No. S125171

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

AMAANI LYLE, Plaintiff and Appellant, vs. WARNER BROTHERS TELEVISION PRODUCTIONS, *et al.*, Defendants and Respondents.	2D Civ. No. B 160528 Los Angeles County Superior Court No. BC239047 **WORD COUNT: 1,214** **ALLOWED: 14,000**

Review After Judgment Of The Court Of Appeal,
Second Appellate District, Division Seven
(Justice Dennis M. Perluss, Presiding Justice)

AMICUS CURIAE BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION; AND PUBLISHERS MARKETING ASSOCIATION

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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

LYLE AMAANI,

Plaintiff and Appellant,

vs.

WARNER BROTHERS TELEVISION PRODUCTIONS, et al.,

Defendants and Respondents.

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Amici Curiae American Booksellers Foundation for Free Expression; Association of American Publishers, Inc.; Comic Book Legal Defense Fund; Freedom to Read Foundation; and Publishers Marketing Association (collectively, "Amici"), respectfully submit this Amicus Curiae Brief in support of Defendants and Respondents Warner Brothers Television Productions, Bright, Kauffman, Crane Productions, NBC Studios, Inc., Todd Stevens, Adam Chase, Gregory Malins and Andrew Reich (collectively, "Defendants"). Amici represent book publishers, booksellers, librarians, and publishers and retailers of comic books.

For the reasons set forth below, Amici urge this Court to reject the Court of Appeal's decision, which imposes liability for sexual harassment based on a judge and/or jury's judgment, after the fact, as to whether statements made during the

creative process, which were neither directed to nor about the plaintiff, were "necessary" to the creative process.

The decision of the Court of Appeals threatens the ability of authors and book editors to create works of literature and non-fiction with a free exchange of ideas and information during the creative and editorial process. It also threatens booksellers and librarians, represented by Amici American Booksellers Foundation for Free Expression and the Freedom to Read Foundation, with a diminution of works addressing sensitive topics, because of the chilling effect that the Court of Appeal's approach would cause.

In order to avoid unnecessarily burdening the Court, Amici incorporate by reference herein the Statement of Facts and legal arguments made by Amici California Newspaper Publishers Association, et al. in their Amici Brief. However, Amici write separately herein to emphasize the particular threat posed by the Court of Appeal's "necessity" standard on the creators and disseminators of works of non-fiction and fiction. For the reasons discussed below, Amici respectfully request this Court to reverse the Court of Appeal and reinstate the trial court's decision.

REQUIRING AUTHORS AND EDITORS TO PROVE THE "NECESSITY" OF PORTIONS OF THE CREATIVE PROCESS VIOLATES THE FIRST AMENDMENT

The creative process is, by definition, creative, which is to say that by its nature it is unique to the respective authors and editors involved. Some authors work in solitude; others work in groups, as did defendants in this case. Some spend days on a few words; others create as if the words were a flowing stream. Often, when there is more than one author, the interplay may become heated, rowdy or

unruly. The same may be true of the interplay among authors and editors. To require the participants to justify after the fact the "necessity" of minor segments of the creative process represents a misunderstanding of the creative process. That process usually includes many dead ends that are not reflected in the final work. But the dead ends are part of creating the final work; the fact that one approach or suggestion is not productive is part of the process of creatively reaching the end result. In that sense the dead ends, as well as everything else in the creative process, are necessary.

The protection of published speech by the First Amendment does not turn on whether the speech is necessary. As this Court has previously recognized, "The standard … is not necessity." Shulman v. Group W. Prod., Inc., 19 Cal. 4th 200, 209 (1998) (argument that disclosure of identity not "necessary" does not support claim for public disclosure of private facts). Certainly the same must be and is true as to speech that is part and parcel of the creation of the finally produced and published materials. Indeed, this Court as well as the United States Supreme Court have repeatedly held that the First Amendment protects the creative and editorial exercise against government intrusion and the imposition of penalties. See, e.g., Hannegan v. Esquire, Inc., 327 U.S. 146, 159 (1946) (second-class mailing privileges cannot be denied on the government's determination "whether the contents meet some standard of the public good or welfare"); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952) (Invalidating licensing scheme prohibiting "sacrilegious" films, because "it is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in

publications, speeches, or motion pictures."); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973); Shulman v. Group W. Prod., Inc., supra.

Amici's members publish and distribute a broad range of materials — some serious, some humorous, some educational, some entertaining. Many deal with sensitive issues which might be the subject of a sexual harassment or other discrimination claim:

* Jon Stewart's **America (The Book)**, which like "Friends," was written by a group, the TV writers from *The Daily Show*
* Benshoff, **Monsters in the Closet: Homosexuality and the Horror Film**
* Timothy Greenfield-Sanders and Gore Vidal, **XXX: 30 Porn Star Portraits**
* Madonna, **Sex**
* Mappelthorpe, Celant and Ippolitov, **Robert Mapplethorpe and the Classical Tradition: Photographs and Mannerist Prints**

The decision of the Court of Appeal potentially reaches back into the process of creation of each of these works and inserts the uncreative hand of the law into the creative process.

This governmental intrusion is not limited to the creation of the work, however. The Court of Appeal's sweeping definition of "hostile work environment," including speech neither directed at nor about the complainant, could also be extended to reach the physical production and distribution of the First Amendment-protected works, as to which no "necessity" defense may be available. The theory of the Court of Appeal could well impose liability on printers printing books featuring photographs by a nationally acclaimed photographer of nudes or discussing

homosexuality, or on retailers selling such materials, when objected to by an employee of the printer or retailer. (These are not hypothetical examples; they are actual situations which have been faced by Amici's members.) And First Amendment protections are not fulfilled unless the speech can be produced and distributed.

In sum, the potential chilling effect of the Court of Appeal's "necessity" test is deeply troubling. Whether it dampens the creative spirit and thus limits full and open discussion in the ultimately published work, or whether it results in certain emotionally charged topics not being written about at all, rights protected by the First Amendment will have been intruded upon. Books will not be written or will not be what they could have been; booksellers' and librarians' stock will not be what it could have been. And our society will have been shortchanged by this incursion on First Amendment rights.

CONCLUSION

For the foregoing reasons, Amici respectfully request this Court to reverse the order of the Court of Appeal and reinstate the decision of the trial court in favor of defendants.

February 4, 2005

By _____

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