NOTE

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

Jared Ham**

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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

-Susan Sommer
Lambda Legal Director of Constitutional Litigation

* 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.
** B.A., Cornell University, 2015; J.D., Cornell Law School, 2019; Notes Editor, Cornell Law Review, Vol. 104; Social Chair, Cornell Law Review, Vol. 104. Thank you to my family, especially my parents, for their unconditional love and support. Thank you to my friends for their unwavering encouragement and loyalty. Thank you to Professor Nelson Tebbe for his guidance in the composition of this Note. Finally, thank you to the staff of Volume 28 of the Cornell Journal of Law and Public Policy for their tireless work and professionalism in preparing this Note for publication.
Following the recent landmark marriage equality cases—United States v. Windsor, Hollingsworth v. Perry, and Obergefell v. Hodges—the conservative backlash to the expansion of equal rights for LGBTQ+ Americans has been intense and relentless. 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. Similarly, the State of Alabama refused to comply with a federal order to begin issuing marriage licenses to same-sex couples. Bakers, florists, and photographers denied service to same-sex couples planning their weddings.


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).


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.”).


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.”).


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 LGBTQ+ 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. 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 get 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. 


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. A federal district court enjoined the ban in March 2016. 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. The law, more commonly referred to as “HB 1523,” “allows businesses to refuse services to gay couples based on religious objections.”

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. Specifically, the Fifth Circuit erred when it formally analyzed the Barber plaintiffs’ standing in the Establishment Clause context without reaching the merits of the case. Given that the Barber court’s holding does not “reach past formalism[,]” the Supreme Court should have granted certiorari, reversed the Fifth Circuit, and perhaps even struck down Mississippi’s HB 1523. 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.”


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).


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”\(^\text{23}\) and wrongfully “put LGBT citizens back in their place.”\(^\text{24}\)

Barber v. Bryant closely resembles another recent case in many respects: Trump v. Hawaii.\(^\text{25}\) 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

\(^\text{23}\) Id. at *49.

\(^\text{24}\) Id. at *23 (citing Barber v. Bryant, 193 F. Supp. 3d 677, 708 (S.D. Miss. 2016)).

\(^\text{25}\) 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 petition 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. The 2019 version of the Equality Act was nearly identical to the 2017 version.

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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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-
chusetts did the same. 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. 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. On February 9, the Ninth Circuit denied the Trump administration’s motion for a stay pending appeals. 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.

On March 6, 2017, President Trump issued the second travel ban. The second travel ban prohibited citizens from the same countries, with the exception of Iraq, from entering the United States for 90 days. The ban also barred the entry of all refugees for 120 days. The ban would take effect on March 16; the first travel ban would also be repealed in its entirety on this date. 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.”).


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


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 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 (“[D]onald 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.”).

43 Id. § 6(a).

44 Id. § 14.

45 Id. § 13.
Derrick Watson for the District of Hawaii issued a nationwide temporary restraining order, blocking implementation of the second travel ban. District Court Judge Theodore Chuang did the same in the District of Maryland the next day. The Trump administration appealed both rulings.

On May 25, the Fourth Circuit essentially upheld Judge Chuang’s ruling. The Fourth Circuit held that the challengers had standing to sue and that the second travel ban likely violates the Establishment Clause. On June 12, The Ninth Circuit essentially upheld Judge Watson’s ruling. 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-
late immigration;\textsuperscript{54} it did not rule on the Establishment Clause claim or any other constitutional claims.\textsuperscript{55}

On June 26, the Supreme Court granted the Trump Administration’s writ of certiorari and scheduled oral arguments for October.\textsuperscript{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.”\textsuperscript{57} The stay only applied to the Respondents and those similarly situated.\textsuperscript{58} Justices Thomas, Alito, and Gorsuch would have stayed the preliminary injunctions in full.\textsuperscript{59}

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

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

\textsuperscript{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.”).

\textsuperscript{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.”).

\textsuperscript{56} Trump v. IRAP, 137 S. Ct. 2080, 2086 (2017).

\textsuperscript{57} Id. at 2087–89.

\textsuperscript{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.”).

\textsuperscript{59} Id. at 2089.

\textsuperscript{60} Proclamation 9645, supra note 28.

\textsuperscript{61} Id. §§ 1(g), 2.

\textsuperscript{62} Compare id., with Exec. Order 13780, supra note 40, §§ 1(e), 2(c).

\textsuperscript{63} Proclamation 9645, supra note 28, § 2.

\textsuperscript{64} Id. §§ 1(g), 2.

\textsuperscript{65} Id. § 2.

\textsuperscript{66} Trump v. IRAP, 138 S. Ct. 50, 50 (2017).

\textsuperscript{67} Id.


\textsuperscript{69} Hawai‘i, 265 F. Supp. 3d at 1148–53; IRAP, 265 F. Supp. 3d at 595–602.

\textsuperscript{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.\textsuperscript{71}

Judge Watson noted in his decision that the third travel ban “suffers from precisely the same maladies as its predecessor.”\textsuperscript{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.”\textsuperscript{73} He proceeded to “fully” enjoin the Trump administration from “enforcing or implementing” key sections of the travel ban.\textsuperscript{74} Judge Chuang, however, extended the injunction only to individuals with a bona fide relationship with an individual or entity in the United States.”\textsuperscript{75} The Trump administration appealed both rulings\textsuperscript{76} and filed applications for stays with the Supreme Court.\textsuperscript{77} The Supreme Court granted the applications, allowing the Trump administration to implement and enforce the third travel ban pending appellate review.\textsuperscript{78}

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

\textsuperscript{71} IRAP, 265 F. Supp. 3d at 616–29.
\textsuperscript{72} Hawai'i, 265 F. Supp. 3d at 1145.
\textsuperscript{73} Id. (citing Hawaii v. Trump, 859 F.3d 741, 776–79 (9th Cir. 2017)).
\textsuperscript{74} Id. at 1161.
\textsuperscript{75} IRAP, 265 F. Supp. 3d at 630 (citing Trump v. IRAP, 137 S. Ct. 2080, 2088 (2017)).
\textsuperscript{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).
\textsuperscript{81} Hawai'i 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.”).
\textsuperscript{82} See id. at 683–98.
\textsuperscript{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.”).
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-

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.”).
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.
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.\(^{106}\)


\(^{99}\) See Lujan, 504 U.S. at 560.


\(^{102}\) 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”).


\(^{104}\) 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 interests [stemming from the federal establishment of Islam as a disfavored religion] establish[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; it will not address statutory standing or the INA.112 Thus, this Note will focus mainly on the Fourth Circuit’s opinions, rather than the Ninth Circuit’s or the Supreme Court’s opinions.113 This Note will next proceed


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).


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 non-adherents 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

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.”).


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).

For example, Judge Chuang noted that one of the plaintiffs “felt insulted” by the travel ban and that people looked at him “more suspiciously,” and that the travel bans “have made [him] feel this more strongly” such that he “continue[s] to feel demeaned by the ban.” Judge Chuang also noted that the travel ban made another plaintiff “feel like a ‘second-class citizen’” and “the target of abuse and discrimination.” The other plaintiffs made similar allegations. These feelings of marginalization and exclusion constituted a “personal contact” with and “direct injury” from the travel bans. Thus, these allegations, according to Judge Chuang, sufficiently established a cognizable injury and standing for the plaintiffs.

Judge Watson made nearly identical findings of feelings of marginalization to those made by Judge Chuang. Although Judge Watson analyzed the case in terms of the INA rather than the Establish-
ment Clause, he still found that the plaintiffs “each satisfy Article III’s standing requirements.” 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. 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, 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. He, however, clearly established that plaintiffs demonstrate an injury stemming from stigmatization. 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.” He added that the travel bans made the plaintiffs feel “condemned, stigmatized, attacked, or discriminated against.” Furthermore, Judge Chuang found that the requested injunction would likely redress the alleged injuries “by removing the stigma associated with the [travel bans].” But he concluded that “[t]hese feelings of marginalization constitute an injury in fact in an Establishment Clause case.”

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 . . . .”).
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, including in Establishment Clause context. The government stigmatizes a specific community of person when it disparages them or treats them unequally. 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.” Although Obergefell presented an Equal Protection issue, 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.

The travel bans stigmatize the plaintiffs because of their religion by officially sanctioning Islamophobic animus and associating Muslims with terrorism. 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.”

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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.”).


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).


suggest that he included overwhelmingly majority-Muslim countries to serve as a proxy for the religion of Islam. Indeed, the travel bans "speak[] with vague words of national security, but in context drip[] with religious intolerance, animus, and discrimination." True, President Trump omitted Iraq and Sudan—two overwhelmingly majority-Muslim countries—from the third travel ban. And true, President Trump included North Korea and Venezuela—two non-majority-Muslim countries—in the third travel ban. 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.”

In addition to singling out Muslims, President Trump also associated Muslims with “terrorism” and “public-safety threats.” 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.” Travel ban supporters have argued that the bans cannot stigmatize the plaintiffs because Islamophobia and anti-Muslim sentiment existed prior to the travel bans. This argument, however, does not rebut the fact that the travel bans contribute to and sanction Islamophobic sentiment and stigma. The Supreme Court has found standing in cases where

\begin{itemize}
  \item \textit{IRAP v. Trump}, 857 F.3d 554, 572 (4th Cir. 2017).
  \item \textit{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).
  \item See Proclamation No. 9645, supra note 28, §§ 1(g), 2.
  \item See Maza, supra note 120.
  \item 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.
  \item See Moustafa Bayoumi, \textit{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 dehumanizing Muslims and normalizing 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-
\end{itemize}
laws did not create, but rather reinforced and sanctioned existing prejudices. 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.

The stigmatization and government-sanctioned religious animus ultimately constitute a “personal contact” with and “direct injury” from the travel bans.

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.’” 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. The court noted that the city of Phoenix had a substantial interest in discouraging discrimination and stigmatization in places of public accommodation. 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 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).


159 See Brush & Nib Studio, 418 P.3d at 445; see also Phoenix, Ariz., 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.”

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. In February 2016, Mississippi legislators introduced the “Protecting Freedom of Conscience from Government Discrimination Act,” also known as HB 1523. 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.” 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. Both houses of the Mississippi legislature passed HB 1523, and Governor Phil Bryant signed it in April 2016.

HB 1523 was set to take effect on July 1, 2016. But on June 3, 2016, thirteen individuals and two organizations filed suit seeking to preliminarily enjoin HB 1523. 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.

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).
165 See id. § 11-62-5.
166 See HB 1532, supra note 151.
but who do not agree with the HB 1523 declarations. 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.”

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,” the plaintiffs each adequately alleged cognizable injuries under the Establishment Clause to establish standing. Judge Reeves cited two cases to support his conclusion: Croft v. Governor of Texas and Catholic League for Religious & Civil Rights v. City & County of San Francisco. 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. 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.

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. 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.’” 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. Just as President Trump’s travel bans marginalize and stigmatize Muslims under the guise of national security and immigration policies, Mississippi’s HB 1523 marginalizes and stigmatizes members of the LGBTQ+ community under the guise of religious freedom and states’ rights.

The Fifth Circuit, however, disagreed. The Fifth Circuit found that none of the plaintiffs showed a cognizable injury that supported standing. 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.” 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.” 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.” 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. Thus, the government endorses and sanctions essential parts of the plaintiffs’ lives, families, and identities. 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)).
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

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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 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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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.
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.\footnote{Barber, 860 F.3d 345, reh’g denied 872 F.3d 671, 673 (5th Cir. 2017).} 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.”\footnote{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)).}

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.\footnote{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.”).} 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.\footnote{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.”).} Although members of Congress reintroduced the Equality Act or an equivalent bill in subsequent Congresses,\footnote{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).} the bills died in committee each time.\footnote{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).} The Equality Act reappeared in July 2015, after LGBTQ+ advocacy organizations and their allies had abandoned their push for the Employment Non-Discrimi-
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. The Act does so by amending the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, and the Jury Selection and Service Act. The version of the Equality Act introduced in 2017 had nearly 250 congressional cosponsors, including then-newly-elected Senator Doug Jones of Alabama. The current 2019 version has nearly 300 congressional cosponsors, including many of the new members elected in the 2018 midterm elections.

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.” The Act further establishes clearer and broader definitions for the terms: “sex,” “sexual orientation,” and “gender identity.” 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.”

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 Id. §§ 3–9.
206 Id. § 10 (amending the Fair Housing Act, 42 U.S.C. § 3601).
208 Id. § 12 (amending the Jury Selection and Service Act, 28 U.S.C. §§ 1861–1869).
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).


\(^{216}\) *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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{218} Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

\textsuperscript{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.”).

\textsuperscript{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.”).

\textsuperscript{221} Cf. 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.”).