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# Should Prudential Standing Requirements Be Applied in Transferred Impact Sexual Harassment Cases? An Analysis of *Childress v. City of Richmond*

Robert J. Aalberts\*

Lorne H. Seidman\*\*

## I. INTRODUCTION

*Childress v. City of Richmond* was decided by three members of the federal Court of Appeals for the Fourth Circuit during the summer of 1997.<sup>1</sup> Their unanimous decision held that white male police officers, who alleged injury as the result of highly derogatory comments made by their supervisor degrading female

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1. 120 F.3d 476 (4th Cir. 1997), *rev'd per curiam*, 134 F.3d 1205 (1998) (en banc), *cert. denied*, 118 S. Ct. 2322 (1998) [hereinafter *Childress I*].

and black officers,<sup>2</sup> had standing to allege a sexually hostile environment under Title VII of the Civil Rights Act of 1964.<sup>3</sup> In September 1997 the appellate court granted a rehearing en banc,<sup>4</sup> and in January 1998 the Fourth Circuit issued a new opinion.<sup>5</sup> This en banc decision overruled the three judge panel and affirmed in full the decision of the district court,<sup>6</sup> which had earlier dismissed the plaintiff's case as a same-sex hostile environment theory.<sup>7</sup> But, despite being overruled, the holding in *Childress I* may pose considerable problems for employers that could spread with significant consequences.<sup>8</sup> It has already attracted the attention of the

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2. The remarks made by the supervisor were so clearly derogatory that the authors feel there is no need to repeat them here.

3. See *Childress I*, 120 F.3d at 478; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994) [hereinafter Title VII]. The court specifically held that "the officers may state hostile environment claims under Title VII for discrimination directed at black and female officers." *Id.* The court further stated,

We believe we should begin by examining the Court's reasoning in *Trafficante v. Metropolitan Life Ins. Co.* to determine whether the Supreme Court's recognition of associational rights under Title VIII militates in favor of conferring a comparable *discriminatory-environment* cause of action on men to complain about discrimination directed at women . . . ."

*Id.* at 480 (emphasis added) (citations omitted). The authors submit that a more descriptive term than the term "discriminatory-environment" used in *Childress I*, is "transferred impact." The word "transferred" is borrowed from the tort concept of "transferred intent." Transferred intent is invoked when "[t]he defendant who shoots or strikes at A, intending to wound or kill A, and unforeseeably hits B instead, is held liable to B for an intentional tort." See W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS § 8, at 37 (5th ed. 1984). The analogy in *Childress I* cases occurs when the harasser unforeseeably creates a hostile work environment for males. The second term, "impact," is borrowed from the concept of "disparate impact," or "impact analysis." See *Griggs v. Duke Power Co.*, 401 U.S. 424, 435-36 (1971) (holding that an intelligence test unrelated to job performance that harmed a disproportionate number of black employees violated Title VII despite lack of employer's intent to discriminate). Under disparate impact analysis, a particular employment practice, such as height and weight requirements, which adversely affects employment opportunities for a protected class, is deemed illegal. Proof of intent to discriminate, however, is not required. See MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW, § 5.41, at 356 (1988). In a transferred impact case, the sexual harasser's conduct, although not intended to harass white males, adversely impacts this protected group.

4. See *Childress I*, 120 F.3d at 476.

5. See *Childress v. City of Richmond*, 134 F.3d 1205 (4th Cir. 1998), *cert. denied*, 118 S. Ct. 2322 (1998) [hereinafter *Childress II*].

6. See *id.* at 1207 ("We affirm the district court's judgment in its entirety. Dismissal of the Title VII 'hostile environment' claim and the 'participation clause' and 'opposition clause' retaliation claims is affirmed by an equally divided vote of the en banc court.')

7. See *Childress v. City of Richmond*, 907 F. Supp. 934, 939 (E.D. Va. 1995) (dismissing the defendants' hostile environment sexual harassment case based on the theory that it was a same-sex sexual harassment claim). The district court noted that "[t]he Fourth Circuit has not yet decided the same-sex issue, but the prevailing view is that Title VII addresses only discrimination between the sexes." *Id.* The second *Childress* district court case allowed the plaintiffs to amend their complaint to add a defendant and to allege retaliation for their assistance to the female police officers. See *Childress v. City of Richmond*, 919 F. Supp. 216, 218 (E.D. Va. 1996).

8. See *infra* text accompanying notes 178-98 (discussing possible increases in already high sexual harassment litigation, as well as the potential effects on already strained judicial resources).

legal press<sup>9</sup> and scholarly comment.<sup>10</sup>

A subsequent legal development gives even greater import to the *Childress I* holding. In March, 1998, the Supreme Court, in the case of *Oncale v. Sundowner Offshore Services*,<sup>11</sup> issued a ruling revealing that same-sex sexual harassment is covered under Title VII,<sup>12</sup> thereby undermining the reasoning in *Childress II*.<sup>13</sup> Thus, in light of the *Oncale* decision, courts ruling in future *Childress* type transferred impact cases will no longer be able to dismiss based on that theory, and will instead be compelled to address the issue of judicial standing.

Clearly within the Fourth Circuit, the *Childress* case, from beginning to end, has endured an arduous if not tortured history.<sup>14</sup> There has been rigorous disagreement among jurists over the thought-provoking problem this case presents. Opinions have ranged from granting judicial standing to the *Childress* plaintiffs<sup>15</sup> to denying it,<sup>16</sup> with three appellate judges, in a concurring opinion, making a distinction between the prudential standing requirements of Title VII and Title VIII of the Civil Rights Act of 1968.<sup>17</sup> In all, there have been four *Childress* decisions, grappling, in part, with the issue of judicial standing.<sup>18</sup> Yet none of them scratch the itch.

The purpose of this Article is to propose a solution to the confusion created by an array of judicial reasoning over the issue of standing to pursue transferred

9. See, e.g., Dawn E. Conner, *Blacks, Women Are Harassed; White Men Sue Under Title VII*, LAW. WKLY U.S.A., Aug. 25, 1997, at 1, 20; Wendal Ford, *White Officers May Sue Under Title VII*, 83 A.B.A. J. 41 (1997); Alan Cooper, *White Males Can Bring Title VII Suits*, NAT'L L.J., Aug. 18, 1997, at B1; *4th Cir. to Decide if Racial Epithets Created Hostile Environment for Whites*, EMPLOY. LIT. REP., Feb. 11, 1997, at 21789.

10. See, e.g., Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 756 n.345 (1997) (disapproving of the fact that the courts have ruled that "conduct which offends both men and women might be obnoxious, but it is not sexually discriminatory.") (citing *Childress*, 907 F. Supp. 934).

11. 118 S. Ct. 998 (1998).

12. See *id.* at 1002 ("We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.").

13. See *Childress II*, 134 F.3d at 476; see also *supra* notes 5-7 and accompanying text. In the *Childress* case, the district court noted that although the Fourth Circuit had not yet decided whether same-sex sexual harassment was covered under Title VII, three district courts in that circuit had ruled that it was not. See *Childress*, 907 F. Supp. at 934. See generally Joanna P.L. Mangum, *Wrightson v. Pizza Hut of America Inc.: The Fourth Circuit's "Simple Logic" of Same-Sex Sexual Harassment Under Title VII*, 76 N.C. L. REV. 306 (1997) (discussing Fourth Circuit's treatment of same-sex sexual harassment prior to the *Oncale* case).

14. See *supra* text accompanying notes 1-6.

15. See *supra* notes 2-3 and accompanying text.

16. See *supra* note 6 and accompanying text.

17. See *Childress II*, 134 F.3d 1205, 1209-10 (4th Cir. 1998) (Luttig, J., concurring).

18. See *supra* text accompanying notes 1-6.

impact discriminatory-environment sexual harassment cases. This is a solution reserved by decisions in other circuits,<sup>19</sup> the provisions of Title VII itself<sup>20</sup> and the real state of congressional intent when Title VII became law.<sup>21</sup> A discussion of how such claims, if they become widespread, may place a strain on judicial resources will also be noted.<sup>22</sup> We focus primarily on the issue of standing to pursue workplace sexual hostile environment claims when the actions undergirding the claims are directed at individuals of the opposite sex.<sup>23</sup> Claims of alleged racial discrimination must also be reviewed in some detail; they are the geneses of *Childress I*. Two cases, *Trafficante v. Metropolitan Life Insurance Co.*<sup>24</sup> and *Hackett v. McGuire Brothers, Inc.*<sup>25</sup> are of capital importance.

Over twenty years ago two tenants in a San Francisco apartment complex alleged that their landlord discriminated against blacks in violation of Title VIII of the Civil Rights Act of 1968.<sup>26</sup> One tenant was black, the other white; neither were direct victims of the landlord's alleged practices.<sup>27</sup> Both, however,

claimed they had been injured in that (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being "stigmatized" as residents of a "white ghetto."<sup>28</sup>

These allegations resulted in *Trafficante v. Metropolitan Life Insurance Co.*<sup>29</sup>

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19. See *infra* text accompanying notes 127-47.

20. See *infra* notes text accompanying notes 162-77.

21. See *infra* text accompanying notes 148-61.

22. See *infra* text accompanying notes 178-98.

23. This Article will not address directly the race issue raised by the plaintiffs in the *Childress* cases. See, e.g., *Childress v. City of Richmond*, 907 F. Supp. 934, 934 (E.D. Va. 1995) ("This case presents the question of whether a white or male worker can state a civil rights claim for a supervisor's hostility to blacks or women."). It is the authors' contention that Title VII accords standing to whites to assert loss of interracial associations to the full limit allowed under Article III of the Constitution. See *infra* text accompanying notes 30-65.

24. 409 U.S. 205 (1972).

25. 445 F.2d 442 (3rd Cir. 1971).

26. See *Trafficante*, 409 U.S. at 206-07 (citing Title VIII of the Civil Rights Act of 1968 (also called the Fair Housing Act), 42 U.S.C. § 3601-3619, 3631 (1995 & Supp. 1998)).

27. See *id.* at 206-08.

28. *Id.* at 208.

29. See *id.* at 205.

## II. IS THERE STANDING TO ALLEGE INJURY AS THE RESULT OF RACIAL DISCRIMINATION AGAINST ANOTHER UNDER TITLE VIII AND TITLE VII?

Courts exist to resolve disputes. They do not provide a general superintendency over all discontent in an unjust world.<sup>30</sup> To the contrary, Article III of the Constitution of the United States creates the concept and requirement of "standing to sue."<sup>31</sup> Fundamentally this doctrine requires that plaintiffs seeking to invoke the aid of a court must establish that they are adversely affected in a real way.<sup>32</sup> Furthermore, standing must be established before a court reaches the merits of a case.<sup>33</sup> In addition to Article III requirements,<sup>34</sup> courts, in the interest of judicial self-restraint, may also consider prudential standing requirements.<sup>35</sup> While there is no complete list of prudential rules, the Supreme Court, according to one commentator, often refers to three:<sup>36</sup> "(1) litigants should not assert the rights of third parties; (2) litigants should not assert 'generalized grievances'; and (3) the

30. See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962) (noting that the gist of the question of standing is whether the parties have "alleged such a *personal stake* in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.") (emphasis added); *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972) ("Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing . . .").

31. See U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .").

32. See John C. Yang, *Standing in the Doorway of Justice*, 59 GEO. WASH. L. REV. 1356, 1359 (1991) ("At a minimum, plaintiffs must meet three requirements to establish standing: (1) a distinct and palpable injury; (2) an injury fairly traceable to the government action being challenged; and (3) an injury redressable by judicial action. These three requirements form the basis of Article III, or constitutional standing.") (citing *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1979); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 260-61 (1977)).

33. One commentator likens standing to a metaphorical "door" which a plaintiff must pass through before he or she can litigate a claim. See Yang, *supra* note 32, at 1356.

34. It should be noted that Congress, through legislation, has the authority to remove all prudential standing requirements. See, e.g., *Gladstone Realtors*, 441 U.S. at 109 (concluding that the Fair Housing Act extends to race discrimination cases to the full limit permitted under the Constitution); see also *Trafficante*, 409 U.S. at 209 (ruling that standing should be applied to race discrimination cases under Title VIII "as broadly as is permitted by Article III of the Constitution").

35. The public policy underlying prudential standing is to "prevent the erosion of public confidence on which its power depends and in recognition of the need for a smoothly-run majoritarian government." See John J. Egan III, Note, *Analyzing Taxpayer Standing in Terms of General Standing Principles: The Road Not Taken*, 63 B.U. L. REV. 717, 727 (1983).

36. See Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act*, 60 MO. L. REV. 547, 551 (1995) ("Although the Court has never claimed to set forth a complete list of these prudential rules it frequently mentions three . . .").

injury claimed should be in the 'zone of interests' of the statute or provision in question."<sup>37</sup> When these issues arise, courts may consider such concerns as "separation of powers, congressional intent, court congestion and limitations on judicial resources" before granting a plaintiff standing to sue.<sup>38</sup>

In *Trafficante*, the district court did not reach the merits.<sup>39</sup> It held that "petitioners were not within the class of persons entitled to sue under the Act."<sup>40</sup> The Court of Appeals for the Ninth Circuit affirmed, construing the Act to "permit complaints only by persons who are the objects of discriminatory . . . practices."<sup>41</sup> *Trafficante* then proceeded to the Supreme Court of the United States and was decided in December of 1972.<sup>42</sup>

A unanimous Court reversed the lower courts.<sup>43</sup> The Supreme Court concluded that "tenants of the same housing unit that is charged with discrimination" have standing to sue.<sup>44</sup> Title VIII of the Civil Rights Act of 1968,<sup>45</sup> the Court explained, protects "not only those against whom a discrimination is directed but also those whose complaint is that the manner of managing a housing project affects the very quality of their daily lives."<sup>46</sup> This decision accepted a construction of Title VIII advocated by the Assistant Regional Administrator of HUD; that given the limited jurisdiction and resources of the Attorney General in Title VIII matters, the "main generating force" must be aggrieved individuals<sup>47</sup> performing

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37. *Id.* at 551; *see also* *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* 454 U.S. 464, 474-75 (1982).

38. *See* *Yang*, *supra* note 32, at 1361. However, it should be emphasized that prudential standards "vary depending on the action being challenged." *Id.*; *see also* *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987) (noting that there is no single prudential inquiry which can be applied to all actions). As one commentator points out concerning the *Trafficante* case, the "Court concluded that Congress intended to eliminate the prudential barriers to standing relying on three pieces of evidence: (1) the language of the standing provision of Section 3610 [of Title VIII], (2) the legislative history, and (3) the enforcement mechanisms of the statute." *See* *Rosman*, *supra* note 36, at 597. *See infra* text accompanying notes 136-98 for discussion regarding how judicial resources may be considered when prudential standing requirements are applied to a discriminatory-environment sexual harassment case.

39. *See* *Trafficante*, 409 U.S. at 208.

40. *Id.*

41. *Id.*

42. *See id.* at 205.

43. *See id.* Justice Douglas delivered the opinion; Justice White filed a concurring opinion in which Justices Blackmun and Powell joined. *See id.* The three concurring Justices joined in reluctantly: "Absent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioners' complaint in this case presented a case or controversy within the jurisdiction of the District Court under Art. III of the Constitution." *Id.* at 212 (White, J., concurring).

44. *Id.* at 209.

45. 42 U.S.C. §§ 3601-3619, 3631 (1995 & Supp. 1998) [hereinafter Title VIII].

46. *See* *Trafficante*, 409 U.S. at 211 (citation omitted).

47. *See id.* at 211. The Court was influenced by legislative history, in particular by a speech in which Senator Javitts stated,

The additional factor in housing is that not only is the individual purchaser or renter generally the head of a family, the father or the husband, not only is his individual dignity affected, but when we deal with housing we also deal with it in the view and presence of the man's whole family, to whom he becomes nothing, as well as the *whole community* in which he either lives

as “private attorneys general.”<sup>48</sup>

In reaching its decision the Court determined that the concept of an aggrieved person, as specified in Title VIII, includes “[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur.”<sup>49</sup> The *Trafficante* decision thus revealed *associational rights* under Title VIII of the Civil Rights Act of 1968.<sup>50</sup> And it did more.<sup>51</sup>

In reaching its decision in *Trafficante* the Supreme Court gratuitously went beyond Title VIII by adopting a quote from *Hackett v. McGuire Brothers, Inc.*<sup>52</sup> In *Hackett*, the court resolved an issue regarding standing for race discrimination

or to which he chooses to move.

114 Cong. Rec. 2706 (Feb. 8, 1968) (emphasis added); see *infra* text accompanying notes 127-47 (discussing in more detail some of the foregoing cases).

48. See *Trafficante*, 409 U.S. at 211 (noting that the “role of ‘private attorneys general’ is not uncommon in modern legislative programs”).

49. *Id.* at 206 n.3 (citing Title VIII, § 810(a), 42 U.S.C. § 3610(a) (1994)).

50. See *id.* at 209. The term “associational rights” has its conceptual birth in *Trafficante*. See *id.* at 209-10 (“The alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from *interracial associations*.”) (emphasis added).

51. The concept of associational rights, first articulated in *Trafficante*, appears in related cases involving employment discrimination under Title VII. See, e.g., *Childress I*, 120 F.3d 476, 480 (4th Cir. 1997), *rev’d per curiam* 134 F.3d 1205 (1998) (“[W]e believe we should begin by examining the Court’s reasoning in *Trafficante v. Metropolitan Life Ins. Co.*, to determine whether the Supreme Court’s recognition of *associational rights* under Title VIII militates in favor of conferring a *comparable discriminatory-environment cause of action* on men to complain about discrimination directed at women, or on white person to complain of similar treatment of blacks.”) (citations omitted) (emphasis added); *Stewart v. Hannon*, 675 F.2d 846, 856 (7th Cir. 1982) (“Since the exclusion of a minority person from a work environment can lead to the loss of important benefits from *interracial associations*, the complaint sufficiently apprized the parties and the court of the claimed injury.”) (emphasis added); *EEOC v. Bailey Co., Inc.*, 563 F.2d 439, 453 (6th Cir. 1977) (“The fact that *Trafficante* thus approved the reasoning of this Title VII case further demonstrates that on this issue of standing the Supreme Court does not conceive Titles VII or VIII to be different and that under both Titles VII or VIII a person can be aggrieved from the loss of benefits from the lack of *interracial associations*.”) (emphasis added); *Waters v. Heublein, Inc.*, 547 F.2d 466, 469 (9th Cir. 1976) (“We have no doubt that one of the purposes of Title VII is the purpose stated by the district court. But interpersonal contacts—between members of the same or different races—are no less a part of the work environment than of the home environment.”); *Liebovitz v. New York City Transit Auth.*, 4 F. Supp. 2d 144, 149 (E.D.N.Y. 1998) (discussing associational losses when plaintiff is a woman witnessing other women being sexually harassed).

52. 445 F.2d 442 (3d Cir. 1971). See *Trafficante*, 409 U.S. at 209 (“*Hackett v. McGuire Bros., Inc.*, which dealt with the phrase that allowed a suit to be started ‘by a person claiming to be aggrieved’ under the Civil Rights Act of 1964, concluded that the words used showed ‘a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.’”) (citations omitted).



under Title VII of the Civil Rights Act of 1964.<sup>53</sup> *Hackett* had been decided by the Court of Appeals for the Third Circuit a year before *Trafficante*. It also focused on standing to assert a claim of racial discrimination,<sup>54</sup> but in housing, of course, because Title VII governs the workplace.<sup>55</sup>

Mr. Hackett, an African-American and a former employee of McGuire Brothers, claimed that he had been the victim of discrimination and consequently discharged by his employer because of his race.<sup>56</sup> Mr. Hackett pursued his claim before the Equal Employment Opportunity Commission.<sup>57</sup> After the Commission's "finding of no reasonable cause," and before filing suit, Mr. Hackett applied for and received a union pension.<sup>58</sup> As a pensioner, a district court ruled, Mr. Hackett lacked standing to sue McGuire Brothers under Title VII.<sup>59</sup>

The district court was reversed by the Third Circuit Court of Appeals.<sup>60</sup> The appellate court's reasoning is clear. The district court had erroneously relied on the definition section of Title VII rather than on its remedy section.<sup>61</sup> While the irrelevant definition section simply defines an employee as an individual employed by an employer, the remedy section is significantly different. The remedy section permits "a person claiming to be aggrieved" to file a charge and, after a specified time, to initiate litigation under Title VII.<sup>62</sup>

Because Title VII forbids unlawful racial discrimination by potential employers, labor organizations, and employment agencies,<sup>63</sup> as well as employers,

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53. See *Hackett*, 445 F.2d at 445-46. Prior to *Hackett*, at least one EEOC action addressed the issue of whether a white employee had standing to sue for race discrimination against fellow African-American employees. In this case, the EEOC proceeded to hear the charges. See *White Employees May File Charge Alleging Job Discrimination of Negro Workers*, 1973 EEOC Dec. (CCH) § 6026 (July 8, 1969); see also Note, *Work Environment Injury Under Title VII*, 82 YALE L. J. 1695, 1695 (1973) ("This Note argues that *Trafficante* compels recognition of the theory that the 'conditions of employment' language of Title VII protects the total work environment. Under this theory discriminatory practices directed at one group taint the work environment and thereby cause injury to all employees."); *Rogers v. EEOC*, 454 F.2d 234, 236-37 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (discussing a situation in which an Hispanic employee sued her employer under Title VII for allegedly creating an offensive work environment by giving discriminatory service to Hispanic customers).

54. See *Hackett*, 445 F.2d at 445. The issue in *Hackett* was whether a former employee, now a pensioner, had standing to sue under Title VII for racial discrimination. See *id.*

55. See *id.*

56. See *id.* at 444.

57. See *id.* at 444-45.

58. See *id.* at 445.

59. See *id.*

60. See *id.* at 446-47.

61. See *id.* at 445.

62. See *id.* (citing 42 U.S.C. § 2000e-5(b) (1994)).

63. See *id.* Title VII's remedy provision provides the following:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job train programs, has engaged in an unlawful employment

the appellate court concluded that "a person claiming to be aggrieved may never have been an employee."<sup>64</sup> As a result Mr. Hackett, although a pensioner at the time of the suit, had standing to sue.<sup>65</sup>

### III. WILL *TRAFFICANTE* AND *HACKETT* CONFER STANDING TO ALLEGE TRANSFERRED IMPACT SEXUAL HARASSMENT?

Some comparisons between *Trafficante* and *Hackett* are obvious; both would ultimately deal with alleged racial discrimination.<sup>66</sup> But when the foregoing are compared with *Childress I*, other differences become evident. In neither *Trafficante* nor *Childress I*<sup>67</sup> is the plaintiff the direct object of a discriminatory practice. But another distinction is less overt. *Trafficante* recognizes associational rights<sup>68</sup> while *Childress I* conferred a discriminatory-environment cause of action.<sup>69</sup>

Racial discrimination in the workplace is, of course, unlawful<sup>70</sup> and a hostile work environment created by sexual harassment is also a form of unlawful discrimination.<sup>71</sup> That we need laws to protect each other from such conduct is an unfortunate reality. The issue triggered by the *Childress* cases is who has judicial

practice . . . .

Title VII, 42 U.S.C. § 2000e-5(b).

64. See *Hackett*, 445 F.2d at 445.

65. See *id.* at 446 ("We seriously doubt that the courts would recognize the validity of any pension plan provision purporting to grant earned pension benefits on the condition that the recipient forego access to the courts to redress past employment discrimination.").

66. See *supra* text accompanying notes 64-81.

67. See *supra* text accompanying notes 1-8.

68. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209-10 (1972) ("The alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations.").

69. See *Childress I*, 120 F.3d 476, 480 (4th Cir. 1997), *rev'd per curiam*, 134 F.3d 1205 (1998).

Because the purposes and relevant language in Title VII and Title VIII are so similar, we believe we should begin by examining the Court's reasoning in *Trafficante v. Metropolitan Life Ins. Co.* to determine whether the Supreme Court's recognition of *associational rights* under Title VIII militates in favor of conferring a comparable *discriminatory-environment cause of action* on men to complain about discrimination directed at women . . . .

*Id.* (citations omitted) (emphasis added).

70. See Title VII, 42 U.S.C. § 2000e-2(a) (1994). This section states in pertinent part:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise 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.

*Id.*

71. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986) ("[A] claim of 'hostile environment' sexual harassment is a form of sex discrimination that is actionable under Title VII.").

standing; who can come before a court, allege such offensive conduct, and seek a remedy.

The remedy section of Title VII, relied on by the *Hackett* court, simply states that a “suit may be started by the person claiming to be aggrieved.”<sup>72</sup> The relevant language in Title VIII of the Fair Housing Act, quoted in *Trafficante*, permits any person to file a complaint who has been “injured by a discriminatory housing practice or believes that he will be.”<sup>73</sup> Both cases, ultimately concerned with racial discrimination, held that standing must be construed as “broadly as permitted by Article III of the Constitution.”<sup>74</sup> By citing *Trafficante*<sup>75</sup> and quoting its acceptance of the *Hackett* court’s construction of Title VII,<sup>76</sup> the *Childress I* court concluded that a court must *only* consider Article III requirements for standing because it was the intent of Congress to remove prudential standing requirements from the path of any plaintiff alleging injury as the result of a Title VII violation.<sup>77</sup> Analogical reasoning to be sure, but is it worthy, and could it survive scrutiny before the Supreme Court?

To answer these questions we must understand what *Childress I* held and what it did not hold. *Childress I* did not hold that male officers can assert the rights of their female co-workers.<sup>78</sup> The court, in fact, agreed that they have no standing to do this.<sup>79</sup> Nor can these officers assert some vague right to be “free of tensions”

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72. See *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 445 (3rd Cir. 1971) (citing 42 U.S.C. § 2000e-5) (“The remedies section is § 706. That section permits ‘a person claiming to be aggrieved’ to file a charge with the Commission.” (citations omitted)).

73. See *Trafficante*, 409 U.S. at 207 (citing Section 810(a) of Title VIII). The *Trafficante* Court further noted that “[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur . . . may file a complaint with the Secretary.” *Id.* at 206.

74. *Hackett*, 445 F.2d at 446; see also *Trafficante*, 409 U.S. at 209.

75. See *Childress I*, 120 F.3d 476, 481 (4th Cir. 1997), *rev’d per curiam*, 134 F.3d 1205 (1998) (“*Trafficante*’s construction of the term ‘person aggrieved’ and the extension of Article III standing to the victims of indirect discrimination has been adopted by every court of appeals that has considered the issue of a white person’s standing to sue under Title VII for associational or hostile environment claims flowing from discriminatory conduct directed at black persons.”).

76. See *id.* at 480 (“[T]he [*Trafficante*] Court espoused the view of an appeals court [*Hackett* court] that the phrase ‘by a person claiming to be aggrieved,’ as used in the Civil Rights Act of 1964 [the same statute involved in the officers’s suit], ‘showed a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.’”).

77. See *id.* at 480-81. In its reasoning the *Childress I* court asserted that the adoption of the *Trafficante* Court’s broad standing rule on Title VII to the instant case was justified because of “the similar language of the 1964 and 1968 statutes, the important enforcement role conferred on private individuals in both statutory schemes, the citation of *Hackett* in *Trafficante*, the identity of the purposes of each statute, and the consistent interpretation by the EEOC.” *Id.* at 481.

78. See *id.* at 479 (“To the extent that the male officers attempt to assert the rights of other persons, female officers, they clearly state no claim.”).

79. See *id.* (“Anyway their complaints are viewed, the male officers are attempting to recover for violations of others peoples’ civil rights, which they have no standing to do.”).

caused by their favorable treatment in the workplace.<sup>80</sup> The issue in *Childress I*, as framed by the appellate court, was to determine if the white male officers could be “persons aggrieved” within the meaning of Title VII, and if so, could they have suffered an injury actionable under Title VII.<sup>81</sup> Or, as the court stated, “[t]he problem is standing.”<sup>82</sup> Then, as noted, principally relying on *Trafficante*, the court held Title VII confers a “discriminatory-environment cause of action on men to complain about discrimination directed at women.”<sup>83</sup>

There are, however, distinctions between *Childress I* and *Trafficante*, along with the latter case’s incorporation of *Hackett*. *Trafficante* “was the Supreme Court’s recognition of associational rights” and *Trafficante* and *Hackett* construed a federal law aimed at race discrimination.<sup>84</sup> But *Childress I* goes beyond this. There is no reason to believe that other circuits or the Supreme Court will follow this attempted lead. The distinction between *Trafficante* and *Childress I*, a review of decisions from other circuits, and an examination of standing requirements combine to foster this doubt.<sup>85</sup>

### A. Accepted Requirements for Standing

Unless denied authority to do so by legislative action,<sup>86</sup> courts apply a two-step standing analysis.<sup>87</sup> The first step is rooted in Article III of the Constitution.<sup>88</sup> The second considers the prudence of judicial intervention.<sup>89</sup> Prudential requirements

80. *See id.* (“To the extent they assert a general Title VII right to be free of tensions caused by special treatment in their favor, the male officers’ complaints should be dismissed because they attempt to create a new Title VII right out of whole cloth.”).

81. *See id.* at 480 (“We need to determine whether the plaintiffs are ‘persons aggrieved’ and, if so, whether they have suffered an injury that would entitle them to bring this action.”).

82. *See id.*

83. *See id.*

84. *See id.*

85. *See infra* text accompanying notes 86-147.

86. *See* Yang, *supra* note 32, at 1361 (“Congress may remove all prudential standing requirements through legislation, leaving only the Article III requirements.”). One commentator noted the following:

A statute can modify standing principles in two different ways. First, a law can identify a “right” the violation of which constitutes an injury “in fact.” Second, Congress can, in passing a statute, instruct the courts to ignore any prudential limitation on standing, and to consider any case brought by a plaintiff who can meet the Article III minimum requirements.

Rosman, *supra* note 36, at 556-57.

87. *See* Yang, *supra* note 32, at 1361 (“In addition to Article III requirements for standing, courts examine prudential standing requirements.”).

88. *See* U.S. CONST. art. III, § 2.

89. *See* Warth v. Seldin, 422 U.S. 490, 499 (1975) (recognizing that apart from the minimal Constitutional mandate “other limits on the class of persons who may invoke the courts’ decisional and remedial powers”).

for standing were developed to foster judicial self-restraint.<sup>90</sup> These requirements permit a court to ask if judicial review is prudent for certain litigants,<sup>91</sup> such as the police officers in *Childress I*,<sup>92</sup> while considering the limitations of judicial resources, court congestion, and, as must be considered when construing legislation such as Title VII and VIII, congressional intent.<sup>93</sup>

Plaintiffs, at a minimum, must meet the three Article III requirements to ensure standing.<sup>94</sup> First, plaintiffs must establish “a distinct and palpable injury.”<sup>95</sup> This requirement is most easily satisfied by alleging an infringement of an economic interest in civil cases.<sup>96</sup>

It becomes important to recall that in *Trafficante* the plaintiffs alleged that a denial of their associational rights resulted in “missed business and professional advantages” and that they had suffered “economic damage” as the result of living in a “white ghetto.”<sup>97</sup> In *Hackett* the plaintiff had lost his job, alleged he “accepted the pension out of dire necessity,”<sup>98</sup> and sued in part, for “back pay.”<sup>99</sup> In *Childress I* the white officers alleged “loss of teamwork” as their injury.<sup>100</sup>

Second, the plaintiff must show “his injury was a probable result of the challenged action.”<sup>101</sup> The *Childress I* court itself was compelled to note that “we do not express an opinion on whether the injury alleged . . . would satisfy Article III’s requirement of an injury ‘fairly traceable’ to the challenged action.”<sup>102</sup>

The final Article III requirement for standing considers redressability by

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90. See Egan, *supra* note 35, at 727 (discussing public policy reasons for prudential standing requirements which courts have imposed on themselves).

91. See Rosman, *supra* note 36, at 551. Although the kind of litigants prudential rules are applied to is not complete, the Supreme Court often cites three: those litigants who should not assert the rights of third parties; litigants who should not assert “generalized grievances,” and those in which the injury claimed is not in the “‘zone of interests’ of the statute or provision in question.” See *id.* Because of the lack of an unambiguous rule regarding standing requirements “few hold the internal coherence of that doctrine in high regard.” See *id.* at 550. Even the Supreme Court has pronounced the concept elusive. See *id.* (citing *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970)). The *Camp* Court stated that “generalizations about standing . . . are largely worthless as such.” *Camp*, 397 U.S. at 151; see also *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“[The standing doctrine] incorporates concepts concededly not susceptible of precise definition . . . [which] cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise.”).

92. See *Childress I*, 120 F.3d 476, 477-78 (4th Cir. 1997), *rev’d per curiam*, 134 F.3d 1205 (1998). An argument could be made that the white police officers in *Childress I* fell within the second and third class of litigants. That is, it could be argued that they asserted a “generalized grievance” or that they may or may not have been within the “zone of interests” protected by Title VII.

93. See Yang, *supra* note 32, at 1361.

94. See *id.* at 1359.

95. See *id.*

96. See *id.*

97. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208 (1972).

98. See *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3rd Cir. 1971).

99. See *id.* at 444.

100. See *Childress I*, 120 F.3d 476, 481 n.8 (4th Cir. 1997), *rev’d per curiam*, 134 F.3d 1205 (1998).

101. Yang, *supra* note 32, at 1360.

102. *Childress I*, 120 F.3d at 481 n.8.

determining “whether a favorable court decision will remedy the injury suffered by the plaintiff.”<sup>103</sup> As one commentator noted “[q]uite simply, courts conclude that nothing can be done by the judiciary to help the plaintiffs.”<sup>104</sup>

Obviously, reinstatement to his former position would have done something for Mr. Hackett, who had alleged he accepted his pension out of necessity<sup>105</sup> and providing the benefits from interracial associations would have satisfied the plaintiffs in *Trafficante*.<sup>106</sup> What a court could have done for the white officers as the result of a favorable decision in *Childress I* is speculative. For example, could a court accept the argument that quashing a sexually hostile work environment would overcome the reluctance of police officers in one group to assist another group of officers that were performing their duties on the streets?<sup>107</sup>

It becomes apparent that, even in the Fourth Circuit, a *Childress*-based cause of action may not survive an application of the basic Article III test for standing to sue. This question, on remand, would and should have been left for the district court’s determination.<sup>108</sup>

There is, however, some reason to conclude that *Childress I* would have satisfied Article III. The appellate court interpreted *Trafficante* as conferring a “broad standing rule on Title VII cases”<sup>109</sup> generally, and elected to disregard the fact that in *Trafficante* this was done only “insofar as tenants of the same housing unit” were concerned with implementing associational rights and abolishing the consequence of racial discrimination.<sup>110</sup> If these constraints prove immaterial, Article III will not deter *Childress*-type litigation. Still, there is a second procedural issue unresolved by *Childress I*. In contrast to its acknowledgment of Article III requirements, *Childress I* failed to suggest the application of prudential requirements.<sup>111</sup> The majority opinion repeated this flaw in *Childress II*.<sup>112</sup>

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103. Yang, *supra* note 32, at 1360-61.

104. *Id.*

105. See *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3rd Cir. 1971).

106. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972).

107. See *Childress I*, 120 F.3d at 478.

108. See *id.*

109. See *id.* at 481.

110. See *Trafficante*, 409 U.S. at 209.

111. See *Childress I*, 120 F.3d at 481 (holding that the plaintiffs had standing under Article III but did not address the issue of prudential standing).

112. See *Childress II*, 134 F.3d 1205, 1206-07 (4th Cir. 1998). The concurring opinion, however, addressed the issue of prudential standing. See *id.* at 1208-10 (Luttig, J., concurring).

## B. Should Prudential Standing Requirements Be Applied to Transferred Impact Sexual Harassment Cases?

When applicable, prudential standing requirements must also be met, beyond those imposed by Article III. In *Gladstone v. Village of Bellwood*,<sup>113</sup> the Supreme Court noted that “[e]ven when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import.”<sup>114</sup> This principle would limit access to federal courts to those litigants *best suited to assert a claim* rather than one shared in substantially equal measure by a large class.<sup>115</sup>

Thus, although a plaintiff may allege an injury sufficient to meet the requirements of Article III, it does not necessarily follow that the legislation at issue has given that party a cause of action.<sup>116</sup> Congress may, however, by legislation, remove prudential standing requirements leaving only Article III requirements to be met.<sup>117</sup> Both *Trafficante* and *Hackett* have been cited by one commentator as demonstrating this with respect to both Titles VIII and VII respectively.<sup>118</sup>

The *Hackett* court noted that “the language ‘a person claiming to be aggrieved’ [in Title VII] shows a congressional intention to define standing as broadly as is permitted by Article III.”<sup>119</sup> The *Trafficante* Court, in applying congressional intent to Title VIII, reached the same conclusion<sup>120</sup> as did the circuit court in *Hackett*.<sup>121</sup> But will this “generous construction” found in *Trafficante* prevail when the alleged

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113. 441 U.S. 91 (1978).

114. *See id.* at 99.

115. *See id.* at 99-100.

116. *See, e.g.,* Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp., 28 F.3d 1268, 1277 (D.C. Cir. 1994) (“Though the [Fair Employment] Council has adequately alleged an ‘injury in fact’ sufficient to meet the requirements of Article III, this does not necessarily mean that Congress has conferred a cause of action upon it.”).

117. *See Gladstone*, 441 U.S. at 100. The *Gladstone* Court stated that “Congress may, by legislation, expand standing to the full extent permitted by Article III, thus permitting litigation by one ‘who otherwise would be barred by prudential standing rules.’” *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

118. *See Rosman, supra* note 36, at 557.

[T]he Court concluded that Congress intended to define standing under Section 3610 [of Title VIII] ‘as broadly as is permitted by Article III of the Constitution.’ In that last cited phrase, the Court quoted *Hackett v. McGuire Bros.*, a case in which the Third Circuit had held that the standing provisions of Title VII were as broad as Article III permitted.

*Id.* at 558.

119. *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3rd Cir. 1971) (citation omitted).

120. *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (“With respect to suits brought under the 1969 Act, we reach the same conclusion, insofar as tenants of the same housing unit that is charged with discrimination are concerned.”).

121. *See Hackett*, 445 F.2d at 446 (“[A] person claiming to be aggrieved’ shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.”).

discriminatory actions undergirding a male's claim of hostile environment are directed at women or will courts be permitted to assess the litigants best suited to assert such a claim?<sup>122</sup>

Even assuming that plaintiffs in a *Childress*-type case can establish Article III standing, there are persuasive arguments that they must also be compelled to satisfy prudential standing requirements.<sup>123</sup> These arguments are found, in part, in the text of Title VII,<sup>124</sup> case law interpreting that statute,<sup>125</sup> and by a review of congressional intent when sex discrimination was added to Title VII's prohibitions.<sup>126</sup>

#### IV. HAS TITLE VII BEEN ACCEPTED AS SUPPORTING *CHILDRESS I*?

##### A. Case Law

*Waters v. Heublin, Inc.*<sup>127</sup> was decided by the Ninth Circuit Court of Appeals in 1976, four years after the Supreme Court's decision in *Trafficante*. It is cited in *Childress I*.<sup>128</sup> The issue in *Waters* focused on the standing of a white woman to sue her employer for race discrimination directed at African and Hispanic Americans.<sup>129</sup> Although noting that *Trafficante* concerned racial discrimination in housing, the court found *Trafficante* "logically indistinguishable" from the case before it and held that Ms. Waters had standing to allege race discrimination under Title VII.<sup>130</sup>

The *Waters* court, however, clearly indicated that *Trafficante* left its discretion to construe the application of Title VII to other actions under Title VII, such as sexual harassment, intact.<sup>131</sup> The court stated that "[i]t is important to note the

122. See *Trafficante*, 409 U.S. at 212 ("We can give vitality to § 810(a) only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute.").

123. See *infra* notes 199-216 and accompanying text.

124. See *infra* text accompanying notes 162-77.

125. See *infra* text accompanying notes 128-47.

126. See *infra* text accompanying notes 148-61.

127. 547 F.2d 466 (9th Cir. 1976).

128. See *Childress I*, 120 F.3d 476, 481 (4th Cir. 1997), *rev'd per curiam*, 134 F.3d 1205 (1998).

129. See *Waters*, 547 F.2d at 469.

130. See *id.*

131. See *id.* at 470. The *Waters* court cited a case involving gender discrimination in which it referred to "casual dictum" supported by no cited authority in *EEOC v. Occidental Life Insurance Co. of California* and stated that it "should not be followed here." See *Waters*, 547 F.2d at 470 n.1 ("It remains true that Ms. Edelson would not have had 'standing' to charge Occidental with discrimination against unmarried female employees (Ms. Edelson was married), or against male employees with respect to retirement."); see also *EEOC v. Occidental Life Ins. Co. of Cal.*, 535 F.2d 533, 542 (9th Cir. 1976).



limits of our decision” and that it held “only that Waters has standing to sue to redress racial and ethnic discrimination.”<sup>132</sup> *Waters* does not support *Childress I*.<sup>133</sup>

*Equal Employment Opportunity Commission v. Bailey Co. Inc.*<sup>134</sup> was decided by the Court of Appeals for the Sixth Circuit one year after *Waters*. The relevant question presented in *Bailey* was whether Ms. Wade, a white female, had standing under Title VII to file a charge with the EEOC, alleging race discrimination against blacks by her employer.<sup>135</sup>

In *Bailey* a reluctant court, citing *Trafficante* and *Waters*,<sup>136</sup> held that Ms. Wade “who may have suffered from the loss of benefits from the *lack of association* with racial minorities” had standing.<sup>137</sup>

The *Bailey* court, as the *Waters* court before it, indicated that *Trafficante* had left intact the discretion for courts to construe Title VII to apply to matters other than racial discrimination.<sup>138</sup> Specifically, the *Bailey* court wrote “we pass no judgement on the question whether a male could file charges alleging sex discrimination against females.”<sup>139</sup>

Almost exactly three years after *Bailey*, in 1980, the Fifth Circuit Court of Appeals decided *Equal Employment Opportunity Commission v. Mississippi College*.<sup>140</sup> Again, citing the construction of Title VII found in the union of *Hackett* and *Trafficante*, the court allowed standing for a white woman to file a charge asserting that her employer discriminated against blacks.<sup>141</sup> The ruling was

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132. *Waters*, 547 F.2d at 470.

133. The distinction made between *Waters*, which allows for persons claiming to be aggrieved under Title VII by race discrimination and cases, like *Childress I*, which allow standing to sue for discriminatory-environment under Title VII for sexual harassment, can be supported by a number of other lower court cases which also involved gender discrimination, albeit not sexual harassment. *See, e.g., Patee v. Pacific Northwest Bell Tel. Co.*, 803 F.2d 476, 479 (9th Cir. 1986) (disallowing standing to male maintenance administrators who claimed that their salaries were illegally lowered after they were put into a traditional female job groups); *Spaulding v. University of Wash.*, 740 F.2d 686, 709 (9th Cir. 1984) (disallowing standing to a male faculty member of a nursing school who alleged his salary was illegally lower than others because it was “infected” by discrimination the female faculty members had received); *Siegal v. Board of Educ. of New York*, 713 F. Supp. 54, 65 (E.D.N.Y. 1989) (disallowing elementary school principals standing after they alleged they were the victims of sex discrimination against women who traditionally held those positions because they were paid less than high school principals); *American Fed’n State, County and Mun. Employees v. County of Nassau*, 664 F. Supp. 64, 66 (E.D.N.Y. 1987) (disallowing standing for male plaintiffs who claimed they were losing money by being trapped in a lower paying female work group).

134. 563 F.2d 439 (6th Cir. 1977).

135. *See id.* at 451.

136. *See id.* at 452. Although the *Bailey* court was less than enthusiastic about its decision, it felt bound by *Trafficante*. The court stated that “[w]e would be inclined to agree with appellee were it not for the Supreme Court’s decision in *Trafficante*.” *Id.*

137. *See id.*

138. *See id.* at 452-54.

139. *Id.* at 454.

140. 626 F.2d 477 (5th Cir. 1980).

141. *See id.* at 483 (“We conclude that § 706 of Title VII permits Summers to file a charge asserting that Mississippi College discriminates against blacks on the basis of race in recruitment and hiring.”).

made not to allow the assertion of others' rights, but for the loss of important benefits from *interracial associations*.<sup>142</sup> That ruling is clearly confined to the concept of associational rights.<sup>143</sup> Provided the plaintiff "meets the standing requirements imposed by Article III," she may assert "her own personal right to work in an environment unaffected by racial discrimination."<sup>144</sup>

As in *Bailey*, the court in *Mississippi College* refused to address "any form of discrimination other than racial discrimination."<sup>145</sup> The Fifth Circuit also indicated that *Trafficante* left intact that court's discretion to construe Title VII to apply to matters other than racial discrimination.

*Trafficante* and *Hackett*<sup>146</sup> have unquestionably resolved the issue of standing to allege race discrimination in violation of Title VIII and VII respectively. Only the constitutional requirements of Article III must be met. Thus, prudential standing requirements will not be invoked to preclude judicial resolution of alleged race discrimination.

The cases that follow *Trafficante*, however, suggest that the standing requirement prescribed for allegations of race discrimination may differ from those used to resolve issues of sex discrimination under Title VII, thus allowing courts to apply prudential standards.<sup>147</sup> An examination of congressional intent also

142. *See id.*

143. *See id.*

144. *See id.*

145. *See id.* at 483 n.8. The court further stated:

We decide on the issue before us of whether a white employee can charge her employer with discriminating against blacks in violation of Title VII. We expressly premit the question of whether any form of discrimination other than racial discrimination can be charged by a person who is not a member of the group against whom the discrimination is directed.

*Id.* (citing EEOC v. Bailey, 563 F.2d 439, 454 n.9 (6th Cir. 1977)).

146. *See supra* text accompanying notes 68-85.

147. Indeed the courts have drawn distinctions between what constitutes racial harassment and sexual harassment, which may further advance the argument that prudential standing should be applied to sexual harassment claims even if it is not applied to racial harassment claims. For example, in *Harris v. Forklift Systems, Inc.*, the Supreme Court's first sexual harassment case after *Meritor Savings Bank*, the Court stated: "As we pointed out in *Meritor*, 'mere utterance of an . . . epithet which engenders offensive feelings in a employee,' does not sufficiently affect the conditions of employment to implicate Title VII." *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986); *see also Lehman v. Toys 'R Us, Inc.*, 626 A.2d 445, 445 (N.J. 1993) ("Although it will be a *rare and extreme case* in which a single incident will be so severe that it would, from the perspective of a reasonable woman, make the working environment hostile, such a case is certainly possible."). In contrast, a number of courts have ruled that a single racial epithet might be actionable under Title VII or equivalent state civil rights laws. *See, e.g., Taylor v. Metzger*, 706 A.2d 685, 694 (N.J. 1998) (overruling a summary judgment in defendant's favor under a New Jersey civil rights statute modeled on Title VII and stating: "[a] rational factfinder, crediting plaintiff's evidence, could conclude that defendant engaged in discriminatory harassment by uttering a racial epithet that was sufficiently severe to have created a hostile work environment"); *Reid v. O'Leary*, No. 96-401,

supports acknowledging this distinction.

## B. Congressional Intent

*Meritor Savings Bank, FSB v. Vinson*<sup>148</sup> was decided by the Supreme Court in 1986. In a comment by Justice Rehnquist, the *Meritor* Court held that sex discrimination could take the form of hostile environment sexual harassment, differentiating sex discrimination from other prohibitions under Title VII.<sup>149</sup> Referring to Title VII, Justice Rehnquist noted that sex was added to the Act at “the last minute” and “the bill was quickly passed” with “little legislative history.”<sup>150</sup> He could have said with really no legislative history.

Including the term “sex” in Title VII was the result of an amendment proposed by Congressman Howard (Judge) Smith (D-Va.) to what was at the time, H.R. 7152.<sup>151</sup> The Judge was an 80-year-old segregationist<sup>152</sup> and the amendment was a “trump card he had been waiting so long to play.”<sup>153</sup> He intended to make H.R. 7152 so controversial that it would be defeated.<sup>154</sup> Indeed, after his amendment was introduced “[t]he house erupted in shock.”<sup>155</sup> There is little record of debate over the amendment, and there is no mention of “sex” in the Legislative History of

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1996 U.S. Dist. LEXIS 10627, at \*9-10 (D.C.C. July 15, 1996) (refusing to grant a summary judgment, stating that “[i]t is very possible that the term ‘Coon-Ass’ is racially derogatory or severe enough, in and or itself, to create a hostile work environment.”); see also Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2338 (1989) (“However irrational racist speech may be, it hits right at the emotional place where we feel the most pain.”); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452 (“The experience of being called ‘nigger,’ ‘spic,’ ‘Jap,’ or ‘kike,’ is like receiving a slap in the face. The injury is instantaneous.”).

148. 477 U.S. 57 (1986).

149. See *id.* at 73.

150. See *id.* at 63; see also *Leibovitz v. New York City Transit Auth.*, 4 F. Supp. 2d 144, 149 (E.D.N.Y. 1998). The *Leibovitz* court observed:

Neither the language of this statute nor its legislative history is conclusive. “Sex” was added by Congress to Title VII at the last minute, with minimal debate and great celerity. Legislators supporting the measure acted to eliminate inequality in the workplace based on gender with respect to hiring, promotion, pay, and task assignment. Beyond these relatively immediate concerns, their design is unknown. Given that it was a large step towards equality to guarantee women pay parity for equal work, it is unlikely that the enacting legislators envisioned how much further the Act’s language could reach. Talk of intent is futile.

*Id.* (citations omitted).

151. See CHARLES W. WHALEN & BARBARA WHALAN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115 (1985).

152. See *id.* at 84. Smith was also a very influential member of Congress serving as Chairman of the Rules Committee. See *id.* As a member of the House for 33 years, he was perhaps the most powerful person in the House. See *id.*

153. See *id.* at 115.

154. See *id.* at 116.

155. See *id.* at 115.

the Civil Rights Act of 1964.<sup>156</sup> There was, however, a spontaneous bipartisan coalition of congresswomen who claimed entitlement “to this little crumb of equality.”<sup>157</sup>

“Pandemonium reigned” as the predominately male House of Representatives was unexpectedly compelled to take a stand for or against women, knowing that to stand against women “would alienate most women in the country.”<sup>158</sup> As one House member came to note “Smith outsmarted himself. At this point there was no way you could sink the bill.”<sup>159</sup> That “little crumb of equality” approved by a “befuddled” Congress had suddenly become “a precursor of women’s liberation.”<sup>160</sup>

However, nothing can be gleaned from any record of congressional actions that precludes the consideration of prudential standing requirements in Title VII sexual harassment cases. To the contrary, “sex” was added to Title VII as an unexpected amendment after thoughtful consideration of race and color.<sup>161</sup>

### C. Text of Title VII

With Title VII Congress intended to confer the strictest protection against race and color classifications.<sup>162</sup> The Supreme Court, in *Trafficante*, enforced this goal

156. See CIVIL RIGHTS ACT OF 1964, S. REP. NO. 872, 88th Cong. 2d (1964), reprinted in 1964 U.S.C.C.A.N. 2355-2519 (1964).

157. WHALEN & WHALEN, *supra* note 151, at 117.

158. See *id.*

159. *Id.*

160. See *id.* at 118.

161. The bill was introduced to the House on June 26, 1963. See *id.* at 2. “Sex” was added to the bill on February 7, 1964. See *id.* at 114. Three days later, on February 10, 1964, the bill was passed by the House and sent to the Senate. See *id.* at 118-23. President Johnson signed the bill into law on July 2, 1964. See *id.* at 228. Due to the hasty insertion of “sex” in the bill, there is no legislative history regarding sexual harassment. Some commentators have argued that Congress never intended sexual harassment to be covered under Title VII. See, e.g., John Cloud, *Sex and the Law*, TIME, Mar. 23, 1998, at 49. Eugene Volokh, UCLA harassment law expert, made the following observation:

In 1964 [when discrimination based on gender first became illegal], if you told a member of Congress, “If you voted to bar discrimination based on sex, you will prohibit employees from putting pictures of their wives in bikinis on their desks,” most legislators would have said, “Wait a minute, where does it say that?”

*Id.* (quoting Eugene Volokh).

162. The original Civil Rights Act of 1964 Title VII protected classes based on race, color, religion or national origin until the later and unexpected inclusion of “sex” into the bill. However, the civil rights movement of the 1950s and 1960s, in which African-Americans fought for their civil rights was the primary impetus for the Act. See WHALEN & WHALEN, *supra* note 151, at xiv-xix. In President Kennedy’s June 11, 1963 television speech, which he used to inform the nation of his desire to introduce sweeping civil rights legislation (Civil Rights Act of 1964), he stated:

One hundred years of delay have passed since President Lincoln freed the slaves, yet their

by revealing the associational rights of tenants in an apartment complex.<sup>163</sup> Moreover, color, although it overlaps with race, fortifies this protection.<sup>164</sup> Race and color classifications, in fact, are not limited to those commonly advanced by ethnologists; they are broader.<sup>165</sup> Hispanic, as an example, would not be classified as a race by an ethnologist, yet discrimination against an American Hispanic is a form of race discrimination under Title VII.<sup>166</sup> Even discrimination based on subtle race/color characteristics is forbidden under Title VII.<sup>167</sup> Discrimination, for example, against a person of “swarthy” complexion is illegal.<sup>168</sup>

Sex, on the other hand, has been more narrowly applied and construed.<sup>169</sup> Thus, although sex is defined by a dictionary in two acceptable ways: as a “[d]ivision of organisms distinguished respectively as male or female” (gender), and as the “sum of the structural, functional, and behavioral characteristics of

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heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freed from social and economic oppression. And this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free. Now the time has come for this Nation to fulfill its promise. The events in Birmingham and elsewhere have so increased the cries for equality that no city or state or legislative body can prudently choose to ignore them.

*Id.* at xx.

163. *See supra* text accompanying notes 26-29, 39-52.

164. *See* PLAYER, *supra* note 3, § 5.23, at 229-31.

165. *See id.*

166. *See id.* § 5.23, at 229 (citing *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979)).

167. *See id.* (“Persons from the Middle East may not be a distinct ‘race.’ Nonetheless, discrimination against Semitic persons would be racial. Discrimination against indigenous Americans (Eskimos, Native Hawaiians, Samoans, or American Indians) is a clear form of race discrimination.”).

168. *See id.* § 5.23, at 229-30.

169. *See id.* § 5.25, at 239-40. “The narrow construction of ‘sex’ was pioneered in *General Electric Co. v. Gilbert*, which held that pregnancy distinctions were not ‘sex’ distinctions.” *Id.* Katherine M. Franke, a prominent commentator, discussed how early cases involving sex-based harassment were much like race-based harassment. She noted that sex and race cases were aimed at victims who “violated gender and race norms.” *See* Franke, *supra* note 10, at 710. Later sex cases, however, departed from this norm when victimized women were required to produce evidence that the “harassing conduct was undertaken ‘because of the target’s sex.’” *See id.* Franke further noted that cases prohibited “not only sex harassment, but sexual harassment—that is, conduct of a sexual nature.” *Id.* Franke concluded that “while sexual harassment is similar to, it is not the same as racial harassment. Many authorities might say that Title VII proscribes all, or virtually all, conduct of a racial nature in the workplace, but few would argue that Title VII renders actionable all sexual conduct in the workplace.” *Id.* at 709 n.85. Recently, the Supreme Court reinforced Franke’s contention that Title VII does not render actionable all sexual conduct actionable. *See Oncale v. Sundowner Offshore Serv. Inc.*, 118 S. Ct. 998, 1001-02 (1998). In *Oncale*, Justice Scalia opined that “the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.” *Id.* at 1002-03. Justice Scalia further stated, “We have always regarded that requirement [conduct that is severe and pervasive enough to be objectively hostile or abusive] as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory ‘conditions of employment.’” *Id.* at 1003.

living beings that subserve reproduction" (sexuality).<sup>170</sup> Congress "intended to refer to the first, narrow definition, thus proscribing gender discrimination, but not prohibiting discrimination based broadly upon sexuality, sexual practices, or sexual preferences."<sup>171</sup>

Congress also drew a textual distinction between race and color and sex when it created the Bona Fide Occupational Qualification (BFOQ) defense.<sup>172</sup> Under a BFOQ defense it is lawful to discriminate against a person based on his or her sex,<sup>173</sup> provided it can be proven that "the excluded person could not safely and effectively perform essential job duties,"<sup>174</sup> "that all, or substantially all [persons] in the class could not perform [the] essential job duties,"<sup>175</sup> and that "there is no reasonable alternative that would serve the employer's business needs equally well."<sup>176</sup>

Race and color, on the other hand, share none of these exceptions. Congress, in its determination to eliminate this form of discrimination, did not provide for exceptions to race and color discrimination, not even narrow ones.<sup>177</sup>

The foregoing support the argument that race/color and sex, as protected classifications under Title VII, are distinguishable based on case law, congressional intent, and the text of the statute. If courts find that prudential standards can be applied to sex, what considerations might they apply to decide whether a particular litigant in a *Childress I*-type case has standing to proceed? The evaluation of judicial resources is certainly relevant.

170. See *PLAYER*, *supra* note 3, § 5.25, at 239 (citing WEBSTER'S NEW COLLEGIATE DICTIONARY 1062 (1976)).

171. *Id.*

172. 42 U.S.C. § 2000e-2(e) (1994). Regarding the BFOQ, the statute provides:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

*Id.*

173. It should be noted that the BFOQ defense is to be applied narrowly. See *Dothard v. Rawlinson*, 433 U.S. 321, 332-34 (1977) (discussing narrow application of the BFOQ exception in sex discrimination cases).

174. *PLAYER*, *supra* note 3, § 5.29b, at 281.

175. *Id.* § 5.29b, at 282.

176. *Id.*

177. Legislative history on the BFOQ defense is meager. Discussion, however, in the Congressional Record alludes to legal approval of such employment practices as "male players for a professional baseball team," and a French chef for a "French restaurant." See *PLAYER*, *supra* note 3, § 5.29(a), at 280.

## V. SHOULD JUDICIAL RESOURCES BE A FACTOR WHEN ASSESSING PRUDENTIAL STANDING IN TRANSFERRED IMPACT CASES?

As noted earlier, courts consider various factors when deciding whether a party has prudential standing.<sup>178</sup> Among them are judicial resources.<sup>179</sup> In *Childress* scenarios, consideration of judicial resources may become a strong determining factor.

Sexual harassment cases are rapidly becoming one of the most discussed and visible topics in American society.<sup>180</sup> Ever since Clarence Thomas' highly charged and publicized Supreme Court hearings in 1991,<sup>181</sup> it is quite likely that one will read, almost daily, a story in the popular press about sexual harassment. Indeed, the fact that some of the country's leaders, from President Clinton, in the Paula Jones *et. al.* controversies, to Clarence Thomas and his past problem, have all contributed to the issue's high visibility, making it the topic of frequent comment.<sup>182</sup>

But those who feel they are victimized by sexual harassment are not merely lamenting it, they are suing. Consider the following statistics. In 1991, 6,883 sexual harassment claims were filed with the EEOC.<sup>183</sup> But after the Clarence Thomas hearings that year, claims swelled to over 15,300 by 1996.<sup>184</sup> Sexual

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178. See *supra* note 91 (discussing scenarios when prudential standing is often applied).

179. See *id.*; see also *National Fed'n of Fed. Employees v. Cheney*, 892 F.2d 98, 99 (D.C. Cir. 1989) (reviewing the issue of prudential standing in the context of creating a strain on judicial resources).

180. See John Leo, *Every Man a Harasser?*, U.S. NEWS & WORLD REP., Feb. 16, 1998, at 18 ("It wasn't just Jay Leno and David Letterman, though they took the lead and set the tone [regarding the alleged Monica Lewinsky affair]. The first week of the scandal was probably the decade's high-water mark of euphoria around the water cooler.").

181. See, e.g., Marlene Cemons, *The Click! Heard 'Round the Nation*, L.A. TIMES, Oct. 18, 1991, at E1; Derrick Z. Jackson, *After the Thomas Affair, Progress—or Silence*, Oct. 20, 1991, at A37; James Warren, *Coverage Offers Class on Sexual Harassment*, CHI. TRIB., Oct. 12, 1991, at C1. One journalist observed:

In 1991 the world watched, rapt with attention, as Anita Hill described her allegations of sexual harassment against then-Supreme Court nominee Clarence Thomas. Back then, the legal term 'sexual harassment' was a foreign notion to most men and women in the workplace. Hill's testimony spawned thousands of successful claims that have compelled lawyers and judges to settle enormously expensive claims and to define notions of appropriate behavior between men and women.

Sonia Katyal, *Victims Must Prove Sexual Preference of Harassers*, LAS VEGAS REV.-J., Dec. 16, 1997, at 9B.

182. See Del Jones & Stephanie Armour, *Romance at Work Tricky to Manage: Even Consensual Relationships Can Hurt Morale*, U.S.A. TODAY, Jan. 23, 1998, at 2B ("The Clinton controversy, 'will just add more fuel to the [sexual harassment] fire,' says Chicago employment lawyer Michael Karpeles.").

183. Shaheena Ahmad, *Get Your Sex Insurance Now*, U.S. NEWS & WORLD REP., March 2, 1998, at 61.

184. See *id.*

harassment claims now show signs of leveling off at 15,889.<sup>185</sup>

And sexual harassment claims are not only numerous, they are expensive. One estimate of the cost of litigating a sexual harassment suit ranged from \$200,000<sup>186</sup> to \$406,000, if the lawsuit went to trial.<sup>187</sup> Indeed, since the passage of the Civil Rights Act of 1991, which allows compensatory<sup>188</sup> as well as punitive damages where the plaintiff's behavior is malicious or reckless,<sup>189</sup> the economic incentive to sue has increased.<sup>190</sup> This, plus the fact that the parties may now have a jury trial, only adds to the pressure put upon judicial resources.<sup>191</sup>

With these trends and conditions in mind,<sup>192</sup> an argument can be made that sexual harassment claims will continue to constitute a sizable portion of lawsuits filed, thereby imposing a very real strain on judicial resources. We are not, however, arguing here that a judicial resources factor should be applied to those who are directly the victims of sexual harassment.<sup>193</sup> Sexual harassment is a

185. See *id.* Sexual harassment cases, according to the EEOC, were "the fastest-growing area of employment discrimination" in recent years. See Kirsten Downey Grimsley, *Worker Bias Cases Are Rising Steadily, New Laws Boost Hopes for Monetary Awards*, WASH. POST, May 12, 1998, at A1.

186. See Jay Finegan, *Law and Disorder; Employee Lawsuits, INC.*, Apr. 1994, at 68.

187. See Cary Stemle, *Seminar Shows Ambiguity of Sexual-Harassment Cases*, BUS. FIRST-LOUISVILLE, Dec. 22, 1997, at 8.

188. Under the Civil Rights Act of 1991, compensatory damages include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses . . ." See 42 U.S.C. § 1981a(b)(3) (1994). In addition, a plaintiff can receive the remedies available under the Civil Rights Act of 1964, which can include backpay, interest on backpay, and reinstatement. See 42 U.S.C. § 1981a(a)(1) ("[T]he complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) [42 U.S.C. § 2000e-5(g)] of the Civil Rights Act of 1964, from the respondent.").

189. See 42 U.S.C. § 1981a. Under the 1991 Act, compensatory damages are capped based on the number of employees working for the defendant. See *id.* § 1981a(b)(3).

190. According to the Jury Research Institute, the average sexual harassment plaintiff is awarded \$256,000 if the party wins in court. See Steve Salerno, *An End to Harassment Hysteria*, WALL ST. J., Mar. 31, 1998, at A22. Indeed, there may now be a more dependable "deep pocket" source to settle sexual harassment claims in the future, giving even greater incentive to sue. The sale of employment practices liability insurance (EPL), which covers sexual harassment, as well as other employment-related lawsuits, have swelled. See Ahmad, *supra* note 183, at 61. One company which sells EPL policies sold them to more than 500 mid-size companies, witnessing the doubling of sales every year. See *id.*

191. See 42 U.S.C. § 1983(c) ("If a complaining party seeks compensatory or punitive damages under this section—(1) any party may demand a trial by jury . . .").

192. Plaintiffs also enjoy success in prosecuting their cases. One source states that two-thirds of sexual-harassment lawsuits that get to trial are won by plaintiffs. See Stemle, *supra* note 187, at 8.

193. Because prudential standing requirements are commonly applied by courts in three scenarios: when a litigant asserts the rights of a third party, when a litigant asserts "generalized grievances," and when there is an issue of whether a litigant is within a "zone of interests" of the statute or provision in question, the issue of whether to apply prudential standing requirements to a direct victim of sexual harassment would not be raised. See *supra* text accompanying notes 36-37.



serious problem in the workplace, and a victim must have access to court to resolve this problem. However, we are contending that if standing is extended in an unrestrained manner to a *Childress I*-type scenario, sexual harassment lawsuits might increase exponentially. This would occur with the addition of a new group of purported victims. In these situations, judges should be free to apply prudential standards to determine whether the plaintiff has standing to sue for damages.

Indeed, there is no dearth of authority, even from the Supreme Court itself, regarding how difficult hostile environment sexual harassment is to define.<sup>194</sup> And it appears that the theory is expanding. As noted earlier, the Supreme Court has now extended Title VII to same-sex sexual harassment.<sup>195</sup>

With these uncertainties in mind, to allow an additional party,<sup>196</sup> a victim of transferred impact, to only be required to satisfy Article III standing requirements,<sup>197</sup> could open a potential floodgate of claims.<sup>198</sup> Judges should be

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194. To date the Supreme Court has been unable, and perhaps will never be able, to define precisely the difference between conduct that is merely offensive and conduct that is actionable under Title VII. In *Harris v. Forklift Systems, Inc.*, the first Supreme Court sexual harassment case after *Meritor Savings Bank*, the Court stated that there is no "mathematically precise test" for determining these distinctions. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). Moreover, Justice Scalia in his concurrence in *Harris*, stated that "[a]s a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or omitted by) an employer is egregious enough to warrant an award of damages." *Id.* at 24; see also Anne C. Levy, *The United States Supreme Court Opinion in Harris v. Forklift Systems: Full of Sound and Fury Signifying Nothing*, 43 U. KAN. L. REV. 275, 296-97 (1995) (discussing the lack of guidance by the Court in the *Harris* case); Eugene Volokh, *Was Right Wrong? Who Knows?*, WALL ST. J., Apr. 3, 1998, at A18 ("The [sexual harassment law] is so mushy that it really is a matter of which judge or jury you draw.").

195. See *Oncala v. Sundowner Offshore Serv.*, 118 S. Ct. 998, 1002 (1998); see also *supra* text accompanying notes 11-12.

196. A number of commentators have argued that sexual harassment cases are being asserted by some for political reasons, rather than to redress actual sexual harassment. Assuming this to be true, the addition of another party might also increase the likelihood of sexual harassment suits. See, e.g., Leo, *supra* note 180, at 18 ("Sexual-harassment litigation can now be part of partisan politics as usual. With deep-pocket contributors behind you, and on your allegations alone, you can depose a politician about his sex life and perhaps force him to spend hundreds of thousands of dollars defending himself in court."); see also Jim Impoco, *The Mother of All Wedge Issues*, U.S. NEWS & WORLD REP., June 5, 1995, at 31 (discussing how two California professors who authored the California Civil Rights Initiative will be investigated by a state Democratic Party official as to whether they have ever "inappropriately touched students"). The popular press has also reported how sexual harassment claims have been apparently leveled against others in the workplace for purposes of impairing or even destroying that worker's career. See, e.g., Judy Peres, *Few Remedies to False Claims of Harassment*, CHI. TRIB., Apr. 20, 1998, at 1.

197. A useful analogy between a *Childress I*-type case and tort law might be illustrative. Traditionally, under tort law an observer of an accident caused by another's negligence is denied standing to sue, even if the accident caused the observer to suffer mental distress. If all observers of accidents were allowed to do so, it would impose a great strain on the resources of the court. See, e.g., KEETON ET AL., *supra* note 3, § 54, at 366. Discussing the issue of peril or harm to another after a party witnesses it, Prosser and Keeton argue:

If recovery is to be permitted, however, it is also clear that there must be some limitation. It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other

free to consider how such claims will affect the management of judicial resources.

## VI. CONCLUSION

*Childress I* was overruled by *Childress II* when the full Fourth Circuit Court reversed its three judge panel and affirmed the "district court's judgment in its entirety."<sup>199</sup> As a result, the Circuit Court dismissed the plaintiff's hostile environment claim because "the prevailing rule is that Title VII addresses only discrimination between sexes."<sup>200</sup> The approach taken by the Fourth Circuit, and therefore the district court, has now been overruled by the Supreme Court with the recent opinion issued in *Oncale*.<sup>201</sup> Title VII, it has been revealed, applies to same-sex sexual harassment. As a result, the *Childress I* reasoning has been resuscitated.

The unusual allegations advanced by the white male officers in *Childress* has provoked thought. Judicial opinions,<sup>202</sup> commentary and the legal popular press reflect this fact,<sup>203</sup> along with the fact that reasonable minds do differ. We conclude, however, that a reasonable solution to the conundrum presented by *Oncale* and the four *Childress* decisions has remained unarticulated. And we conclude that a practical solution can be supported by a review of *Trafficante*,<sup>204</sup> circuit court decisions,<sup>205</sup> the text of Title VII,<sup>206</sup> and a realistic assessment of congressional intent.<sup>207</sup>

Three circuit court judges, concurring in *Childress II*, recognized the significance of prudential standing requirements in addition to those required by

person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends.

*Id.*

198. The "floodgate" argument was advanced in *National Federation of Federal Employees v. Cheney*, 892 F.2d 98, 99-100 (D.C. Cir. 1989) (Mikva, J., dissenting) ("The court's warning that allowing petitioners standing would 'eviscerate the prudential standing test,' rings hollow. Adopting the role of floodgate attendant, the court asserts that would-be plaintiffs could claim standing to challenge any agency action . . ."). Prosser and Keeton assert an analogous floodgate-like argument for allowing third party claims in tort: "And probably the danger of fictitious claims, and the necessity of some guarantee of genuineness, are even greater here than before. It is no doubt such considerations that have made the law extremely cautious in extending its protection to the bystander." KEETON ET AL., *supra* note 3, § 54, at 366.

199. *See supra* note 6.

200. *See supra* note 7.

201. *See supra* text accompanying notes 11-13.

202. *See supra* text accompanying notes 1-6.

203. *See supra* notes 9-10.

204. *See supra* text accompanying notes 66-85.

205. *See supra* text accompanying notes 127-46.

206. *See supra* text accompanying 162-77.

207. *See supra* text accompanying notes 148-61.

Article III. These judges asserted that in Title VII litigation plaintiffs must “satisfy both types of standing requirements—Constitutional and prudential.”<sup>208</sup> These jurists are painting with too broad of a brush.<sup>209</sup>

The Supreme Court, as noted, concluded that *Hackett* revealed that, with respect to associational rights, Title VII conferred “standing as broadly as permitted by Article III”<sup>210</sup> and then approvingly revealed “the same conclusion”<sup>211</sup> with respect to tenants in a housing project.

This reasoning, however, does not undermine the position taken here. Prudential standing requirements should be applied in cases other than those alleging race and color discrimination under Title VII. Neither *Hackett* nor *Trafficante* preclude this conclusion. Nor is there any prevailing view that it is unworkable.<sup>212</sup>

Three circuit courts, while broadly construing standing requirements in cases alleging race discrimination under Title VII, have kept their discretion intact by expressly refusing to provide even *dicta* related to the transferred impact issue raised by *Childress I*.<sup>213</sup>

It is our position that neither *Childress I* nor *II* articulated a just or appropriate standing requirement. Of course, Article III standing requirements must be met. In *Childress I* the appellate court, quite properly, called upon the district court to resolve this issue.<sup>214</sup> The lower court should also have been free to consider prudential standing requirements. *Childress II* again failed to direct this reasonable two-step process.<sup>215</sup>

Assuming a *Childress*-type case can satisfy Article III, it is possible that the plaintiffs can also demonstrate it is prudent for the court to permit them to proceed. This, we proffer, can and should be assessed on the facts of individual cases.

In *Childress I*, as an example, the white male officers may have been able to establish that sexual discrimination, allegedly directed at females, plausibly fostered a danger that demonstrably impaired the performance of their work. If so, arguably they were injured by conduct prohibited by Title VII. Conversely, it would be conceivable for a court to rule that, in this particular case, the female officers would be the appropriate plaintiffs and that the male officers were merely incidental beneficiaries of Title VII protections.

This is legitimate work for courts. In the absence of clear congressional intent or a Supreme Court ruling that precludes them from doing so, courts should not shed their authority to consider prudential standing requirements in Title VII

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208. *Childress II*, 134 F.3d 1205, 1208 (4th Cir. 1998) (Luttig, J., concurring).

209. See *infra* text accompanying notes 210-15.

210. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972); see also *supra* text accompanying notes 52-53.

211. See *Trafficante*, 409 U.S. at 209.

212. See *supra* notes 66-85.

213. See *supra* notes 127-45.

214. See *Childress I*, 120 F.3d 476, 478 (4th Cir. 1997), *rev'd per curiam*, 134 F.3d 1205 (1998).

215. See *supra* text accompanying notes 5-7.

litigation. With the exception of allegations of race or color discrimination, neither Title VII, nor any precedent considering it, weaken this conclusion.

