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In the Case of *Lyle v. Warner Bros. Television Productions, et. al.*: A Brief *Amicus Curiae*

Prof. Russell K. Robinson*

INTRODUCTION

I wrote this amicus brief in connection with the California Supreme Court's review of *Lyle v. Warner Bros. Television*.¹ Thirteen other law professors from several elite law schools joined the brief.

As a writer's assistant for the hit television sitcom *Friends*, Amaani Lyle was charged with recording the conversations in the writers' room and producing a transcript, which would sometimes lead to jokes and plots for the sitcom. In this position, Lyle alleges, she was routinely subjected to crude sexual conduct and expression in violation of California's Fair Housing and Employment Act, which bans various forms of discrimination, including verbal sexual harassment.² The Respondents, including *Friends* writers who were Lyle's supervisors, argue that their crude sexual conduct was an indispensable means of developing gags, dialogue and story lines for *Friends*, which depicts the lives of sexually active adults.

This case attracted my attention because it involves several difficult and interesting legal issues that have rarely been addressed by

* Acting Professor, UCLA School of Law. The author would like to thank Kimberlé Crenshaw, Adam B. Wolf and Noah Zatz for critical encouragement and advice in writing this brief. I am also very grateful to the following professors who decided to join the brief: Cynthia G. Bowman, Devon Carbado, Kimberlé Crenshaw, Laura Gomez, Cheryl Harris, Kenneth L. Karst, Charles J. Ogletree, Deborah L. Rhode, Dorothy E. Roberts, Leti Volpp, Adam Winkler, Kimberly A. Yuracko, and Noah Zatz.

¹ 12 Cal. Rptr. 3d 511 (Cal. Ct. App. 2004).

² Cal. Gov. Code § 12940 *et seq.*

courts.³ First, should artists and expressive organizations ever be able to break general laws in furtherance of creative or expressive purposes? Resolving this question in an absolute fashion seems unpalatable. On the one hand, completely immunizing creative enterprises from harassment laws would strip millions of employees and students in media, entertainment and educational institutions of basic antidiscrimination protections. At the other extreme, imagine punishing a sex columnist⁴ for harassing his secretary by requiring her to type sexually explicit columns on a regular basis. The answer must lie in the middle.

Second, if there are some circumstances in which an artist may break the law, who counts as an artist?⁵ Once the courts open the door to letting artists break general laws, they will have to define who qualifies as an artist, and this may not be easy. Courts would easily agree that a novelist or an opera singer is an artist, and most would agree that the creators of the television show *Friends* qualify, but what about those at the margins of judges' cultural experiences? Such as an "adult" film producer? Street performers breaking anti-solicitation laws? Teenagers defacing property with graffiti? Third, what principles can courts use to decide when an artist has the right to break a general law? Are there any alternatives to ad hoc balancing of the government interest versus the artistic interest?

Although, as a scholar, I was drawn to the case because of these challenging questions, my brief urged the *Lyle* court *not* to try to resolve these tricky issues and instead to rule narrowly. I argued that summary judgment for the Respondents should be reversed because of the extreme facts of the case and the failure of the Respondents to tether the harassment to the creative context. There is ample record evidence of gender-denigrating sexual talk and conduct with no discernable connection to the writing process. (Lyle's supervisors at times even ordered Lyle not to record these personal digressions.) These facts, I argue, show that Respondents' creative freedom argument is a pretext for justifying ordinary sexual harassment, which the First

³ I address some of these questions in depth in a work in progress. See Russell K. Robinson, *On Caste and Casting: Reconciling Artistic Freedom and Antidiscrimination Norms* (forthcoming).

⁴ Consider the explicit nature of the Savage Love column in the *Village Voice*. See <http://www.villagevoice.com/people>.

⁵ See, e.g., Eugene Volokh, *You Can Blog, but You Can't Hide*, N.Y. TIMES, Dec. 2, 2004, at A1. For a discussion of the ambiguities in First Amendment doctrine that could permit a limitless variety of expressive conduct to trigger heightened scrutiny, see Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 770-78 (2001); see also Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252 (1995).

Amendment should afford no protection. We can agree that the nature of a creative enterprise may legitimately require employees to engage in speech that would otherwise constitute illegal harassment (recall the sex columnist mentioned above), but it does not follow that *all* speech that happens to occur at *Vanity Fair*, NBC or UCLA is motivated by a creative purpose.⁶

Whether a harassment claim based solely on statements more closely related to the creative process would violate free speech principles should await future consideration. If the California Supreme Court declines to resolve these challenging and understudied questions, my hope is that it will buy courts and scholars more time to figure out the best resolution.

⁶ For example, a professor who sexually harasses a student during office hours should not be able to invoke his unrelated scholarly pursuits as an excuse.

Case No. S125171

IN THE SUPREME COURT OF CALIFORNIA

AMAANI LYLE
Plaintiff and Appellant,

vs.

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

After a Decision by the Court of Appeal
Second Appellate District, Division 7
Case No. B160528

BRIEF AMICUS CURIAE

PROFESSOR RUSSELL K. ROBINSON (SBN 218240)

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BRIEF *AMICUS CURIAE***TO THE HONORABLE CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:**

Pursuant to Rule 29.3(c) of the California Rules of Court, amici request leave to file the accompanying brief *amicus curiae* in support of Plaintiff and Appellant Amaani Lyle.

Amici are law professors who teach and write about equality and the First Amendment at law schools in the United States. We care deeply about the fundamental principles of gender and racial equality embodied in California fair employment law and Title VII as well as the principle of free speech. We write to ensure that free speech law is respected, but not deployed to undermine our nation's commitment to workplace equality for women. We have no interest in the outcome of this litigation, except as it pertains to these concerns.

This case raises a number of important questions concerning the need to reconcile antidiscrimination law with free speech protections under state and federal law. Although Lyle's cause of action is under state law, California courts have looked to Title VII for guidance in interpreting California antidiscrimination law. The U.S. Supreme Court has not extensively discussed the relationship between sexual harassment law and the First Amendment. Thus, scholars have attempted to fill the void, exploring ways to reconcile the two areas of law while providing rationales for the Court's affirmation of sexual harassment law and rejection of free speech arguments. We are familiar with this literature and write in order to share our expertise on these important questions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents seek to use the First Amendment as a shield against the regulation of sexual harassment that lacks a discernable connection to the creative process. Amaani Lyle's male supervisors repeatedly pretended to masturbate in her presence, displayed a coloring book with female cheerleaders with their legs spread apart, frequently requested a "good blow job," and altered the words on scripts to create words such as "tits" and "penis." These male writers-supervisors also repeatedly used the vilest gender-based epithets to refer to women in Lyle's presence. Respondents have not shown how any of this conduct appeared in the scripts for *Friends*, a relatively tame sitcom, or led to plots or jokes. In many instances, the supervisors even ordered Lyle not to record these personal digressions, which demonstrates that they had nothing to do with the creative process. These facts, we submit, show that Respondents' creative freedom argument is a pretext for justifying ordinary sexual harassment, which should enjoy no protection from the First Amendment.

This repeated sexual conduct not only failed to advance the creative process, it also perpetuated an exclusionary culture that marginalizes female writers and writers' assistants in an industry where women are substantially underrepresented. This Court must reject Respondents' sweeping First Amendment argument because it would eviscerate antidiscrimination law in all "creative industries" and leave women as well as people of color and others without legal protection. The court below properly recognized that sexual harassment claims in creative enterprises must be carefully examined in order to determine whether the expression was justified by legitimate creative interests. At this stage in the proceedings, Respondents have simply failed to make a showing that the abovementioned sexual harassment was reasonably connected to the creative process. Accordingly, this Court should affirm the judgment of the Court of Appeal.

ARGUMENT

RESPONDENTS' UNDULY BROAD CONSTRUCTION OF THE FIRST AMENDMENT IS INCONSISTENT WITH STATE AND FEDERAL FREE SPEECH PRECEDENT AND THE NEED TO BALANCE SPEECH AND EQUALITY.

This Court should affirm and remand for trial because there remains a triable issue of fact as to whether Respondents' pervasive and intimidating sexual conduct actually advanced the creative process, and remanding for trial is consistent with free speech protections. This Court must determine "whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law." *Guz v. Bechtel Nat'l* (2000) 24 Cal.4th 317, 334. The same plaintiff-friendly standard applies when a defendant asserts a First Amendment defense. *See Shulman v. Group W Prod.* (1998) 18 Cal.4th 200, 228 (*Shulman*). Respondents have not demonstrated that the numerous instances of "sexually coarse, vulgar and demeaning language in the workplace" experienced by Lyle were reasonably connected to the search for storylines and jokes for the television series *Friends*. *Lyle v. Warner Bros. Television* (2004) 12 Cal.Rptr.3d 511 (*Lyle*). To the extent Respondents can establish a substantial connection between the storylines and their sexual conduct and expression, the trial court should find in their favor based on legitimate creative freedom interests.⁷ But it would be premature for this Court to resolve that issue in Respondents' favor given the many instances of sexual harassment that lack a discernable connection to any reasonable understanding of the First Amendment.

As an initial matter, Respondents misapprehend the scope of free speech protections. Although they accuse the court below of adopting a "strikingly broad interpretation of anti-harassment law," Respondents' Opening Brief at 6, it is their construction of the First Amendment that is grossly overbroad, *see id.* at 63 (claiming that the California Constitution's free speech provision is "unbounded in range" and "unlimited in scope"). "Although stated in broad terms,

⁷ Respondents' claim that the jury will mishandle this case is rank speculation. *See* Respondents' Opening Brief at 37-38 (suggesting that the jury may punish the writers for using words like "schlong" instead of "penis"). If the jury finds for Lyle, Respondents may renew their First Amendment claim, and the jury's findings will be reviewed independently by the trial judge and the appellate courts. *See, e.g., In re George T.* (2004) 33 Cal.4th 620, 631-34 (requiring independent review when "plausible" First Amendment defense is asserted).

the right to free speech is not absolute.” *Aguilar v. Avis Rent A Car Sys.* (1999) 21 Cal.4th 121, 134 (*Aguilar*). Accordingly, this Court has often indicated that free speech rights must be balanced against competing interests and sometimes yield. *See, e.g., DVD Copy Control Ass’n v. Bunner* (2003) 31 Cal.4th 864 (upholding speech prohibition in order to protect property interest in trade secrets); *Kasky v. Nike* (2002) 27 Cal.4th 939 (permitting regulation of false and misleading commercial speech in order to protect consumers); *Comedy III Prod. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387 (balancing free speech with right of publicity and finding no free speech protection); *Shulman*, 18 Cal.4th 200 (rejecting First Amendment argument and permitting intrusion action against media defendants where they allegedly invaded plaintiffs’ privacy). Leading First Amendment scholars also recognize the need for a flexible interpretation of free speech provisions. *See, e.g.,* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark*, 1994 Sup. Ct. Rev. 1, 23 (stating that First Amendment doctrine “almost inevitably reflects a complex effort to balance competing interests, to promote a multiplicity of values, and to reach practically and symbolically acceptable results”); Laurence H. Tribe, *American Constitutional Law* § 12-1, at 792 (1988) (“The [First Amendment] ‘balancers’ are right in concluding that it is impossible to escape the task of weighing the competing interests . . .”).

Contrary to Respondents’ suggestion, neither the federal nor state free speech guarantees broadly entitle entertainment companies to flout antidiscrimination laws. Even with respect to the press, which performs a more overtly political function than the entertainment industry and is specifically mentioned by the First Amendment, the U.S. Supreme Court has stated: “It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems.” *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue* (1983) 460 U.S. 575, 581 (*Minneapolis Star & Tribune*). Thus, the Court has consistently held that the media:

. . . has no special immunity from the application of general laws. [A publisher] has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and nondiscriminatory taxes on his business.

Associated Press v. NLRB (1937) 301 U.S. 103, 132-33 (*Associated Press*).

A law limited to the media would “raise concerns about censorship of critical information and opinion” because it would suggest that the legislature intended to punish the press. *Leathers v. Medlock* (1991) 499 U.S. 439, 447.⁸ Laws of general applicability, by contrast, do not “single out the press” or “threaten to hinder the press as a watchdog of government activity.” *Id.*

The *Associated Press* court thus upheld a generally applicable labor law against a First Amendment challenge.⁹ The California Fair Employment and Housing Act (FEHA), Cal. Gov. Code § 12940 *et seq.*, like the law at issue in the *Associated Press* case, is a labor law. In neither case is there any evidence of legislative intent to punish or threaten the press. The fact that such laws might incidentally burden the speaker is not dispositive if the law is not targeted at expressive industries and is borne by all in society. As the United States Supreme Court stated in explaining why Title VII’s ban on sex discrimination, including sexual harassment, is consistent with the First Amendment, such laws are “directed not against speech but against conduct.” *R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 389; *see also* Jed Rubenfeld, *The First Amendment’s Purpose*, 53 *Stan. L. Rev.* 767 (2001). Thus, Respondents cannot obtain an exemption simply by showing that complying with the labor laws regarding discrimination would impose a burden on them.¹⁰ If entertainment and media companies have a First Amendment right to be free from burdens created by generally applicable laws, this new right would extend not just to Title VII, but to virtually any “burdensome” law such as other labor laws and tax and environmental regulations. The *Associated Press* court refused to open this Pandora’s Box and rejected the First Amendment claim of an “absolute and unrestricted freedom” to employ, discharge and mistreat employees involved in the creative process. *Associated Press*, 301 U.S. at 131. The Court refused to accede to the dissent’s desire to place the media in “a category apart” from other industries,

⁸ Because such laws single out the press, they must pass heightened scrutiny. *See, e.g., Minneapolis Star & Tribune*, 460 U.S. at 591-92; *Arkansas Writers’ Project, Inc. v. Ragland* (1987) 481 U.S. 221, 227-28.

⁹ The *Associated Press* had discharged an employee for joining a labor organization, which is protected activity under the National Labor Relations Act. *See* 301 U.S. at 123.

¹⁰ The Court’s free speech rule is consistent with its interpretation of the Free Exercise Clause, also housed in the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment, both of which permit government to enact laws that burden religious or racial groups so long as it does not act with the intent to harm such a group. *See Employment Div. v. Smith* (1990) 494 U.S. 872 (religion); *Washington v. Davis* (1976) 426 U.S. 229 (race). A contrary rule would privilege speech over the similarly fundamental constitutional interest in equality.

uniquely free to break general laws. *Id.* at 135 (Sutherland, J., dissenting).

California law is in accord. As this Court stated in *Shulman*, “the decisional law reflects a general rule of *nonprotection*: the press in its newsgathering activities enjoys no immunity or exemption from generally applicable laws.” 18 Cal.4th at 238 (emphasis in original). Whereas an attempt to punish Respondents for the content of *Friends* would be strongly suspect, the same constitutional presumption does not apply where the media breaks valid laws in the process of creating content. *See id.* at 240. For instance, creating a show about drug use surely would not entitle writers to get high in the writing room. Neither “status as members of the news media,” nor a creative “purpose” justifies methods that entail breaking general laws. *Id.*

The U.S. Supreme Court has confirmed that this same First Amendment rule applies to sexual harassment laws. Title VII and FEHA ban gender discrimination, whether that conduct is effectuated by acts, expression or a combination of the two, and this is wholly consistent with free speech protections. *See Aguilar*, 21 Cal.4th at 135 (“A statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity.”). Therefore, this Court declared in *Aguilar*,

[I]n *R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 389, the high court made this point explicit in discussing certain circumstances in which spoken words are not constitutionally protected, stating: “[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation’s defense secrets) . . . speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory ‘fighting words,’ among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices.’ *Id.*

Contrary to Respondents’ contention, this statement was not limited to so-called “fighting words,” a category of speech traditionally considered unprotected. The Court underscored that Title VII bans “sexually derogatory ‘fighting words,’ *among other words*” [emphasis added]. It thus validated the *entire scope* of Title VII’s ban on sexual harassment, which resembles the ban on sexual harassment embodied in FEHA.

The objective component of sexual harassment law, which requires severe and pervasive treatment, measured from the perspective of a

reasonable employee, “play[s] a crucial, mediating role in the effort to accommodate equality and dignitary interests without trampling on free speech values.” Fallon, *supra*, at 43-44. Courts have been careful not to impose liability for sexual harassment in the absence of a pattern of clearly pervasive and harmful speech. For instance, many courts have held that an isolated instance of offensive speech or conduct is insufficient to trigger liability. *See, e.g., Herberg v. California Inst. for the Arts* (2002) 101 Cal.App.4th 142 (*Herberg*).

Finally, even if the application of FEHA implicates the First Amendment incidentally, *cf. Shulman*, 18 Cal.4th at 242 (noting in dicta the possibility that general law might inflict an “impermissibly severe burden on the press”), if the factfinder agrees with the facts proffered by Lyle, any creative interest would be trumped by California’s compelling interest in gender equality. The U.S. Supreme Court has allowed impingements on First Amendment interests in a wide range of cases where the state’s goal was to advance gender or racial equality. *See Roberts v. U.S. Jaycees* (1984) 468 U.S. 609 (holding that any abridgment of U.S. Jaycees’ First Amendment associational interests created by a state antidiscrimination ordinance was justified by the state’s compelling interest in prohibiting gender discrimination); *see also Metro Broad. v. FCC* (1990) 497 U.S. 547 (upholding FCC diversity regulations over a First Amendment challenge), *overruled in part on other grounds by Adarand Constr. v. Peña* (1995) 515 U.S. 200; *Hishon v. King & Spalding* (1984) 467 U.S. 69 (rejecting law firm’s claim that First Amendment allowed it to discriminate against female candidate for partner); *Runyon v. McCrary* (1976) 427 U.S. 160 (rejecting private school’s claim of First Amendment-based exemption from § 1981’s ban on racial discrimination in contracting because “the Constitution places no value on discrimination . . . it has never been accorded affirmative constitutional protections” (quoting *Norwood v. Harrison* (1973) 413 U.S. 455, 470)).

California law also affirms that Lyle’s right to be free from gender discrimination in the workplace is a fundamental constitutional interest. *See Cal. Const. Art. I, § 8* (“A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex”); *Cal. Gov. Code § 12920* (finding it “necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of . . . sex”); *see also Fallon, supra*, at 44 (“[P]rotection against workplace harassment appears as essential both to human dignity and to equal employment opportunity as prohibitions against discriminatory hiring and unsafe working conditions.”). Thus, this Court, as it did

in *Shulman*, should strive to strike a sensitive balance between speech and equality. Because Respondents have failed to make a substantial free speech showing at this stage in the proceedings, as demonstrated by the next section, this Court should affirm the lower court and remand for trial.

RESPONDENTS' FAILURE TO CONNECT NUMEROUS INCIDENTS OF SEXUAL HARASSMENT TO THE DEVELOPMENT OF STORYLINES OR JOKES FOR THE SERIES REQUIRES REMANDING THIS CASE FOR TRIAL.

Just as Respondents' construction of the First Amendment is grossly unrefined, their attempt to connect the facts to their creative freedom argument is woefully incomplete. The crude expressions of sexuality in this case included numerous acts that lack any discernable connection to the First Amendment. Lyle cites incidents in which various male writers-supervisors repeatedly "pretended to masturbate in her presence." *Lyle*, 12 Cal.Rptr.3d at 515. Since simulated masturbation plainly would not be permitted on an 8 pm network television show, it is hard to see how this pervasive sexual practice did anything other than to allow the male writers to pursue their own personal gratification. *See id.* ("[N]o character on the show ever pantomimed masturbation"); CT 1705; 1706 ("We have not pantomimed masturbation on the show"); 1792; 1815. Similarly, male supervisors "made and displayed crude drawings of women's breasts and vaginas," including a coloring book that depicted "female cheerleaders with their legs spread apart." *Lyle*, 12 Cal.Rptr.3d at 517; CT 1656, 1658. Supervisors also would "alter[] the words on the scripts and other documents to create words such as 'tits' and 'penis.'" *Lyle*, 12 Cal.Rptr.3d at 517; CT 1819. On one occasion, a supervisor altered the words of a script to make it say "penis" and then told Lyle "this is the most important thing you'll learn on 'Friends.'" CT 1658. "[N]o character on the show ever . . . defaced calendars or documents to spell out slang words referring to sex." *Lyle*, 12 Cal.Rptr.3d at 521. Lyle's male supervisors also repeatedly referred to women as "cunts" and "twats." CT 4344. Such vile gender-based epithets—which would have violated FCC regulations if aired on *Friends*—plainly did nothing to advance the creative process. One supervisor "frequently" told female co-workers that "he wanted 'someone who could give him a good blow job.'" *Lyle*, 12 Cal.Rptr.3d at 516; CT 1656; 4341. Again, such personal requests have no obvious connection to a storyline or a joke that might be incorporated into the show. These are not instances of writers simply "doing their job," as Respondents' attorney argued. Christopher Noxon, *Television Without*

Pity, N.Y. Times, Oct. 17, 2004, at 2-34. Despite *Friends*' ten-year run, Respondents' brief mentions a mere handful of *Friends* storylines that involved vague sexual innuendo. See Respondents' Opening Brief at 9-10, 17-18. Notably, none of these few stories involves calling a woman a "cunt" or a "twat," a man asking a woman for a "good blow job," demeaning a woman's sexual organs as "dried up pussy," or anything of the sort. *Lyle*, 12 Cal.Rptr.3d at 516; CT 1659.

According to Respondents' logic, because an episode once alluded, however cryptically and timidly, to oral sex, the writers were perpetually permitted to discuss "blow jobs" in graphic detail and even personally request fellatio. Because the show featured female characters that were sexually active, the male writers were justified in discussing their personal fantasies of "fucking" the female (but not the male) stars and ridiculing one of the female actor's sex organs. See *Lyle*, 12 Cal.Rptr.3d at 516; CT 4344; 4355. Because the show indirectly referred to female sex organs, Respondents suggest, the male writers had a First Amendment right repeatedly to call a female co-worker a "cunt" in *Lyle*'s presence. This cannot be the case.

Even if it were not self-evident from the very nature of the above-mentioned harassment, the writers' practice of instructing *Lyle* *not* to record certain personal digressions demonstrates that they lack a reasonable nexus with the creative process. CT 1655 ("I was regularly told not to take notes about my supervisors' personal conduct because the comments had nothing to do with any story we were working on."); CT 2055 ("I was told many times not to type in certain things because [the writers] were just being boys in the locker room."); CT 4340. In this sense, the conduct was actually counterproductive. Moreover, the daily stream of sexual conduct was pervasive throughout the workplace, not just in the writers' room, the supposed locus of the creative writing process. See *Lyle*, 12 Cal.Rptr.3d at 515 (stating that harassment occurred in "common areas," including "hallways and [the] break room"); Respondents' Opening Brief at 11. This was a workplace in which the "no limits" approach to sexual expression was hardly restricted to the writers or their work space; there was no safe space for unconsenting female employees like *Lyle*. CT 1858; 1938 ("I don't really think there were limitations . . . I mean there weren't even limitations on really talking about work or the script . . ."). Respondents have utterly failed to show a discernable connection between multiple recurring incidents of workplace sexual harassment and the creative process of developing plots and jokes. Such gratuitous and exclusionary conduct, pursued for personal gratification rather than creative interests, does not fall within the purview of the First Amendment.

REPEATED GRATUITOUS SEXUAL HARASSMENT IN WRITERS' ROOMS, SUCH AS THE BEHAVIOR AT ISSUE HERE, MAINTAINS THE EXCLUSION OF WOMEN FROM A FIELD IN WHICH THEY ARE SUBSTANTIALLY UNDERREPRESENTED

The abovementioned sexual conduct not only failed to advance the creative process, it effectively maintained an exclusionary culture that systematically, if unintentionally, marginalizes female writers and writers' assistants. See Noxon, *supra*, at 2-1 (stating that "situation comedies are written by large groups of predominantly white guys—often under-socialized, smart-alecky guys"). If a show as innocuous and mainstream as *Friends*—which was broadcast during the 8 pm "family hour" and now airs even earlier in syndication—is granted a First Amendment right to subject female employees to sexual harassment, then virtually every employer in the entertainment industry will enjoy a similar constitutional exemption. Respondents' argument would essentially sanction this form of exclusion in the entire television writing sector.

The impact of this sexually coarse dialogue does not fall evenly on male and female employees. Women are substantially underrepresented in writing positions and other behind-the-scenes entertainment industry jobs. Recent statistics reveal a distinct and persistent gender disparity, with women (a statistical majority in the general public) constituting slightly more than one quarter of television writers. See William T. Bielby & Denise L. Bielby, *The 1998 Hollywood Writers' Report Executive Summary*, at 9 (1998), available at <http://www.wga.org/manual/Report/women.html> (reporting that 26% of writers are female); Noxon, *supra*, at 2-1 ("According to the Writers Guild of America, of the 1,576 writers who worked on network television programs in the 2002-2003 season, 425 were women."). "White males still account for 70% of those writing for television"—double their representation in the general public. Bielby & Bielby, *supra*, at 1.¹¹ Moreover, "there has been a consistent gender disparity in media earnings among television writers." Bielby & Bielby, *supra*, at 2. This is in part because "[i]n each sector of the television industry women writers are more likely than men to be freelancers and less likely to be staff writers or writer-producers." *Id.* at 3. As a Warner Brothers executive vice president further explained, industry decision makers "always thought

¹¹ Female underrepresentation in film production is even worse than in television. See Lisa Hirsch, *Slender Gender Gain*, at www.variety.com (reporting study that found women made up just 13% of the writers, 6% of directors and 2% of cinematographers of the top 250 highest-grossing films of 2003). The problems are intertwined, as writers often work in television first and then break into film.

that only men could write for men and women could write for women.” Lisa Hirsch, *Slender Gender Gain*, available at www.variety.com. Female writers, as a result, face considerable cultural obstacles when they attempt to integrate traditionally-male writers’ rooms.

People of color, like Lyle, also are underrepresented and marginalized in the television writing field. “[M]inority writers accounted for just 3% of those who received credits on ABC, CBS, and NBC series.” Bielby & Bielby, *supra*, at 6. Eighty percent of the shows on the major networks have no writer of color or one token writer of color. *See id.* People of color who manage to secure writer jobs obtain very few opportunities beyond the genre of urban comedies, and given this perceived lack of versatility their jobs are “extremely vulnerable to changes in programming strategies.” *Id.* As a woman of color trying to break into the television writing business, Lyle was subject to dual forces of exclusion. *See generally* Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. Cal. L. Rev. 1467, 1468 (1992). This exclusion was both manifested by and likely exacerbated by her requests that the writers integrate the all-white *Friends* cast by creating an African-American character.

Because male writers numerically dominate, especially among show runners, and thus are invariably in control, they dictate the form of the sexualized expression in the writers’ room, which is consistently misogynistic. To view the writers’ room as a free space where anyone—male or female—can pipe in with her individualistic perspective on sexual issues would be to ignore the underrepresentation of women and male-dominated industry culture. Women working in such environments are caught in a double bind. If they reveal that they are offended by crude sexual conduct, they will be marginalized and have difficulty advancing. If they engage in the same sort of sexual conduct and try to “outgross” the guys, they transgress gender norms and risk being punished by their male colleagues for being aggressive and lacking femininity. *See Price Waterhouse v. Hopkins* (1999) 490 U.S. 228, 251 (“An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.”); *see also* Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination*, 83 Tex. L. Rev. 167, 197 (2004) (“Vulgarity in women is shocking and disturbing in a way that vulgarity in men is not.”). Respondents’ assertion that “[t]his case does not involve workers who pepper their speech with vulgarity to intimidate other employees” misses the mark. Respondents’ Opening Brief at 5. In the context of an employment setting historically and

presently dominated by men, those men's habit of calling women "cunts" and "twats" and simulating masturbation, among other offensive gender-based conduct, would intimidate many reasonable women. The court need not engage in some inquiry into the subjective mindset of Lyle's supervisors in order to see this conduct as a form of discrimination. See, e.g., Ken Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 Univ. Ill. L. Rev. 95, 130 (describing sexual harassment as a form of "systematic subordination in the workplace" that "communicate[s] to men and women alike the view of woman as object," even as it is often invisible to those who practice it). The "strong industry culture," "low representation of women and minorities in decision-making positions" and "highly subjective" nature of hiring and promotion combine to entrench institutional barriers to the advancement of female writers. Bielby & Bielby, *supra*, at 9.

In *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 617, the Supreme Court relied on similar workplace power dynamics in upholding speech regulations in the labor context. The Court stressed that:

. . . any assessment of the precise scope of employer [free speech rights] must be made in the context of its labor relations setting. . . . And any balancing of those rights must take into account the economic dependence of the employees, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. *Id.*

In the present case, the television industry's exclusion of female writers and male-dominated, sexually oriented culture is an indispensable aspect of the context that this Court should take into account in weighing the respective rights.

ADOPTING RESPONDENTS' BROAD "CREATIVE NECESSITY" ARGUMENT WOULD PREVENT APPLYING STATE AND FEDERAL ANTIDISCRIMINATION LAWS TO EMPLOYERS IN NUMEROUS INDUSTRIES

Respondents' incredibly broad First Amendment argument, if followed to its natural extension, would cut a wide swath out of antidiscrimination protections and harm women, people of color and other groups subject to discrimination. Respondents assert that they have no obligation to show a connection between their sexual conduct and legitimate creative interests. "The boundary between the creative process and 'personal motives' is impossible to discern," they claim. Respondents' Opening Brief at 58. Moreover, Respondents seek to defend

their discriminatory treatment of women by invoking not just the creative interests of the vast entertainment industry but “all communicative workplaces.” *Id.* at 3. They define such workplaces, which “produce[] or support[] the production of expression that is ordinarily protected by the First Amendment,” *id.* at 3 n.1, to include museums, art galleries, newspapers, universities, bookstores and theatres, *id.* at 3 n.1, & 6. By this logic, one must also include all forms of media and internet companies and all advertising and marketing companies and departments within companies. Under this sweeping view of the First Amendment, millions of women working in such fields would be required to endure crude sexual expression and conduct—so long as the woman could not prove that such behavior was “directed” exclusively at her. *See Respondents’ Brief* at 28.¹² Furthermore, Respondents offer no logic to limit this rollback of discrimination protections to women. Accordingly, people of color, who like Lyle can assert a racial harassment claim under FEHA, would also be subject to this new First Amendment rule.¹³ A manager could call a former employee a “nigger” so long as he “directed” it to an audience of both white and African-American employees. A boss would be free to call women “cunts” so long as he did not refer specifically to one female employee with that word. Similarly, a professor could wax on regularly in class about his search for a “good blow job” (like Lyle’s boss), indifferent to the impact of such comments on young female students seeking to obtain an education.

Respondents would not require any more specific showing before permitting free speech to thwart antidiscrimination protections. One could imagine a strong First Amendment claim where an editor used the term “cunt” in the context of putting together a story on incidents of sexual harassment. Additionally, a professor teaching a class on human sexuality in general should be allowed to discuss sex in class much more frankly and regularly than a professor teaching basket weaving. But even here, the court would have to examine the totality of the circumstances in order to ensure that the speaker did not use the setting as a pretext to level a gratuitous gender-based attack at a colleague or student. Respondents’ free speech argument fails in that it ignores the very factor that the court below underscored as incorporating protection for First Amendment rights: “the context in which the

¹² Although we find Respondents’ proposed test—which would ban only harassment that is “directed at” a particular plaintiff—to be vague and unworkable, we focus here on Respondents’ First Amendment defense.

¹³ Respondents concede as much in asking the Court to adjudicate summarily Lyle’s racial harassment claim “based on the same statutory and constitutional analysis as Lyle’s sexual harassment claim.” Respondents’ Opening Brief at 6-7 n.2.

sexually harassing conduct occurred.” *Lyle*, 12 Cal.Rptr.3d at 516. Based on a careful examination of context, the same Court of Appeal division that decided this case rejected a FEHA hostile work environment harassment claim brought by an elderly female employee who was depicted performing a sexual act in a student work of art displayed in a college art gallery. See *Herberg*, 101 Cal.App.4th at 153-154. The court rejected the defendants’ request for a blanket First Amendment exemption from antidiscrimination laws, yet it went on to conclude that the context of the gallery (and the absence of unrelated instances of sexual harassment) demonstrated the legitimacy of the artistic display. Accordingly, the court concluded, it was not harassment. See *id.* at 154 n.12. The court noted a “vast difference between posting obscene cartoons in a men’s room . . . and the display of *The Last Art Piece* in the designated gallery area at an art school.” *Id.* A context-sensitive approach, therefore, is sufficient to take into account legitimate creative concerns. Such a narrow, fact-specific method is precisely the approach adopted by the U.S. Supreme Court in its media cases and endorsed by this Court in *Shulman*. See, e.g., *Bartnicki v. Vopper* (2001) 532 U.S. 514; *Florida Star v. B.J.F.* (1989) 491 U.S. 524; *Cox Broad. Corp. v. Cohn* (1975) 420 U.S. 469; see also *Shulman*, 18 Cal.4th at 216-218.

This Court should reject Respondents’ request for a de facto repeal of civil rights protections. Respondents’ free speech argument would create a world in which a vast segment of society, including all educational and media organizations, is exempt from antidiscrimination laws. This Court should affirm the court below and remand for trial.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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Respectfully submitted,

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