

June 16, 2004

VIA MESSENGER

Chief Justice Ronald M. George
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-7303

Re: *Lyle v. Warner Brothers Television Production et al.*, No. S125171
Letter Supporting Petition for Review Filed by Defendants and Respondents

To Chief Justice George and the Associate Justices of the California Supreme Court:

On behalf of the Center for Individual Rights, the Foundation for Individual Rights in Education, and the National Association of Scholars, we write to support the petition for review filed by the Defendants and Respondents (collectively “Warner Bros. TV”) in the above-referenced case.

**I.
INTERESTS OF AMICI CURIAE**

The Center for Individual Rights (“CIR”) is a non-profit public interest law firm. CIR was founded in 1989 to provide free legal representation to deserving clients who cannot otherwise afford legal counsel. CIR has been counsel of record in many notable First Amendment cases, including *Rosenberger v. Rector & Visitors of the Univ. of Va.* (1995) 515 U.S. 819 [115 S.Ct. 2510, 132 L.Ed.2d 700]; *Iota Xi Chapter v. George Mason University* (4th Cir. 1993) 993 F.2d 386 and *Silva v. University of New Hampshire* (D.N.H. 1994) 888 F.Supp. 293 (*Silva*). CIR is one of the few public interest law firms that regularly represents students and professors whose First Amendment rights are infringed by administrators.

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

The National Association of Scholars (“NAS”) is an organization comprising professors, graduate students, administrators, and trustees at accredited institutions of higher education throughout the United States. NAS has more than 4,300 members, organized into 46 state affiliates, and includes within its ranks some of the nation’s most distinguished and respected scholars in a wide range of academic disciplines. The purpose of NAS is to encourage, to foster, and to support rational and open discourse as the foundation of academic life. More particularly, NAS seeks, among other things, to support the freedom to teach and to learn in an environment without politicization or coercion, to nourish the free exchange of ideas and tolerance as essential to the pursuit of truth in education, to maintain the highest possible standards in research, teaching, and academic self-governance, and to foster educational policies that further the goal of liberal education.

II. INTRODUCTION

In this letter supporting Warner Bros. TV’s petition for review, amici make two points. First, it is time for this Court to address the important concerns raised by the clash between “hostile work environment” employment claims and the freedom of speech guaranteed by the First Amendment of the United States Constitution (as well as by the California Constitution). Second, if allowed to stand, the Court of Appeal’s decision will chill a great deal of protected speech — much of it with a political or pedagogical purpose — on university campuses throughout California. Because of its notoriety, the opinion is likely to have a chilling effect even if the Court ordered the opinion depublished.

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

III.

THIS COURT SHOULD GRANT REVIEW TO ADDRESS THE CLASH BETWEEN HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT CLAIMS AND THE FIRST AMENDMENT

For over a decade, courts and scholars have noted that “hostile work environment” anti-harassment laws raise First Amendment concerns because such laws seek to regulate speech based upon its content.¹ Cases in this area invoke competing interests. On the one hand, laws limiting speech based upon content are subject to strict scrutiny and usually struck down. (See *Texas v. Johnson* (1989) 491 U.S. 397, 414 [109 S.Ct. 2533, 2545, 105 L.Ed.2d 342, 360] [“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”].) On the other hand, the government has a strong interest in eliminating discrimination on the basis of sex or race in the workplace.

In this case, the Court should grant review and conclude that the balance must be struck on the side of protecting freedom of expression guaranteed by the First Amendment for two reasons: (1) the sexually-themed expression at issue in this case occurred in a “communicative workplace,”² where communications raising sexual issues

¹ The scholarly work includes: Balkin, *Free Speech and Hostile Environments* (1999) 99 Colum. L.Rev. 2295; Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment* (1991) 52 Ohio St. L.J. 481; Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark* (1994) 1994 Sup. Ct. Rev. 1 (hereafter Fallon); Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment* (1993) 68 Notre Dame L.Rev. 1003; McGowan, *Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment is Wrong* (2002) 19 Const. Commentary 391 (hereafter McGowan); Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight* (1995) 47 Rutgers L.Rev. 461; Strauss, *Sexist Speech in the Workplace* (1990) 25 Harv. C.R.-C.L. L.Rev. 1; Volokh, *How Harassment Law Restricts Free Speech* (1995) 47 Rutgers L.Rev. 563; Comment, *Freedom of Speech and Workplace Harassment* (1992) 39 UCLA L.Rev. 1791 (hereafter Comment).

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

² “A ‘communicative workplace’...produces or supports the production of expression that is itself ordinarily protected by the First Amendment,” such as a museum, art gallery, newspaper, or concert hall. (McGowan, *supra*, 19 Const. Commentary at p. 393, fns. omitted.) A classroom naturally would be included in this list.

were an integral part of the nature of being employed on a television show that often featured sexual themes; and (2) the complained-of speech was not directed at the plaintiff nor was it spoken for the purpose of harassing or intimidating the plaintiff. To balance the interests here in favor of anti-harassment law and against the First Amendment would cast a chill over creative expression and protected speech at workplaces as diverse as theaters, universities, bookstores, and even courts.

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

The United States Supreme Court has indicated in dicta that a narrow type of sexual harassment claim is consistent with the First Amendment. In *R.A.V. v. City of St. Paul, Minn.*, *supra*, 505 U.S. at pp. 389-390, the Court stated that Title VII’s prohibition on sexual discrimination in employment practices is consistent with the First Amendment “[w]here the government does not target conduct on the basis of its expressive content.” The *R.A.V.* Court gave the example of “sexually derogatory ‘fighting words’” as unprotected by the First Amendment. As the United States Court of Appeals for the Third Circuit explained in *Saxe v. State College Area School Dist.*, *supra*, 240 F.3d at p. 208, *R.A.V.* suggests that “government may constitutionally prohibit speech whose *non-expressive* qualities promote discrimination.” (See also *ibid.* [“*R.A.V.* . . . does not necessarily mean that anti-discrimination laws are categorically immune from First Amendment challenge when they are applied to prohibit speech solely on the basis of its expressive content”].) Beyond this narrow point, the Supreme Court has been silent.

In contrast, lower courts have held that the First Amendment limits application of racial and sexual harassment policies at universities precisely because such policies can chill protected expression. See, for example, *Cohen v. San Bernardino Valley College* (9th Cir. 1996) 92 F.3d 968 (*Cohen*) [college’s sexual harassment policy unconstitutionally vague as applied to professor]; *Dambrot v. Central Michigan University* (6th Cir. 1995) 55 F.3d 1177, 1182-1184 [racial and ethnic anti-harassment policy at university unconstitutionally overbroad]; *Iota Xi Chapter v. George Mason University* (4th Cir. 1993) 993 F.2d 386 [First Amendment bars punishing university students for “ugly woman contest”]; see also *Saxe v. State College Area School Dist.*, *supra*, 240 F.3d 200 [school district anti-harassment policy unconstitutionally over broad].

This Court has not squarely addressed the First Amendment question. In *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121 (*Aguilar*), this Court did not reach the “broad” First Amendment question raised by hostile work environment claims, (*id.* at

p. 131, fn. 3), in part because of the inadequate factual record presented by the *Aguilar* petitioners. (See *Avis Rent A Car System, Inc. v. Aguilar* (2000) 529 U.S. 1138, 1143 [120 S.Ct. 2029, 2033, 146 L.Ed.2d 971, 974] [Thomas, J., dissenting from the denial of a writ of certiorari, “My colleagues are perhaps dissuaded from granting certiorari by the paucity of lower court decisions addressing the First Amendment implications of workplace harassment law, and by the incomplete factual record in this case”].) It is time for this Court to address these issues head-on, in a case such as this one with a fully developed factual record.

Employers in California, particularly those in academic environments and other communicative workplaces, need guidance from this Court over the proper balance between anti-harassment law and the First Amendment. There is broad agreement that the First Amendment limits at least some anti-harassment law, but the precise contours of the boundary between permissible and impermissible speech remain unclear. As Justice Thomas noted in his dissent from the U.S. Supreme Court’s decision not to take up the *Aguilar* case following this Court’s fractured decision, “it is not surprising that even those commentators who conclude the First Amendment generally permits application of harassment laws to workplace speech recognize exceptions where First Amendment interests are especially strong.” (*Avis Rent A Car System, Inc. v. Aguilar, supra*, 529 U.S. at p. 1141.) As we now show, the First Amendment interests are especially strong in this case.

IV. **THE COURT OF APPEAL’S DECISION, IF ALLOWED TO STAND, WILL CHILL IMPORTANT AND CONSTITUTIONALLY PROTECTED SPEECH AT UNIVERSITIES**

The Court of Appeal held that plaintiff, a writers’ assistant on a television show, could pursue a “hostile work environment” sexual harassment claim based solely upon *hearing* workplace-related speech with sexual themes. (Of course, the male employees working in the same room also heard the same speech, so it is difficult to understand how plaintiff possibly could have been treated differently on the basis of her sex.) In its petition for review, Warner Bros. TV amply demonstrates the unconstitutional chill that the Court of Appeal’s decision, if allowed to stand, will cast over the entertainment industry and other communicative workplaces. How will it be possible to write, produce, film, or stage any work with sexual content—content that is fully protected by the First Amendment — without opening oneself up to a lawsuit for sexual harassment? The issue is especially troubling because a great deal of entertainment with sexual content carries a political message as well, as viewers of the plays “Hair” or “The Vagina Monologues” can attest.³

³ Indeed, in the recent “cross-burning” case of *Virginia v. Black*, the United States Supreme Court noted that “[c]ross burnings have appeared in movies such as Mississippi

We write here to explain how the chill created by the Court of Appeal’s decision will affect speech in universities, which are of course paradigmatic communicative workplaces: universities are “organized around the purpose of communicating an idea or message, sparking conversation, argument, or thought among [the academic community], [and] providing a place for [members of the academic community] to engage in conversation.”⁴

Offending sexually-themed speech in a workplace that is directed at another person for the purpose of harassing that person may create liability for sexual harassment consistent with the First Amendment. But this case concerns *undirected* speech of a sexual nature that is part and parcel of the communicative purpose of the workplace. Such speech deserves full First Amendment protection (see *U.S. v. X-Citement Video, Inc.* (1994) 513 U.S. 64, 72 [115 S.Ct. 464, 469, 130 L.Ed.2d 372, 381-382]), protection the Court of Appeal took away in this case.

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

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

Indeed, to the extent that the Unruh Civil Rights Act, Civil Code section 51, applies to universities (see *Davison v. Santa Barbara High School Dist.* (C.D.Cal. 1998)

Burning, and in plays such as the stage adaption of Sir Walter Scott’s *The Lady of the Lake*.” (*Virginia v. Black* (2003) 538 U.S. 343, 366 [123 S.Ct. 1536, 1551, 155 L.Ed.2d 535, 556].) Should an offended stagehand be able to bring a racial hostile work environment claim based upon cross-burning occurring on the set of these productions?

⁴ *McGowan, supra*, 19 Const. Commentary at p. 393.

48 F.Supp.2d 1225, 1232-1233), a *student's* objection to the sexually-themed speech will be enough to create the potential for liability.⁵ Because the Unruh Act bans discrimination even against “individuals who wear long hair, or unconventional dress, . . . who are members of the John Birch Society, or who belong to the American Civil Liberties Union” (*In re Cox* (1970) 3 Cal.3d 205, 217-218), the chill could extend far beyond speech with sexual themes, or racial or religious themes, for many other persons may claim harassment based upon their personal characteristics.

And, of course, under the Court of Appeal's ruling, professors, staffers and others can sue over *student* speech and expression, creating a de facto mandatory speech code for all universities. (See *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142 (*Herberg*) [treating a university as potentially liable for student speech]; Gov. Code, § 12940, subd. (j)(1) [holding employers explicitly responsible for “the acts of nonemployees, with respect to sexual harassment of employees . . . where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action”].) Sexually-themed student expression may occur not only in the classroom, but also in student newspapers, on leaflets posted on campuses, and, as we know from *Herberg*, in student art displayed at university galleries.

The Court of Appeal's purported solution to the inevitable First Amendment chill created by its decision is no solution at all. It would allow hostile sexual environment cases to go to a jury under a defense that the offending speech was sufficiently workplace-related. (*Lyle v. Warner Brothers Television Production* (2004) 117 Cal.App.4th 1164, 1175 [recognizing “creative necessity” defense].) Defendants would have to demonstrate that each offensive statement “was within ‘the scope of necessary job performance’” and “not engaged in for purely personal gratification or out of meanness or bigotry or *other personal motives*.” (*Id.* at p. 1177, emphasis added.) The court's “personal motive” test is problematic on two levels. First, the jury will be required to discern the motive for sexually related comments in a context where the boundary between the creative process and “personal motives” is impossible to discern. Second, the test creates a potential for liability far broader than currently exists, including cases in which a worker's comments are not directed at the plaintiff.

The court's improper resolution of this issue will require an employer to gamble on a favorable outcome before a jury, a jury that will hear sexually-themed speech

⁵ Federal Titles VI and IX apply to almost all universities as well, and thus also make hostile racial or sexual atmospheres actionable by students. In this regard, cases such as *Cohen, supra*, 92 F.3d at p. 968 and *Silva, supra*, 888 F.Supp. at p. 293 have recognized the importance of First Amendment principles even where an instructor's speech is said to create a hostile atmosphere.

outside the communicative workplace context in which it was made. The inevitable result of such a system of speech regulation will be university (and other employer) directives to curtail much sexually-themed speech. (See *Volokh, supra*, 47 Rutgers L.Rev. at p. 568 [an employer’s lawyer faced with a client whose employee feels harassed by a coworker’s sexual political statements would “be committing malpractice if [he] didn’t tell the client to shut the offending employee up. The downside of letting the employee talk is uncertain, but possibly huge” (footnote omitted)].)

The “creative necessity” test has yet another weakness: by protecting expression only when it is actually “necessary,” students, professors, and others may censor themselves whenever someone might think that some sexual (or religious or racial) reference isn’t really “necessary” to the topic. That sort of self-censorship will interfere with the creativity, spontaneity, and freedom that is needed for universities — or for writers’ offices — to function.

The concerns expressed here are far from hypothetical. Consider *Herberg, supra*, 101 Cal.App.4th 142, a case decided by the same Court of Appeal division as the case at bar. In *Herberg*, the Court of Appeal expressly rejected the argument — in a footnote, just as the Court dismissed First Amendment concerns in *Lyle* — that the First Amendment protected the California Institute of the Arts from a hostile work environment claim based upon a sexually-oriented drawing by CalArts students displayed as part of a year-end exhibition of student art in CalArts’ main gallery. (*Id.* at p. 154, fn. 12.) The institute, fearing liability, had removed the picture within 24 hours after it was posted.

The *Herberg* Court of Appeal rejected the sexual harassment claim solely on the ground that the display of a single picture for 24 hours did not create a severe or pervasive hostile work environment even though the picture included a sexually explicit drawing of one of the plaintiffs. However, the panel’s opinion strongly suggests that the university was right to fear liability, since it might well have been held liable if the painting hadn’t been taken down. Cases such as *Lyle* and *Herberg* send a message to universities: If you want to avoid the risk of liability, and of expensive litigation, you had better censor speech promptly.⁶

⁶*Herberg* involved speech that was *about* the plaintiff; but given that *Lyle* allows liability even for speech that is *not* about the plaintiff, the cases together tell universities that they can be held liable any time they display any material — including student art projects — that some people may find sexually offensive, even when is not at all about them.

V.
CONCLUSION

For the foregoing reasons, this Court should grant Warner Bros. TV's petition for review and reverse the judgment of the Court of Appeal to the extent it permitted plaintiff's hostile work environment sexual harassment claim to go forward to trial. It should hold that undirected sexually-themed speech in communicative workplaces such as writers' rooms and universities is protected by the First Amendment and the California Constitution against hostile work environment claims.⁷

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⁷Alternatively, the Court should reverse the judgment of the Court of Appeal on the statutory grounds raised by Warner Bros. TV in its petition for review. Courts have a duty to avoid construing statutes in ways that raise serious constitutional problems, and to adopt a narrower reading of the statute if it is plausible. (*DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const.* (1988) 485 U.S. 568, 574 [108 S.Ct. 1392, 1397, 99 L.Ed.2d 645, 654]; see also Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(E) [California's Fair Employment and Housing Commission has admonished that "[i]n applying [sexual harassment regulations], the rights of free speech and association shall be accommodated".])