

No. 17-3581

**United States Court of Appeals
for the Third Circuit**



FREEDOM FROM RELIGION FOUNDATION, INC., STEPHEN MEHOLIC,
DAVID SIMPSON, JOHN BERRY, AND CANDACE WINKLER,

Plaintiffs-Appellees,

v.

THE COUNTY OF LEHIGH,

Defendant-Appellant.

*Appeal of the United States District Court for the Eastern District of Pennsylvania
Memorandum Opinion and Order of Court Dated September 28, 2017 at
Docket No.: 5:16-cv-04504 (Hon. Edward G. Smith)*

Supplemental Brief of Appellees

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INTRODUCTION

More than any particular Establishment Clause analysis, the unique factual record in this case dictates that the Lehigh County seal is unconstitutional. The Latin cross-adorned seal at issue is *the symbol of government*, intimately and unmistakably linking the County with Christianity. The record reveals that the Commissioner-designer of the seal included the centrally-located cross for this very reason. It further shows that the cross's Christian meaning has not changed over time; the seal's continued use still sends the message that Lehigh County is a Christian county. The County's intent and success in sending this message of Christian endorsement are unconstitutional under the principles of purpose and endorsement embodied in this Court's *Lemon*-endorsement framework.

American Legion v. American Humanist Association does not change this result. Like *Van Orden v. Perry* before it, *American Legion* merely provides that in religious display cases featuring uniquely secular histories and contexts, an exercise of legal judgment is more useful than *Lemon*'s framework. But the facts here do not identify a unique history. As *McCreary County v. ACLU of Kentucky* and the other circuit court cases considering seal challenges demonstrate, considerations of purpose and endorsement govern cases like this one.

What *American Legion* does show is just how much history and context is necessary to secularize a Latin cross. In *American Legion*, it took a world war and

decades of literature, poetry, and commemoration featuring the cross in honor of World War I veterans to secularize a war memorial. Only with this extensive history, borne out by a robust record featuring expert reports discussing the cross's use as a World War I symbol, did the Court eschew *Lemon* and uphold the display.

In contrast, on the thin but damning record in this case, the Court must find the cross's inclusion on the seal unconstitutional. Given the County's expressly Christian purpose in adopting the seal, its reliance upon this original purpose in electing to maintain the seal, and its inability to provide evidence demonstrating that this particular Latin cross has been imbued with an alternative, secular meaning, the seal cannot pass muster under the Establishment Clause. On this record, no presumption of constitutionality is due, and any presumption afforded is overcome. The Court should find this particular seal unconstitutional and deny any attempt by the County to remand the case to augment the record.

I. *American Legion's* impact on this case is limited because of the significant factual differences between the two cases.

In *American Legion*, the Court found the Bladensburg community erected the Latin cross war memorial to honor local soldiers killed in the First World War. *Am. Legion v. Am. Humanist Ass'n*, No. 17-1717, slip op. at 6. This purpose was spelled out by the inclusion of a bronze plaque identifying the 49 local soldiers to whom the monument was dedicated and by the inclusion of the words "Valor," "Endurance," "Courage," and "Devotion" on the memorial's base. *Id.* at 6-7. The

Court found this design “unsurprising” because the cross was “so widely associated with” the war.¹ *Id.* at 6.

This historical link between the war and the memorial was critical in the Court’s Establishment Clause analysis. When used in World War I memorials erected while the nation was mourning, the Court found the cross to be a “symbol of the[] sacrifice” of American soldiers killed in the war. *Id.* at 28. For the Bladensburg Cross, the Court found that, “[a]s long as [the memorial was] retained in its original place and form” it would also speak of the community that erected and maintained the monument. *Id.* Importantly, the Court noted that while the memorial’s Latin cross may have conveyed a symbolic reference to faith, that faith was associated with the fallen soldiers, not the government. *Id.* at 23, 30.

Here, the history and context of the prominent Latin cross at the center of the Lehigh County seal stands in stark contrast to that of the roadside memorial in *American Legion*: this seal’s meaning and purpose for inclusion are not secular. According to County Commissioner Hertzog, who designed the seal, the cross signifies “Christianity and the God-fearing people which are the foundation and backbone of [Lehigh] County.” App. 99. Under threat of litigation, the present-day

¹ The plurality decision examined the “close link” between the “plain Latin cross” and World War I in Parts I.A., I.B., II.C., and III. In doing so, the Court discussed historical examples of the use of the Latin cross to honor World War I veterans and reference to the cross in culture and literature.

Commissioners voted to keep the Latin cross based upon their claimed conclusion that the cross is secular because it “honors the original settlers of Lehigh County who were Christian.” App. 310. But the County has never produced evidence supporting this historical claim. Instead, when challenged by the Plaintiffs, the County conceded its claim was based solely upon Commissioner Hertzog’s comments, which explicitly indicate an improper purpose of Christian endorsement. App. 78, 266-267.

Two other factual differences distinguish this case from *American Legion*. First, unlike the roadside war memorial, the Lehigh County seal has not been retained in its original place and form. The seal has been and continues to be placed throughout the County. Second, the religious message of the seal’s cross links directly to the government itself because the seal is *the government’s chosen symbol*. There is no non-governmental third party to whom the seal’s Christian endorsement can be attributed. *Cf. County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring and dissenting) (“erection of a large Latin cross on the roof of city hall . . . would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion”) (citing *Friedman v. Board of County Comm’rs of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985) (en banc)). The County announces its deliberate affiliation with the symbol at

commissioner meetings by displaying its seal on each of the several television monitors facing the citizens in attendance. App. 155.

These stark differences are important because the specific facts in a given case play an important role in determining which Establishment Clause framework applies. Because the record in this case includes evidence that the County acted with an improper religious purpose in adopting and maintaining its seal and because the County failed to provide historical and contextual evidence suggesting that its Latin cross has unique and secular importance to Lehigh County, the principles embodied in *McCreary* and this Court's *Lemon*-endorsement framework are better suited for these facts than the *American Legion* analysis.

II. *American Legion* does not create a new legal framework for considering this case.

Although *American Legion* was decided without application of *Lemon*, the fractured decision did not discard *Lemon* or the longstanding Establishment Clause principles that underlie it. Justice Alito criticized *Lemon* most directly in his plurality opinion at Parts II.A. and II.D., in which he was joined by only three other justices.² *Am. Legion*, slip op. at 12-16, 24-25. Thus, the criticism of *Lemon*

² Justice Kagan, who joined in the remainder of Justice Alito's opinion, specifically declined to join on these two sections and noted in her concurrence that *Lemon*'s "focus on purposes and effects is crucial in evaluating government action" in the Establishment Clause sphere. *Am. Legion*, slip op. 1-2 (Kagan, J., concurring).

in *American Legion* is like the criticism in *Van Orden*³, which did not stop the Court from applying *Lemon* in *McCreary* the very same day.

McCreary relied upon *Lemon* because the record pointed towards a religious purpose for the display. *McCreary*, 545 U.S. at 862 (“scrutinizing purpose does make practical sense . . . where an understanding of official objective emerges from readily discoverable fact”). With a record reflecting an original religious purpose, the Court found that deviation from *Lemon*’s purpose inquiry would have the effect of *ignoring* history. *Id.* at 863-64. To avoid this result, *McCreary* rejected the government’s push to abandon or minimize the purpose inquiry, holding the inquiry is not satisfied where a claim to secular purpose is trivial or unworthy of belief. *Id.* at 865, 865 n.13.

With markedly different facts, *Van Orden* and *American Legion* took a different tack. The monument displays in both cases featured unique contexts and histories that pointed towards an original secular purpose and allowed some to interpret the religious symbols as having a secular meaning. *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring); *Am. Legion*, slip op. 28-29. Those particular facts are what led the Court’s controlling opinions away from *Lemon*.

³ Justice Breyer’s controlling plurality opinion did not apply *Lemon*; however, Justice Breyer noted that *Lemon* provided “useful guideposts,” *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring), whereas Justice Rehnquist’s opinion, in which Justices Scalia Kennedy, and Thomas joined was more critical of the test. 545 U.S. at 686.

Where similarly unique facts have existed in the context of seal challenges, courts applying *Lemon* have reached results that do not offend *American Legion* and *Van Orden*. In the presence of historical facts exemplifying a secular connection between the Latin cross and a particular community, courts have upheld cross-adorned seals. *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1035 (10th Cir. 2008); *Murray v. City of Austin*, 947 F.2d 147, 155 (5th Cir. 1991). But where actual secular history was lacking and perfunctory appeals to history were made instead, seals featuring the Latin cross have been struck down. *Harris v. City of Zion*, 927 F.2d 1401, 1413-14 (7th Cir. 1991); *Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995). These outcomes track the differences in more recent Supreme Court Establishment Clause cases, even though they were decided before *American Legion* and under *Lemon*.

The consistency in these outcomes despite the varied approaches used by courts comes from consistent reliance upon core Establishment Clause principles. Before and after *Lemon*, the Supreme Court has observed that the touchstone for Establishment Clause analysis is that the “First Amendment mandates neutrality between religion and religion, and between religion and nonreligion. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *McCreary*, 545 U.S. at 860. As this Court has held, the clause “prohibits the government from ‘promot[ing] or affiliat[ing] itself with any religious doctrine or organization.’” *Doe v. Indian River Sch. Dist.*, 653

F.3d 256, 269 (3d Cir. 2011) (internal citations omitted). Regardless of the chosen analytical framework, applying these guiding principles to the unique facts of this case yields another consistent result: the seal is unconstitutional.

III. Even if this Court concludes *American Legion* provides a legal framework for considering this case, the Lehigh County seal is unconstitutional.

Even if the Court determines that *American Legion* can be applied to the facts of this case in a manner that does not stray from core Establishment Clause principles, the factual differences between this case and *American Legion* compel a different fate for the Lehigh County seal. The overtly religious purpose for the inclusion of the Latin cross and the lack of evidence to support a secular meaning of the cross strip away *American Legion*'s rationale for a presumption of constitutionality for some longstanding displays. Moreover, the Court's application of a presumption in the first place—designed for situations involving “the use, *for ceremonial, celebratory, or commemorative purposes*, of words or symbols with religious associations”—is inappropriate here because the singular symbol of Christianity was included in the seal specifically to signify Christianity. *Am. Legion*, slip op. at 15.

In addition, the facts of this case do not implicate the four considerations undergirding *American Legion*'s presumption of constitutionality. First, this Court should find no difficulty in identifying the original purpose for the inclusion of the

Latin cross on the seal; Commissioner Hertzog's comments answer that question. Second and third, this record contains no evidence to suggest that the purpose or intended meaning of the Latin cross in the seal has multiplied or changed over time. Instead, the self-serving testimony of the County reflects a desperate attempt to make up such a claim, despite contradictory evidence. Fourth, removal of an actively-used seal, compared with that of a static monument, is far less likely to be perceived as hostile towards a religion or a community's history. The County's decades-long representation of itself as a Christian community is more hostile than any order requiring removal of the cross could be.

Even if the Lehigh County seal is afforded a presumption of constitutionality despite these differences, the unique history and context of *this* seal overcomes any presumption. Unlike the Bladensburg Cross, which carries special significance due to its connection with World War I, this seal does not enshrine any secular reference or meaning. It was designed to and successfully does honor Christianity by using the symbol of Christianity in a community where that symbol has no other unique meaning. The County was unable to supply evidence supporting its self-serving position that the seal honors Christian settlers.⁴ If these facts do not defeat a presumption of constitutionality, presumption will become per se rule.

⁴ Moreover, the County has never taken the position that it kept the seal because it has become an important or familiar part of the community. The County produced no evidence to support such an argument, and instead of

IV. The Court should decide this case without remand.

The County will likely argue that *American Legion* requires the Court to remand this case for further discovery based upon the differences in the depth of the record in the two cases. But the record here is sufficiently developed. Establishment Clause jurisprudence has long held that the history and context of a display is important and that the sort of evidence the County was unable to develop in this case can significantly impact a court's Establishment Clause analysis. The well-settled importance of context guided the parties' discovery and led Plaintiffs to discover that Commissioner Hertzog's statement of religious purpose was the County's only support for its modern "reinterpretation" of the cross's meaning. There is no additional evidence the County can offer to alter this analysis.

Thus, remand is inappropriate. This Court may resolve purely legal questions where the factual record is developed. *Chavez-Alvarez v. Attorney Gen. United States*, 850 F.3d 583, 587 n. 2 (3d Cir. 2017). Moreover, the court has full discretion to resolve issues on appeal that have not been first addressed by a district court. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The answers to the legal questions the Court must consider in this case remain unchanged: the Lehigh County seal violates the Establishment Clause.

acting quickly to retain something familiar, the County looked into the meaning of the cross and came up with its reinterpretation of Commissioner Hertzog's statement.

Respectfully submitted,

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COMPLIANCE CERTIFICATIONS

I, Marcus B. Schneider, hereby certify that the following statements are true and accurate:

- 1. My name appears on the brief for Appellants, and I am a member of the bar of the United States Court of Appeals for the Third Circuit.**
- 2. Appellants' brief complies with the applicable Court Order requesting supplemental briefing not to exceed 10 pages.**
- 3. Appellees' Supplemental Brief was filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system on July 3, 2019. Opposing Counsel in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.**
- 4. The text of the electronic version of Appellants' brief is identical to the text of the paper copies of the same.**
- 5. The virus detection program Windows Defender has been run against the final PDF version of Appellees' brief prior to filing, and no virus was detected.**

The have hereby been served upon counsel of record via the appellate CM/ECF system.

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