

## COMMENTS

# Standing for Statues, but Not for Statutes? An Argument for Purely Stigmatic Harm Standing under the Establishment Clause

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*In the wake of Obergefell v Hodges, a number of state legislatures passed laws exempting individuals with religious objections to same-sex marriage from state antidiscrimination laws. By granting special privileges to religious adherents, these laws may violate the Establishment Clause. This Comment concerns the threshold issue of which plaintiffs have standing to bring such an Establishment Clause challenge. Specifically, can the emotional harm caused by a law’s stigmatizing message—for example, the message that individuals in same-sex relationships are less-valued members of the community—constitute a judicially cognizable “injury in fact” in the Establishment Clause context? This question has split the lower courts. Drawing on basic separation-of-powers principles, several courts of appeals have held that stigmatic harms can confer standing only when they are accompanied by physical exposure to a challenged Establishment Clause violation. By contrast, other courts of appeals have relied on the Supreme Court’s Establishment Clause merits decisions to uphold the justiciability of “purely stigmatic harms,” or stigmatic harms that are not accompanied by physical contact. This Comment suggests a different approach. It proposes that the Court’s seminal Establishment Clause standing cases imply that purely stigmatic harms do confer standing, so long as the plaintiff belongs to the community affected by the alleged Establishment Clause violation. In addition to articulating the precedential basis for this proposed test, this Comment describes the policy advantages and practical applications of adopting such a rule.*

INTRODUCTION .....	1564
I. ESTABLISHMENT CLAUSE STANDING EXCEPTIONALISM.....	1566
A. Background on Standing.....	1566
B. The Religious Display and Exercise “Exception” .....	1568
II. THE VIEW FROM THE LOWER COURTS.....	1571
A. Stigmatic Harm Standing as Predicated on Physical Contact.....	1571
B. Implications of Conditioning Stigmatic Harm Standing on Physical Contact.....	1575

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C. Circuits Rejecting the View That Stigmatic Harm Standing Requires Physical Contact .....	1578
III. THE SUPREME COURT'S VIEW .....	1580
A. Reexamining Supreme Court Precedent: <i>Schempp</i> and <i>Valley Forge</i> .....	1581
1. <i>Schempp</i> : presuming the justiciability of stigmatic harms. ....	1581
2. <i>Valley Forge</i> : corroborating <i>Schempp</i> 's implications.....	1585
B. Misapplication of <i>Valley Forge</i> by the Lower Courts .....	1587
IV. RETURNING TO THE COURT'S CONCEPTION OF STIGMATIC HARM STANDING .....	1591
A. Sample Applications of the Proposed Test.....	1592
B. Addressing Counterarguments .....	1596
C. Additional Benefits of Adopting the Proposed Test.....	1599
CONCLUSION .....	1600

## INTRODUCTION

In 2016, Mississippi passed the Protecting Freedom of Conscience from Government Discrimination Act,<sup>1</sup> a law exempting Mississippians with “sincerely held religious beliefs or moral convictions” that marriage should be restricted to heterosexual couples from the state’s antidiscrimination laws.<sup>2</sup> A varied group of plaintiffs, including gay and transgender individuals, religious leaders, and an LGBT advocacy organization, challenged the law as violating the Establishment Clause. Whether the law’s carve out for residents with a particular set of religious beliefs constituted an impermissible establishment of religion was never decided. Instead, the court held that the plaintiffs lacked the “concrete” injury necessary for standing to challenge the law in federal court.<sup>3</sup>

The plaintiffs in *Barber v Bryant*,<sup>4</sup> the Fifth Circuit case described above, alleged that they had been injured by the law’s “clear message” that their state government viewed them as disfavored citizens.<sup>5</sup> Rejecting the plaintiffs’ argument, the Fifth Circuit asserted that such “stigmatic injur[ies]” cannot confer standing unless the plaintiff has been physically exposed to the allegedly unconstitutional religious message.<sup>6</sup>

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<sup>1</sup> 2016 Miss Laws 334, codified at Miss Code § 11-62-1 et seq.

<sup>2</sup> Miss Code §§ 11-62-3, -5.

<sup>3</sup> *Barber v Bryant*, 860 F3d 345, 351–53, 358 (5th Cir 2017).

<sup>4</sup> 860 F3d 345 (5th Cir 2017).

<sup>5</sup> *Id.* at 352.

<sup>6</sup> See *id.* at 353–56.

The type of injury alleged by the *Barber* plaintiffs is a “stigmatic harm,” a “form of treatment that ‘marks’ the plaintiff in some way as defective, low, or unworthy of respect.”<sup>7</sup> The lower courts agree that stigmatic harms are cognizable when a plaintiff has come into physical contact with a government-sponsored religious display or exercise, such as by seeing a cross in a public park or hearing the recitation of a religious prayer at a public ceremony.<sup>8</sup> However, the courts are split regarding whether *purely stigmatic harms*—that is, stigmatic harms that are not accompanied by physical contact with a religious symbol—are judicially cognizable. Similar to the Fifth Circuit, the DC Circuit has held that stigmatic harms do not satisfy standing requirements unless the plaintiff has been physically exposed to the challenged Establishment Clause violation.<sup>9</sup> By contrast, the Fourth and Ninth Circuits have held that there is no physical contact requirement for stigmatic harms to be cognizable.<sup>10</sup>

This Comment proposes that a physical exposure requirement for standing based on stigmatic harms contradicts Supreme Court precedent on Establishment Clause standing. Rather than hinging on physical exposure, the Court’s precedents suggest that standing depends on the plaintiff’s relationship to the community impacted by the alleged Establishment Clause violation.<sup>11</sup> Under this view, plaintiffs who claim that violations of the Establishment Clause denigrate them within their own community have asserted a cognizable injury.

In addition to contradicting Supreme Court precedent, it is normatively undesirable to condition stigmatic harm standing on physical exposure to a challenged Establishment Clause violation. As demonstrated in *Barber*, a physical contact requirement prevents plaintiffs from challenging explicitly religious statutes and policies that stigmatize nonadherents as second-class citizens. This outcome directly contradicts courts’ longstanding practice of allowing plaintiffs to challenge religious statues and prayers for inflicting the very same harm.<sup>12</sup> Inoculating religious laws and policies that may violate the Establishment Clause from

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<sup>7</sup> Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 Brooklyn L Rev 1555, 1565, 1569 (2016).

<sup>8</sup> See Part I.B.

<sup>9</sup> See Part II.A.

<sup>10</sup> See Part II.C.

<sup>11</sup> See Part III.A.

<sup>12</sup> See Part II.B.

judicial review is particularly troubling in light of recent restrictions on taxpayer standing in Establishment Clause cases.<sup>13</sup>

Part I of this Comment provides a brief overview of standing doctrine and describes the specialized standing principles that pertain to the Establishment Clause. Part II describes current conflicting approaches among the lower courts regarding the justiciability of purely stigmatic harms in Establishment Clause cases, while Part III examines the Court's seminal Establishment Clause standing decisions. In addition, Part III clarifies the standing principles embraced by the Court's precedents and explains how these principles have been obscured in the lower courts' religious display and exercise cases. Part IV proposes a rule for purely stigmatic Establishment Clause harms that would return the lower courts to alignment with the Court's standing principles. Under this rule, stigmatic harms caused by a government's overtly religious conduct are justiciable so long as the plaintiff belongs to the community impacted by the challenged government conduct.

## I. ESTABLISHMENT CLAUSE STANDING EXCEPTIONALISM

### A. Background on Standing

Article III of the Constitution vests the “judicial Power of the United States” in the federal courts while limiting the scope of such power to certain “Cases” and “Controversies.”<sup>14</sup> As part of Article III's case and controversy limitation, plaintiffs must show that they have suffered a judicially cognizable “injury in fact.”<sup>15</sup>

It is relatively straightforward to identify the extreme ends of the injury-in-fact spectrum. Economic losses represent quintessentially cognizable injuries; a plaintiff who is denied a tax exemption, for instance, easily satisfies the injury-in-fact requirement.<sup>16</sup> At the other extreme, a plaintiff whose only injury is offense that the government has violated the Constitution has not suffered an injury in fact. The Supreme Court has repeatedly

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<sup>13</sup> See Parts IV.B–C.

<sup>14</sup> US Const Art III, §§ 1–2. For a clear and succinct explanation of the “cases and controversies” term of art, see *Flast v Cohen*, 392 US 83, 94–95 (1968).

<sup>15</sup> *Lujan v Defenders of Wildlife*, 504 US 555, 560–61 (1992).

<sup>16</sup> See *Arizona Christian School Tuition Organization v Winn*, 563 US 125, 129–30 (2011) (noting that the denial of a tax exemption “conditioned on religious affiliation” confers standing). See also Charles Alan Wright et al, 13A *Federal Practice & Procedure* § 3531.4 (West 3d ed 2019) (“Standing is found readily, particularly when injury to some traditional form of property is asserted.”).

held that the fact that the government has violated the Constitution “is not sufficient, standing alone, to confer jurisdiction on a federal court.”<sup>17</sup> No matter how deeply felt, offense at the government’s unconstitutional conduct is not a judicially cognizable injury.<sup>18</sup>

It is markedly more difficult to determine whether injuries falling between these two poles meet the injury-in-fact requirement. The Court has stated that the impairment of “noneconomic values,” such as “aesthetic, conservational, and recreational” interests, can sometimes suffice as an injury in fact.<sup>19</sup> This amorphous standard has left the courts of appeals particularly at sea when applying the injury-in-fact requirement to Establishment Clause cases.<sup>20</sup> For plaintiffs bringing Equal Protection claims, the Court has clarified that the “stigmatizing injury” caused by racial discrimination meets the injury-in-fact requirement so long as the plaintiff has personally been discriminated against.<sup>21</sup> However, it remains an open question whether and under what circumstances stigmatic harms caused by Establishment Clause violations are cognizable injuries.<sup>22</sup>

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<sup>17</sup> *Allen v Wright*, 468 US 737, 754 (1984) (collecting cases). See also *Hein v Freedom from Religion Foundation, Inc.*, 551 US 587, 620 (2007) (Scalia concurring); *United States v Richardson*, 418 US 166, 176–78 (1974); *Schlesinger v Reservists Committee to Stop the War*, 418 US 208, 217, 219–20 (1974); *Ex parte Levitt*, 302 US 633, 634 (1937).

<sup>18</sup> See *Valley Forge Christian College v Americans United for Separation of Church and State, Inc.*, 454 US 464, 485–86 (1982).

<sup>19</sup> *Association of Data Processing Service Organizations, Inc v Camp*, 397 US 150, 152, 154 (1970) (noting that a qualifying injury in fact may be an injury that is “economic or otherwise,” and listing a variety of sufficient noneconomic injuries, such as injuries to “aesthetic, conservational, and recreational” values, “to emphasize that standing may stem from them as well as from [ ] economic injury”).

<sup>20</sup> See, for example, *Cooper v US Postal Service*, 577 F3d 479, 490 (2d Cir 2009) (noting that the Supreme Court has failed to address the lower courts’ “uncertainty concerning how to apply the injury-in-fact requirement in the Establishment Clause context”).

<sup>21</sup> See *Allen*, 468 US at 755.

<sup>22</sup> See, for example, *Trump v Hawaii*, 138 S Ct 2392, 2416 (2018) (declining to decide “whether the claimed dignitary interest establishes an adequate ground for standing” in a case in which the plaintiffs alleged injury from a presidential proclamation that denigrated them by “establish[ing their religion as] a disfavored faith”). The courts of appeals habitually recite the Eleventh Circuit’s observation that the “concept of injury for standing purposes is particularly elusive in Establishment Clause cases” when confronting plaintiffs alleging stigmatic harms. *Saladin v City of Milledgeville*, 812 F2d 687, 691 (11th Cir 1987). See also, for example, *American Humanist Association, Inc v Douglas County School District RE-1*, 859 F3d 1243, 1250 (10th Cir 2017); *Montesa v Schwartz*, 836 F3d 176, 196 (2d Cir 2016); *Awad v Zirriax*, 670 F3d 1111, 1120 (10th Cir 2012); *Catholic League for Religious and Civil Rights v City and County of San Francisco*, 624 F3d 1043, 1049 (9th Cir 2010); *Suhre v Haywood County*, 131 F3d 1083, 1085 (4th Cir 1997); *Murray v City of Austin, Texas*, 947 F2d 147, 151 (5th Cir 1991). See also Bayefsky, 81 Brooklyn L

## B. The Religious Display and Exercise “Exception”

Establishment Clause cases frequently involve challenges to government-sponsored religious displays—for instance, crosses, nativity scenes, and Ten Commandments statues—and religious exercises, such as prayers or ceremonies.<sup>23</sup> The lower courts’ treatment of standing in these religious exercise and display cases represents a radical departure from the fundamental standing principle that *mere offense* is not a cognizable injury.

The vast majority of the courts of appeals have held that physical exposure to a government-sponsored religious display or exercise—such as seeing a nativity scene or Ten Commandments statue or hearing the recitation of a prayer—is sufficient to confer standing, regardless of the harm the plaintiff alleges to have suffered from the exposure.<sup>24</sup> In some cases, the lower courts have recognized standing for plaintiffs who have alleged nothing more than mere offense at the violation of the Establishment Clause,<sup>25</sup> a conclusion directly at odds with the Court’s strict bar on mere offense standing.<sup>26</sup> More frequently, courts simply neglect to discuss the harm alleged, basing standing on physical contact with the religious display or exercise alone.<sup>27</sup>

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Rev at 1557–58 (cited in note 7) (noting that “the Court has shown a willingness to recognize . . . —possibly—stigma or indignity as bases of Article III injury”).

<sup>23</sup> For the most recent Supreme Court case following this pattern, see generally *American Legion v American Humanist Association*, 139 S Ct 2067 (2019).

<sup>24</sup> While seeing religious displays and hearing religious invocations qualify as physical exposure to an alleged Establishment Clause violation, the mere awareness that the government has set up a display or recited a prayer do not. See, for example, *Doe v Tangipahoa Parish School Board*, 494 F3d 494, 497 (5th Cir 2007) (asserting that “mere abstract knowledge that invocations were said” cannot substitute for actually hearing the invocation in a standing analysis); *ACLU-NJ v Township of Wall*, 246 F3d 258, 265–66 (3d Cir 2001) (concluding that plaintiffs who had not personally seen a challenged nativity scene lacked the “personal contact” that confers standing).

<sup>25</sup> See, for example, *Cooper*, 577 F3d at 488, 490–91 (holding that “direct contact with religious displays” was sufficient to confer standing, when the harm alleged by the plaintiff was “discomfort” with “governmentally-sponsored and supported religious activity”); *Buono v Norton*, 371 F3d 543, 546–48 (9th Cir 2004) (finding standing for a Catholic plaintiff who was offended by the Establishment Clause violation effected by a cross placed on public land, even though the plaintiff expressly stated that he did not take issue with the cross itself).

<sup>26</sup> See text accompanying notes 17–18.

<sup>27</sup> See, for example, *Nikolao v Lyon*, 875 F3d 310, 317 (6th Cir 2017); *Newdow v Roberts*, 603 F3d 1002, 1014 (DC Cir 2010); *American Atheists, Inc v Davenport*, 637 F3d 1095, 1113–14 (10th Cir 2010); *Newdow v Lefevre*, 598 F3d 638, 642 (9th Cir 2010); *Pelphrey v Cobb County, Georgia*, 547 F3d 1263, 1279–80 (11th Cir 2008); *Books v Elkhart County, Indiana*, 401 F3d 857, 861–62 (7th Cir 2005); *Suhre*, 131 F3d at 1090; *Murray*, 947 F2d at 149–51. See also David Spencer, Note, *What’s the Harm? Nontaxpayer Standing to Chal-*

By failing to ensure that the harm suffered by the plaintiff is more than mere offense at the government's unconstitutional conduct, these lower courts have created a special exception to the principle that mere offense at unconstitutional conduct is nonjusticiable. Under this exception, physical contact with a religious display or exercise appears to transform mere offense from an unrecognizable injury to a cognizable one. While not necessarily agreeing with the validity of this apparent exception to normal standing requirements, numerous scholars have recognized its widespread acceptance among the lower courts.<sup>28</sup>

The Supreme Court has not overtly recognized the lower courts' religious display and exercise exception to the bar on mere offense standing, and this Comment contends in Part III that predicating standing solely on physical exposure to a religious symbol is at odds with the Court's precedents.<sup>29</sup> However, the Court has muddied the water by reaching the merits—without discussing standing—in a series of religious display cases involving Establishment Clause challenges to nativity scenes and Ten

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*lenge Religious Symbols*, 34 Harv J L & Pub Pol 1071, 1076–78 (2011) (presenting a thorough discussion of lower court case law holding that “a plaintiff can establish injury-injury by alleging direct exposure to an offensive governmental religious object” alone). But note that at least two courts of appeals are careful to require allegations that the harm caused is not merely offense at unconstitutional government conduct, even in religious display and exercise cases. See *Township of Wall*, 246 F3d at 265–66 (suggesting that the plaintiffs' physical contact with a religious display could not confer standing without evidence that the display caused the plaintiff feelings of exclusion or resentment beyond mere offense at unconstitutional conduct); *ACLU Nebraska Foundation v City of Plattsmouth*, 358 F3d 1020, 1029–31 (8th Cir 2004) (taking care to establish that the plaintiff was suing over the “alienation” caused by a Ten Commandments statue, rather than the fact that the monument violated the Establishment Clause), vac'd en banc on other grounds, 419 F3d 772, 775 n 4 (8th Cir 2005) (vacating the panel's conclusion on the merits but affirming its conclusion and reasoning regarding standing).

<sup>28</sup> See, for example, Steven D. Smith, *Nonestablishment, Standing, and the Soft Constitution*, 85 St John's L Rev 407, 439–40 (2011) (noting the “courts' acceptance, often with little or no discussion, of what might be called ‘offended observer’ standing in Establishment Clause cases”); Ira C. Lupu and Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 BYU L Rev 115, 119; Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing to Sue under the Establishment Clause*, 11 Ga St U L Rev 495, 529–30 (1995) (arguing that “[p]laintiffs who assert that they are offended by governmental sponsorship of religious symbols to which they have been, and will be again, personally exposed” have asserted judicially cognizable injuries).

<sup>29</sup> In contrast to the Court's silence on the lower courts' special standing rules for religious displays and exercises, the Court has explicitly acknowledged another standing exception unique to Establishment Clause plaintiffs. While there is normally an “impenetrable barrier” to basing standing on the plaintiff's status as a taxpayer, taxpayer status can confer standing in particular Establishment Clause challenges. See *Flast*, 392 US at 85, 105–06.

Commandments statues on public land.<sup>30</sup> Many courts and commentators have assumed that these cases imply the Court's support for the religious display exception adopted by the lower courts.<sup>31</sup>

The basis for this assumption is quite weak. First, the Court's silence with respect to standing makes it impossible to definitively identify what theory of standing (if any) the Court credited in reaching the merits of its religious display cases. It is possible that the Court considered mere offense at a constitutional violation to be cognizable in the religious display context, thus supporting the lower courts' religious display exception. But it is equally possible that the Court relied on taxpayer harm, stigmatic harm, or another injury entirely to find standing;<sup>32</sup> as the Court did not discuss standing, it is purely a matter of conjecture. Second, it is a longstanding principle that "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."<sup>33</sup> Thus, the fact that the Court did not address standing in its religious display cases leaves open the possibility that the plaintiffs in those cases did not in fact have standing.

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<sup>30</sup> See generally *McCreary County, Kentucky v American Civil Liberties Union of Kentucky*, 545 US 844 (2005); *Van Orden v Perry*, 545 US 677 (2005); *County of Allegheny v American Civil Liberties Union Greater Pittsburgh Chapter*, 492 US 573 (1989); *Lynch v Donnelly*, 465 US 668 (1984).

<sup>31</sup> See, for example, *Catholic League*, 624 F3d at 1049–50. See also, for example, Carl H. Esbeck, *Unwanted Exposure to Religious Expression by Government: Standing and the Establishment Clause*, 7 *Charleston L Rev* 607, 616–17 (2013); John M. Bickers, *Standing on Holy Ground: How Rethinking Justiciability Might Bring Peace to the Establishment Clause*, 60 *Cleve St L Rev* 415, 440–41 (2012); Lupu and Tuttle, 2008 *BYU L Rev* at 158 (cited in note 28); Rohr, 11 *Ga St U L Rev* at 504–05 (cited in note 28); William P. Marshall and Gene R. Nichol, *Not a Winn-Win: Misconstruing Standing and the Establishment Clause*, 2011 *S Ct Rev* 215, 246–47.

<sup>32</sup> See Richard H. Fallon Jr., *Tiers for the Establishment Clause*, 166 *U Pa L Rev* 59, 124 & nn 311–12 (2017) (noting that the Court's failure to articulate the basis for standing in religious display cases has "perplexed the lower courts, which have had to guess at the basis on which the Justices thought they could reach the merits," and positing that standing may have been based on taxpayer status in some of the religious display cases).

<sup>33</sup> *Arizona Christian School*, 563 US at 144. See also *Pennhurst State School and Hospital v Halderman*, 465 US 89, 119 (1984) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.") (quotation marks omitted).

## II. THE VIEW FROM THE LOWER COURTS

As recently as June 2018, the Supreme Court expressly declined to rule on whether a “dignitary interest establishes an adequate ground for standing” under the Establishment Clause.<sup>34</sup> Remarkably, the last Supreme Court case to address stigmatic harm standing in the Establishment Clause context was decided in 1982.<sup>35</sup>

In light of the Supreme Court’s long silence on this issue, this Comment examines the courts of appeals’ current positions on purely stigmatic harm standing in Part II before turning to the Supreme Court’s seminal Establishment Clause standing cases in Part III. In the past decade, four courts of appeals have confronted the question whether purely stigmatic harms can confer standing in Establishment Clause claims. Part II.A discusses the reasoning of the Fifth and DC Circuits, which have held that purely stigmatic harms are not cognizable, while Part II.B considers the potential normative consequences of this approach. Part II.C presents the approach taken by the Fourth and Ninth Circuits, which have held that purely stigmatic harms can confer standing.

### A. Stigmatic Harm Standing as Predicated on Physical Contact

As of the writing of this Comment, two courts of appeals have held that stigmatic injuries are cognizable only when the plaintiff has been physically exposed to the alleged Establishment Clause violation. For instance, this approach would require a plaintiff seeking to challenge a Ten Commandments monument placed in a courthouse to have seen the monument herself. In addition to requiring physical contact for stigmatic harm standing to lie, these courts of appeals have asserted that the stigmatizing message sent by a law or policy is not capable of being physically encountered. In this way, these circuits’ physical exposure requirement necessarily precludes stigmatic harms caused by laws and policies from conferring standing.

In *Barber*, the Fifth Circuit held that stigmatic harms require physical exposure in order to be cognizable.<sup>36</sup> Recall from the Introduction that in *Barber*, LGBT individuals alleged stigmatic injury from the denigrating message sent by HB 1523, a Mississippi

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<sup>34</sup> *Trump v Hawaii*, 138 S Ct 2392, 2416 (2018).

<sup>35</sup> See Part III.A.2.

<sup>36</sup> *Barber*, 860 F3d at 353. See notes 3–6 and accompanying text.

law exempting people with religious objections to same-sex marriage from Mississippi's antidiscrimination laws.<sup>37</sup> The *Barber* court began its standing analysis by acknowledging that “stigma can be a cognizable Establishment Clause injury.”<sup>38</sup> However, the court then limited stigmatic injury standing to religious display and exercise cases. As the court put it, religious display and exercise cases “represent the outer limits of where we can find these otherwise elusive Establishment Clause injuries.”<sup>39</sup> Thus, according to the *Barber* court, plaintiffs have standing under the Establishment Clause to challenge an allegedly stigmatizing “government message”—such as HB 1523's stigmatizing message that the state shuns LGBT individuals—only in the “context of a religious display or exercise.”<sup>40</sup>

The *Barber* court entertained the possibility that the religious display or exercise “context” could potentially extend to policies or laws conveying governmental messages concerning religion. However, the court ultimately precluded this possibility in holding that (a) the religious display and exercise context “require[s] an encounter with the offending item or action to confer standing,”<sup>41</sup> and (b) “an individual . . . cannot [physically] confront statutory text.”<sup>42</sup> The *Barber* court explained that the “confrontation” required for stigmatic harms to be cognizable in religious display cases occurs only when a plaintiff views the display; once the display is “removed from view, standing dissipates because there is no longer an injury.”<sup>43</sup> The court further stated that statutory text occupies the same status as a “warehoused monument”; it is by definition removed from view and therefore cannot be confronted.<sup>44</sup>

As statutory text can never be physically “encountered” under the Fifth Circuit's interpretation, stigmatic harms caused by a statute or governmental policy will never be justiciable in the

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<sup>37</sup> Id at 350–51.

<sup>38</sup> Id at 353.

<sup>39</sup> Id.

<sup>40</sup> *Barber*, 860 F3d at 355, citing *Navy Chaplaincy*, 534 F3d at 765.

<sup>41</sup> *Barber*, 860 F3d at 353. Note that the court acknowledges the injury in religious display cases as stigmatic, stating that “[a] plaintiff has standing to challenge a religious display where his stigmatic injury results from a ‘personal[ ] confront[ation]’ with the display.” Id. See also *Doe v Tangipahoa Parish School Board*, 494 F3d 494, 497 (5th Cir 2007) (requiring “exposure” to a prayer recited at school board meetings for standing to challenge the prayer as violating the Establishment Clause).

<sup>42</sup> *Barber*, 860 F3d at 354.

<sup>43</sup> Id at 353–54.

<sup>44</sup> Id at 354.

religious display and exercise “context.” And given the Fifth Circuit’s conclusion that stigmatic harms are justiciable only in the religious display and exercise context, stigmatic harms caused by policies and statutes can never confer standing under the Establishment Clause. Accordingly, as the *Barber* plaintiffs could not “personally confront” HB 1523, the court rejected their stigmatic injury as uncognizable.<sup>45</sup>

The DC Circuit has similarly held that stigmatic harm standing in Establishment Clause challenges requires physical confrontation with a religious display or exercise. In *In re Navy Chaplaincy*,<sup>46</sup> Protestant Navy chaplains challenged a policy granting superior retirement benefits to Catholic chaplains as violating the Establishment Clause.<sup>47</sup> To establish standing, the plaintiffs advanced a theory of stigmatic injury, alleging that the retirement policy conveyed a preference for Catholicism that made them feel like “second-class citizens within the Navy Chaplaincy.”<sup>48</sup> The court held that stigmatic harms are only cognizable in the Establishment Clause context when they are caused by “religious words or religious symbols—in other words, [when the government] was engaging in religious speech that was observed, read, or heard by the plaintiffs.”<sup>49</sup> As the Navy’s policy granting preferential treatment to Catholics did not convey the government’s endorsement of Catholicism through “religious words or religious symbols,” the court held that the policy’s exclusionary message could not suffice to confer standing.<sup>50</sup>

Importantly, the court acknowledged that when the government erects a Ten Commandments statue on public property or recites a prayer as part of a government-sponsored ceremony, the implicit “religious message” communicated by the government’s actions has been held to be judicially cognizable.<sup>51</sup> Nonetheless, the court denied standing to plaintiffs alleging that the Navy’s retirement policy conveyed the same message of religious favoritism. In justifying this unintuitive distinction between religious displays or prayers and religious policies, both of which are alleged by Establishment Clause plaintiffs to convey the same message

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<sup>45</sup> *Id.*

<sup>46</sup> 534 F3d 756 (DC Cir 2008).

<sup>47</sup> *Id.* at 759.

<sup>48</sup> *Id.* at 763.

<sup>49</sup> *Id.* at 764–65.

<sup>50</sup> *Navy Chaplaincy*, 534 F3d at 764–65.

<sup>51</sup> *Id.* at 763–64.

of religious favoritism,<sup>52</sup> the DC Circuit emphasized that statues and prayers—unlike a demeaning message conveyed by a statute—can be “observed, read, or heard.”<sup>53</sup> Like the Fifth Circuit in *Barber*, the DC Circuit fixated on the tangible, physically confrontable aspect of religious displays and prayers in denying standing for the very same harms caused by religious policies and laws.

To summarize, the Fifth and DC Circuits have held that stigmatic harms caused by Establishment Clause violations are cognizable only if the plaintiff has physically encountered the source of the government’s stigmatizing message. In order to arrive at this conclusion, the courts in both *Barber* and *Navy Chaplaincy* relied on the assertion that plaintiffs must personally see or hear a religious display or exercise in order to have standing to challenge it.<sup>54</sup> This position—which a number of commentators have taken as true<sup>55</sup>—adopts a far narrower view of standing in religious display and exercise cases than that of most other courts of appeals. Almost all of the lower courts recognize the religious display and exercise exception as one avenue for stigmatic harms to confer standing.<sup>56</sup> But only the Fifth and DC Circuits have held that the exception is the *only* way stigmatic harms are judicially cognizable.<sup>57</sup> Similarly, while it is widely accepted that physical

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<sup>52</sup> See, for example, *Freedom from Religion Foundation, Inc v Obama*, 641 F3d 803, 806–07 (7th Cir 2011) (in which plaintiffs alleged that President Barack Obama’s invitation to Americans to pray and to ask for “God’s continued guidance” in his Thanksgiving Day proclamation made them feel “excluded, or made unwelcome”); *Navy Chaplaincy*, 534 F3d at 763; *Saladin v City of Milledgeville*, 812 F2d 687, 692–93 (11th Cir 1987) (in which plaintiffs alleged that the word “Christianity” featured on the city’s seal made them “feel like second class citizens,” and that “Christianity is the ‘litmus test’ of being a ‘true’ citizen of Milledgeville”).

<sup>53</sup> *Navy Chaplaincy*, 534 F3d at 764.

<sup>54</sup> See *Barber*, 860 F3d at 353; *Navy Chaplaincy*, 534 F3d at 764.

<sup>55</sup> See, for example, Marshall and Nichol, 2011 S Ct Rev at 248 (cited in note 31) (asserting that the Court “require[s] that, in order to satisfy standing requirements [in religious display cases], the litigant must actually witness the challenged display”); Esbeck, 7 Charleston L Rev at 616–17 (cited in note 31); Rohr, 11 Ga St U L Rev at 529 (cited in note 28).

<sup>56</sup> See Part I.B.

<sup>57</sup> The Ninth Circuit has noted, for instance, that there is “not a single standing case that limits Establishment Clause standing” to religious displays and exercises. *Catholic League for Religious and Civil Rights v City and County of San Francisco*, 624 F3d 1043, 1050 n 20 (9th Cir 2010).

contact is *sufficient* to confer standing to challenge an establishment of religion, most of the lower courts have not held that physical contact is *necessary* to do so.<sup>58</sup>

#### B. Implications of Conditioning Stigmatic Harm Standing on Physical Contact

As *Barber* and *Navy Chaplaincy* illustrate, under the Fifth and DC Circuits' framework, any purely stigmatic harms caused by laws or policies that may violate the Establishment Clause will necessarily be nonjusticiable. This is the logical result of ruling both that stigmatic harms are cognizable only when they are accompanied by physical contact and that receiving a stigmatizing message from a law or policy does not qualify as physical exposure to the government's message. Under this regime, physical exposure to a Ten Commandments statue or to a public prayer that sends a governmental message of religious favoritism suffices to confer standing, while receiving this same message from a government policy conferring special status on a particular set of religious beliefs does not.

This state of affairs seems patently undesirable. Plaintiffs who are refused service will likely have standing to challenge Mississippi's law under the Equal Protection Clause, as the law allows religious believers to refuse to provide certain medical, counseling, and wedding-related services to LGBT individuals.<sup>59</sup>

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<sup>58</sup> In addition to the Fifth and DC Circuits, the Second and Seventh Circuits have both held that physical exposure is required for standing to lie in religious display and exercise cases. See *Montesa v Schwartz*, 836 F3d 176, 197 (2d Cir 2016) (holding that "it is a plaintiff's interaction with or exposure to the religious object of the challenged governmental action that gives rise to the [judicially cognizable] injury"); *Freedom from Religion Foundation, Inc v Lew*, 773 F3d 815, 820 (7th Cir 2014) (stating that religious exercise and display cases cannot confer standing if the plaintiff is not required to "see or do anything"). The remaining circuit courts have not required physical contact.

<sup>59</sup> See Miss Code § 11-62-5(4)–(5). The plaintiffs in *Barber* challenged the law under both the Equal Protection and the Establishment Clauses. The court held that the plaintiffs lacked the "denial of equal treatment" necessary for standing under the Equal Protection clause. *Barber*, 860 F3d at 356. However, this requirement would easily be met by a plaintiff who requested and was denied one of the services—for instance, wedding photography—exempted by the law. While it is not certain that the law at issue in *Barber* violated the Establishment Clause, the district court found that the plaintiffs were "substantially likely to succeed on their claim that HB 1523 violates" the Establishment Clause. *Barber v Bryant*, 193 F Supp 3d 677, 722 (SD Miss 2016), revd on other grounds, 860 F3d 345 (5th Cir 2017). In addition, numerous commentators have argued that laws such as Mississippi's excusing religious believers from antidiscrimination laws violate the Establishment Clause. See, for example, Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 UMKC L Rev 749, 788, 791–95 (2016) (claiming that laws exempting religious believers from antidiscrimination laws

However, government policies and statements that merely announce a favored status for certain religious beliefs without effecting any government action—for instance, a city ordinance declaring Christianity as the city’s preferred religion—would not be actionable under the Equal Protection Clause.<sup>60</sup> And under the Fifth and DC Circuits’ interpretation of stigmatic harm standing, a plaintiff’s inability to “confront” the ordinance would make the ordinance unchallengeable under the Establishment Clause, as well. In fact, jurists and commentators who have adopted these circuits’ interpretation have argued that an official municipal resolution condemning specific religious beliefs should be unchallengeable under the Establishment Clause.<sup>61</sup> It is quite clear that such an ordinance would violate the Establishment Clause.<sup>62</sup> Interpretations of Article III standing that prevent such an ordinance from being challenged in federal court would thus make the Establishment Clause’s protections a dead letter.

The courts adopting this position argue that recognizing purely stigmatic harms as cognizable would exceed the constitutional bounds of the judiciary’s power. The DC Circuit in *Navy Chaplaincy*, for instance, warned that allowing stigmatic harms to confer standing in the absence of physical exposure would “eviscerate well-settled standing limitations,” opening the courthouse doors to plaintiffs anywhere in the country who merely “become[ ] aware” of the alleged Establishment Clause violation and exceeding the “limited judicial role mandated by the Constitution.”<sup>63</sup> The Fifth Circuit’s refusal to expand the grounds for cognizable

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“constitute an establishment of religion”); Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 Harv L & Pol Rev 25, 54–55 (2015) (arguing that “exemptions for religious actors” from LGBT antidiscrimination laws violate the Establishment Clause by shifting burdens onto third parties).

<sup>60</sup> Under the Equal Protection Clause’s standing requirements, stigmatic injuries can only confer standing when the plaintiff has personally been denied some benefit. This much is clear from *Allen v Wright*, 468 US 737, 755–56 (1984).

<sup>61</sup> These are the facts of *Catholic League*, in which five judges of the Ninth Circuit would have denied standing due to the plaintiff’s lack of physical contact with the resolution. See *Catholic League*, 624 F3d at 1077 (Graber concurring). For commentators endorsing this position, see, for example, Spencer, Note, 34 Harv J L & Pub Pol at 1085–86 (cited in note 27).

<sup>62</sup> See, for example, *Wallace v Jaffree*, 472 US 38, 60 (1985) (holding that a moment of silence enacted for the “purpose of expressing the State’s endorsement of prayer . . . is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion”).

<sup>63</sup> *Navy Chaplaincy*, 534 F3d at 764–65.

injuries beyond the “outer limits” of Article III standing demarcated by the religious display and exercise cases evinces a similar sentiment.<sup>64</sup>

These courts are correct in recognizing that some limiting principle must be employed to prevent purely stigmatic harm standing from opening the court’s doors to too many plaintiffs. In explaining Article III’s standing requirements, the Court often does invoke separation of powers (although this rationale is often cited as only one among many, and is in no way clearly the controlling justification for standing).<sup>65</sup> And it is readily apparent that many plaintiffs could easily recharacterize their offense at unconstitutional conduct as stigmatization from the message sent by a government action.<sup>66</sup> This easy recharacterization would not quite extend to *all* mere offense plaintiffs, as the Fifth and DC Circuits have claimed;<sup>67</sup> for example, if the government had placed a Roman Catholic cross on public land, a Catholic plaintiff who was offended by the Establishment Clause violation could not credibly claim that the cross caused him, a Catholic, to feel like an outsider or second-class citizen.<sup>68</sup> Nonetheless, the point is well taken that recognizing stigmatic harms as cognizable injuries in Establishment Clause cases without any further limiting principle would come fairly close to granting standing to all mere offense plaintiffs, which the Court clearly *has* held exceeds Article III’s limits.<sup>69</sup>

But the Fifth and the DC Circuits have erred in the limiting principle they have employed. Although the lower courts have assumed that physical contact with a religious message is the touchstone for determining standing, the Supreme Court has never

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<sup>64</sup> *Barber*, 860 F3d at 353.

<sup>65</sup> See Gene R. Nichol Jr, *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 NC L Rev 798, 824 (1983).

<sup>66</sup> For commentators noting this issue, see, for example, Marshall and Nichol, 2011 S Ct Rev at 247 (cited in note 31).

<sup>67</sup> See *Barber*, 860 F3d at 354 (stating that granting standing to plaintiffs alleging stigmatic harms would be “indistinguishable” from granting standing to any plaintiff who was merely offended by a constitutional violation); *Navy Chaplaincy*, 534 F3d at 764 (claiming that “every government *action* that allegedly violates the Establishment Clause could be re-characterized” as a message inflicting stigmatic harm by “everyone who becomes aware” of the action).

<sup>68</sup> These are the facts of *Buono v Norton*, 371 F3d 543, 546–48 (9th Cir 2004). The issue of stigmatic harm allegations raised by members of the benefitted religion is discussed further in Part IV.A. See text accompanying notes 146–52.

<sup>69</sup> See note 17 (collecting cases in which the Court has repeatedly expressed that mere offense is not a cognizable injury).

explicitly endorsed this position. In fact, the Court's Establishment Clause standing precedents can be read as upholding purely stigmatic harm standing. Rather than relying on physical contact as a limiting principle, the Court's precedents suggest limiting stigmatic harm standing to plaintiffs who belong to the community affected by the challenged religious message.

Before taking up this argument in Part III, the next Section briefly sketches the positions taken by the courts of appeals that have rejected the *Barber* and *Navy Chaplaincy* approach.

### C. Circuits Rejecting the View That Stigmatic Harm Standing Requires Physical Contact

While many of the circuits have not yet addressed the justiciability of purely stigmatic harms, the Fourth and Ninth Circuits have rejected the Fifth and DC Circuits' theory that stigmatic harms can confer standing only when they are accompanied by physical contact. However, the justifications for purely stigmatic harm standing that the Fourth and Ninth circuits rely on—inferences from the Court's Establishment Clause merits jurisprudence and from its *sub silentio* cases—provide a weak basis for their position.

In the Fourth Circuit case *International Refugee Assistance Project v Trump*<sup>70</sup> (*IRAP*), a Muslim plaintiff challenging President Donald J. Trump's travel ban asserted a purely stigmatic theory of standing, arguing that the travel ban's "state-sanctioned message condemning his religion [ ] caus[ed] him to feel excluded and marginalized in his community."<sup>71</sup> Not only did the court hold that this injury sufficed to confer standing, it also expressly endorsed the cognizability of purely stigmatic harms, stating that "[f]eelings of marginalization and exclusion are cognizable forms of injury" in the Establishment Clause context.<sup>72</sup>

To justify this holding, the *IRAP* court relied on the fact that "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.'"<sup>73</sup> The proposition

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<sup>70</sup> 857 F3d 554 (4th Cir 2017).

<sup>71</sup> *Id.* at 583.

<sup>72</sup> *Id.* at 582, 585 (quotation marks omitted).

<sup>73</sup> *Id.* at 582. This theory of the Establishment Clause's purpose is most prominently articulated in Justice Sandra Day O'Connor's "endorsement test," which defines Establishment Clause violations as encompassing government actions that "send[ ] a message

that avoiding stigmatic harms is a “core objective[ ]”<sup>74</sup> of the Court’s Establishment Clause jurisprudence is itself hotly contested.<sup>75</sup> More importantly, it does not necessarily follow that all harms that could be redressed on their merits under the Establishment Clause constitute cognizable injuries for standing purposes. While this is an admittedly counterintuitive position, it is one that some courts and commentators—including the *Barber* court—have adopted.<sup>76</sup> Indeed, the Supreme Court has long held that the fact that no plaintiff could have standing to challenge a constitutional violation “is not a reason to find standing.”<sup>77</sup>

Similarly, in *Catholic League for Religious and Civil Rights v City and County of San Francisco*,<sup>78</sup> the Ninth Circuit upheld purely stigmatic harm standing for Catholic plaintiffs challenging a municipal resolution that condemned the Catholic Church’s views on homosexuality. The plaintiffs, who lived in the municipality, asserted injury from the resolution’s message that “they are outsiders, not full members of the political community.”<sup>79</sup> The Ninth Circuit based its standing determination on the Supreme Court’s numerous merits decisions in Establishment Clause cases concerning stigmatic harms—in the Ninth Circuit’s words, the harms caused by “exclusion or denigration on a religious basis within the political community.”<sup>80</sup> Critically, though, the Supreme

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to nonadherents that they are outsiders, not full members of the political community.” *Lynch v Donnelly*, 465 US 668, 688 (1984) (O’Connor concurring).

<sup>74</sup> *IRAP*, 857 F3d at 582.

<sup>75</sup> The Court uses many different tests to adjudicate Establishment Clause cases on the merits. Scholars have both lamented the general “confus[ion] and disarray[ ]” of Establishment Clause merits doctrine, Fallon, 166 U Pa L Rev at 60 (cited in note 32), and have attacked the validity of viewing the purpose of the Establishment Clause as “preventing the alienation of outsiders.” Marshall and Nichol, 2011 S Ct Rev at 246 n 184 (cited in note 31) (listing scholars taking both sides in this debate).

<sup>76</sup> See *Barber*, 860 F3d at 354. The Fifth Circuit rejected the argument that the Supreme Court’s decision in *Santa Fe Independent School District v Doe*, in which the Court found that a school’s pre-football game prayer policy was “impermissible because it sends the ancillary message to members of the audience who are nonadherents [sic] ‘that they are outsiders, not full members of the political community,’” implied that similar stigmatic harms could confer standing. *Santa Fe Independent School District v Doe*, 530 US 290, 309 (2000). For commentators endorsing this position, see Spencer, Note, 34 Harv J L & Pub Pol at 1089 (cited in note 27) (arguing that “[a]s a formal doctrinal matter [ ] the interests protected by the endorsement test are of no consequence in evaluating standing”).

<sup>77</sup> *Schlesinger v Reservists Committee to Stop the War*, 418 US 208, 227 (1974). See also *United States v Richardson*, 418 US 166, 179 (1974) (noting that the “absence of any particular individual or class [with standing] to litigate” certain constitutional provisions excludes them from the province of the judiciary).

<sup>78</sup> 624 F3d 1043 (9th Cir 2010).

<sup>79</sup> *Id* at 1048 (quotation marks omitted).

<sup>80</sup> *Id* at 1052.

Court did not actually discuss standing in the cases cited by the Ninth Circuit. In light of the longstanding principle against extrapolating from the Court's silence on jurisdictional issues, the precedential value of these cases for standing is quite weak.<sup>81</sup> Relying on the Court's *sub silentio* decisions is all the more concerning given the Court's recent admonition, in an Establishment Clause standing case no less, that the Court's failure to address standing "does not stand for the proposition that no defect existed."<sup>82</sup>

In addition to relying on tenuous justifications for stigmatic harm standing, the Fourth and Ninth Circuits have not addressed the problematic separation-of-powers implications of purely stigmatic harm standing that the Fifth and DC Circuits emphasize.<sup>83</sup> However, the Supreme Court's own precedent provides both a stronger justification for purely stigmatic harm standing as well as a more sensible limiting principle for constraining judicial power within its constitutional limits.

### III. THE SUPREME COURT'S VIEW

For almost four decades, the lower courts have been guided by only two Supreme Court cases addressing the justiciability of stigmatic harms caused by Establishment Clause violations: *School District of Abington Township, Pennsylvania v Schempp*<sup>84</sup> and *Valley Forge Christian College v Americans United for Separation of Church and State, Inc.*<sup>85</sup> While lower courts often interpret

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<sup>81</sup> See note 33 and accompanying text.

<sup>82</sup> *Arizona Christian School Tuition Organization v Winn*, 563 US 125, 144 (2011). *Arizona Christian School* does not feature in this Comment because it concerns taxpayer standing only. See also note 29.

<sup>83</sup> See text accompanying notes 63–67.

<sup>84</sup> 374 US 203 (1963).

<sup>85</sup> 454 US 464 (1982). In addition to *Schempp* and *Valley Forge*, the Court explicitly addressed standing in challenges to government-sponsored prayers in *Marsh v Chambers*, 463 US 783 (1983), and *Lee v Weisman*, 505 US 577 (1992). However, in both *Chambers* and *Weisman*, the Court's cursory justifications for finding standing offer no insight into whether purely stigmatic harms are cognizable. In *Chambers*, a Nebraska state senator challenged the legislature's practice of paying for and opening legislative sessions with a chaplain-led prayer. The Court pointed to the plaintiff's status *both* "as a member of the Legislature and as a taxpayer whose taxes are used to fund the chaplaincy" in finding standing, thus obscuring whether the plaintiff's status as a "member of the Legislature" alone would have supported standing. *Chambers*, 463 US at 786 n. 4. Even if the Court had based standing on the plaintiff's status as a legislator, it still would not be clear whether such standing was based on the plaintiff physically hearing the prayer or merely belonging to the community impacted by the prayer policy, thus shedding no light on this Comment's topic. In *Weisman*, the Court construed the plaintiff's injury as coercion to

these cases as suggesting the primacy of physical contact in determining whether stigmatic harms are cognizable, a careful reading of *Schempp* suggests the opposite—that stigmatic harms are cognizable in the *absence* of physical contact. In this light, *Schempp* and *Valley Forge* can be read to suggest that the closeness of the plaintiffs' relationship to the community affected by the religious message, rather than physical exposure to the message, confers standing for stigmatic harms in Establishment Clause cases.

A. Reexamining Supreme Court Precedent: *Schempp* and *Valley Forge*

In *Schempp*, the Court held that a plaintiff alleging purely stigmatic harms had standing to sue under the Establishment Clause. Two decades later, in *Valley Forge*, the Court rearticulated its holding in *Schempp*, affirming the cognizability of the *Schempp* plaintiffs' stigmatic injuries. However, the *Valley Forge* Court's broad, ambiguous language denying standing to the *Valley Forge* plaintiffs spread lasting confusion among the lower courts as to the cognizability of purely stigmatic harms. Parts III.A.1 and III.A.2 will examine *Schempp* and *Valley Forge* in turn.

1. *Schempp*: presuming the justiciability of stigmatic harms.

*Schempp* involved two consolidated cases, both of which challenged policies implementing mandatory Bible readings in public schools.<sup>86</sup> The plaintiffs in the first consolidated case—the Schempps—were Unitarians, for whom literal readings of certain Biblical passages conflicted with their religious beliefs.<sup>87</sup> The plaintiffs in the second case were William Murray and his mother, both of whom were atheists.<sup>88</sup>

The challenged policies required public schools to open the school day with a Bible reading.<sup>89</sup> However, both policies allowed

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participate in a religious exercise, an injury distinct from stigmatic harm. See *Weisman*, 505 US at 594. The rest of the Court's Establishment Clause cases that implicate stigmatic harm standing pass on the matter *sub silentio*. See generally *Santa Fe Independent School District v Doe*, 530 US 290 (2000); *Wallace v Jaffree*, 472 US 38 (1985). See also note 30.

<sup>86</sup> *Schempp*, 374 US at 205.

<sup>87</sup> *Id.* at 206, 208.

<sup>88</sup> *Id.* at 211.

<sup>89</sup> *Id.* at 205 (Schempp policy); *id.* at 211 (Murray policy).

students to opt out of the Bible reading, either by staying in the classroom without participating or by leaving the classroom entirely.<sup>90</sup> Accordingly, the plaintiffs did not claim to have been injured by being forced to participate in a religious practice.<sup>91</sup> Nor did the parents express any concern that their children were being indoctrinated by the readings. Rather, the harm alleged by the plaintiffs was purely stigmatic: they claimed that the Bible-reading policy injured them by denigrating them in the eyes of the other students. The Murrays, for instance, asserted that the policy equated religious beliefs with morality and virtue, thus making them, as atheists, look “sinister, alien and suspect” and “promoting doubt and question of their morality, good citizenship and good faith.”<sup>92</sup> The Schempps made similar claims, testifying that they would be “labeled as ‘odd balls’ before their teachers and classmates every school day” and viewed as “un-American” and “immoral[ ]” if they opted out of the readings.<sup>93</sup>

These alleged injuries fall within the core notion of stigmatic harms. The student plaintiffs alleged that the Bible-reading policy cast them as outsiders, injuring the students’ dignity and sense of belonging by demeaning and excluding them. Indeed, in his concurrence, Justice William Brennan characterized the cost inflicted by requesting to be excused from the readings as “be[ing] *stigmatized* as atheists or nonconformists.”<sup>94</sup>

The Court addressed the plaintiffs’ standing in a footnote, reasoning that the stigmatic harms caused by the Bible-reading policies “surely suffice” to confer standing on the plaintiffs because “[t]he parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed.”<sup>95</sup> The Court thus limited stigmatic harm standing to plaintiffs who are “directly affected” by the challenged religious policies. Of course, this merely prompts the question:

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<sup>90</sup> See *Schempp*, 374 US at 207 (Schempp policy); id at 211–12 & n 4 (Murray policy).

<sup>91</sup> Justice William O. Douglas notes as much in his concurrence, reasoning that, as the prayers are not compulsory, the cases do not involve a “coercive religious exercise aimed at making the students conform.” Id at 228 (Douglas concurring). Importantly, while Justice Douglas acknowledges that nonmandatory readings could still feel mandatory and hence coerce students who are afraid of being labeled “odd balls” if they opt out, he notes that the parties in these cases are not making this argument. Id at 228–29.

<sup>92</sup> Id at 212 (majority) (quotation marks omitted).

<sup>93</sup> Id at 208 n 3 (quotation marks omitted).

<sup>94</sup> *Schempp*, 374 US at 290 (Brennan concurring) (emphasis added).

<sup>95</sup> Id at 224 n 9 (majority).

What does it mean to be “directly affected” by an establishment of religion?

The *Schempp* Court did not provide an explicit answer to that question. However, a close examination of *Schempp*’s facts forecloses the view, erroneously adopted by many later courts of appeals, that being “directly affected” by a challenged establishment of religion means being physically exposed to it.

First, not all of the *Schempp* plaintiffs actually heard the Bible readings. Recall that *Schempp* consolidated two cases, and that the policy in both cases allowed students to opt out of the Bible reading by leaving the classroom.<sup>96</sup> In the first consolidated case, the *Schempp* children remained in the classroom during the offending Bible readings, thus physically hearing the challenged conduct. However, in the second consolidated case, William Murray had opted out of the Bible readings, leaving the classroom when they were conducted.<sup>97</sup> The Court, however, did not differentiate between the two sets of children in finding that the parties were “directly affected” by the Bible readings, implying that physical exposure to the challenged endorsement did not determine its ability to “directly affect[ ]” the students.<sup>98</sup>

Second, the Court included the children’s parents as parties who were “directly affected” by the Bible readings, although the parents certainly were not present to hear the readings themselves. Indeed, Justice Brennan stated in his concurring opinion that “the parent is surely the person most directly and immediately concerned about and affected by the challenged establishment.”<sup>99</sup>

Importantly, when the Court refers to the “parents” as being “directly affected,” it is not merely remarking that the parents have standing by virtue of representing their children’s interests. Parents are often granted custodial standing as stand-in representatives for their children, who are unable to sue on their own behalves. If this were all the Court was referring to, the fact that the parents were not physically exposed to the Bible reading would be of no consequence. So long as the children had heard the

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<sup>96</sup> Id at 207, 211–12 & n 4.

<sup>97</sup> The Court notes that William Murray had been “excused” pursuant to the Bible-reading policy. Id at 212. From this alone, it is unclear whether William had been excused from “participating in the opening exercises” or from “attending the opening exercises” at all, both of which were authorized by the policy. Id at 211–12 & n 4. However, the Maryland Court of Appeals’ decision clarifies that William had been excused “from further attendance.” *Murray v Curlett*, 179 A2d 698, 699 (Md 1962), revd *Schempp*, 374 US 203 (1963).

<sup>98</sup> *Schempp*, 374 US at 224 n 9.

<sup>99</sup> Id at 266 n 30 (Brennan concurring).

Bible reading, and the parents had taken their children's place for purposes of standing, the fact that the parents had not physically heard the Bible reading would not tell us anything about whether physical exposure were required for standing.

This was not the case for the parents in *Schempp*. Parents sometimes also have standing in their own right to sue over matters that injure them, as parents, by affecting their children.<sup>100</sup> Justice Brennan clarifies that this noncustodial parental standing is what the Court had in mind in *Schempp*. In a discussion presenting his own, additional explanations for why the parents should have standing, Justice Brennan assumes that the majority opinion found standing for the parents to sue “either *in [their] own right* or on behalf of [their] child” based on the direct effects of the Bible-reading policy.<sup>101</sup> If the parents, who did not hear the Bible readings, had standing to challenge the policy on their own behalves by virtue of being the “most directly . . . affected” by the policy, being “directly affected” by an Establishment Clause violation surely cannot refer to physical contact.<sup>102</sup>

*Schempp* thus demonstrates that the requirement that plaintiffs alleging stigmatic harms be “directly affected” by the challenged Establishment Clause violation has nothing to do with physical contact. Rather than limiting stigmatic harm standing

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<sup>100</sup> For instance, in *Elk Grove Unified School District v Newdow*, 542 US 1 (2004), the Court acknowledged that a parent suing over an injury to his child could have standing to sue on his own behalf. In *Elk Grove*, the father of a student who attended a school requiring pupils to recite the Pledge of Allegiance challenged the school's policy under the Establishment Clause. *Id.* at 4–5. The Court noted that the father could not have had custodial standing, as his ex-wife retained exclusive legal custody of their child. See *id.* at 9–10 (stating that the Court would address whether the father had standing “as a *noncustodial* parent”) (emphasis added). Nonetheless, the Court held that the father did indeed satisfy Article III standing requirements to challenge the Pledge policy on his own behalf. See *id.* at 19 (Rehnquist concurring) (“[T]he Court does not dispute that respondent . . . satisfies the requisites of Article III standing.”). Although the plaintiff in *Elk Grove* did have Article III standing in his own right—not as a third-party representative for his daughter—to sue over a school policy implemented by his daughter's school, the *Elk Grove* Court declined to confer standing under its “prudential” standing factors, which counsel against granting jurisdiction in cases involving domestic disputes. See *id.* at 17–18 (majority) (holding that the plaintiff lacked *prudential*, rather than Article III, standing). Unlike Article III standing, which is constitutionally mandated, prudential standing is “judicially self-imposed” and constitutes an entirely separate strand of standing jurisprudence, which is not addressed by this Comment. See *id.* at 11 (quotation marks omitted).

<sup>101</sup> *Schempp*, 374 US at 266 n 30 (Brennan concurring) (emphasis added). While this quotation is taken from Justice Brennan's concurrence, it reflects Justice Brennan's assumption of the *majority's* view of the parents' standing. Although this assumption itself is not authoritative, it helpfully sheds light on the majority's cursory discussion of the parents' standing.

<sup>102</sup> *Id.*

to Establishment Clause violations that are accompanied by physical exposure to the challenged violation, *Schempp* is more sensibly read as suggesting that stigmatic harms confer standing on plaintiffs who belong to the community impacted by the challenged violation. Indeed, in the aftermath of *Valley Forge*, many lower courts recognized that a plaintiff's relationship to the community perpetrating the alleged Establishment Clause violation is critically important to the standing determination under *Schempp*.<sup>103</sup> In *Suhre v Haywood County*,<sup>104</sup> for instance, the Fourth Circuit noted that "[t]he circuits have [ ] recognized that [t]he practices of our own community may create a larger psychological wound than someplace we are just passing through," concluding that "where there is a personal connection between the plaintiff and the challenged display in his or her home community, standing is more likely to lie."<sup>105</sup>

In sum, the *Schempp* Court's conclusion that the plaintiffs had standing as "directly affected"<sup>106</sup> parties indicates that the plaintiffs were "directly affected" by the Bible-reading policies because they or their children attended the schools implementing those policies—not because of any physical exposure to the Bible readings themselves. The Court's brief discussion of standing in *Schempp* thus implies that purely stigmatic harms suffered by plaintiffs who belong to the community impacted by the challenged Establishment Clause violation are judicially cognizable.

## 2. *Valley Forge*: corroborating *Schempp*'s implications.

Nearly twenty years after *Schempp*, in *Valley Forge*, the Court reaffirmed and elaborated on the rationale underlying its conclusion that the *Schempp* plaintiffs had standing. First, a brief discussion of the *Valley Forge* case itself is in order. In *Valley Forge*, a Washington, DC-based organization "committed to the constitutional principle of separation of church and State" challenged a gift of excess government property near Philadelphia to

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<sup>103</sup> See, for example, *Saladin v City of Milledgeville*, 812 F2d 687, 689, 693 (11th Cir 1987) (emphasizing that plaintiffs challenging a cross on the City of Milledgeville seal were "part of the City," where they lived, shopped, paid taxes, and actively participated in civic organizations); *Foremaster v City of St. George*, 882 F2d 1485, 1491 (10th Cir 1989) (considering whether the fact that a plaintiff challenging the depiction of the Mormon Temple on a city seal had lost his standing by moving outside of the city).

<sup>104</sup> 131 F3d 1083 (4th Cir 1997).

<sup>105</sup> *Id.* at 1087.

<sup>106</sup> *Id.*

Valley Forge Christian College, a private Christian school.<sup>107</sup> The organization claimed to have been injured by the fact that the federal government's gift of land to a religious institution violated the Establishment Clause, thus impairing their right to a government that abides by the Constitution.<sup>108</sup>

The Court dismissed the case for lack of standing, holding that the fact that the government had violated the Constitution was not a cognizable injury.<sup>109</sup> Importantly, this standing determination was not novel;<sup>110</sup> the Court merely rejected the lower court's creative reasoning that Establishment Clause violations possess a special status exempting them from the normal rule that mere offense at the government's violation of the Constitution is uncognizable.<sup>111</sup> The Court did, however, take pains to emphasize the unyielding nature of the bar on mere offense standing. For instance, the Court noted that even if the plaintiffs had lived in the vicinity of the challenged land transfer, they still would not have "establishe[d] a cognizable injury where none existed before."<sup>112</sup> Rather, the plaintiffs would "still [be] obligated to allege facts sufficient to establish that one or more of its members has suffered, or is threatened with, an injury other than their belief that the transfer violated the Constitution."<sup>113</sup> Notably, this principle directly contradicts the lower courts' current practice of finding standing for plaintiffs, regardless of the injury they allege, so long as they demonstrate physical exposure to a religious display or exercise.<sup>114</sup>

In denying standing to the *Valley Forge* plaintiffs, the Court explained the critical difference between the uncognizable mere offense injury alleged in *Valley Forge* and the cognizable injury in *Schempp*. The Court stated that the injury suffered by the *Schempp* plaintiffs consisted of being "subjected to unwelcome religious exercises or [ ] forced to assume special burdens to avoid them."<sup>115</sup> Here, the Court identified two injuries that can confer

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<sup>107</sup> *Valley Forge*, 454 US at 468–69, 486.

<sup>108</sup> See *id.* at 482.

<sup>109</sup> *Id.* at 485–87.

<sup>110</sup> See notes 17–18 and accompanying text. See also Nichol, 61 NC L Rev at 809 (cited in note 65) (describing *Valley Forge* as consistent with previous Supreme Court cases holding that "standing cannot be predicated merely upon the 'harm' a citizen sustains as the result of the government's failure to comply with the Constitution").

<sup>111</sup> See *Valley Forge*, 454 US at 483, 486 n 22.

<sup>112</sup> *Id.* at 487 n 23.

<sup>113</sup> *Id.*

<sup>114</sup> See Part I.B.

<sup>115</sup> *Valley Forge*, 454 US at 486 n 22.

standing: being forced to endure a religious exercise and being forced to “assume special burdens” to avoid one. Critically, the “special burden[ ]” that William Murray was “forced to assume” to avoid the Bible-reading program was entirely stigmatic: his “good citizenship” was called into question and his views were cast as “alien and suspect.”<sup>116</sup> *Valley Forge*’s gloss on the injury recognized in *Schempp* thus reinforces that purely stigmatic harm can (and did) confer standing in the Establishment Clause context.

The *Valley Forge* Court’s characterization of *Schempp* also points to the importance of ensuring that plaintiffs alleging stigmatic harms belong to the community impacted by the challenged religious message. In *Valley Forge*, the Court emphasized that the *Schempp* plaintiffs had standing to challenge the Bible-reading policies because they were “children who attended the schools in question, and their parents.”<sup>117</sup> As in *Schempp*, this explanation highlights the importance of considering the plaintiffs’ relationship to the impacted community—here, their status as students or parents at the schools implementing the challenged policies—in determining which plaintiffs are sufficiently “directly affected” to have cognizable injuries.

#### B. Misapplication of *Valley Forge* by the Lower Courts

A careful reading of *Valley Forge* makes clear that the *Valley Forge* plaintiffs themselves did not advance a theory of stigmatic harm; they relied exclusively on mere offense harm, which the Court unsurprisingly rejected. Moreover, the Court in *Valley Forge* reaffirmed *Schempp*’s recognition of purely stigmatic harm standing. However, two aspects of the *Valley Forge* decision appear to have misled many subsequent lower courts into thinking that the Court’s rejection of mere offense harms precludes purely stigmatic harms from conferring standing, as well.

First, the Court referred to the *Valley Forge* plaintiffs’ alleged injury as a mere “psychological consequence presumably produced by observation of conduct with which one disagrees.”<sup>118</sup> Some lower courts have mistakenly interpreted the Court’s use of the term “psychological consequence,” which in context refers to mere offense at unconstitutional conduct, to bar *any* psychological

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<sup>116</sup> *Schempp*, 374 US at 212.

<sup>117</sup> *Valley Forge*, 454 US at 486 n 22.

<sup>118</sup> *Id* at 485.

harm—including stigmatic harms—from conferring standing. For instance, shortly after *Valley Forge*, two atheist plaintiffs challenged several provisions of the Arkansas constitution under the Establishment Clause.<sup>119</sup> The plaintiffs alleged that the provisions, which excluded any person who “denies the being of a God” from testifying as a witness or holding civil office, caused them to suffer “adverse psychological consequences” as atheists.<sup>120</sup> Although the plaintiffs’ alleged injuries likely constituted stigmatic harms, the Eighth Circuit considered the injury so clearly barred by *Valley Forge*’s pronouncement against “psychological consequence[s]” that the court simply quoted *Valley Forge* and dismissed the case for lack of standing without providing any further explanation.<sup>121</sup>

This reading of *Valley Forge* is incorrect, as is apparent when the “psychological consequence[s]” phrase excerpted from *Valley Forge* is read in context. In rejecting the *Valley Forge* plaintiffs’ standing, the Court stated:

Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant’s interest or the fervor of his advocacy.<sup>122</sup>

In the sentence immediately preceding the Court’s remark about “psychological consequence[s],” the Court emphasizes that the plaintiffs’ injury-in-fact theory rested solely on the “claim that the Constitution has been violated.” Likewise, the Court mentions the plaintiffs’ dedication to the “constitutional principle of separation of church and State” in order to highlight that the mere desire that the government’s actions conform to the Establishment Clause is insufficient to confer standing. These statements

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<sup>119</sup> *Flora v White*, 692 F2d 53 (8th Cir 1982).

<sup>120</sup> *Id* at 54.

<sup>121</sup> *See id.*

<sup>122</sup> *Valley Forge*, 454 US at 485–86.

make clear that the “psychological consequence” that is not cognizable is the plaintiffs’ offense at the fact that “the Constitution ha[d] been violated”; it does not refer to any and all psychological harms.<sup>123</sup> Indeed, the *Valley Forge* opinion itself emphasized that its holding was specifically not intended to “retreat from [the Court’s] earlier holdings that standing may be predicated on non-economic injury.”<sup>124</sup>

A second aspect of the *Valley Forge* opinion has also led the lower courts astray. As evidence of the *Valley Forge* plaintiffs’ lack of cognizable injury, the Court pointed to the fact that the plaintiffs lived several states away from the site of the alleged Establishment Clause violation and had heard about it only through a “news release.”<sup>125</sup> This discussion of the *Valley Forge* plaintiffs’ physical distance from the alleged Establishment Clause violation seems to have caused many lower courts to think that the extent of physical contact with the alleged Establishment Clause violation is what allowed standing for the *Schempp* plaintiffs and consigned the *Valley Forge* plaintiffs to dismissal. But as discussed above, the *Schempp* plaintiffs’ physical contact with the challenged Bible readings did not factor into either the *Schempp* or *Valley Forge* Courts’ determinations that the *Schempp* plaintiffs had standing. In this light, it seems clear that the *Valley Forge* plaintiffs’ physical distance from the land transfer matters not because the plaintiffs failed to meet a physical contact requirement for standing but because the plaintiffs were not at all connected to the community affected by the challenged establishment of religion.<sup>126</sup>

*Saladin v City of Milledgeville*<sup>127</sup> starkly illustrates the lower courts’ widespread confusion on this point.<sup>128</sup> In *Saladin*, the

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<sup>123</sup> *Id.* at 485. The Ninth Circuit has similarly noted the importance of reading *Valley Forge*’s “psychological consequence” phrase in context. Rejecting the argument that *Valley Forge* has barred all stigmatic harms from sufficing as injury in fact, the court stated: “One has to read the whole *Valley Forge* sentence quoted, and not stop at ‘psychological consequence,’ to understand it. . . . [I]n *Valley Forge*, the psychological consequence was merely disagreement with the government.” *Catholic League for Religious and Civil Rights v City and County of San Francisco*, 624 F3d 1043, 1052 (9th Cir 2010).

<sup>124</sup> *Valley Forge*, 454 US at 486.

<sup>125</sup> *Id.* at 486–87.

<sup>126</sup> See Part IV.A.

<sup>127</sup> 812 F2d 687 (11th Cir 1987).

<sup>128</sup> Of course, not all lower courts have made these errors. For instance, in one of the earliest applications of *Valley Forge*, the Eleventh Circuit confronted the question whether plaintiffs had standing to challenge a cross situated in a large public park. The court explicitly noted that it could “conceive of no rational basis for requiring the plaintiffs to view in person the subject matter of the action prior to filing the suit,” reasoning that *Valley*

plaintiffs alleged injury from the message, sent by the word “Christianity” on the Milledgeville, Georgia city seal, that “Christianity is the ‘litmus test’ of being a ‘true’ citizen of Milledgeville.”<sup>129</sup> The court reasoned that the plaintiffs in *Schempp*, “unlike [those in] *Valley Forge*,” had standing because they had “come into direct contact with the offensive conduct.”<sup>130</sup> As such, the *Saladin* plaintiffs, who were physically “affronted by the presence of the allegedly offensive word on the city seal,” had standing.<sup>131</sup> In this way, the *Saladin* court focused its standing determination exclusively on the plaintiffs’ physical contact with the alleged religious message, to the complete and erroneous exclusion of the nature of the harm alleged or the plaintiffs’ membership in the impacted community.

The *Saladin* court’s myopic focus on physical exposure was replicated by other lower courts. For instance, in *Foremaster v City of St. George*,<sup>132</sup> decided several years after *Saladin*, the plaintiff alleged that a city logo containing a picture of the Mormon Temple “offended and intimidated” him.<sup>133</sup> As the plaintiff framed his injury as both “intimidation” and “offense,” there is a good argument that the plaintiff’s injury fits under the stigmatic harm standing rubric suggested by *Schempp*. Rather than engaging in this analysis, however, the Tenth Circuit held that the plaintiff’s “direct personal contact with offensive municipal conduct” conclusively satisfied *Valley Forge*’s requirement of being “directly affected.”<sup>134</sup> To its credit, the *Foremaster* court specifically considered whether the fact that the plaintiff had moved outside the city limits caused him to “los[e]” the standing conferred by his physical exposure to the city’s seal, gesturing toward the Court’s emphasis on the plaintiff’s relationship to the impacted community.<sup>135</sup> Even this analysis, however, ultimately turned on the extent of the plaintiff’s physical exposure to the seal. The court found that the plaintiff’s standing remained intact, even after his

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*Forge*’s characterization of standing in *Schempp* was in no way dependent on the *Schempp* parents “actually seeing teachers reading the Bible to school children.” *American Civil Liberties Union of Georgia v Rabun County Chamber of Commerce, Inc.*, 698 F2d 1098, 1107 n 17 (11th Cir 1983). This point—hidden in a footnote—seems to have been lost on most subsequent lower courts.

<sup>129</sup> *Saladin*, 812 F2d at 693.

<sup>130</sup> *Id.* at 692.

<sup>131</sup> *Id.* at 692–93.

<sup>132</sup> 882 F2d 1485 (10th Cir 1989).

<sup>133</sup> *Id.* at 1489–91.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1491.

move outside of the city, largely because he was “directly confronted by the logo on a daily basis.”<sup>136</sup>

These early court of appeals opinions focusing predominantly on physical exposure proved highly influential on later courts of appeals. Several often-cited lower court cases from the 1990s, for instance, rely on *Saladin* and *Foremaster* to conclude that physical contact with a challenged establishment of religion alone is sufficient to confer standing, even if the harm alleged is mere offense at unconstitutional conduct.<sup>137</sup> Such misapplications of *Valley Forge* help explain the current lower courts’ narrow focus on physical exposure. Nonetheless, this physical exposure myopia remains at odds with Supreme Court precedent.

#### IV. RETURNING TO THE COURT’S CONCEPTION OF STIGMATIC HARM STANDING

The Court’s recognition of stigmatic harms for plaintiffs belonging to the community impacted by a challenged establishment of religion has been lost on the lower courts. Some courts, such as the Fourth and Ninth Circuits, seem unaware of Supreme Court precedent supporting standing for plaintiffs alleging purely stigmatic harms. Other courts, such as the Fifth and DC Circuits, have assumed a physical contact requirement for plaintiffs alleging purely stigmatic harms that directly contradicts the Court’s jurisprudence. The Supreme Court has not helped matters by issuing merits decisions in religious display cases without clarifying its basis for finding standing over the past two decades.

Lower courts, the Supreme Court itself, and parties turning to the judiciary to redress their harms would all benefit from a clear articulation of the Court’s standard for determining when plaintiffs alleging purely stigmatic Establishment Clause harms have standing. As a preliminary matter, courts should be careful to distinguish mere offense injuries, which the Court has held do not confer standing under the Establishment Clause or in any other context, from stigmatic harms. As for purely stigmatic harm

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<sup>136</sup> *Foremaster*, 882 F2d at 1491.

<sup>137</sup> See *Murray v City of Austin, Texas*, 947 F2d 147, 151–52 (5th Cir 1991) (relying on previous lower court decisions, including *Foremaster* and *Saladin*, to suggest that physical contact with a religious symbol is sufficient to confer standing, and failing to discuss the nature of the harm alleged in the standing analysis); *Suhre*, 131 F3d at 1086–87, 1089–90 (relying on previous lower court decisions, including *Foremaster* and *Saladin*, to hold that “personal contact with a public religious display may thus satisfy the injury-in-fact requirement for standing to bring an Establishment Clause case,” and focusing predominantly on physical contact with a Ten Commandments display to uphold standing).

standing, the Court should clearly articulate the standing test that its precedents suggest. In addition to clearing up confusion among the lower courts, such a test would have the benefit of significantly enhancing compliance with the Establishment Clause.

Read in their original contexts, *Schempp* and *Valley Forge* point to the following rule: while mere offense at the government's violation of the Establishment Clause is uncognizable, stigmatic harms plausibly caused by the government's overtly religious actions or statements are justiciable so long as the plaintiff belongs to the community to which the challenged action or statement applies.<sup>138</sup> Clarifying this test would allow standing for plaintiffs in cases like *Barber* and *Navy Chaplaincy*, enabling otherwise unchallengeable Establishment Clause violations to be contested in federal court. Common sense dictates, and several scholars have recently argued, that such constitutional violations will grow more numerous if the lower courts declare them nonjusticiable.

#### A. Sample Applications of the Proposed Test

To see how this test would apply, consider the situation of the *Barber* plaintiffs. First, the plaintiffs alleged injury from “the ‘clear message’ sent by HB 1523 [the Mississippi law] that the ‘state government disapproves of and is hostile to same-sex couples.’”<sup>139</sup> This harm constitutes a classic example of a stigmatic, rather than a mere offense, injury, as it harms the plaintiffs by marking them as second-class citizens unworthy of respect. Next, it is more than “[ ]plausible” that HB 1523 stigmatizes the plaintiffs, as the State itself admitted that the statute was passed in “direct response to *Obergefell*,”<sup>140</sup> the 2015 Supreme Court decision guaranteeing the right to marry to same-sex couples.<sup>141</sup> Given this context, the plaintiffs' claim that HB 1523 marks them as devalued in the eyes of their state government hardly seems outlandish.

Determining the relevant community to which the law applies is somewhat trickier. In one sense, HB 1523 might be thought of as only applying to the individuals it exempts from the

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<sup>138</sup> As explained in Part III.A.2, the nonjusticiability of mere offense harms in the Establishment Clause context, as well as under all other Constitutional provisions, is clear from *Valley Forge*. The justiciability of stigmatic harms under the Establishment Clause is evidenced by the Court's statements concerning standing in both *Schempp* and *Valley Forge*.

<sup>139</sup> *Barber*, 860 F3d at 352.

<sup>140</sup> *Barber v Bryant*, 193 F Supp 3d 677, 700 (SD Miss 2016).

<sup>141</sup> See *Obergefell v Hodges*, 135 S Ct 2584, 2607–08 (2015).

state's antidiscrimination statutes, and perhaps also to the individuals denied services under the exemption. Under this interpretation, the gay, lesbian, and transgender *Barber* plaintiffs would have standing, as HB 1523 authorizes the denial of services to them.<sup>142</sup> But the *Barber* plaintiffs also included numerous clergy and religious leaders who held religious beliefs contrary to those protected by HB 1523 and asserted stigmatic harm from the law's message denigrating their religious beliefs.<sup>143</sup> These plaintiffs would be denied standing by such a narrow view of the relevant community, as the statute does not implicate them directly.

The Court's standing analysis in *Schempp* implies that the relevant community is broader than this formulation suggests. In *Schempp*, the Bible-reading policies were implemented and applied to the entire student body, regardless of the fact that individual students were not required to participate in the Bible-reading exercises. By the same token, Mississippi's laws, including HB 1523, apply to all Mississippi residents, regardless of whether particular citizens make use of them. Because all of the *Barber* plaintiffs are residents of Mississippi,<sup>144</sup> they should be included in the class of plaintiffs belonging to the community impacted by HB 1523. Thus, because the *Barber* plaintiffs plausibly alleged stigmatic harms from the message sent by HB 1523 and belonged to the community—Mississippi—to which the statute applies, they would have standing to challenge HB 1523 under the proposed rule. Plaintiffs from Massachusetts, however, would not have standing to challenge the Mississippi law.

A similar application would pertain to the DC Circuit's *Navy Chaplaincy* case. Recall that the plaintiffs, Protestant Navy chaplains, claimed that a Navy policy affording preferential retirement benefits to Catholic chaplains "makes them feel like second-class citizens within the Navy Chaplaincy."<sup>145</sup> The chaplains' asserted injury is stigmatic, and the claim that the policy stigmatizes non-Catholic Navy chaplains is eminently plausible. As the policy at issue applies to the Navy, a group to which the non-Catholic Navy chaplains belong, the plaintiffs would have standing to challenge the policy.

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<sup>142</sup> More accurately, HB 1523 authorizes the denial of services in accordance with religious beliefs that marriage is reserved to one man and one woman, as defined by an individual's "immutable biological sex . . . at . . . birth." Miss Code §§ 11-62-3, -5.

<sup>143</sup> See *Barber*, 193 F Supp 3d at 688, 701–02.

<sup>144</sup> *Barber*, 860 F3d at 351.

<sup>145</sup> *Navy Chaplaincy*, 534 F3d at 763.

On the other hand, the test would deny standing in the Ninth Circuit case of *Buono v Norton*.<sup>146</sup> There, the plaintiff, a Roman Catholic, challenged the display of a Latin cross on federal land.<sup>147</sup> The plaintiff explicitly denied any stigmatic injury, claiming that he did not find the cross itself objectionable, but rather was “deeply offended” by the cross because it constituted “a religious symbol . . . rest[ing] on federal land.”<sup>148</sup> While the Ninth Circuit held that the plaintiff had standing,<sup>149</sup> *Valley Forge* makes clear that standing cannot be premised on mere offense that the Constitution has been violated, no matter the extent of physical exposure to a religious symbol. This Comment’s proposed reading of the Court’s Establishment Clause standing principles would deny standing on this set of facts.

Denying standing when the plaintiff explicitly commits himself to a theory of mere offense at unconstitutional conduct is straightforward. But what is to stop a plaintiff from simply converting her allegation of mere offense into an allegation of stigmatic harm? Here is when the proposed rule’s plausibility bar kicks in. Imagine that the plaintiff in *Buono* had alleged stigmatic harm from the cross. As it is inherently implausible to claim that a message endorsing a particular religious group could devalue or exclude a member of the endorsed religion, the erection of a dedicatory Latin cross could not plausibly be thought to stigmatize Roman Catholics. Consequently, the plaintiff in *Buono* would still be denied standing to challenge the cross, and simply recharacterizing a mere offense injury as an implausible allegation of stigmatic harm would not suffice to confer standing.

Of course, some allegations of stigmatic harm will straddle the “plausibility” line. In *Freedom from Religion Foundation, Inc v Obama*,<sup>150</sup> for instance, the plaintiffs alleged that they were made to feel “excluded” and “unwelcome” by the President’s Thanksgiving Day proclamation, in which the President “call[ed] upon the citizens of our Nation to pray, or otherwise give thanks,

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<sup>146</sup> 371 F3d 543 (9th Cir 2004). The Supreme Court granted certiorari in this case; however, due to the posture of the case on appeal, the majority declined to address the issue of standing. See *Salazar v Buono*, 559 US 700, 711–12 (2010).

<sup>147</sup> *Buono*, 371 F3d at 544–46.

<sup>148</sup> *Id* at 546.

<sup>149</sup> *Id* at 547–48 (upholding standing because the plaintiff went out of his way to avoid seeing the cross). Regardless of the fact that the plaintiff imposed this extra burden on himself, the underlying reason for his detours remained his mere offense at the fact that the government was violating the Establishment Clause.

<sup>150</sup> 641 F3d 803 (7th Cir 2011).

in accordance with their own faiths and consciences.”<sup>151</sup> The Seventh Circuit openly questioned the plausibility of the plaintiffs’ alleged injury, noting that it was “difficult to see how any reader of the [ ] proclamation would feel excluded or unwelcome.”<sup>152</sup> The Supreme Court’s decisions in *Schempp* and *Valley Forge*—concerning government-sponsored Bible readings and gifts to a religious organization—do not indicate whether such borderline plausible allegations of stigmatic harm are cognizable. One possible approach could be to use a “rational observer” standard, under which courts would accept as plausible claims of stigmatic harm that a rational, neutral third party would acknowledge as potentially demeaning to the plaintiff.

In addition to barring implausible claims of stigmatic harm, any test for purely stigmatic harm standing must also preclude plaintiffs from bringing Establishment Clause claims against government actions that are not overtly religious. To see why, imagine that Mississippi passes a statute legalizing abortion in the second trimester. A Mississippi citizen challenges the law under the Establishment Clause, alleging stigmatic harm from the message that she, as a Roman Catholic who believes that abortions in the second trimester are immoral, is a second-class citizen in her political community. This plaintiff might argue that the abortion law violates the Establishment Clause by implicitly rejecting the value of her religious beliefs about abortion. However, allowing this plaintiff standing under the Establishment Clause would make the number of government policies that could be challenged on the basis of stigmatic harm coextensive with the number of government actions concerning any issue upon which people hold views influenced by religion—which is to say, almost all issues.

Standing this expansive, which would expand courts’ jurisdiction to every complaint against the government’s policy choices, surely would trigger Article III’s “concern about the proper—and properly limited—role of the courts in a democratic society.”<sup>153</sup> Thus, the proposed rule limits stigmatic harm standing to government actions that explicitly invoke or are intended to benefit or burden religion. Under the proposed rule, a plaintiff would not have stigmatic harm standing to challenge this hypothetical abortion law, as it does not explicitly invoke or intend to

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<sup>151</sup> *Id.* at 806–07 (emphasis and quotation marks omitted).

<sup>152</sup> *Id.* at 807.

<sup>153</sup> *Warth v Seldin*, 422 US 490, 498 (1975).

benefit or burden religion. By contrast, a plaintiff could have stigmatic harm standing to challenge Mississippi's HB 1523, which explicitly protects certain "religious beliefs"<sup>154</sup> and is clearly intended to benefit a particular religious group.

## B. Addressing Counterarguments

The use of relaxed standing requirements in Establishment Clause cases for taxpayers<sup>155</sup> and for plaintiffs merely offended by the unconstitutionality of religious displays and exercises has attracted the derision of prominent jurists, scholars, and lower courts, who see these specialized standing principles as unjustified and unconstitutional modifications of otherwise bedrock standing principles. Most recently, Justice Neil Gorsuch called on the Court to reject standing premised solely on physical contact with religious displays, stating that such "offended observer standing" was "invented" by the lower courts, "has no basis in law," and "cannot be squared with this Court's longstanding teachings about the limits of Article III."<sup>156</sup> Justice Antonin Scalia similarly demanded that the Establishment Clause taxpayer exception be overruled as "wholly irreconcilable with the Article III restrictions on federal-court jurisdiction that this Court has repeatedly confirmed are embodied in the doctrine of standing."<sup>157</sup> In a similar vein, Judge Harold DeMoss of the Fifth Circuit urged the Court to bring Establishment Clause standing requirements in line with those employed in all other contexts, chastising the Court for "speak[ing] out of both sides of its mouth" in stating that standing requirements in Establishment Clause cases are "as rigorous as in other types of cases" while not addressing the potential standing issues presented in religious display cases.<sup>158</sup>

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<sup>154</sup> Miss Code § 11-62-3.

<sup>155</sup> See note 32 (discussing the Court's recognition of taxpayer standing in certain Establishment Clause cases).

<sup>156</sup> *American Legion v American Humanist Association*, 139 S Ct 2067, 2098, 2100–01 (2019) (Gorsuch concurring in the judgment).

<sup>157</sup> *Hein v Freedom from Religion Foundation, Inc.*, 551 US 587, 618 (2007) (Scalia concurring).

<sup>158</sup> *Doe v Tangipahoa Parish School Board*, 494 F3d 494, 500 (5th Cir 2007) (DeMoss concurring) (emphasis omitted). Jurists on other lower courts have expressed similar criticisms of religious display and exercise standing. See also *Navy Chaplaincy*, 534 F3d at 763, 764 n 4 (casting doubt on whether religious display cases constitute valid precedents on standing and citing criticism of the Court's Establishment Clause standing exemptions).

Commentators have also weighed in, arguing that religious display standing is at odds with the Court's standard Article III requirements.<sup>159</sup>

These arguments are mainly directed against the recognition of standing for religious display and exercise plaintiffs whose sole injury is mere offense at the government's unconstitutional conduct. This Comment is entirely in agreement with demands that the Court explicitly reject standing for mere offense injuries that happen to be accompanied by physical exposure to a religious display or exercise.<sup>160</sup> In this sense, calls for the revocation of specialized taxpayer and religious display standing exceptions do not directly implicate this Comment's argument for recognizing the justiciability of purely stigmatic harms.

However, the argument against specialized Establishment Clause standing exceptions could easily be extended to include demands for the revocation of stigmatic harm standing. Regardless of the fact that the Court has recognized stigmatic harms as cognizable in *Schempp* and *Valley Forge*, if purely stigmatic harm standing is seen as inconsistent with otherwise "bedrock"<sup>161</sup> standing principles, it is likely to come under the same attacks levied against the Establishment Clause's taxpayer and religious display standing exceptions. Indeed, the view that stigmatic harm standing is a dispensation unique to the Establishment Clause, and should therefore be revoked, has already been suggested by several jurists and commentators.<sup>162</sup>

This view is incorrect. The Court has recognized stigmatic harms as cognizable injuries in a variety of contexts apart from the Establishment Clause, most notably in Equal Protection

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<sup>159</sup> See, for example, Spencer, Note, 34 Harv J L & Pub Pol at 1082–87 (cited in note 27) (arguing that "the circuit courts' religious display cases" are "out of line with Article III"); Fallon, 166 U Pa L Rev at 126 (cited in note 32) ("We should agree that mere feelings of offense do not furnish a plausible basis for standing.").

<sup>160</sup> See Parts III.A.2, III.B (explaining that mere offense injuries are barred by *Valley Forge*).

<sup>161</sup> *Navy Chaplaincy*, 534 F3d at 765.

<sup>162</sup> See, for example, Smith, 85 St John's L Rev at 440 (cited in note 28) (asserting that stigmatic harms "likely . . . would not support standing outside the establishment area"). In addition, the fact that Judge DeMoss castigated the Court for tolerating special exceptions for religious display and exercise cases in a concurrence with a decision rejecting standing for plaintiffs alleging purely *stigmatic* harms suggests that he viewed stigmatic harm standing as similarly exceptional and unfounded as religious display standing. See *Tangipahoa*, 494 F3d at 500 (DeMoss concurring). Several scholars who oppose limiting Establishment Clause standing have noted this trend with alarm. See Lupu and Tuttle, 2008 BYU L Rev at 120, 158–63 (cited in note 28); Marshall and Nichol, 2011 S Ct Rev at 217, 243 (cited in note 31).

Clause cases involving race discrimination, sex discrimination, and gerrymandering based on race.<sup>163</sup> Indeed, in the Equal Protection context, the Court has expressly held that “discrimination itself, by . . . stigmatizing members of the disfavored group as ‘inately inferior’ and therefore as less worthy participants in the political community, can cause serious non-economic injuries.”<sup>164</sup> Recognizing stigmatic harm standing in the Establishment Clause context is thus entirely consistent with the Court’s standing doctrine as applied to other constitutional provisions.

To be sure, the Court has adopted various limiting principles to ensure that stigmatic harm standing in non–Establishment Clause contexts does not extend past Article III limits. The “stigmatizing injury often caused by racial discrimination,” for example, is only cognizable when the plaintiff has personally been discriminated against.<sup>165</sup> Similarly, plaintiffs alleging only stigmatic injury from the racial classifications implicit in gerrymandering must live in the gerrymandered district for the stigmatic harm to be cognizable.<sup>166</sup> However, the use of different criteria for limiting stigmatic harm standing in Equal Protection cases and Establishment Clause cases does not signify that Establishment Clause stigmatic harm standing exceeds the limits of Article III, as Judge DeMoss contends.<sup>167</sup> The Court is quite explicit that injuries alleged under different constitutional provisions require different types of injuries to be cognizable.<sup>168</sup> As such, the Court’s requirement that a plaintiff alleging stigmatic harm from race discrimination must have been “personally” discriminated against does not bar purely stigmatic harms from conferring standing in Establishment Clause cases.<sup>169</sup>

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<sup>163</sup> See Thomas Healy, *Stigmatic Harm and Standing*, 92 Iowa L Rev 417, 431–43 (2007); Note, *Expressive Harms and Standing*, 112 Harv L Rev 1313, 1320, 1325 (1999).

<sup>164</sup> *Heckler v Mathews*, 465 US 728, 739 (1984) (citation omitted).

<sup>165</sup> *Allen v Wright*, 468 US 737, 755 (1984) (“[S]uch [stigmatic] injury accords a basis for standing only to ‘those persons who are personally denied equal treatment’ by the challenged discriminatory conduct.”).

<sup>166</sup> See *United States v Hays*, 515 US 737, 744–47 (1995).

<sup>167</sup> See *Tangipahoa*, 494 F3d at 500 (DeMoss concurring).

<sup>168</sup> For example, it is universally accepted that standing requirements under the Establishment and Free Exercise Clauses differ. See, for example, *Schempp*, 374 US at 224 n 9 (“[T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed.”). See also Allison Hugi, Comment, *A Borderline Case: The Establishment Clause Implications of Religious Questioning by Government Officials*, 85 U Chi L Rev 193, 211–12 (2018).

<sup>169</sup> The argument that standing requirements that apply in the Equal Protection context necessarily apply to the Establishment Clause context has been put forth in several

### C. Additional Benefits of Adopting the Proposed Test

This Comment has attempted to demonstrate that the Supreme Court's non-*sub silentio* precedent already recognizes purely stigmatic harm standing for Establishment Clause plaintiffs who belong to the community impacted by the challenged establishment of religion. Even beyond this important consideration, the proposed rule offers three additional benefits.

First, predicating stigmatic harm standing on physical exposure to a statute or policy that explicitly favors certain religious beliefs, rather than on allegations of stigmatic harm, unnecessarily leads to nonsensical outcomes. In *Barber* and *Navy Chaplaincy*, the challenged government policies almost certainly violated the Establishment Clause by singling out particular religious beliefs for special benefits. Nonetheless, both cases were dismissed for lack of standing because the plaintiffs could not physically confront the text of the statute or policy. While a physical contact requirement does provide an easily administrable, bright-line rule that limits courts' power by barring an entire class of Establishment Clause violations from judicial review, it does so at the expense of reason. It is hard to see how viewing a nativity scene sends a more harmful message of exclusion than a policy explicitly favoring certain religious beliefs simply because the nativity scene is capable of being physically confronted.<sup>170</sup> *Barber*, for instance, starkly portrays the inequity of upholding standing for plaintiffs suing over the inclusion of a cross on a city seal<sup>171</sup> while denying LGBT individuals standing to challenge a law arguably intended to promote discrimination against LGBT individuals.<sup>172</sup> As *Barber* illustrates, laws favoring particular religions sometimes send a much clearer message of hostility to disfavored minorities than commemorative statues or insignias. As such, no rational reason

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student Notes. See, for example, Spencer, Note, 34 Harv J L & Pub Pol at 1088 (cited in note 27); Note, *Nontaxpayer Standing, Religious Favoritism, and the Distribution of Government Benefits: The Outer Bounds of the Endorsement Test*, 123 Harv L Rev 1999, 2013–19 (2010); Daniel J. Austin, Comment, *How to Reconcile the Establishment Clause and Standing Doctrine in Religious Display Cases with a New Coercion Test*, 83 Miss L J 605, 613 (2014). It is perhaps telling that this argument is seldom raised in Articles or judicial opinions.

<sup>170</sup> The Ninth Circuit lays out this argument nicely in *Catholic League*, 624 F3d at 1052 n 33.

<sup>171</sup> See *Murray v City of Austin, Texas*, 947 F2d 147, 149, 151–52 (5th Cir 1991).

<sup>172</sup> See *Barber*, 193 F Supp 3d at 691–93, rev'd on other grounds, 860 F3d 345 (5th Cir 2017) (recounting that HB 1523 was passed as a backlash to the Supreme Court's decision legalizing gay marriage in *Obergefell*, and observing that "[a] layperson reading about the bill might conclude that it gives a green light to discrimination").

suggests that physical contact is the correct way to separate cognizable from uncognizable stigmatic injuries.

Fortunately, the courts are not constrained to using physical contact as a limiting principle; indeed, this Comment argues that the Court's precedent precludes this approach. Limiting standing to plaintiffs who belong to the community impacted by the alleged Establishment Clause violation ensures that standing is not available to the entire country without imposing an arbitrary and wholly nonsensical distinction between messages that can and cannot be physically confronted.

Second, as noted above, there is a very real risk that courts will conflate stigmatic harms with mere offense injuries. If standing for mere offense injuries is rescinded, as many commentators and courts have advocated, many courts are likely to mistakenly reject standing for plaintiffs alleging stigmatic harms as well.<sup>173</sup> A clear enunciation by the Court that stigmatic harms can confer standing, even while mere offense at unconstitutional conduct cannot, would go a long way toward clearing up these mistakes.

Finally, several scholars have predicted that the Court's likely eventual revocation of the religious display and exercise standing exemption will cause a vast increase in the number of nonjusticiable Establishment Clause violations.<sup>174</sup> This potential gap between the substantive protections of the Establishment Clause and its actual enforcement—necessarily predicated on plaintiffs' ability to challenge violations of these protections in court—would be avoided by clarifying the Court's recognition that stigmatic harms may confer standing for plaintiffs belonging to the community impacted by the Establishment Clause violation.

## CONCLUSION

Laws and policies that devalue certain groups as second-class citizens inflict stigmatic harms that can be as concrete as economic loss or physical injury.<sup>175</sup> Nonetheless, several of the courts

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<sup>173</sup> See text accompanying notes 118–21 (describing the Eighth Circuit's conflation of stigmatic and mere offense harms). Similarly, Judge Kevin Newsom of the Eleventh Circuit recently refused to differentiate between the *Valley Forge* plaintiffs' mere offense injury and the stigmatic injury alleged by plaintiffs claiming to feel "affronted and excluded" by a cross in a public park. *Kondrat'yev v City of Pensacola, Florida*, 903 F3d 1169, 1175 (11th Cir 2018) (quotation marks omitted).

<sup>174</sup> See Lupu and Tuttle, 2008 BYU L Rev at 120, 158–63 (cited in note 28); Marshall and Nichol, 2011 S Ct Rev at 217, 243 (cited in note 31).

<sup>175</sup> See Healy, 92 Iowa L Rev at 453–58 (cited in note 163) (presenting findings from the psychology literature suggesting that "stigmatization is a serious injury with harmful

of appeals interpret Article III to preclude standing based on such stigmatic harms in Establishment Clause claims unless the plaintiff has physically encountered the alleged Establishment Clause violation. This physical exposure requirement deprives plaintiffs of the ability to obtain redress for injuries that are judicially cognizable under the Supreme Court's standing determinations in *Schempp* and *Valley Forge*. Moreover, in seeking to protect the separation of powers principles embodied by Article III's case and controversy limitation, these courts' physical exposure requirement for stigmatic harm standing inhibits the enforcement of an equally binding constitutional provision: the Establishment Clause itself.

It is past time for the Court to clarify its Establishment Clause standing jurisprudence with respect to stigmatic harms. This Comment proposes that the Court do so in two ways: first, by reiterating the nonjusticiability of mere offense at unconstitutional conduct; and second, by confirming the justiciability of stigmatic harms caused by overtly religious government conduct, provided that the plaintiff belongs to the community impacted by the challenged government conduct.

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consequences"); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S Cal L Rev 619, 645 & n 127 (2015) (citing psychology literature documenting adverse health effects of stigmatization on LGBT individuals).