

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

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

Plaintiffs,

vs.

THE COUNTY OF LEHIGH,

Defendant.

CIVIL ACTION NO.: 5:16-cv-04504

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Introduction

Lehigh County regularly affixes its official seal adorned by a large Latin cross throughout the community. The Commissioner of Lehigh County who designed the Seal in 1944 placed that “huge, canary-yellow” cross in the middle of the seal to signify Christianity and the “God-fearing people” who he believed made up the “foundation and backbone” of Lehigh County. In the eyes of the Plaintiffs—and the reasonable observer at the heart of this motion—the Latin cross still endorses Christianity today.

As a community member, the reasonable observer would find it difficult to avoid contact with the Seal. A citizen involved in local government would encounter it on the County’s flag outside the Government Center before observing perhaps the largest reproduction of the Seal in the Public Hearing Room where the County’s Commissioners meet. A citizen just passing through his community would confront the Seal on signs for local parks and on the County flag

at the airport and transportation authority. Even the community member who managed to avoid the Seal in its numerous locations would face the certainty of encountering the seal once each year on his property tax bill.

When the Court asks how the reasonable observer would perceive the presence of the Latin cross on the Seal, the original purpose of the Latin cross and its prominence, both on the seal and in the community, will be significant factors in answering that question. These features of the Seal and the Latin cross's preeminence as a symbol of Christianity compel the conclusion that the County Seal represents an unconstitutional endorsement of religion. The County cannot escape this conclusion by focusing on its recent decision to retain the Seal because that decision was based upon and is tainted by the very history that confirms the Seal's Latin cross to be the religious symbol it is.

Factual Background

I. The Lehigh County Seal

On December 28, 1944, Lehigh County adopted the below "Official Shield and Coat of Arms of Lehigh County," which it has used as its official county seal since. Plaintiff's Concise Statement of Material Facts¹ ¶ 1, 4-5.

¹ Plaintiff's Concise Statement of Material Facts is attached as Exhibit "1" to Plaintiff's Brief in Support of Plaintiff's Motion for Summary Judgment. It will be cited as "Pl. CSF."



The County Seal was designed by Mr. Harry D. Hertzog, one of the County Commissioners of Lehigh County who moved for the Seal's adoption at the December 28, 1944 Commissioners' meeting. Pl. CSF ¶ 2, 10. Moreover, Mr. Hertzog, explained to the Lehigh County Historic Society that he included the "huge, canary-yellow" Latin cross on the County Seal to "signify[] Christianity and the God-fearing people which are the foundation and backbone of [Lehigh] County." Pl. CSF ¶¶ 11-12. The County admits the Latin cross is a religious symbol. Pl. CSF ¶¶ 9.

The other symbols on the County Seal relate to various aspects of Lehigh County. Pl. CSF ¶ 14. The building in the foreground of the Latin cross is the old County courthouse. Pl. CSF ¶ 13. According to Mr. Hertzog, the red heart was the emblem of Allentown, the Lehigh

County Seat; the two books with the lamp of learning represent the County education system; the red buntings represent the clothing manufacturing industries of Lehigh County; the bison represents hoof animals protected by the County Preserve; the cement silos represent the cement industry in the County; the other buildings represent the diversified industries of the County; and the agricultural symbolism represents the agricultural industry of the County. Pl. CSF ¶ 14.

A number of slight variations of the County Seal are used throughout the County today. Pl. CSF ¶¶ 16-22. All of the representations include the Latin cross. *Id.* The Seal is used on the County website and on a variety of County documents, including real estate tax paperwork. Pl. CSF ¶ 16, 18. The County Seal is also visible in the Public Hearing Room within the County's Government Center, both in a large format on the wall behind where the County Commissioners sit and on numerous television monitors in the room. Pl. CSF ¶¶ 21-22. The Seal is also located throughout the County on County vehicles, the County Government Center, the County Courthouse, signage of a nature preserve in the County, signage of parks in the County, a previously-operational juvenile detention facility in the County, the Coroner's building, and the prison in the County. Pl. CSF ¶¶ 19-20.

The County Seal is also displayed on the County's flag, which, as shown below, utilizes many colors similar to those on the original print of the Seal. Pl. CSF ¶ 24. Plaintiffs Berry and Winkler believe the Latin cross is particularly noticeable on the flag because of the color scheme. Pl. CSF ¶¶ 66, 73.



The County Flag is displayed in a variety of locations throughout the County, including the Lehigh Valley International Airport, the Work Release Center, a detox center, Cedarbrook Nursing Home, Iron Pigs Stadium, Velodrome, nature preserve, CedarView Apartments, Agricultural Preservation Building, Juvenile Detention facility, Coroner's Building, Government Center, County Courthouse, prison, Lehigh Valley Planning Commission, and Lehigh and Northampton Transportation Authority. Pl. CSF ¶ 25.

II. Freedom From Religion Foundation's Request for Removal and Lehigh County's Retention of the County Seal

Freedom From Religion Foundation (FFRF) sent two letters to the County, one in November 2014 and one in January 2015, raising concerns that the County Seal violates the Establishment Clause because of its inclusion of the Latin cross. Pl. CSF ¶¶ 78-81. In response to FFRF's January 2015 letter, the County contacted the Lehigh County Historical Society about the County Seal and directed its solicitor to do research on the Seal. Pl. CSF ¶¶ 84-85.

On March 25, 2015, the Board of Commissioners of the County voted to retain the Seal in spite of the complaints from FFRF. Pl. CSF ¶¶ 91-93. The County approved a letter to be sent to FFRF, which set forth its response to FFRF's January letter. *Id.* In its letter, the County took the position that the Latin cross was included on the County Seal to "honor the original settlers of Lehigh County who were Christian." Pl. CSF ¶ 86. The County maintains that position today. Pl. CSF ¶ 94.

The County's position is based exclusively upon Mr. Hertzog's statements in the Lehigh Historic Society Proceedings from 1946, in which Mr. Hertzog specifically stated that the cross signified "Christianity and the God-fearing people which are the foundation and backbone of [Lehigh] County." Pl. CSF ¶ 87. The County has not located any other documents to support its position. Pl. CSF ¶ 89. Although the County acknowledges the Historic Society Proceedings upon which it relies to support its position do not state that the Latin cross was included to honor the Christian settlers of Lehigh County, it claims to have "processed the information" contained in the Proceedings to conclude that was the purpose. Pl. CSF ¶¶ 88, 90.

III. Individual Plaintiffs' Direct, Unwelcome Contact with the County Seal

All of the individual Plaintiffs are members of FFRF. Pl. CSF ¶¶ 27, 41, 54, 69. The individual Plaintiffs reside in Lehigh County. Pl. CSF ¶¶ 26, 40, 53, 68. As residents of Lehigh County, all of the Plaintiffs have had contact with the County Seal. Pl. CSF ¶¶ 28-31, 42-45, 53, 56-59, 70-72.² Plaintiff Stephen Meholic has primarily had contact with the County Seal at County Commissioner's meetings. Pl. CSF ¶ 28. Plaintiff David Simpson first encountered the Seal at the County Sheriff's Office securing a carry permit, which he must renew every five

² Plaintiffs' contact with the County Seal is set forth more fully in Plaintiff's Concise Statement of Material Facts. Certain unique aspects of the Plaintiffs' contact are highlighted in this Brief.

years. Pl. CSF ¶ 42. Plaintiff John Berry works in a County building and frequently sees the Seal on County vehicles that service his work building. Pl. CSF ¶ 55-56. Plaintiff Winkler lives near the Lehigh Valley Airport and routinely sees the County Seal as she drives past the airport. Pl. CSF ¶ 72. All of the Plaintiffs have also encountered the County Seal on the County website. Each of the Plaintiffs believes he or she will come into contact with the County Seal in the future. Pl. CSF ¶¶ 32, 42, 52, 60-61, 71-72.

All of the Plaintiffs find their contact with the County Seal to be unwelcome. Pl. CSF ¶¶ 34-36, 46-50, 62-65, 74-77. Plaintiffs Meholic and Simpson are atheists, Plaintiff Berry is a non-practicing Methodist, and Plaintiff Winkler is an anti-theist. Pl. CSF ¶¶ 33, 46, 62, 74. All of the Plaintiffs view the County Seal as promoting Christianity. Pl. CSF ¶¶ 35, 48, 64, 77.

Standard of Review

A motion for summary judgment is governed by Federal Rule of Civil Procedure 56 and is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.” *Foehl v. U.S.*, 238 F.3d 474, 477 (3d Cir. 2001) (citing Fed. R. Civ. P. 56(c)). Cross-motions for summary judgment are subject to the same standards as unilateral motions, and each is handled as a distinct, independent motion. *Doe v. Indian River School Dist.*, 685 F. Supp. 2d 524, 531 (D. Del. 2010) (citing *Rains v. Cascade Indus. Inc.*, 402 F.2d 241, 245 (3d Cir. 1968)). A factual dispute is material if it bears upon an essential element of the claim. *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 210 (3d Cir. 2002). An issue is genuine “if a reasonable jury could find in favor of the nonmoving party” based upon it. *Id.*

Building upon these basic principles, only “those facts ‘that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.’” *DeHart v. Horn*, 390 F.3d 262, 267 (3d Cir. 2004). In other words, “[a] motion for summary judgment will not be defeated by the mere existence of *some* disputed facts, but will be defeated when there is a *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If upon review the facts supporting a claim or defense are “merely colorable” or “not significantly probative,” then a court must grant the summary judgment motion. *Equimark Commercial Fin. Co. v. C.I.T. Fin. Services Corp.*, 812 F.2d 141, 144 (3d Cir. 1987).

Argument

The Court must decide whether the Lehigh County Seal, featuring a large Latin cross as its centerpiece, violates the Establishment Clause of the First Amendment. Although the Third Circuit has not had an opportunity to address the constitutionality of a municipal seal containing an unabashed Christian symbol, the majority of other federal courts reviewing similar seals have found them to be unconstitutional. The obvious religious purpose behind the inclusion of the *preeminent symbol of Christianity* in the Lehigh County seal and the strong message of Christian endorsement that symbol conveys compel the same result here. The County has not pointed to any facts that would secularize the cross and warrant an opposite conclusion.

In resolving this issue, the Court must first confirm Plaintiffs have standing before turning to the application of the Third Circuit’s Establishment Clause jurisprudence to this case. Plaintiffs have amply demonstrated the sort of injury required in Establishment Clause cases to demonstrate standing, and the totality of circumstances surrounding the County Seal reveal that it quite clearly fails to pass muster under the appropriate Establishment Clause analysis. These issues are addressed in turn below.

I. Plaintiffs have standing to seek nominal damages and injunctive and declaratory relief.

Constitutional standing exists where a plaintiff (1) has “suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”

Freedom From Religion Foundation Inc. v. New Kensington Arnold School Dist., 832 F.3d 469, 476 (3d Cir. 2016) (internal quotations omitted) (citing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)).

A plaintiff must demonstrate these requirements are met for each form of relief sought at the outset of the litigation. *Id.* (citation omitted). Standing to seek nominal damages stems from past injury, *id.* at 480, whereas standing to seek injunctive relief exists where a plaintiff shows that he or she is “‘likely to suffer future injury’ from the defendant’s conduct.” *McNair v. Synapse Group Inc.*, 672 F.3d 213, 223 (3d Cir. 2012) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

The Third Circuit recently clarified that an Establishment Clause plaintiff in this Circuit need only demonstrate direct, unwelcome contact with an allegedly offending display to have standing. *New Kensington*, 832 F.3d at 479. This direct, unwelcome contact with an allegedly offending display need not be frequent, and a plaintiff need not alter his or her conduct to avoid the contact in order to have standing. *Id.* In *New Kensington*, the court found the individual plaintiff’s statements that the Ten Commandments monument at issue in that case caused her to feel like an outsider as an atheist and made her stomach turn sufficient to demonstrate that her contact with the monument was unwelcome. *Id.*

Turning to this case, with the understanding that direct, unwelcome contact constitutes a constitutional injury in fact, Plaintiffs must demonstrate *past* direct, unwelcome contact with the Lehigh County Seal to have standing for their claims for nominal damages, and *likely future* direct, unwelcome contact with the County Seal to have standing for their claims for prospective injunctive relief. *See id.* at 480-81.

Each of the individual Plaintiffs has demonstrated past and likely future contact with the Lehigh County Seal. Plaintiffs have all had contact with the County Seal on the County website, and each of the Plaintiffs has had other unique contact with the seal throughout the Lehigh County community. As members of the community and given the prominence of the County Seal throughout the County, Plaintiffs will continue to have contact with the County Seal in the future. At a minimum, because the County Seal is used on County real estate tax documents and all Plaintiffs reside in Lehigh County, each of the Plaintiffs will confront the County Seal when they receive property tax bills each year.

The Plaintiffs have also demonstrated that their contact with the County Seal has been and continues to be unwelcome. The Christian endorsement each of the Plaintiffs perceives from the presence of the Latin cross on the County Seal conflicts with the individual view of each Plaintiff. All of the Plaintiffs object to this perceived endorsement of Christianity by Lehigh County.

The Plaintiffs' testimony of past and likely future direct, unwelcome contact with the Lehigh County Seal provides standing for each of the individual Plaintiffs to seek retrospective relief, in the form of nominal damages, and prospective relief, in the form of a declaration that the Lehigh County Seal is unconstitutional and a permanent injunction enjoining the continued use of the Seal.

FFRF also has organizational standing to bring suit. Where members of an organization have individual standing, the organization itself has standing. *ACLU-NJ v. Twp. of Wall*, 246 F.3d 258, 261 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476 n.14 (1982)). Each of the individual Plaintiffs provided testimony of active membership with FFRF. Therefore, FFRF has standing based upon the standing of each of the individual Plaintiffs.

II. Lehigh County’s Seal violates the Establishment Clause.

As a bulwark against the potential abuse of governmental power, the Establishment Clause prohibits the government from “promoting or affiliating itself with any religious doctrine or organization, discriminating among persons on the basis of their religious beliefs and practices, delegating a governmental power to religious institution, and involving itself too deeply in such an institution’s affairs.” *Doe v. Indian River School Dist.*, 653 F.3d 256, 269 (3d Cir. 2011) (quotations and citations omitted). The Clause extends the same prohibition to state governments through the Fourteenth Amendment. *Id.* (citing *Borden v. Sch. Dist. of Twp. East Brunswick*, 523 F.3d 153, 175 (3d Cir. 2008)).

The first step in analyzing whether a government has run afoul of the Establishment Clause is determining the appropriate test or framework to apply. *Freethought Soc. of Greater Philadelphia v. Chester County*, 334 F.3d 247, 256 (3d Cir. 2003). Although Establishment Clause jurisprudence is marred by frequent discussion surrounding the complexities of this task, other circuits have consistently applied the *Lemon*³ and “endorsement”⁴ tests in cases involving

³ The *Lemon* test arose out of the Supreme Court’s decision in *Lemon v. Kurtzman*. 408 U.S. 602-612-13 (1971).

⁴ The “endorsement” test is found in Justice O’Connor’s concurrence in *Lynch v. Donnelly*. 465 U.S. 668, 692 (1984) (O’Connor, J., concurring)

challenges to local government seals. *Harris v. City of Zion, Lake Cty., Ill.*, 927 F.3d 1401, 1411 (7th Cir. 1991); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1254-55 (9th Cir. 2007); *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1030 (10th Cir. 2008). Moreover, even though the Third Circuit has not had occasion to consider the constitutionality of a county seal, it has consistently applied the *Lemon* and “endorsement” tests when reviewing government conduct for Establishment Clause violations. *See Freethought*, 334 F.3d at 261 (applying both tests); *Modrovich v. Allegheny County, Pa.*, 385 F.3d 397, 406-13 (same); *Indian River*, 653 F.3d at 282-83 (examining Third Circuit cases and electing to apply both tests); *Freedom From Religion Foundation v. Connellsville Area School Dist.*, 127 F.Supp.3d 283, 301-02, 311 (W.D. Pa. Aug. 28, 2015) (applying *Lemon* as modified by the endorsement test after concluding the Third Circuit has done so absent “clear guidance from the Supreme Court compelling it to do otherwise”). Therefore, this Honorable Court should also analyze the Lehigh County Seal under the Third Circuit framework of *Lemon* as modified by the endorsement test.

In the Third Circuit, the Court has often combined parts of *Lemon* with its analysis under the endorsement test and vice versa. *See, e.g., Modrovich*, 385 F.3d at 404, 412 (concluding application of endorsement test encompassed analysis under *Lemon*); *Indian River*, 653 F.3d at 290 (concluding application of *Lemon* encompassed analysis under endorsement test). *Lemon* provides that “the challenged action is unconstitutional if (1) it lacks a secular purpose, (2) its primary effect is to either advance or inhibit religion, or (3) it fosters an excessive entanglement with religion.” *Indian River*, 653 F.3d at 283 (citing *Modrovich*, 385 F.3d at 401). The endorsement test prohibits government practices from having “the effect of communicating a message of government endorsement or disapproval of religion.” *Id.* at 282 (citing *Lynch*, 465 U.S. at 692). When both tests are applied, the Third Circuit has consistently found

indistinguishable overlap between the (second) “effect” prong of *Lemon* and the endorsement test analysis. *Id.* (citing *American Civil Liberties Union of N.J. v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1486 (3d Cir. 1996)). In display cases, the Third Circuit has also disposed of the (third) “excessive entanglement” prong of *Lemon* in the combined endorsement/effect analysis. *See Modrovich*, 385 F.3d at 412 (the “effect and entanglement prongs of *Lemon* are encompassed by the endorsement test”); *Freethought*, 334 F.3d at 258 n.8 (noting that the entanglement prong is “an aspect of the inquiry into the effect”) (internal quotations and citation omitted).⁵ Therefore, the application of “*Lemon* as modified by the endorsement test” consists of analysis under the (first) purpose prong of *Lemon* and a combined analysis of *Lemon*’s effect prong and the endorsement test. *Id.*

Both the purpose prong and the combined endorsement/effect test assess the challenged government action from the perspectives of impartial observers. *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005) (“The eyes that look to purpose belong to an objective observer”) (internal quotations and citations omitted); *Indian River*, 653 F.3d at 282 (endorsement test analysis adopts the view of a “reasonable observer”). The objective observer considering purpose looks to “the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act.” *McCreary*, 545 U.S. at 862 (internal quotations and citations omitted). The reasonable observer evaluating endorsement and effect is “familiar with the history and context of the display.”

⁵ *Indian River*’s separate analysis of the excessive entanglement prong can be chalked up to the fact that it was a case involving prayer, where the risks of institutional entanglement and tangible benefits to a certain religion are more pronounced. *See Indian River*, 653 F.3d at 288 (noting prayer as a “hallmark of state involvement” in religion).

Indian River, 653 F.3d at 282. Both observers would find the inclusion of the Latin cross in the Lehigh County Seal unconstitutional.

A. The purpose of Lehigh County’s Seal is to endorse Christianity.

The secular purpose prong of *Lemon* asks whether the “government’s actual purpose is to endorse or disapprove religion.” *Id.* at 283 (quotations and citation omitted). In order to survive a challenge, the government must point to some secular purpose. *Id.* (citing *Freethought*, 334 F.3d at 262)). Although courts “normally defer” to a government’s “articulation of a secular purpose,” the articulated purpose must be sincere and will be insufficient if it is nothing more than a sham. *Freethought*, 334 F.3d at 262 (citing *Edwards v. Aguillard*, 482 U.S. 578, 586-587 (1987)). Under the secular purpose prong, the Third Circuit analyzes both the original purpose for a challenged government action and the modern purpose associated with any decision to persist in the challenged conduct. *See Freethought*, 334 F.3d at 262.

The evidence surrounding the creation and adoption of the County Seal demonstrates that the original purpose for including the Latin cross on the Seal was to endorse Christianity. The contemporaneous personal statements of Lehigh County Commissioner Hertzog provide the sort of reliable historic information about the origins of the Latin cross on the County Seal that courts so often lack in Establishment Clause cases. In describing the significance of the Latin cross, Mr. Hertzog referenced its central location, size, and bright color, while expressing clearly that the cross signifies “Christianity and the God-fearing people which are the foundation of our County.” Pl. CSF ¶ 12. Commissioner Hertzog provided this information to the Lehigh County Historic Society as not only the County commissioner who moved for the adoption of the County Seal but as the actual designer of the Seal. Hertzog’s own statements inescapably reveal that the

purpose of the Latin cross was to signify Christianity and its presence in the Lehigh County community.

That Mr. Hertzog chose the Latin cross to signify Christianity is unsurprising given the central role the cross plays in Christian tradition. Courts have consistently recognized the Latin cross as indisputably symbolic of Christianity. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1110 (9th Cir. 2011) (surveying the decisions of the circuit courts and finding unanimous agreement with the characterization of the Latin cross as the “preeminent symbol of Christianity”); *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002) *aff’d*, 371 F.3d 543 (9th Cir. 2004) (the Latin cross “is the preeminent symbol of Christianity. It is exclusively a Christian symbol and not a symbol of any other religion.”); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1102 (10th Cir. 2010) (cross memorials “use the preeminent symbol of Christianity”); *Carpenter v. City & Cty. Of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996) (cross “represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ”); *Murray v. City of Austin, Tex.*, 947 F.2d 147, 166 (5th Cir. 1991) (Goldberg, J., dissenting) (“The cross is the paradigmatically Christian symbol . . .”); *Doe ex rel. Doe v. Elmbrook School Dist.*, 687 F.3d 840, 852 (7th Cir. 2012); *Jewish War Veterans of the U.S. v. United States*, 695 F.Supp. 3, 12 (D.D.C. 1988) (“running through” federal court decisions and observing a “single thread: that the Latin cross . . . is a readily identifiable symbol of Christianity”). Because of the symbolic importance of the Latin cross to Christianity, there is every reason to believe Mr. Hertzog’s stated purpose for including the cross in the County Seal.

The inclusion of other secular symbols in the Seal does not detract from Mr. Hertzog’s express purpose of symbolizing Christianity nor does it lessen the influence of the Latin cross to accomplish that purpose. Each of the other elements celebrates aspects of Lehigh County life and

industry, underscoring the message that Lehigh County's Christianity and God-fearing population are equally worthy of celebration. Moreover, given the recognizability of the Latin cross and its prominence on the Seal—in terms of size, location, and color—in comparison with the other elements, it would be reasonable to conclude that the promotion of Christianity was the preeminent purpose of the County Seal.

The County's purpose in retaining the seal in response to Freedom From Religion Foundation's letters is no different than Mr. Hertzog's original purpose. While the County superficially asserts a different purpose for the inclusion of the Latin cross—that it is meant to honor the Christian settlers of Lehigh County—its position is based upon nothing more than Mr. Hertzog's own historical explanation of the Seal. The slightest examination of the County's stated position reveals that it is a self-serving and ultimately unfounded "interpretation" of Mr. Hertzog's stated religious purpose for including the cross. The County does not defend its claimed revision of the purpose for the inclusion of the Latin cross other than to claim it is simply how it "processed the information" contained in Mr. Hertzog's explanation of the Seal's symbols.

The County's attempt to legitimize the cross by putting a modern spin on the original purpose is similar to the efforts undertaken in prior cases dealing with a Christian cross on a municipal seal. The City Council of the City of Zion made a similar claim in *Harris*, and the Seventh Circuit rejected the Council's self-serving claim to a present-day secular purpose. 927 F.2d at 1413-14. The seal at issue in *Harris* also included a Latin cross as one of four symbols on the seal. *Id.* at 1404-05. The reverend who founded the city, designed the seal and presented it to the Zion City Council for approval made clear he had a religious purpose in designing the seal. *Id.* at 1405 (the reverend described the seal as signifying God's approval of all things on which

the seal would be placed and conveying that the officers of the city were God's ministers). After the seal was challenged, the City Council voted to retain the seal for what it cited as "historical reasons." *Id.* at 1413-14. The court rejected the City Council's argument that this modern purpose vitiated the original purpose, finding the government's stated secular purpose to be nothing more than a sham and holding that "[w]ith such explicit religious design behind the seal's original adoption . . . something more than a perfunctory appeal to history is required to legitimize the underlying purpose of [the] seal." *Id.*

Similarly, Lehigh County's statement of modern purpose in this case is nothing more than a sham. Lehigh County's stated purpose for retaining the seal cannot be detached from the designer's original religious purpose for the inclusion of the cross. While a court must always take account of the history behind a government display when considering whether a stated modern purpose is a sham, *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005), Lehigh County has actually invited such a consideration here by citing Mr. Hertzog's explanation as its sole basis for claiming the Latin cross is designed to honor the Christian settlers of the County. The County's claimed support for its position rings hollow because it disregards Mr. Hertzog's express statements relating to the Latin cross. Like the Seventh Circuit in *Harris*, the Court should reject this sort of perfunctory change-of-position as nothing more than a sham attempt by the County to secularize the Latin cross and improve its position in this litigation.

Even if the County's stated modern purpose for retaining the Latin cross is considered to be genuine, that stated purpose still endorses Christianity. A purpose to honor Christian settlers of the County is not meaningfully different than a purpose to honor Christianity itself, especially in light of the clear history of an original intention to honor Christianity. These sorts of honoring-

community-history defenses have been consistently rejected under the second prong of *Lemon* in seal cases. *See, e.g., Robinson v. City of Edmond*, 68 F.3d at 1232 (characterizing such a defense as an argument that could always “trump” the Establishment Clause if accepted); *Harris*, 927 F.2d at 1415 (holding that the City of Zion could not honor history by retaining a “blatantly sectarian seal” because the symbols “transcend mere commemoration, and effectively endorse or promote the Christian faith”). The Court should take a similar view of the County’s stated purpose for retaining the Latin cross here and strike it down as nothing more than an attempt to “trump” the Establishment Clause and retain a blatantly Christian County Seal by claiming to honor certain Christian individuals instead of Christianity itself.

This analysis under *Lemon*’s purpose prong reveals that both the original and modern purposes for inclusion of the Latin cross are the endorsement of Christianity. Mr. Hertzog’s own statements make clear that he made the decision to include the Latin cross to celebrate Lehigh County’s Christianity. Because the present day Commissioners lack any support for their claim of a different purpose, the Court can reject their stated claims of a different purpose and impute Mr. Hertzog’s purpose to them. But even if the Court credits the County’s claims of a different purpose for retaining the Seal, the County’s own stated reasons still amount to the endorsement and commemoration of Christianity and no other religion. In light of these facts, the Lehigh County Seal is unconstitutional under the purpose prong of *Lemon*.

B. Lehigh County’s Seal has the primary effect of advancing and endorsing religion.

The endorsement test and the “primary effect” prong of *Lemon* ask whether, “under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion.” *Indian River*, 653 F.3d at 284 (citing *American Civil Liberties Union of N.J. v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1486 (3d Cir. 1996)). The reasonable observer

used by the court for this analysis is “more knowledgeable than the uninformed passerby” and is aware of the context and history of the challenged display or action. *Freethought*, 334 F.3d at 259, 262; *Indian River*, 653 F.3d at 284 (citations omitted). Therefore, even though the endorsement test asks whether, the government practice symbolically endorses or disapproves religion regardless of subjective intent, the history surrounding the origination of the government practice is part of the reasonable observer’s perspective and a court’s review. *Indian River*, 653 F.3d at 284-285.

On its face, the Lehigh County Seal endorses Christianity. As discussed above, the Latin cross is the preeminent symbol of Christianity. *See* Section II.B., 14-15. The meaning of the cross as a Christian symbol stems from its connection with the claimed crucifixion and miraculous resurrection of Jesus Christ, “a doctrine at the heart of Christianity. *See Carpenter*, 93 F.3d at 630 (“[T]he Latin cross . . . represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ.”). Although the meaning of the Latin cross is clear, its religious significance in this particular Seal is underscored by the fact that it was specifically chosen by Mr. Hertzog to signify Christianity.

Additionally, the prominence of the Latin cross as compared with the other symbols on the County Seal adds to its endorsement of Christianity. *See Robinson*, 68 F.3d at 1232 n.11 (noting the significance of the visibility of the cross in a seal) (citing *Friedman v. Board of County Comm’rs of Bernalillo County*, 721 F.2d 777, 781 (10th Cir. 1985) (“a one-color depiction in which the seal and especially the cross are not easily discernible might not pass the threshold” of impermissible government action)). In terms of positioning, the Latin cross is the centerpiece of the County Seal. Its prominence as the centerpiece is made more pronounced by its size—the largest of any of the symbols on the Seal—and color— which is often a bright

canary yellow, which stands out prominently against the blue background. These features cannot be viewed as incidental given the fact that Mr. Hertzog’s explanation of the presence of the Latin cross remarked on each of these key features (“in *center* of Shield appears the *huge cross* in *canary-yellow*”).

The presence of the other, less-prominent secular symbols does not detract from the endorsement and celebration of Christianity conveyed by the centrally-placed Latin cross. While the Latin cross is one of several symbolic representations on the County Seal, the context provided by the other symbols makes the endorsement of Christianity conveyed by the Latin cross even more pronounced. As explained by Mr. Hertzog, the other symbols represent aspects of Lehigh County life and community he deemed worthy of celebration, including the County’s education system, industry, farms, flora, and fauna. The central placement of the foremost symbol of Christianity among these pillars of Lehigh County conveys a pronounced importance of Christianity to Lehigh County’s identity.

The Seventh Circuit reached a similar conclusion reviewing the Latin cross’s placement among other symbols representing a community in the Rolling Meadows decision in *Harris*. 927 F.2d at 1403.⁶ The Rolling Meadows seal consisted of a four-leaf clover design containing a tree in one section, a bird in another, a school in the third, and an under-construction church featuring a Latin cross in the fourth. *Id.* In evaluating that seal under the second prong of *Lemon*, the Seventh Circuit found that the non-religious elements did not “neutralize” the obvious religious meaning of the Latin cross, instead holding that the other images were charged with endorsement because of the presence of the cross. *Id.* at 1412. (“To an observer, the Rolling Meadows seal

⁶ *Harris* dealt with two seals: the City of Zion seal (discussed in Section I.A. above) and the Rolling Meadows seal.

expresses the City’s approval of those four pictures of City life—its flora, its schools, its industry and commercial life, and its Christianity.”).

The prominence of the County Seal throughout the County further accentuates the endorsement of Christianity. The County has the power to create and place its seal, and the County Seal reasonably represents government power. *See Harris*, 927 F.2d at 1412 (finding a corporate seal of a municipality to be plainly under government control and symbolic of government power). In the Lehigh County community, this symbol of government power confronts citizens in all aspects of life—on buildings, on vehicles, in local government meeting rooms, on the County website, and on a large number County forms, including real estate tax bills that go out to all property owners in the County. This is not a Seal that was adopted generations ago and long since forgotten—it is present in the everyday life of Lehigh County citizens. The widespread presence of the County Seal makes it more likely that a reasonable observer would see the Seal as an endorsement of religion. *See id.* (remarking that religious seals present more compelling cases than holiday displays because they represent a “permanent statement that is viewed year-round” and because they “bring together church and state in a manner that suggests their alliance”); *American Civil Liberties Union of Ohio, Inc. v. City of Stow*, 29 F.Supp.2d 845, 852 (“use of a religious symbol in a regular, daily context . . . must [be done with] great care that the symbol draws people together, and does not create a wedge among them.”).

When the reasonable observer looks beyond these facial observations to the history of the Seal, the religious endorsement evinced by the Latin cross is not dampened or obscured. The inclusion of the Latin cross in the Seal was expressly aimed at endorsing and celebrating Christianity and the God-fearing people of Lehigh County. This statement of original purpose

has never been disavowed by the County. At most, the County has announced the narrower purpose of celebrating only certain Christians—the settlers of the County. But, the County may not “honor its history by retaining [a] blatantly sectarian seal.” *Harris*, 927 at 1415 (also holding “[n]o appeal to history can abate [a sectarian] message when the images in the seal are abstract symbols of a particular Christian sect”). Since its adoption, the County has never attempted to cite a truly secular purpose for including the Latin cross in the Seal. Even if the County made a broader appeal to the Seal’s longstanding presence, the mere fact that the County Seal now has a 70 year history in the County is insufficient to alter the message of such a significant Christian symbol. *Freethought*, 334 F.3d at 260 n.10 (“Historic artifacts and monuments” do not possess a “presumption of constitutionality,” and “displays that do have the effect of endorsing religion” cannot be” held to be constitutional simply because of their age.”).

On the whole, Lehigh County’s Seal bears a strong resemblance to the municipal seals that have been found to be unconstitutional in other circuits. *Harris*, 927 F.2d at 1412-17; *Robinson*, 68 F.3d at 1232-1234; *Stow*, 29 F.Supp.2d at 851-853; *Friedman*, 781 F.2d 781-783. In particular, *Harris*, *Robinson*, and *Stow* all involved seals containing a Christian cross among other secular symbols. Despite the presence of secular symbols, those cases all found the presence of a Christian cross too much to overcome absent a unique appeal to some secular meaning. *Harris*, 927 F.2d at 1414-145 (finding that abstract, sectarian Christian symbols cannot be diluted by an appeal to commemoration of history); *Robinson*, 68 F.3d at 1232 (rejecting argument that inclusion of secular imagery altered the effect of the unmistakable religious significance of the Latin cross); *Stow*, 29 F.Supp.2d at 851-52 (finding no unique circumstances to take away from the endorsement of Christianity over other religions conveyed by the presence of the cross).

The absence of any secular basis for Lehigh County’s inclusion of the Latin cross distinguishes this case from the two outlier cases where seals containing Christian crosses were found to pass constitutional muster. In *Murray*, the Fifth Circuit upheld the presence of a Christian cross in the seal of the City of Austin because it was used as a part of the Coat of Arms of Stephen F. Austin, the “father of Texas” and the person after whom the town was named. 947 F.2d 147, 149 (5th Cir. 1991). In reaching its decision, the court specifically distinguished the case from *Harris* and *Friedman* and repeatedly referenced the “long-standing” and “unique” history of the use of the cross in the Coat of Arms. *Id.* at 155, 158. Similarly, in *Weinbaum v. City of Las Cruces, N.M.*, the Tenth Circuit upheld the constitutionality of a seal containing Christian crosses only because strong evidence existed to show that the presence of the crosses on the seal was “not religious at all” but was instead related to the name of the town itself (Las Cruces, translating to “The Crosses”), which the court found had a secular origin. 541 F.3d at 1035. In reaching its decision, the Tenth Circuit specifically distinguished the facts of that case from *Robinson*. *Id.* at 1034. The court found the seal in *Robinson* to contain “unabashed Christian symbolism” despite the fact that three of the quadrants on that seal contained secular symbols “apparently representing an important aspect of the history and life of Edmond.” *Id.* at 1034. The court held:

The putative secular explanation of the Christian cross [in *Robinson*] was that it reflected the Christian heritage of the area but that, of course, is not a secular explanation at all. Whether the religious symbolism refers to recent or long-standing values of a city, it is equally religious in nature. The principal issue in *Robinson* was whether the religious component of one quadrant of the seal could be diluted by the secular components of the other three quadrants. We held it could not. So . . . a seal which contains an unambiguous religious symbol could not pass muster under the Establishment Clause.

Id. at 1304-05.

This passage makes clear that even *Weinbaum*, the more recent of the only two cases to ever uphold the use of a Christian cross in a seal, falls short of providing Lehigh County with any support against Plaintiffs' claims. The Lehigh County Seal prominently displays the same "unabashed Christian symbol" that was a part of the seal in *Robinson*—the Latin cross. Additionally, unlike *Weinbaum*, there are no unique facts about the history of the cross in the Lehigh County Seal that would provide a secular reason for its inclusion. In fact, the history of the Seal reveals quite the opposite.

Given the totality of the circumstances surrounding the presence of the Latin cross on the Lehigh County Seal, the reasonable observer would agree with the Plaintiffs that the Latin cross is an unconstitutional endorsement of Christianity by the County. Maintaining a seal with this sort of "unabashed religious imagery" endorses the Christian religion and "sends a message to nonadherents"—like Plaintiffs—"that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (citing *Lynch*, 465 U.S. at 688) (O'Connor, J., concurring). This is precisely the sort of endorsement the Establishment Clause is designed to protect against. Therefore, the County Seal is also unconstitutional under the endorsement/effect analysis.

Conclusion

The presence of the Latin cross on the Lehigh County Seal fails to pass constitutional muster under the purpose prong of *Lemon* and the effect/endorsement test. Just as the County's use of the iconic Christian symbol points to an impermissible religious endorsement, the intent of adding that symbol to the Seal to signify and honor Christianity points to an impermissible

religious purpose. Defendant can point to nothing to overcome these two key attributes of the Seal. In fact, the surrounding circumstances only underscore the impermissibility of the inclusion of the Latin cross. The Lehigh County Seal, like the many similar seals challenged under the Establishment Clause, is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2017, the foregoing **PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic case filing system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

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