No. 17-15589

IN THE

United States Court of Appeals
for the Ninth Circuit

STATE OF HAWAII; ISMAIL ELSHIKH,
Plaintiffs-Appellees,

ALI PLAINTIFFS; JOSEPH DOE; JAMES DOE;
EPISCOPAL DIOCESE OF OLYMPIA,
Intervenors - Pending,

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; UNITED STATES OF AMERICA,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii,
Case No. 1:17-CV-00050-DKW-KSC

BRIEF FOR THE AMERICAN CIVIL RIGHTS UNION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND VACATUR

KENNETH A. KLUKOWSKI
Counsel of Record
AMERICAN CIVIL RIGHTS UNION
3213 Duke Street #625
Alexandria, Virginia 22314
Telephone (877) 730-2278
kklukowski@theacru.org

Attorney for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and the rules of this court, *Amicus Curiae* American Civil Rights Union declares the following:

The American Civil Rights Union is a 501(c)(3) organization that has not issued stock to the public, so no publicly held company owns 10% or more of its stock. It has no parent company and no subsidiaries.

Dated April 21, 2017

Respectfully submitted,

s/ Kenneth A. Klukowski

Kenneth A. Klukowski

Attorney for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan 501(c)(3) nonprofit public-policy organization dedicated to protecting constitutional liberty. Founded by Reagan White House adviser Robert Carleson and incorporated in Washington, D.C., the ACRU believes that the best safeguards of civil rights for all Americans are found in faithful adherence to constitutional government. This faithfulness recognizes that, as important as enumerated rights are, the Framers regarded the Constitution's structural features—enumerated powers, separation of powers, and checks and balances—as the most durable bulwarks to protect individual liberty by ensuring a strictly limited federal government.

The ACRU is dedicated to promoting originalism: the legal philosophy that in our democratic republic, the only legitimate way for unelected and politically unaccountable federal judges to interpret the law is in accordance with the original meaning of its terms. This interpretive approach applies to all forms of positive law, most importantly the Constitution of the United States as the Supreme Law of the Land, but also

[1] *Amicus Curiae* American Civil Rights Union certifies that all parties have consented to the filing of this brief, and were timely notified. No party or counsel for any party authored this brief in whole or in part, and no person or entity other than the American Civil Rights Union contributed any money to fund the preparation or submission of this brief.

to federal statutes, regulations, and sub-regulatory written authorities. Courts ascertain the original meaning of the Constitution and lesser laws by consulting the text, structure, and history of the document, to determine the meaning that ordinary American citizens of reasonable education and public awareness would have understood those terms to mean at the time they were democratically adopted.

The ACRU Policy Board sets the policy priorities of the organization, and include some of the most distinguished statesmen in the Nation on matters of constitutional law and constitutional governance. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel, William Bradford Reynolds, the former Assistant Attorney General for the Civil Rights Division; and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission. Over the years, the Policy Board has previously included other senior officials from the U.S. Department of Justice and leadings jurists from the federal judiciary, such as the late Judge Robert H. Bork, and Judge Kenneth W. Starr, both of whom served on the U.S. Court of Appeals for the District of Columbia Circuit.

The ACRU has three specific institutional interests here. First, advocating strict adherence to the requirements of Article III regarding lawsuits that are properly justiciable within the federal court system. Second, ensuring that the most qualified federal officers are making decisions on immigration policy, meaning here that Congress has plenary authority to set immigration policy, and has conferred vast discretion and authority to the President to make the decisions that are implicated by this litigation. And third, advocating an interpretation of the First Amendment's Establishment Clause that comports with the historical understanding of that constitutional guarantee. That third interest is the focus of this amicus brief.

SUMMARY OF ARGUMENT

The Establishment Clause does not apply to facially neutral immigration statutes and administrative actions. Although this court should not reach the merits of this case due to numerous threshold issues, Executive Order 13,780 does not implicate the Establishment Clause in any event. Like other constitutional rights, it cannot be claimed by foreigners on foreign soil. The court's analysis in that regard does not fluctuate based on the level of the enactment or the breadth of its scope.

The district court applied the wrong standard by looking to whether the Executive Order had a secular purpose or whether it endorsed a

particular religious message. The Supreme Court in 2014 jettisoned that line of cases and abandoned such lines of inquiry. This 2014 decision restored a historically grounded approach to the Establishment Clause, under which the Constitution is violated if a government action involving religion would have been regarded as an official establishment in 1791, or if the action, even though historically accepted, nonetheless coerces a person to engage in a religious exercise. There is no question that Executive Order 13,780 is not a religious establishment by historical standards, nor does it coerce any of the Plaintiffs here. Not only did Plaintiffs present no evidence that would satisfy either step of the correct analysis, they do not even allege that the President's order violates either aspect of this constitutional standard.

Despite the Supreme Court's recent major change in Establishment Clause jurisprudence, if there were any case from the High Court directly on point, this court would be required to follow that errant precedent until the Supreme Court explicitly overrules it. But this case presents a question of first impression, hence the newly restored historical standard controls. Given that there is no evidence or allegations that Executive Order 13,780 violates the Establishment Clause under the current analysis, rather than remand, this court should vacate the preliminary injunction.

ARGUMENT

I. The Establishment Clause does not apply to facially neutral immigration statutes and administrative actions.

The Establishment Clause commands that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I, cl. 1. However, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Lacking any meaningful connection to this Nation, aliens on foreign soil cannot assert any right with a situs in any clause of the Bill of Rights. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). Indeed, aliens seeking admission into the United States cannot claim any constitutional right to be admitted into this country. *Landon*, 459 U.S. at 32; *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972). This includes having no rights under the Establishment Clause.

This court should not reach the constitutional question in this case. The district court held that Plaintiffs have a substantial likelihood of success on the merits of their Establishment Clause claim. E.R. 15. This lawsuit should have been dismissed on numerous threshold issues, as the Department of Justice explains in its opening brief. But if this court were to hold that all the threshold issues are satisfied, then also (correctly) hold that

President Trump's Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017),[2] signed by the President on March 6, 2017, is consistent with the applicable federal statutes, then in reaching the constitutional issue, this court should hold that the Executive Order is also fully consistent with the Establishment Clause as well.

The district court's reliance on *Larson v. Valente*, 456 U.S. 228 (1982), is mistaken. *See* E.R. 53, 56. *Larson* is inapposite. It is true that *Larson* holds that "one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. However, the Court itself elaborates upon what official preference consists of. *Larson*'s bar only applies when the positive law at issue makes "explicit and deliberate distinctions." *Id.* at 246 n.23. Executive Order 13,780 does precisely the opposite: It is explicitly religion-neutral. It references its predecessor, Executive Order 13,769, only to declare that the first measure "did not provide a basis for discriminating on the basis of religion," explaining that it had intended to provide priority refugee relief to "members of persecuted religious minority groups," including subsects of the majority religion.

[2] Executive Order 13,780 revoked and replaced the President's order from January 27, 2017, Executive Order 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017).

Exec. Order 13,780 § 1(b)(iv). After the express disclaimer regarding the preceding order, the new Executive Order is silent on religious faith.

Larson poses no difficulty for the Executive Order. Instead, insofar as facial evaluation is concerned, assuming *arguendo* that the Establishment Clause can be invoked at all for aliens seeking admission into the United States or any person currently in the country who can raise legal claims regarding the admission of others, all the Constitution requires is "a facially legitimate and bona fide reason" to limit a person's entry. *Kleindienst*, 408 U.S. at 770. The district court acknowledges that *Kleindienst*'s facial standard is satisfied here. *See* E.R. 54.

All the statements cited by the district court as the basis for holding that the Executive Order discriminates on the basis of religion were extrinsic evidence consisting of statements by Donald Trump—some as President, but many as a private citizen—plus statements by presidential aides. *See, e.g.*, E.R. 17, 36, 145. These do not constitute evidence of an Establishment Clause violation.

II. The Supreme Court has abandoned the *Lemon*/endorsement test in favor of a history-and-coercion test.

Federal Defendants are correct that, even if the court holds that all the threshold issues are satisfied and thus reaches the merits of the case, Executive Order 13,780 is permissible even under previous decades of

Establishment Clause jurisprudence, characterized alternatively as the *Lemon* test or the endorsement test (both described below). However, in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the Supreme Court jettisoned that test in favor of one that looks to history and coercion. The challenged Executive Order is *a fortiori* constitutional under the historically grounded analytical framework recently resuscitated in *Town of Greece*. This court should not construe the Department of Justice's brief as a concession that *Lemon* controls. It does not. Under the test that does control, the two-step test from *Town of Greece*, it is even more clear that the President's Executive Order 13,780 is constitutional.

A. The Supreme Court has abandoned the "endorsement" variation of *Lemon*'s purpose prong.

Until recently, the Supreme Court would often apply the so-called *Lemon* test when deciding Establishment Clause claims, under which government action violates the Establishment Clause if it (1) lacks a "secular legislative purpose," (2) has a principal effect that advances religion, or (3) fosters "excessive entanglement" between government and religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). The test proved so unworkable that the Court finally revised it into the "endorsement test" in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). Under this test, a court asks "whether the challenged governmental

practice has the purpose or effect of 'endorsing' religion." *Id.* at 592. This variation of *Lemon* predicates the endorsement test on the premise that the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community." *Id.* at 594 (internal quotation marks omitted). The question of endorsement is from the perspective of a hypothetical "reasonable" or "objective" observer. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

Four Justices vigorously dissented in *Allegheny*, with Justice Kennedy authoring the dissenting opinion. *Allegheny*, 492 U.S. at 659–70 (Kennedy, J., concurring in the judgment in part and dissenting in part). As discussed below, the dissenting Justices categorically rejected the endorsement concept as an acceptable interpretation of the Establishment Clause, instead insisting that the Establishment Clause must be interpreted consistent with its historical meaning, a meaning that focuses on coercion, rather than endorsement.

Although the endorsement test began as a revision of *Lemon*'s second prong—the effects prong—it has long since subsumed the other two prongs as well. In 1997, the Court "recast *Lemon*'s entanglement inquiry as simply

one criterion relevant to determining a statute's effect," collapsing *Lemon*'s third prong into merely one aspect of *Lemon*'s second prong. *Mitchell v. Helms*, 530 U.S. 793, 807–08 (2000) (opinion of Thomas, J.) (discussing *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997)); *accord id.* at 845 (O'Connor, J., concurring in the judgment). Then in the case most central to the district court's analysis, *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), the Court recast *Lemon*'s first prong as an endorsement inquiry. The Court engrafted the endorsement test's rationale from *Allegheny* into the purpose prong, holding that "[b]y showing a purpose to favor religion, the government sends the . . . message to . . . adherents that they are insiders, favored members [of the political community]." *Id.* at 860 (internal quotation marks omitted). After supplying the necessary fifth vote for the majority opinion, Justice O'Connor's concurring opinion articulated this conjoining of *Lemon* and endorsement explicitly, adding, "The purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer." *Id.* at 883 (O'Connor, J., concurring).[3] After 2005, government violates the Establishment Clause if (1) it shows a purpose favoring religion, conveying to a reasonable

[3] A panel of the Fourth Circuit acknowledged the fusion of these two inquiries. *See Lund v. Rowan Cnty.*, 837 F.3d 407, 424 (4th Cir. 2016), *reh'd en banc*, (argued 4th Cir. Mar. 22, 2017) (No. 15-1591).

observer an endorsement of religion, (2) its action has the effect of advancing religion because a reasonable observer would believe the government is endorsing religion, or (3) its action excessively entangles government with religion, such that a reasonable observer would conclude the government is endorsing religion. Endorsement is therefore now the touchstone of all three of *Lemon*'s prongs, including the purpose prong prominently at issue in this case. Some Justices even refer to the test on occasion as the "*Lemon*/endorsement test." *See, e.g.*, *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 996 (2011) (Thomas, J., dissenting from the denial of certiorari).

However, in some types of Establishment Clause cases the Court does not apply *Lemon* at all. For example, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court eschewed *Lemon* when it affirmed the constitutionality of legislative prayers at the outset of lawmaking sessions. *See id.* at 794–95. And in *Lee v. Weisman*, 505 U.S. 577 (1992), the Court held that prayers at public school graduation ceremonies are unconstitutional because they coerce minors (though not adults) who are present. *Id.* at 599.

In more recent years, the Supreme Court has looked to history rather than *Lemon* in Establishment Clause cases. In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court upheld a longstanding Ten Commandments display

outside the Texas statehouse, with the principal opinion focusing on the place of the Ten Commandments in American history. *Id.* at 686–90 (opinion of Rehnquist, C.J.).[4] A majority of the Court held that *Lemon* did not apply in the case, and the plurality cast doubt on the test as a whole. *Id.* at 686 ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it is not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."). The Justices instead looked to history, explaining, "Instead, our analysis is driven both by the nature of the monument and by our Nation's history." *Id.* So after *Van Orden*, there is some class of passive displays that are not subject to the *Lemon*/endorsement test. At least one circuit followed the Court's lead, refusing to apply *Lemon* to a Ten Commandments display. *ACLU Neb. Found. v. City of Plattsmouth*, Neb., 419 F.3d 772, 777–78 & 778 n.8 (8th Cir. 2005) (en banc). At least one circuit has gone even further, extending *Van Orden*'s displacement of *Lemon* to other types of establishment cases. *See, e.g.*, *Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005) (upholding under *Van Orden* a statute

[4] Justice Breyer supplied the fifth vote setting aside the *Lemon*/endorsement test to uphold the Ten Commandments, saying that instead of *Lemon* or the endorsement test, such difficult cases must be decided on the basis of "legal judgment." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment).

concerning voluntary recitations of the Pledge of Allegiance in public schools). This court has expressed confusion as to whether *Allegheny*'s endorsement refinement of the *Lemon* test governs crosses in war memorials, or whether *Van Orden* instead supplies the rule, and purported to apply *both* tests. *Trunk v. San Diego*, 629 F.3d 1099, 1105, 1109, 1117–18 (9th Cir. 2011).

In a subsequent Establishment Clause case, the Supreme Court did not even mention *Lemon*, and instead looked exclusively to history. The Court in 2012 unanimously held that both the Establishment Clause and the Free Exercise Clause require a "ministerial exception" to federal employment laws. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188 (2012). Without dissent, the Court's analysis examined the history that illuminated the Framers' original meaning of the Religion Clauses, never giving the slightest of nods to purpose, effects, or endorsement. *See Hosanna-Tabor*, 565 U.S. at 182–87.

Then in *Town of Greece* the Court again looked to history instead of the *Lemon*/endorsement test, in a decision written by Justice Kennedy. But more than that, the Court also explicitly held that the history-and-coercion analysis controlled that legislative prayer case, then broadly commanded without caveat, qualification, or limitation that history must be the

touchstone of any Establishment Clause analysis. The Court held, "*Any* test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece*, 134 S. Ct. at 1819 (emphasis added). In doing so, the Court again cast aside *Lemon*.

The Supreme Court applied a two-step analysis in *Town of Greece*, under which the challenged government practice is unconstitutional (1) if it was historically regarded as an establishment of religion, or (2), even if historically accepted, the practice coerces any person to participate in a religious exercise. *Id.* at 1819–25.[5] This two-step test is now the controlling interpretation of the Establishment Clause for any case where there is not a Supreme Court case still directly on point that dictates a different outcome.[6]

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[5] Most of the principal opinion in *Town of Greece* is a majority opinion. However, Part II-B is a three-Justice plurality opinion authored by Justice Kennedy, incorporating all the elements of his dissenting opinion from *Allegheny*. *See Town of Greece*, 134 S. C. at 1824–28 (plurality). This plurality opinion is narrower than Justice Thomas's concurring opinion, in which he and Justice Scalia agreed that coercion is unconstitutional, but would limit that rule to "actual legal coercion" such as imprisonment or fines, which were religious establishments under the historical standard, and thus already invalid under Part II-A of the opinion, without the need for Part II-B. *Id.* at 1837 (Thomas, J., concurring in part and concurring in the judgment). Justice Kennedy's opinion therefore controls. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

[6] There is a tie between the historical-inquiry step and the coercion step, in that the Supreme Court has reasoned that "governmentally established

In adopting the history-and-coercion test, *Town of Greece* sharply criticized the endorsement test. The parties in *Town of Greece* agreed that *Marsh*, rather than *Lemon* or its endorsement revision, was the rule for legislative prayer, and the Court sustained the town's challenged practice under *Marsh* in the part of the opinion that commanded a full majority of the Court. *Id.* at 1815. The Solicitor General of the United States filed an amicus brief in which the United States likewise took the position that *Marsh* was dispositive of the case at bar, and therefore that the Court should decide the case solely on the basis of *Marsh*, *see* Brief of the United States as Amicus Curiae at 9–30, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696), and not act on the petitioners' urging to address and jettison the endorsement test.

But the Court did not limit its analysis in the manner the Obama Administration urged, which could have left *Marsh* as a sui generis anomaly in Establishment Clause jurisprudence. Rather, *Town of Greece* proceeded to declare that *Marsh* did not "'carv[e] out an exception' to the Court's Establishment Clause jurisprudence," *Town of Greece*, 134 S. Ct. at 1818, and instead showcases the approach that should inform *every* Establishment Clause analysis, *see id.* at 1819 ("*Marsh* must not be understood as

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religions and religious persecution go hand in hand." *Engel v. Vitale*, 370 U.S. 421, 432–33 (1962).

permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'") (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J.)). The Court explicitly rejected dictum from *Allegheny* pertaining to legislative prayer. *Id.* at 1821. But then the Court engaged in a broad rejection of the premises and rationale of the endorsement test, mirroring the criticisms that no fewer than six Justices had leveled against the test—whether called *Lemon* or endorsement—in the intervening years. *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment) (collecting cases). In both the majority and plurality parts of his opinion, Justice Kennedy adopts the entirety of his *Allegheny* dissent as the holding of the Court in *Town of Greece*. *Town of Greece*, 134 S. Ct. at 1818–28.

This repudiation of the endorsement test includes the standalone purpose-prong inquiry from *McCreary*, which was the only prong of *Lemon* ruled upon by the district court. E.R. 15. Justice Kennedy joined most of the dissent in *McCreary*, along with all the Justices still serving on the Court who had joined him in his *Allegheny* dissent. That part of the *McCreary* dissent adopted the same principles as the *Allegheny* dissent, and embraced

the same historical approach to interpreting the Establishment Clause. *See McCreary*, 545 U.S. at 900–12 (Scalia, J., dissenting). Aspects of *McCreary*'s inquiry might survive the Supreme Court's recurrence to history and tradition in *Town of Greece*, such as an examination of "the text, legislative history, and implementation of the statute, or comparable official act," such as the Executive Order at issue here. *Id.* at 862 (majority opinion) (internal quotation marks omitted). But the Court's holding in *McCreary* cannot be reconciled with *Town of Greece*, and thus did not survive the Court's 2014 seminal decision.

At least two circuits have acknowledged that *Town of Greece* abrogated *Allegheny*'s endorsement test. *Cressman v. Thompson*, 798 F.3d 938, 959 (10th Cir. 2015); *Tearpock-Martini v. Borough of Shickshinny*, 756 F.3d 232, 238 (3d Cir. 2014). In yet another circuit, Judge Batchelder discussed this doctrinal change at length, *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 596–605 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result), referring to *Town of Greece* as a "major doctrinal shift" in Establishment Clause jurisprudence, *id.* at 602. Even before *Town of Greece* was decided, now-Justice Gorsuch questioned whether the *Lemon*/endorsement test is still good law. *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1110 (10th Cir. 2010) (Gorsuch, J., dissenting from

the denial of reh'g en banc) (asserting that whether the "reasonable observer/endorsement test remains appropriate for assessing Establishment Clause challenges is far from clear.").

B. Executive Order 13,780 is consistent with the historical meaning of the Establishment Clause.

1. *Town of Greece* holds that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece*, 134 S. Ct. at 1819 (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J.)). The Establishment Clause is not violated "where history shows the specific practice is permitted." *Id.* The Supreme Court held that "the line [courts] must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Id.* (alterations and internal quotation marks omitted). The Court upheld legislative prayer because it is "a benign acknowledgement of religion's role in society." *Id.* at 1819. Courts must rule permissible under the Establishment Clause "a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.*

To illustrate what coercion entails in an Establishment Clause context, the Court elaborated that certain "constraints remain on [prayer] content." *Town of Greece*, 134 S. Ct. at 1823. Historically accepted prayers are those

that "lend gravity . . . and reflect values long part of the Nation's heritage," are "solemn and respectful in tone," invite lawmakers to "reflect upon shared ideals and common ends," and sometimes involve asking for "blessings of peace, justice, and freedom." *Id.* Legislative prayers are constitutional unless "over time," a consistent pattern of prayers demonstrate "that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Id.* The Court noted that many people might strongly object to public prayer, especially prayers expressing beliefs the objectors do not share, but reasoned that "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Id.*

2. Plaintiffs here have not made any argument or introduced any evidence that to suggest that Executive Order 13,780 runs afoul of the Establishment Clause when examined through the lens of a historical inquiry. Not a shred of their argument explores the application of the Establishment Clause to immigration questions in 1791. Nor do they cite to any historical source showing that any positive law that is facially neutral on religion, but which some litigants allege affects adherents of one faith more than adherents of another faith, was an official religious establishment during the Framing. The historical record is quite to the contrary, as the

Federal Defendants provide numerous past examples of government actions favoring one religion over another. *See, e.g.*, U.S. Br. at 7 (citing 8 U.S.C. § 1101(a)(42), 1157). Even though such religion-preference actions from the Early Republic would be sufficient to satisfy the historical pedigree relevant to *Town of Greece*, the fact that many of these actions were from the twentieth century shows that such policies have been part of federal immigration policy throughout the Nation's history. Not only is Executive Order 13,780 constitutional under this standard, but the now-revoked Executive Order 13,769 was legally permissible, as well.

None of the material the district court regarded as betraying an impermissible religious purpose under *McCreary* is impermissible under the historical standard from *Town of Greece*. Even if such problematic material were it exist (and it does not), Plaintiffs did not carry their burden of producing it. Plaintiffs therefore have not shown a substantial likelihood of success.

C. Executive Order 13,780 does not coerce persons in the United States to participate in a religious exercise.

1. Even if a government enactment involving faith was not considered an establishment of religion in 1791, the Supreme Court has held that the Establishment Clause imposes a second requirement that the government action not be coercive. "It is an elemental First Amendment

principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Town of Greece*, 134 S. Ct. at 1825 (plurality opinion of Kennedy, J.) (quoting *Allegheny*, 492 U.S. at 659 (Kennedy, J.)). For example, when reviewing legislative prayer, this second prong of *Town of Greece* requires a "fact-sensitive" inquiry to determine whether the government "compelled its citizens to engage in a religious observance," an inquiry that defines coercion "against the backdrop of historical practice," *id.*, and thus retains the historical inquiry as the centerpiece of the entire analysis.

Justice Kennedy added that other factors might suggest coercion, and are useful here insofar as analogous facts are completely lacking in the instant case. "The analysis would be different if [municipal] board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* Justice Kennedy elaborated that public prayers might be coercive "where the prayers [e]ither chastised dissenters [or] attempted lengthy disquisition on religious dogma." *Id.* The Court explicitly rejected the argument that feeling offended or excluded violates the Constitution. It goes without saying that no one wants to be offended. "Offense, however, does not equate to coercion." *Id.*

"Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views. . . ." *Id.*

2. Executive Order 13,780 coerces no one. Neither did Executive Order 13,769. It does not require any immigrant in this country, nor any family member seeking to bring someone into this country, to engage in a religious activity. The President's order does not require any verbal affirmation of any religious belief, or any expression of rejecting any belief. It does not command that any person adopt a particular article of faith or adhere to any theological doctrine. It does not require any type of religious attendance, ceremony, or observance. Executive Order 13,780 does not preach conversion to any one faith, or threaten damnation to the adherents of other faiths. It does not disparage or denigrate followers of any faith, nor does it threaten to withhold public benefits from those who will not acquiesce to a preferred governmental religious display or action.

The President's order of March 6, 2017, is consistent with the second step from *Town of Greece*. Given that the President's measure also comports with the historical-inquiry step, Executive Order 13,780 is therefore consistent with the Establishment Clause.

III. If this court reaches the Establishment Clause claim, *Town of Greece* controls.

This is not to say that the *Lemon* test or its endorsement test revision does not still apply to some Establishment Clause cases. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), *quoted in Agostini*, 521 U.S. at 237.[7] If this were a case involving a religious government display where the public leaders responsible for it gave the sorts of speeches that were given in Kentucky more than a decade ago, then *McCreary* would control.[8] If this involved a nativity display in a government building, *Allegheny* would control.

But this case presents a question of first impression to this court. Never before has an immigration Executive Order been challenged on Establishment Clause grounds. There is no precedent directly on point that

[7] There is no question that this rule controls in Establishment Clause challenges, because *Agostini* was an Establishment Clause case.

[8] Even then, the statements cited by the Court in *McCreary* were those of government policymakers who made the challenged policy, not those of private citizens running for public office, or aides to policymakers.

implicates *Agostini*'s admonition. With no such precedent, the general rule declared by *Town of Greece* controls.

Again, for all the reasons the Department of Justice sets forth in its opening brief, Executive Order 13,780 would pass constitutional muster even if analyzed under *McCreary* and the endorsement test. But instead in reality this is a much easier case, because under *Town of Greece* there cannot be any doubt that President Trump's order is consistent with the Establishment Clause.

This court reviews for abuse of discretion a district court's grant of a preliminary injunction. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013). In that context, this court reviews de novo the trial court's "interpretation of the underlying legal principles." *Id.* The district court set forth a manifestly erroneous set of legal principles here, applying *McCreary* instead of *Town of Greece*.

Some may suggest remand as the appropriate remedy, to require the district court to reevaluate the evidence under the proper standard. But here, where it is unquestionably clear that the Plaintiffs have made no allegations and proffered no evidence that could possibly show an Establishment Clause violation under *Town of Greece*, remand would be an unnecessary waste of scarce judicial resources and unnecessarily deny the President the prompt

and timely vindication to which the Constitution entitles him. This court should vacate the preliminary injunction.

CONCLUSION

The district court did not apply the correct rule governing the Establishment Clause claim, thereby abusing its discretion in granting the preliminary injunction. The District of Hawaii's preliminary injunction should accordingly be vacated.

Respectfully submitted,

s/ Kenneth A. Klukowski
KENNETH A. KLUKOWSKI
Counsel of Record
AMERICAN CIVIL RIGHTS UNION
3213 Duke Street #625
Alexandria, Virginia 22314
Telephone (877) 730-2278
kklukowski@theacru.org

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CERTITFICATE OF COMPLIANCE

I certify that the foregoing Brief:

1. Complies with the type-volume limitation of Fed. R. App. P. 28.1(e). This brief contains 5,412 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B). Microsoft Word 2010 was used to calculate the word count; and

2. Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

s/ Kenneth A. Klukowski
KENNETH A. KLUKOWSKI
Counsel of Record
AMERICAN CIVIL RIGHTS UNION
3213 Duke Street #625
Alexandria, Virginia 22314
Telephone (877) 730-2278
kklukowski@theacru.org

CERTIFICATE OF SERVICE

I certify that on April 21, 2017, I electronically filed this brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kenneth A. Klukowski
KENNETH A. KLUKOWSKI
Counsel of Record
AMERICAN CIVIL RIGHTS UNION
3213 Duke Street #625
Alexandria, Virginia 22314
Telephone (877) 730-2278
kklukowski@theacru.org