Nos. 16-1436, 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth and Ninth Circuits

BRIEF FOR THE AMERICAN CIVIL RIGHTS UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The questions presented are:

1. Whether Respondents' challenges to Section 2(c)'s temporary entry suspension, Section 6(a)'s temporary refugee suspension, and Section 6(b)'s refugee cap are justiciable.

2. Whether Respondents' challenges to Section 2(c) became moot on June 14, 2017.

3. Whether Sections 2(c), 6(a), and 6(b) exceed the President's statutory authority under the INA.

4. Whether Sections 2(c), 6(a), and 6(b) violate the Establishment Clause.

5. Whether the global injunctions are impermissibly overbroad.

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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. Incorporated in Washington, D.C., the ACRU is dedicated to promoting originalism: that in the United States' democratic republic, the only legitimate way for politically unaccountable federal judges to interpret the law is in accordance with the original public meaning of its terms. 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. Members include former Attorney General Edwin Meese III, former Assistant Attorneys General Charles J. Cooper and William Bradford Reynolds, and former U.S. Ambassador J. Kenneth Blackwell. These statesmen are accomplished leaders regarding immigration policy, national security, and Religion Clauses jurisprudence.

The ACRU has three specific interests here. First, advocating strict adherence to the requirements of

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[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.

Article III regarding lawsuits that are properly justiciable. 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 on the President to make the specific decisions implicated in 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 courts below applied the wrong Establishment Clause test. This Court in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), abandoned the test applied by the Fourth Circuit here, restoring an Establishment Clause inquiry that looks to history and determines whether plaintiffs in the litigation are being coerced by the government to participate in a religion or religious exercise against their conscience.[2]

The district courts in both cases, as well as the Fourth Circuit, applied the wrong standard by looking to whether the Executive Order had a secular purpose or whether it endorsed a particular religious message. This Court in *Town of Greece* jettisoned those errant lines of cases and abandoned their forms of inquiry. That 2014 decision restored a historically grounded

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[2] Although the Ninth Circuit decided the legal challenge before it on statutory grounds, and thus did not reach the constitutional question in the case, this brief's arguments are directed against the judgments of both the Fourth and the Ninth Circuits, and seeks a judgment from this Court reversing both of them.

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 of religion in 1791. Three Justices added that a historically accepted action might also be problematic if it coerces a person to engage in a religious exercise.

There is no question that Executive Order 13780 is not a religious establishment by historical standards, nor does it coerce any of the Respondents here. Beyond the fact that Respondents presented no evidence that would satisfy the correct analysis, they do not even allege that the President's order violates this constitutional standard.

Despite the Court's recent refining of Establishment Clause jurisprudence, if there were any precedent from the Court directly on point, inferior courts would be required to follow that wrongly decided case until this Court explicitly overrules it. But this case presents a question of first impression, therefore inferior courts are bound by this Court's rule from *Town of Greece*: "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." All of the inferior courts in these consolidated cases were required to adopt that approach to answer this novel constitutional question. Given that there is no evidence—or even allegation—that Executive Order 13780 violates the Establishment Clause under the controlling test, this Court should reverse the courts below.

ARGUMENT

The Court should not reach the Establishment Clause question presented in this case for the reasons set forth by the President in the Federal Petitioners' opening brief.[3] But if a court were to (incorrectly) conclude that *IRAP* and *Hawaii* are justiciable cases, then (correctly) conclude that the EO is consistent with the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*. (INA), and thereby reach the constitutional issue, that court must then apply the correct test. The courts below failed to do so.[4]

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[3] Some of these reasons pertain to threshold issues. Others show that the various provisions of the Bill of Rights—including the Establishment Clause—do not apply to facially neutral immigration statutes and administrative actions. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972). Executive Order 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (the "EO"), therefore does not implicate the Establishment Clause. The Court's more recent pronouncement in *Kerry v. Din*, 135 S. Ct. 2128 (2015), does not change that result. *See* U.S. Brief at 62–70. While *Amicus* American Civil Rights Union agrees with the President's arguments on each of the five questions before the Court in this litigation, this brief is exclusively focused on Question 4 in the Petition.

[4] While the Fourth Circuit held that the EO is consistent with the INA and thus reached the Establishment Clause issue in *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), the Ninth Circuit held that the EO violated the INA, and therefore never reached the constitutional question in *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017). However, like other federal appellate courts, the Ninth Circuit holds it may affirm the district court's judgment against the President "on any basis fairly supported by the record," *Henry v. Lehman Commer. Paper., Inc.*, 471 F.3d 977, 995 (9th Cir. 2006). The court of appeals could therefore persist in thwarting the EO

"*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 v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (emphasis added). The lower courts applied an older test from other Establishment Clause contexts—a version of the so-called *Lemon* test—that violates the Court's rule.

I. IN *TOWN OF GREECE*, THIS COURT ABANDONED THE *LEMON*/ENDORSEMENT TEST IN FAVOR OF A HISTORY-AND-COERCION TEST.

The Establishment Clause commands that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I, cl. 1. The President is correct that, even if the Court holds that all other issues are satisfied and thus reaches the constitutional question in the case, Executive Order 13780 is permissible even under previous decades of Establishment Clause jurisprudence, characterized alternatively as the *Lemon* test or the endorsement test (both described *infra* in Part II). *See* U.S. Brief at 70–78.

However, in *Town of Greece*, the Court jettisoned that ahistorical and hopelessly subjective test in favor of one that looks to history and coercion. Executive Order 13780 is *a fortiori* constitutional under the historically grounded analytical framework

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if this Court reverses the Ninth Circuit's statutory ruling. For purposes of this brief, *amicus* assumes the Ninth Circuit would rule against the President on constitutional grounds as well as statutory grounds, and therefore the arguments contained herein are directed at both Nos. 16-1436 and 16-1540.

resuscitated in *Town of Greece*. This Court should not construe the Solicitor General'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 13780 is constitutional.

A. The Court's recent Establishment Clause cases increasingly look to history and coercion, and away from *Lemon* and the "endorsement test."

1. 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 in a manner consistent with its historical meaning, a meaning that focuses on coercion, rather than endorsement.

Although courts initially treated the endorsement test 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 analysis of the courts below, *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), the Court recast *Lemon*'s first prong as an endorsement inquiry. *Allegheny* itself had initially cast the endorsement test as encompassing purpose as well as effect, declaring the test of "whether the challenged governmental practice has the *purpose* or effect of 'endorsing' religion." *Allegheny*, 492 U.S. at 592 (emphasis added). In *McCreary*, 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).[5] 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 therefore now the touchstone of all three of *Lemon*'s prongs, including the purpose prong centrally at issue in this case. Some Justices even refer to this 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).

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[5] 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), *aff'd en banc* 863 F.3d 268 (4th Cir. 2017).

2. 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, 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.

3. 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.).[6] 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

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[6] 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).

Nation's history." *Id.* Thus 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*, 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 concerning voluntary recitations of the Pledge of Allegiance in public schools). Another circuit 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, this 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 illuminates the original meaning of the Religion Clauses as recognized by the Framers, never giving the slightest of nods to purpose, effects, or endorsement. *See id.* at 182–87.

B. Justices of this Court frequently criticize the *Lemon*/endorsement test.

Members of this Court routinely criticize the *Lemon* test directly or indirectly, either in its original three-pronged form or in its more recent endorsement variation. On occasion the full Court has highlighted *Lemon*'s shortcomings. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); *Hunt v. McNair*, 413 U.S. 734, 741 (1973). It is no secret that the test has been beset by problems from its inception.

Other times the criticism is offered by one or more Justices, often in a more pointed fashion than is typically found in majority opinions. As Justice Scalia said in reaction to the Court's invocation of *Lemon* in a 1993 case involving a public school:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence again, frightening the little children and school attorneys of [the school involved in the litigation]. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman*, 505 U.S. 577 (1992), conspicuously avoided the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart . . . and a sixth has joined an opinion doing so.

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (citing, *inter alia*, *Lee*, 505 U.S. at 644 (Scalia, J., joined by, *inter alios*, Thomas, J., dissenting); *Allegheny*, 492 U.S. at 655–57 (Kennedy, J., concurring in the judgment in part and dissenting in part); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346–49 (1987) (O'Connor, J., concurring in the judgment); *Wallace v. Jaffree*, 472 U.S. 38, 107–13 (1985) (Rehnquist, J., dissenting); *id.* at 90–91 (White, J., dissenting)).

As already noted, Chief Justice Rehnquist, joined by Justices Scalia, Kennedy, and Thomas, questioned the longevity and vitality of *Lemon* in 2005. *Van Orden*, 545 U.S. at 686 (plurality opinion of Rehnquist, C.J.); *see also id.* at 692 (Scalia, J., concurring) ("I join the opinion of the Chief Justice because I think it accurately reflects our current Establishment Clause jurisprudence—or at least the Establishment Clause jurisprudence we currently apply some of the time."). Justice Thomas separately weighed in six years later, faulting the Court's "nebulous Establishment Clause analyses" for creating the result that the Court's "jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases." *Utah Highway Patrol Ass'n*, 565 U.S. at 995, 996 (Thomas, J., dissenting from the denial of certiorari). Justice Alito added his voice to the chorus in 2012. *See Mt. Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 945 (2012) (Alito, J., respecting the denial of certiorari) ("This Court's Establishment Clause jurisprudence is undoubtedly in need of clarity[.]"). And Justice Gorsuch expressed skepticism over the

continued applicability of the *Lemon* test as well, while serving as a circuit judge on a lower court. *See 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."). Other judges on the courts of appeals express similar sentiments. *See, e.g.*, *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 596–601 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result); *ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005) (commenting that the federal judiciary is confined to "Establishment Clause purgatory"); *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11th Cir. 2003) ("We follow the tradition in this area by beginning with the almost obligatory observation that the *Lemon* test is often maligned.").

C. A broad consensus of scholars spanning the spectrum of legal thought agree that the *Lemon*/endorsement test is fatally flawed.

Justices' frequent withering commentary regarding *Lemon* is mirrored by scathing scholarly criticism of the test. Adherents of two schools of thought regarding the Establishment Clause—strict separationists and accommodationists—view the Clause in very different terms that often lead to diametrically opposed results. Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 224–27 (2008). Notwithstanding the fact that they normally disagree with each other, a wide range of

professors and academics spanning this divide find common ground in concluding that the *Lemon*/endorsement framework is as hopelessly subjective as Members of the Court have found it over the test's troubled lifespan. This "Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices." LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 163 (1986).

1. Professor Michael McConnell is a leading accommodationist who concluded after *Allegheny* that this "Court's conception of the First Amendment more closely resemble[s] freedom *from* religion . . . than freedom *of* religion. The animating principle [of the *Lemon*/endorsement test is] not pluralism and diversity, but maintenance of a scrupulous secularism in all aspects of public life." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 116 (1992) (footnote omitted). Rather than achieve consistent results as Justice O'Connor intended, *see Wallace*, 472 U.S. at 69 (O'Connor, J., concurring in the judgment), "this goal of consistency is the test's greatest failing." McConnell, *supra*, at 148. That should come as no surprise. "Whether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no 'neutral' position, outside the culture, from which to make this assessment." *Id.* Consequently, the "concept of 'endorsement' therefore

provides no guidance to legislatures or lower courts about what is an establishment of religion." *Id.*

This jurisprudential quagmire is the product of divorcing the Establishment Clause from its historical moorings. Marginalizing original meaning and historical context from the Establishment Clause has done far more than lead to decisions that the Framers would not recognize; it has led to decisions that this Court would not have recognized as recently as this past century. Professor McConnell contends that "it is like stepping into a time warp to read establishment clause opinions of the 1940's, 1950's, and 1960's." Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 933 (1986). Strict-separationist Justices from that era might be mistaken for accommodationists today. "Was it really Justice Brennan . . . who told us that, in deciphering the first amendment, 'the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers?'" *Id.* (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

Professor Steven Smith hones in on the *Lemon*/endorsement test's ahistorical foundation. "If the possibility of separating church and state presented eighteenth century Americans with a genuine option, the separation of politics and religion, or of government and religion, did not." Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 966 (1989). Religious sentiments were ubiquitous in both public and private thought and conversation, including consideration of

public policy. "Religious premises, assumptions, and values provided the general framework within which most Americans thought about and discussed important philosophical, moral, and political issues." *Id.* The ineluctable result? "Americans of the time could not seriously contemplate a thoroughly secular political culture from which religious beliefs, motives, purposes, rhetoric, and practices would be filtered out." *Id.*

2. Professor Laurence Tribe is one leading strict separationist who sharply criticizes the *Lemon*/endorsement regime. Four years before the Court narrowly adopted the endorsement test, Tribe opined on Justice O'Connor's advocacy for the test in her *Lynch* concurrence that the "Court dispensed at a stroke with what should have been its paramount concern: from *whose perspective* do we answer the question whether an official crèche effectively tells minority religious groups and non-believers that they are heretics, or at least not similarly worthy of public endorsement?" Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 611 (1985) (footnote omitted).

Professor Steven Gey echoes Professor Tribe's criticism of the test's subjectivity. "In contrast to Justice Brennan, whose *Schempp* standard focuses on the objective facts of government aid to religion, Justice O'Connor converts the analysis of Establishment Clause issues into a question of subjective perceptions." Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 477. "The obvious problem with any approach that measures constitutional compliance by the appearance

of compliance is that every individual perceives the world differently, depending on factors such as the individual's background, prejudices, sensitivity, and general personality." *Id.* at 478–49.

3. Decades of wrestling with the *Lemon*/endorsement test employed in *McCreary*, applied by the Fourth Circuit below, and briefed by all the parties to this Court in these consolidated cases, confirm that this test is irredeemable, and cannot be the basis of a principled jurisprudence governing the Establishment Clause. As Professor Choper explained:

> [L]ower courts, struggling to give it content, have succeeded only in producing ad hoc fact-laden decisions that are difficult to reconcile. Another unwise feature of the test, more serious because not curable, is its grounding of a constitutional violation on persons' reactions to their sense that the state is approving of religion. . . [S]ince its effect is to grant an inappropriately broad discretion to the judiciary, the endorsement approach proves unworkable. . . .

Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 510 (2002). This judicial and scholarly impeachment of *Lemon* and its endorsement revision necessarily encompasses the purpose prong.

4. *Lemon*'s purpose prong is unworkable because it is as subjective as *Lemon*'s other two prongs. Whenever government acts, its lawyers can probably articulate some sort of secular purpose as part of the government's motivation. But the fact that the

government action touches upon religion should likely mean that policymakers were also considering some sort of religious sentiment. How can a judge read the minds of policymakers to draw the line between the two?

Evidently recognizing that secular and religious purposes are likely both present in such circumstances, *McCreary* made *Lemon*'s purpose prong even more subjective, citing several *Lemon* decisions to hold specifically that the government must have a *primarily* secular purpose—that the secular purpose must predominate over any religious purpose. *McCreary*, 545 U.S. at 864 (collecting cases). The challenge this presents is insoluble. A court cannot examine the thoughts and feelings of public officials to determine which motivation was primary, and which was secondary.

The purpose prong of the beleaguered *Lemon* test is the sole basis for the Fourth Circuit's judgment below holding that the EO violates the Establishment Clause. Yet the statements by Justices, judges, and professors discussed above make clear that the *Lemon*/endorsement test is not a workable or desirable test. And in fact, this Court recently acknowledged as much in *Town of Greece*.

D. While the prior Administration urged the Court to decide *Town of Greece* on *Marsh* alone, the Court instead responded to Petitioner's and *amici*'s urging to opine on *Lemon*.

The Court did not need to weigh in on the *Lemon*/endorsement test in *Town of Greece*, which concerned legislative prayer. Respondents' initial complaint in the district court declared that the *Lemon*/endorsement test should control legislative prayer and this Court's sole examination of legislative prayer, *Marsh v. Chambers*, 463 U.S. 783 (1983), is an "exception" to general Establishment Clause rules and applies only in the most "narrow and strictly circumscribed" circumstances. Pls.' Mot. Summ. J. at 8, *Galloway v. Town of Greece*, 732 F. Supp. 2d 195 (W.D.N.Y. 2010) (No. 08-cv-6088). On appeal, Respondents continued to argue against *Marsh* and insisted that *Lemon*'s endorsement variation controlled, an argument the Second Circuit accepted. *See Galloway v. Town of Greece*, 681 F.3d 20, 30–31 (2d Cir. 2012) (No. 10-3635). But before this Court, Respondents retained new legal counsel who completely reversed course, arguing that *Marsh* is good law, was fully applicable in that case, and that this Court should invalidate the challenged prayer practice instead as coercive under *Lee v. Weisman* and Justice Kennedy's *Allegheny* dissent. *See* Resp't Br. at 20–54, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696). Justice Scalia responded to this abrupt about-face by extracting a stipulation from Respondents during oral argument that they agreed that *Marsh* controlled this case. *See* Transcript of Oral Argument at 36–37, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696). This Court

could then have decided *Town of Greece* in a short opinion invoking *Marsh*, and go no further.

The Solicitor General of the United States in the Obama Administration argued that this Court should do precisely that. The Solicitor General 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 for the United States as *Amicus Curiae* at 9–30, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696), and not venture further. When Justice Scalia similarly pressed the Principal Deputy Solicitor General with the same question of whether the coercion test controlled, the Obama Administration explicitly replied in the negative, urging the Court to decide the case on *Marsh* alone. *See* Transcript of Oral Argument, *supra*, at 24.

However, Petitioner Town of Greece argued that the Court should address the broader issue and jettison the endorsement test. The Petitioner argued first that *Marsh* controlled legislative prayer cases, and that the Court could decide the case by following *Marsh* exclusively. Petitioner's Brief at 16–27, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696). But instead of stopping there, Petitioner then devoted the bulk of its brief to lambasting the *Lemon*/endorsement test, arguing that the Court should abandon it. *See id.* at 27–50. Numerous *amici* followed suit, urging the Court to formally repudiate *Lemon*/endorsement, including almost two dozen sovereign States and almost 100 Members of Congress. *See* Brief for Indiana Supp. Pet'r, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696);

Brief for Members of Congress Supp. Pet'r, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696).

Ultimately, this Court in *Town of Greece* chose to "go big." The Court began by holding that the prayers in Greece were consistent with *Marsh*. *Town of Greece*, 134 S. Ct. at 1815, 1818. But the Court did not cabin its decision in the manner the Obama Administration urged, which could have left *Marsh* as a sui generis anomaly in Establishment Clause jurisprudence. To the contrary, *Town of Greece* proceeded to declare 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 further held that the historical inquiry that controlled legislative prayer must also be the touchstone of any Establishment Clause analysis. "*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 adopting this test, described *infra* in Part II, *Town of Greece* sharply criticized the endorsement test. 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. Between 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*.

This repudiation of the *Lemon*/endorsement test includes the standalone purpose-prong inquiry from *McCreary* relied upon by the Fourth Circuit here. Pet. App. 29–30a, 47–48a, 51–54a. Justice Kennedy joined most of Justice Scalia's dissent in *McCreary*, along with all the Justices still serving on the Court who had joined Justice Kennedy in his *Allegheny* dissent. That part of the *McCreary* dissent incorporated 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*, 788 F.3d at 596–605 (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.

II. EXECUTIVE ORDER 13780 SATISFIES THE ESTABLISHMENT CLAUSE TEST SET FORTH IN *TOWN OF GREECE*.

This Court set forth 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, *id.* at 1819–24, or (2), even if historically accepted, the practice coerces any person to participate in a religion or religious exercise, *id.* at 1824–28 (opinion of Kennedy, J.).[7] This test is now the current doctrine governing the Establishment Clause for any case where there is not a Supreme Court case still directly on point that dictates a different outcome in the lower courts.[8]

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[7] 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 define that concept as "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 in the lower courts. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

[8] There is also a tie between the historical-inquiry step and the coercion step, in that this Court has reasoned that

A. Executive Order 13780 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.'" *Id.* 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, showcasing one of many examples of this principle. 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.* In the context of that case, 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. Respondents here have not made any argument or introduced any evidence that would suggest that

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

Executive Order 13780 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 any historical source showing that a positive law that is facially neutral on religion, but that affects adherents of one faith more than adherents of another faith, was an official religious establishment during the Framing. Not only is Executive Order 13780 constitutional under this standard, but the now-revoked Executive Order 13769 was legally permissible, as well.

None of the material the courts below regarded as betraying an impermissible religious purpose under *McCreary* is impermissible under the historical standard from *Town of Greece*. Executive Order 13780 satisfies the first step of *Town of Greece*.

B. Executive Order 13780 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, *Town of Greece* also cautioned 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.'" *Id.* at 1825 (plurality opinion of Kennedy, J.) (quoting *Allegheny*, 492 U.S. at 659 (Kennedy, J.)). For example, when reviewing legislative prayer, these Justices permitted 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 a historical examination as the centerpiece of the entire analysis.

Justice Kennedy added that he thought other factors might suggest coercion, and the examples he gives for legislative prayers are useful here insofar as analogous facts are completely lacking in the instant case, such as "if [municipal] board members directed the public to participate in the prayers." *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.* A majority of 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 13780 coerces no one. Neither did Executive Order 13769, for that matter. The EO 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, or ceremony, or observance. Executive Order 13780 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 EO of March 6, 2017, is thus consistent with every aspect of *Town of Greece*. Given that the President's measure also comports with the historical-inquiry step, Executive Order 13780 is therefore consistent with the Establishment Clause.

III. THE EXECUTIVE ORDER LIKEWISE SATISFIES THE ESTABLISHMENT CLAUSE UNDER ANY TEST THE COURT COULD APPLY.

A. *Agostini* requires inferior courts to follow errant precedents that are directly on point until this Court overrules them.

Mere weeks after the Court decided *Town of Greece*, the Court declined review in another Establishment Clause case, regarding which Justice Scalia and Justice Thomas wrote, "*Town of Greece* abandoned the antiquated 'endorsement test,' which formed the basis of the decision below." *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (dissenting from the denial of certiorari).

Nonetheless, the *Lemon* test or its endorsement test revision still applies in the lower courts in some Establishment Clause contexts. "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.[9] If this were a case involving a Ten Commandments display where the public leaders responsible for the display gave the sorts of speeches that were given in Kentucky more than a decade ago, then *McCreary* would control.[10] If this case involved a nativity display in a government building, *Allegheny* would control. Although the Court's approach in those cases cannot be reconciled with *Town of Greece*, the Court has not unequivocally overruled any of those prior cases. Lower courts are bound to follow those previous cases, even while this Court enjoys the option with each such case either to revisit those specific factual settings, or more broadly to formally repudiate the rule.

But *IRAP* and *Hawaii* together present a question of first impression. 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. That would be true even if this case still resided in an inferior court. There is *a fortiori* no

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

[10] 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.

impediment to following *Town of Greece* here in the Supreme Court. This Court can and should adopt a test that looks to history, which will swiftly lead to the inescapable result that the EO is permissible under the Establishment Clause.

B. The Executive Order is also permissible under *Larson*.

Finally, arguments in the courts below that the EO violates the Establishment Clause under *Larson v. Valente*, 456 U.S. 228 (1982), are mistaken. *Larson* is inapposite. It is true that *Larson* holds that "one religious denomination cannot be officially preferred over another." *Id.* at 244. However, *Larson* then described what this Court meant by "official preference." *Larson*'s bar applies only when the positive law at issue makes "explicit and deliberate distinctions" between religious faiths. *Id.* at 246 n.23. Executive Order 13780 does precisely the *opposite*: It is explicitly religion-*neutral*. The EO references its predecessor, Executive Order 13769, only to declare that the President's initial order "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 13780 § 1(b)(iv) (emphasis added). After the express disclaimer regarding the preceding order in Section 1, the new Executive Order is silent on religious faith.

Larson poses no difficulty for the EO. 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. *Mandel*, 408 U.S. at 770. The *IRAP* district court acknowledged that *Mandel*'s facial standard is satisfied here. *See* Pet. App. 254a.

All the statements cited by the courts below as the basis for holding that the EO discriminates on the basis of religion were extrinsic evidence consisting of statements by Donald Trump—some made as President, but many as a private citizen—plus statements by presidential aides. *See, e.g.*, *id.* at 10a–13a, 50a–51a.

These statements do not constitute evidence of an Establishment Clause violation, and holding such utterances henceforth to be admissible would have a profound chilling effect on the democratic process. Campaigns are messy, and candidates frequently say things during heated contests or at the end of a difficult day that do not find their way into formal policy decisions when the campaign is over and the candidate now carries the solemn obligation of governing. The Republic is best served by candidates whose words are judged solely by the electorate as manifested by Election Day returns at the ballot box. The unelected members of the judiciary must not sit as political censors, parsing campaign statements by private citizens seeking public office as evidence to be cited later as grounds for invalidating official actions.

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In conclusion, for all the reasons the Solicitor General sets forth in the President's opening brief, Executive Order 13780 would pass constitutional muster even if analyzed under *McCreary*'s application of *Lemon*'s purpose prong and the endorsement test. U.S. Brief at 70–78. But in reality this is a much easier case, because the controlling precedent here is *Town of Greece*. Under *Town of Greece*, there cannot be any doubt that President Trump's Executive Order is consistent with the Establishment Clause.

CONCLUSION

The judgments of the United States Courts of Appeals for the Fourth Circuit and Ninth Circuit should accordingly be reversed.

Respectfully submitted,

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