No. 17-1351

IN THE

United States Court of Appeals

for the Fourth Circuit

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Maryland

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

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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, and accordingly no publicly held company owns 10% or more of its stock. It has no parent company and no subsidiaries.

Dated March 31, 2017

Respectfully submitted,

s/ Kenneth A. Klukowski
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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 currently headquartered in Alexandria, Virginia, on the boarder of the Nation's capital, 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 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

[1] Amicus Curiae American Civil Rights Union certifies that all parties have consented to the filing of this brief. 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.

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 at least 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. And third, advocating an interpretation of the 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. Under current Supreme Court precedent, the Establishment Clause is violated if a government action involving religion would have been regarded as an official establishment in 1791, or if a historically accepted enactment 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 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, so the new 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 vacate and remand, this court would reverse the district court's 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, the aliens being denied entry 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). This includes the Establishment Clause. *See Kleindienst v. Mandel*, 408 U.S. 753 (1972).

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. JA 794–807. 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), is consistent with the applicable federal statutes, then in reaching the constitutional issue, this court must hold that the Executive Order is also fully consistent with the Establishment Clause as well.

It is utterly irrelevant regarding constitutionality that Executive Order 13,780 can be described as "the promulgation of sweeping immigration policy at the highest levels of the political branches." JA 806 (internal quotation marks omitted).[2] The district court's statement is puzzling, given that whether it is the President acting pursuant to 8 U.S.C. § 1182(f), or other high-ranking officials such as the Attorney General making an immigration decision, *see, e.g.*, *Mandel*, 408 U.S. at 769–70, it is Congress' policy that is being effectuated, carried out by Executive officers Congress empowered by statute. The district court drew this novel distinction, however, to elide *Mandel* and render a decision on the Establishment Clause claim.

Plaintiffs' argument also includes that Executive Order 13,780 violates the Establishment Clause because "one religious denomination cannot be officially preferred over another." JA 209 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). However, *Larson*'s bar only applies when the positive law at issue makes "explicit and deliberate distinctions." *Larson*, 456 U.S. at 246 n.23. Executive

[2] For evidentiary purposes, statements made by a private citizen who later becomes a public official should also be utterly irrelevant. Although in this case that private citizen was elected to the highest office in the land as President of the United States, the district court offers no limiting principle on the level of office. If this court does not correct the district court's error, it could be used against county sheriffs, town board members, or school superintendents. Nor does this rule apply only to candidates for public office, as the district court cited to statements made several years ago when Donald Trump was a prominent private citizen talking on a television show. *See, e.g.*, JA 797–800.

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

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* JA 795–803. 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 a valid 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 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 added even more explicitly, "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). A panel of this court has already acknowledged the fusion of these two inquiries. *See Lund v. Rowan Cnty.*, 837 F.3d 407, 424 (4th Cir. 2016), *vacated for reh'g en banc*, 2016 U.S. App. LEXIS 19805 (4th Cir. Oct. 31, 2016) (No. 15-1591). After 2005, government violates the Establishment Clause if (1) it shows a purpose favoring religion, conveying to a reasonable 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 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.).[3] The plurality held that *Lemon* did not apply in the case, and 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.").

[3] 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).

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. Indeed, this court 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 concerning voluntary recitations of the Pledge of Allegiance in public schools).

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 looked to history instead of the *Lemon*/endorsement test, in a decision written by Justice Kennedy. But more that, the Court also explicitly held that the history-and-coercion analysis controlled that

legislative prayer case, then broadly commanded without limitation that history must be the touchstone of any Establishment Clause analysis. 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. *Town of Greece*, 134 S. Ct. at 1819–25.[4] 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.[5]

In adopting the history-and-coercion test, the controlling plurality opinion sharply criticized the endorsement test. The parties in *Town of Greece* agreed that

[4] 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*. *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).

[5] There is a tie between the historical step and the coercion test, in that the Supreme Court has reasoned that "governmentally established religions and religious persecution go hand in hand." *Engel v. Vitale*, 370 U.S. 421, 432–33 (1962).

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. But the Court then proceeded to say that *Marsh* did not "'carv[e] out an exception' to the Court's Establishment Clause jurisprudence," *id.* at 1818, and instead showcases the approach that should inform every Establishment Clause analysis, *see id.* at 1819 ("*Marsh* must not be understood as 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*. 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" of the challenged law (or Executive Order, as is the case 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, Judge Gorsuch (very likely soon to be 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 twice upheld legislative prayer because it is "a benign acknowledgement of religion's role in society," *id.* at 1819, which is equally true when those prayers are offered by a local representative as it is when offered by any other government officer or by a community volunteer. Courts would normally hold 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.*

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 under such 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 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 the opposite, as the Federal Defendants provide numerous past examples of government actions favoring one religion over another. Even though such preferential 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 show how longstanding such policies have been in federal policy. Not only is Executive Order 13,780 constitutional under this standard, Executive Order 13,769 was legally permissible, as well.

None of the material the district court held had an impermissible religious purpose under *McCreary* is impermissible under the historical standard from *Town of Greece*. Even if such material exists, Plaintiffs did not carry their burden of producing it. Plaintiffs therefore have no chance of success on the merits under this standard, to say nothing of 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. For example, it is not coercive for municipal leaders during prayers "to show who they are," including that their prayers "may also reflect the values they hold as private citizens." *Id.* at 1826.

Justice Kennedy added that other factors would impact the analysis. "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 belief, or any expression of rejecting any belief. It does not require any type of religious attendance, or 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*. 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. 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. 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 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 passes constitutional muster even if analyzed under *McCreary* and the endorsement test. But this is a much easier case, because under *Town of Greece* there cannot even 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. *United States v. South Carolina*, 720 F.3d 518, 524 (4th Cir. 2013). "Pursuant to this standard, we review the district court's . . . legal

conclusions de novo." *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013). A district court abuses its discretion when it articulates or applies the wrong legal standard governing the case. *See Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc). The district court conducted an analysis that was manifestly erroneous, applying *McCreary* instead of *Town of Greece*.

Some may suggest vacatur 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*, vacatur would be an unnecessary waste of scarce judicial resources and unnecessarily deny the President the vindication to which the Constitution entitles him. This court should reverse.

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 Maryland should accordingly be reversed.

Respectfully submitted,

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March 31, 2017

CERTIFICATION PURSUANT TO FED. R. APP. P. 29 AND 32

This *amicus* brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7) because it contains 5,032 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief 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) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2017, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit using CM/ECF, which will send notification of such filing to counsel of record.

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