

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREEDOM FROM RELIGION FOUNDATION,	:	
INC., ET AL.,	:	
	:	
Plaintiffs,	:	NO. 16-4504-EGS
	:	
	:	
v.	:	
	:	
COUNTY OF LEHIGH,	:	
	:	
Defendant.	:	

**BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**CONCISE STATEMENT OF MATERIAL FACTS**

1. On December 28, 1944, a meeting of the Commissioners of Lehigh County was held in the Office of the Commissioners at the Lehigh County Courthouse, Allentown, Pennsylvania. Commissioners Good, Schellhamer and Hertzog attended the meeting. Commissioners Good, Schellhamer and Hertzog unanimously approved the Official Shield and Coat of Arms of Lehigh County by adopting the following resolution:

RESOLVE, that the County Commissioners of Lehigh County do hereby adopt as the Official Shield and Coat of Arms of Lehigh County adopt as the Official Shield and Coat of Arms of Lehigh County the form and design attached to this resolution and made a part of the minutes of this meeting: said Shield and Coat of Arms having been approved by Hon. James F. Henninger, President Judge of the Court of Common Pleas of Lehigh County Pennsylvania, and Hon. William S. Livengood, Jr., Secretary of Internal Affairs of the Commonwealth of Pennsylvania.

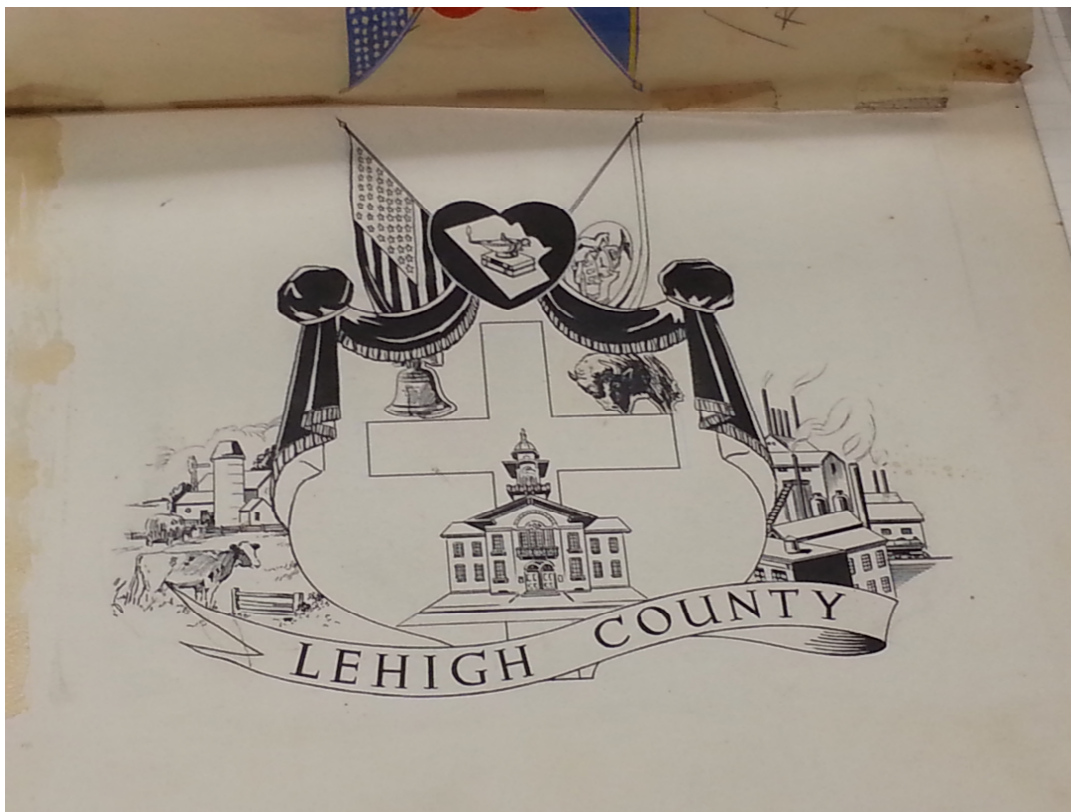
*Minutes of the Commissioners' meeting, 12/28/1944.<sup>1</sup>*

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<sup>1</sup> A true and correct copy of the Meeting Minutes reflecting the adoption of this Resolution are attached hereto as Exhibit 1.

2. The Official Shield and Coat of Arms of Lehigh County, approved by the Commissioners of Lehigh County on December 28, 1944, is depicted in the Minutes of the Commissioners' meeting as follows:





*Minutes of the Commissioners' meeting, 12/28/1944.*<sup>2</sup>

3. The Official Shield and Coat of Arms of Lehigh County, as approved by the Commissioners of Lehigh County on December 28, 1944, had been approved by James F. Henninger, President Judge of the Court of Common Pleas of Lehigh County, on October 19, 1944. *Minutes of the Commissioners' meeting, 12/28/1944.*
4. The Official Shield and Coat of Arms of Lehigh County, as approved by the Commissioners of Lehigh County on December 28, 1944, had been approved by William S. Livengood Jr., the Secretary of Internal Affairs of the Commonwealth of Pennsylvania, on November 15, 1944. *Minutes of the Commissioners' meeting, 12/28/1944.*

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<sup>2</sup> The photographs included herein are photographs of the Seal depicted in the Minutes of the Commissioners' meeting held on December 28, 1944.

5. At the meeting of the Commissioners of Lehigh County Commissioners held on December 28, 1944, the Commissioners “unanimously agreed to enter into a contract with Harry R. Dubbs, 1020 Hamilton Street, Allentown, Pa., for the purchase of One (1) Federal Artglow County Flag, reproducing the County Seal, hand painted, size 4 1/3 x 5 1/2 to include jointed pole, base, spread eagle, head piece with gold fringe, cord and tassels, at \$212.50 delivered.” *Minutes of the Commissioners’ meeting, 12/28/1944.*<sup>3</sup>
6. The August 1946 edition of the “Proceedings of the Lehigh County Historical Society,” Volume Fifteen, contained an article at page 147 titled “Lehigh County Shield.”<sup>4</sup> The article was written by Harry D. Hertzog who, according to an Editor’s note, was the County Commissioner who personally designed the Lehigh County Shield. The article reads as follows:

The Shield of Lehigh County was approved and accepted on October 19, 1944, by President Judge James F. Henninger; on November 15, 1944, by William S. Livengood, Jr., Secretary of Internal Affairs, Harrisburg, Pa.; and on December 28, 1944, was adopted and made part of the minutes of the Commissioners, the original copy of Shield attached thereto, and therefore adopted as the official Shield of the County of Lehigh.

So that every symbolic significance and so that the Shield of Lehigh County may be understood, the following appear on same:-

The American Flag signifies the United States, and the State of Flag the great Commonwealth of the State of Pennsylvania, the Keystone State of America.

Between the two cross flags appears the vermilion red heart which is the emblem of the City of Allentown, the County Seat of Lehigh.

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<sup>3</sup> A true and correct copy of the Meeting Minutes reflecting the approval of this agreement are attached hereto as Exhibit 2.

<sup>4</sup> A true and correct copy of the Lehigh County Historical Society article is attached hereto as Exhibit 3.

Within the heart appears an outline of the map of the County of Lehigh, therein appearing two books with the lamp of learning thereon, symbolic of the fine educational system in the City and County which we feel is the finest in the United States.

The buntings in red, underneath the above-mentioned, is an outline of the Shield and symbolizes the tremendous diversified clothing manufacturing industries in Lehigh County.

Underneath same and in center of Shield appears the huge cross in canary-yellow signifying Christianity and the God-fearing people which are the foundation and backbone of our County.

Underneath the cross appears the historical and beautiful old Court House which the famously known Stanford White, noted architect, once said was one of the most beautiful pieces of architecture he had ever seen.

In the upper left-hand corner of the cross appears the old historical Liberty Bell which here needs no elaboration as to the historical significance.

In the upper right-hand corner of the cross appears the head of the American Bison which twenty-four years ago made its home and was preserved in Lehigh County to the extent that the County today owns one of the largest herds of pure-bred American Bison east of the Mississippi River and a variety of hoof animals, forty-one in number, giving us the largest collection of hoof animals in the eastern part of the United States. The Preserve is enclosed in 1107 acres of fence.

To the right of the Shield appears a description of the huge cement silos and a replica of buildings signifying that Lehigh County is the cement center of the United States. The other buildings surrounding the cement silos signify the numerous diversified industries in Lehigh County.

To the left of the Shield appear the barn, farm lands and cow which are symbolic of our enormous agricultural center supplemented by huge orchards, the tremendous potato crops and other numerous farm products that Lehigh County supplies to the Nation.

Underneath the Shield, inserted in flying ribbons, the words Lehigh County appear.

7. There are no official records of Lehigh County which show that Lehigh County adopted and approved changes to the Seal after it was approved as the Official County Seal on December 28, 1944.<sup>5</sup>
8. There are no official records of Lehigh County which show that Lehigh County took any official action to celebrate the Seal or any of the symbols depicted on the Seal after it was approved as the Official County Seal on December 28, 1944.
9. Section 1002 of the Lehigh County Home Rule Charter, titled "County Seal," provides:  
"The Board shall have the power to adopt an official seal for the County."<sup>6</sup>
10. The Board of Commissioners maintains the authority under the Lehigh County Home Rule Charter to create or modify the Seal. *Osborne Deposition, pp. 15-16.*<sup>7</sup>
11. The Board of Commissioners has not taken any action regarding the Seal during the period of time in which he has served as a commissioner. *Osborne Deposition, p. 16.*
12. There is no official Lehigh County policy regarding the use of the Seal as it represents Lehigh County. *Osborne Deposition, p. 16.*
13. The Executive Branch of Lehigh County government decides the manner in which the Seal will be used. *Osborne Deposition, pp.18-19.*
14. Commissioner Osborne is not aware of any restrictions on how the Executive Branch of Lehigh County government uses the Seal. *Osborne Deposition, p. 16; pp. 18-19.*

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<sup>5</sup> It should be noted that the Minutes from the Commissioners' meeting held on December 28, 1944, reflect that the Commissioners approved what they referred to as the "Official Shield and Coat of Arms" of Lehigh County, but also approved an agreement to purchase a County Flag which reproduced the "County Seal." This item will be referred to herein as the "Seal."

<sup>6</sup> A true and correct copy of Section 1002 of the Lehigh County Home Rule Charter is attached hereto as Exhibit 4.

<sup>7</sup> A true and correct copy of the transcript of the Deposition of Brad Osborne is attached hereto as Exhibit 5.

15. Brad Osborne has served as a Lehigh County Commissioner since 2012. *Osborne Deposition, p. 6.*
16. There are nine commissioners on the Lehigh County Board of Commissioners. *Osborne Deposition, p. 7.*
17. The Board of Commissioners is responsible for shaping policies and setting the course of action for Lehigh County. *Osborne Deposition, p. 8.*
18. Lehigh County has two branches of government: the Executive Branch and the Legislative Branch. *Osborne Deposition, p. 8.*
19. The Board of Commissioners' understanding of how the Seal was adopted as the official Seal of Lehigh County stems from the minutes of the meeting of the Commissioners of Lehigh County held on December 28, 1944. *Osborne Deposition, p. 11.*
20. The Seal is displayed at the following locations: Lehigh County Government Center; Lehigh County Courthouse; Lehigh County Juvenile Detention Facility; Lehigh County Prison; and Lehigh County Coroner's building. *Defendant's Answer to Plaintiffs' Interrogatories, Number 4.*<sup>8</sup>
21. The Seal is displayed on the letterhead of Lehigh County documents; on Lehigh County vehicles; on the Lehigh County website; on Lehigh County business cards; on signage at the Lehigh County Nature Preserve; and on signage at Lehigh County parks. *Defendant's Answer to Plaintiffs' Interrogatories, Number 4.*
22. The Lehigh County flag is displayed at the following locations: Lehigh Valley International Airport; Lehigh County Work Release Center; Lehigh County Detox Center;

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<sup>8</sup> A true and correct copy of Defendant's Answer to Plaintiff's Interrogatories is attached hereto as Exhibit 6.

Lehigh County Cedarbrook Nursing Home; Coca-Cola Park; Lehigh County Velodrome; Lehigh County Nature Preserve; Lehigh County Cedar View Apartments; Lehigh County Agricultural Preservation building; Lehigh County Juvenile Detention Facility; Lehigh County Coroner's building; Lehigh County Government Center; Lehigh County Courthouse; Lehigh County Prison; Lehigh Valley Planning Commission; and Lehigh and Northampton Transportation Authority. *Defendant's Answer to Plaintiffs' Interrogatories, Number 7.*

23. Lehigh County received a complaint regarding the Seal in a letter from FFRF to the County Executive, Thomas Muller, dated November 5, 2014. The letter states in relevant part that the "inclusion of a Latin cross on the official County Seal violates the Establishment Clause of the First Amendment," and requests that "the County ... immediately discontinue using this seal and ... develop a new seal that is both constitutional and representative of all citizens."<sup>9</sup>
24. FFRF sent a second letter to the County Executive, Thomas Muller, dated January 16, 2015. The letter states in relevant part that FFRF is following up on its letter of November 5, 2014, "regarding the prominent cross on Lehigh County's seal," and requests a written response from the County "as to what actions have been taken to resolve these concerns."<sup>10</sup>
25. The Board of Commissioners first became aware of FFRF's complaint regarding the Seal after Lehigh County received the letter from FFRF, dated January 16, 2015. *Osborne Deposition, pp.21-22.*

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<sup>9</sup> A true and correct copy of the November 5, 2014, letter is attached hereto as Exhibit 7.

<sup>10</sup> A true and correct copy of the January 16, 2015, letter is attached hereto as Exhibit 8.



26. The Board of Commissioners has not taken any action regarding the Seal pursuant to the authority of Section 1002 of the Lehigh County Home Rule Charter. *Lehigh County's Answer to Plaintiffs' Interrogatories, Number 14.*
27. The Seal appears differently depending upon the context in which it is displayed. However, Lehigh County has not taken any official action to change the appearance of the Seal since it was originally adopted by Lehigh County on December 28, 1944. *Lehigh County's Answer to Plaintiffs' Interrogatories, Number 2.*
28. The Board of Commissioners discussed FFRF's complaint regarding the Seal at the following official County meetings: Board of Commissioners' executive session on March 11, 2015; Board of Commissioners' executive session on March 25, 2015; Board of Commissioners' meeting on March 25, 2015; Board of Commissioners' executive session on September 28, 2016; and Board of Commissioners' executive session on November 22, 2016. *Defendant's Answer to Plaintiffs' Interrogatories, Number 11.*
29. After it became aware of the complaint filed by FFRF, the Board of Commissioners met in an executive session to discuss FFRF's complaint regarding the Seal and to understand the Board of Commissioners' role in the process. *Osborne Deposition, pp. 21-22.*
30. During the first executive session held by the Board of Commissioners to discuss FFRF's complaint regarding the Seal, the Board of Commissioners endeavored to understand the nature of the complaint filed by FFRF, and to gather information regarding the history of the Seal, including, without limitation, the purpose for the symbols on the Seal. *Osborne Deposition, pp.23-24.*
31. During the first executive session to discuss FFRF's complaint regarding the Seal, one commissioner may have had more knowledge than the other commissioners about the

history of the Seal, but for the remaining commissioners the historical information about the Seal was new, and the commissioners essentially had to “start from scratch” in order to gain an understanding about the history of the Seal. *Osborne Deposition*, p. 24.

32. The Board of Commissioners requested that the Department of Law research the history of the Seal. The research conducted by the Department of Law included contacting the Lehigh County Historical Society and reviewing the minutes of the Commissioners’ meetings over the years. *Osborne Deposition*, p. 30.
33. The Board of Commissioners met on a total of three occasions to discuss FFRF's complaint regarding the Seal and its request that the cross be removed from the Seal. *Osborne Deposition*, pp. 21-22.
34. At one of the Board of Commissioner meetings discussing FFRF's complaint regarding the Seal, the commissioners decided that it would ask the Lehigh County Department of Law to draft a letter in response to FFRF's complaint regarding the Seal, and further decided that the commissioners would review and vote on the letter at a public meeting. *Osborne Deposition*, p. 25.
35. The Board of Commissioners held an executive session prior to the public meeting to review and vote on the letter responding to FFRF's complaint regarding the Seal. During the executive session, the Commissioners discussed the letter but did not vote on whether to approve it, and approval of the letter was not predetermined prior to the Commissioners' consideration of the letter at the public meeting. *Osborne Deposition*, p. 28.
36. The letter reviewed by the Board of Commissioners at the executive session stated that the County would not remove the cross from the Seal, as requested by FFRF. However, the

commissioners were aware that if this letter was not approved at the public meeting, they would have to consider an alternative position at that time. *Osborne Deposition*, p. 29.

37. On March 25, 2015, a public meeting of the Board of Commissioners was held at the Lehigh County Government Center. Among other things, the Board of Commissioners discussed the County's proposed response to FFRF's complaint regarding the Seal and request that the County remove the cross from the Seal. The Minutes of the Board of Commissioners' meeting held on March 25, 2015, provide the following:

Under Executive Sessions, the clerk said at the conclusion of the 03/11/15 Board meeting and prior to tonight's meeting the Board met in an executive session to discuss threatened litigation from the Freedom From Religion Foundation.

Commissioner Osborne said the County received a letter in November and a follow-up letter in January asking the County to remove the cross from the official seal. He said the Board has met in executive session three times to discuss our options and ultimately requested our Solicitor's Office to draft a response.

Commissioner Osborne read the attached draft letter to the Freedom From Religion Foundation which is attached as Exhibit A.

Commissioner Scheller made the following motion: to send a letter drafted by the County Solicitor to the Freedom From Religion Foundation which communicates this Board's determination not to change the current Lehigh County Seal. The motion was seconded by Commissioner Dougherty.

Joe Hilliard, County resident, said he applauds this move. He said he would suggest a change to the letter in the last sentence of paragraph two. He said you can either say "original Christian settlers of Lehigh County" or "original settlers of Lehigh County who were Christian".

Commissioners Scheller and Dougherty agreed to change the last sentence of paragraph two to include "original settlers of Lehigh

County who were Christian". The revised letter is attached to the minutes as Exhibit B.

Matt Sorrentino said the suggested changes have no impact on the letter whatsoever.

The motion of Commissioners Scheller and Dougherty was approved by a unanimous roll call vote.

*Minutes of the Board of Commissioners' meeting held on March 25, 2015.*<sup>11</sup>

38. During the public meeting held on March 25, 2015, the Board of Commissioners considered for approval a proposed letter from Matthew R. Sorrentino, the Lehigh County Solicitor.<sup>12</sup>
39. During the public meeting held on March 25, 2015, the Board of Commissioners agreed to revise Solicitor Sorrentino's letter in order to reflect a minor change in the wording of the letter suggested by a private citizen. *Osborne Deposition, p. 40; Minutes of the Board of Commissioners' meeting held on March 25, 2015.*
40. The letter from Solicitor Sorrentino to FFRF, as revised during the public meeting held on March 25, 2015, was approved by the Board of Commissioners.<sup>13</sup>
41. Solicitor Sorrentino's letter to FFRF, dated March 25, 2015, states:<sup>14</sup>

The Lehigh County Board of Commissioners has directed my office to respond to your letters of November 5, 2014 and January 16, 2015. In those letters you contend that the Lehigh County seal violates the Constitution because it has a Latin cross in its center, and therefore contravenes the Establishment Clause. You urged the County to discontinue using the seal and develop a new seal,

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<sup>11</sup> A true and correct copy of the Minutes of the Board of Commissioners' meeting held on March 25, 2015, are attached hereto as Exhibit 9.

<sup>12</sup> The original letter from Solicitor Sorrentino is attached as Exhibit A to the Minutes of the Board of Commissioners' meeting held on March 25, 2015.

<sup>13</sup> The revised letter from Solicitor Sorrentino, as approved by the Board of Commissioners, is attached as Exhibit B to the Minutes of the Board of Commissioners' meeting held on March 25, 2015.

<sup>14</sup> A true and correct copy of Solicitor Sorrentino's letter to FFRF is attached hereto as Exhibit 10.

and requested a written response outlining any steps the County would take to comply with your letter.

The Commissioners have made inquiries with the local Historical Society concerning the history and purpose of the various symbols on the County seal. If you have examined the seal in detail, you will have noted that it contains many different symbols and elements, each with historical significance to Lehigh County. The cross, one of more than a dozen elements, was included to honor the original settlers of Lehigh County who were Christian.

It is the position of the Lehigh County that the presence of the cross on the seal among all the other items of historical significance has the secular purpose of recognizing the history of the County. As such, it does not violate the Establishment Clause. Accordingly, the County is not planning on removing the cross from the seal.

42. In researching the history of the Seal the Board of Commissioners were unable to obtain information from any person who had first hand historical knowledge about the adoption of the Seal. *Osborne Deposition, p. 35.*
43. The document which the Board of Commissioners relied upon in reaching its decision not to remove the cross from the Seal was the article in the August 1946 edition of the Lehigh County Historical Society, titled "Lehigh County Shield." *Osborne Deposition, p. 34.*
44. The letter from Solicitor Sorrentino to FFRF, dated March 25, 2015, provides in relevant part: "The cross, one of the more than a dozen elements, was included to honor the original settlers of Lehigh County who were Christian." The phrase "honor the original settlers of Lehigh County who were Christian" is not contained in the Lehigh County Historical Society article from August 1946. Instead, the Board of Commissioners interpreted the information contained in the Lehigh County Historical Society article to mean that the cross was one of the dozen or so symbols in the Seal which were important to the early settlers of Lehigh County. After discussions regarding the reasons for including the

various symbols on the Seal, the Board of Commissioners was convinced that the cross was included on the Seal in order to honor the original settlers of Lehigh County who were Christian. *Osborne Deposition*, pp. 33-34; p. 36.

45. The County's current position is the same as the position conveyed in the letter from Attorney Sorrentino to FFRF, dated March 25, 2015, and no further information has been developed or gathered by the County since this letter was sent. *Osborne Deposition*, p. 37.
46. During the executive session held to discuss the County's response to FFRF's complaint regarding the Seal, discussion among the commissioners was wide ranging, but the position of the Board of Commissioners was reflected by the unanimous vote at the public meeting to approve Solicitor Sorrentino's letter to FFRF. *Osborne Deposition*, pp. 38-39.
47. The Lehigh County flag includes the red, yellow and blue version of the Seal. *Osborne Deposition*, p. 41.
48. Commissioner Osborne is not aware of any action taken by the Board of Commissioners regarding the County flag since the Board of Commissioners approved the County Flag in 1944. *Osborne Deposition*, p.42.
49. The County did not receive any complaints regarding the Seal or the Flag prior to receiving FFRF's complaint regarding the Seal in November 2014. *Osborne Deposition*, p.43.
50. Commissioner Osborne believes that the cross on the Seal "represents the early Christian settlers," and that this was something that [the Board of Commissioners who originally adopted the Seal] felt were important to document as far as the history." He also believes that the cross is "a secular symbol representing just the history of the early settlers," something that "the early settlers found important in their lives as they settled the area back in the 1700's." *Osborne Deposition*, pp. 43-44; p. 45.

51. Commissioner Osborne does not have any reason to believe that Commissioner Hertzog is not the person who created the Seal. *Osborne Deposition, p. 44.*
52. Stephen Meholic is an atheist who resides in Macungie.<sup>15</sup> *Meholic Deposition, p.4.*
53. Meholic encounters the Seal when he attends Commissioner meetings at the Government Center, since the Seal is located in the Commissioners' meeting room and is shown on the TV screen during meetings. *Meholic Deposition, p. 6.*
54. Meholic encounters the Seal at the Lehigh Valley Airport, since it is located on the flag at the entrance to the airport. *Meholic Deposition, p. 8.*
55. The Seal is also located on the Lehigh County website and on certain County documents. *Meholic Deposition, p.8.*
56. Meholic is not offended by the Seal itself; rather, he is offended by the Latin cross on the Seal. He objects to the Latin cross on the Seal because he feels that the County is trying to force religion on him. He believes that the Seal "doesn't represent me and it doesn't represent I would say over half of the population of Lehigh County." *Meholic Deposition, pp. 9-10.*
57. Meholic did not file any complaints regarding the Seal, but told FFRF that he would participate in a law suit if one was filed against Lehigh County. *Meholic Deposition, p. 12.*
58. John Berry is a non-practicing Methodist who has resided in Lehigh County since 1991.<sup>16</sup> *Berry Deposition, pp.4-5; p.6.*

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<sup>15</sup> A true and correct copy of the transcript of the deposition of Stephen Meholic is attached hereto as Exhibit 11.

<sup>16</sup> A true and correct copy of the transcript of the deposition of John Berry is attached hereto as Exhibit 12.

59. Berry first became aware of the Seal when he learned about the complaint filed by FFRF. *Berry Deposition, pp. 9-10.*
60. Berry sees the Seal on maintenance vehicles which come to the County-owned building in which he works. *Berry Deposition, p. 8; p. 10.*
61. Berry has seen the Seal in the Commissioners' meeting room at the Lehigh County Government Center and on the flag that flies outside the Lehigh Government Center. *Berry Deposition, p. 11.*
62. Berry's most frequent contact with the Seal occurs when he conducts web searches that are County related, since the Lehigh County Government header remains static for all of the different department home pages. He sees the Seal on the Lehigh County website once every two months. *Berry Deposition, p. 12.*
63. Berry encountered the Seal at the Lehigh County Courthouse when he was called for jury duty three years ago, since he saw the Seal on the flag located at the entrance to the courthouse. *Berry Deposition, pp. 15-17.*
64. Berry believes that the cross on the Seal represents an endorsement of a Christian religion. In his opinion, a government entity should not be endorsing any religion, and instead, should be more inclusive. *Berry Deposition, p. 17.*
65. Berry believes that the cross was placed on the Seal as a celebration or recognition of the original settlers to the community, or something along those lines. *Berry Deposition, p. 19.*
66. According to Berry, the Seal found on the website is tiny and it is difficult to see the cross in the Seal. However, the cross on the Seal located on the flag is very visible because it is yellow. *Berry Deposition, p. 22.*
67. Berry did not file any complaints regarding the Seal. *Berry Deposition, p. 18.*



68. David Simpson is an atheist who has lived in Emmaus since 1991. <sup>17</sup> *Simpson Deposition*, pp. 4-5.
69. Simpson first noticed the Seal when he went to the Lehigh County Courthouse and saw the flag located at the entrance to the courthouse. He noticed that the flag had a large Christian cross in the middle. *Simpson Deposition*, p. 8.
70. Simpson interprets the cross on the Seal as an endorsement of religion by the County, in particular as an endorsement of Christianity. *Simpson Deposition*, p. 9.
71. Simpson encounters the Seal on an occasional basis. For example, he encountered the Seal on the Lehigh County website when he was trying to obtain a copy of his marriage certificate. *Simpson Deposition*, p. 10.
72. According to Berry, the envelope in which Lehigh County property tax bills are enclosed has the Seal on it. *Simpson Deposition*, p.11.
73. Simpson does not travel to the Lehigh County Government Center or use the Lehigh County website on a frequent basis. *Simpson Deposition*, p. 12.
74. The inclusion of the cross on the Seal is offensive to Simpson, and he believes that the County should be progressive and inclusive and not have a religious symbol on its Seal. *Simpson Deposition*, pp. 13-14.
75. Simpson researched the history of the Seal, but is not aware as to why the cross was originally included on the Seal. *Simpson Deposition*, p. 16.
76. Simpson never lodged a complaint with the County about the Seal. *Simpson Deposition*, p. 16.

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<sup>17</sup> A true and correct copy of the transcript of the deposition of David Simpson is attached hereto as Exhibit 13.

77. Candace Winkler is an “antitheist” who has lived in Catasauqua for two and one-half years.  
<sup>18</sup> *Winkler Deposition*, pp. 4-6.
78. Winkler first encountered the Seal on a Lehigh County property tax bill. *Winkler Deposition*, p. 9.
79. The cross located on the Seal offended her and, coincidentally, she found out that FFRF had already filed a complaint with the County about the Seal. *Winkler Deposition*, p. 10.
80. The cross is a symbol of Christianity, and including the cross on the Seal is contrary to the First Amendment guarantee that a person will not be discriminated against because of any particular religion. *Winkler Deposition*, pp. 14-15.
81. Winkler has also seen the Seal on the flag at the entrance to the airport. The bright yellow cross against the blue background is very visible. *Winkler Deposition*, p. 16.
82. Winkler encounters the flag at the entrance to the airport fairly frequently, since she drives by the airport in order to get to her gym two times per week. *Winkler Deposition*, p. 17.
83. The cross on the Seal is irritating to her, since she believes that there is a history of abuse in the church and this is what the cross makes her think of. *Winkler Deposition*, p. 17.
84. Winkler also encounters the Seal on the Lehigh County website when she searches property assessment information. *Winkler Deposition*, p. 18.

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<sup>18</sup> A true and correct copy of the transcript of the deposition of Candace Winkler is attached hereto as Exhibit 14.

## **QUESTION PRESENTED**

Whether the Defendant, County of Lehigh, is entitled to summary judgment on Plaintiff's claim that the Official Seal of the County of Lehigh, which displays a Latin cross along with several secular symbols, violates the Establishment Clause of the First Amendment?

Suggested Answer: Yes.

## **ARGUMENT**

### **DEFENDANT COUNTY OF LEHIGH IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM THAT THE OFFICIAL SEAL OF THE COUNTY OF LEHIGH VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.**

#### **The Establishment Clause Tests**

The Establishment Clause of the First Amendment is applicable to the states through the Fourteenth Amendment. Doe v. Indian River School District, 653 F.3d 256, 269 (3d Cir. 2011). The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. Amendment I. Under the Establishment Clause, both the state and federal governments are, at a minimum, prohibited from:

Set[ting] up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Everson v. Board of Education of Ewing Township, 330 U.S. 1, 15 (1947).

In view of the various ways in which the Establishment Clause can be violated, "interlocking lines of cases applying the Clause in particular situations" have developed over

time. Indian River, 653 F.3d at 279. Three separate tests for determining whether government action violates the Establishment Clause have been articulated by the Supreme Court. Modrovich v. Allegheny County, 385 F.3d 397, 400 (3d Cir. 2004).

The “coercion” test assesses whether school-sponsored religious activity has a coercive effect on students. The “Lemon” test, announced in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), uses a three-prong approach to determine whether government action violates the Establishment Clause. Under Lemon, the challenged government action is unconstitutional if: (1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it fosters an excessive entanglement of government with religion. Lemon, 403 U.S. at 612-13. The “endorsement” test, first advanced by Justice O’Connor in Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984), modifies the Lemon test in religious display cases. “The endorsement test dispenses with Lemon’s ‘entanglement’ prong and, combining an objective version of Lemon’s ‘purpose’ prong with its ‘effect’ prong, asks whether a reasonable observer familiar with the history and context of the display would perceive the display as a government endorsement of religion.” Modrovich, 385 F.3d at 401 (citing Lynch, 465 U.S. at 687).

The second prong of the Lemon test—the primary effect prong—requires that “a state’s practice can neither advance, nor inhibit religion.” Indian River, 653 F.3d at 284. This “prong of Lemon is akin, if not identical, to the endorsement test.” Id. at 284. Under the endorsement test, the court “must determine whether, under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion.” Id. at 284. See also Freethought Society of Greater Philadelphia v. Chester County, 334 F.3d 247, 250 (3d Cir. 2003) (since “effect under the Lemon test is cognate to endorsement,” the endorsement test collapses the purpose and effect prongs of Lemon into one inquiry).

Although the three-prong Lemon test has been criticized frequently over the years, the Supreme Court has never overruled Lemon and “has consistently applied the Lemon test to religious display cases.” Card v. City of Everett, 520 F.3d 1009, 1015 (9<sup>th</sup> Cir. 2008). “Without clear guidance from the Supreme Court compelling it to do otherwise, [the Third Circuit] has also continued to apply Lemon in religious display cases.” Freedom From Religion Foundation, Inc. v. Connellsville Area School District, 127 F. Sup. 3d 283, 303 (W.D. Pa. 2015). “When doing so, though, it has modified Lemon to incorporate the endorsement test ....” Id. at 302. See, e.g., Freethought, 334 F.3d at 261 (“[I]n view of the possibility that a higher court may prefer to analyze the constitutionality of this plaque under the traditional Lemon purpose and effect inquiry, we will now briefly consider how to evaluate the County's purpose.”); Modrovich, 385 F.3d at 406 (“we will apply both the endorsement test and the Lemon test, in case a higher court prefers to apply the traditional Lemon test”).

In view of Third Circuit precedent, this Court must evaluate FFRF's claim that the Seal violates the Establishment Clause under both the endorsement test and the Lemon test. In accordance with the Third Circuit's approach in Freethought, the County will address the constitutionality of the Seal within the context of the endorsement test, and then address this issue in accordance with the secular purpose prong of Lemon. See Freethought, 334 F.3d at 261. See also ACLU v. Black Horse Pike Reg'l Board of Education, 84 F.3d 1471, 1486 (3d Cir. 1996) (since the endorsement test and the primary effect prong of the Lemon test are essentially the same, “[w]hether 'the endorsement test' is part of the inquiry under Lemon or a separate inquiry apart from it, the import of the test is the same”).

### **The Endorsement Test**

Under the endorsement test, the court does not consider the government's "purpose in determining whether a religious display has violated the establishment clause," but rather focuses on "the effect of the display on the reasonable observer." Freethought, 334 F.3d at 261. FFRF contends that because the reasonable observer would perceive the inclusion of a Latin cross in the Seal as an endorsement of religion by the County, the Seal violates the Establishment Clause.

It is not disputed that the Latin cross is a Christian symbol which is inherently religious in nature. See, e.g., Trunk v. City of San Diego, 629 F.3d 1099 (9<sup>th</sup> Cir. 2011) ("We are masters of the obvious, and we know that the crucifix is a Christian symbol."). Cf. Stone v. Graham, 449 U.S. 39, 41 (1980) ("The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature."); Freethought, 334 F.3d at 262 ("As a preliminary matter, we cannot ignore the inherently religious message of the Ten Commandments."). And the Latin cross, like the Ten Commandments, has not lost its "primary religious significance" or "taken on a primarily secular purpose." See Freethought, 334 F.3d at 264.

However, although the Latin cross is a religious symbol, "context can change the reasonable observer's perception of an otherwise religious display ...." Freethought, 334 F.3d at 263. In particular, "[h]istory provides a context which can change the effect of a religious display because the reasonable observer would understand that the display has 'largely lost [its] religious significance over time,' ... and taken on 'secular purpose[s],'" Freethought, 334 F.3d at 264 (quoting County of Allegheny v. ACLU, 492 U.S. 573, 631 (1989) (O'Connor, J., concurring)). For instance, the inscription "In God We Trust" on U.S. coins has lost its religious significance and "taken on a secular meaning that changes the effect on the reasonable viewer; it

is a cultural tradition and well-known marker identifying money as authentic.” Freethought, 334 F.3d at 264. Furthermore, the phrase “God save the United States and this Honorable Court”—used as an introduction to the opening of a session of the Supreme Court—has taken on the secular purpose of “solemnizing public occasions” and “expressing confidence in the future.” Freethought, 334 F.3d at 264 (quoting Allegheny, 492 U.S. at 631 (O’Connor, J., concurring)).

The court inquires whether a reasonable, informed observer, familiar with the history and context of the challenged display, would “perceive the challenged government action as endorsing religion?” Freethought, 334 F.3d at 250 (internal quotations and citation omitted). Given the history of the inscription "In God We Trust" on coins and the history of the phrase “God save the United States and this Honorable Court” used to open Supreme Court (and many lower court) sessions, the reasonable, informed observer "views the religious language as tempered by the secular meaning that has emerged over the passage of time; the overall effect is that the reasonable person would not perceive in these phrases a government endorsement of religion (despite the clear use of the word ‘God’).” Freethought, 334 F.3d at 264.

In Freethought, the Chester County Commissioners accepted a bronze plaque displaying the Ten Commandments from a religious organization and erected the plaque on the façade of the Chester County Courthouse in 1920. For a period of approximately 80 years, Chester County did not draw attention to, celebrate or maintain the plaque. In 2001, a member of the Freethought Society of Greater Philadelphia requested that Chester County remove the plaque on the grounds that it violated the Establishment Clause. The Freethought Society filed suit after Chester County refused to remove the plaque. Freethought, 334 F.3d at 249-50. The District Court found that the plaque violated the Establishment Clause, and Chester County filed an appeal to the Third Circuit.

Recognizing that "the *age and history* of the plaque provide a context which changes the effect of an otherwise religious plaque," 334 F.3d at 264 (emphasis in original), and that it was appropriate to focus on the events of 2001 (refusal to remove the plaque) rather than on the events of 1920 (erection of the plaque), 334 F.3d at 251, the Third Circuit framed the issue as follows: "Would a passerby (generally knowledgeable about the history of the plaque in Chester County) who walked up the steps to read the text of the Ten Commandments Plaque reasonably believe that by declining to remove the 82-year-old plaque, the County was endorsing religion?" 334 F.3d at 264.

The Third Circuit decided that although the reasonable observer might perceive the Ten Commandments in the abstract as "portraying a religious message," he or she, familiar with the age and history of the plaque, "would view the *plaque* as a reminder of past events in Chester County." 334 F.3d at 264 (emphasis in original). The Court stated:

The reasonable observer would perceive an historic plaque as less of an endorsement of religion than a more recent religious display *not* because the Ten Commandments have lost their religious significance, but because the maintenance of this plaque sends a much different message about the religious views of the County than would a recently erected display of the Ten Commandments. The reasonable observer, knowing the age of the Ten Commandments Plaque, would regard the decision to leave it in place as motivated, in significant part, by the desire to preserve a long standing plaque. In contrast, a contemporary decision to erect such a plaque could not be motivated by historic preservation; rather it would appear much more likely that the County Commissioners were motivated by religion.

334 F.3d at 265 (emphasis in original).

Turning to the case *sub judice*, whether the County's refusal to remove the Latin cross from the Seal represents an endorsement of religion, in violation of the Establishment Clause, hinges upon an analysis of the facts and circumstances pertinent to this matter. See Lynch, 465 U.S. at 678 ("every establishment clause challenge requires a fact-specific, case-by-case



analysis”). Framed in view of applicable precedent, the question presented is whether a passerby (generally knowledgeable about the history of the Seal) who observes the Seal reasonably believes that the County, by refusing to remove the Latin cross from the 72-year old Seal, was endorsing religion?

While each Plaintiff is offended by the Latin cross and believes that the County’s refusal to remove the Latin cross from the Seal represents an endorsement of religion, the endorsement test does not “ask whether there is any person who could find an endorsement of religion” or “whether some people may be offended by the display ....” Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753, 779 (1995). Instead, the “reasonable observer” is “similar to the reasonable person in tort law, ... a personification of a community idea of reasonable behavior, determined by the [collective] social judgment.” Pinette, 515 U.S. at 779.

The reasonable observer would understand that the Latin cross in the middle of the Seal is a religious symbol. However, “the reasonable observer is more knowledgeable than the uniform passerby.” Freethought, 334 F.3d at 259. Therefore, the reasonable observer is aware that the Seal was adopted as the official seal of Lehigh County in 1944; that the Seal has been displayed in essentially the same format on, among other things, the County flag, County documents and County-owned buildings on a continuous basis since 1944; and that the County used and displayed the Seal without complaint or controversy for a period of 71 years (December 1944 through November 2015). See Freethought, 334 F.3d at 262 (the reasonable observer is “aware of the age and history of the [display]”). See also County of Allegheny v. ACLU, 492 U.S. 573, 630 (1989) (O’Connor, J., concurring) (“[T]he ‘history and ubiquity’ of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.”).

The context in which a religious display appears is another critical factor in applying the endorsement test. Modrovich, 385 F.3d at 402. “[I]t is well-established that the context in which an otherwise religious display appears can change the reasonable observer’s perception of it.” Id. (citation omitted).

In Lynch, the Supreme Court considered whether the display of a crèche violated the Establishment Clause. The crèche included secular objects such as Santa Claus, candy-striped pools, a clown and teddy bear. The Court determined that the crèche, when viewed within the context of the entire display, had the effect of acknowledging religion and not endorsing it. Lynch, 465 U.S. at 692 (O’Connor, J., concurring) (“Although the religious and indeed sectarian significance of the crèche... is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display.”) Cf. Allegheny, 492 U.S. at 598 (where the court determined that a crèche displayed in a county courthouse with no accompanying secular items sent a message to the reasonable observer that the county was endorsing religion).

Here, the article written by Harry D. Hertzog, and published in the August 1946 proceedings of the Lehigh County Historical Society, affords insight into the purpose of the symbols displayed on the Seal. *See Exhibit 3*. According to this article, Hertzog was a Lehigh County Commissioner and the person who designed the Seal.<sup>19</sup> Following the prefatory clause “[s]o that every symbolic significance and so that the Shield of Lehigh County may be understood,” Hertzog provides a description of each symbol and explains each symbol’s

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<sup>19</sup> The Minutes of the Commissioners' meeting held on December 28, 1944, reflect that Harry D. Hertzog was one of the Commissioners who approved the Seal.

significance in the history and culture of Lehigh County.<sup>20</sup> As detailed by Hertzog in the article, the following symbols are displayed on the Seal:

1. Flag of the United States flag.
2. Flag of the Commonwealth of Pennsylvania.
3. The vermilion red heart (emblem of the City of Allentown).
4. An outline of the map of Lehigh County within the vermilion red heart.
5. Two books with the lamp of learning within the outline of the map of Lehigh County.
6. Red buntings.
7. Canary-yellow cross.
8. Old Lehigh County Courthouse.
9. The Liberty Bell.
10. An American bison.
11. Cement silos.
12. Industrial buildings.
13. Barn.
14. Farmlands.
15. Cow.
16. “Lehigh County” appearing within a ribbon.

The average Lehigh County resident may or may not have read Hertzog's article or be aware of the specific purpose he ascribed to each of the symbols displayed on the Seal, but the reasonable observer “is an informed citizen who is more knowledgeable than the average passerby,” and is deemed to know the history of Lehigh County and to know that the Seal has been used by the County in its current form for over 70 years. See Modrovich, 385 F.3d at 407. “With this knowledge base, the observer can glean other relevant facts about the [Seal] and its history from viewing it and its surrounding context.” Id. As a result, although the reasonable observer recognizes the Latin cross as a religious symbol, he or she is also aware that the Latin

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<sup>20</sup> Hertzog's article was written almost two years after the County approved the Seal at the Commissioners' meeting held on December 28, 1944, and the Minutes of this meeting do not provide any insight into whether Hertzog's fellow Commissioners shared the opinion expressed by Hertzog two years later.

cross is displayed along with fifteen secular symbols, each one emblematic of the culture and history of Lehigh County.

Had the Board of Commissioners decided in 2015 to adopt a new official seal, one with a large-canary yellow Latin cross, there is little doubt that the reasonable observer would have perceived this decision as motivated by a sectarian purpose. However, in 2015 the Board of Commissioners refused to remove a Latin cross from a 71-year old Seal. The reasonable observer, aware that the Seal, adorned with a canary-yellow Latin cross, had been displayed on the County flag, County buildings and County documents without complaint or controversy for a period of 71 years, and aware that the canary-yellow Latin cross is displayed along with fifteen secular symbols, each one emblematic of the culture and history of Lehigh County, does not perceive the Board of Commissioners' refusal to remove the Latin cross as motivated by a desire to endorse Christianity, but rather motivated solely by a desire to preserve a well-established symbol of Lehigh County.

The Third Circuit recognized in Freethought that "history by itself may not be sufficient to change an otherwise religious display into something that is not perceived by the reasonable observer as an endorsement of religion," Freethought, 334 F.3d at 266 (citing Allegheny, 492 U.S. at 630 (O'Connor, J., concurring)), but deemed it "highly significant" that there was no record evidence that Chester County had "taken any action involving the plaque since it was erected over 80 years ago." 334 F.3d at 266. Here, while the Seal may have been altered somewhat in order to fit the context in which it was displayed (e.g. in digital form on the Lehigh County website), there is no record evidence to show that the County has ever taken official action to change the Seal, to celebrate the Seal or to draw attention in any way to the Latin cross displayed on the Seal. Given his or her presumed knowledge of this history, the reasonable

observer regards the County's refusal to remove the Latin cross as motivated by a desire to preserve the County's history, rather than a desire to endorse Christianity. See Freethought, 334 F.3d at 266 ("The fact that the County has not taken any action to highlight or celebrate the plaque since it was installed reinforces the view of the reasonable observer that the County Commissioners maintained the plaque to preserve a long standing plaque.").

### **The Lemon Test**

#### **Purpose Prong**

Under Lemon, the challenged government action is unconstitutional if: (1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it fosters an excessive entanglement of government with religion. Lemon, 403 U.S. at 612-13.<sup>21</sup>

The secular purpose prong assesses "whether government's actual purpose is to endorse or disapprove of religion." Indian River, 653 F.3d at 282 (internal quotation marks and citation omitted). The challenged action will survive this prong if the government can articulate "some secular purpose." Freethought, 334 F.3d at 267. This is a "low threshold," and the court must only determine that the legitimate secular purpose articulated by the government is not a "sham." Indian River, 653 F.3d at 283. See also Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987) (courts typically defer to articulation of a secular purpose that is "sincere and not a sham").

In Freethought, Chester County refused in 2001 to remove a Ten Commandments Plaque erected on the façade of the Chester County Courthouse in 1920. The District Court, in assessing the secular purpose prong, focused on the original reasons why Chester County accepted the plaque. The Third Circuit, however, concluded that "the primary focus should be on the events of

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<sup>21</sup> The excessive entanglement prong applies only "where the government involves itself with a religious institution." Weinbaum v. City of Las Cruces, 541 F.3d 1017, 1030 (10<sup>th</sup> Cir. 2008).

2001, when the County refused [to remove the plaque].” Freethought, 334 F.3d at 262. “This is consistent with our view of the ‘endorsement’ test, in which we also focus on the events of 2001 .... It would not make sense for us to focus on the present day effect of the plaque, and yet only consider the original purpose for erecting the Ten Commandments Plaque.” 334 F.3d at 262. See also Modrovich, 385 F.3d at 410; Connellsville, 127 F.Supp. 3d at 313.

One Chester County Commissioner testified in part that the plaque symbolized the “two wing theory of our polity,” and that he believed that the Ten Commandments “have both a secular purpose and a religious origin.” 334 F.3d at 267. A second Chester County Commissioner testified in part: “there’s no doubt that there are a lot of traditions [contributing] to the development of our system of law. The Ten Commandments being one.” 334 F.3d at 267. Recognizing the “relatively low threshold required by the purpose prong,” the Third Circuit found that the Commissioners clearly had articulated a “non-sham” secular purpose for refusing to remove the plaque, and therefore, had satisfied “all that is required under the purpose prong of Lemon.” 334 F.3d at 267.

In the case *sub judice*, the Court must consider the events of 1944, when the County approved the Seal, and the events of 2015, when the County refused to remove the Latin cross from the Seal. See Freethought, 334 F.3d at 262 (“[A]ny inquiry into the County’s purpose would require consideration not only of the County’s original purpose for displaying the plaque in 1920, but also of the commissioner’s purpose for leaving the plaque in place in 2001.... “). However, while the County’s original purpose for including the Latin cross on the Seal in 1944 bears on whether the County has propounded a legitimate purpose for refusing to remove the Latin cross in 2015, the “primary focus” is on the events which occurred in 2015. See Freethought, 334 F.3d at 261 ([A]lthough the County’s original purpose for affixing the plaque

to the façade of the Courthouse would certainly inform the determination of whether the stated purpose for leaving it in place was a sham, we conclude that the primary focus should be on the events of 2001, when the county refused [the request to remove the plaque.].”). See also Modrovich, 385 F.3d at 411 (“our focus is on the motivations of the current county officials who have power over the decision of whether to remove the plaque”).

There are no official County records reflecting the reasons why the Commissioners voted to approve a Seal which included a Latin cross. The Minutes of the Commissioners meeting held on December 28, 1944, indicate only that the Commissioners voted to adopt the depiction of the Seal included in the Minutes. *See Finding of Fact No. 2*. As noted above, the only known document which affords some insight into the purpose of the symbols displayed on the Seal is the article written by Harry D. Hertzog, and published in the August 1946 proceedings of the Lehigh County Historical Society. *See Exhibit 3*. According to this article, Hertzog was a Lehigh County Commissioner and the person who designed the Seal. Hertzog explains, at least from his perspective, the purpose of the Latin cross displayed on the Seal: “Underneath same and in center of Shield appears the huge cross in canary-yellow signifying Christianity and the God-fearing people which are the foundation and backbone of our County.”

Since Hertzog's article was written almost two years after the County approved the Seal at the Commissioners' meeting held on December 28, 1944, and the Minutes of this meeting do not provide any insight into whether Hertzog's fellow Commissioners shared the sentiments expressed by Hertzog two years later, there is no dispositive evidence regarding the County's intent in including the Latin cross in the Seal. However, regardless of the evidentiary value of Hertzog's article, it is hardly surprising that Hertzog characterized the Latin cross as “signifying Christianity,” given that a Latin cross is universally considered a Christian symbol.

While the Court must inform itself of the County's motivation in 1944 for choosing to display a Latin cross in the Seal, the more important question, however, is what motivated the County in 2015 to refuse to accede to FFRF's demand that the County remove the Latin cross from the Seal. The record evidence clearly shows that the County's 2015 decision was motivated solely by a secular purpose.

After the Board of Commissioners learned of FFRF's complaint regarding the Seal, the commissioners met to discuss the complaint and to gather information regarding the history of the Seal. *Osborne Deposition pp. 23-24*. With the exception of one commissioner, the commissioners knew little about the history of the Seal and had to "start from scratch." *Osborne Deposition, p. 24*. While it was not possible to find anyone with first-hand knowledge regarding the adoption of the Seal, *Osborne Deposition, p. 35*, the Lehigh County Department of Law located the August, 1946 Lehigh County Historical Society article and the Minutes of the Commissioners' meeting in which the commissioners adopted the Seal. *Osborne Deposition, p. 44*.

The commissioners met in executive session on three occasions. *Osborne, pp. 21-22*. At one of these meetings the commissioners decided that Lehigh County Solicitor Matthew Sorrentino would prepare a proposed response to FFRF's request that the Latin cross be removed from the Seal, and that they would consider and vote on the response at a public meeting. *Osborne, p. 25*.

Solicitor Sorrentino prepared a letter to FFRF, stating that the County would not remove the Latin cross from the Seal. The commissioners were scheduled to vote on the letter at a public meeting scheduled for March 25, 2105. At an executive session held prior to the scheduled public meeting, the commissioners discussed the letter but did not vote on it, and were aware that



the letter would have to be revised if the letter was not approved at the public meeting. *Osborne*, pp. 25-29.

On March 25, 2015, the commissioners held a public meeting to consider approving the letter prepared by Solicitor Sorrentino. Following a minor change in wording, the commissioners unanimously voted to approve Solicitor Sorrentino's letter. The letter states:

The Lehigh County Board of Commissioners has directed my office to respond to your letters of November 5, 2014 and January 16, 2015. In those letters you contend that the Lehigh County seal violates the Constitution because it has a Latin cross in its center, and therefore contravenes the Establishment Clause. You urged the County to discontinue using the seal and develop a new seal, and requested a written response outlining any steps the County would take to comply with your letter.

The Commissioners have made inquiries with the local Historical Society concerning the history and purpose of the various symbols on the County seal. If you have examined the seal in detail, you will have noted that it contains many different symbols and elements, each with historical significance to Lehigh County. The cross, one of more than a dozen elements, was included to honor the original settlers of Lehigh County who were Christian.

It is the position of the Lehigh County that the presence of the cross on the seal among all the other items of historical significance has the secular purpose of recognizing the history of the County. As such, it does not violate the Establishment Clause. Accordingly, the County is not planning on removing the cross from the seal.

Solicitor Sorrentino's letter embodies the County's position regarding the FFRF's request that the Latin cross be removed from the Seal. *Osborne Deposition*, p. 37. Solicitor Sorrentino's letter explains that because the Seal contains a number of symbols, each referencing items of historical significance in Lehigh County, the inclusion of the Latin cross along with several items of historical significance signifies a secular purpose, rather than a sectarian one. Viewed in this matter, the Latin cross, while obviously symbolic of Christianity, is included in the Seal for the purpose of honoring the original settlers of Lehigh County who were Christian.

Commissioner Osborne stated that the Board of Commissioners relied upon the August 1946 Lehigh County Historical Society article when it decided not to remove the Latin cross from the Seal. *Osborne Deposition, p. 34.* During his deposition, Commissioner Osborne was asked why the County would assert that the purpose of the Latin cross was to “honor the original settlers of Lehigh County who were Christian,” when Hertzog did not use this phrase in his August 1946 Lehigh County Historical Society article. Commissioner Osborne explained that while the phrase “honor the original settlers of Lehigh County who were Christian” was not used in this article, the County’s reason for refusing to remove the Latin cross represents how the Board of Commissioners, as a body, processed and interpreted the author’s description of the symbols displayed on the Seal. After discussing the reasons for including the various symbols on the Seal, the commissioners concluded that the Latin cross was included on the Seal in order to honor the original settlers of Lehigh County who were Christian. *Osborne deposition, pp. 33-34; p. 36.*

Even if the 1944 version of the Board of Commissioners acted with a sectarian purpose when it chose to display a canary-yellow Latin cross in the middle of the Seal, the commissioners elected to serve Lehigh County in 2015 did not view the Latin cross as an endorsement of Christianity, but rather viewed the Latin cross as one of many symbols with significance to the rich history of Lehigh County. As a result, the Court can only conclude from the record evidence that the Board of Commissioners did not intend to endorse Christianity when it chose to keep the Latin cross in the 71-year old Seal.

The record evidence in this case includes correspondence, e-mails and public statements in which residents expressed support on religious grounds for continuing to display the Latin cross in the Seal. There is no record evidence, however, to show that such correspondence, e-

mails and/or public statements had any bearing on the Board of Commissioners' decision to retain the Seal as originally configured. Furthermore, the Third Circuit has rejected the notion that such evidence is relevant to the Court's consideration of Lemon's secular purpose prong:

[W]e are not convinced that statements made by other county officials (such as the court of common pleas judge) or by other county residents through letters are relevant to the Lemon purpose analysis. None of these individuals was the decision-maker for the County with respect to the plaque. Therefore, their motivations are not relevant to the inquiry.

Modrovich, 385 F.3d at 412 (footnote omitted). See also Peck v. Upshur County Board of Education, 155 F.3d 274, 281 (4<sup>th</sup> Cir. 1998) (the court cannot “impute an impermissible purpose to advance religion to an elected official merely because he responds to a religiously motivated constituent request”).

In view of the foregoing, the County has articulated a secular purpose for refusing to remove the Latin cross which is “sincere and not a sham.” See Edwards, 482 U.S. at 586-87. Accordingly, the County has satisfied “all that is required under the purpose prong of Lemon.” See Freethought, 334 F.3d at 267. See also Weinbaum, 541 F.3d at 1031 (citation omitted) (“We will not lightly ‘attribut[e] unconstitutional motives to the government, particularly where we can discern a plausible secular purpose.’”).

#### **Effect Prong**

The primary effect prong requires that “a state’s practice can neither advance, nor inhibit religion.” Indian River, 653 F.3d at 284. The “[primary effect] prong of Lemon is akin, if not identical, to the endorsement test.” Id. at 284. See also Freethought, 334 F.3d at 250 (“effect under the Lemon test is cognate to endorsement”). Therefore, since, as noted above, the reasonable observer would not perceive the County’s refusal to remove the Latin cross from the Seal as an endorsement of religion, the County has satisfied the effect prong of Lemon.

**CONCLUSION**

Had the Board of Commissioners voted in 2015 to adopt an official county seal which displayed a Latin cross, there would be little question that the County was motivated by a sectarian rather than secular purpose, in violation of the Establishment Clause of the First Amendment. But in 2015 the Board of Commissioners was confronted with the accusation that the County was choosing to endorse Christianity by displaying a Latin cross which had been displayed on the Seal for 71 years without complaint or hint of controversy, and without any effort by the County during that time period to celebrate or draw attention to its presence on the Seal. The commissioners made a concerted effort to gain an understanding of the history of the Seal and the purpose of the symbols displayed on it. Concluding that the Latin cross is displayed as a symbol with historical significance rather than as an endorsement of Christianity, and motivated solely by the desire to preserve a well-established symbol of Lehigh County, the Board of Commissioners refused to remove the Latin cross from the Seal.

In view of the foregoing, and since the Court can conclude as a matter of law that the County did not violate the Establishment Clause by refusing to remove the Latin cross from the Seal, the County requests that the Court enter summary judgment on FFRF's claim that the Official Seal of the County of Lehigh violates the Establishment Clause of the First Amendment.

RESPECTFULLY SUBMITTED:

By: *Thomas M. Caffrey*  
Thomas M. Caffrey, Esquire  
Attorney I.D. No. 46558  
515 W. Hamilton Street, Suite 502  
Allentown, PA 18101  
610-391-1800 phone  
610-391-1805 fax

Attorney for Lehigh County

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREEDOM FROM RELIGION FOUNDATION,	:	
INC., ET AL.,	:	
	:	NO. 16-4504-EGS
Plaintiffs,	:	
	:	
v.	:	
	:	
COUNTY OF LEHIGH,	:	
	:	
Defendant.	:	

**CERTIFICATE OF SERVICE**

I certify that on the date set forth below, I did cause a true and correct copy of the foregoing Brief in Support of Defendant Lehigh County’s Motion for Summary Judgment to be filed with the Court’s ECF/PACER electronic filing system, where it was available for immediate viewing and download to the following individuals:

Marcus B. Schneider, Esq.  
Steele Schneider  
428 Forbes Ave., Ste. 700  
Pittsburgh, PA 15219

Date: May 5, 2017

By: Thomas M. Caffrey  
Thomas M. Caffrey, Esquire