Case No. S265223

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TWANDA BAILEY

Plaintiff, Appellant, and Petitioner,

v.

SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE, GEORGE GASCON, CITY & COUNTY OF SAN FRANCISCO,

Defendants and Respondents.

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF LEGAL AID AT WORK; ACLU FOUNDATION OF NORTHERN CALIFORNIA, BET TZEDEK LEGAL SERVICES, CENTER FOR WORKERS' RIGHTS, EARTHLODGE CENTER FOR TRANSFORMATION, EQUAL JUSTICE SOCIETY, IMPACT FUND, MAINTENANCE COOPERATION TRUST FUND, NATIONAL EMPLOYMENT LAW PROJECT, AND WORKSAFE IN SUPPORT OF PLAINTIFF AND APPELLANT TWANDA BAILEY; PROPOSED *AMICI CURIAE* BRIEF OF LEGAL AID AT WORK ET AL. IN SUPPORT OF PLAINTIFF AND APPELLANT

First Appellate District, Division One, No. A153520
Appeal from the Summary Judgment
San Francisco Superior Court, No. CGC 15-549675
The Honorable Harold Kahn

Stacy Villalobos, State Bar No. 306710
Christopher Ho, State Bar No. 129845
LEGAL AID AT WORK
180 Montgomery Street, Suite 600
San Francisco, CA 94104
Telephone: (415) 864-8848
Facsimile: (415) 593-0096
E-Mail: svillalobos@legalaidatwork.org
cho@legalaidatwork.org
Attorneys for *Amici Curiae*

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, I hereby certify that no entity or person has an ownership interest of 10 percent or more in proposed *amici curiae*. I further certify that I am aware of no person or entity, not already made known to the Justices by the parties or other *amici curiae*, having a financial or other interest in the outcome of the proceedings that the Justices should consider in determining whether to disqualify themselves, as defined in Rule 8.208(e)(2).

Executed on August 2, 2021, at Los Angeles, California.

Stacy Villalobos
Christopher Ho
Legal Aid at Work

Attorneys for *Amici Curiae*

I. INTRODUCTION

The following workers' and civil rights organizations hereby apply for leave to file a brief as *amici curiae* in support of plaintiff-appellant's request for reversal of the Court of Appeal's decision affirming a grant of summary judgment for the defendants on plaintiff's hostile work environment claim: Legal Aid at Work, ACLU Foundation of Northern California, Bet Tzedek Legal Services, Center for Workers' Rights, Earthlodge Center for Transformation, Equal Justice Society, Impact Fund, Maintenance Cooperation Trust Fund, National Employment Law Project, and Worksafe.

We ask the Court to clarify and reaffirm that a coworker's one-time use of the n-word may give rise to a triable issue of fact under the California Fair Employment and Housing Act ("FEHA").

II. STATEMENTS OF INTEREST

Amici curiae represent low-wage workers of color, and have frequently prosecuted employment discrimination violations. A brief description of the work and mission of each of the *amicus curiae*, explaining our interest in the case, is as follows:

Legal Aid at Work

Legal Aid at Work ("Legal Aid") (formerly known as the Legal Aid Society – Employment Law Center) is a San Francisco-based, non-profit public interest law firm that has for decades advocated on behalf of the workplace rights of members of historically underrepresented communities, including persons of color, women, immigrants, individuals with disabilities, and the working poor. Founded in 1916 as the first legal services organization west of the Mississippi, Legal Aid has litigated numerous cases involving the rights of Black workers and other workers of color. Legal Aid

frequently appears in state and federal courts to promote the interests of low-wage workers both as counsel for plaintiffs and as *amicus curiae*. Legal Aid has appeared in numerous cases before this Court, including: *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, as modified (Feb. 10, 2010); *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203; *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407; *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, as modified on denial of reh'g (Mar. 15, 2017); and *Vazquez v. Jan-Pro Franchising International, Inc.* (2021) 10 Cal.5th 944. Legal Aid also represents workers facing discrimination and harassment before the California Department of Fair Employment and Housing ("DFEH").

ACLU Foundation of Northern California

The ACLU Foundation of Northern California is a regional affiliate of the ACLU, a national nonprofit, nonpartisan organization dedicated to furthering the principles of liberty and equality embodied in the U.S. Constitution and this Nation's civil rights laws. For decades, the ACLU Foundation of Northern California has advocated to advance economic and racial justice for all Californians. The ACLU Foundation of Northern California has participated in cases, both as direct counsel and as amicus, involving the enforcement of constitutional guarantees of equal protection and due process for Black Americans.

Bet Tzedek Legal Services

Bet Tzedek –Hebrew for the "House of Justice"– was established in 1974, and provides free legal services to seniors, the indigent, and the disabled. Bet Tzedek represents Los Angeles County residents on a non-sectarian basis in the areas of housing, welfare benefits, consumer fraud, and employment. Bet Tzedek's Employment Rights Project assists low-wage workers through a combination of individual representation before the Labor

Commissioner and DFEH, litigation, legislative advocacy, and community education. Bet Tzedek's interest in this case comes from 20 years of experience advocating for the rights of low-wage workers in California. As a leading voice for Los Angeles's most vulnerable workers, Bet Tzedek has an interest in ensuring that every workplace is free of harassment and discrimination.

Center for Workers' Rights

The Center for Workers' Rights is a Sacramento-based, non-profit legal and advocacy organization whose mission is to create a community where workers are respected and treated with dignity and fairness. To bring that vision into reality, we provide legal representation to low-wage workers, advocate for initiatives to advance workers' rights, and promote worker education, activism, and leadership in the greater Sacramento area. The Center for Workers' Rights advocates for Black workers in California at the Department of Fair Employment and Housing, before the California Unemployment Insurance Appeals Board and in claims for wages at the California Labor Commissioner's Office.

Earthlodge Center for Transformation

The Earthlodge Center for Transformation is a spiritual sanctuary for California's marginalized communities to transform the trauma they've experienced from racism, sexism and homophobia into healing and justice.

Equal Justice Society

The Equal Justice Society ("EJS") is transforming the nation's consciousness on race through law, social science, and the arts. EJS is a national civil rights organization focused on restoring constitutional safeguards against discrimination, combatting anti-Black and other forms of racism, and promoting race equity. In pursuit of its mission, earlier this year,

EJS submitted an amicus brief to the U.S. Supreme Court in *Collier v. Dallas County Hospital District* in support of petitioner's petition for review. In that brief, EJS advocated for a standard of proof under Title VII that accounts for the grave psychological and physical harm that even one utterance of the n-word in the workplace can cause. EJS has a strong interest in clarifying or establishing this standard in the State of California where Black people bear the disproportionate brunt of workplace racial discrimination in all its forms.

Impact Fund

The Impact Fund is a nonprofit legal organization that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund has served as party or amicus counsel in many major civil rights cases brought under federal, state, and local laws. These cases have challenged: employment discrimination; unequal treatment of LGBTQ people, people of color, and people with disabilities; and limitations on access to justice. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities. The Impact Fund serves as a State Bar-certified Support Center for qualified legal services projects in California.

Maintenance Cooperation Trust Fund

The Maintenance Cooperation Trust Fund (MCTF) is a statewide watchdog that works to eliminate illegal and unfair business practices in California's janitorial industry. MCTF works to ensure that workplace rights are adhered to.

National Employment Law Project

The National Employment Law Project ("NELP") is a non-profit legal organization with 50 years of experience advocating for the employment and

labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor and employment laws, including protections against discrimination, regardless of an individual's status. NELP has a particular focus on addressing discriminatory practices and dismantling structural racism in the workplace. NELP has litigated and participated as amicus curiae in numerous cases in circuit and state and U.S. Supreme Courts addressing the importance of equal access to labor and employment protections for all workers.

Worksafe

Worksafe, Inc. is a California-based non-profit organization dedicated to advocating for worker health and safety through education, training, and advocacy. Worksafe advocates for protective worker health and safety laws and effective remedies for injured workers through the legislature and courts. Hostile environments can lead to workplace violence, a worker health and safety issue. As such, Worksafe has an interest in the outcome of this case.

III. PURPOSE OF PROPOSED BRIEF OF *AMICI CURIAE*

The *amicus* brief submitted seeks to assist this Court in three ways:

1. It describes the heinousness of the n-word and its impact on Black workers, summarizing historical and contemporary research and expounding why a coworker's use of the slur—as opposed to that of a supervisor's—fails to transform it into a trivial, non-cognizable harm.

2. It demonstrates the difficulty in assessing severity from the perspective of reasonable Black person and how trial by jury would be far more revealing of the context of Ms. Bailey's workplace and the actual, human impact of the epithet at issue than the "cold record" before the courts

below on summary judgment. It also details the ways in which the Court of Appeal failed to conduct a holistic inquiry.

3. It explains the import of California Government Code Section 12923, which clarified the hostile work environment standard. It argues that FEHA's purposes, buoyed by this clarification, counsel towards a decision holding that a single, severe incident of co-worker harassment may suffice to survive summary judgment.

IV. CONCLUSION

For all the foregoing reasons, *Amici curiae* respectfully request that the Court grant *Amici curiae*'s application and accept the attached brief for filing and consideration. Counsel for Respondents do not oppose this Application.

Dated: August 2, 2021

Respectfully submitted,

Stacy Villalobos
Christopher Ho
Legal Aid at Work

Attorneys for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH CAL. RULES OF COURT, RULE 8.520(f)(4)

Amici curiae hereby certify under the provisions of California Rules of Court 8.520(f)(4)(A) that no party or counsel for any party authored the proposed brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief, *Amici curiae* further certify under California Rules of Court 8.520(f)(4)(B) that no person or entity other than *amici curiae* and their counsel made any monetary contribution intended to fund the preparation or submission of the brief.

Executed on August 2, 2021, at Los Angeles, California

Stacy Villalobos
Christopher Ho
Legal Aid at Work

Attorneys for *Amici Curiae*

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Stacy Villalobos, State Bar No. 306710
Christopher Ho, State Bar No. 129845
LEGAL AID AT WORK
180 Montgomery Street, Suite 600
San Francisco, CA 94104
Telephone: (415) 864-8848
Facsimile: (415) 593-0096
E-Mail: svillalobos@legalaidatwork.org
cho@legalaidatwork.org
Attorneys for *Amici Curiae*

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INTRODUCTION

Amici urge this Court to reverse the judgment below. The Court of Appeal's decision trivializes the magnitude and heinousness of the n-word slur, solely because it happened to be a coworker of Ms. Bailey who used it.[1] The n-word is this country's most odious epithet—one that raises the specter of Black inferiority, racial terror and violence, and enslavement. It harkens back to a time when Black persons were not seen as human beings, but rather as insensible property whose only significance was as a source of labor.

In the employment setting—where people are laborers—the n-word can instantly imbue the workplace with the trappings of racial subordination. It must therefore only be under the very rarest of circumstances that the effects of its utterance can be found insignificant as a matter of law. Moreover, though the status of the speaker is one relevant factor in assessing the severity of harassment, the coworker limitation lacks a basis in the California Fair Employment and Housing Act (FEHA) and flies in the face of clear precedent that whether a work environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. (*See Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 23.) The recent declaration of the

[1] (*Twanda Bailey v. San Francisco District Attorney's Office, et al.* (Ct.App.1 Dist. Sept. 16, 2020) A153520, 2020 WL 5542657, [hereinafter "Opinion"] at * 7-12).

Legislature's intent in Government Code Section 12923 reinforces this conclusion.

This Court should disavow the reasoning of the Court of Appeal and hold that a single instance of a coworker's use of the n-word may, indeed, give rise to a triable issue; to do otherwise would denigrate the very real injuries done to Ms. Bailey and other Black workers like her who are subjected to the n-word by coworkers. This Court should give Ms. Bailey an opportunity to present her case to a jury, which is best situated to undertake the required complex, situational and highly fact-intensive inquiry.

ARGUMENT

I. A Coworker's One-Time Use of the N-Word May Create a Hostile Work Environment.

The n-word is the most serious and extreme epithet that can be leveled at a Black person. It is drenched in a history of slavery, subjugation, and racial bloodthirst. It humiliates and subordinates Black persons, causing well-documented physical and psychological health impacts. Some historians and researchers have persuasively argued that the slur is a threat in and of itself. For these reasons, a single instance of its expression by a coworker may well be sufficiently extreme to alter the terms and conditions of one's workplace. The distinction between a coworker's and a supervisor's one-time use of the n-word cannot form a per se barrier to

surviving summary judgment. That a court is required to evaluate the abusiveness of the n-word from the perspective of a reasonable Black person only underscores the error of the courts below.

A. The N-Word Humiliates, Threatens and Injures Because of Its Historical and Contemporary Nexus with Subjugation and Violence.

The n-word is rooted in slavery, violence, and racial terror. In around the 17th century, "negro," a descriptor word with no value attached to it, evolved to "[n-word]"—an "intentionally derogatory" word.[2] The linguist Robin Lakoff has argued that the n-word became a racial slur when those who used it understood the term to be a mispronunciation of "Negro," but decided to keep using the mispronunciation "as a signal of contempt – much as individuals sometimes choose to insult others by deliberately

[2] (Kennedy, *Who Can Say "Nigger"? . . . And Other Considerations*, J. of Blacks in Higher Education, No. 26 (Winter 1999-2000) 86-87, *available at* https://www.bennington.edu/sites/default/files/sources/docs/DIVE%20IN%20Article%2012.11.19.pdf (last visited July. 29, 2021).); *see also* Easton, *A Treatise on the Intellectual Character, and Civil and Political Condition of the Colored People of the United States; and the Prejudice Exercised Towards Them* (1837) at 40-41, ["[N-word] is an opprobrious term, employed to impose contempt upon [Blacks] as an inferior race, and also to express their deformity as a person. . . . The term . . . flows from the fountain of purpose to injure."], *available at* https://babel.hathitrust.org/cgi/pt?id=nyp.33433019631575&view=1up&seq=1 (last visited Jul. 29, 2021).); Letter of Amicus Curiae Legal Aid at Work in Support of Petition for Review (Dec. 18, 2020), at 3-5 [hereinafter "Legal Aid Amicus Letter"].)

mispronouncing their names."[3] Professor Randall Kennedy has observed that, "[o]ver the years, nigger has become undoubtedly the best known of the American language's many racial insults, evolving into the paradigmatic epithet[,]" and that it has been described as "the all-American trump card, the nuclear bomb of racial epithets."[4] The n-word, as Chief Justice Warren wrote in a different context, "generates a feeling of inferiority as to [Black person's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." (*See Brown v. Board of Education of Topeka* (1954) 347 U.S. 483, 494.)

In our legal institutions, the n-word first appeared in the Supreme Court Reports in a Reconstruction-era prosecution of two White men for the race-motivated "hack[ing] to death [of] several members of a [B]lack family."[5] Its association with racial terror and lynching continued through the Civil Rights Movement. Dr. Martin Luther King, Jr., in his renowned *Letter from a Birmingham Jail*, wrote:

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[3] (Kennedy, *id.* at 86 [citing Robin Lakoff, *The N-Word: Still There, Still Ugly*, Newsday (Sept. 28, 1995)]; *cf. City of Minneapolis v. Richardson* (1976) 307 Minn. 80, 239 N.W.2d 197, 203 ["We cannot regard use of the term '[n-word]' . . . as anything but discrimination ... based on . . . race . . . . When a racial epithet is used to refer to a [Black] person . . . , an adverse distinction is implied between that person and other persons not of his race."].)

[4] (Kennedy, *supra*, note 2 at 86-87.)

[5] (Kennedy, *supra*, note 2 at 89 [citing *Blyew v. United States* (1871) 80 U.S. 585].)

> But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate filled policemen curse, kick and even kill your black brothers and sisters; when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society . . . when your first name becomes "nigger," your middle name becomes "boy" (however old you are) and your last name becomes "John," . . . when you are forever fighting a degenerating sense of "nobodiness"—then you will understand why we find it difficult to wait.[6]

Professor Neal A. Lester has described how "[t]he word is inextricably linked with violence and brutality on black psyches and derogatory aspersions cast on black bodies" and "[n]o degree of appropriating can rid it of that bloodsoaked history."[7] Freighted with long histories of subjugation and violence, the n-word cannot be understood in isolation, as merely an "offensive"[8] term. The potentially soul-crushing power of the n-word cannot possibly be minimized or dismissed as legally insignificant, as Respondents would have it.

The history of the n-word lives in our present. In contemporary times, anti-Black bias events tracked by the California Department of Justice rose

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[6] (King, Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963).)

[7] (Price, *Straight Talk About the N-Word*, Teaching Tolerance, Issue 40 (Fall 2011), *available at* https://www.tolerance.org/magazine/fall-2011/straight-talk-about-the-nword (last visited Jul. 29, 2021).)

[8] (*See*, *e.g.*, Respondents' Answering Brief (AB) 27, 35.)

87.7 percent from 2019 to 2020.[9] The Los Angeles Commission on Human Relations reported in 2019 that the only hate-motivated attempted murder in the city the previous year consisted of the victim being called an n-word, then being stabbed in the face while his attacker repeated the n-word.[10] Another incident involved assailants yelling at a Black woman, "Hey [n-word]!" from a parked car, exiting the vehicle, and then punching her in the face.[11] These extreme examples demonstrate the close relationship between the n-word and physical violence even today. Indeed, although Respondents would have the Court establish a rule in which a coworker's one-time use of the n-word was only actionable if it was accompanied by actual physical violence, threats, or threatening conduct, (AB 31-32, 35), the frequency with which the term is accompanied by physical violence demonstrates how immediately threatening the slur itself is.

One scholar has even argued that the n-word itself is a threat connoting imminent physical harm. Professor Kennedy has posited that the

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[9] (California Department of Justice, *Hate Crime in California 2020*, *available at* https://data-openjustice.doj.ca.gov/sites/default/files/2021-06/Hate%20Crime%20In%20CA%202020.pdf (last visited Jul. 29, 2021).)

[10] (Los Angeles Commission on Human Relations, *2019 Hate Crime Report*, at Charts, 14, *available at* https://hrc.lacounty.gov/wp-content/uploads/2020/10/2019-Hate-Crime-Report.pdf (last visited Jul. 29, 2021).)

[11] (*Id.* at 29.)

n-word is "assaultive," "a form of violence by speech."[12] Another observed how "[t]he wounding power of '[n-word]' may be derived from the physical violence . . . that historically has accompanied its usage."[13] And one Court of Appeal has concluded that the mere writing of the n-word on a classroom door "carried with it a violent connotation. . . . [and] produced a sense of apprehension, terror, and fear . . . ." (*In Re Michael M*. (2001) 86 Cal.App.4th 718, 721-22, 730 [upholding juvenile court judgment finding Bane Act violation where minor wrote graffiti, and noting testimony of his African-American teacher that "[s]he was shocked, belittled and 'almost moved to tears' by the graffiti. She was somewhat apprehensive about going into her classroom. In her experience, the [n-word] connoted 'a little bit' of violence, and she had some family members who had been exposed to violent situations in which the word had been used in connection with their race and color."].)

Even when it is *not* accompanied by physical violence or its threat, the n-word itself is perniciously wielded to injure Black people. The physical and psychological harms linked to overt racism and other forms of

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[12] (Kennedy, *Nigger*: *The Strange Career of a Troublesome Word* (2002), p. 79.)

[13] (Goodwin, *Nigger and the Construction of Citizenship* (2003) 76 Temp. L.Rev. 129, 203; *cf. In re Spivey* (1997) 345 N.C. 404, 414, 48 ["No fact is more generally known than that a white man who calls a black man a '[n-word]' within his hearing will hurt and anger the black man[.]"].)

racial bias are well-documented.[14] Recently, the House of Delegates of the American Medical Association recognized in its adoption of a policy

[14] (*See* Carter et al., *A Meta-Analytic Review of Racial Discrimination: Relationships to Health and Culture* (2019) 11 Race & Soc. Probs. 15, 23 [analyzing 242 studies that found racial discrimination was related to mental health effects of obsessive-compulsive behavior, stress, hostility, and anger, and physical effects of high blood pressure and negative health]; Paradies et al., *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis* (2015) PLoS One 10(9) [noting racism can impact health via adverse cognitive/emotional processes and associated psychopathology; diminished participation in healthy behaviors (e.g., sleep and exercise) and/or increased engagement in unhealthy behaviors (e.g., alcohol consumption), and finding significant relationships between racism and obesity, hypertension, depression, loss of self-esteem, psychological stress, and anxiety], *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4580597/ (last visited Jul. 29, 2021); Thames et al., *Experienced discrimination and racial differences in leukocyte gene expressions* (2019) Psychoneuroendocrinology 106:277-283 [observing that "[e]xperiences with racial discrimination have been linked to several psychiatric and medical risk factors" including depression, anxiety, cardiovascular disease, hypertension, mortality rates, cognitive compromise, and premature aging, heightened risk of heart, and kidney disease], *available at* https://europepmc.org/backend/ptpmcrender.fcgi?accid=PMC6589103&blobtype=pdf (last visited Jul. 29, 2021); Wong et al., *Lifetime discrimination, global sleep quality, and inflammation burden in a multiethnic sample of middle-aged adults* (2019) Cultural Diversity & Ethnic Minority Psych. 25(1), 82–90 ["Greater lifetime exposure to discrimination was associated with higher inflammation burden. . . . such experiences may be particularly consequential for sleep and physiological functioning in midlife."], *available at* https://psycnet.apa.org/doiLanding?doi=10.1037%2Fcdp0000233 (last visited Jul. 29, 2021); Cuevas et al., *Discrimination, Affect, and Cancer Risk Factors among African Americans* (Jan. 2014) Am. J. Health Behav. 38(1): 31–41, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3775007/ (last visited Jul. 29, 2021); Collins et al., *Very Low Birthweight in African American Infants: The Role of Maternal Exposure to Interpersonal Racial Discrimination* (Dec. 2004) Am. J. Public Health 94(12): 2132–38 ["[D]ata show that the magnitude of the association between maternal reported lifetime exposure to

statement declaring racism to be "an urgent public health threat," that "in its systemic, cultural, interpersonal and other forms, [racism is] a serious threat to public health, to the advancement of health equity and a barrier to appropriate medical care."[15] Researchers have found that "[c]oncerns about being a target of prejudice have grave consequences, not just for emotional well-being, but also for physical health[.]"[16] Physiological responses to discrimination, such as elevated blood pressure and heart rate, adverse biochemical reactions, and hypervigilance, "eventually result in disease and *mortality*."[17] These "[b]iological measures of race-based stress . . . reveal intricate relationships among the brain, immune system, [and] nervous system . . . as well as the ways in which unhealthy environmental stimuli can

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racial discrimination and infant [very low birth weight] was strongest in the 'finding a job' and 'at place of employment' domains."], *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1448603/ (last visited Jul. 29, 2021).)

[15] (O'Reilly, *AMA: Racism is a threat to public health* (Nov. 16, 2020), *available at* https://www.ama-assn.org/delivering-care/health-equity/ama-racism-threat-public-health (last visited Jul. 29, 2021).)

[16] (Toosi et al., *Dyadic Interracial Interactions: A Meta-Analysis* (2012) Psych. Bull., Vol. 138, No. 1, at 4.)

[17] (Mays et al., *Race, Race-Based Discrimination, and Health Outcomes Among African Americans* (2007) 58 Ann. Rev. Psych. 201, 209-10 [emphasis added], *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4181672/pdf/nihms630658.pdf (last visited Jul. 29, 2021).)

'get under the skin' of individuals to cause negative health outcomes."[18] The weaponized use of the n-word can possibly trigger a condition at least one expert contends is unique to Black people: Dr. Joy DeGruy Leary argues that due to the history of degradation and subordination of the African American community many Black people suffer from what she terms post traumatic slave syndrome, "a condition that exists when a population has experienced multigenerational trauma resulting from centuries of slavery and continues to experience oppression and institutionalized racism today." She outlines the traditional causes and symptoms of posttraumatic stress and contextualizes those causes in terms of the African American experience.[19] Similarly, psychoanalyst Jyoti M. Rao has observed, "Slurs, like guns or whips or grenades, are designed to cause damage."[20] "[I]ntensely negative projections and projective identifications, when condensed into slurs, amount to weapons deployed against the psyches of those targeted in prejudicial attacks."[21] Another scholar has written that "[t]he experience of

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[18] (*Ibid.* [citations omitted].)

[19] (Sanders, *Defending the Spirit: The Right to Self-Defense Against Psychological Assault* (2018) 19 Nev. L.J. 227, 241.)

[20] (Rao, *Observations on Use of the N-word in Psychoanalytic Conferences* (2021) J. of the American Psychoanalytic Assn., Vol. 69:2, at 318.)

[21] (*Ibid.*)

being called 'nigger', 'spic', 'Jap', or 'kike' is like receiving a slap in the face. The injury is instantaneous."[22]

The determination of the courts below that the utterance of the n-word cannot under these circumstances *possibly* have had a profound and destructive effect upon Ms. Bailey—given these deep roots in the institution of slavery and the maintenance of white supremacy—simply cannot stand. To deny Ms. Bailey even an opportunity to testify before a jury about the human impact of hearing the slur directed at her is to discount as legally trivial the centuries of oppression, violence and dehumanization that the n-word embodies—as well as its contemporary significance. As important as judicial efficiency may be, it cannot be invoked to justify frustrating the ends of justice.

B. The N-Word, When Considered in Its Full Historical and Cultural Context from the Perspective of a Reasonable Black Person, is Sufficiently Extreme to Alter the Terms and Conditions of the Workplace.

The parties have fully briefed the hostile work environment standard. (*See* Appellant's Opening Brief (AOB) 28-32, AB 25-26.) In short, to establish liability, harassing conduct "must be extreme to amount to a change in the terms and conditions of employment[.]" (*Faragher v. City of*

[22] (Eisenstadt, *The N-Word at Work: Contextualizing Language in the Workplace* (2012) 33 Berkeley J. of Employment & Labor Law 299, 316 [citations omitted].)

Boca Raton (1998) 524 U.S. 775, 788; *see also Aguilar v. Avis Rent A Car Sys., Inc.* (1999) 21 Cal.4th 121, 130.)

The n-word is extreme conduct (*see supra* I.A), a fact that Respondents do not venture to dispute. Even more so, in the workplace, the n-word may have the power to not simply refer to a history of enslavement, "but actually to *make* African Americans slaves."[23] Professor Alexander Brown, a linguistic scientist, has argued that the n-word imposes the mental condition of being enslaved upon Black workers, "stripp[ing the target] of status, control, authority, [and] power" to a degree that the target does "not simply [] work *for* others" but, instead, "*under* others." In effect, the Black worker is subordinate to non-Black coworkers.[24] Importantly, the n-word subordinates Black workers with respect to their supervisors *and* fellow coworkers, "stripping the enslaved person of the sort of *dignity* that other people would normally be required to respect[.]"[25]

The n-word is potent because it invokes the posited inherent inferiority of Black persons. It triggers an onslaught of pain based on the cumulative effect of all the individual acts of racism one has ever suffered.

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[23] (*See* Brown, *African American Enslavement, Speech Act Theory, and the Law* (2019) 23 J. African Am. Studies 163, 163, *available at* https://link.springer.com/content/pdf/10.1007/s12111-019-09431-z.pdf (last visited Jul. 30, 2021).)

[24] (*Id.* at 171 [emphasis in original].)

[25] (*See id.* at 164.)

"[I]njurious words can cause immediate, severe damage and actual injury because they carry historical meaning--typically, a history of actual discrimination, oppression, and violence. In saying such a word, the speaker embodies past oppressors who have used that language. Such words 'evoke in the target all the millions of cultural lessons regarding her inferiority that she has painstakingly repressed, and imprint upon her a badge of servitude and subservience for all the world to see.'"[26]

Courts assessing the severity of the n-word from the perspective of a reasonable person of the plaintiff's race must consider the aforementioned historical and cultural context. (*See McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1116 ["By considering both the existence and the severity of discrimination from the perspective of a reasonable person of the plaintiff's race, we recognize forms of discrimination that are real and hurtful, and yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff."]; *cf. Ash v. Tyson Foods, Inc.* (2006) 546 U.S. 454, 456 [concluding that the term "boy" could be probative of racial animus in a Title VII case, because a word may have various meanings that "depend on various factors including

[26] (Eisenstadt, *supra*, note 22, at 316-17 (citations omitted); *see also* Rao, *supra*, note 20, at 324 [discriminatory gestures "index[] present-day racism and the ongoing historical trauma of slavery"].)

context, inflection, tone of voice, local custom, and historical usage"] [*per curiam*].)

The Courts of Appeal have consistently required that whether harassment is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.[27] Yet, studies have found that "white judges" grant summary judgment in employment discrimination cases 61 percent of the time, while "minority judges" grant these motions at a rate of just 38 percent—a 23 percent difference.[28] This stark and consequential disparity demonstrates the challenges involved in deciding "matters of law" in employment discrimination cases. In particular, it illustrates how a reasonable plaintiff's perspective may not be readily grasped by those whose life experiences have been radically different. As one court has pointed out, "[r]acially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in

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[27] (*See, e.g., Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 263-64; *Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 877.)

[28] (Weinberg & Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking* (2012) 85 So.Cal.L.Rev. 313, 338-39; *see also* Chew & Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases* (2009) 86 Wash. U.L.Rev. 1117, 1134 ["African American judges held for plaintiffs nearly twice as often in sex discrimination cases and over twice as often in race discrimination cases, as compared to White judges."].)

reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group." (*McGinest v. GTE Serv. Corp.*, *supra*, 360 F.3d at p. 1116.)

Accordingly, clear challenges exist where adjudicators must endeavor to evaluate the severity of harassment from the perspective of a reasonable person of a different race, even if making their best efforts. These challenges have been extensively documented in studies of race discrimination cases.[29]

Moreover, although the courts below effectively concluded that being called a "scary [n-word]" did not cause Ms. Bailey any cognizable injury, the severity of pain and negative emotions experienced by Black people is commonly ignored or discounted. This has deep historical antecedents, arising from efforts to justify the institution of slavery. No less a figure than Thomas Jefferson, himself a slaveholder, wrote:

> Their griefs are transient. Those numberless afflictions, which render it doubtful whether Heaven has given life to us in mercy or in wrath, are less felt, and sooner forgotten with them.[30]

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[29] (*See*, *e.g.*, Weinberg & Nielsen, *supra*, note 28, at 343-44; Chew & Kelley, *supra*, note 28, at 1141-45 & 1150 [finding that plaintiffs who bring cases involving racial slurs before White judges are roughly twice as likely to lose than if they are before African American judges].)

[30] (Jefferson, *Notes on the State of Virginia* (1787), pp. 148-49.)

Along the same lines, one historian has written that "most white people had been so acculturated to view black people as different from them that they did not perceive the existence of slavery in America as a problem, and when exposed to slaves, they barely noticed the pain that they experienced. . . . It did not even occur to them that emotions experienced in the white sphere could also be experienced by the enslaved people."[31]

This minimization of and lack of empathy across racial lines for the suffering of Black people, and Black women in particular, persists today. Studies have shown, for instance, that Black women's access to pain medication in the treatment setting is disproportionately low as compared to that of White patients.[32] The same bias appears mirrored in the

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[31] (Williams, *Help Me to Find My People: The African American Search for Family Lost in Slavery*, University of North Carolina Press (2012), p. 108.)

[32] (*See, e.g.*, V. Rao, "*You Are Not Listening To Me": Black Women on Pain and Implicit Bias in Medicine*, Today (Jul. 27, 2020), *available at* https://www.today.com/health/implicit-bias-medicine-how-it-hurts-black-women-t187866 (last visited Jul. 30, 2021); Rapaport, *Black, Hispanic Mothers Report More Pain After Delivery But Get Less Pain Medication*, Reuters (Nov. 12, 2019), *available at* https://www.reuters.com/article/us-health-postpartum-pain/black-hispanic-mothers-report-more-pain-after-delivery-but-get-less-pain-medication-idUSKBN1XM2R4 (last visited Jul. 30, 2021); *cf.* Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs about Biological Differences Between Blacks and Whites* (2016) Proceedings of the Nat. Academy of Sciences of the U.S. of America, Vol. 113, 16: 4296-301 [study indicating that 42 percent of second-year medical students believed that "blacks' skin is thicker than whites," and 14 percent believed Black people's nerve endings "are less sensitive than whites"].)

psychological realm; one study noted that "empathy reactions to others' feelings is affected by similarity between the witness and the person in pain," and reported data suggesting that "Caucasian observers reacted to pain suffered by African people significantly less than to pain of Caucasian people."[33] One researcher, commenting on such studies, noted that "[w]e have this assumption that because black people have been hardened by certain life experiences, that they can deal with more pain or they feel it less intensely, and therefore, they're forced to endure even more."[34] Although it may be impossible to entirely correct for these unconscious biases, it is in pursuit of that goal that the courts have repeatedly underscored the inadequacy of summary judgment as a tool for addressing such complex challenges, and the need for jurors who can draw upon their varied life experiences to conduct the more sensitive inquiry that cases such as this demand. Thus, summary judgment is rarely if ever appropriate in cases involving the n-word. (*See Nazir*, *supra*, 178 Cal.App.4th at p. 286 [reversing summary judgment for employer *inter alia* on FEHA harassment and discrimination claims, and observing "that many employment cases

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[33] (Forgiarini et al., *Racism and the Empathy for Pain on Our Skin*, (May 2011) Frontiers in Psych., Vol. 2, Art. 108, at 1, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3108582/ (last visited July 30, 2021).)

[34] (Martin, *Study: Whites Think Black People Feel Less Pain* (interview with Jason Silverstein), NPR (Jul. 11, 2013), *available at* https://www.npr.org/templates/story/story.php?storyId=201128359 (last visited Jul. 30, 2021).)

present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it may be."].)[35]

II. The Courts Below Erroneously Failed to Conduct a Holistic Assessment of the Slur Directed Against Ms. Bailey.

The Court of Appeal's determination that, as a matter of law, Ms. Bailey was not subjected to a hostile work environment primarily relies on the fact that her harasser was not her supervisor or manager. (Opinion 9-12.) But the law requires a far broader assessment of the hostile work environment question – a complex, fact-bound inquiry poorly suited to resolution via summary judgment.

A. The Courts Below Ignored the "Scary" Modifier to the N-Word, Record Evidence of an Impact on Work Performance and Actual Psychological Injury, and that Ms. Bailey Was Forced To Continue Working with Her Harasser.

The Court should reverse the grant of summary judgment here, just as it did in *Miller v. Department of Corrections* (2005) 36 Cal.4th 446. In *Miller*, another FEHA harassment case, the Court explained that "the Court of Appeal failed to draw [reasonable] inferences [in favor of the plaintiff] *and took too narrow a view of the surrounding circumstances*." (*Id*. at 470 [emphasis added].) In so ruling, *Miller* quoted the observation of the U.S.

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[35] (*See also Moore v. Regents of Univ. of California* (2016) 248 Cal.App.4th 216, 236 [quoting *Nazir*]; *Bareno v. San Diego Comm. College Dist*. (2017) 7 Cal.App.5th 546, 561 [same]; *Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 925 [same]; *Abed v. Western Dental Services, Inc*. (2018) 23 Cal.App.5th 726, 739 [same].)

Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc*. (1998) 523 U.S. 75, 81-82, a Title VII sexual harassment case, that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." (36 Cal.4th at 462.) *Oncale,* of course, only reinforced seminal precedent in this respect. "[W]hether an environment is 'hostile' or 'abusive' *can be determined only by looking at all the circumstances*. . . . *no single factor is required*." (*Harris, supra*, 510 U.S. at p. 23 [emphasis added]). The Court of Appeal "took too narrow a view of the surrounding circumstances" of Ms. Bailey's case in at least three ways: (1) it ignored the intensifier "*scary*" that prefaced the n-word; (2) it failed to consider record evidence of the impact of the slur on Ms. Bailey's work performance; (3) it disregarded that Ms. Bailey was required to continue working with her harasser and evidence of her actual psychological injury.[36] (*See Miller*, *supra*, 36 Cal.4th at p. 470.)

[36] Respondents argue that the "well-established summary judgment standard does not apply differently in employment cases." (RAB 33). We hardly dispute that. However, "some judges and commentators have expressed concern that trial courts have moved too far" in favoring summary judgment in employment cases. (*See Nazir*, *supra*, 178 Cal.App.4th at p. 286 [citing Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases* (1999) 34 Wake Forest L.Rev. 71].)

First, Ms. Bailey was not just called an n-word: she was called a "*scary*" n-word. The n-word in combination with adjectives or other words may have a heightened impact far more severe than would the epithet alone. (*See State v. Liebenguth* (Conn. Supreme Ct. Aug. 27, 2020, No. SC 20145) 336 Conn. 685, 705-06 ["[T]he defendant used the profane adjective 'fucking'—a word of emphasis meaning wretched, rotten or accursed—to intensify the already highly offensive and demeaning character of the word '[n-word].'"] [footnote omitted].) By only focusing on the speaker and not what the speaker said, the Court of Appeal discounted the potency of the full invective. Among other things, the compound slur exacerbates racist stereotypes of Black people as hostile, violent and potentially "dangerous."[37] For Black women, this stereotype often manifests as that of the "angry Black woman," who is hostile, overly aggressive, and ignorant without provocation.[38] This trope is so pervasive and damaging that being called "scary" may trigger intense emotional responses from a reasonable Black woman[39]—much more so when the word is accompanied by an epithet. The

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[37] (Thiem et al., *Are Black Women and Girls Associated With Danger? Implicit Racial Bias at the Intersection of Target Age and Gender* (2019) 45 Personality & Soc. Psych. Bull. 1427, 1427.)

[38] (Ashley, *The Angry Black Woman: The Impact of Pejorative Stereotypes on Psychotherapy with Black Women* (2014) 29 Soc. Work in Pub. Health 27, 28-30.)

[39] Professor Wendy Ashley has observed that Black women may suffer health problems, depression, stress and impaired relationships as a result of

import of this highly-charged intensification of the n-word—even if uttered by a coworker—is properly decided by a jury, not on the papers.

Second, the courts below overlooked facts in the record that this Court and the U.S. Supreme Court have deemed relevant to assessing whether conduct has altered workplace conditions.[40] (*See Nazir, supra*, 178 Cal.App.4th at p. 283 ["There was plenty of evidence here. The trial court just did not see it."].) For example, there is at least a dispute about whether Ms. Bailey's work performance suffered because of her coworker's slur. (2.AA.241, 246, 265-273 [performance review included excessive absences, insufficient courtesy and responsiveness, which Ms. Bailey objected to as stemming from her stress and anxiety attacks following the slur]; *see Harris, supra*, 510 U.S. at p. 23 [stating that one factor in assessing if an environment is objectively hostile or abusive is "whether [the discriminatory

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the disempowering intersection of racism and sexism. (*See ibid.*; *see also* Villines & Legg, *What to Know About Anxiety in Black Communities*, Medical News Today (Jul. 20, 2020), *available at* https://www.medicalnewstoday.com/articles/black-anxiety#causes (last visited Jul. 30, 2021).)

[40] Though Respondents have now has abandoned those arguments, at the petition for review stage, Respondents admitted that the Court of Appeal drew inferences in favor of the moving party. (*See* Respondents' Answer to Petition for Review at 9 ["It is that [Bailey] disagrees with the factual inferences the Court of Appeal drew and the conclusions it reached."]); *id*. at 12 ["Petitioner is unhappy with the inferences and conclusions drawn . . . "].)

conduct] unreasonably interferes with an employee's work performance"]; *Miller*, *supra*, 36 Cal.4th at p. 462 [same].)

Also overlooked in the severity analysis by the courts below is whether Ms. Taylor-Monachino used her power to keep Ms. Bailey working in close proximity to Ms. Larkin for 10 months after the n-word incident.[41] (*See Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 883 [concluding that "in some cases, the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment" and "employers may even have to remove employees from the workplace if their mere presence would render the working environment hostile" in a coworker sex harassment Title VII case].) The Court of Appeal ignored this context—deeming it to be insignificant of including in its analysis and subordinate to Ms. Larkin's status as a co-equal without supervisorial power and authority. (*See* Opinion 9-12.) Perhaps it is insignificant, but that should be decided by a jury—not as a matter of law.

Finally, though not necessary to prove up a hostile work environment, ample evidence indicates that Ms. Bailey also suffered actual

[41] This too appears to be disputed. (*Compare* AOB 21 & Appellant's Reply Brief (ARB) 14-15, *with* AB 20.) To the extent this is disputed, the Court of Appeal viewed the evidence in the light most favorable to defendants, contravening the summary judgment standard. (*See Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 857.)

psychological injury,[42] which the courts below ignored. (2.AA.247:2-6, 275 [psychiatrist's letter conveying her medical conditions, anxiety and depression, and noting that her "emotional well-being" has been damaged, she exhibits features of post-traumatic stress disorder, including "debilitating fear and panic," hypervigilance, problems with concentration and sleep]; 277 [second psychiatrist note]; *see Harris, supra*, 510 U.S. at p. 22 [holding that to be actionable as an abusive work environment harassment need not be "psychologically injurious"]; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1053 ["Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being[.]"] [citing *Harris, supra,* 510 U.S. at pp. 21-23].) The U.S. Supreme Court determined that "Title VII comes into play before the harassing conduct leads to a nervous breakdown." (*Harris, supra*, 510 U.S. at p. 22.) Yet, despite record evidence of what could be termed a nervous breakdown (*see*, *e.g.*, 2AA.275), the Court of Appeal pronounced, "Nor has Bailey made any other factual showing that the conditions of her employment were so altered by the one slur by her coworker as to constitute actionable harassment."

[42] Respondents may dispute whether Bailey was psychologically injured. (*See* AB 37, fn. 7 [arguing based on the record that Bailey was "happy-go-lucky" shortly after the slur incident].) If so, that would raise a material dispute of fact precluding summary judgment. (*See* Code Civ. Proc. § 437c.)

(Opinion 12.) Given the evidence of Ms. Bailey's significant emotional distress, that statement is remarkable.

B. That a Coworker Uttered the Racial Slur Does Not Transform It Into a Trivial, Non-Cognizable Harm Outside the Scope of FEHA.

This Court has recognized the difficulty of evaluating the nature and severity of the harms caused to persons who have been subjected to workplace harassment absent a trial.[43] In *Peralta Community College Dist. v. FEHC* (1990) 52 Cal.3d 40, this Court observed that "harm suffered from emotional distress [is] 'less susceptible of precise measurement than more tangible pecuniary losses or physical injuries would be," and that "[g]iven the intangible nature of the harm, 'it is the members of the jury . . . who, when properly instructed, are in the best position to assess the degree of the harm suffered and to fix a monetary amount as just compensation therefor.'" (*Id*. at 56 [citing *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 953, disapproved on other grounds by *White v. Ultramar, Inc*. (1999) 21 Cal.4th

[43] Despite Respondents' insistence that this case does not present issues of intent or motive, (AB 13), there are at least two questions of motive and intent present in this case: (1) whether Ms. Larkin's use of the n-word was meant to assert her superiority over Ms. Bailey, despite being in the same hierarchical position (*see supra* II.B); (2) whether and if so, why, Ms. Taylor-Monachino kept Ms. Bailey working with her harasser for 10 months (*see supra* II.A.) Additionally, the *Nazir* court noted that "issues of intent, and motive, *and hostile working environment*" were "issues not determinable on paper" and thus "rarely appropriate for disposition on summary judgment[.]" (*Nazir, supra*, 178 Cal.App.4th at p. 286 [emphasis added]).

563.)[44] Similarly, severity or pervasiveness "is not, and by its nature cannot be, a mathematically precise test." (*See Harris*, *supra,* 510 U.S. at p. 22.) While it may be tempting in the abstract to dismiss the n-word's significance if a coworker, instead of a supervisor, uses the slur, that is far too facile for the complexity of n-word itself as well as the myriad other factors that might inform the inquiry. In fact, the previously noted study of judges' decisions in employment discrimination cases found that where plaintiffs alleged that both supervisors and coworkers harassed them, White judges "gave this claim the greatest weight, with the plaintiffs' success rate significantly improving by more than 80%." In contrast, "[t]his claim did not seem to make much difference to African American judges, with plaintiffs' success rate with this claim being about the same as the rate before African

[44] *Agarwal* and *Alcorn v. Anbro Engineering*, *Inc*. (1970) 2 Cal.3d 493 are this Court's only two employment law decisions involving the use of the n-word in the workplace. *Agarwal,* an intentional infliction and defamation case, examined a variety of factors to assess the severity of the injury inflicted by the use of the n-word; that the harassers in that case were the plaintiff's supervisors was but one consideration in its analysis. (25 Cal.3d at pp. 941-43.) The same is true of *Alcorn*, an intentional infliction and Unruh Act case. There, this Court similarly emphasized the need for a fact-intensive inquiry to assess a variety of factors other than the harasser's status as a foreman. Like *Agarwal*, *Alcorn* concluded that "it is for the jury . . . to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." (2 Cal.3d at p. 499.). *Alcorn* specifically noted that "Plaintiff's own susceptibility to racial slurs . . . is a question for the trier of fact, and cannot be determined on demurrer." (*Id*. at 498, fn. 4.)

American judges in general."[45] This study further elucidates why there should not be a clear-cut or even favored exclusion for a single incident of a coworker epithet. Whether the status of the speaker actually undermines the n-word's ability to alter working condition should be decided at trial, where the jury will be able to consider all the evidence within its full context and weigh this factor accordingly. (*Cf. Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540-41 [affirming lower court's rejection of the stray remarks doctrine's exclusion of evidence as it "allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by 'nondecisionmakers or [made] by decisionmakers unrelated to the decisional process'" and cautioning that "[d]etermining the weight of discriminatory or ambiguous remarks is a role reserved for the jury"].)

Rather than a holistic, context-specific inquiry that considered the full heft of the n-word, the Court of Appeal's analysis veered into an exclusive focus on Ms. Larkin's coworker status.[46] (*See* Opinion 7-12.) Instead of

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[45] (Chew & Kelley, *supra*, note 28, at 1160.)

[46] Respondents deny that the Court of Appeal adopted a categorical rule that precludes liability for coworker conduct (AB 13), but they are mistaken. The court below stated, "the question is not whether a single, particularly egregious epithet can create a hostile work environment—under certain circumstances, it can." (Opinion 9.) Instead, it framed the issue as "whether the single alleged racial epithet made by Bailey's co-worker was, in context, so egregious in import and consequence as to be sufficiently severe or pervasive to alter the conditions of [Bailey's] employment" (*Id.* at 9-10

undermining the claim, in fact, precisely because they were co-equals in role, one potential motive Ms. Larkin could have had in using the epithet is to create a hierarchy among herself and Ms. Bailey based on race, similar to how poor White individuals used the slur against newly freed enslaved people to create a social distinction where there was no longer a formal one.[47] (*Cf. Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706-07, as modified (Feb. 10, 2010) ["Because a harasser need not exercise delegated

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[internal quotations marks omitted].) It then went on to hold that *as a matter of law* "no reasonable trier of fact could reach the conclusion that her co-worker's single statement without any other race-related allegations, amounted to severe or pervasive racial harassment." (Opinion 12 [internal quotation marks and alterations omitted]); *see also* Code Civ. Proc. 437c(c).) The Court of Appeal relied exclusively on Ms. Larkin's coworker status and the one-time slur in its reasoning. (*Id.* at 11 [citing *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 36 for the following proposition: "In many cases, a single offensive act by a coemployee is not enough to establish employer liability for a hostile work environment."]; *see generally* Opinion 7-12.)

[47] (*See* Brown, W.O., *Role of the Poor Whites in Race Contacts of the South*, Social Forces, Vol. 19, No. 2 (Dec. 1940), at pp. 264-66 [explaining how poor Whites "supported the Ku Klux Klan . . . and generally [] favored the subordination of the Negro" because of economic rivalry and caste—"[i]in a sense they policed the Negro, aiding the upper classes to 'keep the Negro in his place'"]; Rosette et al., *Why Do Racial Slurs Remain Prevalent in the Workplace? Integrating Theory on Intergroup Behavior* (2013) 24 Org. Sci. 1402, 1403 ["[A] key antecedent for those who use racial slurs is the desire for their dominant social group . . . to retain a dominant social position relative to members of subordinate groups."]; *cf.* Boehm-Turner & Toedt, *Social Class and Whiteness*, Encyclopedia of Critical Whiteness Studies in Education, Vol. 2 (Nov. 2020), at 639 ["Like slaves, indentured servants were seen as inferior by the ruling elite, so assigning them the marker of whiteness served as a promotion, a way of dividing them from black slaves with whom they shared jobs and ways of life[.]"].) This too is a potential dispute in motive not analyzed by the Court of Appeal.

power on behalf of the employer to communicate an offensive message, it does not matter for purposes of proving harassment whether the harasser is the president of the company or an entry-level clerk," while noting that supervisory harassment may in some instances be more injurious]).

This case perhaps epitomizes why where questions of social context and intent are key, such as when epithets are wielded at work, reliance on the cold record, is not the way to seek truth. Of course, there will be cases where the plaintiff is unable to muster *any* evidence of severity or pervasiveness that may still be appropriate for summary judgment. This case is not one of them. Ms. Bailey's claim does not fail as a matter of law simply because her coworker used the slur, instead of her supervisor. A trial by jury would be far more revealing of the context of Ms. Bailey's workplace and the reasonableness of the actual, human impact upon her of the epithet at issue than the "cold record" before the courts on summary judgment. With the benefit of a full exposition of the facts, including those Respondents identify (*see*, *e.g.*, AB 35), a jury should decide whether Ms. Bailey's working environment was altered by her coworker's slur. The Court must reverse, stemming the tide of lower court decisions that reject plaintiff's civil rights claims as too trivial to remedy—in contravention of

the law and law's purposes. The Court must allow Ms. Bailey to present her case to a jury.[48]

III. Government Code Section 12923, Together with FEHA's Purposes, Counsels Toward Reversal.

The Legislature in 2018 passed Senate Bill 1300 to clarify the harassment standard and its intention that a single, severe incident of coworker harassment be deemed sufficient to survive summary judgment. (*See* Gov. Code §§ 12923(b)-(c).)[49] The Legislature criticized the courts, and one case in particular, for "set[ting] an especially high bar for [single incident coworker] harassment claims."[50]

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[48] (*See, e.g., Tademy v. Union Pacific Corp.* (10th Cir. 2008) 614 F.3d 1132, 1142-43 [discussing, in Title VII racial hostile work environment case, a White manager's reference to the Black plaintiff (who was a foreman) as "boy," and noting that "whether Mr. Cagle's comment was racially motivated and what effect it had on Mr. Tademy are judgments of the sort we are not equipped to make as an appellate court reviewing a cold record. Nor were they appropriate for the district court in ruling on a summary judgment motion."].)

[49] (*See also* Sen. Com. on Judiciary, Analysis on Sen. Bill No. 1300 (2017-2018 Reg. Sess.) Apr. 16, 2018, pp. 9-10 [stating that bill's intention was to provide guidance to the courts with regard to the application of the legal standard and that there was "a general point of consensus [] that if changes are needed, those changes relate more to application of the [harassment] legal standard, rather than to the standard itself."]; Assem. Com. on Judiciary Analysis on Sen. Bill No. 1300 (2017-2018 Reg. Sess.) Jun. 24, 2018, pp. 1 & 4.)

[50] (Sen. Com. on Judiciary, Analysis on Sen. Bill No. 1300, *id.* at p. 10 ["When it comes to co-workers . . . some judges have been reluctant to find that harassment occurred when the claim is based on a single incident."]; *see also* Legal Aid Amicus Letter, *supra*, at 7-9.)

A. Government Code Section 12923 May Be Properly Considered by this Court.

Government Code Section 12923 applies here because the Legislature clarified, but did not change, the law. (*See McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 472-73). To determine whether an amendment has clarified rather than changed a law, the Court evaluates whether the law had been "finally and conclusively" interpreted. (*Ibid*.) A California state law may only be "finally and conclusively" interpreted by the California Supreme Court. (*See Lone Star Security & Video, Inc. v. Bureau of Security and Investigative Services* (2009) 176 Cal.App.4th 1249, 1256, fn. 8 [noting that it was not bound by another Court of Appeals decision]; *see also McClung*, *supra*, 34 Cal.4th at p. 473 [finding that it had "finally and conclusively" interpreted the FEHA as not imposing personal liability on nonsupervisory coworkers, in part, because its interpretation was binding on lower state courts].) This Court has said, "[I]f the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to consideration." (*McClung*, *supra,* 34 Cal.4th at p. 473 [citing *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244].) The judiciary decides whether an amendment represents "a change in the law or merely a declaration of

existing law[.]" (*See Gerard v. Orange Coast Memorial Medical Center* (2018) 6 Cal.5th 443, 454–55.)

Here, this Court has not yet ruled on whether a single instance of coworker harassment—and more specifically the n-word—is sufficient to survive summary judgment.[51] Unlike in *McClung*, where the Court had "finally and conclusively" interpreted FEHA on the relevant issue, and the Legislature's response was to amend the statute to undermine the Court's decision while stating that the amendment was a clarification, (*see McClung*, *supra*, 34 Cal.4th at pp. 470-71), Government Code Section 12923(b) rejects the central holding of *Brooks v. City of San Mateo* (2000) 229 F.3d 917, a federal case that is not binding on California state courts interpreting FEHA. (*See People v. Beltran* (2013) 56 Cal.4th 935, 953, as modified on denial of reh'g (Aug. 28, 2013) ["[L]ower federal decisional authority is neither binding nor controlling in matters involving state law."].)

Because Senate Bill 1300 clarified but did not change the law, this Court may consider California Government Code Section 12923 and need not decide whether it applies retroactively. (*See People v. Goldsmith* (2014) 59 Cal.4th 258, 269, fn. 2 ["Because the statutes were intended to be declarative of existing law, no question of retroactive application is presented."]; *McClung, supra,* 34 Cal.4th at pp. 471-72 [concluding that a

[51] This Court has said in *dicta*, in a case reviewing an injunction, that "a single use of a racial epithet, standing alone, would not create a hostile work environment[.]" (*See Aguilar*, *supra*, 21 Cal.4th at p. 146, fn. 9.)

statute that clarifies, rather than changes, law may apply retroactively "because the true meaning of the statute remains the same"].)

Nonetheless, should the Court conclude that Senate Bill 1300 did change the harassment standard, it should apply it retroactively for at least two reasons: (1) Senate Bill 1300 did not substantially change the legal consequences of past events (*see McClung*, *supra,* 34 Cal.4th at p. 472 [citing *Western Security Bank*, *supra*, 15 Cal.4th at p. 243]); *Quarry v. Doe I* (2012) 53 Cal.4th 945, 956 ["In general, a law has a retroactive effect when it functions to change the legal consequences of past conduct by imposing new or different liabilities based upon such conduct that is, when it substantially affects existing rights and obligations."] [internal quotation marks and alterations omitted]); and (2) the Legislature's statement that it was merely clarifying the law provides "a clear and unavoidable implication that the Legislature intended retroactive application." (*See Western Security Bank*, *supra*, 15 Cal.4th at p. 244 ["[E]ven if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a 'clarification,' the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. . . . Thus, where a statute provides that it clarifies or declares existing law, it is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment."] [internal alterations omitted]; *accord McClung, supra*, 34 Cal.4th at p. 476

[distinguishing *Western Security Bank* because "the only judicial action that had interpreted the statute before the Legislature amended it was a Court of Appeal decision that never became final"].)

Thus, absent any constitutional considerations, the Court should apply Government Code Section 12923 to Ms. Bailey's case. Notably, Respondents identify no constitutional concerns with Senate Bill 1300's retroactive application. (*See* AB 38-39.)

B. Because of FEHA's Animating Purposes and the Legislature's Intent as Expressed in Government Code Section 12923, This Court Should Hold that a Coworker's One-Time Use of the N-Word May Raise a Triable Issue.

While the Court of Appeal cited Government Code Section 12923 (*see* Opinion 7), it failed to heed the Legislature's guidance, once more weighing too heavily the coworker status of the harasser. (*See* Opinion 7, 9-11; *Brooks, supra,* 229 F.3d 917, 924 ["Because only the employer can change the terms and conditions of employment, an isolated incident of harassment by a co-worker will rarely (if ever) give rise to a reasonable fear that sexual harassment has become a permanent feature of the employment relationship."]; Gov. Code § 12923(b) ["[T]he Legislature hereby declares its rejection of the United States Court of Appeals for the 9th Circuit's opinion in *Brooks* . . . "].) We urge the Court to adopt the Legislature's

repudiation of the "one free grope"[52] and the one free n-word rules furthered by *Brooks* and the Court of Appeal's opinion.

Such a decision would be consistent with FEHA's animating purposes; it declares "as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to . . . hold employment without discrimination or abridgment on account of race [and other characteristics]." (Gov. Code § 12920). Significantly, FEHA's purposes are not solely limited to the individual's interest in being free from discrimination and harassment; rather, the FEHA moreover furthers a societal interest in remedying employment discrimination. (*See Harris v. Santa Monica* (2013), 56 Cal.4th 203, 225 [observing that FEHA's purpose is not solely "compensatory" but also to "prevent and deter unlawful employment practices[,]" a "forward-looking goal . . . [that] goes beyond the tort-like objective of compensating an aggrieved person"]; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 90 [recognizing "the fundamental public interest in a workplace free from the pernicious influence of sexism. So long as it exist, we are *all* demeaned."]; *Aguilar*, *supra*, 21 Cal.4th at p. 129 ["Employment discrimination 'foments domestic strife . . . and adversely affects the interest

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[52] The Senate Judiciary Committee recognized that Senate Bill 1300's sponsors "assert that the legacy of [*Brooks, supra*, 229 F.3d 917] has been a de facto 'one free grope rule' under which even physical assault of a victim is not considered sufficiently severe to support a finding of sexual harassment." (Sen. Com. on Judiciary, Analysis on Sen. Bill No. 1300, *supra* at p. 10.)

of . . . the public in general.’”].) These societal goals are hindered by a decision preventing single incident coworker epithet uses from being, as a matter of law, actionable harassment.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to reverse and remand for trial.

Dated: August 2, 2021

Respectfully Submitted,

Stacy Villalobos
Christopher Ho
Legal Aid at Work

Attorneys for *Amici Curiae*

STATEMENT OF COMPLIANCE WITH CAL. RULES OF COURT RULE 8.204(c)(1)

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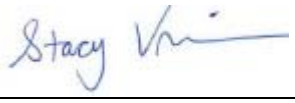

Stacy Villalobos
Christopher Ho
Legal Aid at Work

Attorneys for *Amici Curiae*

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Case No. S265223

Daniel Ray Bacon Law Offices of Daniel Ray Bacon 569 Hayes Street, Suite One San Francisco, CA 94102 Tel: (415) 864-0907 Fax: (415) 864-0989 Email: bacondr@aol.com	Attorney for Petitioner *TWANDA BAILEY*
Robert Leon Rusky Law Office of Robert L. Rusky 159 Beaver Street San Francisco, CA 94114 Tel: (415) 823-9356 Fax: (775) 310-0610 Email: ruskykai@earthlink.net	Attorney for Petitioner *TWANDA BAILEY*

Dennis J. Herrera, City Attorney Katherine Hobin Porter, Chief Labor Attorney Jonathan Rolnick, Deputy City Attorney Tara M. Steeley, Deputy City Attorney 1390 Market Street, Floor Five San Francisco, CA 94102 Tel: (415) 554-4926 Fax: (415) 554-4248 Email: Jonathan.rolnick@sfcityatty.org Tara.steeley@sfcityatty.org	Attorneys for Respondent SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE, GEORGE GASCON, CITY & COUNTY OF SAN FRANCISCO,

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Tishon Smith-Bennett

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Justin Volk Horvitz & Levy LLP	jvolk@horvitzlevy.com	e-Serve	8/3/2021 9:38:26 AM
Jonathan Rolnick Office of the City Attorney 151814	jonathan.rolnick@sfcityatty.org	e-Serve	8/3/2021 9:38:26 AM
Bobette Tolmer Renne Public Law Group	btolmer@publiclawgroup.com	e-Serve	8/3/2021 9:38:26 AM
Daniel Bacon Law Offices of Daniel Ray Bacon 103866	bacondr@aol.com	e-Serve	8/3/2021 9:38:26 AM
Eric Boorstin Horvitz & Levy LLP 253724	eboorstin@horvitzlevy.com	e-Serve	8/3/2021 9:38:26 AM
Arthur Hartinger Renne Public Law Group 121521	ahartinger@publiclawgroup.com	e-Serve	8/3/2021 9:38:26 AM
Tara Steeley Office of the City Attorney	tara.steeley@sfgov.org	e-Serve	8/3/2021 9:38:26 AM
Ryan Mcginley-Stempel Renne Public Law Group 296182	rmcginleystempel@publiclawgroup.com	e-Serve	8/3/2021 9:38:26 AM
Tara Steeley Office of City Attorney 231775	tara.steeley@sfcityatty.org	e-Serve	8/3/2021 9:38:26 AM
Valerie Sprague Legal Aid at Work	vsprague@legalaidatwork.org	e-Serve	8/3/2021 9:38:26 AM
Christopher Ho	cho@las-elc.org	e-	8/3/2021 9:38:26

Legal Aid at Work 129845		Serve	AM
Robert Rusky Law Office of Robert L. Rusky 84989	ruskykai@earthlink.net	e-Serve	8/3/2021 9:38:26 AM
Bradley Pauley Horvitz & Levy LLP 187298	bpauley@horvitzlevy.com	e-Serve	8/3/2021 9:38:26 AM
Stacy Villalobos Legal Aid at Work 306710	svillalobos@legalaidatwork.org	e-Serve	8/3/2021 9:38:26 AM

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Date

/s/Valerie Sprague

Signature

Villalobos, Stacy (306710)

Last Name, First Name (PNum)

Legal Aid at Work

Law Firm