"LOCKER ROOM TALK" OR SEXUAL HARASSMENT? THE PUSH FOR A FEDERAL MODIFICATION OF THE SEVERE OR PERVASIVE STANDARD

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I. INTRODUCTION

"If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet," actress Alyssa Milano tweeted.[1] As hundreds of thousands of people began posting #MeToo, the significant social movement shed light on the prevalence of sexual harassment in the workplace.[2] #MeToo exposed the gaps in sexual harassment legislation and mobilized support for protective lawmaking at both the state and federal levels.[3] Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[4] In 1980, the Equal Employment Opportunity Commission ("EEOC") amended its guidelines to include sexual harassment as a form of sex

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1 Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 4:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976.

2 *See* Brianna Messina, *Redefining Reasonableness: Supervisory Harassment Claims in the Era of #MeToo*, 168 U. PA. L. REV. 1061, 1062–64 (2020) (discussing the effects of the #MeToo movement on reporting and awareness of workplace harassment).

3 *Id.* at 1087–88.

4 42 U.S.C. § 2000e-2(a).

discrimination prohibited by Title VII.[5] Sexual harassment under Title VII is actionable because of its discriminatory nature against protected classes.[6]

There are two types of harassment recognized under Title VII: quid pro quo and hostile work environment.[7] This Comment will focus on hostile work environment claims.[8] To make a prima facie case of a hostile work environment, the victim must show that: (1) they belong to a protected class under the law; (2) the harassment experienced was based on sex; (3) the harassment was unwelcome; (4) the harassment was sufficiently severe or pervasive "to alter the conditions of [the victim's] employment" and create an abusive working environment; and (5) the plaintiff subjectively views, and a reasonable person would also objectively view, the work environment as hostile or abusive.[9] While the "severe or pervasive" standard has long governed hostile work environment claims, both under Title VII and in many state legislative counterparts, the #MeToo movement sparked a desire to revisit this demanding standard.[10] For example, California amended its anti-discrimination law in 2018 to allow a lower threshold for bringing a hostile work environment claim.[11] In 2019, New York similarly passed anti-sexual harassment legislation that allows workers to bring harassment suits resulting from conduct that in the past would

5 EEOC, Policy Guidance on Current Issues of Sexual Harassment (1990), https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment.

6 Anna I. Burke, *"It Wasn't That Bad": The Necessity of Social Framework Evidence in Use of the Reasonable Woman Standard*, 105 IOWA L. REV. 771, 775 (2020) (sexual harassment qualifies as sex discrimination).

7 *See* Rachel Farkas et al., *State Regulation of Sexual Harassment,* 20 GEO. J. GENDER & L. 421, 426 (2019) ("Quid pro quo harassment occurs when the submission to or rejection of requests for sexual favors is used as the basis for employment decisions affecting an individual") (internal quotation marks omitted).

8 *Id.* at 427 (discussing the types of claims actionable under Title VII).

9 *Id.* at 427; *see also* Christine J. Back & Wilson C. Freeman, CONG. RSCH. SERV., R45155, SEXUAL HARASSMENT AND TITLE VII: SELECTED LEGAL ISSUES 2–3 n.10 (2018).

10 *See generally* Andrea Johnson, Kathryn Menefee, & Ramya Sekaran, *Progress in Advancing Me Too Workplace Reforms in #20StatesBy2020*, NAT'L WOMEN'S L. CTR., 10 (Dec. 2019), https://nwlc.org/wp-content/uploads/2019/07/final_2020States_Report-12.20.19-v2.pdf (discussing victim-friendly reforms adopted by a variety of states) [hereinafter *Women's Law Ctr.*].

11 *Women's Law Ctr.*, *supra* note 10, at 10.

not likely satisfy the severe or pervasive burden.[12] Specifically, the law expanded protections to a broader class of employees and eased the burden of persuasion.[13] Anti-discrimination legislation, such as those discussed, is long overdue; however, passed laws remain inadequate due to their limited jurisdictional nature and, often, lack of retroactive coverage.[14] Moreover, despite attempts by many state legislatures to modify their anti-discrimination standards, state courts in these jurisdictions continue to blindly apply the severe or pervasive standard.[15]

The severe or pervasive standard is outdated and inefficient.[16] States should follow in the footsteps of New York and California by adopting a more inclusive standard, one that recognizes all forms of sexual harassment as actionable.[17] Many are skeptical of the validity of sexual harassment claims until they fall victim to an offender's wrongdoing.[18] This skepticism blocks the path to relief for victims, as their experiences are often belittled by judges who quantify the victims suffering based on an employer-friendly standard.[19] This distrust of victims discourages reporting, which leads to impunity for harassers. All these factors

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[12] *Women's Law Ctr.*, *supra* note 10, at 10–11.

[13] *Women's Law Ctr.*, *supra* note 10, at 10–11.

[14] *See, e.g.*, Wellner v. Montefiore Med. Ctr., No. 17 Civ. 3479 (KPF), 2019 WL 4081898, at *5 n.4 (S.D.N.Y. Aug. 29, 2019) (holding that the bill's effective date is October 11, 2019).

[15] *See* Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L. J. F. 121, 144 (2018).

[16] *See A Call for Legislative Action to Eliminate Workplace Harassment: Principles and Priorities*, ACLU 1, 3 (Dec. 2018), https://www.aclu.org/sites/default/files/field_document/workplace_harassment_legislative_principles_10.15.18.pdf (proposing that congress should "[a]ddress the judicially created 'severe or pervasive' liability standard so as to correct and prevent unduly restrictive interpretations by the courts that minimize and ignore the impact of harassment").

[17] *See* Cal. Gov't Code § 12923; N.Y. Exec. Law § 296(h).

[18] *See* Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCH. TODAY (Nov. 16, 2017), https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner.

[19] Alexia Campbell, *How the Legal System Fails Victims of Sexual Harassment*, VOX (Dec. 11, 2017), https://www.vox.com/policy-and-politics/2017/12/11/16685778/sexual-harassment-federal-courts ("federal judges across the country (who are mostly men) have developed an extremely narrow interpretation of what sexual harassment is under the law, and which behaviors create a hostile work environment. Repeated groping, sexual propositions, and sexualized comments at work usually don't meet that high standard").

demonstrate the need for a standard that recognizes all instances of harassment as just that—harassment. By continuing to adhere to the severe or pervasive standard, victims' careers will suffer further, harassers will continue their predatory behavior without accountability, and the progress of the #MeToo movement will go to waste.

Part II of this comment addresses the current severe or pervasive standard set out in the Supreme Court's decision in *Meritor Savings Bank, FSB v. Vinson*[20] and the development of sexual harassment law in recent decades. Part III examines state modifications of this standard, incorporating cases that likely would have been decided differently had the stringent severe or pervasive requirement been abolished. Part IV analyzes the implementation of these reformed thresholds, addressing emerging case law that applies less onerous standards than the traditional *Meritor* standard. There, I argue that state modifications, though a significant improvement in sexual harassment law, are still not inclusive enough and that a binding, plaintiff-friendly federal standard is necessary to protect victims. Accordingly, I conclude that the Federal Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act ("BE HEARD" or "the Act"),[21] proposed in Congress but ultimately rejected, should be pursued again because it better encompasses problematic behavior that continues to serve as a barrier to victim advancement. By setting a threshold that allows for less judicial deference, case law governing hostile work environment claims will become more uniform, and harassers will be held accountable for their inexcusable acts.

[20] 477 U.S. 57, 67 (1986).

[21] Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act, H.R. 2148, 116th Cong. § 204 (2019) [hereinafter "the Act"].

II. THE HISTORY OF THE SEVERE OR PERVASIVE STANDARD

The laws and systems currently in place to address harassment are inadequate. Sexual harassment need not be "sexual."[22] It can "include conduct of a sexual nature, such as requests for sexual favors or unwanted verbal or physical sexual advances, and it can occur regardless of whether the harasser claims to be sexually attracted to the victim."[23] Moreover, women are not the only victims; men, particularly those who do not conform to masculine norms, can also be targets of sexual harassment.[24] Similarly, women can also be harassers.[25] It is well recognized, however, that women are especially susceptible to sexual harassment, and despite "under-reporting, approximately 60% of female employees . . . have experienced at least one specific instance of sexually harassing behavior, such as unwanted sexual attention or sexual coercion."[26]

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[22] *See* Kristen N. Colleta, *Sexual Harassment on Social Media: Why Traditional Company Sexual Harassment Policies Are Not Enough and How To Fix It*, 48 SETON HALL L. REV. 449, 450 (2018) ("For example, 'offensive remarks about a person's sex' can result in a sexual harassment claim"); *see also* Judith J. Johnson, *License To Harass Women: Requiring Hostile Environment Sexual Harassment To Be "Severe Or Pervasive" Discriminates Among "Terms And Conditions" Of Employment*, 62 MD. L. REV. 85, 135 (2003) ("The other type of sexual harassment does not involve sexual conduct, but rather would cover such conduct as derogatory comments about a person's gender").

[23] NEW YORK CITY COMM'N ON HUM. RTS. & SEXUALITY & GENDER L. CLINIC AT COLUM. L. SCH., COMBATING SEXUAL HARASSMENT IN THE WORKPLACE: TRENDS AND RECOMMENDATIONS BASED ON 2017 PUBLIC HEARING TESTIMONY, NEW YORK CITY COMMISSION ON HUMAN RIGHTS 2 (2017) [hereinafter NYC COMMISSION].

[24] Aleiza Durana et al., SEXUAL HARASSMENT: A SEVERE AND PERVASIVE PROBLEM 6 (2018), http://newamericadotorg.s3.amazonaws.com/documents/Sexual_Harassment_A_Severe_and_Pervasive_Problem_2018-09-25_152914.pdf (last visited Feb. 6, 2022).

[25] *Id.*; *See* Ramya Sekaran, *Congress Finally Introduces Groundbreaking Workplace Harassment Legislation For the Rest of Us*, NAT'L WOMEN'S L. CTR. (Apr. 9, 2019). https://nwlc.org/blog/congress-finally-introduces-groundbreaking-workplace-harassment-legislation-for-the-rest-of-us/ (last visited Feb. 6, 2022) (recognizing that while workers in virtually every industry experience harassment and discrimination, low wage workers and women in male-dominated fields are especially vulnerable.).

[26] NYC COMMISSION, *supra* note 23 (citing CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUD. OF HARASSMENT IN THE WORKPLACE (2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace (last visited Feb. 6, 2022).

Against this backdrop, the United States Supreme Court set out the standard to evaluate claims of sexual harassment in *Meritor*, where Vinson, an employee at Meritor Savings Bank, was fired from her position for "excessive use" of sick leave.[27] Vinson brought an action against Meritor Savings Bank and the bank's vice president, Sidney Taylor, claiming that Taylor sexually harassed her on multiple occasions throughout her four-year term of employment.[28] Vinson testified that the first instance of harassment occurred when Taylor invited her out to dinner and pressured her to have sexual relations, which she agreed to out of fear of losing her job.[29] Following this incident, Vinson further alleged that Taylor repeatedly demanded sexual favors, "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions."[30] Vinson did not report this misconduct out of fear of Taylor and termination.[31] Taylor denied all allegations and suggested that the action was a response to a business-related dispute.[32]

The district court denied relief, finding that any sexual activity between the pair was voluntary and that Vinson therefore could not be a victim of sexual harassment.[33] On appeal, the Court of Appeals for the District of Columbia Circuit reversed the district court's ruling and remanded the case, reasoning that if the evidence demonstrated that "Taylor made Vinson's toleration of sexual harassment a condition of her employment," her voluntariness was not material.[34] As such, the court held that Vinson raised a valid claim under Title VII predicated on the existence of a hostile work environment.[35]

27 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 60 (1986).
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.* at 61.
32 *Meritor*, 477 U.S. at 61.
33 *Id.*
34 *Id.* at 62.
35 *Id.*

The Supreme Court, recognizing that a hostile work environment violates Title VII, affirmed the circuit court's holding.[36] The Court found that Vinson raised a sufficient claim for hostile work environment sexual harassment because her supervisor's actions constituted pervasive harassment.[37] In support of its ruling, the Court declared that a hostile work environment may only violate Title VII where the harassment is sufficiently severe or pervasive to alter the conditions of employment and to create an abusive working environment.[38]

Since recognizing a cause of action for hostile work environment claims, the Supreme Court has continued to clarify the standard.[39] For example, seven years after *Meritor*, the Court in *Harris v. Forklift Systems, Inc.*[40] expanded the definition of a discriminatorily hostile work environment by specifying the types of injuries sufficient to support a claim.[41] The case involved a claim raised by Harris, a manager at Forklift, who faced gender-based insults and unwanted sexual innuendos.[42] Specifically, Forklift's Systems President, Hardy, made multiple derogatory comments toward Harris, such as "'you're a woman, what do you know' and . . . 'dumb ass woman.'"[43] Although Harris had complained to Hardy about his conduct and was assured said conduct would cease, the verbal harassment continued, ultimately leading to her resignation.[44] Harris thereafter brought an action

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36 *Id.* at 64 (specifying that "sexual harassment" is a form of sex discrimination prohibited by Title VII).

37 *Id.* at 66–67 ("plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

38 *Meritor*, 477 U.S. at 66–67 (citing Henson v. City of Dundee, 682 F.3d 897, 904 (11th Cir. 1982)) ; *see also* L. Camille Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?,* 22 EMP. RTS. & EMP. POL'Y J. 321, 330 n.33 (citing Cockrell v. Greene Cnty. Hosp. Bd., No. 7:17-cv-00333-LSC, 2018 WL 1627811, at *5 (N.D. Ala. Apr. 4, 2018)) (finding that the "severe or pervasive" standard was enacted to ensure claims of harassment represent real harm to claimants, as well as to distinguish between what the court views as merely "offensive" behavior and behavior which is "abusive.").

39 *See* Johnson*, supra* note 22, at 98.

40 510 U.S. 17 (1993).

41 *See* Johnson, *supra* note 22, at 98–99 (citing *Harris*, 510 U.S. at 17, 19–23).

42 *Harris*, 510 U.S. at 19.

43 *Id.*

44 *Id.*

asserting that Hardy's conduct had created a hostile work environment.[45]

The district court held that, although "a close case," Hardy's conduct did not constitute an abusive working environment because it did not create an "environment so poisoned as to be intimidating or abusive to [Harris]."[46] The court reasoned that while some of Hardy's comments "offended [Harris], and would offend the reasonable woman," they were not "so severe as to be expected to seriously affect [Harris'] psychological well-being," nor sufficiently pervasive to interfere with work performance.[47] On certiorari, the Supreme Court reversed, holding it was improper for the district court to solely rely upon the presence of psychological injury and that, instead, a court must consider all the surrounding circumstances when determining whether an environment is hostile.[48] The Court reaffirmed the severe or pervasive standard, noting that it "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[49] The Court also dismissed the notion that analyzing hostile work environment claims can be "a mathematically precise test."[50] Courts cannot apply generalized factors when analyzing sexual harassment claims because each victim's experience is individualized—instead, there must be a holistic analysis of each distinct claim.[51]

Justice Ginsburg concurred in *Harris,* agreeing that the Court's inquiry should center on "whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance."[52] In Justice Ginsburg's view, a plaintiff need not

45 *Id.*

46 *Id.* at 19–20 (alteration in original).

47 *Harris,* 510 U.S. at 20 (alterations in original).

48 *Id.* at 23.

49 *Id.* at 21; *see also id.* at 23 ("Psychological harm, like any other relevant factor, may be taken into account," but "no single factor is required.").

50 *Id.* at 22.

51 *See* Farkas et al., *supra* note 7, at 451 (citing 29 C.F.R. 1604.11(b)) ("Because of the subjective nature of these terms, the EEOC guidelines recommend that courts assess the totality of the circumstances to determine whether there was severity or pervasiveness based on individual facts of a case.").

52 *Harris*, 510 U.S. at 24–25.

individually prove that their tangible productivity has declined.[53] Rather, it should "suffice[] to prove that a reasonable person subjected to the discriminatory conduct would find . . . that the harassment so altered working conditions as to 'make it more difficult to do the job.'"[54]

The majority in *Harris* further explained that the standard of review is both objective and subjective, meaning that courts must consider how the harasser's behavior would be viewed by a reasonable person and how the harasser's behavior was individually viewed by the plaintiff.[55] The Court further instructed that when assessing the objective portion of a plaintiff's claim, courts should assume the perspective of the reasonable victim.[56] Following the *Harris* decision, the majority of lower courts apply the standard proposed by the Supreme Court; however, some courts stray from this standard, instead opting to apply a reasonable woman standard.[57] The Court has not yet clarified the correct standard for analyzing the objective component of a hostile work environment claim.[58]

The Seventh Circuit's decision in *Swyear v. Fare Foods Corp* demonstrates that requiring an objective prong in the analysis

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[53] *Id.*

[54] *Id.* (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)).

[55] Farkas et al.*, supra* note 7, at 451; *see also* Back & Freeman, *supra* note 9, at 3 (finding that "the plaintiff *subjectively* viewed the harassment as creating an abusive work environment; and a reasonable person would also *objectively* view the work environment as abusive. This last objective prong typically constitutes the most probing aspect of the analysis." (internal quotation marks omitted)).

[56] Brooks v. City of San Mateo, 229 F.3d 917, 924 (9th Cir. 2000); *see also* Policy Guidance on Current Issues of Sexual Harassment, *supra* note 5, at Section C1 (noting that "a 'reasonable person' standard also should be applied to be a more basic determination of whether challenged conduct is of a sexual nature.").

[57] Burke, *supra* note 6, at 774; *but see* Policy Guidance on Current Issues of Sexual Harassment, *supra* note 5, at Section C1 (stating that "the reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior.").

[58] *See* Burke, *supra* note 6, at 781–82 ("In *Harris*, the Supreme Court used a reasonable person standard to determine the objective hostility of a work environment. Following Harris, some lower courts" modified the inquiry depending on who the reasonable person in question was due to gendered perceptions of sexual harassment. "The Supreme Court has not rejected the use of the reasonable woman standard for Title VII cases.").

can lead to the minimization of a victim's experiences.[59] There, an employee testified as to her subjective belief that her workplace environment was both sexist and offensive; however, the Seventh Circuit found the workplace as a whole insufficiently severe or pervasive.[60] Throughout her employment, Amy Swyear was subjected to an unprofessional environment.[61] Swyear met Scott, an outside sales representative, at a county fair to meet with customers.[62] After completing work at the fair, Swyear was forced to stay with Scott for "additional training," and reserved two separate rooms in a hotel.[63] Scott repeatedly touched Swyear's arm, placed his hand on her lower back, and stood close to her.[64] "Scott had three beers during dinner and told Swyear several times that he was single," and later demonstrated signs of intoxication.[65] Upon arriving at their rooms, Scott made his way into Swyear's room, crawled into Swyear's bed, and asked her to be a "cuddle buddy."[66] Despite declining and asking him to leave, Scott returned and knocked several more times on Swyear's door.[67] Later, Swyear reported the incident to her superior, who decided that no discipline was warranted; Swyear was eventually terminated.[68]

The Seventh Circuit articulated that in considering the objective offensiveness of a work environment, courts should consider "the severity of the conduct, its frequency, whether it is merely offensive as opposed to physically threatening or humiliating, and whether it unreasonably interfered with an employee's work performance."[69] The court held that Swyear failed to establish that Scott's conduct was objectively offensive because the conduct was merely "crude and immature," rather

59 911 F.3d 874 (7th Cir. 2018).

60 *See* Swyear v. Fare Foods Corp, 911 F.3d 874, 881 (7th Cir. 2018).

61 *Id.* at 878.

62 *Id.* at 879.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Swyear*, 911 F.3d at 879.

67 *Id.*

68 *Id.* at 879–80.

69 *Id.* at 881 (quoting Robinson v. Perales, 894 F.3d 818, 828 (7th Cir. 2018)).

than pervasively hostile.[70]

The Seventh Circuit exclusively considered whether the environment as a whole was hostile, without assessing the severity of the impact on Swyear herself, thus belittling her trauma and providing her supervisor with the ability to continue to expose her to an unsafe work environment. *Swyear* reflects how pronounced the gaps are in the federal system, as judges continue to belittle a victim's experience by determining that claims are not severe enough. While the federal scheme appropriately provides for an objective consideration of a plaintiff's claim, the issue lies in the abundance of discretion provided to the courts in making that determination, which has ultimately led to inconsistent results. What may be considered objectively offensive to one judge might not be offensive to another. This Comment advocates for the adoption of uniform guidelines that embody a lower threshold in an effort to combat arbitrary results and validate victims' experiences.

Notwithstanding which standard courts apply, conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment is beyond the scope of Title VII.[71] When faced with conduct that does not meet that rigid standard, many courts have used the stringent language to effectively deem harmful conduct permissible.[72] For example, a supervisor raping an employee has, perhaps not surprisingly, consistently been viewed as "severe" enough to meet the bar even though the claim is based upon a single crime.[73] But, in other instances, a single incident does not meet the threshold, such as when physical contact is not "bad" enough, or if the action does not involve

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[70] *Id.* ("Although we recognize the environment at Fare Foods was at times inappropriate and offensive, we do not believe [plaintiff] has met [the severe or pervasive standard].").

[71] *See* Brooks v. City of San Mateo, 229 F.3d 917, 924 (9th Cir. 2000).

[72] *See* Johnson, *supra* note 22, at 85–86; *see also* Sandra F. Sperino & Suja A. Thomas, *Boss Grab your Breasts? That's not (Legally) Harassment*, N.Y. TIMES: OPINION (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html; Back & Freeman, *supra* note 9, at 3 ("Failure to show sufficient severity or pervasiveness, under the objective prong of the analysis, is often the basis for *dismissal* of a Title VII harassment claim.").

[73] *See* Lapka v. Chertoff, 517 F.3d 974, 983-84 (7th Cir. 2008) (co-worker rape was sufficiently severe to constitute actionable harassment under Title VII).

physical threats.[74] Yet, a wide range of other problematic and harmful conduct often does not meet either threshold, such as if a supervisor asks an employee out on a date once and treats her differently if she declines.[75] Accordingly, an abusive work environment, even one that does not impact psychological well-being, "often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers," and therefore should fall within Title VII's purview.[76]

The problem with the federal scheme is that it continues to dismiss improper conduct in the name of not meeting the threshold. When conduct is rendered not serious enough to meet the standard, victims are left without a remedy. Harassers' misconduct cannot continue to be pushed under the rug and excused, as the federal system fails to encompass a wide variety of harassment that harms women. Women are forced to either leave their positions to evade their harassers or must work in an environment that is not conducive to their success and advancement. The standard is far too permissive, as it minimizes bad behavior under the guise of outdated understandings of professionalism and workplace interactions.

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[74] *See* Paul v. Northrop Grumman Ship Sys., 309 F. App'x 825, 826 (5th Cir. 2009) (affirming a district court ruling that a single ninety-second incident of a male foreman going chest to chest with a female plaintiff and rubbing pelvic region across her hips and buttocks was not sufficiently severe or pervasive to constitute an actionable Title VII claim); Guerrero v. Lowe's Home Ctrs., Inc., 254 F. App'x 865, 867 (2d Cir. 2007)

> where the sex-related conduct complained of was principally name calling, no single incident was sufficiently severe to give rise to a cause of action . . . [w]e think it important . . . that Guerrero alleges no physical touching or threats, no interference with her work performance, and no overt sexual advances. If she proffered evidence to support a finding that she had suffered that sort of harassment, the analysis as to whether it was severe or pervasive might well be different.

[75] Sperino & Thomas, *supra* note 72; *see also* Policy Guidance on Current Issues of Sexual Harassment, *supra* note 5 ("A 'hostile environment' claim generally requires a showing of a pattern of offensive conduct.").

[76] Harris v. Forklift Sys., 510 U.S. 17, 22 (1993); *see* Policy Guidance on Current Issues of Sexual Harassment, *supra* note 5.

III. STATE MODIFICATIONS

Many state courts look to Title VII and its interpretations when determining the validity of hostile work environment claims under state anti-discrimination law.[77] Yet, states like California and New York have gone beyond the federal standard by enacting legislation that employs greater protections for victims of sexual harassment.[78] Specifically, the California legislature enacted Section 12923 of its anti-discrimination code in January of 2019, declaring the state's intent regarding the application of the laws against harassment.[79] In doing so, the legislature expressly stated that a "single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment."[80] If the harassing conduct interferes with the employee's work performance or creates "an intimidating, hostile, or offensive working environment[,]" then an employee may pursue a valid sexual harassment claim.[81]

California's approach adopts the reasoning proposed by Justice Ginsburg in her *Harris* concurrence*,* as it involves an objective inquiry into whether a reasonable person would be injured by the altered working conditions.[82] According to the legislature, the purpose of these new laws is "to provide all Californians with an equal opportunity to succeed in the workplace and should be applied accordingly by the courts."[83] The legislature rejected the reasoning of *Brooks v. City of San Mateo,* which previously controlled in the Ninth Circuit.[84] In rejecting that approach, California declared that the opinion

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77 Carol Schultz Vento, *When is Work Environment Intimidating, Hostile or Offensive, So As To Constitute Sexual Harassment Under State Law*, 93 A.L.R.5th 47, 2 (2022).

78 *See* Cal. Gov't Code § 12923; *see* N.Y. Exec. Law § 296.

79 Cal. Gov't Code § 12923.

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 229 F.3d 917, 926 (9th Cir. 2000) ("Utilizing the *Harris* factors of frequency, severity and intensity of interference with working conditions, we cannot say that a reasonable woman in Brooks' position would consider the terms and conditions of her employment altered by Selvaggio's actions.").

shall no longer be used to determine what kind of conduct is sufficiently severe or pervasive to constitute an actionable claim.[85]

California's anti-discrimination reforms, while optimal on paper, have not been implemented effectively. California courts have not only retained the severe or pervasive standard but also disregarded the enhanced protections that Section 12923 provides.[86] For example, in *Jackson v. Pepperdine Univ.*,[87] the appellant asserted that the respondent made two highly offensive remarks that "were sufficiently severe to have had such an effect on a reasonable woman in her position."[88] There, the appellate court upheld the trial court's ruling and applied the incorrect severe or pervasive standard, holding that both before and after the enactment of Section 12923, "the totality of the circumstances Jackson alleged do not reflect conduct sufficiently severe to constitute actionable sexual harassment."[89]

Case law in New York fared differently.[90] On August 12, 2019, Governor Cuomo signed SB 6577 into law, which amended the New York State Human Rights Law ("NYSHRL") by creating new protections and enhancing already existing protections against sexual harassment.[91] Before the amendment, a plaintiff claiming a hostile work environment based on discrimination in violation of the NYSHRL was required to show that the workplace was "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[92] The new law completely discarded the severe or pervasive requirement.[93] Now, under New York law,

85 *Id.*; *see also* Cal Gov Code § 12923.

86 *See* Jackson v. Pepperdine Univ., No. B296411, 2020 Cal. App. Unpub. LEXIS 5719, at *2 (Sep. 1, 2020).

87 *Id.*

88 *Id.*

89 *Id.*

90 *See* S. 6577, 2019–20 Leg. Sess. (N.Y. 2019), https://www.nysenate.gov/legislation/bills/2019/s6577.

91 *Id.*

92 Reichman v. City of N.Y., 179 A.D.3d 1115, 1118 (App. Div. 2nd Dept. 2020).

93 Russell Penzer, *New York Breaks from Federal Sexual Harassment Standards*, N.Y.L.J.: ANALYSIS (Oct. 4, 2019, 11:30 AM), https://www.law.com/newyorklawjournal/2019/10/04/new-york-breaks-from-federal-sexual-harassment-

the employer must prove that a "reasonable victim" would view the conduct in question as no more than "petty slights or trivial inconveniences."[94] The law directs courts to construe the NYSHRL liberally, like its New York City counterpart,[95] "regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of [the NYSHRL], have been so construed."[96] SB 6577 transforms sexual harassment law in the State of New York; now, any unwanted sexual or gender-based harassment, including isolated comments, jokes, or gestures, may be unlawful.[97]

The monumental impact of New York's change was evident in *Petrilli v. Bd. of Educ. of the E. Rochester Union Free Sch. Dist.*, where the plaintiff claimed that her colleague's vulgar behavior and language created a hostile work environment.[98] Although the court dismissed her claim under the severe or pervasive standard, it took judicial notice of the amendments to the standard in a footnote, highlighting that, under the new Human Rights Law, the plaintiff's claim would have been actionable.[99] *Petrilli* illustrates the benefits of disregarding the severe or pervasive standard of conduct because improper conduct can no longer be referred to as inconsequential rudeness. It is unclear, however, how the new standard will be effectuated. Similar to the California opinions, few courts have applied the lower standard to novel case law.

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standards/.

94 *Id.*

95 N.Y. Admin. Code § 8-101.

96 N.Y. Exec. Law § 300.

97 *See generally* Penzer, *supra* note 93 (explaining how the reformed standard is a substantial deviation from historical standards).

98 Petrilli v. Bd. of Educ. of the E. Rochester Union Free Sch. Dist., No. E2019003161, 2019 N.Y. Misc. LEXIS 7172, at *3 (Sup. Ct. Aug. 10, 2019).

99 *Id.* at *5

> Nor does the frequency of the vulgar and lewd references, even if directed at the plaintiff on account of her gender, rise to the level of 'pervasive.' The conduct of the employees in the office of the Superintendent of East Rochester school—although by today's standards is reprehensible and utterly out of place—does not meet the standard of egregiousness and depravity that is contemplated by case law.

Although states can enact legislation that is more restrictive than federal statutes, some experts propose that weakening the severe or pervasive standard will not affect the outcome of many cases due to plaintiffs' lawyers' clever inclusion of state law claims in their pleadings.[100] Additionally, state modifications may also be inefficient in providing recourse for victims of sexual harassment, as courts seem to cling to old norms and misapply, or completely disregard, enhanced protections.

The next section addresses the gaps in protection for victims and proposes that uniformity among courts in the context of sexual harassment can best be achieved by implementing a more easily applied standard. The enactment of the Act, in conjunction with widespread state modifications to the substantive standards in sexual harassment law, will provide this solution.

IV. THE PRESSING NEED FOR A NATIONAL MODIFICATION

A. *The Harmful Effects of Insufficient Standards*

The severe or pervasive standard is outdated and underinclusive because it enables courts to disregard victims' injuries. The disparity in the case law is far too great under the current standard, which creates a gap in federal protections.[101] While the severe or pervasive standard may have worked under the societal norms of the last century, reasonableness standards are meant to update and should not "entrench norms from another time."[102] Despite the increased intolerance of sexual

[100] Erik A Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?,* AM. BAR ASS'N (May 8, 2020), https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims/ (explaining that lawyers can avoid the severe and pervasive standard by "pleading state law claims for assault, battery, negligent hiring, and negligent supervision.").

[101] Kenneth R. Davis, *Strong Medicine: Fighting the Sexual Harassment Pandemic*, 79 OHIO ST. L. J. 1057, 1103 (2018) (explaining that the standard needs to be lower to condemn behavior that would be highly offensive to unbiased observers without overreach, stating "[t]he occasional salacious joke, insult, or provocative remark may be boorish, but most reasonable people would not find such misbehavior highly offensive.").

[102] Joan C. Williams et al., *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 154 (2019).

misconduct and harassment in light of #MeToo, many courts have failed to update their understanding of these types of claims. Instead, courts rely on outdated standards and norms that focus on patriarchal notions and protect employers instead of victims.[103] The Act can help address this problem by providing a national solution that is more reflective of current norms and values.

The case law governing hostile work environment claims is blatantly inconsistent.[104] Judges often interpret the standard as "severe and pervasive," which "elevates the severity of the conduct to a really unconscionable level" even though the Supreme Court originally intended the standard to be disjunctive.[105] For example, in *Hannigan-Haas v. Bankers Life & Casualty Co.*,[106] the senior vice president of the plaintiff's employer asked her to accompany him to his office where he later sexually assaulted her, only stopping when the plaintiff was able to break free and run from the room.[107] While this sexual assault was rendered sufficiently severe, the United States District Court for the Northern District of Illinois held that it nevertheless was not enough to constitute sexual harassment because it only occurred once and was, therefore, not "pervasive" enough to meet the standard.[108] This was a clear misuse of an already impenetrable standard.

In an attempt to avoid further misapplication, the Seventh Circuit restated the *Meritor* standard in *Cerros v. Steel Techs., Inc.*[109] In 2005, the Seventh Circuit clarified that "conduct that is *either* pervasive *or* severe may give rise to a hostile work

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103 *See id.*

104 *See* Back & Freeman, *supra* note 9, at 3 ("Courts repeatedly note the difficulty of assessing whether harassing conduct is sufficiently severe or pervasive under Harris to amount to a Title VII violation.").

105 Anna Gronewold, *Lawmakers Focus On Setting New Standard For Sexual Harassment*, POLITICO (May 24, 2019), https://www.politico.com/states/new-york/albany/story/2019/05/23/in-final-days-of-session-anti-harassment-groups-focus-on-severe-or-pervasive-standard-1029121(supporting that the *Meritor* standard has proven too high for victims).

106 No. 95 C 7408, 1996 U.S. Dist. LEXIS 16416 (N.D. Ill. Nov. 1, 1996).

107 *Id.* at *3.

108 *Id.* at *15; Johnson, *supra* note 22, at 113 (discussing a line of lower court cases misapplying the *Meritor* standard and *Harris* Factors).

109 398 F.3d 944 (7th Cir. 2005).

environment."[110] Yet, other jurisdictions continue to apply the wrong standard, often finding very offensive conduct "that would amount to sexual assault under criminal statutes [not actionable] because it is insufficiently severe or pervasive."[111] Many courts struggle to determine what qualifies as sufficiently severe or pervasive conduct.

While the Supreme Court in *Harris* articulated factors to use in determining whether a work environment is hostile, courts often misapply these factors by overweighing them and inconsistently interpreting the necessary level of "offensive."[112] For example, in *Hill-Dyson v. City of Chicago*,[113] the Seventh Circuit heard a plaintiff's claim that her supervisor rubbed her back, squeezed her shoulders, and stared at her chest during a uniform inspection while telling her to raise her arms and open her blazer.[114] The court held that the plaintiff's allegations were isolated incidents that, even when taken together, did not create a hostile work environment.[115] Yet, in *EEOC v. Management Hospitality of Racine, Inc*, the United States District Court for the Eastern District of Wisconsin held that three instances of sexual harassment by a supervisor—telling her that he thought she was "kinky" and liked it "rough," propositioned her for sex, and "slap groped" her buttocks—was sufficiently pervasive to support a claim for sexual harassment.[116]

The harassment that took place in *Hill-Dyson* and *Management Hospitality* is eerily similar, both instances demonstrate separate incidents of offensive, egregious conduct, and yet the courts reached different results.[117] These

110 *Id.* at 950.

111 Johnson, *supra* note 22, at 111.

112 *See Harris*, 510 U.S. at 23 (articulating five non-exclusive factors for use in determining whether a work environment is unlawfully hostile or abusive including: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The Court clarified that the presence or absence of any of these factors was not determinative).

113 282 F.3d 456, 463-64 (7th Cir. 2002).

114 *Id.*

115 282 F.3d 456, 463–64 (7th Cir. 2002).

116 666 F.3d 422, 429 (7th Cir. 2012).

117 *See* Back & Freeman, *supra* note 9, at 6 (suggesting that controlling circuit precedent that finds certain fact patterns to not amount to severe or pervasive

inconsistencies exemplify the need for a more encompassing federal standard that proposes clear guidelines for judges to utilize when assessing hostile work environment claims to promote uniformity in factually analogous scenarios.[118] If the standard is lowered, victims that were previously unable to have their claims heard will have their day in court.[119] There have been many instances of sexual harassment that have been deemed as not actionable because of the preclusive nature of the severe or pervasive standard.[120]

However, many critics say that a more inclusive national standard may negatively affect victims because men, who are often perceived as harassers, will shy away from interactions with women out of fear of allegations.[121] Some studies reflect that male behavior and interactions with the opposite sex changed in light of the #MeToo movement, causing many women's careers to stagnate.[122] Surveys show that men are less willing to mentor women, thereby adversely affecting the careers of women because workers with mentors are more likely to be promoted.[123] These

conduct contributes to a pattern of conduct courts hold to not be severe or pervasive).

118 Back & Freeman, *supra* note 9, at 5 ("Even when addressing conduct with these characteristics, however, federal appellate case law reflects divergent analyses based on seemingly similar facts.").

119 *See* Pomales v. Celulares Telefonica, Inc., 447 F.3d 79, 81, 82–84 (1st Cir. 2006) (affirming summary judgment where plaintiff asked supervisor to come on a sales visit with her, and he responded by grabbing his crotch and stating that "it would be great to come with you." The court held that the alleged harassing conduct, while certainly crude, comprised only a single incident).

120 *See, e.g.*, McHenry v. Fox News Network, LLC, 510 F. Supp. 3d 51, 86 (S.D.N.Y. 2020); Gronewold, *supra* note 105.

121 Claire Cain Miller, *It's Not Just Mike Pence. Americans Are Wary of Being Alone With the Opposite Sex*, N.Y. TIMES: THE UPSHOT (July 1, 2017), https://www.nytimes.com/2017/07/01/upshot/members-of-the-opposite-sex-at-work-gender-study.html (discussing sentiments about holding meetings alone with members of the other sex).

122 Ann C. McGinley, *#MeToo Backlash or Simply Common Sense?: It's Complicated*, 50 SETON HALL L. REV. 1397, 1398 (2020) (women in McGinley's study argued that treating associates differently on the basis of sex "deprive[s] female associates of the same mentoring, training, and sponsorship opportunities as the male associates").

123 *Id.* at 1407; *see also* Deborah L. Rhode, *#MeToo: Why Now? What Next?,* 69 DUKE L. J. 377, 415–16 (2019) (explaining that surveys conducted by Lean In and Survey Monkey on the effects of the movement found that almost half of male managers were uncomfortable in common workplace activities with women, such as

negative effects on many women's careers are present in most professions, including the legal profession, where differential treatment of female associates is prevalent because the number of male partners and potential mentors exceeds the number of female partners.[124] Therefore, some argue that the deprivation of one-on-one interactions with superiors leaves women with no room for advancement because they are unable to demonstrate that they are qualified and deserving of promotions.[125]

Additional evidence suggests that the stagnancy of women's careers directly correlates with their male superiors' fear of the possible consequences of interacting with them.[126] For example, one study conducted by Ann McGinley proposed a series of hypotheticals to participants based upon common occurrences; one scenario involved a male partner who, when traveling to take depositions, regularly went to dinner with male associates to discuss strategy but refused to go out with female associates due to the fear of potential sexual harassment accusations.[127] This is but one hypothetical that reflects the unforgiving male perception that interactions with females are dangerous.[128] This study showed that senior level male managers are:

> twelve times more likely to hesitate before having a one-on-one meeting with a female junior colleague than with a male junior colleague, nine times more likely to hesitate before traveling for work with a female junior colleague than with a male junior colleague, and six times more likely to hesitate

socializing or working one-on-one, and therefore women fear for the future of their careers as a result of #metoo).

124 McGinley, *supra* note 122, at 1398.

125 Miller, *supra* note 121; *see also* Jillesa Gebhardt, *How #MeToo Has Impacted Mentorship for Women*, SURVEYMONKEY, https://www.surveymonkey.com/curiosity/mentor-her-2019/ (last visited Jan. 26, 2022) (suggesting that male refusal to interact with women at work deprives women of formal and informal mentorship that can aid in networking and promotions).

126 *See* McGinley, *supra* note 122.

127 McGinley, *supra* note 122, at 1398 (citing ABA Commission on Women in the Legal Profession, *A Current Glance at Women in the Law* 2 (April 2019)).

128 McGinley, *supra* note 122, at 1400 ("women (especially younger ones) are dangerous temptresses or liars (or both). A complementary stereotype is that men cannot control their sexual urges when faced with temptation.").

> before having a work dinner with a female junior colleague than with a male junior colleague.[129]

The media often fuels reservations surrounding mentoring women.[130] A large percentage of opinion pieces published since the inception of the #MeToo movement counsel men against mentoring younger women out of concern for sexual harassment accusations.[131] In today's workplace, many men are willing to reduce their interaction with women to avoid the danger of being labeled as a harasser. Fueled by this fear, sixty percent of male managers in the United States say that they are uncomfortable engaging in common workplace interactions with women, including mentoring, socializing, and having one-on-one meetings.[132]

There is a common belief to the contrary, that the consequences of a victim bringing their story to light are more damaging to the victim's career than the harasser's, and that the consequences of reporting actually last longer for victims.[133] In response to #MeToo's powerful impact, opponents began circulating the #HimToo movement—portraying the men accused of harassment as the victims, using the same power-in-numbers technique that made the #MeToo movement.[134] Although many men may act differently out of fear of false reporting, the reality is that women are often hesitant to report sexual misconduct out of fear of retaliation and mistreatment

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129 McGinley, *supra* note 122, at 1404.

130 *See* Gebhardt, *supra* note 125.

131 McGinley, *supra* note 122, at 1405; *see also* Prudy Gourguechon, *Why In The World Would Men Stop Mentoring Women Post #MeToo?*, FORBES (Aug. 6, 2018) https://www.forbes.com/sites/prudygourguechon/2018/08/06/why-in-the-world-would-men-stop-mentoring-women-post-metoo/?sh=1c000e79a539; Bret Stephens, *For Once, I'm Grateful for Trump,* N.Y. TIMES (Oct. 4, 2018), https://www.nytimes.com/2018/10/04/opinion/trump-kavanaugh-ford-allegations.html (explaining that being falsely accused of sexual harassment is more damaging to professional reputation than false accusations of murder).

132 Gebhardt, *supra* note 125.

133 Gebhardt, *supra* note 125.

134 Emma Grey Ellis, *How #HimToo Became the Anti #MeToo of the Kavanaugh Hearings*, WIRED (Sept. 27, 2018), https://www.wired.com/story/brett-kavanaugh-hearings-himtoo-metoo-christine-blasey-ford.

from their employers.[135]

Despite a lack of evidence to support the fear of false claims of sexual misconduct, "men, particularly those in leadership positions in the U.S., are increasingly concerned about the possibility of false accusations of sexual harassment by female subordinates."[136] Former President Trump perpetrated the myth of false reporting throughout his term, once stating that "it is a very scary time for young men in America, where you can be guilty of something you may not be guilty of."[137] During a news conference in New York, Trump fueled the resistance against the #MeToo movement, saying that "somebody could come and say [thirty] years ago, [twenty-five] years ago, [ten] years ago, five years ago, he did a horrible thing to me. He did this, he did that, he did that and, honestly, it's a very dangerous period in our country."[138] In fact, Trump has often suggested that courts should be skeptical of women's complaints and frequently dismisses his own impropriety as inconsequential "locker room talk."[139] The twenty-six women that spoke out against Trump were ridiculed, mocked, and demeaned, and their accusations were dismissed in the media as ploys for attention.[140] The experiences of those who reported Trump's misconduct prove that the stakes for reporting sexual misconduct are high; lowering the threshold would not disparately harm men because, even under the current high standard, few victims seek recourse.

Additionally, some business groups say that removing the severe or pervasive standard would "'unnecessarily' ramp up the volume of legal cases and 'diminish real complaints of

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135 *See, e.g.*, Eliza Relman, *The 26 Women Who Have Accused Trump of Sexual Misconduct,* BUS. INSIDER (Sept. 17, 2020), https://www.businessinsider.com/women-accused-trump-sexual-misconduct-list-2017-12#tasha-dixon-and-bridget-sullivan-13 (Rachel Crooks stating that she feared losing her job if she told her employer about her interaction with Trump).

136 McGinley, *supra* note 122, at 1403.

137 Jeremy Diamond, *Trump Says It's "a Very Scary Time for Young Men in America*," CNN POL. (Oct. 2, 2018, 2:47 PM), https://www.cnn.com/2018/10/02/politics/trump-scary-time-for-young-men-metoo/index.html.

138 *Id.*

139 Jocelyn Frye, *How to Combat Sexual Harassment in the Workplace*, CTR. FOR AM. PROGRESS (Oct. 19, 2017, 9:02 AM), https://www.americanprogress.org/issues/women/news/2017/10/19/441046/combat-sexual-harassment-workplace.

140 Relman, *supra* note 135.

harassment.'"[141] Many advocate for a more interventionist approach that would involve talking to the offender and correcting behavior rather than relying on lawsuits.[142] Others fear that lowering the standard will transform Title VII into a general civility code;[143] however, very few victims of sexual harassment take formal action, as approximately ninety percent of individuals who say that they have experienced sexual harassment never formally reported the misconduct.[144] Moreover, as the facts in *Harris* suggest, confronting a harasser may not stunt the behavior.[145]

The preclusive nature of the severe or pervasive standard is further demonstrated in *Brooks,* where Patricia Brooks was sexually harassed during her evening shift as a police

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141 Anna Gronewold, *Lawmakers Focus On Setting New Standard for Sexual Harassment*, POLITICO (May 24, 2019), https://www.politico.com/states/new-york/albany/story/2019/05/23/in-final-days-of-session-anti-harassment-groups-focus-on-severe-or-pervasive-standard-1029121 (internal quotation marks omitted).

142 *Id.* ("Sometimes this behavior doesn't rise to the level of 'oh yeah, this guy should be sued.'").

143 *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (stating that the statutory requirements for establishing sexual harassment, whether involving people of the same sex or not, prevent the law from becoming a civility code); *see also* Mendoza v. Borden, Inc., 195 F.3d 1238, 1268 (11th Cir. 1999) (Tfoflat, C.J., concurring in part and dissenting in part)

> We do not transform Title VII into a workplace 'civility code' when we condemn conduct less severe than that which shocks our conscience. And when we raise the bar as high as the majority does today, it becomes more likely that we will miss the more subtle forms of discrimination that may still infest the workplace, and make it more difficult for women, especially, to participate on equal terms of equality with their male counterparts. The sexist remark, the offensive touch, the repeated request for an intimate outing: all of these may seem merely annoying and relatively harmless in isolation from one another. But add them up; see them in context; and then try to imagine what it must be like for an employee who merely wants to come to work and make a living to have to endure a daily barrage of sexual assault. Then we might begin to understand the power that these "little" sexual offenses, when considered collectively, can have in reproducing a workplace in which women, especially, are often still thought of by their male employees as incompetents and playthings. (citation omitted).

144 NYC COMMISSION, *supra* note 23, at 2.

145 Harris v. Forklift Sys., 510 U.S. 17, 19 (1993) (despite confronting Hardy, he continued to harass plaintiff until she quit).

dispatcher.[146] While performing her job duties, Brooks' supervisor approached her and "placed his hand on her stomach and commented on its softness and sexiness."[147] Despite Brooks' objections, the supervisor continued to forcefully touch her, "boxing her in against the communications console as she was taking another 911 call."[148] He forced his hand underneath her sweater and bra.[149] Brooks removed the supervisor's hand and continued to shut him down. She was only able to stop the supervisor upon the arrival of another dispatcher.[150] Brooks reported the incident immediately, and the supervisor resigned shortly thereafter.[151] Upon reporting, it was established that the supervisor was a repeat offender: many other female dispatchers had been subjected to similar treatment but none had reported the misconduct.[152] After seeking psychological treatment due to difficulty recovering from the incident, Brooks brought a claim for hostile work environment.[153] Following a six-month leave of absence, Brooks returned to work and was ostracized and mistreated by male supervisors.[154] Accordingly, Brooks was essentially forced to quit her job and never returned.[155]

The district court held that the conduct by Brooks' male supervisors was "not severe enough to give rise to a hostile work environment claim," which led Brooks to appeal.[156] The Ninth Circuit affirmed, determining that, because Brooks could only rely on the single instance of sexual harassment to support her hostile work environment claim, the misconduct was not severe enough to be actionable.[157] In rendering its decision, the court referred to the standard set out in *Harris*, writing that, "Brooks must show that her 'workplace [was] permeated with

146 Brooks v. City of San Mateo, 229 F.3d 917, 921–22 (9th Cir; 2000).

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Brooks*, 229 F.3d at 922.

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.* at 923.

157 *Id.* at 926–27 ("If a single incident can ever suffice to support a hostile work environment claim, the incident must be extremely severe.").

discriminatory intimidation . . . that [was] sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment.'"[158] While the court reasoned that Brooks had asserted sufficient facts to support the subjective prong of the hostile work environment analysis, it held that the supervisor's conduct did not satisfy the objectively reasonable prong.[159] The court's reasoning referred to other cases decided under the *Harris* standard and recognized that physical injuries resulting from a single incident may be sufficient enough to meet the objectively severe standard; because Brooks had only suffered psychological injury, the court deemed Brooks' claim to be insufficient.[160] The court reaffirmed its prior holding in *Meritor,* writing that "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."[161] The *Brooks* decision demonstrates how easily a severe or pervasive standard can jettison claims because large swaths of conduct are not severe enough to meet the threshold.

Similarly, other cases illustrate the difficulty of establishing harassment as adequately pervasive to support a cause of action.[162] For example, the United States District Court for the Northern District of Alabama did not consider twenty separate incidents of harassment by a supervisor, occurring over a year-and-a-half-long period, to be pervasive enough to support a claim.[163] Several of these incidents included comments about an employee's buttocks; making lewd, sexual jokes; telling the same employee that he would be her "sugar daddy;" and suggesting that other workers would want to see her "down on all fours."[164] The court went on to improperly suggest that the harassment would need to have occurred daily in order to satisfy the

158 *Brooks*, 229 F.3d at 923.

159 *Id.* at 924.

160 *Id.* at 926–27.

161 *Id.* at 924 ("In such circumstances, it becomes difficult to say that a reasonable victim would feel that the terms and conditions of her employment have changed as a result of the misconduct.").

162 *See* Williams v. United Launch All., LLC, 286 F. Supp. 3d 1293, 1304 (N.D. Ala. 2018).

163 *Id.*

164 *Id.* at 1303.

governing standard, meaning that even repetitive harassment is often dismissed as not actionable.[165]

Likewise, the Eleventh Circuit in *Mitchell v. Pope*[166] labeled a supervisor's behavior as insufficiently "severe" to attach liability because of the infrequency of the conduct.[167] There, the plaintiff pointed to sixteen specific instances of offensive conduct by her supervisor occurring throughout her four years of employment.[168] Though most incidents involved "offensive utterances," the employee's supervisor touched her (or attempted to touch her) on multiple occasions, during which he attempted to kiss her, lift her, and rub up against her.[169] The court took a dismissive, employer-friendly view of the conduct, discounting the superior's action as "horseplay" that could not qualify as sexual harassment because "some was not sex-based."[170] Notably, this case is explicitly referenced in a section of the Act that describes erroneous analysis of the severe or pervasive standard, supporting the fact that even conduct that satisfies the high severe or pervasive standard is frequently discounted or excused.[171]

The courts' skepticism in the referenced cases demonstrates the need for a different standard to assess what actually makes a work experience harmful to workers—specifically, female workers.[172] The severe or pervasive standard is a product of judicial interpretation, and is found nowhere in Title VII.[173] While it cannot be said that Title VII was written so intentionally broad as to allow for such judicial interpretation, it is clear that divergent understandings and inconsistent applications of the

165 *Id.* at 1304.

166 189 F. App'x 911 (11th Cir. 2006).

167 *Id.*

168 *Id.* at 913.

169 *Id.*

170 *Id.*

171 H.R. 2148, 116th Cong. § 204(a)(18)(E) (2019).

172 *See* Chesier v. On Q Fin. Inc., 382 F. Supp. 3d 918, 925–27 (D. Ariz. 2019) (relying on the decision in *Brooks* to support that a single incident of harassment must be "extremely severe" to be actionable and indicating rape was the type of conduct that met this standard. The court reasoned that a single incident can only support a hostile work environment claim when the victim was violently raped or endured some similar form of physical assault).

173 Sperino & Thomas, *supra* note 72.

standard have shut out an enormous class of victims from legal recognition and redress.[174] For example, in *Brooks*, the plaintiff bravely reported her traumatizing assault, which other women who were assaulted by the same supervisor could not do.[175] Had a more victim-friendly standard been in place, courts in cases like *Brooks* may have ruled differently by recognizing the gravity of the harm inflicted upon victims. Instead, Justice Ginsburg's concurrence in *Harris* reflects a better standard.[176] Justice Ginsburg did not perceive her view as inconsistent with the majority opinion, but instead proposed a lower threshold to allow more victims, regardless of whether the conduct satisfied the *Harris* factors,[177] to come forward.[178]

B. *The Solution: "Be HEARD"*

In light of the faulty application of the severe or pervasive standard, binding legislation explicitly laying out an applicable standard with guidelines is required to lead to more consistent rulings. The Act was introduced in Congress on April 9, 2019.[179] The path to equality in the workplace requires a solution that

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[174] *See* Debra S. Katz & Hannah Alejandro, *Opinion: Blue States are Leading in Sexual Harassment Reforms. Red States are Leaving Women Behind*, THE WASHINGTON POST (July 23, 2019), https://www.washingtonpost.com/opinions/blue-states-are-leading-in-sexual-harassment-reforms-red-states-are-leaving-women-behind/2019/07/23/8858bab2-acb5-11e9-a0c9-6d2d7818f3da_story.html (stating that the severe or pervasive standard "often allows judges to reflect their own gender bias and their own personal sense of what conditions might affect their ability to do their jobs when deciding cases."); *see also* New Jersey Office of the Attorney General Div. on Civil Rights ("DCR"), *Preventing and Eliminating Sexual Harassment in New Jersey,* 20 (February 2020), http://d31hzlhk6di2h5.cloudfront.net/20200218/78/65/41/97/227d55a39cbf6d8ffa5ed7d9/Preventing_and_Eliminating_Sexual_Harassment_in_New_Jersey.pdf (describing how "the 'severe or pervasive' standard prevents survivors from reporting or successfully prosecuting claims" because of the "belief that the harassment they suffered won't constitute sexual harassment under the law.").

[175] Brooks, 229 F.3d 917, 921–22 (9th Cir. 2000).

[176] *Harris*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

[177] *Id.* at 23 ("the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance").

[178] Johnson, *supra* note 22, at 99–100; *see also Harris*, 510 U.S. at 23 (holding that so long as a work environment is hostile, there is no need for it to also be psychologically injurious).

[179] Sekaran, *supra* note 25.

adequately addresses the widespread presence of sexual harassment. Very few states outside of New York and California have made efforts to employ additional protections, most of which were liberal, progressive ("blue") states such as Maryland, Illinois, and Vermont.[180] Accordingly, a federal solution that revises the severe or pervasive standard is necessary. While the Act currently lacks adequate support to pass in the 117th Congress, addressing the sexual harassment epidemic "must remain an urgent priority and should be relentlessly sought as a nonpartisan effort to deliver basic constitutional rights."[181] The Act offers a detailed roadmap for judges and employers to follow to determine whether specific conduct constitutes unlawful harassment, which will lessen the frequent excusal of abusive conduct and encourage the pursuit of legal redress.[182]

The findings in the Act state that harassment is a "persistent and significant problem in the workplace in the United States[,]" and that the purpose of Congress' enactment of Title VII was to provide broad protection from bias in the workplace.[183] The Act clarifies the revised threshold for hostile work environment claims, disregarding the severe or pervasive standard and instead requiring only that the conduct "ha[ve] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[184] The Act also promotes consistency in its application, elaborating on the factors that courts should consider on a case-by-case basis to avoid misapplication and emphasis on solely the severity or pervasiveness of the conduct.[185] Some of the guidelines listed in the Act include that: (1) the

180 Katz & Alejandro, *supra* note 174.

181 Katz & Alejandro, *supra* note 174.

182 Vania Leveille & Lenora M. Lapidus, *The BE HEARD Act Will Overhaul Workplace Harassment Laws*, ACLU (Apr. 10, 2019, 11:15 AM), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/be-heard-act-will-overhaul-workplace-harassment-laws.

183 H.R. 2148, 116th Cong. § 204(a)(1)–(3) (2019).

184 H.R. 2148, 116th Cong. § 204(a)(6)(C) (2019).

185 H.R. 2148, 116th Cong. § 204(a)(7), § 204(a)(15) (2019) (stating that courts should "look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred").

determination be made based on the record in its entirety;[186] and (2) incidents of harassment be considered in the aggregate, rather than in isolation.[187] The Act also specifies factors for courts to consider when determining whether conduct constitutes workplace harassment that is neither exhaustive nor determinative.[188] These factors include:

> (i) the frequency of the conduct; (ii) the duration of the conduct; (iii) the location where the conduct occurred; (iv) the number of individuals engaged in the conduct.; (v) the nature of the conduct, which may include physical, verbal, pictorial, or visual conduct, and conduct that occurs in person or is transmitted, such as electronically; (vi) whether the conduct is threatening; (vii) any power differential between the alleged harasser and the person allegedly harassed; and (viii) any use of epithets, slurs, or other conduct that is humiliating or degrading.[189]

Codification of these factors allows for more thorough and consistent consideration of hostile work environment claims.

V. CONCLUSION

A change to the current federal standard governing sexual harassment law is necessary to penalize harassers, who continue to set victims' careers back through their traumatizing conduct. Since its inception, the severe or pervasive standard has promoted inconsistency in its application. Judges have failed to hold harassers accountable for dehumanizing conduct, leaving victims without a proper remedy. The modifications made by states such as New York and California prove that a lower threshold to bring an actionable claim is appropriate.

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186 H.R. 2148, 116th Cong. § 204(c)(3)(A) (2019) (emphasizing that "a single incident may constitute workplace harassment").

187 H.R. 2148, 116th Cong. § 204(c)(3)(B) (2019).

188 H.R. 2148, 116th Cong. § 204(c)(3)(C) (2019).

189 *Id.*

Accordingly, in light of the progress of the #MeToo movement, the severe or pervasive standard set forth in *Meritor* must be abandoned in order to better protect victims. Currently, victims continue to be harmed by the demanding *Meritor* standard, and the passage of the Act will provide relief for victims of sexual harassment by encompassing a wider range of harmful conduct.