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# “Locker Room Talk” or Sexual Harassment? The Push for a Federal Modification of the Severe or Pervasive Standard

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## INTRODUCTION

"If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet."[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 has exposed the gaps in sexual harassment legislation, and mobilized support for protective lawmaking at both the state and federal level.[3] Section 703(a)(2) 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 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, including 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;

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[1] Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21PM), 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, 1061-64 (2020) (discussing the effects of the #metoo movement on reporting and awareness of workplace harassment).

[3] Messina, *supra* note 2, at 1087.

[4] 42 U.S.C. § 2000e-2(a).

[5] Policy Guidance on Current Issues of Sexual Harassment, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, 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 (2019) (the conduct must result in sex discrimination).

[7] *See* Rachel Farkas, et al., *State Regulation of Sexual Harassment,* 20 GEO. J. GENDER & L. 421, 436 (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.").

[8] *See* Farkas et al., *supra* note 7, at 427 (discussing the types of claims actionable under Title VII).

(4) the harassment must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment;" and that the plaintiff subjectively 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 has sparked a movement in favor of softening this hard standard.[10] For example, in 2018, California amended its anti-discrimination law to allow a lower threshold for bringing a hostile work environment claim.[11] In 2019, Governor Andrew Cuomo similarly signed into law anti-sexual harassment legislation that allows for workers to bring harassment suits resulting from conduct that in the past would not likely satisfy the "severe or pervasive" burden.[12] These developments are overdue, but only provide additional protections for citizens within these states, and are often not retroactive.[13] Moreover, many state courts continue to ignore these modifications, blindly applying the old standard.[14]

The "severe or pervasive" standard is outdated and inefficient.[15] States should follow the footsteps of New York and California and adopt a more inclusive standard that recognizes all

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[9] Farkas et al., *supra* note 7; *see also* Christine J. Back & Wilson C. Freeman, CONG. RESEARCH SERV., R45155, SEXUAL HARASSMENT AND TITLE VII: SELECTED LEGAL ISSUES 2-3 (2018).
[10] *See generally* PROGRESS IN ADVANCING ME TOO WORKPLACE REFORMS IN #20STATESBY2020, NAT'L WOMEN'S LAW CTR. (2019), https://nwlc.org/wp-content/uploads/2019/07/final_2020States_Report-12.20.19-v2.pdf.
[11] Nat'l Women's Law Ctr., *supra* note 10, at 10.
[12] Nat'l Women's Law Ctr., *supra* note 10, at 10.
[13] *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).
[14] *See* Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. F. 121, 126 (2018).
[15] *See A Call for Legislative Action to Eliminate Workplace Harassment: Principles and Priorities*, AM. CIV. LIBERTIES UNION 3, https://www.aclu.org/sites/default/files/field_document/workplace_harassment_legislative_principles_10.15.18.pdf (last visited April 15, 2021) (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.").

forms of sexual harassment as punishable.[16] Many are skeptical of sexual harassment claims until they fall victim to an offenders wrongdoing. This skepticism blocks the path to relief for victims, as their experiences are belittled by judges who quantify the victims suffering based off of an employer-friendly standard. This distrust of victims discourages reporting, which in turn authorizes the harasser's impunity. All of these factors support the desperate need for a standard that recognizes all instances of harassment as such. Without this modification, victims' careers will continue to suffer, harassers will continue to harass without penalty, and any progress made in light of #metoo in the realm of sexual harassment law will go to waste.

Part I 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*,[17] and the development of sexual harassment law in recent decades. Part II 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 III analyzes the implementation of these reformed thresholds, addressing emerging case law that apply less onerous standards than the traditional *Meritor* standard. Here, 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")[18], 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's advancement. By setting a threshold that allows for less judicial deference, case law

[16] *See generally* Cal. Gov't Code § 12923; N.Y. Exec. Law § 296.
[17] *See* 477 U.S. 57, 67 (1986).
[18] Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act, H.R. 2148, 116th Cong. §204(a)(5) (2019).

governing hostile work environment claims will become more uniform, and harassers will be held accountable for their unpardonable acts.

## I. The History of the Severe or Pervasive Standard

The laws and systems currently in place to address harassment are inadequate. Sexual harassment does not have to be "sexual."[19] It can include conduct of a sexual nature, such as requests for sexual favors or unwanted verbal or physical sexual advances and can occur regardless of whether the harasser claims to be sexually attracted to the victim.[20] Moreover, women are not the only victims, as men, particularly those who don't conform to masculine norms, can be targets.[21] Women can also be harassers.[22] However, it is well recognized that women are especially susceptible to sexual harassment; despite under-reporting, approximately 60% of female employees have experienced at least one instance of sexually harassing behavior, such as unwanted sexual attention or sexual coercion.[23]

In *Meritor*, plaintiff, Mechelle Vinson, an employee at Meritor Savings Bank, was fired from her position for "excessive use" of sick leave.[24] Vinson brought an action against Meritor

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[19] *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.").

[20] *Combating Sexual Harassment in the Workplace: Trends and Recommendations Based on 2017 Public Hearing Testimony, New York City Commission on Human Rights*, at 2 (2017).

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

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

[23] *Combating Sexual Harassment in the Workplace: Trends and Recommendations Based on 2017 Public Hearing Testimony, supra* note 20.

[24] *Meritor*, 477 U.S. at 60.

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.[25] 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. 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."[26] Vinson did not report this misconduct out of fear of Taylor and of termination.[27] Taylor denied all allegations and suggested that the action was a response to a business-related dispute.[28] 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.[29] However, the Court of Appeals for the District of Columbia Circuit reversed the District Court's ruling and remanded the case, holding that if the evidence demonstrated that "'Taylor made Vinson's toleration of sexual harassment a condition of her employment,'" her voluntariness was not material, and that Vinson raised a valid claim under Title VII predicated on the existence of a hostile work environment. [30] The Supreme Court recognized that a hostile work environment violates Title VII,[31] and affirmed the circuit court's holding, recognizing that Vinson raised a sufficient claim for hostile work environment sexual harassment because Taylor's actions constituted pervasive harassment.[32] In support of its ruling, the Court declared that a hostile work environment may

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[25] *Id.*
[26] *Id.*
[27] *Id.* at 61.
[28] *Id.*
[29] *Id.*
[30] *Meritor,* 477 U.S at 62.
[31] *Id.* at 64 (the Court specified that "sexual harassment," is a form of sex discrimination prohibited by Title VII).
[32] *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.").

violate Title VII only when the harassment is "sufficiently severe or pervasive enough to alter the conditions of employment and create an abusive work environment."[33]

After the Supreme Court recognized a cause of action to redress hostile work environment claims, the Court continued to clarify the standard.[34] For example, seven years after *Meritor,* the Court in *Harris v. Forklift Systems,* expanded the definition of a discriminatorily hostile work environment by specifying the types of injury sufficient to support a claim.[35] The case involved a claim raised by Teresa Harris, a manager at Forklift Systems, who faced gender-based insults and unwanted sexual innuendos.[36] Specifically, Forklift's Systems President, Hardy, made derogatory comments towards Harris multiple times, such as "'you're a woman, what do you know', and 'dumb ass woman."[37] Harris complained to Hardy about his conduct and was assured that he would stop, but the verbal harassment continued until she quit the job.[38] Harris then brought an action asserting that Hardy's conduct created a hostile work environment.[39]

The District Court held that although it was "a close case," Hardy's conduct did not create an abusive environment because it "'did not create a working environment so poisoned as to be intimidating or abusive'" to Harris.[40] There, the court found 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 sufficient to

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[33] *Id.*; *see also* L. Camille Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?,* 22 EMPL. RTS. & EMPLOY. POL'Y J. 321, 330 ("the Severe or Pervasive standard was enacted to make sure that claims of harassment represented real harm to claimants, as well as to distinguish between what the Court viewed as merely 'offensive' behavior and behavior that was 'abusive.'").
[34] *See* Johnson, *supra* note 19, at 98.
[35] 510 U.S. 17, 20 (1993).
[36] *Id.* at 19.
[37] *Id.*
[38] *Id.* at 31.
[39] *Id.*
[40] *Id.* at 20

interfere with a reasonable person's work performance.[41] The Supreme Court later held that the district court erred, holding that it was improper for the District Court to solely rely upon the presence of psychological injury, and that instead all circumstances must be considered when determining whether an environment is hostile.[42] 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."[43] The Court also dismissed the notion that analyzing hostile work environment claims can be "a mathematically precise test."[44] 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.[45]

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." However, in her opinion, she highlights that the plaintiff need not individually prove that their tangible productivity has declined, but instead that it "suffices 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."[46]

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

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[41] *Harris,* 510 U.S. at 20.
[42] *Id.* at 23.
[43] *Id.* at 21 ("Psychological harm, like any other relevant factor, may be taken into account", but no single factor is required).
[44] *Id.*
[45] *See* Farkas, *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.").
[46] *Harris,* 510 U.S at 26.

reasonable person, as well as how the harasser's behavior was individually viewed by the plaintiff.[47] The Court further instructed that when assessing the objective portion of a plaintiff's claim, courts assume the perspective of the reasonable victim.[48] Following *Harris*, lower courts typically apply the standard of review proposed by the Court, however some courts stray from this standard and instead apply a reasonable woman standard.[49] The Supreme Court has not clarified which standard should be invoked when analyzing the objective component of a hostile work environment claim.[50]

The Seventh Circuit's decision in *Swyear v. Fare Foods Corp* demonstrates the dangers of the objective component of the analysis, as while an employee testified that she found the environment at her workplace to be sexist and offensive, the court held that the workplace as a whole was not sufficiently severe or pervasive. [51] Throughout the course of her employment, Amy Swyear was subjected to an unprofessional environment.[52] On July 15, 2015, Swyear met Russell Scott, an outside sales representative, at a county fair to meet with customers.[53] After completing work at the fair, Swyear was forced to stay with Scott for "additional training," and reserved two separate rooms in a hotel. [54] Scott repeatedly touched Swyear's arm, placed his

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[47] Farkas, *supra* note 7, at 451; *see also* Back, *supra* note 9, at 9-10 ("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.").
[48] 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 (noting that a "reasonable person" standard also should be applied to be more basic determination of whether challenged conduct is of a sexual nature).
[49] Burke, *supra* note 6, at 774. *But see Policy Guidance on Current Issues of Sexual Harassment*, *supra* note 5. (supporting that shifting to a reasonable woman standard is unnecessary because "the" reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior).
[50] *See* Burke, *supra* note 6, at 781 (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 yet rejected the use of the reasonable woman standard for Title VII cases).
[51] *See generally* 911 F.3d 874 (7th Cir. 2018).
[52] *Id.* at 877.
[53] *Id.* at 879.
[54] *Id.* at 879.

hand on her lower back, and stood close.[55] Scott had three beers during dinner and told Swyear several times that he was single, and later demonstrated signs of intoxication as a result of the drinks.[56] Upon arriving at their rooms Scott made his way into Swyear's room, and crawled into Swyear's bed and asked her to be a "cuddle buddy".[57] Despite declining and asking Scott to leave, he returned and knocked on Swyear's door multiple times.[58] Shortly after returning, Swyear reported the incident to her superior, who decided that no discipline was warranted; Swyear was eventually terminated.[59]

After the court granted Fare Food's motion for summary judgment, Swyear appealed to the Seventh Circuit, which determined 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."[60] The court reasoned that Swyear failed to establish that Scott's conduct was objectively offensive because the conduct was merely "crude and immature" rather than pervasively hostile.[61] The court here clearly erred, as while the weighed factors may indicate that the environment as a whole is not hostile, this is clearly sexual harassment. This decision is reflective of the gaps in the federal system, as judges continue to belittle a victim's experience by determining that claims aren't harmful enough. While the federal scheme appropriately recognizes an objective consideration of a plaintiff's claim, the problem is that it is too discretionary, and therefore inconsistent. What may be

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[55] *Id.*
[56] *Id.*
[57] *Swyear*, 911 F.3d at 879.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 881.
[61] *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].").

considered objectively offensive to one judge is not to another, which is why I encourage the adoption of uniform guidelines that embody a lower threshold.

But 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.[62] When faced with conduct that does not meet that rigid standard, many courts have used the stringent language to effectively deem harmful conduct permissible.[63] For example, a supervisor raping an employee has, perhaps not surprisingly, consistently been viewed as "severe" enough to meet the bar even if based upon a single crime. However, 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 physical threats.[64] 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.[65] Accordingly, an abusive work environment, even one that does not impact psychological well-being, "can and 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.[66]

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[62] *Brooks*, 229 F.3d at 924.

[63] *See* Johnson, *supra* note 19, at 86; *see also* Sandra F. Sperino & Suja A. Thomas, *Boss Grab your Breasts? That's not (Legally) Harassment*, N.Y TIMES, Nov. 29, 2017, https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html ; Back, *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.").

[64] *See*, *e.g*. Paul v. Northrop Grumman Ship Sys., 309 F. App'x 825, 826 (5th Cir. 2009) (Affirming a district court ruling that a single incident of a male foreman going chest to chest with a female plaintiff and rubbing pelvic region across her hips and buttocks and lasting some 90 seconds 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.").

[65] Sperino & Thomas, *supra* note 63; *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.").

[66] *Policy Guidance on Current Issues of Sexual Harassment*, *supra* note 5.

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, and the federal system fails to encompass a wide variety of harassment that harm 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 preclusive, as it minimizes bad behavior under the guise of outdated understandings of professionalism and workplace interactions.

## II. State Modifications

Many state courts have looked to Title VII and its interpretations when determining the validity of hostile work environment claims under state antidiscrimination law.[67] However, states like California and New York have gone beyond the federal standard and enacted legislation that employs greater protections for victims of sexual harassment.[68] In January of 2019, the California legislature enacted Section 12923 of its antidiscrimination code to declare its intent regarding the application of the laws about harassment.[69] There, the Legislature expressly states that a "single incident of harassing conduct" may be sufficient to create a triable issue regarding the existence of a hostile work environment.[70] 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.[71] California's

[67] 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 (2021).
[68] *See* Cal. Gov't Code § 12923; N.Y. Exec. Law § 296.
[69] Cal. Gov't Code § 12923.
[70] *Id.*
[71] *Id.*

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.[72] 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." [73] The legislature rejected the reasoning portrayed in *Brooks v. City of San Mateo,* the previously controlling approach of the Ninth Circuit,[74] dictating that the opinion shall no longer be used to determine what kind of conduct is sufficiently severe or pervasive to constitute an actionable claim.[75]

While these reforms appear optimal on paper, they have not been effectively implemented, as California courts have not only retained the severe or pervasive standard, but also disregarded the enhanced protections Section 12923 provides.[76] For example, in *Jackson v. Pepperdine Univ.*, 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."[77] The 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."[78]

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[72] *Id.*
[73] *Id.*
[74] 229 F.3d 917 at 926 ("Utilizing the *Harris* factors of frequency, severity and intensity of interference with working conditions, we cannot say that a reasonable woman in Brooks's position would consider the terms and conditions of her employment altered by Selvaggio's actions.").
[75] *Id.*; *see also* Cal Gov Code § 12923.
[76] *See* Jackson v. Pepperdine Univ., No. B296411, 2020 Cal. App. Unpub. LEXIS 5719, at *2 (Sep. 1, 2020*); see also* Mizrahi, *supra* note 14.
[77] 2020 Cal. App. Unpub. LEXIS 5719, at *2.
[78] *Id.*

However, case law in New York following an amendment to their Human Rights Law fared differently.[79] On August 12, 2019, Governor Cuomo signed into law SB 6577, which amended the New York State Human Rights Law by creating new protections enhancing existing protections against sexual harassment.[80] The new law completely discarded the "severe or pervasive" requirement to establish a claim of sexual harassment based upon a hostile environment.[81] Prior to the amendment, a plaintiff claiming a hostile work environment based on discrimination in violation of the NYSHRL had 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."[82] Now, under New York law, that standard does not apply, and it is the employer who must prove that a "reasonable victim" would view the conduct in question as no more than "petty slights or trivial inconveniences."[83] The law directs courts to construe the NYSHRL liberally, like its New York City counterpart,[84] "regardless of whether federal civil rights laws including those laws with provisions worded comparably to the provisions of [the NYSHRL] have been so construed."[85] This legislation transformed sexual harassment law in the state of New York because now any unwanted sexual or gender-based harassment, including seemingly isolated comments, jokes, or gestures, may be unlawful.[86]

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 a plaintiff claimed that she was offended by her

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[79] *See* S.B. 6577, 2019-2020 Reg. Sessions (N.Y. 2019), https://www.nysenate.gov/legislation/bills/2019/s6577.
[80] *Id.*
[81] Russell Penzer, *New York Breaks from Federal Sexual Harassment Standards*, N.Y.L.J (Oct. 4, 2019).
[82] Reichman v. City of N.Y., 2020 NY Slip Op 00631, ¶ 2, 179 A.D.3d 1115, 1118 (App. Div. 2nd Dept.).
[83] Penzer, *supra* note 81.
[84] N.Y Admin. Code § 8-101.
[85] N.Y. Exec. Law § 300.
[86] Penzer, *supra* note 81.

colleague's vulgar behavior and language, which created a hostile work environment.[87] The court dismissed her claim under the previous standard, however addressed the amendments to the standard in a footnote, highlighting that had the new Human Rights Law been enacted at the time of the heinous conduct, plaintiff's claim would have been actionable. [88] *Petrilli* illustrates the benefits of disregarding the severity/pervasiveness of conduct, as improper conduct can no longer be referred to as inconsequential rudeness. However, it is unclear how the new standard will play out, as like in the California opinions, few courts have applied the lower standard to novel case law.

Although states can enact legislation that is more restrictive than federal statutes, some experts propose that weakening the substantive legal standard will not affect the outcome of many cases because the severe or pervasive standard can be avoided by plaintiff's including other state law claims in their pleadings.[89] Additionally, state modifications may be inefficient in providing recourse for victims of sexual harassment, as courts seem to cling to old norms and misapply, or sometimes completely disregard, enhanced protections. The next section will address the gaps in protections for victims and proposes that a new standard that can be more steadily applied may be the best way to promote uniformity among the courts in the context of sexual harassment. The enactment of the "BE HEARD" act, in conjunction with state

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[87] 2019 NY Slip Op 52182(U), ¶ 3, 129 N.Y.S.3d 241, 245 (Sup. Ct.).

[88] *Id.* at 241 ("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.").

[89] Erik A Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?,* AMERICAN BAR ASSOCIATION (2020), https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims/ ("pleading state law claims for assault, battery, negligent hiring, and negligent supervision.").

modifications to their substantive standards in the realm of sexual harassment law, will provide this solution.

## III. ANALYSIS

The "severe or pervasive" standard is outdated and underinclusive because courts are unwilling to recognize victims' injuries. The disparity in the case law is far too great under the current standard, and this gap in federal protections must be lessened.[90] While the severe or pervasive standard may have worked under the principles of the last century, reasonableness standards are meant to update with the law, and cannot "entrench norms from another time."[91] However, despite the increased intolerance of sexual misconduct and harassment in light of #MeToo, many courts have failed to update their understandings of these types of claims and instead rely on outdated standards and norms that focus on patriarchal notions and protecting employers, instead of on protecting victims.[92] Accordingly, the "BE HEARD" Act should be adopted because it provides for a national solution that is more reflective of current understandings and rejections of sexual harassment claims.

The case law governing hostile work environment claims is blatantly inconsistent.[93] Judges often interpret the standard as "severe and pervasive", which "elevates the severity of the conduct to a really unconscionable level" when the Supreme Court intended the standard to be

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

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

[92] *See generally* Williams et al., *supra* note 91, at 151-54.

[93] *See* Back, *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.").

disjunctive.[94] For example, in *Hannigan-Haas v. Bankers Life & Casualty Co.*, the senior vice president of 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.[95] While this sexual assault was rendered sufficiently severe, the United States District Court for the Northern District of Illinois held that it nevertheless wasn't enough to constitute sexual harassment because it only occurred once, and therefore was not "pervasive" enough to meet the standard.[96] This was 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,* in 2005, clarifying that "conduct that is *either* pervasive *or* severe may give rise to a hostile work environment."[97] 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."[98] Many courts struggle to determine what qualifies as sufficiently severe or pervasive conduct. While the Supreme Court in *Harris* articulated factors for use in determining whether a work environment is hostile, courts often misapply these factors by overweighing them and inconsistently interpreting what is offensive enough.[99]

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[94] 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).

[95] *See* No. 95 C 7408, 1996 U.S. Dist. LEXIS 16416 (N.D. Ill. Nov. 1, 1996).

[96] Johnson, *supra* note 19, at 113 (discussing a line of lower court cases misapplying the *Meritor* standard and *Harris* Factors).

[97] 398 F.3d 944, 950 (7th Cir. 2005).

[98] Johnson, *supra* note 19, at 112.

[99] *See Harris*, 510 U.S at 23 (the Supreme Court articulated several 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).

For example, in *Hill-Dyson v. City of Chicago,* the Seventh Circuit held that plaintiff's allegations that a supervisor rubbed her back, squeezed her shoulder and stared at her chest during a uniform inspection while telling her to raise her arms and open her blazer were isolated incidents that, even when taken together, did not create a hostile work environment.[100] 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.[101] The harassment that took place in *Hill-Dyson* and *Management Hospitality* is eerily similar, both demonstrating separate incidents of offensive, egregious conduct, and yet the courts reached different results.[102] These 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.[103]

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.[104] Studies reflect that male behavior and interactions with the opposite sex changed in light of the #MeToo movement, and in turn women's careers are

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[100] 282 F.3d 456, 463-64 (7th Cir. 2002).
[101] 2012 WL 37112 (7th Cir. 2012).
[102] *See* Back, *supra* note 9, at 6 (proposing that circuit precedent that established minimum thresholds for conduct that constitutes harassment inform the severity or pervasiveness of conduct and therefore may contribute to the inconsistencies in the types of conduct that qualifies as harassment).
[103] Back, *supra* note 9, at 4 (discussing inconsistent analyses of similar claims; "Even when addressing conduct with these characteristics, however, federal appellate case law reflects divergent analyses based on seemingly similar facts.").
[104] Claire Cain Miller, *It's Not Just Mike Pence. Americans Are Wary of Being Alone With the Opposite Sex*, N.Y TIMES, July 1, 2017, https://www.nytimes.com/2017/07/01/upshot/members-of-the-opposite-sex-at-work-gender-study.html.

stagnant.[105] Men are less willing to mentor women, therefore women's careers are adversely effected because workers with mentors are more likely to be promoted.[106] Such negative effects on 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.[107] Therefore, some propose that the deprivation of one-on-one interactions with superiors has left women with no room for advancement because they are unable to demonstrate that they are qualified and deserving of promotions and higher positions.[108]

Additional evidence further suggests that the stagnancy of women's careers correlates with male superior's fear of interaction with women. For example, a study conducted by Ann McGinley referenced a series of hypotheticals that she proposed to participants, among which was the situation of a male partner who, when traveling to take depositions, regularly went to dinner before the depositions with male associates to discuss strategy but refused to go with female associates because of his fear of sexual harassment accusations.[109] This is just one hypothetical that reflects the unforgiving perception that exchanges with females are dangerous.[110] Studies show that senior level male managers are:

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[105] 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 deprives the female associates of the same mentoring, training, and sponsorship opportunities as the male associates).

[106] McGinley, *supra* note 105, at 1407; *see also* Deborah L. Rhode, *#MeToo: Why Now? What Next?*, 69 DUKE L.J. 377, 415 (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 socializing or working one-on-one, and therefore women fear for the future of their careers as a result of #metoo).

[107] McGinley, *supra* note 105 at 1398.

[108] Miller, *supra* note 104; *see also* Jillesa Gebhardt, *How #MeToo Has Impacted Mentorship for Women*, SURVEYMONKEY, https://www.surveymonkey.com/curiosity/mentor-her-2019/ (last visited April 15, 2021) (male refusal to interact with women at work deprives them of formal and informal mentorship that can aid in networking and promotions).

[109] McGinley, *supra* note 105, at 1399.

[110] McGinley, *supra* note 105, at 1399 ("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.").

> 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 before having a work dinner with a female junior colleague than with a male junior colleague.[111]

The media fuels reservations surrounding mentoring women.[112] In fact, a large percentage of opinion pieces published since #MeToo counsel men not to mentor younger women out of concern of accusations of sexual harassment.[113] Many men in today's workplace are afraid of being pegged a harasser, and are willing to reduce interaction with women to avoid the danger of being labeled as such. Fueled by this fear, 60% 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.[114]

However, there is also a common contrary belief that the consequences of bringing victim's stories to light are more damaging to victims' careers than harassers' careers, and that the consequences of reporting actually last longer for victims than harassers.[115] In response to #MeToo's powerful impact, opponents circulated #HimToo to introduce accused men as victims, using the same power-in-numbers technique to belittle the #MeToo movement."[116] Many men act differently out of fear of false reporting, but the reality is that women are often hesitant to report sexual misconduct out of fear of retaliation and mistreatment.[117]

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[111] McGinley, *supra* note 105, at 1403.
[112] *See* Gebhardt, *supra* note 108.
[113] McGinley, *supra* note 105, at 1405; *see also* Prudy Gourguechon, *Why In The World Would Men Stop Mentoring Women Post #MeToo?*, FORBES, Aug. 6, 2018; Bret Stephens, *For Once, I'm Grateful for Trump*, N.Y. TIMES, Oct. 4, 2018 (explaining that being falsely accused of sexual harassment is more damaging to professional reputation than false accusations of murder).
[114] Gebhardt, *supra* note 108.
[115] Gebhardt, *supra* note 108.
[116] 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.
[117] Eliza Relman, *The 26 Women who Have Accused Trump of Sexual Misconduct*, BUSINESS INSIDER (Sept. 17, 2020), https://www.businessinsider.com/women-accused-trump-sexual-misconduct-list-2017-12#tasha-dixon-and-bridget-sullivan-13.

Despite a lack of evidence to support the fear of false claims of sexual misconduct, men, particularly those in leadership positions in the United States, are increasingly concerned about the possibility of false accusations of sexual harassment by female subordinates.[118] 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."[119] During a news conference in New York, Trump fueled the resistance against #MeToo, saying that "somebody could come and say 30 years ago, 25 years ago, 10 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."[120] 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."[121] The twenty six women that spoke out against Trump were ridiculed, mocked and demeaned, and their accusations were dismissed as ploys for attention.[122] The experiences of those who reported Trump's misconduct prove that the stakes for reporting sexual misconduct are high, thus lowering the threshold is not going to hurt 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 harassment."[123] Many advocate for a more interventionist approach that involves talking to the

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[118] McGinley, *supra* note 105, at 1403.
[119] 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.
[120] Diamond, *supra* note 119.
[121] 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.
[122] Relman, *supra* note 117.
[123] 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

offender and correcting behavior rather than relying on lawsuits.[124] Others fear that lowering the standard will transform Title VII into a general civility code.[125] However, very few victims of sexual harassment actually take formal action, as approximately 90% of individuals who say that they have experienced sexual harassment never took formal action or reported the misconduct.[126] Moreover, as the facts in *Harris* suggest, confronting a harasser may not stunt the behavior.[127]

If the standard is lowered, victims that were previously unable to have their claims heard will have their day in court.[128] 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.[129] For example, in *Brooks,* Patricia Brooks was sexually harassed during her evening shift.[130] While performing her job duties, her supervisor approached her and "placed his hand on her stomach and commented on its softness and sexiness."[131] Despite Brooks' objections, the

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[124] Gronewold, *supra* note 123 (("Sometimes this behavior doesn't rise to the level of 'oh yeah, this guy should be sued.").

[125] *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.").

[126] *Combating Sexual Harassment in the Workplace: Trends and Recommendations Based on 2017 Public Hearing Testimony, supra* note 20.

[127] *Harris,* 510 U.S. at 19 (despite confronting Hardy, he continued to harass plaintiff until she was forced to quit).

[128] *See* Pomales v. Celulares Telefonica, Inc., 447 F.3d 79, 83 (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).

[129] *See, e.g.* McHenry v. Fox News Network, LLC, 2020 U.S. Dist. LEXIS 238582, at *21-22 (S.D.N.Y. Dec. 18, 2020); Gronewold, *supra* note 123.

[130] *Brooks,* 229 F.3d at 921-22.

[131] *Id.*

supervisor continued to forcefully touch her, "boxing her in against the communications console as she was taking another 911 call."[132] He forced his hand underneath her sweater and bra.[133] Brook's removed the supervisors hand and continued to shut him down, and was only able to stop the supervisor upon the arrival of another dispatcher.[134] Brooks reported the incident immediately, and the supervisor was removed from his position.[135] Upon reporting, it was established that the supervisor was a repeated offender, as many other female dispatchers had been subjected to similar treatment, but had not reported the conduct.[136] Brooks brought this claim for hostile work environment harassment, as she had trouble recovering from the incident and sought psychological treatment.[137] Following a six month leave of absence, Brooks returned to work and was ostracized and mistreated by male supervisors.[138] Accordingly, Brooks was essentially forced to quit her job and never returned.[139]

The District Court held that the conduct was "not severe enough to give rise to a hostile work environment claim", and Brooks appealed.[140] The Ninth Circuit affirmed, determining that because Brooks could only rely on the single instance of sexual harassment in support of her hostile work environment claim, the misconduct was not severe enough to be actionable.[141] 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 discriminatory intimidation . . . that [was] sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive

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[132] *Id*.
[133] *Id*.
[134] *Id*.
[135] *Id*.
[136] *Brooks*, 229 F.3d at 922.
[137] *Id*.
[138] *Id*.
[139] *Id*.
[140] *Id*. at 923.
[141] *Id*. at 926. ("If a single incident can ever suffice to support a hostile work environment claim, the incident must be extremely severe.").

working environment.'"[142] Though the court reasoned that Brooks asserted sufficient facts to support the subjective prong of the hostile work environment analysis, the court held that the supervisors conduct did not satisfy the objectively reasonable analysis.[143] In its reasoning, the court referred to other cases decided under the standard and recognized that physical injuries resulting from a single incident may be sufficient enough to be severe, but because Brooks only suffered psychological injury, this incident could not have sufficiently permeated Brook's workplace to support her claim.[144] The court reaffirmed the standard set out 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."[145]

The decision in *Brooks* demonstrates the judiciary's inability to adequately recognize conduct as severe enough to meet the threshold. Similarly, other cases illustrate this difficulty establishing that harassment is adequately pervasive to support a cause of action.[146] For example, the Northern District of Alabama did not consider twenty incidents of harassment by supervisor over a year and a half period to be pervasive enough to support a claim, despite the harasser making comments about the employee's buttocks, making sexual jokes, telling her that he would be her "sugar daddy", and suggesting that other workers would want to see her "down on all fours.[147] There, the court improperly suggested that the harassment would have had to occur daily to meet the governing standard, meaning that even repetitive harassment is often

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[142] *Brooks*, 229 F.3d at 926.
[143] *Id.* at 924.
[144] *Id.* at 926.
[145] *Id.* ("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.").
[146] *See, e.g.* Williams v. United Launch Alliance, LLC, 286 F. Supp. 3d 1291, 1304 (N.D. Ala. 2018).
[147] *Id.*

dismissed as not actionable. Similarly, the Eleventh Circuit in *Mitchell v. Pope* dismissed a supervisors behavior as insufficiently "severe" to attach liability because of the infrequency of the conduct.[148] Plaintiff pointed to sixteen specific instances of offensive conduct by her supervisor that occurred throughout her four years of employment.[149] Though most incidents involved "offensive utterances," the supervisor touched her (or attempted to touch her) on multiple occasions, including trying to kiss her, lifting her, and rubbing up against her.[150] The court took a dismissive, employer-friendly view of the conduct, discounting the superior's action as horseplay that couldn't qualify as sexual harassment because "some was not sex-based".[151] Notably, this case is explicitly referenced in the "BE HEARD" act in a section describing erroneous analysis of the severe or pervasive standard, supporting that often conduct that meets the high severe or pervasive standard is discounted or excused despite the offensive nature of the conduct.[152]

The court's dismissive reasoning in the referenced cases is reflective of the need for a less stringent standard for assessing what actually makes a work experience harmful to workers, mostly women, who are harassed.[153] The severe or pervasive standard is a product of judicial interpretation, and is not found in Title VII.[154] While it could be said that Title VII was intentionally left broad to allow for judicial interpretation, it is clear that divergent understandings and inconsistent applications of the standard have shut out an enormous class of

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[148] 189 F. App'x 911, 913-14 (11th Cir. 2006).
[149] *Id*.
[150] *Id*.
[151] *Id*.
[152] H.R. 2148, 116th Cong. § 204(a)(18) (2019).
[153] *See* Chesier v. On Q Financial 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).
[154] Sperino & Thomas, *supra* note 63.

victims from legal recognition and redress.[155] For example, in *Brooks*, Brooks reported her traumatizing assault, something that many women who were also assaulted by the same supervisor could not do.[156] Had a more victim-friendly standard been implemented, the court in cases like *Brooks* may have ruled differently. It is possible that the reasoning proposed in Justice Ginsburg's concurrence in *Harris* reflects a better standard.[157] 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 satisfies the Harris factors[158], to come forward.[159]

### *A. The Solution: "Be HEARD"*

Since the severe or pervasive standard, though uniform, has been faulty in its application, binding legislation that explicitly lays out an applicable standard with guidelines may lead to more consistent rulings in sexual harassment cases. The "BE HEARD" act was introduced in Congress on April 9, 2019.[160] The path to equality in the workplace requires a solution that adequately addresses the widespread presence of sexual harassment. Very few states outside

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[155] *See* Debra S. Katz and 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 (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 Division on Civil Rights (DCR), *Preventing and Eliminating Sexual Harassment in New Jersey*, (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 and prosecuting claims because of the belief that the "harassment they suffered wont constitute sexual harassment under the law).

[156] *Brooks*, 229 F.3d at 921.

[157] *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

[158] *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." ).

[159] Johnson, *supra* note 19, at 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).

[160] Sekaran, *supra* note 22.

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.[161] Accordingly, a federal solution that revises the severe or pervasive standard is necessary. While it is unlikely that "BE HEARD" will pass in the 117th United States Congress, addressing our sexual harassment epidemic must remain an urgent priority and should be relentlessly sought as a nonpartisan effort to deliver basic constitutional rights.[162] The "BE HEARD" act offers a detailed roadmap for judges and employers to follow in identifying conduct that constitutes unlawful harassment. The bill provides proper recourse for victims by supplying a template to the federal courts to analyze harassment, as courts have too often excused abusive conduct in the workplace, dissuading other from seeking legal redress.[163]

The findings in the bill support 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 protections from bias in the workplace.[164] The bill clarifies the revised threshold for hostile work environment claims, disregarding the "severe or pervasive" standard and instead only requiring 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."[165] The act also promotes consistency in its application, elaborating on the factors that courts should consider on a case-by-case basis in order to avoid

[161] Katz & Alejandro, *supra* note 155.
[162] Katz & Alejandro, *supra* note 155.
[163] Vania Leveille & Lenora M. Lapidus, *The BE HEARD Act Will Overhaul Workplace Harassment Laws*, ACLU (Apr. 10, 2019), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/be-heard-act-will-overhaul-workplace-harassment-laws [https://perma.cc/AM8M-VDT5].
[164] H.R. 2148, 116th Cong. § 204(a)(1)-(3) (2019).
[165] H.R. 2148, 116th Cong. § 204(a)(6)(C) (2019).

misapplication and emphasis on solely the severity or pervasiveness of the conduct.[166] Some of the guidelines listed by the act include: (1) that the determination be made based off the record in its entirety;[167] and that (2) incidents of harassment be considered in the aggregate, rather than in isolation.[168] The act also specifies factors for courts to consider whether conduct constitutes workplace harassment are neither exhaustive nor determinative.[169] Such 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.[170] Codification of these factors will allow for more thorough and consistent consideration of Hostile Work Environment claims.

**CONCLUSION**

A change to the current federal standard governing sexual harassment law is necessary in order to penalize harassers, who continue to set women's 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

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[166] H.R. 2148, 116th Cong. § 204(a)(7), (15) (2019) (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").
[167] H.R. 2148, 116th Cong. § 204(c)(3)(A) (2019) (emphasizing that "a single incident may constitute workplace harassment").
[168] H.R. 2148, 116th Cong. § 204(c)(3)(B) (2019).
[169] H.R. 2148, 116th Cong. § 204(c)(3)(C) (2019).
[170] H.R. 2148, 116th Cong. § 204(c)(3)(C) (2019).

states such as New York and California have proven that a lower threshold to bring an actionable claim is appropriate. Accordingly, the "severe or pervasive" standard purported in *Meritor* must be abandoned in light of #metoo in order to provide protections for victims. Victims are being harmed by the high *Meritor* standard, and the enactment of the "BE HEARD" act will provide relief for victims of sexual harassment by encompassing a wider range of harmful conduct.