No. 17-3581

United States Court of Appeals for the Third Circuit

FREEDOM FROM RELIGION FOUNDATION, ET AL.,

Plaintiffs-Appellees,

V.

THE COUNTY OF LEHIGH,

Defendant-Appellant.

On Appeal from the U.S District Court for the
Eastern District of Pennsylvania,
No. 5:16-cv-04504 (Hon. Edward G. Smith)

Reply Brief of Defendant-Appellant Lehigh County

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INTRODUCTION

Under the First Amendment, the touchstone of an establishment of religion is religious coercion. This is not that. This is a passive image of a cross on a county seal surrounded by a dozen other purely secular images, all reflecting significant aspects of Lehigh County's culture and history. Although the cross has stood in this collection of symbols as a reminder of the County's early settlers for more than 70 years, no one has ever been pressured, coerced, or discriminated against as a result. Indeed, there is hardly evidence that anyone even noticed the cross until just prior to the filing of this lawsuit. And there is no evidence that anyone has been injured by it. Freedom From Religion Foundation and its plaintiff members (FFRF) thus lack standing to pursue their claims. Moreover, under the Supreme Court's controlling cases, the cross's presence on Lehigh County's seal poses absolutely no risk of imposing an establishment of religion. Even if the Court reaches the merits, it should thus reverse and confirm that religion is an authentic aspect of our history and culture, and that acknowledging it is a far cry from establishing a state religion.

ARGUMENT

I. FFRF and its members lack standing.

"[T]he psychological consequence … produced" by FFRF's "observation of conduct with which [it] disagrees" simply "is not injury sufficient to confer standing." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*,

454 U.S. 464, 485 (1982).[1] Rather, for a "stigmatizing injury" like that alleged here, a plaintiff must be "personally denied equal treatment." *Allen v. Wright*, 468 U.S. 737, 755 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). FFRF claims that *FFRF v. New Kensington Arnold School District*, 832 F.3d 469, 479 (3d Cir. 2016), "recently adopted" a new standing test for plaintiffs who come into "direct, unwelcome contact" with a supposed Establishment Clause violation. Resp. 52. But regardless of how a supposed violation is "observ[ed]," the stigmatizing impact is the same. *Valley Forge*, 454 U.S. at 485. Because *New Kensington* thus conflicts with *Valley Forge* and *Allen*, it is "ineffective as precedent[]." *Pardini v. Allegheny Intermediate Unit*, 524 F.3d 419, 426 (3d Cir. 2008) (citation omitted).

Moreover, in *Town of Greece v. Galloway*, the Supreme Court confirmed that, in cases like this, proving an Establishment Clause violation requires some showing of coercion; experiencing a "sense of affront" is insufficient. 134 S. Ct. 1811, 1826 (2014). FFRF is correct that this decision was on the merits, not standing. Resp. 53. But for standing, a plaintiff still must allege an injury that could "plausibly" establish the cause of action asserted. *Schuchardt v. President of the United States*, 839 F.3d

[1] Standing is jurisdictional and may be raised at any time. *Am. Auto. Ins. Co. v. Murray*, 658 F.3d 311, 319 n.5 (3d Cir. 2011).

336, 344 (3d Cir. 2016). By only claiming a dignitary offense, FFRF has claimed the wrong kind of injury and thus cannot establish standing.

II. Lehigh County's seal complies with the Establishment Clause.

A. This Court must follow *Town of Greece*.

Lemon v. Kurtzman was decided in 1971. 403 U.S. 602 (1971). Yet FFRF insists this Court should end its analysis there, asking it to ignore the Supreme Court's more recent Establishment Clause rulings in *Town of Greece*, 134 S. Ct. 1811, and *Van Orden v. Perry*, 545 U.S. 677 (2005). But common sense and the Court's own standards compel it to "apply the law … as [found] on the date of [its] decision," not as it existed nearly 50 years ago. *United States v. Tann*, 577 F.3d 533, 541 (3d Cir. 2009). Thus, rather than "overlook[] the significant evolution of Supreme Court jurisprudence" since *Lemon*, this Court must fully consider all the "intervening Supreme Court precedent." *Karns v. Shanahan*, 879 F.3d 504, 514 (3d Cir. 2018).

FFRF's devotion to *Lemon* is odd in any instance, because long before *Town of Greece* or *Van Orden*, the Supreme Court already construed *Lemon* to avoid the iconoclastic approach FFRF pushes. For example, in *Lynch v. Donnelly*, the first plenary application of *Lemon* in a religious display case, the Supreme Court gave *Lemon* only cursory treatment, emphasizing its "unwillingness to be confined to any single test or criterion in this sensitive area." 465 U.S. 668, 679 (1984). Instead, the

Court focused on "what history reveals was the contemporaneous understanding of [the Establishment Clause's] guarantees." *Id*. at 673.

Under that standard, the *Lynch* Court upheld a city-owned Christmas display and crèche as consistent with our nation's tradition of "respect[ing] the religious nature of our people." *Id*. at 678 (citations omitted). For comparison, the Court identified a long list of other ways the government has appropriately accommodated religion without violating the Establishment Clause, including by:

- providing "paid chaplains for the House and Senate," *id*. at 674;
- lending official support to Thanksgiving and Christmas as "religious holiday[s]," *id*. at 675-76;
- memorializing our religious heritage in the "national motto," on "our currency," and in "the Pledge of Allegiance," *id*. at 676;
- subsidizing the preservation and display of hundreds of "religious paintings," even though "predominantly inspired by one religious faith," *id*. at 676-77;
- adorning government buildings with "symbol[s] of religion," *id*. at 677;
- providing chapels in government facilities "for religious worship and meditation," *id*.;
- proclaiming "a National Day of Prayer each year," *id*.; and
- commemorating "Jewish Heritage Week and the Jewish High Holy Days," *id*. (citations omitted).

Because the Court was "unable to discern a greater aid to religion" from the crèche than from these "benefits and endorsements previously [up]held," it found no Establishment Clause violation. *Id*. at 683.

It was only in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), that the Court strayed from this approach. In *Lynch*, Justice O'Connor had concurred to propose an alternative approach that asked "whether a government activity communicates endorsement of religion"—a largely "legal question to be answered on the basis of judicial interpretation of social facts." *Id*. at 693-94. In *Allegheny*, the majority fully embraced this "endorsement" test, 492 U.S. at 593-94, expressly disavowing the historical analysis of what the Establishment Clause sought to prevent, *id*. at 603-04, and instead adopting the perspective of a "reasonable observer," *id*. at 620.

The dissent, in contrast, insisted that the Establishment Clause is best "determined by reference to historical practices and understandings," allowing "not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *Id*. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part).[2] It emphasized that "coercion" was the touchstone of the type of establishment the Founders sought to avert. *Id*. at 659. Notably, the majority view in *Allegheny* was abrogated in *Town of Greece*. Thus, these principles from the *Allegheny* dissent are now governing law, having expressly been adopted by the majority in *Town of Greece*. 134 S. Ct. at 1819, 1825, 1827.

[2] For convenience throughout this brief, the four-member opinion in *Allegheny* authored by Justice Kennedy shall hereafter be identified as the "dissent."

This understanding of how the Establishment Clause analysis developed exposes the multiple flaws in FFRF's reasoning. It is irrelevant whether *Town of Greece* provides "the sort of language that would be needed to overrule *Lemon*." Resp. 34-35. At minimum, *Town of Greece* directly abandons any *Allegheny*-inspired application of *Lemon*, in favor of the foundational *Lynch*-driven historical analysis. From that perspective, *Lemon* is dead, and that is enough for this Court to reverse the district court. Br. 46-49.

Also, it is false that *Town of Greece* and *Marsh v. Chambers*, which applied historical analysis to uphold chaplain-led prayers, 463 U.S. 783 (1983), have no effect "outside the legislative prayer context." Resp. 40-41. *Marsh* itself was a leading authority relied upon by the Court in *Lynch*, 465 U.S. at 674, 679, 682, 686, and by the dissent in *Allegheny*, 492 U.S. at 662, 665 n.4, 667, 669, 670—cases involving religious displays, not prayer. Likewise, in *Van Orden*, the Supreme Court cited *Marsh* to uphold a display of the Ten Commandments. 545 U.S. at 687-88. Indeed, courts have relied extensively on *Marsh* to uphold government acknowledgements of religion outside the context of legislative prayer.[3]

[3] *Newdow v. Roberts*, 603 F.3d 1002, 1017 (D.C. Cir. 2010) (applying *Marsh* to uphold "so help me God" in the presidential pledge); *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 299-300 (6th Cir. 2001) (state motto "[w]ith God, all things are possible"); *Murray v. City of Austin*, 947 F.2d 147, 155 (5th Cir. 1991) (city seal with a cross); *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985) (military chaplaincy); *Weinbaum v. City of Las Cruces*, 465 F. Supp. 2d 1164,

The cases cited by FFRF are not to the contrary. *See* Resp. 42. *Smith v. Jefferson County Board of School Commissioners*, for example, acknowledged that courts must "interpret[] the contours of the [Establishment] Clause as embracing … historical practice," but simply found history to be of "limited utility" on the specific facts of that case. 788 F.3d 580, 588 (6th Cir. 2015). And *Lund v. Rowan County* was itself a legislative-prayer case, giving the court no opportunity to consider *Town of Greece* outside that context. 863 F.3d 268, 275 (4th Cir. 2017), *petition for cert. filed* (U.S. Oct. 16, 2017) (No. 17-565). Neither does this Court's unpublished opinion in *Tearpock-Martini v. Borough* speak to the matter at all—it is entirely silent on the issue. 674 F. App'x 138, 140-42 (3d Cir. 2017).

More importantly, *Town of Greece* itself explicitly rebukes efforts to define *Marsh* as "'carving out an exception' to the Court's Establishment Clause jurisprudence." 134 S. Ct. at 1818 (citation omitted). "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id*. at 1819. Rather, it teaches that "*the Establishment Clause* must be interpreted 'by reference to historical practices and understandings.'" *Id.*

1180 (D.N.M. 2006), *aff'd*, 541 F.3d 1017 (10th Cir. 2008) (city seal with three crosses).

(citation omitted; emphasis added). Thus, "[a]ny test" the Court applies in Establishment Clause cases "must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id*.[4]

FFRF's concern that, under *Town of Greece*, "municipalities nationwide [will] adopt seals with religious symbols today, just as they can adopt legislative prayer policies" is unwarranted. Resp. 43. *Town of Greece* is not without limits and precludes any efforts that "over time denigrate, proselytize, or betray an impermissible government purpose." 134 S. Ct. at 1824; *Allegheny*, 492 U.S. at 661 n.1 (dissent) (protecting against "direct or indirect coercion," including "obvious effort[s] to proselytize"). And "recently erected displays" may face greater scrutiny. *Freethought Soc'y of Greater Phila. v. Chester Cty.*, 334 F.3d 247, 265 (3d Cir. 2003).

FFRF also worries that a historically sound Establishment Clause jurisprudence would require "reeducation of our nation's jurists," to help them "become historians," who—even then—would face "unanswerable historical questions." Resp. 31.

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[4] The County's earlier "lack of reliance upon *Town of Greece*" cannot "justif[y]" ignoring it now. *See* Resp. 40 n.5. A court always "retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). *Town of Greece* is the Supreme Court's most recent and controlling Establishment Clause case, and lower courts are always "entitled to apply the right body of law, whether the parties name it or not." *PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 803 n.3 (D.C. Cir. 2004) (Roberts, J., concurring) (cleaned up). *Webb v. City of Philadelphia* is not contrary. There the Court found a constitutional claim unavailable on appeal, because the plaintiff had only raised statutory claims in the trial court. 562 F.3d 256, 259 (3d Cir. 2009).

But FFRF need not fret. Historical analysis *from the beginning* has played a significant role in the Supreme Court's Establishment Clause cases. In *Everson v. Board of Education of Ewing Township*, the Court's first Establishment Clause case, both the majority and dissent looked primarily to history. The majority said the Clause must be interpreted "in the light of its history," 330 U.S. 1, 14 (1947), and the dissent agreed that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment." *Id.* at 33 (Rutledge, J., dissenting). This historical approach controlled the first 24 years of the Supreme Court's Establishment Clause jurisprudence, as the Court repeatedly based its decisions on the history of the practices in dispute. *See, e.g.*, *McGowan v. Maryland*, 366 U.S. 420, 437 (1961) (weighing "what historical position Sunday Closing Laws have occupied with reference to the First Amendment"); *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970) (upholding church tax exemptions because they were supported by "more than a century of our history and uninterrupted practice"). It was only in *Lemon v. Kurtzman* that the Court diverged from this approach, leading to the current morass of Establishment Clause confusion. *Town of Greece* simply returns Establishment Clause jurisprudence to its roots.

A historical approach to the Establishment Clause also aligns with the way other constitutional provisions are interpreted. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (looking to "historical background" of the Sixth Amendment's

Confrontation Clause "to understand its meaning"); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (construing Fourth Amendment "in the light of what was deemed an unreasonable search … when it was adopted"); *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (relying on "historical background" to define scope of Second Amendment). The role of historian is thus not unfamiliar to our nation's jurists.

Nor does a historical analysis lack "framework to guide" the courts." Resp. 31. By its very nature, history provides concrete examples to reveal guiding principles that can then be applied to modern concerns. Contrast this with the endlessly split personalities of the "reasonable observer," who—47 years after *Lemon*—is still evolving. *See, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995) (questioning whether the reasonable observer is "*any* beholder," or "the *average* beholder," or an "'ultra-reasonable' beholder"); *see also Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari) (documenting the plethora of splintered outcomes under *Lemon* within and among the circuit courts).

In short, FFRF has provided no legitimate reason why *Town of Greece* should not apply to the facts of this case.

B. Under *Town of Greece*, the County's seal does not establish a religion.

Assuming that *Town of Greece* applies, FFRF argues it nonetheless does not support the County's position, because "there is no centuries-old tradition of Christian

symbols being used in a seal or symbol of the United States." Resp. 43. But that argument fails to take account of the historical evidence, including the national seals proposed by Benjamin Franklin (depicting Moses at the Red Sea) and consummate separationist Thomas Jefferson (depicting the children of Israel to invoke Americans' self-image as "a chosen people"). Br. 4; *see also* Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U. L. Rev. 146, 166 & 166 n.85 (1986). Nor does FFRF account for the national seal ultimately adopted—and still used today—with its eye of "Providence" and Latin motto translating as "He (God) has favored our undertakings." Br. 5. And while states and towns at the founding were not subject to the Establishment Clause, an intense debate nevertheless raged throughout the new country, leading to state-level disestablishments in all states by 1833. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2126 (2003). Yet FFRF cites no evidence that even the most ardent separationists expressed any concern about the many religious symbols in state and local seals and flags. *See* Br. 6-24.

Instead, FFRF asks this Court to disregard the dozens of seals and flags throughout the country that incorporate religious elements, as well as the impact of religion on the history of Lehigh County. Resp. 44-51. But much of this information constitutes "legislative fact" to which this Court has "unrestricted" access. Fed. R. Evid.

201 (1972 advisory committee's note). Also, this Court routinely takes judicial notice of facts "not subject to reasonable dispute." Fed. R. Evid. 201(b), (d). And the information in the County's brief—much of which derives from official government websites, prominent encyclopedias, and widely circulated newspapers—plainly qualifies. *See, e.g.*, *Vanderklok v. United States*, 868 F.3d 189, 205 n.16 (3d Cir. 2017) (judicial notice of information on government websites"); *United States v. Pozsgai*, 999 F.2d 719, 731 (3d Cir. 1993) (scholarly history books); *Peters v. Delaware River Port Auth.*, 16 F.3d 1346, 1359 (3d Cir. 1994) (newspaper accounts).

Further, in religious-display cases it is "common practice for courts to … look outside the record to understand the nature and significance of a particular symbol within a religious tradition, to consider historical materials, and even to take some sort of judicial notice of the social context in which the display exists." B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 Brook. L. Rev. 1407, 1449 (2014) (collecting cases); *see also Marsh*, 463 U.S. at 788-89 (relying on amicus brief for historical evidence that legislative prayer "has … been followed consistently in most of the states"). Indeed, in *Weinbaum*, the Tenth Circuit looked to an online encyclopedia for precisely the same type of information that the County has presented here—the contents of the "seals and flags" of other "American towns, cities, and counties." *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1033 n.18 (10th Cir. 2008) (citing Wikipedia).

But even without the founding-era evidence regarding seals and flags, FFRF's argument must fail. While the Establishment Clause analysis "*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), proof that the specific practice at issue was engaged in at the founding is not a prerequisite. Rather, under *Town of Greece* and its antecedents, the Establishment Clause permits not just "practices two centuries old but *also* any other practices with *no greater potential* for an establishment of religion." *Allegheny*, 492 U.S. at 670 (dissent) (emphasis added); *see also Lynch*, 465 U.S. at 682 (question is whether the practice at issue results in "greater aid to religion" than long-accepted historic practices). Thus, in *Van Orden*, the Court upheld a Ten Commandments display based on historic acknowledgments of religion in the Mayflower Compact, in Thanksgiving proclamations, and in quotes inscribed on federal monuments. 545 U.S. at 685-89 & n.9; *see also id.* at 699 (Breyer, J., concurring). And in *Town of Greece*, the Court upheld a *city council*'s prayer practice based primarily on the practices of *Congress* and the *states*. 134 S. Ct. at 1819. Here, using religious symbols on flags and seals to memorialize matters of historical significance poses no more risk of an establishment than the government actions condoned in *Lynch*, *Van Orden*, and even the *Town of Greece* dissent. 134 S. Ct. at 1845, 1853 (Kagan, J., dissenting) (describing "long history" of legislative prayer which "coexis[ts] with the principles

disestablishment and religious freedom" and stating that references to the divine in "the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court'" also "fit[] the bill"). An Establishment Clause that would accommodate "state-sponsored prayer" at a county meeting cannot reasonably be construed to prohibit a passive reference to religion's role in that same county's history. *Allegheny*, 492 U.S. at 665 & n.4 (dissent); *see also Murray*, 947 F.2d at 155 ("Any notion that [a city seal featuring a Latin cross] poses a real danger of establishment of a state church is far-fetched indeed.") (quoting *Lynch*, 465 U.S. at 686).

C. *Van Orden* confirms that Lehigh County's seal is constitutionally permissible.

Under *Van Orden*, the County's actions are plainly constitutional: like the *Van Orden* monument, the cross on the seal is surrounded by numerous secular symbols and has remained in place for decades without controversy, "suggest[ing] more strongly than" any "formulaic test[]" that it does not violate the Establishment Clause. 545 U.S. at 702, 704 (Breyer, J., concurring).

FFRF has no answer for this argument. Instead, it asserts that *Van Orden* does not apply because—unlike removing the Ten Commandments monument—stripping the cross from Lehigh County's seal would "not tread near a slippery slope of excessive hostility towards religion." Resp. 38-39. But erasing a cross that has been on the County's seal for 74 years, while allowing all other symbols of the County's

history and culture to remain, would send the message that religious aspects of history and culture are uniquely disfavored, creating precisely the divisiveness that Justice Breyer sought to avoid. *See* 545 U.S. at 704; *see also Murray*, 947 F.2d at 158 (requiring city to "remove all displays of [its] insignia" because it featured a cross "arguably evinces not neutrality, but instead hostility, to religion").

Second, FFRF argues that this case is different because "the Latin cross" is "universally recognized as the symbol of Christianity." Resp. 39-40. But "the Ten Commandments are religious" too. *Van Orden*, 545 U.S. at 690 (plurality); *see also Freethought*, 334 F.3d at 262-63. And the First Amendment certainly does not evince a special hostility toward Christian symbols as opposed to those originating in Judaism. FFRF's argument that a "standalone" Latin cross has no secular meaning is wrong both factually and legally: factually, because a cross surrounded by more than a dozen secular symbols (and partially obscured by one) can hardly be described as "standalone"; and legally, because other courts and a Supreme Court plurality have held that crosses, like the Ten Commandments, can have more than just a religious meaning. Br. 55-56; *see also Murray*, 947 F.2d at 155 (in context, cross represented "Austin's unique role and history").

Finally, FFRF's comparison of Lehigh County's seal to "the permanent erection of a Latin cross on the roof of city hall," Resp. 38, is inapt. The dissent in *Allegheny* invoked that example to illustrate an "extreme" circumstance when "[s]ymbolic

recognition or accommodation of religious faith" might be sufficiently coercive to violate the Establishment Clause. *Allegheny*, 492 U.S. at 659-61 (dissent). But, notably, the dissent did not think that the crèche in *Allegheny*, which stood alone in "the 'main' and 'most beautiful part'" of the "seat of county government" violated the Establishment Clause. *Id*. at 599; *id*. at 655 (dissent). And in *Town of Greece*, the Court did not think that prayers that were overwhelmingly Christian crossed the line. 134. S. Ct. at 1823. Nor in *Van Orden* did the Court think that the "large granite monument" of the Ten Commandments at the Texas State Capitol was a constitutional violation, even though it "undeniably ha[d] a religious message, invoking, indeed emphasizing, the Deity." 545 U.S. at 700-01.

Lehigh County's seal easily falls within the latter category of cases. Its use of the cross among a dozen or more other images of historical or cultural significance gives unambiguous context that removes any risk of coercion or proselytizing. And because it has remained in use for more than 70 years, there is no credible argument that the cross "in fact 'establishes a [state] religion … or tends to do so.'" *Allegheny*, 492 U.S. at 659 (citation omitted). [5]

[5] It is in this context that the County's alleged admissions at summary judgment must be understood. *See* Resp. 43. Absent the passage of time and without the immediately surrounding context of the other symbols, the cross might more readily be perceived as proselytizing if enacted today. *See Freethought*, 334 F.3d at 265 ("maintenance" of a historic Ten Commandments plaque "sends a much different

D. The County's seal is constitutional even under the *Lemon* test.

FFRF's response further ignores that—even under the now-superseded *Lemon* test—the County's seal does not violate the Establishment Clause because it does not have a religious purpose and it does not endorse religion.

1. The *Lemon*-"endorsement" test favors Lehigh County.

Under the *Lemon*-endorsement test, the seal does not constitute an "endorsement" of religion because, like the plaques in *Freethought* and *Modrovich*, the seal's "age and history," combined with the its inclusion of a range of symbols, ensure that a reasonable observer would see it as a "reminder of past events" rather than as an endorsement of religion. *Freethought*, 334 F.3d at 264-65; *Modrovich v. Allegheny Cty.*, 385 F.3d 397, 410 (3d Cir. 2004). FFRF's claim that the cross is too "prominent" is unavailing, Resp. 23, 25, as courts must consider the perspective of a "reasonable observer" who is familiar with the entire context of the government's actions—including the "context of the community" and "the general history of the place." *Pinette*, 515 U.S. at 780-81 (O'Connor, J., concurring). The "reasonable observer" would know the history of Lehigh County, the history of the seal, and the way it is viewed in the current community, all factors which indicate that the seal

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message … than would a recently erected display"). Even so, *Town of Greece* clarifies that this is not always true. In proper context, even modern government acknowledgments of religion may be entirely appropriate. 134 S. Ct. at 1816 (upholding prayer practice begun only in 1999).

does not "communicat[e] a message endorsing religion." *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 282 (3d Cir. 2011).

The primary effect of the County's actions is to tell the story of Lehigh County's history and culture. Part of the context of the seal is the number of items other than the cross on the seal. Indeed, the cross is partially obscured on the seal by the Allentown courthouse and the ribbon bearing the County's name. And the seal neither contains nor is associated with any religious text. Rather than emphasizing Christianity, as FFRF claims, this context shows that religion is just one aspect of many contributing to the County's background. *See Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (religious content in a clearly secular setting "negates any message of endorsement of that content").

This secular meaning of the cross as merely part of an overall commemoration of the County's history and culture also distinguishes this case from the Seventh Circuit's Rolling Meadows decision in *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991). Resp. 24-25. There, the government offered no secular message attributable to the cross, but only argued that the presence of nonreligious symbols in the seal's other quadrants served to "neutralize" the cross's undisputed religious message. *Harris*, 927 F.2d at 1412-13; *cf. Murray*, 947 F.2d at 154-55 (refusing to "focus exclusively on the inclusion of the" cross and instead finding that "[t]aken as a whole, the insignia has the principal or primary effect of … promoting Austin's

unique role and history"); *see also id.* at 157 (*Harris* does not "hold that any use of a cross in a seal" would fail the endorsement prong). Also relevant to the "reasonable observer" is that the seal has represented the County for over 70 years, and that the County's early Christian settlers were influential in founding the County and developing its culture and economy. Br. 24-30; *see Freethought*, 334 F.3d at 260 ("reasonable observer is aware of the general history of [the] County").

FFRF attempts to distinguish *Freethought* and *Modrovich* by pointing out that the Ten Commandments were on a courthouse, and not a seal. But a courthouse is itself a "seat of government," so there is no distinction there. *See, e.g.*, *Allegheny*, 492 U.S. at 579 ("The county courthouse is owned by Allegheny County and is its seat of government."); *but see id.* at 666 (dissent) (finding "seat of government" factor "inconsequential").

Similarly, FFRF's argument that the seal is an endorsement because of its broad use proves too much. The fact that it has been used so widely for so long without objection, conflict, or religious coercion confirms that it does not pose a risk of an establishment of religion. *See Murray*, 947 F.2d at 158 (upholding seal featuring Latin cross because the seal's "long and unchallenged use" and "non-proselytizing effect" demonstrated that any "real danger of establishment" was "far-fetched indeed" (citation omitted)). Indeed, striking the seal on the basis of its use would conflict with the Tenth and Fifth Circuits, which have both held seals to be constitutional

even though the seals had religious symbols on them and were widely dispersed. *Weinbaum*, 541 F.3d at 1025 (seal used on public "signs, flags, buildings (such as City Hall and the City library), official uniforms (such as those of the City's police and firefighters), and vehicles" as well as "the City's letterhead, notices, maps, brochures, and advertisements"); *Murray*, 947 F.2d at 150 (seal "used on police cars and other city vehicles, letterhead, monthly utility bills, uniforms of city employees, including police and firefighters, on the wall of the city council chambers, and on or in many city-owned buildings, parks, and recreation centers"). And such a ruling would endanger numerous seals in the Third Circuit and around the country. *See* Br. 23; Addendum.

FFRF's argument that the seal's historical longevity may be disregarded under *Allegheny* does not stand up. First, in Justice Breyer's controlling opinion in *Van Orden*, the monument's long, previously uncontroversial existence was "*determinative*." 545 U.S. at 702 (emphasis added). And second, the *Allegheny* majority opinion was abrogated in *Town of Greece*, where Justice Kennedy expressly incorporated his *Allegheny* dissent into the *Town of Greece* holding. 134 S. Ct. at 1819, 1821.; *see also* Resp. 29 (recognizing abrogation).

Whether or not historical longevity is considered a "presumption of constitutionality," *see* Resp. 28-29, *Town of Greece*, *Van Orden*, and this Court's precedent all emphasize the importance of considering the history behind a symbol to determine

whether or not it constitutes an establishment of religion. *See supra* at 13. Moreover, *Allegheny* is distinguishable, as it involved a recent crèche that was not historic, and it had "unmistakably clear" religious text. *Allegheny*, 492 U.S. at 598-99.

2. The full *Lemon* test also favors Lehigh County.

The County's stated secular purpose in its decision to keep the cross on the seal is "honoring the early settlers" of Lehigh County. Br. 33. That purpose is entitled to "deference" unless it can be shown to be a "sham." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005). Only two Supreme Court cases have found an impermissible purpose in a government display with religious symbolism. *See id.*; *see also Stone v. Graham*, 449 U.S. 39 (1980). Both were recent Ten Commandment displays whose legislative history was available for scrutiny; both contained visible religious text; and both "stood alone, not part of an arguably secular display." *McCreary*, 545 U.S. at 868. None of those factors exist here, and FFRF provides no further evidence that the County's purpose is a sham. Thus, its arguments fail.

First, rather than countering the County's purpose of honoring the early settlers with evidence, FFRF flips the burden on its head. Resp. 14. But once the County has articulated a legitimate secular purpose, it is the *plaintiffs'* burden to show that the true purpose is religious. *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (Court is "reluctan[t] to attribute unconstitutional motives to the states, particularly when a plausible secular purpose … may be discerned"); *see also King v. Richmond Cty.*,

331 F.3d 1271, 1277 (11th Cir. 2003) (plaintiffs must "rebut the stated secular purpose with evidence"); *Freethought*, 334 F.3d at 267 ("relatively low threshold required by the purpose prong of *Lemon*"). None of the cases that FFRF relies on support the proposition that the government has the burden of proving that the secular purpose is not a sham, and FFRF offers no evidence of its own.

Second, FFRF claims that the County's stated purpose is a sham because it was submitted after the FFRF complaint letter. But the record shows that the cross was viewed by the public as a tribute to the early settlers well before the litigation began. A 2003 local history curriculum identified the seal as meant "to honor the Christians who settled in Lehigh County." App. 83, 87. The individual Plaintiffs themselves identified the same purpose for the cross on the seal: to honor "the Moravians," App. 223, or "the Pennsylvania Dutch," App. 128, or "the first settlers in this area," App. 134. They cannot acknowledge the cross's secular purpose and then argue that the County commissioners created a sham by reaching the same conclusion.

Third, though it acknowledges that the relevant purpose for the Establishment Clause inquiry is that of the present-day Commission, *Freethought*, 334 F.3d at 267, FFRF insists that the "best insight into the Seal's purpose" is the statement of Commissioner Hertzog two years after the seal was adopted. Resp. 15-16. But this is far from the type of evidence that *McCreary* identified as relevant to the purpose inquiry: the "text, legislative history, and the implementation of the … official act."

McCreary, 545 U.S. at 862. Commissioner Hertzog was only one commissioner, and post-enactment statements have repeatedly been dismissed by courts as unreliable. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history … is not a legitimate tool of statutory interpretation."). Absent such evidence, courts have held that "the government may propose possible secular justifications for the challenged practice." *King*, 331 F.3d at 1277. That is what the County has done here, and what FFRF has failed to rebut.

Lacking evidence of original intent, FFRF distorts the other available evidence. Commissioner Hertzog's article is not the only evidence the Commission consulted, Resp. 17-18, and is open to interpretation. Hertzog's reference to the "the foundation and backbone of" the County is unclear, but hearkens to a historical foundation and backbone upon which the County is built. Upon FFRF's complaint, the County commissioned research from the County solicitor, who reviewed multiple sources and reported his findings to the Commission, App. 263, including not only the Hertzog article, App. 264, but prior commission meeting minutes, App. 263, and the Lehigh County activities notebook, App. 264. The passage of time since the original Commission approved the seal makes it difficult to determine a clear purpose, so the County's conclusion that the sum of the evidence pointed to "the secular purpose of recognizing the history of the County" is entirely credible. App. 310.

Fourth, FFRF posits that the mere existence of the cross means that the seal "likely" has a religious purpose because the cross is "indisputably symbolic of Christianity." Resp. 16-17. But FFRF's reasoning would mean that the government could never use a cross without invoking an improper religious purpose, a proposition this Court and six other circuits have rejected.[6] Likewise, FFRF's argument that honoring historical Christian settlers "is not meaningfully different than a purpose to honor Christianity itself," Resp. 20, would prevent localities from recognizing historical figures and modern culture on a neutral basis if they are in any way associated with faith. That scenario would *disfavor* religion in violation of the Religion Clauses. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2020 (2017) (government cannot "exclude individual[s] … *because of their faith*, or lack of it," from neutral treatment). Recognizing Lehigh County's settlers *as* Christians is simply not the same as honoring Christianity itself. Nor is the County required to recognize other religions on its seal that may not have had the same influence on the

[6] *Tearpock-Martini*, 674 F. App'x at 142; *FFRF v. Weber*, 628 F. App'x 952, 953-54 (9th Cir. 2015); *Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 206 (4th Cir. 2017); *Trunk v. City of San Diego*, 629 F.3d 1099, 1108 (2011); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010); *Harris*, 927 F.2d 1401, 1411 (7th Cir. 1991); *Weinbaum*, 541 F.3d at 1033; *Briggs v. Mississippi*, 331 F.3d 499, 505-06 (5th Cir. 2003); *Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 242 (2d Cir. 2014).

County's history and culture. Resp. 21; *see Town of Greece*, 134 S. Ct. at 1824 (town "not require[d] to search beyond its borders for non-Christian prayer givers").

Fourth, FFRF argues that the secular symbols on the seal "do[] not detract from" the supposedly religious purpose of the seal. Resp. 17, 24. But they cite no cases for that proposition, ostensibly because that argument goes against the very *Lemon* precedent they rely on. *See, e.g.*, *Lynch*, 465 U.S. 668 (1984) (holding that the inclusion of a crèche as part of a larger display did not constitute a religious purpose); *Allegheny*, 492 U.S. at 620 (presence of multiple items in "overall display" determined display's constitutionality); *Modrovich*, 385 F.3d at 409-10 ("[T]he perception that the Allegheny Plaque does not endorse religion is only strengthened by the existence of other displays on the courthouse … .").

Finally, FFRF relies heavily on the Seventh Circuit's Zion decision in *Harris*. There, the city was founded by a religious leader who designed a seal with four religious elements and, in 1902, persuaded the city to adopt the seal for an explicitly religious purpose. 927 F.2d at 1403-04. In 1986, the city council passed a resolution "to retain the seal for historical reasons." *Id.* at 1414. The Seventh Circuit held that this resolution did not reflect "the true … purpose for the Zion seal." *Id. City of Zion*'s seal can be distinguished by clear evidence of the city's explicitly religious purpose in adopting the original seal: that "every officer" who used it would "feel,

as he pulls this lever and makes [the seal's] impression, 'God Reigns,' that the document must be such a one as God approves." *Id*. at 1404.

Harris also conflicts with the Tenth Circuit's purpose analysis in *Weinbaum*, which has facts closer to this case than to *Harris*. In *Weinbaum*, as here, the evidence surrounding the City of Las Cruces' adoption of a symbol depicting three crosses on its flag was "indeterminate," but "the City offered various secular justifications for the symbol, including … identification with the City's unique historical name." *Weinbaum*, 541 F.3d at 1033. Those purposes were sufficient in *Weinbaum*, and they should be here.

CONCLUSION

This Court should vacate and remand with instructions to dismiss the case for lack of jurisdiction. Alternatively, if the Court reaches the merits, it should reverse the decision of the district court and remand for entry of summary judgment in favor of Lehigh County.

Dated: May 23, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A) AND LOCAL RULE 31.1

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rules of Appellate procedure 29(d) and 32(a)(7)(B). It contains 6450 words, excluding the parts of the brief exempted by Federal Rule 32(a)(7)(B)(iii) and by Local Rule 29.1(b).
2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.
3. This brief complies with the electronic filing requirements of Local Rule 31.1(c). The text of this electronic brief is identical to the text of the paper copies, and Bitdefender Endpoint Security Tools has been run on the file containing the electronic version of this brief and no virus has been detected.

Executed this 23d day of May 2018.

/s/ Eric Baxter
Eric S. Baxter

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send notification and a copy of the brief to the counsel of record for the parties. I further certify that all parties to this case are represented by counsel of record who are CM/ECF participants.

Executed this 23d day of May 2018.

/s/ Eric Baxter
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