NOTE

GETTING AWAY WITH MARGINALIZATION: REJECTING A FORMALISTIC STANDING ANALYSIS AND REMEDYING LGBTQ+ DISCRIMINATION THROUGH CONGRESSIONAL LEGISLATION*

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INTRODUCTION

We are appealing to our nation's highest court to make sure that attempts by state legislatures to defy the law of the land and trample the rights of LGBT people are blocked for good. Mississippi's HB 1523 creates a toxic environment of fear and prejudice. Along with other anti-LGBT laws across the country like those in North Carolina and Texas, these laws are a pack of wolves in sheep's clothing, dressing up discrimination and calling it religious freedom.[1]

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* This Note uses both "Hawaii" and "Hawai'i" throughout. This Note uses "Hawai'i" when referring to the state, but conforms to each court's spelling when referencing a case.

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[1] Press Release, Lambda Legal, Legal Advocates Will Appeal to Supreme Court After Full Fifth Circuit Denies Challenge to Anti-LGBT Mississippi Law (Oct. 2, 2017), https://www.lambdalegal.org/news/ms_20171002_appeal-to-supreme-ct-fifth-circuit-denies-appeal-1523.

Following the recent landmark marriage equality cases—*United States v. Windsor*,[2] *Hollingsworth v. Perry*,[3] and *Obergefell v. Hodges*[4]—the conservative backlash to the expansion of equal rights for LGBTQ+ Americans has been intense and relentless.[5] Kim Davis, a county clerk in Rowan County, Kentucky, refused to issue marriage licenses to same-sex couples after the Court in *Obergefell* held that state laws denying recognition of same-sex marriage were unconstitutional.[6] Similarly, the State of Alabama refused to comply with a federal order to begin issuing marriage licenses to same-sex couples.[7] Bakers,[8] florists,[9] and photographers[10] denied service to same-sex couples planning their weddings.[11]

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2 570 U.S. 744 (2013) (invalidating the Defense of Marriage Act for denying equal treatment to same-sex marriages).

3 570 U.S. 693 (2013) (affirming the California Supreme Court's decision to invalidate Proposition 8's definition of marriage as a union between a heterosexual couple).

4 135 S. Ct. 2584 (2015) (invalidating state bans of same-sex marriage).

5 *See* Richard Wolf, *Gay Marriage Victory at Supreme Court Triggering Backlash*, USA TODAY (May 29, 2016, 8:02 AM), https://www.usatoday.com/story/news/politics/2016/05/29/gay-lesbian-transgender-religious-exemption-supreme-court-north-carolina/84908172/ ("Across the country, the gay rights movement has been met with local opposition . . . That has forced the movement back on the defensive less than a year after its greatest success: the Supreme Court's 5–4 decision in *Obergefell v. Hodges* that extended same-sex marriage nationwide.").

6 *See* Miller v. Davis, 123 F. Supp. 3d 924, 930–32 (E.D. Ky. 2015).

7 *See* Searcy v. Strange, 81 F. Supp. 3d 1285, 1286–87 (S.D. Ala. 2015); *cf.* Campbell Robertson, *Roy Moore, Alabama Chief Justice, Suspended Over Gay Marriage Order*, N.Y. TIMES (Sept. 30, 2016), https://www.nytimes.com/2016/10/01/us/roy-moore-alabama-chief-justice.html ("Nine months after instructing Alabama's probate judges to defy federal court orders on same-sex marriage, Roy S. Moore, the chief justice of the Alabama Supreme Court, was suspended on Friday for the remainder of his term for violating the state's canon of judicial ethics.").

8 Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015). The Supreme Court granted certiorari after the Colorado Supreme Court denied certiorari. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 2016 Colo. LEXIS 429, at *1 (Colo. Apr. 25, 2016). In June 2018, the Supreme Court reversed the holding of the Colorado Court of Appeals. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 138 S. Ct. 1719, 1732 (2017). In particular, the Court cited the Colorado Civil Rights Commission's "hostility" towards Masterpiece Cakeshop and its owner, Phillips, who were entitled to "a neutral decisionmaker who would give full and fair consideration to his religious objection[.]" *Id.* Some lower courts have seized on other language that in *Masterpiece Cakeshop* to protect the rights of LGBTQ+ citizens in the public accommodations context. *See infra* notes 158–61 and accompanying text.

9 State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017).

10 Elane Photography v. Willock, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

11 *Cf.* Kyle Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in* Masterpiece Cakeshop v. Colorado Civil Rights Commission, 36 LAW & INEQ. 67, 92 (2018) ("While the Court has solid doctrinal and identity-theory grounds on which to reject the status-conduct arguments presented in *Masterpiece*, the most important reason for it to do so is to break the preservation-through-transformation dynamic. Disrupting this cycle would be a breakthrough in formal equality for LGBT[Q+] Americans."); Kyle Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49

The State of North Carolina passed a law forcing transgender individuals to use bathrooms and similar facilities according to the sex listed on their birth certificates.[12] Further, Chad Griffin, President of the Human Rights Campaign, notably remarked after the *Obergefell* decision:

> Even after this 50 state marriage victory at the Supreme Court, in most states in this country, [couples] who gets married at 10 a.m. remain at risk of being fired from their jobs by noon and evicted from their home by 2 p.m. simply for posting their wedding photos on Facebook.[13]

CONN. L. REV. 1, 54 (2016) ("The stakes are high but the law is clear. State antidiscrimination laws may—consistent with RFRAs and the First Amendment—be applied to for-profit corporations, regardless of their purported religious beliefs. Moreover, they *should* be so applied to protect both the rule of law and genuine religious freedom, which can only truly exist in the context of religious pluralism.") (emphasis original); Jeremiah Ho, *Find Out What It Means to Me: The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination*, 2017 UTAH L. REV. 463, 529 (2017) ("[T]he movement in gay rights advocacy must continue to push for stronger antidiscrimination protections during the post-marriage equality era. Sexual minorities have achieved significant successes of late, but their cultural acceptance is incompatible with normative positions on dignity within American constitutional law.").

12 *See* Carcaño v. McCrory, 203 F. Supp. 3d 615, 627–28 (M.D.N.C. 2016); Public Facilities Privacy & Security Act, § G.S. 115C-47 (2016). This law, however, was partially repealed in March 2017 by Governor Roy Cooper. Mark Berman & Amber Phillips, *North Carolina Governor Signs Bill Repealing and Replacing Transgender Bathroom Law Amid Criticism*, WASH. POST (Mar. 30, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/03/30/north-carolina-lawmakers-say-theyve-agreed-on-a-deal-to-repeal-the-bathroom-bill/?utm_term=.9bf11500fd5c. The Supreme Court recently was able to avoid ruling on a similar issue, but only because the Trump administration rescinded the Obama administration's protections for transgender students in public schools. *See* Gloucester Cnty. Sch. Bd. v. G.G., 137 S. Ct. 1239, 1239 (2017) ("Judgment vacated, and case remanded to the . . . Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.").

13 *Historic Marriage Equality Ruling Generates Momentum for New Non-Discrimination Law*, HUMAN RIGHTS CAMPAIGN (July 7, 2015), https://www.hrc.org/blog/historic-marriage-equality-ruling-generates-momentum-for-new-non-discrimina; *but see* Zarda v. Altitude Express, Inc., 883 F.3d 100, 132 (2d. Cir. 2018) (en banc) (holding that Title VII prohibits employment discrimination on the basis of sexual orientation); Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 352 (7th Cir. 2017) (en banc) (same). The other Circuit Courts of Appeals still decline to extend Title VII protections on the ground of sexual orientation. *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Prowel v. Wise Bus. Forms, Inc. 579 F.3d 285, 290 (3d Cir. 2009); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979); Kalich v. AT&T Mobility, LLC, 679 F. 3d 464, 471 (6th Cir. 2012); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); Medina v. Income Support Div. 413 F.3d 1131, 1135 (10th Cir. 2005); Bostock v. Clayton Cty. Bd. of Comm'rs, 723 Fed. App'x 964, 965 (11th Cir. 2018) (per curiam). Nonetheless, there is a split amongst the Circuit Courts of Appeals, which suggests the Supreme Court may grant certiorari on the issue in the near future. The Supreme Court denied certiorari to a case invoking the exact issue in 2017. *See* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1250 (11th Cir. 2017), *cert. denied* 138 S. Ct. 557 (2017). But on April 22, 2019, the Supreme Court granted certiorari in *Zarda* as well as two other cases—*Bostock v. Clayton County, Georgia* and *R.G. & G.R. Harris Funeral Homes v. EEOC*. *See* Altitude Express v. Zarda, 2019 U.S. LEXIS 2931 *1 (Apr. 22, 2019); Bostock v.

After *Obergefell*, Roberta Kaplan, the lawyer who represented respondent Edith Windsor in *Windsor*, challenged Mississippi's ban on adoption by same-sex couples on behalf of four lesbian couples.[14] A federal district court enjoined the ban in March 2016.[15] Only a few days later, the State of Mississippi passed what some commentators have called the "most expansive and malicious anti-LGBTQ" legislation in the nation.[16] The law, more commonly referred to as "HB 1523," "allows businesses to refuse services to gay couples based on religious objections."[17]

This Note contends that the Fifth Circuit incorrectly reversed the preliminary injunction of HB 1523, as issued by the district court in *Barber v. Bryant*.[18] Specifically, the Fifth Circuit erred when it formalistically analyzed the *Barber* plaintiffs' standing in the Establishment Clause context without reaching the merits of the case.[19] Given that the *Barber* court's holding does not "reach past formalism[,]"[20] the Supreme Court should have granted certiorari, reversed the Fifth Circuit, and perhaps even struck down Mississippi's HB 1523.[21] In their petition for writ of certiorari, the *Barber* plaintiffs correctly noted, "HB 1523 is a test balloon for a fleet of similar religious-objection laws targeting LGBT people that have already been introduced in state legislatures around the country."[22] The Supreme Court's failure to invalidate HB 1523 and the

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Clayton Cty., 2019 U.S. LEXIS 2927 *1 (Apr. 22, 2019); R.G. & G.R. Harris Funeral Homes v. EEOC, 2019 U.S. LEXIS 2846 *1 (Apr. 22, 2019).

14 Mark Joseph Stern, *The First Challenge to Mississippi's Anti-LGBTQ Law Has Arrived*, SLATE (Apr. 26, 2016, 1:31 PM), http://www.slate.com/blogs/outward/2016/04/26/roberta_kaplan_challenges_anti_lgbtq_mississippi_law.html; *see also* MISS. CODE ANN. § 93-17-3(5) (2014) (prohibiting adoption by married gay couples). Mississippi's ban on same-sex adoption was the final one remaining in the country. *See* Mark Joseph Stern, *Mississippi is Actually Defending its Comically Unconstitutional Gay Adoption Ban*, SLATE (Sept. 14, 2015, 1:48 PM), http://www.slate.com/blogs/outward/2015/09/14/mississippi_is_defending_its_unconstitutional_gay_adoption_ban.html.

15 *See* Campaign v. Miss. Dep't of Human Servs., 175 F. Supp. 3d 691, 709–11 (S.D. Miss. 2016).

16 Mark Joseph Stern, *Mississippi Governor Signs LGBTQ Segregation Bill Into Law*, SLATE (Apr. 5, 2016, 1:23 PM), http://www.slate.com/blogs/outward/2016/04/05/mississippi_lgbtq_segregation_bill_signed_into_law_by_gov_phil_bryant.html.

17 Mark Berman, *Mississippi Governor Signs Law Allowing Businesses to Refuse Service to Gay People*, WASH. POST (Apr. 5, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/04/05/mississippi-governor-signs-law-allowing-business-to-refuse-service-to-gay-people/?utm_term=.a797ee4e768a.

18 *See* 860 F.3d 345, 358 (5th Cir. 2017), *rev'g* Barber v. Bryant, 193 F. Supp. 3d 677 (S.D. Miss. 2016).

19 *See Barber*, 860 F.3d at 352–58, *reh'g denied* 872 F.3d 671, 673 (5th Cir. 2017).

20 Lee v. Weisman, 505 U.S. 577, 595 (1992).

21 *See* MISS. CODE ANN. § 11-62-1 *et. seq.* (2016); *see generally* Petition for Writ of Certiorari, *Barber*, 2017 U.S. S. Ct. Briefs LEXIS 3918 (No. 17-547). If the Supreme Court were to reverse the Fifth Circuit's decision, it would probably be more likely to remand than further decide the constitutionality of HB 1523.

22 Petition for Writ of Certiorari, *supra* note 21, at *48 (citing similar bills in Arkansas, Oklahoma, Texas, and Wyoming).

like may, as the *Barber* plaintiffs explain, "erode the promise and protection of *Obergefell*"[23] and wrongfully "put LGBT citizens back in their place."[24]

Barber v. Bryant closely resembles another recent case in many respects: *Trump v. Hawaii*.[25] Both cases involve directly afflicted plaintiffs who sought to enjoin government action because the government actions, as the respective plaintiffs claimed and this Note argues, violated the Establishment Clause. The *Barber* plaintiffs argued that Mississippi's HB 1523 favors religion over sexual orientation by permitting private and government actors to use religion as an excuse to discriminate against LGBTQ+ citizens. In effect, the *Barber* plaintiffs argued, the government denies LGBTQ+ citizens full and equal citizenship by condemning their identities and sanctioning discrimination against them. In doing so, the government stigmatizes and marginalizes the *Barber* plaintiffs—both of which violate the Establishment Clause. Similarly, in *Trump v. Hawaii*, the plaintiffs contended that President Trump's travel bans disfavored their religion of Islam by only banning foreign nationals from majority-Muslim countries. The travel bans, like HB 1523, stigmatize and marginalize the plaintiffs and other Muslims. Unlike the Fourth

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[23] *Id.* at *49.

[24] *Id.* at *23 (citing Barber v. Bryant, 193 F. Supp. 3d 677, 708 (S.D. Miss. 2016)).

[25] This Note uses *Trump v. Hawaii* to encompass all litigation concerning President Trump's travel bans, namely the litigation in the Fourth and Ninth Circuits. The Supreme Court is hearing the case under the case name *Trump v. Hawaii*. *See* Trump v. Hawaii, 138 S. Ct. 923, 923 (2018) (granting the Government's petitioner for writ of certiorari); Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (finding that the Muslim plaintiffs had not shown a likelihood of success on the merits and reversing the grant of preliminary injunction). In her dissent in *Trump v. Hawaii*, Justice Sotomayor decries the inconsistency between the Court's decisions in *Trump v. Hawaii* and *Masterpiece Cakeshop*. *See id.* at 2447 (Sotomayor, J., dissenting) ("But unlike in *Masterpiece*, where a state civil rights commission was found to have acted without 'the neutrality that the Free Exercise Clause requires,' the government actors in this case will not be held accountable for breaching the First Amendment's guarantee of religious neutrality and tolerance. Unlike in *Masterpiece*, where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President's charged statements about Muslims as irrelevant."). Other scholars have similarly questioned the consistency of the two decisions. *See, e.g.*, Leah Litman, *Unchecked Power is Still Dangerous No Matter What the Court Says*, N.Y. TIMES (June 26, 2018), https://www.nytimes.com/2018/06/26/opinion/travel-ban-hawaii-supreme-court.html (noting the discrepancy between the Court's conclusion in *Masterpiece Cakeshop* and *Trump v. Hawaii*); Ilya Somin, *The Supreme Court's Indefensible Double Standard in the Travel-Ban Case and Masterpiece Cakeshop*, VOX (June 27, 2018), https://www.vox.com/the-big-idea/2018/6/27/17509248/travel-ban-religious-discrimination-christian-muslim-double-standard. Professor Michael Dorf has also questioned not only the discrepancy between the Court's decision in *Trump v. Hawaii* and *Masterpiece Cakeshop*, but also between the Court's decision in *Trump v. Hawaii* and its decisions in recent death penalty cases. *See* Michael Dorf, *Pretexts in the Travel Ban Case, Method-of-Execution Cases, the Assange Indictment, and More Generally*, DORF ON LAW (Apr. 22, 2019), http://www.dorfonlaw.org/2019/04/pretexts-in-travel-ban-case-method-of.html.

and Ninth Circuits in *Trump v. Hawaii*, however, the Fifth Circuit refused to reach the merits in *Barber*.

This Note's contribution is prescriptive, arguing that the Fifth Circuit incorrectly disposed of the case by holding that the *Barber* plaintiffs lacked standing. The Fifth Circuit, as well as the Supreme Court, should instead look to the Fourth and Ninth Circuits' opinions in *Trump v. Hawaii* as models and conclude that the stigmatizing and marginalizing effects of HB 1523 and similar statutes satisfy the direct and concrete injury standing requirements. In the absence of a Supreme Court ruling on the merits for LGBTQ+ individuals similarly situated to the *Barber* plaintiffs—which necessarily also requires a reversal of the Fifth Circuit's standing analysis—Congress should intervene to partially remedy the injury by passing federal legislation prohibiting discrimination against LGBTQ+ individuals. One example of such legislation is the Equality Act, which Representative David Cicilline and Senators Jeff Merkley, Tammy Baldwin, and Cory Booker reintroduced in the 116th Congress on March 13, 2019.[26] The 2019 version of the Equality Act was nearly identical to the 2017 version.[27]

This Note unfolds in five sections. Section I reviews the *Trump v. Hawaii* litigation. In particular, Section I highlights the standing analyses of the Fourth and Ninth Circuits, against which this Note juxtaposes the Fifth Circuit's standing analysis in *Barber v. Bryant*. Sections II and III discuss the twin but distinct injuries of marginalization and stigmatization, both of which are sufficient to confer standing in the Establishment Clause context. These Sections note that marginalization is more akin to exclusion whereas stigmatization is more akin to disparagement. Section IV reviews and analyzes the Fifth Circuit's decision in *Barber v. Bryant*, asserting that the court's decision that the plaintiffs did not satisfy Article III's standing requirement to be erroneous. To be sure, Section IV contends, Mississippi's HB 1523 both marginalizes and stigmatizes the *Barber* plaintiffs and other LGBTQ+ citizens. If other states follow Mississippi's lead and pass laws similar or identical to HB 1523, LGBTQ+ citizens in those states will be similarly aggrieved. Section V proposes the Equality Act as a partial remedy for and protection against the discrimination directed at LGBTQ+ citizens and the resulting injuries.

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[26] *See* Equality Act, H.R. 5, 116th Cong. (2019); S. 788, 116th Cong. (2019); *see also* Press Release, U.S. Senator Tammy Baldwin, Baldwin, Merkley, Booker, Collins Lead Senate Introduction of Landmark Bipartisan Equality Act (Mar. 13, 2019), https://www.baldwin.senate.gov/press-releases/equality-act-2019 (announcing the introduction of the Equality of Act of 2019).

[27] *Compare* H.R. 5, 116th Cong. (2019), *and* S. 788, 116th Cong. (2019), *with* H.R. 2282, 115th Cong. (2017), *and* S. 1006, 115th Cong. (2017).

I. *TRUMP V. HAWAII*

A. Background

On September 24, 2017, President Donald Trump issued the third Executive Order in, what critics have called, a series of "thinly veiled" "Muslim ban[s]."[28] It came as no surprise to some that, by issuing yet another Executive Order, the President and his administration were again trying to circumvent rulings of "biased" "so-called" judges that previously struck down the first and second Executive Orders.[29] However, multiple federal courts quickly enjoined the third iteration of the travel ban.[30]

On January 27, 2017, President Trump issued the first travel ban.[31] The first travel ban prohibited citizens from Iraq, Syria, Iran, Libya, Somalia, Sudan, and Yemen from entering the United States for 90 days.[32] The ban also indefinitely banned the entry of refugees from Syria.[33] On January 28 and 29, 2017, District Court Judge Ann Donnelly in the Eastern District of New York issued a temporary restraining order, partially blocking implementation of the first travel ban.[34] The next day, District Court Judge Nathaniel Gorton sitting in the District of Massa-

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[28] Proclamation 9645 (Sept. 24, 2017), https://www.whitehouse.gov/the-press-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attempted-entry; 82 Fed. Reg. 45,161; *see also* Josh Gerstein & Ted Hesson, *Trump to Replace Travel Ban with Restrictions on More Countries*, POLITICO (Sept. 24, 2017, 7:35 PM), https://www.politico.com/story/2017/09/24/trump-travel-ban-iran-korea-syria-243078.

[29] Elise Viebeck, *Trump's First 100 Days: President Sees Bias From Judges – and Nordstrom*, WASH. POST (Feb. 8, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/02/08/trumps-first-100-days-trump-sees-bias-from-judges-and-nordstrom/?utm_term=.88812bf5dabf; Corky Siemaszko, *Experts: Trump Undermines Judiciary with Twitter Attack on Judge Robart*, NBC NEWS (Feb. 7, 2017, 5:36 AM), https://www.nbcnews.com/news/us-news/experts-trump-undermines-judiciary-twitter-attack-judge-robart-n717626; c*f.* Veronica Stracqualursi & Ryan Struyk, *President Trump's History with Judge Gonzalo Curiel*, ABC NEWS (Apr. 20, 2017, 3:48 PM), http://abcnews.go.com/Politics/president-trumps-history-judge-gonzalo-curiel/story?id=46916250 (reporting that then-candidate Trump called Judge Curiel a "hater" and stated that Judge Curiel is "extremely hostile" toward him).

[30] *See, e.g.*, Hawai'i v. Trump, 265 F. Supp. 3d 1140, 1160–61 (D. Haw. 2017); IRAP v. Trump, 265 F. Supp. 3d 570, 633 (D. Md. 2017).

[31] Exec. Order No. 13769 (Jan. 27, 2017), https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/; 82 Fed. Reg. 8,977–80.

[32] *Id.* § 3(c); *see also* Adam Liptak, *President Trump's Immigration Order, Annotated*, N.Y. TIMES (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/us/politics/annotating-trump-immigration-refugee-order.html (highlighting the "major excerpts from the executive order" and providing commentary).

[33] Exec. Order 13769, *supra* note 31, § 5(c).

[34] Darweesh v. Trump, 2017 U.S. Dist. LEXIS 13243, at *3 (E.D.N.Y. Jan. 28, 2017) ("[I]t is hereby ordered that [Trump administration officials] . . . are enjoined and restrained from, in any manner or by any means, removing individuals with refugee applications approved by U.S. Citizenship and Immigration Services as part of the U.S. Refugee Admissions Program, holders of immigrant and non-immigrant visas, and other individuals from Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen legally authorized to enter the United States.").

chusetts did the same.[35] On February 3, 2017, District Court Judge James Robart in the Western District of Washington issued a nationwide preliminary injunction, blocking implementation of the first travel ban.[36] The Trump administration appealed Judge Robart's ruling to the Ninth Circuit. The Trump administration also filed an emergency motion for an immediate stay while the Ninth Circuit considered its stay motion.[37] On February 9, the Ninth Circuit denied the Trump administration's motion for a stay pending appeals.[38] The Trump administration decided not to pursue its appeal and instead filed an unopposed motion to dismiss the appeal voluntarily, which the court granted on March 8.[39]

On March 6, 2017, President Trump issued the second travel ban.[40] The second travel ban prohibited citizens from the same countries,[41] with the exception of Iraq,[42] from entering the United States for 90 days.[43] The ban also barred the entry of *all* refugees for 120 days.[44] The ban would take effect on March 16;[45] the first travel ban would also be repealed in its entirety on this date.[46] On March 15, District Court Judge

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35 Tootkaboni v. Trump, 2017 U.S. Dist. LEXIS 14241, at *5 (D. Mass. Jan. 29, 2017) ("[I]t is hereby ordered that [Trump administration officials] . . . shall not, by any manner or means, detain or remove individuals with refugee applications approved by U.S. Citizenship and Immigration Services as part of the U.S. Refugee Admissions Program, holder of valid immigrant and non-immigrant visas, lawful permanent residents, and other individuals from Iraq, Syria, Iran, Sudan, Libya, Somalia and Yemen who, absent the Executive Order, would be legally authorized to enter the United States . . . .").

36 Washington v. Trump, 2017 U.S. Dist. LEXIS 16012, at *7–10 (W.D. Wash. Feb. 3, 2017) ("The court concludes that the circumstances brought before it today are such that it must intervene to fulfill its constitutional role in our tripart government. Accordingly, the court concludes that entry of the above-described TRO is necessary, and the States' motion . . . is therefore granted.").

37 Washington v. Trump, 691 Fed. App'x 834, 835 (9th Cir. 2017).

38 Washington v. Trump, 847 F.3d 1151, 1169 (9th Cir. 2017).

39 Washington v. Trump, 2017 U.S. App. LEXIS 4235, at *7 (9th Cir. Mar. 8, 2017).

40 Exec. Order 13780 (Mar. 6, 2017), https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states; 82 Fed. Reg. 13209.

41 *Id.* §§ 1(e), 2(c). Many commentators noticed that the Trump administration excluded majority-Muslim nations where Donald Trump's companies have businesses interests from the ban. *See, e.g.*, Caleb Melby et al., *Trump's Immigration Ban Excludes Countries with Business Ties*, BLOOMBERG (Mar. 6, 2017), https://www.bloomberg.com/graphics/2017-trump-immigration-ban-conflict-of-interest/ ("[Donald Trump's] proposed list doesn't include Muslim-majority countries where his Trump Organization has done business or pursued potential deals. Properties include golf courses in the United Arab Emirates and two luxury towers operating in Turkey.").

42 Exec. Order 13780, *supra* note 40, § 1(g).

43 *Id.* § 2(c); *cf.* Angela Dewan & Emily Smith, *What It's Like in the 6 Countries on Trump's Travel Ban List*, CNN (Mar. 6, 2017, 12:29 PM), https://www.cnn.com/2017/01/29/politics/trump-travel-ban-countries ("For many, conflict, human rights abuses and long-term unemployment are the norm, and are reasons to flee or try to immigrate.").

44 Exec. Order 13780, *supra* note 40, § 6(a).

45 *Id.* § 14.

46 *Id.* § 13.

Derrick Watson for the District of Hawaii issued a nationwide temporary restraining order, blocking implementation of the second travel ban.[47] District Court Judge Theodore Chuang did the same in the District of Maryland the next day.[48] The Trump administration appealed both rulings.[49]

On May 25, the Fourth Circuit essentially upheld Judge Chuang's ruling.[50] The Fourth Circuit held that the challengers had standing to sue[51] and that the second travel ban likely violates the Establishment Clause.[52] On June 12, The Ninth Circuit essentially upheld Judge Watson's ruling.[53] Although the Ninth Circuit—like the Fourth Circuit—ruled for the challengers, it did so on a different ground than the Fourth Circuit. The Ninth Circuit concluded that the second travel ban likely violates the Immigration and Naturalization Act (INA) and that President Trump exceeded the power Congress delegates to the executive to regu-

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47 Hawaii v. Trump, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017) ("When considered alongside the constitutional injuries and harms [present in this case], and the questionable evidence supporting the Government's national security motivations, the balance of equities and public interest justify granting the Plaintiffs' TRO. Nationwide relief is appropriate in light of the likelihood of success on the Establishment Clause claim. [Therefore], Plaintiff's Motion for TRO is hereby granted.") (internal citation omitted).

48 IRAP v. Trump, 241 F. Supp. 3d 539, 566 (D. Md. 2017) ("In light of the constitutional harms likely to befall Plaintiffs in the absence of relief, and the constitutional mandate of a uniform immigration law and policy, Section 2(c) of the Second Executive Order will be enjoined on a nationwide basis.").

49 *See* IRAP v. Trump, 857 F.3d. 554, 579 (4th Cir. 2017); Hawaii v. Trump, 859 F.3d 741, 761 (9th Cir. 2017).

50 *See* IRAP v. Trump, 857 F.3d. at 605 ("In light of the Supreme Court's clear warning that [injunctive relief against the President himself] should be ordered only in the rarest of circumstances we find that the district court erred in issuing an injunction against the President himself. We therefore lift the injunction as to the President only. The court's preliminary injunction shall otherwise remain fully intact.").

51 *Id.* at 586 ("[Plaintiff] #1 has . . . met the constitutional standing requirements with respect to the Establishment Clause claim. And because we find that at least one Plaintiff possesses standing, we need not decide whether the other individual Plaintiffs or the organizational Plaintiffs have standing with respect to this claim.").

52 *Id.* at 601 ("[The Second Executive Order] cannot be divorced from the cohesive narrative liking it to the animus that inspired it. In light of this, we find that the reasonable observer would likely conclude that [the Second Executive Order's] primary purpose is to exclude persons from the United States on the basis of their religious beliefs. We therefore find that [the Second Executive Order] likely fails *Lemon*'s purpose prong in violation of the Establishment Clause. Accordingly, we hold that the district court did not err in concluding that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim.").

53 *See* Hawaii v. Trump, 859 F.3d 741, 788–89 (9th Cir. 2017) ("We conclude that Plaintiffs' injuries can be redressed fully by injunctive relief against [the Trump administration officials], and that the extraordinary remedy of enjoining the President is not appropriate here. We therefore vacate the district court's injunction to the extent the order runs against the President, but affirm to the extent that it runs against the remaining [Trump administration officials].") (internal citations omitted).

late immigration;[54] it did not rule on the Establishment Clause claim or any other constitutional claims.[55]

On June 26, the Supreme Court granted the Trump Administration's writ of certiorari and scheduled oral arguments for October.[56] The per curium decision also partly stayed the injunctions and removed barriers for the Trump Administration "with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States."[57] The stay only applied to the Respondents and those similarly situated.[58] Justices Thomas, Alito, and Gorsuch would have stayed the preliminary injunctions in full.[59]

On September 24, President Trump issued the third travel ban.[60] The third travel ban prohibited citizens from the same countries as the second travel ban,[61] with the exception of Sudan,[62] from entering the United States.[63] The third travel ban included three additional countries: Chad, North Korea, and Venezuela.[64] It also went further, imposing permanent restrictions on travel from the enumerated countries.[65] The next day, the Supreme Court cancelled oral arguments for the travel ban case.[66] It instead asked lawyers to submit supplemental briefs addressing the issue of mootness.[67]

On October 17, District Court Judges Watson and Chuang again issued nationwide injunctions, blocking implementation of the third travel ban.[68] In deciding whether to enjoin the third travel ban, Judge Watson and Judge Chuang addressed whether: (1) the plaintiffs have standing,[69] and (2) the third travel ban likely violates the INA.[70] Judge

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54 *Id.* at 782 ("[W]e conclude that Plaintiffs have shown a likelihood of success on the merits at least as to their arguments that [the Second Executive Order] contravenes the INA by exceeding the President's authority under § 1182(f), discriminating on the basis of nationality, and disregarding the procedures for setting annual admissions of refugees.").

55 *Id.* at 789 ("As we have affirmed the injunction in part on statutory grounds, and vacated certain parts on the basis of considerations governing the proper scope of an injunction, we need not consider the constitutional claims here.").

56 Trump v. IRAP, 137 S. Ct. 2080, 2086 (2017).

57 *Id.* at 2087–89.

58 *Id.* at 2087 ("We leave the injunctions entered by the lower courts in place [only] with respect to respondents and those similarly situated, as specified in this opinion.").

59 *Id.* at 2089.

60 Proclamation 9645, *supra* note 28.

61 *Id.* §§ 1(g), 2.

62 *Compare id.*, *with* Exec. Order 13780, *supra* note 40, §§ 1(e), 2(c).

63 Proclamation 9645, *supra* note 28, § 2.

64 *Id.* §§ 1(g), 2.

65 *Id.* § 2.

66 Trump v. IRAP, 138 S. Ct. 50, 50 (2017).

67 *Id.*

68 Hawai'i v. Trump, 265 F. Supp. 3d 1140, 1160–61 (D. Haw. 2017); IRAP v. Trump, 265 F. Supp. 3d 570, 632–33 (D. Md. 2017).

69 *Hawai'i*, 265 F. Supp. 3d at 1148–53; *IRAP*, 265 F. Supp. 3d at 595–602.

70 *Hawai'i*, 265 F. Supp. 3d at 1155–59; *IRAP*, 265 F. Supp. 3d at 605–16.

Chuang also considered whether the third travel ban likely violates the Establishment Clause.[71]

Judge Watson noted in his decision that the third travel ban "suffers from precisely the same maladies as its predecessor."[72] Judge Watson concluded that the third travel ban "discriminated based on nationality in the manner that the Ninth Circuit found antithetical to both [the INA] and the founding principles of this nation.[73] He proceeded to "fully" enjoin the Trump administration from "enforcing or implementing" key sections of the travel ban.[74] Judge Chuang, however, extended the injunction only to individuals with a bona fide relationship with an individual or entity in the United States."[75] The Trump administration appealed both rulings[76] and filed applications for stays with the Supreme Court.[77] The Supreme Court granted the applications, allowing the Trump administration to implement and enforce the third travel ban pending appellate review.[78]

On December 6, the Ninth Circuit considered the appeal from Judge Watson's decision to enjoin the third travel ban.[79] Similarly, two days later, the Fourth Circuit considered an analogous appeal from Judge Chuang's decision.[80] On December 22, the Ninth Circuit again upheld Judge Watson's ruling.[81] And as with the second travel ban, the Ninth Circuit relied heavily on the INA and statutory interpretation.[82] The Ninth Circuit did not consider the Establishment Clause claim.[83] Less than two months later, the Fourth Circuit upheld Judge Chuang's rul-

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71 *IRAP*, 265 F. Supp. 3d at 616–29.

72 *Hawai'i*, 265 F. Supp. 3d at 1145.

73 *Id.* (citing Hawaii v. Trump, 859 F.3d 741, 776–79 (9th Cir. 2017)).

74 *Id.* at 1161.

75 *IRAP*, 265 F. Supp. 3d at 630 (citing Trump v. IRAP, 137 S. Ct. 2080, 2088 (2017)).

76 *See* Hawaii v. Trump, 878 F.3d 662, 675 (9th Cir. 2017); IRAP v. Trump, 2018 U.S. App. LEXIS 3513, at *27, 79 (4th Cir. Feb. 15, 2018).

77 *See* Trump v. Hawaii, 2017 U.S. LEXIS 7357, at *1 (Dec. 4, 2017) (granting a stay for the district court's injunction); IRAP v. Trump, 2017 U.S. LEXIS 7358 at *1 (Dec. 4, 2017) (same).

78 *See* Trump v. Hawaii, 2017 U.S. LEXIS 7357, at *1; Trump v. IRAP, 2017 U.S. LEXIS 7358, at *1.

79 *See* Nicholas Fillmore, *Ninth Circuit Wrestles with Unblocking Trump's Travel Ban*, COURTHOUSE NEWS (Dec. 6, 2017), https://www.courthousenews.com/ninth-circuit-wrestles-with-unblocking-trumps-travel-ban/.

80 *See* Richard Wolf, *Trump's Tweets Taint Travel Ban, Federal Judges Say*, USA TODAY (Dec. 8 2017 1:43 PM), https://www.usatoday.com/story/news/politics/2017/12/08/trumps-tweets-taint-travel-ban-federal-judges-say/934778001/.

81 Hawaii v. Trump, 878 F.3d 662, 701–02 (9th Cir. 2017) ("[W]e conclude that the district court did not abuse its discretion in granting an injunction.").

82 *See id.* at 683–98.

83 *Id.* at 702 ("Because we conclude that the district court did not abuse its discretion in granting the preliminary injunction relying on Plaintiffs' statutory claims, we need not and do not consider this alternate constitutional ground.").

ing.[84] Unlike the Ninth Circuit, however, the Fourth Circuit relied on the Establishment Clause.[85] Again, both cases were appealed to the Supreme Court.[86]

In June 2018, the Supreme Court reversed and remanded the Ninth Circuit's decision.[87] Principally, the Court held that the Muslim plaintiffs were unable to show a likelihood of success on the merits, the Trump administration had not exceeded its authority under the INA, and the Trump administration had proffered a "sufficient national security justification to survive rational basis review."[88] The Court expressly did not "express [a] view on the soundness of the policy."[89] Therefore, the Court reversed the preliminary injunctions against the travel ban.[90] The Court only addressed the INA claims adjudicated by the Ninth Circuit.[91] The Court declined to directly rule on the Establishment Clause claims adjudicated by the Fourth Circuit.[92] Instead, the Court looked to its holding in *Kleindienst v. Mandel*[93] to avoid an Establishment Clause inquiry and instead apply rational basis review.[94]

B. Standing

The Cases and Controversies Clause of Article III of the Constitution requires courts to ensure each case before it is justiciable.[95] To establish that a case is justiciable, just one of the plaintiffs must have standing.[96] But that single plaintiff must also establish standing for each claim included in the case.[97] To prove standing for a claim, a plaintiff must establish: (1) a "concrete and particularized injury" (i.e., a cogniza-

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84 IRAP v. Trump, 883 F.3d 233, 274 (4th Cir. 2018). For a more robust discussion of the Fourth Circuit's decision and the various opinions, see Peter Margulies, *Travel Ban Update: Fourth Circuit Affirms Injunction as Supreme Court Awaits Argument*, LAWFARE (Feb. 16, 2018, 12:00 PM), https://www.lawfareblog.com/travel-ban-update-fourth-circuit-affirms-injunction-supreme-court-awaits-argument-0.

85 *IRAP*, 883 F.3d at 269–70 ("We therefore agree with the district court that Plaintiffs have demonstrated that they will likely succeed on the merits of their Establishment Clause claim.").

86 *See* Petition for Writ of Certiorari, *Hawaii*, 2018 U.S. S. Ct. Briefs LEXIS 27 (No. 17-965); Petition for Writ of Certiorari, *IRAP*, 2018 U.S. S. Ct. Briefs LEXIS 737 (No. 17-1194).

87 Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* at 2407–15.

92 *Id.* at 2418–20.

93 408 U.S. 753, 769 (1972) (limiting judicial review of executive actions in the immigration and national security context so long as there is a facially legitimate and bona fide reason for the action).

94 *Hawaii*, 138 S. Ct. at 2419–23.

95 *See* U.S. CONST. art. III, § 2, cl. 1; *see also* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013); Massachusetts v. EPA, 549 U.S. 497, 516 (2007).

96 *See* Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 52 n.2 (2006).

97 DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006).

ble injury), (2) "that is fairly traceable" to the defendant's conduct, and (3) is "likely to be redressed by a favorable judicial decision."[98] Furthermore, the cognizable injury must be concrete and particularized and actual or imminent, not conjectural or hypothetical.[99]

To establish standing in the Establishment Clause context, plaintiffs must demonstrate that they have direct personal contact with the alleged government establishment of religion.[100] The plaintiffs may demonstrate a direct harm through direct personal contact with the establishment of religion.[101] The direct harm may take the form of either economic injuries[102] or noneconomic and intangible injuries.[103]

The Ninth Circuit correctly found that the plaintiffs in each of the challenges to the three travel bans established Article III standing.[104] The Ninth Circuit and Judge Watson focused on the "zone of interest" requirement for statutory standing related to the INA rather than as related to the Establishment Clause.[105] The Fourth Circuit also found that the plaintiffs established Article III standing in the litigation concerning each of the travel bans.[106] The Fourth Circuit on Establishment Clause

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98 Hollingsworth v Perry, 507 U.S. 693, 704 (2013) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

99 *See Lujan*, 504 U.S. at 560.

100 *See* Valley Forge Christian Coll. v. Ams. United for Separate of Church and State, Inc., 454 U.S. 464, 471 (1982).

101 Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 129 (2011).

102 *See* McGowan v. Maryland, 366 U.S. 420, 430–31 (1961) (finding that the plaintiffs "suffered direct economic injury, allegedly due to the imposition on them of the tenets of the Christian religion" and thus had standing to "complain that the statutes are laws respecting an establishment of religion").

103 *See Valley Forge*, 454 U.S. at 486 (citing United States v. SCRAP, 412 U.S. 669, 686–88 (1973) and Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153–54 (1970)).

104 *See* Hawaii v. Trump, 878 F.3d 662, 678 n.5 (9th Cir. 2017) ("The Government does not challenge Plaintiffs' Article III standing on appeal. Nonetheless we have an obligation to consider Article III standing independently, as we lack jurisdiction when there is no standing. For the reasons set forth in the district court's order, we conclude that Plaintiffs have Article III standing.") (internal citations and quotation marks omitted); Hawaii v. Trump, 859 F.3d 741, 765–66 (9th Cir. 2017); Washington v. Trump, 847 F.3d 1151, 1161 (9th Cir. 2017).

105 *See Hawaii*, 878 F.3d at 680–83 ("Because we conclude that the district court did not abuse its discretion in granting the preliminary injunction relying on Plaintiffs' statutory claims, we need not and do not consider this alternate constitutional ground."); Hawai'i v. Trump, 265 F. Supp. 3d 1140, 1152–53 (D. Haw. 2017).

106 *See* IRAP v. Trump, 2018 U.S. App. LEXIS 3513, at *43–44 (4th Cir. Feb. 15, 2017) ("Unlike the plaintiffs in *Valley Forge*, Plaintiffs here have not roamed the country in search of governmental wrongdoing. Instead, the purported wrongdoing has found them. We conclude that many of the individual and two of the organizational Plaintiffs have standing to bring an Establishment Clause claim."); IRAP v. Trump, 857 F.3d 554, 583 (4th Cir. 2017). The Fourth Circuit did not have a chance to rule on the first travel ban before President Trump issued the second travel ban in response to the Ninth Circuit's ruling in *Washington v. Trump*. However, affected parties began to litigate the first travel ban in district courts in the Fourth Circuit. For example, the District Court for the Eastern District of Virginia enjoined the first travel ban. *See* Aziz v. Trump, 234 F. Supp. 3d 724, 738–39 (E.D. Va. 2017). Additionally,

standing, which requires that the plaintiffs have "personal contact with the alleged establishment of religion" and suffered "direct harm" as a result.[107]

The Supreme Court also briefly addressed the plaintiffs' Article III standing.[108] The Supreme Court noted that plaintiffs alleging Establishment Clause violations must show that they are "directly affected by the laws and practices against which [their] complaints are directed.[109] The Court expressly declined to "decide whether the claimed dignitary interest [stemming from the federal establishment of Islam as a disfavored religion] establishe[d] an adequate ground for standing," and instead looked to the "more concrete injury" of being separated from their relatives.[110] Although the Supreme Court recognized that the Muslim plaintiffs in *Trump v. Hawaii* suffered a harm sufficient to confer Article III standing, they did not rule on the "spiritual and dignitary" injury that is more akin to that suffered by the plaintiffs in *Barber v. Bryant*.[111] Furthermore, the Court makes no mention of marginalization or stigmatization in the decision.

This Note focuses only upon Article III standing and standing related to the Establishment Clause in the travel ban cases;[112] it will not address statutory standing or the INA.[113] Thus, this Note will focus mainly on the Fourth Circuit's opinions, rather than the Ninth Circuit's or the Supreme Court's opinions.[114] This Note will next proceed

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the International Refugee Assistance Project and other plaintiffs had filed a claim against President Trump, the Trump administration, and related officials in Judge Chuang's court. *See* IRAP v. Trump, 2017 U.S. Dist. LEXIS 29058, at *2 (D. Md. Mar. 1, 2017) ("On February 7, 2017, Plaintiffs filed this action alleging that [the first travel ban] violates the First and Fifth Amendments . . . [and] the Immigration and Nationality Act . . . .").

107 *IRAP*, 857 F.3d at 582 (quoting Suhre v. Haywood Cty., 131 F.3d 1083, 1085 (4th Cir. 1997) and Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 129 (2011)).

108 Trump v. Hawaii, 138 S. Ct. 2392, 2415–16 (2018).

109 *Id.* at 2416 (citing *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 224 n.9 (1963)).

110 *Id.* (citing Kerry v. Din, 135 S. Ct. 2128 (2015) and Kleindienst v. Mandel, 408 U.S. 753, 762 (1972)).

111 *Id.* ("[The *Trump v. Hawaii* plaintiffs] describe [their] injury as 'spiritual and dignitary.'"); *see also infra* Section IV.B. (describing the injury inflicted on the *Barber* plaintiffs by HB 1523).

112 *See generally* Mary Alexander Myers, Note, *Standing on the Edge: Standing Doctrine and the Injury Requirement at the Borders of Establishment Clause Jurisprudence*, 65 VAND. L. REV. 979 (2012) (reviewing the standing law concerning Establishment Clause claims).

113 *See generally* William Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763 (discussing statutory standing and the "zone of interests" criteria).

114 The Ninth Circuit and Judge Watson decide the case based on the Immigration and Naturalization Act and related injuries. These injuries deal with the "zone of interest" and prudential standing.

to explore the injuries that the Executive Orders inflicted upon plaintiffs.[115]

II. MARGINALIZATION

The Establishment Clause of the First Amendment demands "government neutrality between religion and religion, and between religion and nonreligion."[116] When the government disfavors adherents of one or more religions, the message of denigration injures members of those faiths in a real and concrete way that establishes Article III standing.[117] For example, "[f]eelings of *marginalization* and exclusion are cognizable forms of inquiry, particularly in the Establishment Clause context, because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to nonadherents of a particular religion 'that they are outsiders, not full members of the political community.'"[118] The Supreme Court has repeatedly held that feelings of marginalization and exclusion are sufficiently real and concrete to establish Article III standing.[119]

The circumstances surrounding the travel bans—especially the tweets and statements made by President Trump—demonstrate that the travel bans marginalize and exclude the plaintiffs from being full members of the community, causing the plaintiffs to feel like outsiders.[120]

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115 *Cf.* Caroline Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299, 299 ("This Essay explores the increased symmetry between the Establishment Clause, the Equal Protection Clause, and the Free Exercise Clause. It argues that many of the critiques of the intentional discrimination standard made in the equal protection context apply in the establishment context.").

116 Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

117 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) (finding that a policy permitting prayer at a school event sent a message of marginalization); *see also* McCreary Cty. v. ACLU 545 U.S. 844, 860–61 (2005) (finding that a display of the Ten Commandments sent a message of marginalization).

118 Moss v. Spartanburg Cty. Sch. Dist. Seven, 683 F.3d 599, 607 (4th Cir. 2012) (citing *McCreary*, 545 U.S. at 860) (emphasis added). In *IRAP v. Trump*, Judge Chuang also cited several other Circuit Court cases for this proposition. *See* IRAP v. Trump, 265 F. Supp. 3d 570, 599 (D. Md. 2017) (citing Suhre v. Haywood Cty., 131 F.3d 1082, 1086 (4th Cir. 1997); Awad v. Ziriax, 670 F.3d 1111, 1122–23 (10th Cir. 2012); and Catholic League v. City & Cty. of San Francisco, 624 F.3d 1043, 1048 (9th Cir. 2010)).

119 *See, e.g.*, County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 595–96 (1989) (finding that a crèche on the steps of a government building treated non-adherents as outsiders).

120 *See* IRAP v. Trump, 265 F. Supp. 3d 570, 585–86, 589–90 (D. Md. 2017) (discussing President Trump's statements about Muslims and the travel ban); Ali Vitali, *In His Words: Donald Trump on the Muslim Ban, Deportations*, NBC NEWS (June 27, 2016, 4:58 PM), https://www.nbcnews.com/politics/2016-election/his-words-donald-trump-muslim-ban-deportations-n599901; c*f.* Sahar Aziz, *Losing the 'War of Ideas:' A Critique of Countering Violent Extremism Programs*, 52 TEXAS INT'L L.J. 255, 256 (2017) ("In 2011 the Obama Administration initiated a Countering Violent Extremism program (CVE) purportedly aimed at tackling the underlying causes that may contribute to terrorism domestically and abroad . . . . In January

For example, Judge Chuang noted that one of the plaintiffs "felt insulted" by the travel ban and that people looked at him "more suspicious[ly]."[121] This, in turn, caused the plaintiff to feel that he is "being labeled as a Muslim more often," and that the travel bans "ha[ve] made [him] feel this more strongly" such that he "continue[s] to feel demeaned by the ban."[122] Judge Chuang also noted that the travel ban made another plaintiff "feel like a 'second-class citizen'" and "the target of abuse and discrimination."[123] The other plaintiffs made similar allegations.[124] These feelings of marginalization and exclusion constituted a "personal contact" with and "direct injury" from the travel bans.[125] Thus, these allegations, according to Judge Chuang, sufficiently established a cognizable injury and standing for the plaintiffs.[126]

Judge Watson made nearly identical findings of feelings of marginalization to those made by Judge Chuang.[127] Although Judge Watson analyzed the case in terms of the INA rather than the Establish-

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2017, the Trump Administration announced that it would change the name of the program to "Countering Islamic Extremism" to reflect his Administration's intentions to focus exclusively on terrorism committed by individuals claiming to be Muslim, while excluding terrorism committed by others including white supremacists."); Elizabeth Landers & James Masters, *Trump Retweets Anti-Muslim Videos*, CNN (Nov. 30, 2017, 3:48 AM), https://www.cnn.com/2017/11/29/politics/donald-trump-retweet-jayda-fransen/index.html ("President Donald Trump retweeted Wednesday morning three inflammatory videos from a British far-right account rife with anti-Muslim content."); Cristina Maza, *Trump's Speech Causes More Anti-Muslim Hate Crimes Than Terrorism, Study Shows*, NEWSWEEK (Nov. 16, 2017, 2:43 PM), http://www.newsweek.com/trump-speech-anti-muslim-hate-crime-terrorism-study-713905 ("Muslims are more frequently assaulted in Trump's America than they were post-9/11, a new study of FBI crime data revealed. The number of assaults rose precipitously within the past two years, eventually surpassing the peak reached in the aftermath of the September 11 terror attacks, according to the study from the Pew Research Center."); Sarah Wildman, *Trump is Quick to Blame Muslims for Terror Attacks. He's Slow When Muslims are the Victims*, VOX (June 6, 2017, 9:30 AM), https://www.vox.com/world/2017/6/6/15740628/trump-muslims-terror-twitter ("When Donald Trump believes a terrorist attack by Muslim extremists has taken place, he rarely hesitates before speaking out about it—often regardless of whether authorities have even begun to investigate what actually took place. But when it comes to anti-Muslim hate crimes, Trump's reactions are often half-hearted, delayed, or nonexistent."); Daniel Burke, *Anti-Muslim Hate Crimes: Ignorance in Action?*, CNN (Jan. 30, 2017, 12:03 PM), https://www.cnn.com/2017/01/30/us/islamerica-excerpt-hate-crimes/index.html ("American Muslims have been told that a mosque, unlike churches and synagogues, cannot serve as an election polling station. Dozens of communities have fought to keep Muslims from building mosques in their neighborhoods, sometimes threatening violence.").

121 *IRAP*, 265 F. Supp. 3d at 600.

122 *Id.*

123 *Id.*

124 *See id.*

125 *Id.* at 600–01. This Note will further discuss the significance of this finding in my discussion of Barber v. Bryant, 860 F.3d 345 (5th Cir. 2016). *See infra* Section IV.

126 *See IRAP*, 265 F. Supp. 3d at 601 ("These feelings of marginalization constitute an injury in fact in an Establishment Clause case.").

127 *See* Hawai'i v. Trump, 265 F. Supp. 3d 1140, 1150 (D. Haw. 2017) (noting that plaintiffs argue that the third travel ban "denigrates their faith and makes them feel they are second-class citizens in their own country").

ment Clause,[128] he still found that the plaintiffs "each satisfy Article III's standing requirements."[129] That is, the plaintiffs "sufficiently allege[d] a concrete harm" because the third travel ban prohibited visitation and reunification with family members simply because of their nationality.[130] Notwithstanding Judge Watson's and the Ninth Circuit's focus on statutory standing, the federal Courts of Appeals and the Supreme Court should mirror the standing analyses used by the Fourth Circuit and Judge Chuang when deciding cases like *Barber v. Bryant*. Because the Fifth Circuit did not do so,[131] its analysis erred, and the Supreme Court should have corrected this mistake and remanded for further proceedings.

III. STIGMATIZATION

Stigmatization and marginalization are similar but not identical injuries. Marginalization entails excluding a specific class of people from the political community and making them feel like outsiders. Stigmatization, on the other hand, entails disparaging a specific class of people and associating them with inferiority or criminality. The same alleged facts and events can—and often do—give rise to both marginalization and stigmatization. But they are not the same.

Judge Chuang appears to have combined marginalization and stigmatization into a single injury under the Establishment Clause.[132] He, however, clearly established that plaintiffs demonstrate an injury stemming from stigmatization.[133] Judge Chuang noted that the plaintiffs asserted that they will "suffer harm from the implementation of the [travel bans] in the form of . . . *stigmatizing injuries* arising from the anti-Muslim animus of the travel ban."[134] He added that the travel bans made the plaintiffs feel "condemned, *stigmatized*, attacked, or discriminated against."[135] Furthermore, Judge Chuang found that the requested injunction would likely redress the alleged injuries "by removing the *stigma* associated with the [travel bans]."[136] But he concluded that "[t]hese feelings of *marginalization* constitute an injury in fact in an Establishment Clause case."[137]

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128 *Id.* at 1153.

129 *Id.* at 1152.

130 *Id.* at 1151.

131 *See* Barber v. Bryant, 860 F.3d 345, 358 (5th Cir. 2017) ("The failure of the Barber plaintiffs to assert anything more than a general stigmatic injury dooms their claim to standing . . . .").

132 *See* IRAP v. Trump, 265 F. Supp. 3d 570, 601 (D. Md. 2017).

133 *See id.*

134 *Id.* at 593–94 (emphasis added).

135 *Id.* at 601 (emphasis added).

136 *Id.* (emphasis added).

137 *Id.* (citing Moss v. Spartanburg Cty. Sch. Dist. Seven, 683 F.3d 599, 607 (4th Cir. 2012)) (emphasis added).

The Supreme Court has previously recognized the detriment that stigmatization can cause. The Court has aptly noted that stigmatization can also cause intangible injuries that confer Article III standing,[138] including in Establishment Clause context.[139] The government stigmatizes a specific community of person when it disparages them or treats them unequally.[140] In *Obergefell v. Hodges*, Justice Kennedy declared that laws disfavoring one particular group "impose *stigma and injury* of the kind prohibited by our [Nation's] basic charter."[141] Although *Obergefell* presented an Equal Protection issue,[142] Justice Kennedy has previously stated that the Supreme Court's Equal Protection cases guide the Court with respect to impermissible government animus and disparagement under the Religion Clauses.[143]

The travel bans stigmatize the plaintiffs because of their religion by officially sanctioning Islamophobic animus and associating Muslims with terrorism.[144] The "extraordinary record" reveals that President Trump singled out Muslims and that his "principal motive in issuing the Order—and in gerrymandering it in peculiar ways—was anti-Muslim animus."[145] President Trump's own statements concerning the travel bans

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138 *See, e.g.*, Heckler v. Mathews, 465 U.S. 728, 739–40 (1984) (concluding that "stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious noneconomic injuries to those persons . . . ."); *see also* Bostic v. Schaefer, 760 F.3d 352, 372 (4th Cir. 2014) (finding that "[s]tigmatic injury stemming from discriminatory treatment is sufficient to satisfy standing's injury requirement . . . .").

139 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 755 (1984) ("There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing.").

140 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 584 (2003) (finding stigma when the government "single[d] out one identifiable class of citizens"); Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (finding that laws which singled out same-sex couples by denying them the right to marry "impose[d] stigma and injury of the kind prohibited by our basic charter"); Brown v. Bd. Of Educ., 347 U.S. 483, 494 (1954) (finding that laws segregating African American students stigmatized them as inferior).

141 135 S. Ct. 2584, 2602 (2015) (emphasis added).

142 *Id.* at 2602–04.

143 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,?508 U.S. 520, 540 (1993) ("In determining if the object of a law is a neutral one under the [Religion Clauses of the First Amendment], we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, 'neutrality in its application required an equal protection mode of analysis.' Walz v. Tax Comm'n of New York City, 397 U.S. at 696 (concurring opinion)."); *see also* Corbin, *supra* note 115, at 308–18 (arguing that the Supreme Court should bring Establishment Clause jurisprudence into alignment with Equal Protection Clause jurisprudence).

144 *See* Brief for Civil Rights Organizations as Amici Curiae Supporting Appellees, Hawaii v. Trump, No. 17-17168 (9th Cir. Nov. 20, 2017), 2017 U.S. 9th Cir. Briefs LEXIS 130, at *13–24.

145 Brief for Constitutional Law Scholars as Amici Curiae Supporting Respondents, Trump v. IRAP, Nos. 16-1436 & 16-1540 (Sept. 18, 2017), 2017 U.S. S. Ct. Briefs LEXIS 3551, at *7; *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2447 (2018) (Sotomayor, J., dissent-

suggest that he included overwhelmingly majority-Muslim countries to serve as a proxy for the religion of Islam.[146] Indeed, the travel bans "speak[ ] with vague words of national security, but in context drip[ ] with religious intolerance, animus, and discrimination."[147] True, President Trump omitted Iraq and Sudan—two overwhelmingly majority-Muslim countries—from the third travel ban.[148] And true, President Trump included North Korea and Venezuela—two non-majority-Muslim countries—in the third travel ban.[149] However, President Trump's thinly-veiled omissions and inclusions do not rid the bans of anti-Muslim animus. After all, "the world is not made brand new every morning."[150]

In addition to singling out Muslims, President Trump also associated Muslims with "terrorism" and "public-safety threats."[151] Thus, by banning nationals from the majority-Muslim countries regardless of whether the nationals had extremist ties, President Trump effectively stigmatized all Muslims as "terrorists" and "public-safety threats."[152] Travel ban supporters have argued that the bans cannot stigmatize the plaintiffs because Islamophobia and anti-Muslim sentiment existed prior to the travel bans.[153] This argument, however, does not rebut the fact that the travel bans contribute to and sanction Islamophobic sentiment and stigma.[154] The Supreme Court has found standing in cases where

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ing) ("[E]ven a cursory review of the Government's asserted national-security rationale reveals that the Proclamation is nothing more than a 'religious gerrymander.'").

146 *See* IRAP v. Trump, 265 F. Supp. 3d 570, 585–86 (D. Md. 2017).

147 IRAP v. Trump, 857 F.3d 554, 572 (4th Cir. 2017).

148 *Compare* Proclamation 9645 (Sept. 24, 2017), *supra* note 28, at §§ 1(g), 2, *with* Exec. Order 13780, *supra* note 40, at §§ 1(e), 2(c), *and* Exec. Order 13769, *supra* note 31, at § 2(c).

149 *See* Proclamation No. 9645, *supra* note 28, §§ 1(g), 2.

150 McCreary Cty. v. ACLU 545 U.S. 844, 866 (2005); *see also* IRAP v. Trump, 2018 U.S. App. LEXIS 3513, at *52–53 (4th Cir., Feb. 15, 2018) ("[T]he President and his advisors have repeatedly relied on . . . pre-election statements to explain the President's post election actions related to the travel ban . . . [T]hese statements certainly provide relevant context when examining the purpose of the Proclamation."); *supra* note 120 (discussing President Trump's statements about Muslims and the travel ban).

151 Proclamation 9645, *supra note 28*, § 1(a).

152 *Id.* The Presidential Proclamation uses the terms "terrorist" and "terrorism" a total of 47 times collectively and the terms "public-safety" and "threat" a total of 38 times collectively. *See id.*

153 *See* Maza, *supra* note 120.

154 *See* Moustafa Bayoumi, *The Year I Stopped Breathing: On Being Muslim and American in the Age of Trump*, THE NATION (Jan. 10, 2018), https://www.thenation.com/article/the-year-i-stopped-breathing-on-being-muslim-and-american-in-the-age-of-trump/ ("Trump didn't invent Islamophobia, but he has injected it with a new and lethal force."); Azmia Magane, *As a Muslim American, I'm Witnessing State-Sponsored Islamophobia – the Basis of Trump's Travel Ban is Fake News*, THE INDEPENDENT (Dec. 6, 2017, 12:27 PM), http://www.independent.co.uk/voices/travel-ban-donald-trump-far-right-extremism-islamophobia-fake-news-sessions-a8094731.html ("Beyond endangering the safety of the American Muslim community by systematically dehumani[z]ing Muslims and normali[z]ing anti-Muslim hate – and setting a precedent of upholding falsehoods over facts – the Muslim ban is tearing apart families, even if the family hails from a Muslim-majority country that's not the current ban-

laws did not create, but rather reinforced and sanctioned existing prejudices.[155] On the issue of government legitimizing a preexisting stigma, one scholar notes:

> [S]tate practices provide a context and a framework for the broader demonization and marginalization of minority groups. Through its rhetoric and policies, the state absorbs and reflects back onto the public hostile and negative perceptions of the Other—in this case, Muslims. Public expressions of racism by state actors are constituted of and by public sentiments of intolerance, dislike, or suspicion of particular groups. Thus, the state seems to reaffirm the legitimacy of such beliefs, while at the same time giving them public voice.[156]

The stigmatization and government-sanctioned religious animus ultimately constitute a "personal contact" with and "direct injury" from the travel bans.[157]

In a more recent case, *Brush & Nib Studio v. City of Phoenix*, the Arizona Court of Appeals declared, "[A]llowing a vendor who provides goods and services for marriages and weddings to refuse similar services for gay persons would result in 'a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.'"[158] In that case, the Arizona Court of Appeals declined to enjoin a Phoenix city ordinance that prohibits discrimination in places of public accommodation based on the enumerated protected classes.[159] The court noted that the city of Phoenix had a substantial interest in discouraging discrimination and stigmatization in places of public accommodation.[160] The court also approvingly cited to *McLaughlin v. Jones*, which held, "Denying same-sex couples 'the same legal treatment' . . . and 'all the benefits' afforded [to] opposite-sex couples, 'works a grave and continuing harm' on [same-sex

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list."); *see also* Maza, *supra* note 120 (discussing studies showing a rise in hate crimes committed against Muslims since Trump began advocating for a Muslim travel ban).

155 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 584 (O'Connor, J., concurring) (arguing that a Texas sodomy law subjected "homosexuals to a lifelong penalty and stigma"); Plessy v. Ferguson, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting) (arguing that train segregation laws place a stigmatizing "badge of servitude" upon African Americans).

156 Barbara Perry, *Anti-Muslim Violence in the Post-9/11 Era: Motives Forces*, 4 HATE CRIMES 172, 185 (Barbara Perry & Randy Blazak, eds. 2009).

157 IRAP v. Trump, 265 F. Supp. 3d 570, 600–01 (D. Md. 2017).

158 Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 438 (Ariz. Ct. App. 2018) (quoting Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018)), *review pending* 2018 Ariz. LEXIS 375 (Ariz. Oct. 31, 2018). As of April 2019, review by the Arizona Supreme Court is still pending.

159 *See Brush & Nib Studio*, 418 P.3d at 445; *see also* PHOENIX, AZ., CODE § 18-4(B).

160 *Brush & Nib Studio*, 418 P.3d at 440.

couples] . . . —demeaning them, humiliating and stigmatizing their children and family units, and teaching society that they are inferior in important respects."[161] The Arizona courts suggest that government-sanctioned discrimination against LGBTQ+ individuals, even when guised as religious liberty, constitutes stigmatization, which in turn harms and injures the LGBTQ+ individuals. The courts should follow the lead of the Fourth Circuit and Arizona courts in evaluating the stigmatization injury when conducting the standing inquiry.

IV. *BARBER V. BRYANT*

A. Background

Following the Supreme Court's decision to legalize marriage equality in all fifty states, political leaders in Mississippi immediately expressed their displeasure and opposition.[162] In February 2016, Mississippi legislators introduced the "Protecting Freedom of Conscience from Government Discrimination Act," also known as HB 1523.[163] HB 1523 declares: "(a) Marriage is or should be recognized as the union of one man and one woman; (b) Sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."[164] Additionally, HB 1523 both establishes that those who act according to the declarations are protected from adverse action by the state, and defines the circumstances in which adverse state action occur.[165] Both houses of the Mississippi legislature passed HB 1523, and Governor Phil Bryant signed it in April 2016.[166]

HB 1523 was set to take effect on July 1, 2016.[167] But on June 3, 2016, thirteen individuals and two organizations filed suit seeking to preliminarily enjoin HB 1523.[168] The plaintiffs fell into three "broad and sometimes overlapping" categories: (1) religious leaders who do not agree with the HB 1523 declarations, (2) gay and transgender persons who may be negatively affected by HB 1523, and (3) other persons associated with the circumstances in which adverse state action is restricted

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161 *Id.* at 433 (citing McLaughlin v. Jones, 401 P.3d 492, 496 (Ariz. 2017)).

162 *See* Barber v. Bryant, 193 F. Supp. 3d 677, 691–93 (S.D. Miss. 2016) (recounting the statements made by Governor Phil Bryant, Lieutenant Governor Tate Reeves, Speaker of the House Philip Gunn, and others).

163 *See* HB 1523, 2016 Reg. Sess. (Miss. 2016), http://billstatus.ls.state.ms.us/2016/pdf/history/HB/HB1523.xml.

164 MISS. CODE ANN., *supra* note 21, § 11-62-1 *et. seq.* (2016).

165 *See id.* § 11-62-5.

166 *See* HB 1532, *supra note* 151.

167 MISS. CODE ANN. § 11-62-1 *et. seq.*, *supra* note 21.

168 Barber v. Bryant, 193 F. Supp. 3d 677, 696 (S.D. Miss. 2016).

but who do not agree with the HB 1523 declarations.[169] The plaintiffs alleged that HB 1523 violates the Establishment Clause by endorsing "specific religious beliefs" and also "that it violates the Equal Protection Clause" by providing "different protections for Mississippians based on those beliefs."[170]

B. Standing

District Court Judge Carlton Reeves sitting in the Fifth Circuit proclaimed that, although "[t]he concept of injury for standing purposes is particularly elusive in Establishment Clause cases,"[171] the plaintiffs each adequately alleged cognizable injuries under the Establishment Clause to establish standing.[172] Judge Reeves cited two cases to support his conclusion: *Croft v. Governor of Texas*[173] and *Catholic League for Religious & Civil Rights v. City & County of San Francisco*.[174] In *Croft*, the Fifth Circuit found that a parent had standing to challenge a public school's moment of silence when the parent demonstrated that his children were forcibly exposed to and injured by the mandatory moment of silence.[175] In *Catholic League*, the Catholic plaintiffs established standing when they demonstrated that a municipal resolution condemned the Catholic Church's beliefs concerning same-sex marriage.[176]

Similarly the *Barber* plaintiffs argued that HB 1523: (1) elevates a particular set of religious beliefs, (2) conveys Mississippi's "disapproval and diminution" of their own religious beliefs, (3) announces that they are not welcome in their political community, and (4) affirms that Mississippi will not protect them.[177] Thus, Judge Reeves concluded, "[t]he 'sufficiently concrete injur[ies]' here are the psychological consequences stemming from the plaintiffs' 'exclusion or denigration on a religious basis within the political community.'"[178] This determination of cognizable injury was consistent with the findings that courts made in the

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169 Barber v. Bryant, 860 F.3d 345, 351 (5th Cir. 2017); *see also Barber*, 193 F. Supp. 3d at 688.

170 *Barber*, 860 F.3d at 352. This Note only discusses the Establishment Clause issue.

171 *Barber*, 193 F. Supp. 3d at 700 (citing Doe v. Tangipahoa Par. Sch. Bd., 473 F.3d 188, 194 (5th Cir. 2006)).

172 *Id.* at 702.

173 562 F.3d 735 (5th Cir. 2009)

174 624 F.3d 1043 (9th Cir. 2010) (en banc).

175 *Croft*, 562 F.3d at 746–47.

176 *Catholic League*, 624 F.3d at 1047–48.

177 *Barber*, 193 F. Supp. 3d at 701.

178 *Id.* at 702 (citing *Catholic League*, 624 F.3d at 1052). Judge Reeves also found that the plaintiffs demonstrated a causal connection between their injuries and HB 1523 and that a favorable ruling would redress plaintiffs' injuries. *See id.* at 702–03. He further found that HB 1523 violated the Equal Protection Clause of the Fourteenth Amendment and the Establishment Clause of the First Amendment. *See id.* at 711, 722. Accordingly, he granted the plaintiffs' motion for preliminary injunction. *See id.* at 723–24.

travel ban cases.[179] Just as President Trump's travel bans marginalize and stigmatize Muslims under the guise of national security and immigration policies,[180] Mississippi's HB 1523 marginalizes and stigmatizes members of the LGBTQ+ community under the guise of religious freedom and states' rights.[181]

The Fifth Circuit, however, disagreed.[182] The Fifth Circuit found that *none* of the plaintiffs showed a cognizable injury that supported standing.[183] The court concluded that the plaintiffs did not demonstrate "a personal confrontation" with HB 1523, which precedent requires to demonstrate a stigmatic injury that is sufficiently "concrete and particularized."[184] This conclusion is based on two fallacious premises.

First, the Fifth Circuit stated that HB 1523's declarations, which allegedly favor a particular religion, "exist only in the statute itself."[185] But this cannot be right. HB 1523 and its codification of favoring a particular religion are not mere words on a page, but rather declarations that direct the government's conduct. HB 1523 would force the plaintiffs to live and work in Mississippi knowing that their government has "chosen to endorse religious beliefs condemning their lives and relationships and very existence, and that their government has permitted . . . discriminat[ion] against them."[186] Indeed, HB 1523 provides safe harbor to individuals who believe that the gay plaintiffs' marriages are immoral and that the transgender plaintiffs' gender identities should be rejected.[187] Thus, the government endorses and sanctions essential parts of the plaintiffs' lives, families, and identities.[188] The resultant stigmatiza-

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179 *See supra* Section I.B (discussing the standing analyses in the Muslim ban litigation).

180 *See supra* Sections II–III (discussing the twin injuries of marginalization and stigmatization).

181 *Cf.* Romer v. Evans, 517 U.S. 620, 630 (1996) ("It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings . . . At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and, thus, forbidden basis for . . . discrimination.").

182 Barber v. Bryant, 860 F.3d 345, 352 (5th Cir. 2017).

183 *Id.*

184 *Id.* at 353 (citing Murray v. City of Austin, 947 F.2d 147, 151 (5th Cir. 1991)).

185 *Id.* at 354.

186 Petition for Writ of Certiorari, *supra* note 21 at *36 (citing Awad v. Ziriax, 670 F.3d 1111, 1122 (10th Cir. 2012)).

187 *See* MISS. CODE ANN. § 11-62-1 *et. seq.*, *supra* note 21.

188 *Cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2590–2591 (2015) ("[T]he Court [has] acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians . . . . This dynamic also applies to same-sex marriage . . . . [T]he challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. [T]he marriage laws [at issue] are in essence unequal: [S]ame-sex couples are denied . . . benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial

tion and marginalization is not imagined or speculative; they occurred the moment HB 1523 became the law of Mississippi. That which the Fifth Circuit claims to exist only in the statute itself will "undermine the equal dignity of LGBT[Q+] citizens established in [the Supreme] Court's decision . . . ."[189]

Second, the Fifth Circuit maintained that an individual cannot "personally confront" a statutory text.[190] The court further explained that "[t]he religious-display cases do not provide a basis for standing to challenge the endorsement of beliefs that exist only in the text of a statute."[191] This cannot be right either. As the travel ban cases suggest, feelings of marginalization and exclusion constitute a "personal contact" with and "direct injury" from a statute or executive order.[192] The same is true for feelings of stigmatization and disparagement.[193] Both the *Barber* plaintiffs and the plaintiffs in the travel ban cases have suffered injuries resulting from their government's proclamation that they are unworthy of equal rights and equal protection under the law. The government has made these proclamations for all to hear—effectively excluding the plaintiffs from the political community and labeling them as inferior citizens. The main distinction is that *Barber* involves state statute, while *Trump v. Hawaii* involves a federal executive order.

Furthermore, countless courts have found that the type injury demonstrated by the *Barber* plaintiffs and the plaintiffs in the travel ban cases was sufficient to confer standing.[194] To hold otherwise would effectively bar all individuals from establishing standing to challenge the most powerful act of government endorsement, "enacting its preference for particular religious beliefs into state law."[195] Given that the injury caused by government establishment of religion is psychological or spiritual harm resulting from feelings of exclusion or disparagement,[196] a plaintiff must be able to establish standing to challenge the government's

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. . . works a grave and continuing harm . . . serv[ing] to disrespect and subordinate [gays and lesbians].").

189 Petition for Writ of Certiorari, *supra* note 21, at *8.

190 *Barber,* 860 F.3d at 354 (comparing a statutory text to the warehoused monument in *Staley v. Harris Cty.*, 485 F.3d 305 (5th Cir. 2007)).

191 *Barber,* 860 F.3d at 354.

192 IRAP v. Trump, 265 F. Supp. 3d 570, 600–01 (D. Md. 2017).

193 *See id.* at 601 (D. Md. 2017).

194 *See, e.g.*, Santa Fe Independent Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (concluding that "the mere passage by the [government] of a policy that has the purpose and perception of government establishment of religion" can result in an Establishment Clause injury); Awad v. Ziriax, 670 F.3d 1111, 1122–23 (holding that a Muslim plaintiff had sufficiently alleged a concrete injury arising from "personal and unwelcome contact with an amendment to the Oklahoma constitution that would target his religion for disfavored treatment").

195 Petition for Writ of Certiorari, *supra* note 21, at *26.

196 *See Santa Fe*, 530 U.S. at 309–10; McCreary Cty. v. ACLU, 545 U.S. 844, 860 (2005).

establishment of a particular religion by alleging marginalization or stigmatization injuries resulting from the establishment.[197] After all, "the standing inquiry" in Establishment cases such as this has been designed to "reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer."[198]

V. THE EQUALITY ACT

In the absence of a court ruling—presumably by the Supreme Court—rejecting the Fifth Circuit's formalistic standing analysis and striking down HB 1523, Congress must act to protect LGBTQ+ individuals' fundamental civil rights. The Equality Act would serve this purpose by enacting broad protections for LGBTQ+ individuals and by significantly preempting HB 1523.[199] Until the federal government acts, LGBTQ+ individuals in states such as Mississippi will remain second-class citizens lacking equal protection under law. This treatment cannot persist.

The Equality Act was initially introduced in Congress in 1974; the bill died in committee without a vote.[200] Although members of Congress reintroduced the Equality Act or an equivalent bill in subsequent Congresses,[201] the bills died in committee each time.[202] The Equality Act reappeared in July 2015, after LGBTQ+ advocacy organizations and their allies had abandoned their push for the Employment Non-Discrimi-

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197 *Barber*, 860 F.3d 345, *reh'g denied* 872 F.3d 671, 673 (5th Cir. 2017).

198 Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 294 n.31 (5th Cir. 2001) (citing Suhre v. Haywood Cty., 131 F.3d 1083, 1086 (4th Cir. 1997)).

199 *Cf.* Altria Group v. Good, 555 U.S. 70, 76 (2008) ("[W]e have long recognized that state laws that conflict with federal law are 'without effect.'"); U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

200 *See* Alex Reed, *A Pro-Trans Argument for a Transexclusive Employment Non-Discrimination Act*, 50 AM. BUS. L.J. 835, 838 (2013) [hereinafter *Transexclusive Employment Non-Discrimination Act*]; Equality Act of 1974, H.R. 14,752, 93d Cong. (1974); *see also* David G. Dodge, *The Equality Act Turns 40*, HUFFINGTON POST (May 29, 2014 6:03 PM), https://www.huffingtonpost.com/david-g-dodge/the-equality-act-turns-40_b_5352209.html ("In May of 1974, New York Representatives Bella Abzug and Ed Koch introduced the 'Equality Act' into Congress . . . It's unfortunately a bittersweet anniversary; 40 years later—in a year when we've seen the first only gay player drafted to the NFL and same-sex marriage bans are falling across the country on a weekly basis—we still lack federal anti-discrimination protections for LGBTQ[+] people.").

201 Lisa Bornstein & Megan Bench, *Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protections*, 22 WM. & MARY J. OF WOMEN & L. 31, 48 (2015).

202 *Id.*; *see also* William C. Sung, Note, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 495–514 (2011) (recounting the history of the Equality Act and equivalent bills).

nation Act.[203] The current iteration of the Equality Act would amend preexisting legislation to include protections related to public accommodation, public education, federal funding, employment, housing, credit, and jury service for LGBTQ+ individuals.[204] The Act does so by amending the Civil Rights Act of 1964,[205] the Fair Housing Act,[206] the Equal Credit Opportunity Act,[207] and the Jury Selection and Service Act.[208] The version of the Equality Act introduced in 2017 had nearly 250 congressional cosponsors, including then-newly-elected Senator Doug Jones of Alabama.[209] The current 2019 version has nearly 300 congressional cosponsors, including many of the new members elected in the 2018 midterm elections.[210]

In the context of public accommodations, the Equality Act amends Section 201 of the Civil Rights Act of 1964 to prohibit discrimination based on "sex, sexual orientation, [and] gender identity."[211] The Act further establishes clearer and broader definitions for the terms: "sex," "sexual orientation," and "gender identity."[212] The Act also defines "public accommodations" to include places or establishments—physical facilities or otherwise—that provide: (1) "exhibitions, recreation, exercise, amusement, gatherings, or displays"; (2) "goods, services, or programs, including a store, a shopping center, an online retailer or service provider, a salon, a bank, a gas station, a food bank, a service or care center, a shelter, a travel agency, a funeral parlor, or a health care, accounting, or legal service"; or (3) "train service, bus service, car service, taxi service, airline service, station, depot, or other place of or establishment that provides transportation service."[213]

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203 Melissa Wasser, *Legal Discrimination: Bridging the Title VII Gap for Transgender Employees*, 77 OHIO ST. L.J. 1109, 1119 (2016).

204 *See* Equality Act, *supra* note 27.

205 *See id.* §§ 3–9.

206 *Id.* § 10 (amending the Fair Housing Act, 42 U.S.C. § 3601).

207 *Id.* § 11 (amending the Equal Credit Opportunity Act, 15 U.S.C. § 1691).

208 *Id.* § 12 (amending the Jury Selection and Service Act, 28 U.S.C. §§ 1861–1869).

209 Nick Morrow, *MOMENTUM: U.S. Senator Doug Jones Signs on as Co-Sponsor of the Equality Act*, HUMAN RIGHTS CAMPAIGN (Apr. 12, 2018), https://www.hrc.org/blog/u.s.-senator-doug-jones-signs-on-as-co-sponsor-of-the-equality-act. For a full list of co-sponsors, see *H.R. 2282 – Equality Act*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/2282/cosponsors?overview=closed; *S. 1006 – Equality Act*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-bill/1006/cosponsors?overview=closed.

210 Tim Fitzsimons, *Democrats Reintroduce Equality Act to Ban LGBTQ Discrimination*, NBC NEWS (Mar. 13, 2019), https://www.nbcnews.com/feature/nbc-out/democrats-reintroduce-equality-act-ban-lgbtq-discrimination-n982771. For a full list of co-sponsors, see *H.R. 5 – Equality Act,* CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/5/cosponsors; *S. 788 – Equality Act*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/senate-bill/788.

211 Equality Act, *supra* note 27, § 3.

212 *Id.* § 9.

213 *Id.* § 3.

This Note should also briefly address the effort in Congress to address the Supreme Court's decision in *Trump v. Hawaii*. On April 10, 2019, Congresswoman Judy Chu and Senator Chris Coons introduced the NO BAN Act.[214] The NO BAN Act would effectively repeal the Trump administration's travel ban and prevent future discriminatory travel bans.[215] When Congresswoman Chu and Senator Coons introduced the bill, 90 members of Congress—spanning both chambers—had already signed on as cosponsors of the bill.[216] The NO BAN Act, similar to the Equality Act, serves as a partial remedy to the injury inflicted by the Trump administration's travel ban. The legislation, if passed, would reverse the actual effects of the executive action as well as send a message that the government stands against discrimination against the Muslim community. At the very least, the mere introduction of the bill shows that members of a coequal branch of the federal government seek to protect the Muslim community. The Equality Act, if passed, would serve a similar role for the LGBTQ+ community. Although Mississippi, through HB 1523, marginalizes and stigmatizes its LGBTQ+ citizens, the federal government could at least partially remedy the injury by passing the Equality Act.

CONCLUSION

The Fifth Circuit erroneously found that LGBTQ+ plaintiffs did not have standing to challenge HB 1523. And the Supreme Court failed to correct the mistake. In future cases, this Note contends, courts should look instead to the Fourth Circuit's decision in the travel ban litigation. Indeed, courts will effectively cripple American citizens' ability to challenge government endorsement of religion if they follow the Fifth Circuit's flawed decision and reasoning to stand in future cases similar to that of *Barber v. Bryant*. Statutes, ordinances, executive orders, and the like will be immune from legal challenges, even if they endorse a particular religion—either by thinly-veiled language or in express terms. The Fifth Circuit's *Barber* decision may unravel the progress and dignity afforded by the Supreme Court in *Lawrence v. Texas, Romer v. Evans, U.S. v. Windsor*, and *Obergefell v. Hodges*.[217] Indeed, the *Barber* decision

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214 *See* NO BAN Act, H.R. 2214, 116th Cong. (2019).

215 Press Release, U.S. Congresswoman Judy Chu, Rep. Chu, Sen. Coons Lead Bicameral Push to Repeal Muslim Ban, Prevent Future Discriminatory Bans (Apr. 10, 2019), https://chu.house.gov/media-center/press-releases/rep-chu-sen-coons-lead-bicameral-push-repeal-muslim-ban-prevent-future.

216 *Id.*

217 These four landmark cases all struck down state and federal laws discriminating on the basis of sexual orientation. The Court in each case found that arbitrary discrimination against LGBTQ+ individuals and animus toward the community fail rational basis review—the least stringent standard of review in the due process or equal protection contexts. Perhaps most

extinguishes the "equal dignity in the eyes of the law" that the "Constitution grants" members of the LGBTQ+ community.[218] Brett Kavanaugh's confirmation to the Supreme Court has only amplified the concerns about the result of future cases involving the conflict of religious exemptions and LGBTQ+ rights.[219]

The *Barber* decision also contravenes language recently articulated by then-Justice Anthony Kennedy in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* that reaffirmed that LGBTQ+ Americans are entitled to equal dignity and equal rights.[220] If, as Justice Kennedy referenced, LGBTQ+ individuals are entitled to equal dignity, equal rights, and equal protection under the law, then laws such as HB 1523 cannot stand.[221] If the courts continue to shirk their responsibility of protecting fundamental rights and continue to greenlight discrimination through formalistic standing analyses or otherwise, Congress must intervene. The Equality Act is an example of legislation that would, if passed, provide broad protections for LGBTQ+ Americans against blatant discrimination disguised as religious liberty.

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significantly, however, the Court declared that the Constitution affords LGBTQ+ individuals equal protection and equal dignity. *See infra* notes 218–221 and accompanying text.

218 Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

219 *Cf.* Nelson Tebbe, *Judge Kavanaugh Would Vote to Expand Religious Exemptions from General Laws*, WASH. POST (Sept. 7, 2018), https://www.washingtonpost.com/outlook/2018/09/07/judge-kavanaugh-would-vote-expand-religious-exemptions-general-laws/?utm_term=.2db40e5137ae ("Collectively, Kavanaugh's written opinions suggest that he would provide reliable support on the Supreme Court for judgments that exempt religious actors from government regulations, and that allow endorsement of religion by government.").

220 *See* Masterpiece Cakeshop v. Colo. Civil Rights Comm'n., 138 S. Ct. 1719, 1727 (2018) ("Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason[,] the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights.").

221 *Cf. See* Note, *Equal Dignity—Heeding Its Call*, 132 HARV. L. REV. 1323, 1324 (2019) ("[E]qual Dignity should have particular salience to the growing judicial recognition of the rights of transgender individuals."); Laurence Tribe, *Equal Dignity: Speaking its Name*, 129 HARV. L. REV. F. 16, (2015) ("*Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity* . . . Equal dignity . . . does not simply look back to purposeful subordination, but rather lays the groundwork for an ongoing constitutional dialogue about fundamental rights and the meaning of equality."); *but cf.* Tobin Sparling, *A Path Unfollowed: The Disregard of Dignity Precedent in Justice Kennedy's Gay Rights Decisions*, 26 TUL. J.L. & SEXUALITY 53, 55 (2017) ("In the chain of gay rights opinions written by Justice Kennedy, each case relies to a remarkable degree on the dignity precepts he announced in the chain's prior opinions. This has exposed these decisions to the charge that their legal standing is suspect.").