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ABSTRACT

In 2000, the Ninth Circuit set a high bar for plaintiffs bringing hostile work environment sexual harassment cases under Title VII with its decision in *Brooks v. City of San Mateo*. Over twenty years later, this precedent still prevents plaintiffs who plead single instances of sexual harassment from moving past summary judgment unless they can prove that the incident was "extremely severe." Workplace sexual harassment is tied to mental and physical health impacts that follow individuals throughout their lives. The *Brooks* standard perpetuates the public health consequences of sexual harassment, contravening an underlying goal of Title VII: to promote the public's health. Based on the Supreme Court's interpretation of Title VII and the legislative intent behind the Civil Rights Act, the Ninth Circuit should revise the bar for severity in hostile work environment sexual harassment cases to bring single instances of physical touching within the realm of severe conduct. Longstanding precedent from other federal appellate courts, innovative state law, and proposed federal legislation provide guidance for a new standard that would meet public health needs and allow plaintiffs a meaningful opportunity to vindicate their rights.

I. INTRODUCTION

Workplace sexual harassment captured the nation's focus during the MeToo movement in 2017, after the New York Times released its investigation into decades of sexual harassment perpetrated by Harvey Weinstein.[1] The investigation spurred discourse on the consequences of sexual harassment and violence as well as gender equality more generally.[2] However, workplace sexual harassment has long predated the MeToo movement.[3] Despite its pervasiveness, significant legal protections against workplace sexual harassment were not recognized by the U.S. Supreme Court until 1986 in *Meritor Savings Bank, FSB v. Vinson*.[4] The decision was based on the Court's interpretation of Title VII of the Civil Rights Act of 1964, which protects employees and job applicants from discrimination based on race, color, religion, national origin, and sex.[5] Over fifty years after the Civil Rights Act was signed into law and over thirty years after the Supreme Court created protections against workplace sexual harassment, considerable progress still needs to be made.[6]

While protections against sex discrimination in the workplace have their roots in the broad federal protections granted during the Civil Rights Movement,[7] some predominant court interpretations determining when workplace sexual harassment claims are actionable have limited the ability of many affected plaintiffs to successfully bring their claims.[8] *Meritor* held that for hostile work environment sexual harassment claims to be actionable, the alleged conduct must be sufficiently severe or pervasive to alter the conditions of the working environment so that it becomes abusive.[9]

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[1] Jaclyn Diaz, *Where the #MeToo movement stands, 5 years after the Weinstein allegations came to light*, NPR (Oct. 8, 2022, 5:00 AM), https://www.npr.org/2022/10/28/1131500833/me-too-harvey-weinstein-anniversary.

[2] *Id.*

[3] Sascha Cohen, *A Brief History of Sexual Harassment in America Before Anita Hill*, TIME (Apr. 11, 2016, 9:00 AM), https://time.com/4286575/sexual-harassment-before-anita-hill/.

[4] 477 U.S. 57 (1986).

[5] 42 U.S.C. § 2000e-2 (2021).

[6] *See* text accompanying notes 14, 15.

[7] The Civil Rights Movement was a "mass protest movement" led by black Americans that resulted in significant legislation, known as the Civil Rights Acts, during the 1950s and 1960s. ENCYCLOPEDIA BRITANNICA, AMERICAN CIVIL RIGHTS MOVEMENT (2023), https://www.britannica.com/event/American-civil-rights-movement.; *see also* CHRISTOPHER M. RICHARDSON & RALPH E. LUKER, HISTORICAL DICTIONARY OF THE CIVIL RIGHTS MOVEMENT 69 (2d ed. 2014).

[8] *See* discussion *infra* Section III.B.

[9] *Meritor*, 477 U.S. at 67.

This standard has been interpreted differently throughout the country.[10] In the Ninth Circuit, for example, the requirement of severity has created a high bar, especially when plaintiffs bring claims based on a single instance of harassment.[11] In *Brooks v. City of San Mateo*[12], decided in 2000, the Ninth Circuit held that a single incident in which plaintiff was physically touched and restrained at work did not constitute conduct severe enough to overcome summary judgment for the defendant employer.[13] As a result, it is nearly impossible for affected individuals to move past summary judgment in the Ninth Circuit when alleging a single incident of sexual harassment under Title VII.[14]

Workplace sexual harassment is a long-standing and widespread problem. Since 2010, the Equal Employment Opportunity Coalition (EEOC) has received over 85,000 sexual harassment charges, or about 7,000 claims per year.[15] These numbers likely pale in comparison to the actual incidence of workplace sexual harassment, as one study has indicated that ninety percent of people experiencing sexual harassment never file formal complaints.[16]

Workplace sexual harassment is also widely recognized as a public health issue. In 2022, the U.S. Surgeon General identified sexual harassment as a form of violence in the workplace that must be addressed.[17] In Canada, the Minister of Employment, Workforce Development and Labor launched an investigation on harassment and sexual violence in the workplace, revealing

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[10] *See* discussion *infra* Section IV.C.
[11] *See* discussion *infra* Section III.B.
[12] 229 F.3d 917 (9th Cir. 2000).
[13] *Id*.
[14] *See* discussion *infra* Section III.B.
[15] U.S. EQUAL EMP. OPPORTUNITY COAL., *Charges Alleging Sex-Based Harassment (Charges Filed with the EEOC) FY 2010–FY 2022*, https://www.eeoc.gov/data/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2022 (last visited Mar. 18, 2023). The highest number of charges per year is 7,944 from 2010, while the lowest is 5,581 filed in 2021. *Id.* The number of charges filed dropped between 2010-2017, with an increase in 2018 and 2019, and another drop in 2020, 2021, and 2023. *Id.* The percent of charges per year filed by men was also consistent, averaging about 16.7%. *Id.*
[16] EQUAL EMP. OPPORTUNITY COAL, EEOC DATA HIGHLIGHT 1 (2022), https://www.eeoc.gov/data/sexual-harassment-our-nations-workplaces#:~:text=EEOC%20Charge%20Data%20(FY%202018,27%2C291%20charges%20alleging%20sexual%20harassment. Assuming that ninety percent of people do not report sexual harassment, the actual incidence of sexual harassment over the twelve years from 2010-2021 may be close to 850,000 cases. While the average number of charges filed during this time is about 7,000 per year, the actual incidences per year would be close to 71,000.
[17] OFFICE OF THE SURGEON GENERAL, THE U.S. SURGEON GENERAL'S FRAMEWORK FOR WORKPLACE MENTAL HEALTH AND WELL-BEING 13 (2022), https://www.hhs.gov/sites/default/files/workplace-mental-health-well-being.pdf (discussing the numbers of sexual harassment charges filed with the EEOC as a matter of physical and psychological workplace safety).

findings on the reporting, prevention of, and response to workplace harassment and violence. [18] Scholars[19] and non-profit organizations[20] have similarly framed sexual harassment as a key public health concern.[21] This is not without reason; research shows that sexual harassment is linked to depressive symptoms, substance abuse, suicide, hypertension, poor sleep, and psychological distress.[22] Considering the serious and long-lasting health consequences of a such a widespread issue,[23] the Ninth Circuit should reinterpret the standard for severity to bring single incidences of physical touching within the realm of Title VII hostile work environment claims. Other circuits, state law, and proposed federal legislation provide potential models.[24]

Part II demonstrates the health consequences of sexual harassment through scientific studies and data. Part III assesses how the legal standard for hostile work environment sexual harassment claims developed through the Supreme Court's interpretation of Title VII and the Ninth Circuit case law that followed. Part IV explains how a new standard in the Ninth Circuit is supported by the legislative intent of the Civil Rights Act as well as recent Supreme Court precedent. It also provides a guide for reinterpreting the bar for severity based on federal precedent, state law, and proposed federal legislation.

II. THE HEALTH CONSEQUENCES OF WORKPLACE SEXUAL HARASSMENT

Workplace sexual harassment is a pervasive and longstanding issue causing harmful economic and health consequences for workers across many

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[18] EMP. AND SOCIAL DEV. CANADA, HARASSMENT AND SEXUAL VIOLENCE IN THE WORKPLACE CONSULTATIONS: WHAT WE HEARD (2017), https://www.canada.ca/content/dam/canada/employment-social-development/services/health-safety/reports/workplace-harassment-sexual-violence-EN.pdf.

[19] *See* Sandro Galea, *Preventing Sexual Harassment and Assault: A Public Health Imperative*, BOSTON UNIV. SCH. OF PUB. HEALTH (Nov. 28, 2017), https://www.bu.edu/sph/news/articles/2017/preventing-sexual-harassment-and-assault-a-public-health-imperative/; Sabine Oertelt-Prigione, *Sexual Harassment is an Occupational Hazard*, 29 J. WOMEN'S HEALTH 1 (2020).

[20] Shakun Kaushal, *Sexual Harassment at the Workplace is a Public Health Crisis*, NATIONAL WOMEN'S HEALTH NETWORK (Oct. 8, 2019), https://nwhn.org/sexual-harassment-at-the-workplace-is-a-public-health-crisis/.

[21] *Id.*

[22] *See* discussion *infra* Section II.

[23] *See* discussion *infra* Section II.

[24] *See* discussion *infra* Section IV.

fields.[25] From 2005-2015, the EEOC received 41,250 sexual harassment charges spanning across every kind of workplace.[26] Job-related impacts of sexual harassment include job satisfaction, turnover, productivity or performance, and job stress.[27] The psychological impacts are also far-reaching.[28] Sexual harassment has been tied to depression, anxiety, general distress, post-traumatic stress disorder, self-esteem issues, and eating disorders.[29] It has negative physical health impacts as well.[30]

The Centers for Disease Control and Prevention (CDC) defines sexual violence as "a sexual act that is committed or attempted by another person without freely given consent of the victim or against someone who is unable to consent or refuse."[31] It includes "intentional sexual touching" and "non-contact acts of a sexual nature," among other acts.[32] Unwanted sexual contact and unwanted sexual experiences are not limited to sexual touching but also include verbal and behavioral sexual harassment.[33] Verbal and behavioral sexual harassment include "making sexual comments, spreading sexual rumors, sending unwanted sexually explicit photographs, or creating a sexually hostile climate, in person or through the use of technology."[34]

The CDC specifies that an incident of sexual violence can be a single act or a number of interconnected acts.[35] An incident may occur "over a period of minutes, hours, or days."[36] Perpetrators of sexual violence range from an intimate partner or family member to a person in a position of power, a friend,

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[25] Lilia M. Cortina & Jennifer L. Berdahi, *Sexual Harassment in Organizations: A Decade of Research in Review, in* THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 478–80 (Julian Barling & Cary L. Cooper, eds. 2008).

[26] Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across All Industries Affects All Workers*, CTR. FOR AM. PROGRESS (Nov. 20, 2017), https://www.americanprogress.org/article/not-just-rich-famous/. Notably, 14.23% of these claims originated in the food service industry. *Id.* "Sexual harassment is endemic to the restaurant industry with the vast majority of workers reporting sexual harassment." RESTAURANT OPPORTUNITIES CTRS. UNITED, TAKE US OFF THE MENU: THE IMPACT OF SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY 1 (2018) (outlining the widespread health and economic impacts of sexual harassment in the restaurant industry assessed through surveys and interviews).

[27] Cortina & Berdahi, *supra* note 24.

[28] Cortina & Berdahi, *supra* note 24, at 478–80.

[29] *Id.*

[30] *See* discussion *infra* notes 46–48.

[31] CTRS. FOR DISEASE CONTROL & PREVENTION, SEXUAL VIOLENCE SURVEILLANCE: UNIFORM DEFINITIONS AND RECOMMENDED DATA ELEMENTS 11 (2014), https://www.cdc.gov/violenceprevention/pdf/sv_surveillance_definitionsl-2009-a.pdf.

[32] *Id.* at 11.

[33] *Id.* at 12.

[34] *Id.*

[35] *Id.* at 13.

[36] *Id.*

an acquaintance, or a stranger.[37] In the workplace, persons in positions of power may include an employer or supervisor, while a friend or acquaintance could be a co-worker.[38]

Workplace sexual harassment, specifically, has been shown to have significant physical and mental health impacts, particularly depressive symptoms.[39] One 2017 study found that exposure to harassment by clients and customers as well as by supervisors, colleagues, or subordinates was associated with higher levels of depressive symptoms compared to those who did not experience harassment.[40] The association between harassment and depressive symptoms was stronger when the harassment was done by supervisors, colleagues, or subordinates as compared to clients or customers.[41] Workplace sexual harassment has also long been associated with anxiety, hostility, and substance abuse.[42]

These mental health impacts are sustained and long-lasting. One 2011 study suggests that sexual harassment early in one's career has "long-term implications for adult depressive symptoms."[43] This is because "targets of harassment experience heightened emotional distress later in their career" as a result of these early experiences.[44] Workplace sexual harassment has also been prospectively linked to suicidal behavior.[45] One 2019 study focusing on

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[37] *Id.* at 14.

[38] *Id.*

[39] Maria K. Friborg et al., *Workplace Sexual Harassment and Depressive Symptoms: A Cross-Sectional Multilevel Analysis Comparing Harassment from Clients or Customers to Harassment from Other Employees Amongst 7603 Danish Employees from 1041 Organizations*, BMC PUBLIC HEALTH (2017), https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-017-4669-x.

[40] *Id.* at 7–8.

[41] *Id.* The authors of the study opined that this may be true because it may be more difficult for employees to report harassment by colleagues or supervisors and because this kind of harassment may occur for longer periods of time than harassment by clients and customers. *Id.* at 8–9.

[42] Judith A. Richman et al., *Sexual Harassment and Generalized Workplace Abuse Among University Employees: Prevalence and Mental Health Correlates*, 89 AM. J. PUB. HEALTH 358, 361–62 (1999), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1508597/pdf/amjph00003-0080.pdf.

[43] Jason N. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC'Y MENTAL HEALTH 89, 90, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3227029/pdf/nihms318538.pdf. Adolescents may be especially at risk of sexual harassment in the workplace. *See* Susan Fineran & James E. Gruber, *Youth at Work: Adolescent Employment and Sexual Harassment*, 8 CHILD ABUSE NEGLECT 550 (2009).

[44] Houle, *supra* note 43, at 101.

[45] Urmimala Sarkar, Shirin Hemmat & Eleni Linos, *Sexual Harassment and Suicide*, BMJ (2020), https://www.bmj.com/content/370/bmj.m3330 ("In the linked prospective study, Magnusson Hanson and colleagues convincingly show excess rates of suicide attempts and deaths among people reporting workplace sexual harassment.") (citing Linda L Magnusson Hanson et al., *Work*

the U.S. military found that individual reporting revealed that sexual harassment is associated with a five times higher risk of suicide.[46] Individuals were at a three-times higher risk of suicide within units or companies with higher levels of sexual harassment,.[47]

A 2022 study found that women who had experienced sexual assault or workplace sexual harassment were at higher risk of developing hypertension than women who had not experienced these kinds of sexual violence.[48] Other researchers have similarly connected workplace harassment to higher blood pressure as well as other consequences like poor sleep[49] and psychological distress.[50] Based on these above clinical definitions of sexual violence and their proven health consequences, even single incidences of sexual harassment can have profound consequences, individually and collectively.

Public health-based approaches to sexual violence comprise three levels of prevention: primary, secondary, and tertiary.[51] The "primary level of prevention focuses on stopping the problem behavior before it starts," while the secondary and tertiary levels involve working with people who have already sexually abused others.[52] Workplace trainings designed to prevent sexual harassment are widespread, but their effectiveness is questionable.[53]

Related Sexual Harassment and Risk of Suicide and Suicide Attempts: Prospective Cohort Study, BMJ (2020), https://www.bmj.com/content/370/bmj.m2984?ijkey=3f814f6bc56eecaabaebc0f45b6c0c15a8f2cf4d&keytype2=tf_ipsecsha).

[46] James Griffith, *The Sexual Harassment–Suicide Connection in the U.S. Military: Contextual Effects of Hostile Work Environment and Trusted Unit Leaders*, 49 SUICIDE LIFE THREATENING BEHAV. 41, 41 (2019), https://onlinelibrary-wiley-com.ezproxy1.lib.asu.edu/doi/pdfdirect/10.1111/sltb.12401.

[47] *Id.*

[48] Rebecca B. Lawn et al., *Sexual Violence and Risk of Hypertension in Women in the Nurses' Health Study II: A 7-Year Prospective Analysis*, 11 J. AM. HEART ASS'N (2022), https://www.ahajournals.org/doi/10.1161/JAHA.121.023015.

[49] Rebecca C. Thurston et al., *Association of Sexual Harassment and Sexual Assault With Midlife Women's Mental and Physical Health*, 179 J. AM. MED. ASS'N INTERNAL MED. 48, 50 (2018), https://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2705688.

[50] Morten B. Nielsen & S. Einarsen, *Prospective Relationships Between Workplace Sexual Harassment and Psychological Distress*, 62 OCCUPATIONAL MED. 226 (2012), https://academic.oup.com/occmed/article/62/3/226/1433687 (finding a prospective association between workplace sexual harassment and psychological distress while emphasizing that longitudinal studies confirming the relationship are lacking); *see also* Nancy Krieger et al., *The Inverse Hazard Law: Blood Pressure, Sexual Harassment, Racial Discrimination, Workplace Abuse and Occupational Exposures in US Low-income Black, White and Latino Workers*, 67 SOC. SCI. MED. 1970 (2008), https://www.sciencedirect.com/science/article/pii/S0277953608004735.

[51] Pamela M. McMahon, *The Public Health Approach to the Prevention of Sexual Violence*, 12 SEXUAL ABUSE: J. RESEARCH TREATMENT 27, 28 (2000).

[52] *Id.*

[53] *See* Frank Dobbin & Alexandra Kalev, *Why Sexual Harassment Programs Backfire*, HARV. BUS. REV. (2020), https://hbr.org/2020/05/why-sexual-harassment-programs-backfire.

Data suggest that many sexual harassment training programs may actually be harmful.[54] According to a 2019 report by the National Academies, trainings that regard male employees as potential perpetrators are tied to decreases in women managers.[55] In addition, sexual harassment training has been shown to negatively affect the attitudes of men who already have a tendency toward harassment.[56] Given the ineffectiveness of these traditional prevention efforts, data-informed prevention and response models should be implemented.[57]

Courts also have a role to play in this evolving landscape. In its current form, the Ninth Circuit severity standard does not allow courts to participate in the primary level of prevention because it requires that harassment continue and escalate to be actionable.[58] In light of the public health necessity of addressing sexual harassment, the Ninth Circuit should reevaluate what is considered severe to include single incidences of physical touching. Not only is this change supported by scientific data, but in the succeeding sections, it will be established that such a change is supported by Congressional intent behind Title VII, as well as growing movements among judges and lawmakers.

III. TITLE VII ORIGINS AND COURT INTERPRETATIONS

Title VII is part of the Civil Rights Act of 1964 (CRA),[59] which was signed into law by President Johnson on July 2, 1964, ten years after the Supreme

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[54] Frank Dobbin & Alexandra Kalev, *The Promise and Peril of Sexual Harassment Programs*, 116 PROC. NAT'L ACAD. SCI. 12255 (2019), https://www.pnas.org/doi/abs/10.1073/pnas.1818477116.

[55] *Id.* at 12255.

[56] Lori A. Robb & Dennis Doverspike, *Self-Reported Proclivity to Harass as a Moderator of the Effectiveness of Sexual Harassment-Prevention Training*, 88 PSYCH. REPORTS 85, 87 (2001), https://journals.sagepub.com/doi/abs/10.2466/pr0.2001.88.1.85.

[57] *See* Sarkar, Hemmat, & Linos, *supra* note 45 ("[N]ew ways to prevent and deal with workplace sexual harassment are urgently needed."). Bystander trainings which treat male managers and supervisors as allies, rather than predators, are shown to positively affect the number of women in managerial roles. Dobbin & Kalev, *supra* note 53, at 12259; *see also Prevention Strategies*, CTR. FOR DISEASE CONTROL & PREVENTION (Feb. 5, 2022), https://www.cdc.gov/violenceprevention/sexualviolence/prevention.html. Experts also recommend reporting processes that use an ombudsperson, an individual who investigates complaints and can mediate resolutions. Sarkar, Hemmat, & Linos, *supra* note 45. These systems reduce retaliation and give those experiencing sexual harassment an opportunity to share their story before pursuing administrative and legal remedies. *Id.*

[58] *See* discussion *infra* Section III.B.

[59] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2021).

Court's decision in *Brown v. Board of Education*.[60] The CRA created legal avenues to challenge discrimination in certain contexts, including voting registration, service in public accommodations, and federally assisted programs.[61] Title VII protects against discrimination in the realm of employment, including discrimination based on race, color, religion, sex, and national origin.[62]

Title VII was originally aimed at combatting racial discrimination in employment.[63] Lawmakers added protections against sex discrimination into the bill once the House debates were almost over.[64] Congressman Howard Smith's motivations behind the introduction of the amendments focused on sex discrimination has sparked ample scholarly debate..[65] Despite the controversy, the addition of "sex" into Title VII led to undeniable protection against sex discrimination in the workplace.

Over decades, this protection has evolved to include the prohibition of discrimination based on pregnancy, sexual harassment, gender identity, sexual orientation, and transgender status.[66] In the Ninth Circuit, though, the standard for hostile work environment claims has evolved to defeat the public health objectives behind these protections.

A. Meritor *and the Creation of Sexual Harassment Claims*

In the years following the CRA's passage, there was confusion about the legal definition of sex discrimination. In 1965, Franklin D. Roosevelt, Jr., the president of the EEOC, wrote to President Johnson that implementing the

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[60] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954). This landmark decision was followed by the Voting Rights Act of 1965 and the expanded Civil Rights Act of 1968. *See The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBR. OF CONG. (last visited Oct. 9, 2023), https://www.loc.gov/exhibits/civil-rights-act/epilogue.html.

[61] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2021).

[62] *Id.*

[63] *See* 110 CONG. REC. 2577 (1964).

[64] Cary Franklin, *Inventing the 'Traditional Concept' of Sex Discrimination*, 125 HARV. L. REV. 1307, 1317–18 (2012).

[65] Many scholars believe that the amendment to add protections against sex discrimination into Title VII was an attempt to quash the legislation at the final stages by Congressman Smith, who was an opponent of the bill. Others see it as a mockery of the women's movement. Others still have disproved this theory, explaining the addition of sex-based protections as a calculated objective of the women's movement. *See* Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN L. 137 (1997).

[66] *See Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COAL., https://www.eeoc.gov/sex-based-discrimination.

prohibition on sex discrimination had been challenging.[67] As the Commission saw it, Congress did not clarify what kinds of actions, prohibitions, and regulations qualified as discrimination based on sex.[68]

As a result, sex discrimination did not gain widespread legal significance until the 1970's, when the women's rights movement gained traction.[69] In 1972, Congress passed Title IX of the Education Amendments Act and the Equal Rights Amendment to the Constitution (though the Amendment was never ratified).[70] At the same time, courts slowly began to interpret Title VII to define sex discrimination protections. In 1971, the Supreme Court heard its first Title VII sex discrimination case, *Phillips v. Martin Marietta Corp*.[71] It held that refusing to hire mothers, but not fathers, with young children was a form of sex discrimination.[72] However, the Court also clarified that family obligations could constitute a Bona Fide Occupational Qualification, a legal basis to refuse to hire someone based on their sex.[73] In 1976, the Supreme Court held that discrimination based on pregnancy did not violate Title VII sex discrimination protections.[74] Two years later; however, Congress amended Title VII to include protections against pregnancy discrimination.[75]

It was not until 1986 when the Supreme Court decided *Meritor Savings Bank v. Vinson* that it declared sexual harassment a form of sex discrimination actionable under Title VII.[76] Michelle Vinson, a bank employee, sued her employer, claiming that for over four years she had been sexually harassed by Sidney Taylor, the bank manager.[77] The district court found that Vinson had not proved a case under Title VII.[78] The District of

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[67] Franklin, *supra* note 64, at 1329 (quoting *EEOC Reports to President on First 100 Days of Activity*, [1965-1968 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8024, at 6036 (Nov. 12, 1965)).
[68] *Id.* at 1332–33. The inclusion of "sex" to Title VII also created panic over the changes this new act might bring to the gendered social structure of the time. At a press conference in the late 1960's, EEOC Executive Director Herman Edelsberg conjured images of a new reality where secretaries were men. *Id.* at 1336–37 (citing CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES 187 (1988)).
[69] Gerald Rosenberg, *The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law*, 49 ST. LOUIS UNIV. L. J. 1147, 1151–52 (2004) ("Given this background, it is perhaps not surprising that although the amendment passed, the newly created [EEOC] decided to treat the prohibition on sex discriminations as a joke. [. . .] The result of this attitude was inaction on the part of the federal government. For the next four years, the Justice Department did not file a single sex discrimination suit.").
[70] *Id.* at 1153.
[71] 400 U.S. 542 (1971).
[72] *Id.* at 544.
[73] *Id.*
[74] General Electric Co. v. Gilbert, 429 U.S. 125, 128 (1976).
[75] Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978).
[76] 477 U.S. 57, 63 (1986).
[77] *Id.* at 60.
[78] *Id.* at 61.

Columbia Circuit Court of Appeals reversed, citing EEOC Guidelines which outlined two kinds of sexual harassment claims under Title VII: economic quid pro quo and hostile work environment.[79] The first kind of claim is aimed at the exchange of employment benefits for sexual favors.[80] The second type focused on harassment that creates a hostile working environment, regardless of economic impacts.[81]

The Supreme Court held that Vinson's allegations created a claim for hostile work environment sexual harassment.[82] The Court rejected the defendant's argument that Title VII only protected against tangible economic loss.[83] For support, the Court cited EEOC precedent which affirmed an employee's "right to work in an environment free from discriminatory intimidation, ridicule, and insult."[84] This right was not conferred without bounds. To be actionable, stated the Court, sexual harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the employee's] employment and create an abusive working environment.'"[85] Proving sexual harassment depends on whether the conduct was unwelcome, not whether it was voluntary.[86] The Court did not definitively rule on employer liability but held that the Court of Appeals was incorrect that employers are always automatically liable for supervisors' sexual harassment.[87]

Seven years later, in *Harris v. Forklift Systems*, the Supreme Court affirmed *Meritor* and clarified the concept of a hostile work environment.[88] Plaintiff worked at the defendant company for two and a half years.[89] She alleged that the president of the company made suggestive comments and innuendos to the women at the company, asked them to get coins from his pockets, threw things on the ground for them to pick up, and once called plaintiff a "dumb ass woman."[90] On another occasion, he asked the plaintiff if she had promised a customer sex in front of other employees.[91] The district court held that the hostile work environment claim was not actionable

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[79] *Id.* at 62.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 67–68.
[83] *Id.* at 64.
[84] *Id.* at 65.
[85] *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
[86] *Id.* at 68.
[87] *Id.* at 72.
[88] Harris v. Forklift Systems, 510 U.S. 17, 21, 23 (1993).
[89] *Id.* at 19.
[90] *Id.*
[91] *Id.*

because the harassment was not serious enough to reasonably impact the plaintiff's well-being.[92]

In a majority opinion written by Justice Sandra Day O'Connor, the Court held that for a hostile work environment claim to be actionable, a plaintiff does not need to show concrete psychological harm as a result of the harassment.[93] Whether a work environment is hostile or abusive depends on the totality of the circumstances.[94] The Court outlined factors 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."[95] While psychological harm is relevant to the analysis, no single factor is necessary to show harassment.[96] In their concurring opinions, Justices Antonin Scalia and Ruth Bader Ginsberg suggested that focusing on whether the conduct unreasonably interfered with the employee's work performance might clarify guidance to the lower courts.[97]

After *Meritor* and *Harris*, the circuit courts developed their own case law, defining what constitutes severe or pervasive harassment in light of the totality of the circumstances. Seven years after the *Harris* decision, the Ninth Circuit declared a standard for severity in *Brooks v. City of San Mateo*.[98]

B. The Ninth Circuit Brooks Standard for Hostile Work Environment Claims

Brooks,[99] decided in 2000, sets the precedent in the Ninth Circuit for severity when a plaintiff brings a claim for a single instance of sexual harassment.[100] In the Ninth Circuit currently, to hold an employer liable for a single incident of sexual harassment under Title VII, plaintiffs must pass a two-pronged test, showing the existence of a hostile work environment and

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[92] *Id.* at 20.
[93] *Id.* at 22.
[94] *Id.* at 23.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 24–25 (Scalia, J. and Ginsberg, J., concurring).
[98] Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000).
[99] *Id.*
[100] *Id.* at 921. When a plaintiff's claim is based on a single incident, the harassment will not be considered pervasive. *See* Brennan v. Metro Opera Ass'n, Inc., 192 F.3d 310, 318 (2d Cir. 1999) ("However, a plaintiff must still prove that the incidents were 'sufficiently continuous and concerted' to be considered pervasive or that a single episode is 'severe enough' to establish a hostile working environment.") (citations omitted).

that the employer is liable.[101] To show the existence of a hostile work environment, plaintiffs need to prove that (1) they were subjected to verbal or physical conduct of a sexual nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.[102] The Ninth Circuit has held that, because the frequency factor is not dispositive, a single incident can support a hostile work environment claim, though it must be "extremely severe."[103] This bar for extreme severity is not supported by the data on health implications of sexual harassment.[104]

Patricia Brooks, a 911 telephone dispatcher, brought a claim for sexual harassment under Title VII against her employer, the City of San Mateo, California.[105] She argued that the employer should be liable for an incident in which her co-worker, Steven Selvaggio, touched her stomach and breast.[106] One evening, as Brooks was taking a 911 call, Selvaggio, a senior dispatcher, approached her and touched her stomach.[107] After Brooks told him to stop and pushed him away, Selvaggio restrained her in the communications console and forced his hand underneath her clothing, touching her breast.[108] Sevlaggio also verbally harassed Brooks during this incident, commenting on the "softness and sexiness" of her stomach and saying "you don't have to worry about cheating [on your husband], I'll do everything."[109] Selvaggio approached Brooks a third time that evening and was only stopped by the arrival of a third dispatcher.[110]

As a result, Brooks took leave from work to see a psychologist.[111] When she returned six months later, she was ostracized and mistreated by the male employees, received negative performance reviews, and had trouble getting time off and sick leave, despite her seniority.[112] The city took remedial measures against Selvaggio.[113] He was placed on administrative leave after the city initiated termination proceedings against him and he spent 120 days

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[101] Freitag v. Ayers, 468 F.3d 528, 539 (9th Cir. 2006).
[102] Fried v. Wynn Las Vegas, LLC, 18 F.4th 643, 647 (9th Cir. 2021).
[103] *Id.* at 648.
[104] *See* discussion *supra* Section II.
[105] *Brooks*, 229 F.3d at 917, 921.
[106] *Id.* at 923.
[107] *Id.* at 921.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 922.
[112] *Id.*
[113] *Id.*

in jail.[114] An investigation revealed Selvaggio had sexually harassed other coworkers in the past.[115]

Brooks originally sued the city, the police department, and its chief for sexual harassment and retaliatory discrimination under Title VII and California's Fair Employment and Housing Act.[116] The district court found that the incident was not severe enough to alter the conditions of Brooks' working environment and granted all the defendants' motions for summary judgment.[117] The Ninth Circuit agreed.[118]

For a single instance of sexual harassment to be actionable as a hostile work environment claim, the Ninth Circuit Court reasoned that the harassment must be extremely severe.[119] To determine the bar for severity, the Court pointed to *Al-Dabbagh v. Greenpeace, Inc.*, a case in which a single instance of harassment met the bar for severity.[120] In that case, the plaintiff was raped and kidnapped.[121] The Court described the facts of *Al-Dabbagh*:

> [T]he assailant "slapped [plaintiff], tore off her shirt, beat her, hit her on the head with a radio, choked her with a phone cord and ultimately forced her to have sex with him." . . . The perpetrator held the victim captive overnight; when she finally managed to escape, she had to be hospitalized for her injuries.[122]

The court found that the incident at hand in *Brooks* was significantly less severe than that in *Al-Dabbagh*.[123] Brooks did not require hospitalization and did not suffer any physical injuries.[124] According to the court, the harassment Brooks experienced was minimal, compared to the plaintiff in *Al-Dabbagh*, who was held captive.[125] Brooks, on the other hand, was only harassed for "a matter of minutes."[126] The court found that the incident did not impact her

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[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 927.
[119] *Id.* at 926. The court cited the EEOC guidelines to support this claim. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990) ("[A] single unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severe the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical.").
[120] *Brooks*, 229 F.3d at 926 (citing Al-Dabbagh v. Greenpeace, Inc., 873 F.Supp. 1105, 1108 (N.D. Ill. 1994)).
[121] *Id.*
[122] *Id.* (quoting *Al-Dabbagh*, 873 F.Supp. at 1108).
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*

ability to do her job, especially because the city removed Selvaggio from the workplace.[127]

Brooks has been cited over 1,500 times by district courts within the Ninth Circuit and the Court of Appeals itself.[128] For example, in *Robello v. Mandalay Corp*., a Ninth Circuit decision from 2018, the plaintiff alleged that her co-worker sexually assaulted her at work by "grabbing" her breasts.[129] The court found that this incident was not severe enough, citing *Brooks* as a similar instance of sexual harassment that did not meet the test for hostile work environment.[130]

Likewise, in *Petty v. Circle K Stores, Inc.*, the plaintiff brought a hostile work environment claim based on a single incident of harassment.[131] The district court faced facts very similar to those in *Brooks* and, in its decision, relied on the reasoning in *Brooks* explicitly.[132] In the incident alleged, the defendant, Allsworth, a market manager, directed plaintiff, a Circle K store assistant, to go into the walk-in cooler with him.[133] After the door to the cooler closed, Allsworth told Petty that he "would love to see [her] bent over [his] knees," "professed his love for her," told her that he would trade her for his wife, and tried to kiss her.[134] Petty attempted to leave the cooler, but Allsworth closed the door and prevented her from leaving by grabbing and restraining her.[135] Petty "yelled for help" and repeatedly told Allsworth that she wanted to leave.[136] He only let her go when the cashier buzzed, indicating that help was needed at the register.[137]

Although the parties had previously exchanged text messages, the district court analyzed the assault in the walk-in cooler as a single incident and assessed the severity based on the *Brooks* precedent:[138]

> Like *Brooks*, it involves a single incident, spanning no more than a few minutes, in which an employee was subjected to unwelcome sexual advances by a fellow employee. Like *Brooks*, the conduct was largely verbal, although there was some touching. Like *Brooks*,

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[127] *Id.*
[128] According to data on Westlaw, *Brooks* has been cited within the Ninth Circuit in 1,510 cases between 2001 and 2023 (as of April 19, 2023).
[129] 740 Fed. Appx. 607, 608 (9th Cir. 2018).
[130] *Id.*
[131] No. CV-18-00567-PHX-DWL, 2020 WL 1236343 (D. Ariz. Mar. 13, 2020).
[132] *Id.*
[133] *Id.* at *1.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at *5.

> the touching didn't take the form of slapping, beating, choking, or rape and didn't result in any physical injury or hospitalization.[139]

The court also cited language directly from *Brooks* stating that, although the conduct was "highly reprehensible," not all forms of workplace harassment fall within the scope of Title VII.[140] As per the court's decision in *Petty*, the *Brooks* precedent binds the lower courts and leaves little room to interpret even the most reprehensible actions.[141]

The *Brooks* standard for severity has essentially obviated claims of single instances of harassment where a plaintiff is physically touched because they are insufficiently severe to withstand summary judgment.[142] This high bar relegates the courts to a reactive tool that can only be employed in extreme circumstances. Creating a standard that allows certain single instances of harassment to be actionable would not only allow plaintiffs a remedy for harm suffered but would also allow the courts to articulate employer liability based on prevention and response strategies. Even more,a more inclusive standard would further public health objectives.

IV. REINTERPRETING THE NINTH CIRCUIT SEVERITY STANDARD TO MEET PUBLIC HEALTH NEEDS

In the wake of the MeToo movement, the *Brooks* standard has been criticized for failing to reflect modern understandings of sexual harassment.[143] Legal scholars have argued that judges no longer have to fear "unguided juries"[144] as there is a general consensus as to what constitutes sexual harassment.[145] They contend that instead of deciding these cases on

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[139] *Id.* at *6.
[140] *Id.* at *7.
[141] *Id.* at *6 (quoting *Brooks*, 229 F.3d at 927).
[142] Interestingly, *Brooks* also stated that an employer's insufficient response to an employee's report of sexual harassment can create a hostile environment claim. *See also*, *Fried*, 18 F.4th 643, 652-53 ("But a reasonable factfinder could conclude that the manager's response to Fried's report of a customer's overt sexual proposition subjected Fried to a hostile work environment."); Fuller v. Idaho Dept. of Corrections, 865 F.3d 1154, 1167 (9th Cir. 2017) ("Although we decline to opine on whether other circumstances may constitute 'condoning or ratifying' a rape, we find that Fuller has raised a question of material fact as to whether the IDOC did so here.").
[143] *See* Joan C. Williams et al., *What's Reasonable Now? Sexual Harassment Law after the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 155-162 (2019).
[144] *Id.* at 152. In his concurrence in *Harris*, Justice Scalia wrote that the law "lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough." *Harris*, 510 U.S. at 24. Williams et al. suggest this language urged trial courts to decide these cases on summary judgment, rather than let juries decide. Williams et al., *supra* note 140, at 152.
[145] Williams et al., *supra* note 143, at 152.

summary judgment, judges allow juries to set new, more appropriate and informed standards.[146]

The question is not simply *what* constitutes sexual harassment but *when* should an employer be liable. Analyzing sexual harassment as an important public health issue answers this question. Reinterpreting the standard to bring single instances of sexual harassment within the scope of Title VII follows the intent of the Civil Rights Act and is supported by Supreme Court precedent. Other circuit court decisions and state laws provide guides for judicial reconsideration in the Ninth Circuit.

Data demonstrating the serious, long-lasting consequences of sexual violence and harassment show that single instances of harassment may be considered severe.[147] In place of a severity standard which runs counter to the intent of the Civil Rights Act and public health imperatives, the Ninth Circuit should consider the following proposed definition of severity, which incorporates language and ideas from circuit court decisions, state law, and proposed federal law:

> *Severe conduct must rise above petty slights and inconveniences to create an intimidating or hostile environment at work. Single instances of harassment involving the touching of an intimate body part are a severe form of sexual harassment. Factors like location; the number of individuals involved; whether the conduct is humiliating, degrading, or threatening; power differentials; and whether the conduct involves stereotypes may also determine what is severe.*

This proposed definition outlines four key safeguards. Notably, it maintains language indicating that certain conduct—petty slights and inconveniences—is not actionable, as the Supreme Court confirmed in *Clark County School District v. Breeden*.[148] It defines a hostile work environment as an environment where it is difficult to perform the duties of one's job due to the sexual misconduct. It also declares that the touching of an intimate body part is a severe form of sexual harassment. Lastly, it outlines factors that may be considered in addition to intimate touching. These ideas have been successfully implemented in other federal and state jurisdictions.[149] They are responsive to the health consequences of sexual harassment as well as the legislative intent of the Civil Rights Act and recent Supreme Court interpretation of Title VII.

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[146] *Id.* at 224.
[147] *See* discussion *supra* Section II.
[148] 532 U.S. 268 (2001).
[149] *See* discussion *infra* Section IV.C.

A. The Civil Rights Act and Public Health

The CRA was enacted to promote public health. Civil rights themselves are social determinants of health.[150] This is because holding or lacking civil rights affects social determinants of health "such as education, housing, transportation, employment, and the system of justice, that causally affect the societal distribution of resources that in turn affect disease, injury, and health."[151]

Steady employment in safe working conditions has been shown to be an indicator of long term health,[152] just as unemployment is a risk factor in mortality.[153] Businesses also affect the health of their employees and communities "through their impact on natural and built environments, workplace conditions, and relationships with communities."[154] Business policies not only affect worker health, but also the surrounding environment.[155] Many businesses also provide their employees with health insurance, showing the interconnectedness of public health and private businesses.[156] With the passage of Title VII, Congress sought to promote the positive health outcomes tied to employment by protecting against discrimination in the workplace.

Although the CRA was aimed primarily at racial discrimination, debates in Congress surrounding the passage of Title VII were rooted in how the rights conferred would impact certain social determinants of health.[157] The debates illustrate the trade-offs between public benefits and private interests that permeate health law decisions.[158] Public benefits at stake in Title VII include protecting workers' health and safety, reducing health and safety risks in the conduct of business, and regulating dangerous work environments

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[150] R. A. Hahn, B. I. Truman & D. R. Williams, *Civil Rights as Determinants of Public Health and Racial and Ethnic Health Equity: Health Care, Education, Employment, and Housing in the United States*, 4 SSM POPULATION HEALTH 17, 17–18 (2018).

[151] *Id.*

[152] HOW DOES EMPLOYMENT, OR UNEMPLOYMENT, AFFECT HEALTH?, ROBERT WOOD JOHNSON FOUNDATION 1–2 (2013), https://www.rwjf.org/en/insights/our-research/2012/12/how-does-employment--or-unemployment--affect-health-.html.

[153] David J. Roelfs et al., *Losing Life and Livelihood: A Systematic Review and Meta-Analysis of Unemployment and All-Cause Mortality*, 72 SOC. SCI. MED. 840 (2011).

[154] LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 15 (2d ed. 2008).

[155] *Id.*

[156] *Id.*

[157] PAUL M. DOWNING, CONG. RSCH. SERV. GGR 100-2, THE CIVIL RIGHTS ACT OF 1964: LEGISLATIVE HISTORY 38 (1965), https://www.senate.gov/artandhistory/history/resources/pdf/CivilRights_CRSReport1965.pdf.

[158] JAMES G. HODGE, JR., PUBLIC HEALTH LAW IN A NUTSHELL 14–15 (4th ed. 2022) ("[N]either public health powers nor individual freedoms are absolute. Rather, they are consistently at play in determining the breadth and limit of the role of law in the interests of communal health."); GOSTIN, *supra* note, 153, at 11–12, 44–46.

and stressful conditions.[159] These interests are reflected in Congress's goal of reducing poverty and encouraging education, which impact health outcomes.[160]

Proponents of Title VII were concerned with poverty and unemployment.[161] They asserted that other rights protected by the Act "are rendered less meaningful by racial discrimination" in employment because, without income, travel and services like restaurant dining are inaccessible.[162] They also lamented how widespread unemployment would lead to children dropping out of school and becoming involved in crime.[163] The Senate considered that the unemployment rate among nonwhite workers was twice as high as that of white workers, and that nonwhite workers "tend to be channeled into unskilled kinds of work."[164] This was problematic because increased automation and technological innovation eliminated many forms of "unskilled" labor.[165] Simply put, "[e]mployment discrimination perpetuates poverty."[166]

Arguments against the passage of Title VII surrounded private interests like property rights, consumer costs, and freedom of contract.[167] First, Congress feared employers and businessmen would be stripped of their independence and prosecuted for decisions made in the course of managing their businesses.[168] Congress hesitated to introduce federal government control into the realm of private businesses and workplaces.[169] The Senate also feared that this legislation would deprive private entities of their property rights, a special consideration because "[a] violation of property rights threatens all rights."[170] Congress made the connection between employer liability and the loss of the private wealth held in businesses.[171]

Studies linking sexual harassment to serious mental and physical health consequences establish workplace sexual harassment as a health and safety threat.[172] By rendering many single instances of sexual harassment, particularly those involving sexual touching, unactionable, the Ninth Circuit

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[159] *See* GOSTIN, *supra* note 153, at 44.
[160] DOWNING, *supra* note 156, at 38–39.
[161] *Id.* at 39.
[162] *Id.* at 38.
[163] *Id.* at 39.
[164] *Id.*
[165] *Id.*
[166] DOWNING, *supra* note 156, at 38–39.
[167] *See* GOSTIN, *supra* note 153, at 45–46.
[168] DOWNING, *supra* note 156, at 39.
[169] *Id.*
[170] *Id.* at 40.
[171] *Id.*
[172] *See* discussion *infra* Section II.

standard fails to address this threat. Instead, it requires that harassment escalate to be actionable, subjecting employees to the dangerous conditions that the CRA sought to eliminate in the interests of public health and safety. Adjusting liability for such claims supports the original intent behind the Title VII: to protect civil rights in the realm of employment and promote public health.

B. Supreme Court Precedent Showing the Evolving Nature of Civil Rights: Bostock v. Clayton County

Recent Supreme Court precedent guides the courts in crafting a new standard that fulfills the original intent of Title VII's protections. The Supreme Court's decision in *Bostock v. Clayton County, Ga.*[173] shows the lower courts how precedent operates in Title VII sex discrimination cases to confer civil rights more broadly as times change. In *Bostock*, the Court held that firing an individual for being gay or transgender violates Title VII protections against sex discrimination.[174] The Court reasoned that, in accordance with the plain terms of the statute,[175] discrimination based on one's sexuality or transgender status is necessarily discrimination based on sex.[176] The defendants argued that because in 1964 discrimination against homosexual and transgender people would not have been considered within the scope of Title VII, it should not be now.[177] The Court rejected the idea that "because few in 1964 expected today's *result*," it should decide the case differently.[178]

The Court also explained how Title VII's meaning with regard to sex specifically has evolved over time.[179] It recognized that many in 1964 would not have expected Title VII to protect against male-on-male sexual harassment, as the Court decided in *Oncale v. Sundowner Offshore Servs., Inc*.[180] The majority also noted that at one time, courts held that a policy against hiring mothers of young children and not fathers was not discriminatory.[181] The Court's recognition of sexual harassment as a form of sex discrimination, too, was novel.[182] Yet, the CRA was written to be broadly

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[173] 140 S. Ct. 1731 (2020).
[174] *Id.* at 1737.
[175] *Id.* at 1743.
[176] *Id.* at 1741.
[177] *Id.* at 1749.
[178] *Id.* at 1750.
[179] 140 S. Ct. 1751- 52 (2020).
[180] *Id.* at 1751 (referencing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)).
[181] *Id.* at 1752.
[182] *Id.*

protective over time, the Court declared.[183] The majority saw its decision as aligned with this precedent and stated that "the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them."[184]

The lower courts should apply the message of *Bostock* and revise their interpretation of "severe" to allow for the broad protections conferred by Title VII. The severe or pervasive standard has operated as a check, determining not what harassment is, but when it should be legally actionable at the expense of businesses and employers. As the legal standards for workplace sexual harassment have developed over time, courts have weighed fears and cautions that Title VII would become a general civility code.[185] Of course, there must be limits on liability.

In 2001, the Supreme Court articulated the lower bounds of severe conduct in *Clark County School District v. Breeden*.[186] While reading psychological evaluation reports of job applicants, plaintiff's coworker and supervisor read that one of the applicants had once commented to a coworker, "I hear making love to you is like making love to the Grand Canyon."[187] The plaintiff's coworker and supervisor laughed about this comment and indicated they would discuss it later.[188] The Court held that this incident was not severe enough to be actionable under Title VII.[189] The majority wrote that the Court's opinions had established that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes" in the work environment.[190]

The Supreme Court has indicated that actionable conduct must have consequences. However, it has not explained when a single incident of sexual harassment is "extremely serious."[191] Given the data on the varied physical and mental health consequences of sexual harassment,[192] it is time for courts to reevaluate the meaning of severity to include single incidences of physical assault, using *Bostock*'s affirmation of the scope of Title VII as a guide.

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[183] *Id.*
[184] *Id.* at 1753.
[185] *E.g.*, *Oncale*, 523 U.S. at 80–81 ("Respondents and their amici contend that recognizing liability for same-sex harassment will transform Title VII into a general civility code for the American workplace.").
[186] 532 U.S. 268 (2001).
[187] *Id.* at 269.
[188] *Id.*
[189] *Id.* at 270–71.
[190] *Id.* at 271 (quoting Faragher v. Boca Raton, 524 U.S. 775, 788 (1998)).
[191] *Id.*
[192] *See* discussion *supra* Section II.

C. Federal and State Jurisprudence Lending Toward an Alternative Framework

Multiple federal circuit courts and state legislatures have measured the bar for severity differently than the Ninth Circuit, allowing for single instances of physical touching or assault to be actionable. These approaches reflect the intent behind Title VII and the public health exigencies of workplace sexual harassment. To accomplish the same, the Ninth Circuit should incorporate these examples into an amended bar for severity.

1. Circuit Court Decisions

In the Tenth Circuit Court of Appeals, the examples of sexual harassment previously discussed would likely be considered severe enough to be actionable.[193] In *Lockard v. Pizza Hut, Inc.* (1998), a waitress was sexually harassed by two customers. [194] She was instructed by her manager to serve two male customers who had made suggestive comments to her in the past.[195] After one of the customers grabbed her by her hair, she asked her manager if he could find someone else to serve them, but he refused, stating that it was her job to serve customers.[196] When she returned to the table, one of the customers pulled her hair, grabbed her breast, and put her breast in his mouth.[197] The plaintiff resigned from her job as a result.[198]

A jury found that the conduct was severe enough to create an actionable hostile work environment claim.[199] The Tenth Circuit agreed.[200] The court reinforced the holding from *Harris*,[201] which stated the "especially egregious" conduct in *Meritor* is merely an example and does not delineate actionability.[202] The Tenth Circuit described the conduct as "physically threatening and humiliating behavior that unreasonably interfered" with plaintiff's ability to do her job.[203] It was not fair, the court reasoned, to deny

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[193] *See* discussion *supra* Section III.
[194] 162 F.3d 1062 (10th Cir. 1998).
[195] *Id.* at 1067.
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.* at 1072.
[200] 162 F.3d 1072 (10th Cir. 1998).
[201] *Harris*, 510 U.S. at 22 ("The appalling alleged conduct in Meritor . . . merely present[s] some especially egregious examples of harassment.").
[202] *Lockard*, 162 F.3d at 1072.
[203] *Id.*

the plaintiff's claims just because the court has ruled on more severe instances of sexual harassment.[204]

The Seventh Circuit appellate court also addressed the severity inherent in conduct involving physical touching. In *Worth v. Tyer* (2001), the defendant business owner hired plaintiff as an independent contractor.[205] The alleged harassment took place over a two-day work period, during which the defendant massaged the plaintiff, brushed up against her, stroked her face, and stared at her breasts.[206] During a meeting, the defendant placed his hand under the plaintiff's dress and touched her breast, holding his hand there for several seconds.[207] The plaintiff went to the police, and the defendant terminated her independent contractor status.[208] The plaintiff brought a lawsuit in federal court, alleging claims under Title VII and state law.[209]

While the Seventh Circuit considered that the conduct took place over a period of two days, it emphasized that even one act of sexual harassment can be actionable if it is egregious.[210] "[T]ouching as opposed to verbal behavior increases the severity of the situation" especially "touching an intimate body part."[211] The court characterized this kind of touching as among the most serious forms of sexual harassment.[212] Consequently, it found the defendant's conduct to be severe and actionable.[213]

Both cases present similar facts and were decided within a couple years of *Brooks*. These cases raise two important shortcomings of the Ninth Circuit severity standard. First, the especially egregious facts of one case do not necessarily limit actionable conduct. To that end, *Brooks* did not need to be decided in strict comparison to facts presented in *Al-Dabbagh*. Rather, a spectrum of facts can be severe.. Second, physical touching of an intimate body part is a severe form of sexual harassment. Even in 2001, a federal appellate court recognized this kind of conduct as highly sensitive and consequential.[214] The conduct in *Brooks*, which also involved touching an intimate body part, would likely be considered severe under the *Worth* standard. A revision of the severity standard according to these circuits'

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[204] *Id.*
[205] 276 F.3d 249, 255 (7th Cir. 2001).
[206] *Id.* at 256–57.
[207] *Id.* at 257.
[208] *Id.* at 255.
[209] *Id.*
[210] *Id.* at 268.
[211] 276 F.3d 249, 268 (7th Cir. 2001).
[212] *Id.*
[213] *Id.*
[214] Worth v. Tyer, 276 F.3d 249 (7th Cir. 2001).

precedent would aberrate from *Brooks* in alignment with decades-old precedent from other circuits.

2. State Legislative Action

State legislatures have taken steps toward a new, modern version of the severe or pervasive test. Within the Ninth Circuit, California's Fair Employment and Housing Act (FEHA) outlines a standard for hostile work environment claims that rejects *Brooks*.[215] FEHA imposes a less strict standard and clarifies that a single incident can be actionable.[216] Under FEHA, a single incident of harassment can be enough to defeat summary judgment if it "unreasonably interfered with the employee's work performance or created an intimidating, hostile, or offensive working environment."[217] FEHA does not require specific proof that an employee's productivity declined as a result of the alleged conduct, echoing Justice Ginsberg's concurrence in *Harris*:

> [Plaintiffs] need not prove his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the Plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.[218]

It also specifies that harassment cases are rarely appropriate for decisions on summary judgment and limits the circumstances in which defendants can be awarded attorneys' fees.[219] California's standard is much more favorable to the plaintiff. Consequently, the state's cause of action has obviated Title VII hostile work environment claims for Californians. [220]

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[215] Fair Employment and Housing Act, CAL. GOV'T CODE § 12923 as amended by S.B. 1300, 2017-2018 Leg., Reg. Sess. (Cal. 2018). In 2018, California passed SB 1300, which amended Sections 12940 and 12965 of and added Sections 12923, 12950.2, and 12964.5 to FEHA. *Id.*

[216] *Id.* § 12923(b)

[217] *Id.*

[218] *Id.* § 12923(a).

[219] *Id.* § 12923(e).

[220] On the other hand, the Minnesota Supreme Court opted to retain the severe or pervasive test in the Minnesota Human Rights Act (MHRA), which mirrors the federal standard. MINN. STAT. §§ 363A.01-.44. In *Kenneh v. Homeward Bound, Inc.*, the district court held that plaintiff did not meet the severe or pervasive standard under the MHRA, stressing the high bar of the test, and the Minnesota Court of Appeals agreed. Kenneh v. Homeward Bound, Inc., No. 27-CV-17-391, 2019 WL 178153 (Minn. Ct. App. Jan. 14, 2019).

The plaintiff appealed to the Minnesota Supreme Court, asking the Court to abandon the severe or pervasive standard under the MHRA. Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222 (2020). The court declined to abandon the standard altogether but explained, "[f]or the severe-

In 2019, New York state abolished the severe or pervasive standard, following the example set by New York City in 2005.[221] New York state law directs the labor department to set minimum standards for sexual harassment prevention policies. [222] The model policy emphasizes that sexual harassment "is not limited to sexual contact, touching, or expressions of a sexually suggestive nature."[223] It explicitly states that sexual harassment need not be severe or pervasive and that "there is no single boundary between petty slights and harassing behavior."[224] The Human Rights Law makes workplace discrimination against anyone in a protected class actionable regardless of whether it is severe or pervasive;[225] harassment need only rise above the level of "petty slights or trivial inconveniences."[226]

3. Federal Legislative Movement

Federal lawmakers have also attempted to revise the hostile work environment standard. On November 17, 2021, the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination (BE HEARD) in the Workplace Act was introduced in both the House[227] and the Senate.[228] One of the purposes of the bill is "to update and clarify certain employment nondiscrimination laws."[229] To expand the scope of the severe

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or-pervasive standard to remain useful in Minnesota, the standard must evolve to reflect changes in societal attitudes towards what is acceptable behavior in the workplace." *Id.* at 231. It also underscored that a "single, severe incident may support a claim for relief." *Id.* at 232. The *Kenneh* decision represents a middle ground, as the state's highest court kept the standard but instructed lower courts to separate their analyses from more rigid federal precedent.

[221] N.Y. EXEC. LAW § 296(1)(h) (2019)

[222] N.Y. LAB. LAW § 201-G (2019).

[223] NEW YORK STATE GOV'T, SEXUAL HARASSMENT PREVENTION MODEL POLICY AND TRAINING 3, https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training.

[224] *Id.*

[225] N.Y. EXEC. LAW § 296(1)(h) (2019)

[226] *Id.*

[227] BE HEARD in the Workplace Act, H.R. 5994, 117th Cong. (2021). The BeHEARD Act was also introduced in the House in April 2019. BE HEARD in the Workplace Act, H.R. 2148, 116th Cong. (2019). In 2019, the bill was referred to several Subcommittees but was not acted upon. In November 2021, the bill was reintroduced and in November of 2022, was once again referred to House Subcommittees, but there has been no further action. *H.R. 5994*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/5994/all-actions?overview=closed#tabs.

[228] BE HEARD in the Workplace Act, S. 3219, 117th Cong. (2021). In November 2021, the bill was read twice and referred to the Committee on Health, Education, Labor, and Pensions. *S. 3219*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/3219/all-actions?overview=closed#tabs.

[229] *Id.* at § 3.

or pervasive standard, the BE HEARD Act outlines a factors test which includes:

> the frequency and duration of the conduct, the location where the conduct occurred, the number of individuals engaged in the conduct, whether the conduct is humiliating, degrading, or threatening, any power differential between the alleged harasser and the person allegedly harassed, and whether the conduct involves stereotypes about the protected class involved.[230]

These protections would apply to a broader class of workers by implicating businesses of any size.[231] It also clarifies that harassment does not have to result in tangible injury or inability to continue employment.[232] Finally, the bill requires research on workplace harassment.[233] As of yet, no Congressional committees have acted on the bill. The likelihood of the passage of a federal standard abandoning or meaningfully altering the severe or pervasive test is highly unlikely, especially given the Republican party's control of the House of Representatives as of January 2023.[234]

V. CONCLUSION

What is missing from a bill like the BE HEARD Act, which does not explicitly overrule the severe or pervasive standard, is an explanation of what conduct should be considered severe. The severe or pervasive standard as interpreted by the Ninth Circuit ignores sexual harassment as a public health issue. By requiring that harassing behavior escalate to a violent or repetitive level to be actionable, courts fail to protect public health—a premier objective behind Title VII. Workplace harassment has significant consequences and is widespread. Scientific data shows that sexual harassment impacts physical and mental health, and EEOC records reveal widespread claims of such harassment.

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[230] *The Be Heard in the Workplace Act: Addressing Harassment to Acheive Equality, Safety, And Dignity on the Job*, NATIONAL WOMEN'S LAW CENTER 2 (2019), https://nwlc.org/wp-content/uploads/2019/04/BE-HEARD-Factsheet.pdf.

[231] *Id.*

[232] *Id.*

[233] H.R. 5994, 117th Cong. (2021); S. 3219.. Increased, federally funded research on the health and economic consequences of sexual harassment would be powerful and could potentially be incorporated into other bills. Outside of hostile work environment claims, the bill would also prohibit certain nondisclosure clauses and dispute agreements and increase the federal minimum wage for tipped employees to match that of non-tipped employees. *Id.*

[234] *See* Diedre Walsh, *Republicans narrowly retake control of the House, setting up divided government*, NPR (Nov. 16, 2022, 6:35 PM), https://www.npr.org/2022/11/16/1133125177/republicans-control-house-of-representatives

Reinterpreting the severity requirement of hostile work environment claims to include single instances of intimate touching is necessary to realign the Ninth Circuit standard with the intent behind the CRA: to promote the public health by limiting discrimination. This change also comports with the Supreme Court's evolving interpretation of the meaning of sex within Title VII. The definition of severity proposed in this article is based on long-standing and recent legal interventions in other federal circuit courts, state law, and proposed federal law. It is time to reevaluate and allow plaintiffs who have suffered real harm the full opportunity to litigate or settle work-based sex discrimination cases.