing their message with the public at large, no matter how hostile or offensive it may have been to the women seeking abortions, *see Id.* at 723 ("It places no restrictions on . . . either a particular viewpoint or any subject matter that may be discussed by a particular speaker"), and sought only "to protect those who enter a health care facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach within

eight feet of a patient." *Id.* at 723-24. In short, it was focused on speech directed at the victims, *see Id.* at 716 ("'deliberate verbal or visual assault,'" quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-211 n.6 (1975)), not merely speech which they overheard (like the complainant) and were offended by. *Hill*, 530 U.S. at 718 n.25 (statute's "purpose . . . is not to protect a potential listener from hearing a particular message"). Moreover, as medical patients preparing to undergo a sensitive medical procedure, they were especially vulnerable to invasions of their privacy and stresses that could physically harm them. See *Id.* at 716 ("'The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests,'" quoting *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 772-73 (1994), especially since they have a substantial "privacy interest"); *Hill*, 530 U.S. at 718 n.25 (statute's purpose was "to protect those who seek medical treatment from . . . physical" and other "harm").

D. The Captive Audience Doctrine Forbids Viewpoint-Based Restrictions, Like Those Plaintiff Seeks

More importantly, the restrictions on speech were upheld by the Court only because it deemed them to be viewpoint-neutral, not content-based. *Hill*, 530 U.S. at 725 (statute "is content-neutral" and not viewpoint-based); *Id.* at 713 n.19 (even the petitioners had conceded that the restriction was content-neutral). Restrictions on speech to shield a captive

audience must be viewpoint-neutral and not single out ideas for their offensiveness, as Justice Stevens cautioned in Pacifica:

> the fact that society may find speech offensive is not a sufficient reason for suppressing it. . . it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content . . . First Amendment protection might be required.

Pacifica, 438 U.S. at 745-46. For example, although residential picketing can be restricted to protect people who are "captive" in their homes, *Frisby v. Schultz*, 487 U.S. 474, 487 (1988), such restrictions must be content-neutral, and content-based restrictions on residential picketing are unconstitutional. *Carey v. Brown*, 447 U.S. 455 (1980); see also *Erznoznik v. Jacksonville*, 422 U.S. 205, 218 (1975) (Douglas, J.), ("the interests of captive audiences . . . cannot . . . justify attempts to discriminate among movies on the basis of content"). By contrast, harassment law is content-based and viewpoint-discriminatory, *Saxe v. State College Area School District*, 240 F.3d 200, 206-07 (3d Cir. 2000); *DeAngelis*, 51 F.3d at 596-97, especially under the Court of Appeal's extremely expansive interpretation of it.

Justice Werdegar's concurrence in *Aguilar v. Avis Rent A Car System*, which relied on the captive-audience rationale as one factor in upholding an injunction against a continuing course of verbal and physical racial harassment after an unchallenged finding of unlawful discrimination, is distinguishable. That injunction prohibited only targeted harassment, specifically "derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc., and . . . uninvited intentional touching of said Hispanic/Latino employees." 21 Cal. 4th 121, 128 (1999) (emphasis added). Like *Hill*, in which the speech was accompanied by the "implied threat of physical touching," the *Aguilar* case involved "uninvited touching." *Id.* As Justice Werdegar noted, that case was a special case, and did not justify restrictions on offensive workplace speech in general under a captive-audience rationale. See *Id.* at 169 ("No single factor present in this case justifies the restraint on speech here; indeed, another case posing different facts may lead to a different conclusion").

By contrast, in this case, the plaintiff seeks to obtain damages solely for speech that was not directed at her and had nothing to do with her merely because it offends her. There is no allegation of targeted insults, physical assaults, or invasion of her privacy. Moreover, the injunction in *Aguilar* was limited to a certain manner of speech, leaving the defendants free to discuss racial issues, even to express racist opinions, provided they

did not use epithets in doing so, much as the statute in *Hill* left anti-abortion protestors free to express any message they chose from a distance of at least eight feet. Here, the complainant seeks to hold the defendants liable for harassment for all their sexually-oriented or sexist humor, regardless of the specific words they used or the manner in which they expressed them, applying a blanket restriction on speech defined by its content. Finally, Justice Werdegar observed that the *Aguilar* injunction left "ample alternative speech venues for the speaker." *Aguilar*, 21 Cal. 4th at 166; see also *Id.* at 164 ("ample alternative channels of communication"); *Id.* at 168 ("ample alternative avenues of communication"). But here, the only logical place for the defendants to discuss sitcom plots or brainstorm together about sexual themes is in the workplace. They have no alternative venue.

XI. CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeal and uphold the trial court's grant of summary judgment for the defendants.

Respectfully submitted,

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WORD COUNT CERTIFICATION

Counsel for Amici hereby certifies that this Brief was produced using 13-point Times New Roman-type and contains approximately 11,218 words (excluding the cover page, tables, signature block, and this certification). Counsel relies on the word count of the computer program used to prepare this Brief.

DATED: February 7, 2005

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