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Sí, Se Puede: Why the Agricultural Industry's "Mujeres Imparables" Fight for Adequate Legal Remedies for Survivors of Sexual Assault Matters

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SÍ, SE PUEDE: WHY THE AGRICULTURAL INDUSTRY'S "MUJERES IMPARABLES" FIGHT FOR ADEQUATE LEGAL REMEDIES FOR SURVIVORS OF SEXUAL ASSAULT MATTERS[1]

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The '#metoo' movement sparked cross-industry dialogue, illuminating the rampant sexual harassment within certain industries. While the Civil Rights Act of 1991 broadens the scope of available remedies to employees who endured sexual harassment in the workplace, the Act's statutory cap on compensatory and punitive damages inadequately redresses survivors' injuries and fails to encourage employers to implement and enforce sufficient workplace protections. The statutory cap impacts all employees who have viable sexual harassment claims; however, the statutory cap markedly affects women fieldworkers in the agricultural industry. The severe lack of adequate employee protections in conjunction with the vulnerabilities this workforce inhabits, make women fieldworkers highly susceptible to sexual harassment and prevents many from taking legal action, especially when there are limited remedies.

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1. *See* Ai-Jen Poo & Mónica Ramírez, *Female Domestic and Agricultural Workers Confront an Epidemic of Sexual Harassment*, ACLU (May 4, 2018, 2:30 PM), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/female-domestic-and-agricultural-workers-confront (explaining that "Mujeres imparables," the "unstoppable women," is a self-identified name for "Black, Latina and immigrant women of color . . . [u]nited in the belief that all women, and all people, deserve safe and dignified work.").

This Note examines the limited federal remedies under the Civil Rights Act of 1991. First, this Note traces the development of labor protections, or lack thereof, for agricultural workers in the United States. Next, this Note identifies the legal problem at hand; specifically, the statutory cap on compensatory and punitive damages. This statutory cap uniquely affects survivors of sexual assault within the agricultural industry and aggravates certain vulnerabilities of fieldworkers, increasing the risk for sexual assault and decreasing the rate of reporting. Lastly, this Note discusses the removal of the statutory cap to eliminate the burden placed on survivors and to motivate agricultural employers to implement adequate protections for fieldworkers; this Note also proposes the enactment of a federal compensation board to financially aid survivors whose available relief fails to assuage the economic loss resulting from their injuries.

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I. INTRODUCTION

Sexual harassment affects all people in every industry.[2] Women, however, endure higher rates of sexual harassment in the workplace.[3] Between thirty-five to fifty percent of working women experience sexual harassment within the course of their career.[4] Prior to the '#metoo' movement, the magnitude of sexual harassment remained largely hidden.[5] But as individuals stepped forward to share their "me too" stories, the stigma that often submits survivors[6] into silence dissipated.[7] While the entertainment industry amplified the "me too" conversation, the dialogue increased across industries.[8] In solidarity with the Hollywood actors who exposed the sexual harassment within their industry, farmworkers[9] in California penned their public support and illuminated the rampant sexual harassment within the agricultural industry:

> Like you, there are few positions available to us and reporting any kind of harm or injustice committed against us doesn't seem like a

2. *See* ELYSE SHAW, ARIANE HEGEWISCH, M. PHIL & CYNTHIA HESS, INST. FOR WOMEN'S POL'Y RES., SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS (2018), https://iwpr.org/iwpr-publications/briefing-paper/sexual-harassment-and-assault-at-work-understanding-the-costs/ ("The U.S. Equal Employment Opportunities Commission (EEOC) states that 'unwelcome sexual advances, request for sexual favors, and other verbal or physical harassment of a sexual nature constitutes sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.' ").

3. WOMEN'S INITIATIVE, CTR. FOR AM. PROGRESS, WOMEN DISPROPORTIONATELY REPORT SEXUAL HARASSMENT IN MALE-DOMINATED INDUSTRIES (2018), https://www.americanprogress.org/issues/women/news/2018/08/06/454376/gender-matters/.

4. Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237, 240 (2010).

5. *See Statistics*, ME TOO., https://metoomvmt.org/learn-more/statistics/ (last visited Feb. 14, 2021).

6. This Note mainly uses "survivor" over "victim." *Key Terms and Phrases*, RAINN, https://www.rainn.org/articles/key-terms-and-phrases (last visited Jan. 29, 2019) (explaining that individuals who have experienced sexual harassment or sexual assault may identify as either a victim or survivor and that RAINN (Rape, Abuse, & Incest National Network) "use[s] the term 'victim' when referring to someone who has recently been affected by sexual violence" whereas the term survivor is used "to refer to someone who has gone through the recovery process, or when discussing the short- or long-term effects of sexual violence").

7. *Id.*

8. *#MeToo: RAINN Turns Awareness Into Action*, RAINN (Oct. 2, 2018), https://www.rainn.org/news/metoo-rainn-turns-awareness-action.

9. This Note uses farmworker, fieldworker, and agricultural worker interchangeably. Occupational Emp't Statistics, *45-2092 Farmworkers and Laborers, Crop, Nursery, and Greenhouse*, U.S. BUREAU OF LAB. STAT. (May 2019), https://www.bls.gov/oes/current/oes452092.htm (defining farmworkers as those who "[m]anually plant, cultivate, and harvest vegetables, fruits, nuts, horticultural specialties, and field crops . . . [and u]se hand tools, such as shovels, trowels, hoes, tampers, pruning hooks, shears, and knives.").

> viable option. Complaining about anything—even sexual harassment—seems unthinkable because too much is at risk, including the ability to feed our families and preserve our reputations. We understand the hurt, confusion, isolation and betrayal that you might feel. We also carry shame and fear resulting from this violence. It sits on our backs like oppressive weights. But, deep in our hearts we know that it is not our fault.[10]

The farmworkers' open letter reflects the reality in which agricultural workers are uniquely susceptible to sexual harassment within the fields they work. Eighty percent of female immigrant farmworkers attested to encountering sexual harassment.[11] The lack of adequate employment protections coupled with immigrant fieldworkers' unique vulnerabilities account for the high rate of sexual assault within this population.[12]

This Note examines the limited federal remedies under the Civil Rights Act of 1991. First, the background section traces the development of labor protections, or lack thereof, for agricultural workers in the United States.[13] Next, this Note identifies the legal problem at hand; specifically, the statutory cap on compensatory and punitive damages.[14] Thereafter, this Note engages in a statutory analysis of the Civil Rights Act of 1991.[15] This analysis addresses how the statutory cap aggravates certain vulnerabilities of fieldworkers, increasing the risk for sexual assault and decreasing the rate of reporting. Lastly, the proposal section discusses the removal of the statutory cap to eliminate the burden placed on survivors and to motivate agricultural employers to implement adequate protections for fieldworkers; this section also proposes the enactment of a federal compensation board to financially aid survivors whose available relief fails to assuage the economic loss resulting from their injuries.[16]

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10. Alianza Nacional de Campesinas, *700,000 Female Farmworkers Say They Stand With Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017, 11:11 AM), https://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/.

11. Ariel Ramchandani, *There's a Sexual-Harassment Epidemic on America's Farms*, ATLANTIC (Jan. 29, 2018), https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109/.

12. Sasha Khokha, *Prosecuting Sexual Harassment on Calif. Farms*, NPR (Aug. 1, 2006, 1:00 PM), https://www.npr.org/templates/story/story.php?storyId=5597646.

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Part IV.

16. *See infra* Part V.

II. THE DEVELOPMENT OF U.S. AGRICULTURAL LABOR PROTECTIONS

The vestiges of slavery, subsisting in the inadequate protections of farmworkers, remain a pervasive and systemic issue within the agricultural industry.[17] An estimated 1.4 million farmworkers work in the agricultural industry in the United States.[18] While the U.S. economy was built on the backs of fieldworkers, the law has consistently failed to protect this critical workforce, ignoring the vulnerabilities unique to this industry. From the National Labor Relations Act and the Fair Labor Standards Act to the Civil Rights Act of 1964 and the Civil Rights Act of 1991, legal protections either excluded farmworkers entirely or lacked bite to transform adverse workplace conventions within the agricultural industry.[19]

A. The National Labor Relations Act and the Fair Labor Standards Act

In the 1930s, the Great Depression catalyzed a social and political movement for the advancement of labor rights.[20] Resolved in reviving a dispirited economy, President Franklin D. Roosevelt campaigned on New Deal legislation which sought to increase government protections of the worker.[21] At decade's end, Congress passed the first labor rights legislation: the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA).[22] While these acts introduced notable government legislation concerning the workplace,[23] political differences led to the "racialized and gendered exclusion" of agricultural worker protections.[24]

Although slavery legally ended seventy years prior, the Southern economy depended heavily on the "hyper-exploitation of Black

17. *See* Poo & Ramírez, *supra* note 1 ("This exclusion of domestic workers and farmworkers from labor protections didn't begin with Title VII. Its roots extend back to America's legacy of slavery and Jim Crow . . . .").

18. BON APPÉTIT MGMT. CO. FOUND., INVENTORY OF FARMWORKER ISSUES AND PROTECTIONS IN THE UNITED STATES ii (2011), https://s3.amazonaws.com/oxfam-us/static/oa3/files/inventory-of-farmworker-issues-and-protections-in-the-usa.pdf.

19. *See* Poo & Ramírez, *supra* note 1.

20. Harmony Goldberg, *The Long Journey Home: The Contested Exclusion and Inclusion of Domestic Workers from Federal Wage and Hour Protections in the United States* 3-4 (Int'l Labour Office, Working Paper No. 58, 2015), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_396235.pdf.

21. *Id.*

22. Jonathan Fox Harris, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA's Future*, 13 CUNY L. REV. 107, 107 (2009).

23. *Id.*

24. Goldberg, *supra* note 20, at 8.

agricultural and domestic labor" in the 1930s.[25] President Roosevelt's New Deal initially offered labor rights and protections for agricultural workers.[26] Yet, legislators vehemently objected to such protections out of fear that the balancing of racial inequity would jeopardize the Southern economy.[27] Legislators also worried that those protections might empower Black Americans to advance past the Southern caste system maintained post-slavery.[28] Consequently, Congress passed the NLRA and FLSA expressly precluding field workers from labor protections.[29]

Notably, the FLSA excluded women fieldworkers from government protections.[30] Fueled by the Civil Rights Movement, female fieldworkers and domestic workers alongside women advocate coalitions protested for coverage under the FLSA.[31] However, because FLSA exclusively regulated interstate commerce and most female workers in the 1930s labored "in locally based services and production industries," thus supporting intra-state commerce,[32] the Act failed to cover the majority of female workers, especially those of color who labored in the fields.[33]

25. Goldberg, *supra* note 20, at 4; *see* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 101 (2011) ("Just as the antebellum southern plantation system depended on the forced labor of black slaves, so postbellum southern agriculture depended on exploitation and subordination of black labor. The formal abolition of slavery in the Constitution made little difference . . . . Agriculture, and the exploitation of black labor to support it, remained particularly and uniquely important to the South during the New Deal Era.").

26. Goldberg, *supra* note 20, at 11 (explaining that while President Roosevelt insisted on the inclusion of farm worker protections, his "administration made it clear to its congressional allies that inclusion of these two populations should be considered expendable bargaining chips in the legislative process.").

27. *Id.* ("The Act made it through the Senate with the inclusion of farm workers and domestic workers intact, but when it came before the House Ways and Means committee - which was predominantly composed of Southern New Deal Democrats - these workers came to be excluded.").

28. Goldberg, *supra* note 20, at 11.

29. *See* Perea, *supra* note 25, at 104.

30. *Id.* at 114.

31. Goldberg, *supra* note 20, at 8-9.

32. *Id.* at 7.

33. *Id.* ("The Fair Labor Standards Act only covered only 14% of working women and almost completely excluded black workers of both genders, many of whom were domestic workers or farm laborers.").

B. The Civil Rights Act of 1964

Thirty years later, a second movement driven by racial injustice and inequality demanded civil rights legislation. The Civil Rights Movement reached a critical juncture in the 1960s.[34] While citizens grew accustomed to widespread discrimination, the horrific violence against civil rights protestors, displayed on television screens and in print across the United States, eroded citizens' complacency towards discrimination.[35] In 1963, President John F. Kennedy confronted the issue of discrimination and called upon Congress to enact legislation protecting all citizens of the United States: "[t]he heart of the question is whether all Americans are afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated."[36]

Congress answered the President's call to action. With great compromise to the proposed legislation and "with the mobilization of the civil rights and labor organizations and strong presidential leadership," Congress enacted the Civil Rights Act of 1964.[37] Title VII of the Act stood as a landmark victory for workers by introducing work-place protections against discrimination based on race, color, religion, sex, and national origin.[38] Yet, on trend with prior employment legislation, significant compromise in the passing of the Act resulted in Title VII lacking sufficient enforcement mechanisms to adequately protect workers.[39]

Originally, the Civil Rights Act of 1964 did not contain "sex" as a protected category.[40] But upon the National Women's Party's insistence, House Representative Howard W. Smith added "sex" to Title VII in advance of the legislation reaching the floor for a vote.[41]

34. EEOC, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 1 (2000).

35. *Id.*

36. *Id.* at 1-2.

37. *Id.* at 2. After President Kennedy's assassination, President Johnson became a fervent advocate of the Civil Rights Movement and the passage of civil rights legislation. *Id.* ("[The President,] addressing a joint session of Congress, stated: 'We have talked long enough in this country about civil rights. It is time to write the next chapter and to write it in the books of law . . . . No eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long.' ").

38. *Id.* at 3. The Supreme Court recently held employment discrimination on the basis of sex includes discrimination based on sexual orientation. Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).

39. EEOC, *supra* note 34, at 3.

40. *Id.* at 7.

41. Bruce Dierenfield, *Howard W. Smith (1883-1976)*, ENCYCLOPEDIA VA., https://www.encyclopediavirginia.org/Smith_Howard_Worth_1883-1976#start_entry (last visited Feb. 17, 2021).

Congressman Smith, however, strongly opposed the Civil Rights Act; in fact, he used the addition as a ploy to detract supporters from passing the Act.[42] While the inclusion of "sex" did not deter votes, Congress had not intended to pass legislation for the equal treatment of women in the workplace.[43]

C. The Civil Rights Act of 1991

Motivated by a succession of Supreme Court decisions shielding employers from liability,[44] Congress sought to strengthen the meager enforcement provisions of the Civil Rights Act of 1964.[45] Congress introduced the Civil Rights Act of 1990 and H.R. 1, but both bills failed to survive debate.[46] The Civil Rights Act of 1991 acted as a "compromise" between both bills, and the Act passed with "no committee hearings, no reports, and only abbreviated floor debate on the final provisions of the Act."[47] In enacting new civil rights legislation, Congress sought to render five Supreme Court decisions,[48] particularly *Wards Cove Packing Co. v. Atonio*,[49] and *Price Waterhouse v. Hopkins*,[50] ineffectual.[51]

In *Wards Cove*, respondent raised a disparate-impact claim[52] under Title VII of the Civil Rights Act of 1964 alleging petitioner engaged in

42. EEOC, *supra* note 34, at 7; Dierenfield, *supra* note 41.

43. EEOC, *supra* note 34, at 7 ("The amendment stayed in because female members of Congress argued that there was a need to protect equal job opportunities for women. Congresswoman Katherine St. George of New York argued that she could think of 'nothing more logical than this amendment' and that while women did not need any special privileges 'because we outlast you, we outlive you . . . we are entitled to this little crumb of equality.' ").

44. Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304, 304-05 (1992) (explaining that Patterson v. McLean Credit Union, 491 U.S. 164 (1989), held "an 1866 statute does not prohibit racial harassment . . . beyond the" scope of the contract but, the Civil Rights Act of 1991 amended "contract" to mean at any point throughout the business relationship; Martin v. Wilks, 490 U.S. 755 (1989), permitted challenges to consent decrees "many years after its issuance" of which the Act limited challenges within a "reasonable" time after issuance; Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989), shortened the "time limit for challenging a discriminatory seniority system" but the Act reversed the holding by expanding the circumstances when individuals may bring forth challenges).

45. EEOC, *supra* note 34, at 53.

46. David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, 8 LAB. LAWYER 849, 853 (1992).

47. *Id.*

48. *See* Loudon, *supra* note 44, at 304-05.

49. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

50. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

51. EEOC, *supra* note 34, at 53. Several Supreme Court decisions such as *Price Waterhouse v. Hopkins* and *Wards Cove Packing Co. v. Atonio* inspired separate amendments in the Civil Rights Act of 1991. *Id.* ("Both cases were seen as having made it more difficult for plaintiffs to prevail in employment discrimination lawsuits.").

52. *Wards Cove*, 490 U.S. at 656.

discriminatory employment practices.[53] The respondents, nonwhite cannery workers, claimed petitioner preferred whites over nonwhites in hiring for the greater paying skilled jobs and separated workers within housing and cafeterias based on race.[54] Breaking from precedent, the Supreme Court held the burden rests on the plaintiff to show the "specific employment practice . . . created the disparate impact."[55] Once established, the defendant may offer "any business justification" to dispel allegations of discriminatory practices; the justification need not be "essential," only "legitimate."[56] With the passage of the Civil Rights Act of 1991, Congress reversed *Wards Cove* and raised the employer's burden.[57] The Act "require[es] the employer to show that an employment practice is justified by 'business necessity.' "[58]

Similarly in *Price Waterhouse*, the Supreme Court mitigated employers' liability against employment discrimination claims.[59] Respondent, a female manager, alleged Petitioner denied her promotion for partnership based on gender, and thus, violated Title VII of the Civil Rights Act of 1964.[60] While the Supreme Court held petitioner made sex-based stereotype comments within promotion evaluations, the Court held petitioner may evade liability through "mixed motive" employment decisions by showing "it would have made the same decision even if it had not taken the plaintiff's gender into account."[61] With similar treatment to *Wards Cove*, Congress nullified the holding in *Price Waterhouse* by adding a provision in the Civil Rights Act of 1991 in which "any reliance on a discriminatory reason is illegal."[62]

In conjunction with the Supreme Court cases limiting employee protections, the 1991 confirmation hearings of Judge Clarence Thomas to the Supreme Court also compelled Congress to enact the Civil Rights Act of 1991.[63] Professor Anita Hill's testimony concerning the sexual harassment from then Judge Clarence Thomas illuminated the inadequate employment protection combatting workplace sexual harassment "and the general unavailability of economic relief for . . . [survivors] of sexual harassment."[64] The amended Act strengthened

53. *Id.* at 647.
54. *Id.* at 647-48.
55. *Id.* at 657.
56. *Id.* at 658-59.
57. *See* Loudon, *supra* note 44, at 305.
58. *Id.*
59. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).
60. *Id.* at 231.
61. *Id.* at 247 n.12, 258.
62. Loudon, *supra* note 44, at 305.
63. *Id.* at 307.
64. *Id.*

Title VII employee protections by allowing plaintiffs to recover compensatory and punitive damages for employment discrimination.[65] Congress added the recovery of damages to effectuate particular objectives: to make the survivor whole, and moreover, to punish and deter discrimination.

Compensatory damages aim to make an injured person whole.[66] In essence, the plaintiff should "be restored to the condition in which he would have been had the wrongful act not taken place."[67] Prior to the Civil Rights Act of 1991, plaintiffs could only recover economic losses.[68] Yet, the effects of sexual harassment in the workplace extend far beyond economic injuries.[69] Survivors of sexual harassment experience physical injury as well as mental trauma, including "damage to self-esteem, personal relationships, and reputation."[70] In amending the Act to include compensatory damages, Congress expanded relief to compensate non-economic injuries.[71] Moreover, the availability of compensatory damages encourages employees to bring forth claims whereas prior to the amendment, the lack of compensatory damages acted as a deterrent to pursuing claims that would fail to redress the employee's injuries.[72]

In contrast, punitive damages seek to punish the wrongdoer and deter potential illegal conduct in the future.[73] While centuries of ancient social and religious codes utilized punitive damages, the United States Supreme Court first addressed punitive damages in 1852.[74] In *Day v. Woodworth*,[75] the Court held the jury possessed the power to impose punitive damages in suits arising from tort law.[76] The jury may also evaluate the depravity of the illegal conduct outside of damages focused

65. EEOC, *supra* note 34, at 53. The Civil Rights Act of 1991 also allowed for jury trials, amongst other amendments. *Id.*

66. René Demogue, *Validity of the Theory of Compensatory Damages*, 27 YALE L.J. 585, 585 (1918).

67. *Id.*

68. *See* Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEMINISM 299, 299-301 (1991).

69. *See id.*

70. *Id.* at 300.

71. Civil Rights Act of 1991, 42 U.S.C.A. 1981 (West 1991).

72. *See* Mathews, *supra* note 68, at 318.

73. Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 743 (2008).

74. *Id.* at 743-44.

75. Day v. Woodworth, 54 U.S. 363 (1852).

76. *Id.* at 373.

on restitution.[77] Further, *Day* noted the acceptable availability of punitive damages within common law and by statute.[78]

Enacting the Civil Rights Act of 1991, legislators intended to dissuade employment discrimination by including punitive damages.[79] The availability of punitive damages should act as a deterrent for discriminatory conduct in the workplace.[80] Moreover, the damages are "regarded as one of the single greatest motivators" for corporations to encourage anti-discriminatory behaviors and implement measures that promote safe workplace environments.[81]

III. IDENTIFICATION OF THE LEGAL PROBLEM: STATUTORY CAPS

Compromise became a necessity to advance the legal protections afforded to workers, especially female workers.[82] The Civil Rights Act of 1991 broadened the scope of available remedies to employees who endured sexual harassment in the workplace.[83] Plaintiffs raising sex discrimination claims could seek pecuniary losses and obtain compensatory and punitive damages.[84] Still, Congress placed a statutory cap on compensatory and punitive damage awards.[85] This cap intentionally undercut the effectiveness of damages and signaled that sex discrimination, which overwhelmingly affects women, was a lower priority for Congress.[86] Consequently, the cap on compensatory and punitive damages inadequately redresses survivors' injuries and fails to encourage employers to implement and enforce sufficient workplace protections. While the statutory cap impacts all employees who have viable sexual harassment claims, the statutory cap markedly affects women fieldworkers in the agricultural industry. The severe lack of adequate employee protections in conjunction with the vulnerabilities this workforce inhabits make women fieldworkers highly susceptible to sexual harassment and prevents many from taking legal action, especially when there are limited remedies.

77. *See id.* at 370-71.
78. *Id.* at 370-73.
79. Seiner, *supra* note 73, at 740.
80. *Id.*
81. *Id.*
82. *See* Cathcart & Snyderman, *supra* note 46, at 853.
83. Civil Rights Act of 1991, 42 U.S.C.A. 1981 (West 1991).
84. *Id.*
85. *Id.*
86. *See* Lynn Ridgeway Zehrt, *Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 YALE J.L. & FEMINISM 249, 316 (2014).

IV. ANALYSIS

A. Statutory Analysis: The Civil Rights Act of 1991

Congress enacted the Civil Rights Act of 1991 to strengthen employee protections through the addition of compensatory and punitive damages.[87] The passage of the Act "imperfectly resolve[d] two years of controversy between Congress, the President, and various civil rights and business organizations."[88] Congress held the Act as a "victory for women and civil rights advocates,"[89] but while it enlarged the available recovery for survivors of sex discrimination, the effects of the statutory cap pushed back against Congress's self-proclaimed triumph.

The Civil Rights Act of 1991 provides that in a claim filed under "the Civil Rights Act of 1964 . . . against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and punitive damages."[90] The expansion of available remedies largely impacted survivors of workplace sexual harassment since those plaintiffs could only obtain relief for lost wages.[91] Nonetheless, the Act limits the amount of compensatory[92] and punitive damages each party may receive:

> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.[93]

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87. *Id.* at 249-50.

88. Cathcart & Snyderman, *supra* note 46, at 851.

89. Zehrt, *supra* note 86, at 249.

90. Civil Rights Act of 1991, 42 U.S.C.A. 1981 (West 1991).

91. Cathcart & Snyderman, *supra* note 46, at 858 ("Since harassment often occurs without loss of pay, the prior law provided little or no monetary remedy for such harassment.").

92. *Id.* at 858-59 (The limit on compensatory damages pertains to "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.").

93. Civil Rights Act of 1991, 42 U.S.C.A. 1981 (West 1991).

Indiscriminately, Legislators affixed certain monetary limits to ranges of employee counts as the determinate for available compensatory and punitive damages.[94] The limit of recovery for sex-based discrimination compared to the relief available for other employment discrimination claims can be attributed to the lack of female representation at the time of the Act's passage.[95] Notably, the "102nd Congress had only three female Senators and thirty female Representatives."[96] The Senate, under the George H.W. Bush Administration, proffered two main rationales for the statutory caps: to deter trivial claims and to limit the potential strife within the workplace following litigation.[97]

Instead, the statutory caps re-victimize survivors whose suffering is pre-quantified based on the amount of respondent's hired employees rather than from the jury's evaluation of evidence and testimony. Moreover, the cap allows the harasser to go unpunished for the harm caused, placing the financial burden on the survivor.[98]

Thirty years have passed since the enactment of the Civil Rights Act of 1991. For three decades, the statutory cap remains unchanged amongst price inflation and increased public dialogue concerning sex discrimination.[99] Since 1991, the national average wage has increased by approximately forty percent, yet the maximum recovery still stands at $300,000.[100] Furthermore, the statutory cap fails to deter sex discrimination. In 2018, the EEOC reported 13,055 sex discrimination charges filed with the commission.[101] Of those allegations, 7,609 claims alleged sexual harassment.[102] The sex-based harassment claims increased during the height of the "me too" movement,[103] likely reflecting a greater sense of agency within the "me too" era.

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94. Zehrt, *supra* note 86, at 300.
95. *Id.* at 316.
96. *Id.*
97. *Id.* at 307-08.
98. *Id.* at 308-09.
99. *See* HUMAN RIGHTS WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT 96 (2012), https://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf.
100. *See* SOC. SEC. ADMIN., NATIONAL AVERAGE WAGE INDEX, https://www.ssa.gov/oact/cola/AWI.html#Series (last visited Feb. 13, 2021) (percentage calculated with 2018 data).
101. *Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2019*, U.S. EQUAL EMP'T OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (last visited Feb. 13, 2021).
102. *Id.*
103. *Id.*

B. The Statutory Cap Aggravates the Heightened Vulnerabilities of the Fieldworker

The compensatory and punitive damage cap particularly affects the agricultural industry because of the certain vulnerabilities that women fieldworkers face, making them uniquely susceptible to workplace sexual harassment. First, an inherent imbalance of power persists through the structure and nature of agricultural work; without proper protections for employees, the risk of sexual violence increases.[104] Second, fieldworkers' immigration status precludes many workers from seeking legal action, especially when the cause of action lacks adequate remedies.[105] Third, fieldworkers lack access to crucial social services that provide medical, legal, and financial support to survivors.[106]

1. The Nature of Fieldwork

The agricultural industry's employment structure precludes survivors of workplace sexual harassment from obtaining adequate relief within the "cap" requirements of the Civil Rights Act of 1991. Further, the disproportionate imbalance of power within the agricultural employer-employee relationship heightens the risk of sexual harassment.[107] Growers retain workers through either direct-hire employment or contract employment.[108] Direct-hire fieldworkers are hired and managed by growers whereas contract fieldworkers are employed and supervised by farm labor contractors.[109] In the United States, approximately twenty percent of fieldworkers are employed by farm labor contractors.[110] Growers utilize farm labor contractors because of the need for seasonal labor and the desire to limit employment liability.[111]

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104. Bernice Yeung & Grace Rubenstein, *Female Workers Face Rape, Harassment In U.S. Agriculture Industry*, PBS (June 25, 2013, 2:39 AM), https://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/female-workers-face-rape-harassment-in-u-s-agriculture-industry/ (" ' Sexual violence doesn't happen unless there's an imbalance of power,' Tamayo said. 'And in the agricultural industry, the imbalance of power between perpetrator, company and the worker is probably at its greatest.' ").

105. Sara Kominers, *Working in Fear: Sexual violence against women farmworkers in the United States*, OXFAM AM. 27-28 (2015), https://www.northeastern.edu/law/pdfs/academics/phrge/kominers-report.pdf.

106. HUMAN RIGHTS WATCH, *supra* note 99, at 43-48.

107. *See* Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 185 (2002).

108. *Id.* at 162.

109. *Id.* at ii.

110. JBS INT'L, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015-2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS, RESEARCH REPORT NO. 13, at ii (2018).

111. HUMAN RIGHTS WATCH, *supra* note 99, at 19-21.

Due to seasonal demands, growers benefit from using farm labor contractors to employ a temporary and seasonal workforce quickly.[112] While the grower administers the contract fieldworkers' salary to the farm labor contractor,[113] the contract fieldworker remains the employee of the farm labor contractor.[114] Consequently, contract fieldworkers earn less money than direct-hire fieldworkers and lose employment benefits that growers provide to direct-hire fieldworkers.[115] However, the hardship of gaining full-time employment compels laborers to accept contract fieldwork and prevents contract fieldworkers from protesting over unjust treatment.[116]

Moreover, growers may evade liability for substandard treatment of contract fieldworkers.[117] Since the farm labor contractor stands as the employer to the contract fieldworker, the grower avoids liability.[118] The fear of joint-liability also deters growers from intruding into the farm labor contractor's management of his employees.[119] Further, growers often skirt reporting and sanction provisions of the Immigrant Reform and Control Act of 1986[120] by securing unauthorized labor through farm labor contractors.[121] The farm labor contractor acts "as a shield between the grower and the INS with respect to responsibility for the verification of workers' documents" since the farm labor contractor is the employer of the fieldworker.[122] The grower exploits the power disparity within the

112. *See id.*

113. Steven Alan Elberg, *Agriculture and the Immigration Reform and Control Act of 1986: Reform or Relapse?*, 3 SAN JOAQUIN AGRIC. L. REV. 197, 215 (1993).

114. Wage & Hour Div., *Fact Sheet #35: Joint Employment and Independent Contractors Under the Migrant and Seasonal Agricultural Worker Protection Act*, U.S. DEP'T OF LAB., https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs35.pdf (last visited Feb. 17, 2021) ("An independent contractor is an individual who performs services but is not an employee of the person utilizing the services. Independent contractors are not covered by MSPA protections that apply to employees."); Wage & Hour Div., *Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/agriculture/mspa (last visited Feb. 17, 2021) ("The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures and recordkeeping. The MSPA also requires farm labor contractors to register with the U.S. Department of Labor (DOL).").

115. HUMAN RIGHTS WATCH, *supra* note 99, at 20-21.

116. *Id.* at 19.

117. *Id.* at 20-21.

118. *Id.* at 21.

119. *Fact Sheet #35*, *supra* note 114 ("[F]ailure to provide the required [MSPA] protections will result in joint liability for all joint employers.").

120. Elberg, *supra* note 113, at 197-98 ("The primary aim of IRCA was to reduce the overall influx of illegal refugees to the U.S., while asserting greater levels of management and control over the rising tide of foreign farm workers seeking employment in U.S. agriculture.").

121. HUMAN RIGHTS WATCH, *supra* note 99, at 20.

122. Elberg, *supra* note 113, at 215.

employment structure by failing to provide adequate workplace protections for the unauthorized contract fieldworker which foments predatory behaviors.[123] This power imbalance severely increases the risk of sexual violence.

In addition to the heightened susceptibility of workplace sexual harassment, those who have a sexual harassment cause of action may not receive adequate compensatory or punitive damages based on the grower's number of hired employees. According to the 2007 Census of Agriculture, eighty-eight percent of all United States farms hired ten employees or less.[124] Pursuant to the Civil Rights Act of 1991, a successful plaintiff filing suit against one of those farms with ten employees or less may only recover fifty thousand dollars in punitive damages.[125] This limited award fails to compensate the survivor and, moreover, neglects to deter and punish growers who either ignore sexual harassment within their fields or who lack adequate protections for their fieldworkers.

Furthermore, the secluded nature of the work environment and on-site residency of the fieldworker increases the risk of sexual violence.[126] Agricultural workers often labor in isolated orchards or fields in which foliage and branches obscure harassing or violent acts.[127] The foremen's intentional placement of women fieldworkers in secluded locations escalates the threat of sexual violence because foremen "have easy access to such individuals, and there generally are no witnesses to the harassment."[128] Moreover, the need for "stoop labor" places women laborers in compromising positions to reap labor-intensive crops that grow close to the ground.[129]

The workplace residency also heightens the fieldworker's vulnerability to sexual harassment. Roughly twenty percent of agricultural workers utilize employee housing.[130] Generally, landowners

123. *Id.*

124. BON APPÉTIT MGMT. CO. FOUND., *supra* note 18, at 2, 9.

125. Civil Rights Act of 1991, 42 U.S.C.A. 1981 (West 1991).

126. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_ftn132 (last visited Dec. 18, 2019); *see* HUMAN RIGHTS WATCH, *supra* note 99, at 32.

127. Waugh, *supra* note 4, at 245; Kominers, *supra* note 105, at 17.

128. FELDBLUM & LIPNIC, *supra* note 126; Waugh, *supra* note 4, at 245 (noting that in California, men occupied ninety-two percent of "supervisory roles . . . another major risk factor for sexual harassment").

129. Waugh, *supra* note 4, at 245 (exposing the prevalence and experiences of sexual harassment of immigrant field laborers on California farms and documented that crop workers handling "strawberries, lettuce, and broccoli required women to bend over . . . [making] respondents vulnerable to sexual stares, verbal comments, and unwanted grabbing").

130. Kominers, *supra* note 105, at 17.

allocate housing authority to foremen, in addition to field placement and wage distribution.[131] Employee housing overpopulates workers within single residencies that "force women to live with multiple strangers and in insecure places where they can be vulnerable to physical assaults."[132] Not only may the fieldworker fear sexual harassment from co-workers living within employee housing, but the fieldworker may also fear predatory conduct by the foreman knowing her place of residence. Since the foreman possesses significant power over the fieldworker's life, the available legal remedies are severely disproportionate to the consequences the fieldworker may face.

2. Immigration Status

Although Title VII protects all workers regardless of immigration status, the fear of deportation dissuades fieldworkers from raising sexual harassment claims.[133] Non-citizen fieldworkers—both unauthorized and H-2A workers—remain especially prone to workplace maltreatment because their ability to work and live in the United States is beholden to their employer.[134] Moreover, sexual harassment endured in the fields, akin to the sexual assault suffered while crossing the border, re-traumatizes women fieldworkers and often suppresses them from reporting.[135] Thus, the strong prevalence of worker exploitation signals that the statutory cap neither deters nor motivates employers to implement adequate protections for fieldworkers.[136]

In the United States, approximately six out of ten agricultural workers are undocumented.[137] The threat of deportation, coupled with the stress of economic insecurity and family separation, compels undocumented women fieldworkers to endure employer abuse in silence.[138] Countless women crop workers "accept the sexual abuse as a burden they must bear to remain in the country."[139] Further, the mistrust between law enforcement and local immigrant communities inhibits

131. HUMAN RIGHTS WATCH, *supra* note 99, at 22.

132. BON APPÉTIT MGMT. CO. FOUND., *supra* note 18, at 11.

133. HUMAN RIGHTS WATCH, *supra* note 99, at 19.

134. *Id.* at 6.

135. AMNESTY INT'L, INVISIBLE VICTIMS: MIGRANTS ON THE MOVE IN MEXICO 15 (2010), https://www.amnesty.org/download/Documents/36000/amr410142010eng.pdf.

136. *See generally* S. POVERTY LAW CTR., INJUSTICE ON OUR PLATES (2010), https://www.splcenter.org/20101107/injustice-our-plates (providing examples of continued abuses among current availability of punitive and compensatory damages).

137. *Id.* Although undocumented workers have a private right of action, "most undocumented workers have no practical way to enforce their rights. And employers know that." *Id.*

138. Kominers, *supra* note 105, at 27.

139. *Id.*

fieldworkers from reporting sexual harassment to the police. This mistrust deepens when law enforcement aids federal initiatives to deport undocumented fieldworkers.[140]

H-2A fieldworkers, although authorized, also stand vulnerable to sexual harassment and exploitation.[141] The H-2A visa program hires agricultural workers outside the United States for growers that need seasonal or temporary farmworkers; this program also benefits fieldworkers seeking employment within the United States.[142] However, the H-2A visa is contingent on the fieldworker maintaining employment with the same grower who applied for the H-2A worker.[143] As such, the program places the fieldworkers' immigration status in the hands of the employers.[144] This power imbalance leaves H2-A fieldworkers more susceptible to sexual harassment because fieldworkers face deportation if they leave the job.[145] Because of these vulnerabilities, the statutory cap fails to motivate growers to protect their workers and indicates workplace harassment is not a priority.

3. Limited Social Services

Minimal access to social services further disadvantages survivors of sexual violence within the agricultural industry.[146] Social services provide critical aid to fieldworkers seeking emotional support or legal action.[147] Yet, these services often do not meet the needs of the community they seek to serve; remote service centers, language barriers, and limited outreach efforts hinder access to critical support.[148] Due to limited access to social services, the financial and emotional burden to report and file suit falls onto the fieldworker.[149]

Statutory caps on damages neglects to compensate for the exceptionable obstacles immigrant women fieldworkers must overcome. Since fieldworkers labor in rural areas, many social service agencies lack resources to provide sweeping support in vast agricultural areas.[150]

140. *Id.* For instance, Section 287(g) of the Immigrant Nationality Act or the "287(g) program" permits law enforcement to "detain unauthorized immigrants and turn them over to federal immigration authorities." *Id.*

141. *Id.* at 28.

142. *H-2A Visa Program*, U.S. DEP'T OF AGRIC., https://www.farmers.gov/manage/h2a (last visited Apr. 12, 2021).

143. *See id.*

144. HUMAN RIGHTS WATCH, *supra* note 99, at 16.

145. *See id.*

146. Kominers, *supra* note 105, at 5, 36-37.

147. *See generally* HUMAN RIGHTS WATCH, *supra* note 99.

148. Kominers, *supra* note 105, at 36-37.

149. Yeung & Rubenstein, *supra* note 104.

150. *See id.*

Fieldworkers may also lack transportation to reach particular agencies. Even if an accessible social service exists, agencies frequently "lack culturally and linguistically appropriate staff, materials [and] services."[151] For instance, the lack of Spanish-speaking providers greatly restricts fieldworkers' access to social services as the primary language of at least eighty percent of fieldworkers is Spanish.[152] Moreover, immigrant fieldworkers may not have familiarity with the legal protections and social services that exist to safeguard and support workers in the United States.[153] Thus, an immigrant fieldworker bringing forth a sexual harassment claim not only endures the trauma most sexual assault survivors confront, but must overcome many additional barriers and vulnerabilities.

C. A $200,000 Loss: EEOC v. Harris Farms, Inc.

EEOC v. Harris Farms, Inc.,[154] demonstrates how the statutory cap operates, directly reducing a fieldworker's recovery. In 2002, the U.S. Equal Employment Commission filed suit against Harris Farms, Inc. under Title VII, alleging sexual harassment of Mrs. Olivia Tamayo ("Tamayo").[155] Tamayo immigrated to the United States from Mexico and found employment as a seasonal fieldworker at Harris Farms, "one of the largest agribusinesses in the nation."[156] Harris Farms eventually hired Tamayo as a year-round employee.[157] Throughout her fifteen-year tenure at Harris Farms, Tamayo endured incessant sexual harassment[158] and was raped three times by the foreman.[159] Fears of further harassment, the safety of her family, and the risk of unemployment initially silenced Tamayo from reporting the harassment:

> For a long time, I remained silent about what my supervisor did and said to me. He carried a gun and a knife, and bragged that he had fought another woman's husband before and gotten away with it . . .

151. Kominers, *supra* note 105, at 37.

152. *Id.* at 28-29, 36-37; HUMAN RIGHTS WATCH, *supra* note 99, at 16 n.24.

153. *See generally* FELDBLUM & LIPNIC, *supra* note 126.

154. EEOC v. Harris Farms, Inc., No. CIV F 02-6199 AWI LJO, 2005 U.S. Dist. LEXIS 37399 (E.D. Cal. Sept. 30, 2005).

155. *Id.* at *10 (Ms. Tamayo filed a third-party claim in 2004). For the remainder of the section, Ms. Olivia Tamayo is respectfully referred to as "Tamayo."

156. Press Release, U.S. Equal Emp't Opportunity Comm'n, Jury Orders Harris Farms Pay $994,000 In Sexual Harassment Suit By EEOC (Jan. 21, 2005), https://www.eeoc.gov/eeoc/newsroom/release/1-21-05.cfm.

157. *Id.*

158. *Id.*

159. *Id.*; *Harris Farms, Inc.*, 2005 U.S. Dist. LEXIS 37399, at *15.

> after he attacked me out of jealousy for speaking with another male supervisor, I decided I had to speak out.[160]

Upon receiving Tamayo's complaints, Harris Farms commenced an investigation, which fell short of competent.[161] The outside consultant Harris Farms recruited relied on witnesses who asserted that Tamayo and her harasser's relationship was consensual.[162] The consultant informed Tamayo her claims were unconfirmed, yet recommended that Harris Farms management require the harasser to complete individual sexual harassment training and to separate work assignments between the two parties.[163] Critically, the consultant failed to communicate this recommendation to Tamayo's supervisors.[164] The harassment ensued, and Tamayo once again reported the claims of sexual harassment to Harris Farms—to no avail.[165] With access to and support from a social service, Tamayo filed the sexual harassment charge with the EEOC.[166] Harris Farms finally responded to her claims, but with retaliatory measures rather than employment protections.[167]

Following twenty-three days of trial, the jury entered a verdict in support of Tamayo's Title VII claims.[168] The jury granted "$350,000 in compensatory damages, $53,000 in front pay, and $91,000 in back pay . . . and awarded $500,000 . . . in punitive damages."[169] The compensatory award met the requisite statutory cap of the Civil Rights Act of 1991 since the statute excludes the incorporation of backpay into the damage calculation.[170] Albeit, the punitive damage award exceeded the statutory cap.[171] The Court later reduced the punitive damage award to $300,000 to meet the cap.[172]

EEOC v. Harris Farms, Inc. became the first "of nine sexual harassment lawsuits filed by the EEOC's San Francisco District Office

160. Press Release, *supra* note 156.
161. *See Harris Farms, Inc.*, 2005 U.S. Dist. LEXIS 37399, at *13-*16.
162. *Id.* at *13.
163. *Id.* at *14-*15.
164. *Id.* at *15.
165. *Id.*
166. Khokha, *supra* note 12.
167. Press Release, *supra* note 156 ("This was very hard and very frightening for me, but I finally reported his attacks, and I reported the talk and threats that some co-workers were saying about me. That's why it was so devastating when the company failed to protect me, let me work alone in the fields, and instead punished me with a suspension.").
168. EEOC v. Harris Farms, Inc., No. CIV F 02-6199 AWI LJO, 2005 U.S. Dist. LEXIS 37399, at *1-*10 (E.D. Cal. Sept. 30, 2005).
169. *Id.* at *10-*11.
170. Civil Rights Act of 1991, 42 U.S.C.A. 1981 § 1977A (b)(2) (West 1991).
171. Civil Rights Act of 1991, 42 U.S.C.A. 1981 § 1977A (b)(3)(D) (West 1991).
172. *Harris Farms, Inc.*, 2005 U.S. Dist. LEXIS 37399, at *11.

against a California agricultural employer . . . to go to trial."[173] This landmark case championed all fieldworker survivors of sexual violence. Moreover, the jury verdict signaled to agricultural employers that the sexual harassment of this vulnerable population will not go unpunished. EEOC Attorney Bill Tamayo[174] asserted *EEOC v. Harris Farms, Inc*. enforced "[t]he message . . . that a farm worker could stand up against a major company and assert her civil rights . . . [a]nd that's radical that farm worker immigrant women particular[ly] who don't speak English or very limited English speaking would be able to take on a big company and win."[175] However, in the context of the Civil Rights Act of 1991, this victory is bittersweet. *EEOC v. Harris Farms, Inc*. marked a significant achievement for farmworker rights and brought justice for Oliva Tamayo.[176] Yet, this case also illustrates the problematic nature of the statutory caps. The Civil Rights Act of 1991 required the Court to reduce the jury award from $500,000 in punitive damages to $300,000.[177] Not only does the arbitrary cap fail to deter or punish one of the largest agricultural businesses in the United States, but the limitation places the burden back onto the survivor to recover costs of the harassment.[178]

V. PROPOSAL

With the enactment of the Civil Rights Act of 1991, Congress intended to bolster workplace protections by allowing claimants to recover compensatory and punitive damages.[179] However, the statutory cap limiting the amount of recoverable damages leaves fieldworker survivors of sexual harassment inadequately compensated for their injuries and allows employers to go unpunished for exploiting this particularly vulnerable workforce. Despite the injuries sustained or the pervasiveness of the harassment, survivors may only recover $300,000.[180] Hence, the statutory cap under the Civil Rights Act of 1991 "devalue[s] and diminish[es] claims of sex discrimination by refusing to award full and complete remedies to its victims."[181] Thus, Congress should eliminate the statutory cap; notwithstanding the statutory cap's

173. Press Release, *supra* note 156.
174. Khokha, *supra* note 12. Olivia Tamayo bares no relation to Bill Tamayo.
175. *Id.*
176. *See* Press Release, *supra* note 156.
177. EEOC v. Harris Farms, Inc., No. CIV F 02-6199 AWI LJO, 2005 U.S. Dist. LEXIS 37399, at *11 (E.D. Cal. Sept. 30, 2005).
178. *See generally id.*
179. Zehrt, *supra* note 86, at 249-50.
180. Civil Rights Act of 1991, 42 U.S.C.A. 1981 § 1977A (b)(3)(D) (West 1991).
181. Zehrt, *supra* note 86, at 316.

removal, Congress should establish a federal victim compensation board to adequately redress survivors' losses.

A. Removal of Statutory Cap

Presently, the statutory cap conveys the message that "victims of sex discrimination in the workplace should be afforded less protection and legal recourse" than other claims of discrimination.[182] To remedy the gender bias embedded in the Civil Rights Act of 1991, Congress must remove the statutory cap on compensatory and punitive damages.[183] This proposal is not unfamiliar to Congress.[184] The statutory cap stood as a concession for the inclusion of compensatory and punitive damages, but Senators endeavored to remove the cap soon after the Act passed, albeit unsuccessfully.[185] To repeal the cap would further the Act's fundamental goals of curtailing employment discrimination while expanding relief for sexual harassment and discrimination.[186]

Uncapped jury-awarded compensatory damages would more adequately provide relief to fieldworker claimants bringing forth workplace sexual harassment and sexual assault claims. The power imbalance underlying the grower-fieldworker relationship coupled with the unique—and compounded—vulnerabilities fieldworkers face as a result of language barriers, citizenship status, and housing dependency impedes plaintiffs from seeking legal action.[187] Moreover, fieldworkers may find difficulty accessing social services capable of providing low cost medical or legal assistance in rural areas.[188] Hence, the existence of adequate remedies would encourage fieldworkers to bring forth claims in which their injuries may be redressed.

The repeal of the punitive damage cap will increase protections for agricultural workers in the fields and signal to the agricultural industry that workplace sexual harassment is a priority. Over eighty percent of farms employ ten workers or less which holds these employers

182. *Id.*

183. *Id.* at 251 ("These caps are now, just as they were then, unequal and discriminatory . . . . Most importantly, the legislative history surrounding the enactment of the Civil Rights Act demonstrates that Congress knew it was creating a 'double-standard' that treated women victims as 'second-class citizens,' but it nonetheless approved the caps endorsed by the Bush administration.").

184. *Id.*

185. *Id.* at 250-51 (noting that Senator Kennedy remained an ardent advocate for eliminating the statutory cap and introduced two bills for its removal—both of which failed to pass).

186. *See generally* Civil Rights Act of 1991, 42 U.S.C.A. 1981 (West 1991).

187. *See generally* HUMAN RIGHTS WATCH, *supra* note 99.

188. Kominers, *supra* note 105, at 36-37.

accountable for up to fifty thousand dollars in punitive damages.[189] The repeal of the punitive damage cap, making employers liable to unfettered punitive damages, will prompt farms to implement and enforce workplace protections for their fieldworkers. Thus, the removal of the cap on punitive damages will deter workplace sexual harassment and chastise growers who overlook discriminatory conduct or lack workplace protections.

B. Establishing a Federal Victim Compensation Fund

Irrespective of Congress' decision to maintain the statutory cap, Congress should establish a federal compensation fund to financially support plaintiffs who have endured sexual harassment in the workplace, and for whom the cap on damages failed to provide adequate relief. While Congress does not have a national victim compensation board,[190] Congress did create the Crime Victims Fund under the Victims Crime Act of 1984 (VOCA) to financially compensate victims of violent crime.[191] The Crime Victims Fund allocates money to state government victim compensation boards which in turn reimburses victims for loss of income, medical bills, and other injuries caused by the crime.[192] Modeling the state-run victim compensation boards, Congress should take a two-tiered approach in creating its victim compensation board. First, Congress should establish a set of requirements each plaintiff must meet to receive compensation. Second, Congress should determine which expenses to reimburse.

Although each state governs its own victim compensation program, all programs require victims to meet certain qualifications:[193]

> Generally, a victim must (a) report the crime promptly . . . (b) submit a timely victim compensation application . . . (c) have a cost or loss not covered by insurance or another government benefit program . . . and (d) not have committed a criminal act or some substantially wrongful act that caused or contributed to the crime.[194]

189. BON APPÉTIT MGMT. CO. FOUND., *supra* note 18, at 9.

190. *General Information: Crime Victim Compensation Quarterly*, NAT'L ASS'N OF CRIME VICTIM COMP. BDS., http://www.nacvcb.org/index.asp?sid=7 (last visited Jan. 27, 2020) ("[T]here is no federal or national crime victim compensation program, except for victims of international terrorism committed outside the U.S.").

191. *Crime Victims Fund*, OFF. FOR VICTIMS OF CRIME, https://www.ovc.gov/about/victimsfund.html (last visited Jan. 27, 2020).

192. *See General Information*, NAT'L ASS'N OF CRIME VICTIM COMP. BDS., http://www.nacvcb.org/index.asp?bid=5 (last visited Jan. 27, 2020).

193. *General Information: Crime Victim Compensation Quarterly*, *supra* note 190.

194. *Crime Victim Compensation: An Overview*, NAT'L ASS'N OF CRIME VICTIM COMP. BDS., http://www.nacvcb.org/index.asp?bid=14 (last visited Jan. 27, 2020).

While these standards remain relevant for crime victims, Congress should amend the requirements to adequately determine the eligibility of plaintiffs who have suffered sexual harassment in the workplace, and subsequently need financial aid to recover from those injuries. First, eligibility must depend on a jury verdict in favor of plaintiffs. In anticipation of financial need, plaintiffs should "promptly" report the verdict to the compensation board.[195] A "timely" application for financial assistance should be filed only for outstanding expenses that insurance does not cover or that the government will not subsidize.[196] Lastly, plaintiffs need not demonstrate a lack of criminal activity or contribution to a crime, as required for crime victims seeking compensation, because that would perpetuate victim blaming attributed to survivors of sexual harassment and sexual assault.

In determining the types of expenses that the national compensation will reimburse, Congress should model The California Victim Compensation Board program.[197] The California Legislature underscored how "it is in the public interest to assist residents . . . in obtaining compensation for the pecuniary losses they suffer as a direct result of criminal acts."[198] Following this directive, Congress should compensate medical bills, lost wages, and relocation costs as a public policy initiative to support survivors of workplace sexual harassment and sexual assault whose legal remedies failed to redress their injuries.

The California Victim Compensation Board not only compensates medical bills pertaining to physical injuries,[199] but also compensates emotional injuries if the victim sustained a "physical injury" or the "threat of physical injury."[200] Additionally, the program reimburses expenses related to "outpatient psychiatric, psychological, or other mental health counseling[]."[201] Congress should adopt these provisions. Within the agricultural industry context, fieldworkers lack access to critical social services due to language barriers and the rural location of farms.[202] Furthermore, a considerable percentage of fieldworkers do not have health insurance, and therefore must pay medical costs out-of-pocket.[203] Thus, if Congress remains unwilling to eliminate the statutory

195. *Id.*
196. *See id.*
197. *Id.*
198. CAL. GOV'T CODE § 13950(a) (2002).
199. CAL. GOV'T CODE § 13955 (2002).
200. *Id.*
201. CAL. GOV'T CODE § 13957 (2002).
202. Kominers, *supra* note 105, at 36-37.
203. *Health Care Access*, FARMWORKER JUST., https://www.farmworkerjustice.org/advocacy-programs/health/accessing-healthcare (last visited Jan. 30, 2019).

caps, reimbursing these costs would shift the burden away from the survivor.[204]

Moreover, Congress should reimburse lost wages and relocation costs. The California Victim Compensation Board "[c]ompensate[s] the victim for loss of income directly resulting from the injury."[205] Because of the fieldworkers' vulnerable position, employer abusers may hold wages or terminate employment if fieldworkers report harassment. Thus, the national compensation fund's financial aid may encourage survivors to seek legal action. This provision will benefit seasonal or temporary fieldworkers who fear returning to the fields and who are unable to find employment until the next season.

Moreover, The California Victim Compensation Board reimburses costs of relocating if "necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim."[206] Since agricultural workers utilize employee housing, Congress should compensate relocation expenses for survivors who need to move from the worksite. Without the necessary funds, survivors are forced to remain in employee housing with the fear that the abuser knows her place of residence. Hence, Congress should adopt these provisions to support the survivors' transition away from her abuser. Since the statutory cap fails to provide adequate relief, Congress should create a federal compensation fund to compensate survivors of sexual harassment in remedy of Congress' prior failed attempts to strengthen workplace protections against sex discrimination.

VI. CONCLUSION

Almost thirty years have passed since the passage of the Civil Rights Act of 1991. In nearly three decades, the availability of damages expanded for survivors of sexual assault; the 'me too' movement sparked international, cross-industry dialogue on the issue of sexual harassment in the workplace; and, 144 women now hold office within the 117th Congress.[207]

Amidst progressive change, the statutory cap on compensatory and punitive damages of the Civil Rights of 1991 remains unchanged—even with basic price inflation.[208] In preserving the statutory caps, Congress devalues sex discrimination claims which severely harms survivors of

204. *See* Press Release, *supra* note 156.
205. CAL. GOV'T CODE § 13957.5 (2002).
206. CAL. GOV'T CODE § 13957 (2002).
207. *See* JENNIFER E. MANNING & IDA A. BRUDNICK, CONG. RESEARCH SERV., R43244, WOMEN IN CONGRESS: STATISTICS AND BRIEF OVERVIEW (2020).
208. Zehrt, *supra* note 86, at 315.

sexual harassment; moreover, such caps disincentivize employers from implementing and enforcing employee protections in the workplace. Historically, Congress neglected labor protections, especially protections for women of color.[209] The statutory cap of the Civil Rights Act of 1991 follows suit, particularly affecting female fieldworkers within the agricultural industry. Fieldworkers stand highly susceptible to sexual harassment in the workplace because unique vulnerabilities heighten their risk for discrimination.[210] These vulnerabilities preclude survivors from seeking legal action, especially when the statutory cap fails to adequately provide relief. Thus, if Congress continues to deny proposals of reform, the injuries of sexual harassment survivors will continually fail to be redressed.

209. *See* Poo & Ramírez, *supra* note 1.
210. *See generally* HUMAN RIGHTS WATCH, *supra* note 99.