No. 17-3581

United States Cout of Appeals for the Third Circuit

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

Plaintiffs-Appellees,

v.

THE COUNTY OF LEHIGH,

Defendant-Appellant.

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

Brief of Appellees

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 17-3581

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL

v.

THE COUNTY OF LEHIGH

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Freedom From Religion Foundation, Inc. (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

s/ Patrick C. Elliott
(Signature of Counsel or Party)

Dated: 04/25/18

Table of Contents

Table of Authorities

Cases

Other Authorities

STATEMENT OF THE ISSUES PRESENTED

(1) Under *Lemon*, the government must show that it has a genuine secular purpose for maintaining a challenged display. Lehigh County claims the Latin cross on its County Seal is included to honor Christian settlers. But the County rests its claim exclusively upon the statement of the Seal's designer that the "huge" cross signifies "Christianity and the God-fearing people which are the foundation and backbone" of Lehigh County. Has Lehigh County met its burden to show it has a genuine secular purpose for maintaining the Latin cross on its Seal?

The parties raised and addressed the application of *Lemon*'s purpose prong in their cross-motions for summary judgment filed with the district court. (ECF No. 20-1 ("Plaintiffs' S.J. Br."), 14-18; ECF No. 19-1 ("County S.J. Br."), 29-35). The Court addressed the issue in its Memorandum Opinion. App. 25-27.

(2) If a reasonable observer would perceive a government display as favoring religion, it is unconstitutional under this Court's *Lemon*-endorsement test. Lehigh County maintains a seal featuring a large, centrally-located Latin cross and regularly places the seal throughout the County on government buildings, County documents, and its website. Would a reasonable observer conclude the Lehigh County Seal favors Christianity?

The parties raised and addressed the application of the *Lemon*-endorsement test in their cross-motions for summary judgment filed with the district court. (ECF

No. 20-1, 18-24; ECF No. 19-1, 35). The Court addressed the issue in its Memorandum Opinion. App. 27-29.

(3) This Court has consistently evaluated Establishment Clause challenges under its *Lemon*-endorsement test and may only abandon this approach if conflicting Supreme Court precedent exists. The Supreme Court has never abandoned the *Lemon* and endorsement tests—which are grounded upon more than 70 years of Establishment Clause jurisprudence. Can the Court depart from its long-established *Lemon*-endorsement test in the absence of intervening cases calling that framework into question?

Before the district court, the parties agreed that *Lemon*-endorsement is the test that applies to Plaintiffs' Establishment Clause challenge to the Lehigh County Seal. (ECF No. 20-1, 12; ECF No. 19-1, 21). Because the County's argument that *Lemon*-endorsement does not apply is being raised for the first time on appeal, it was not considered by the district court.

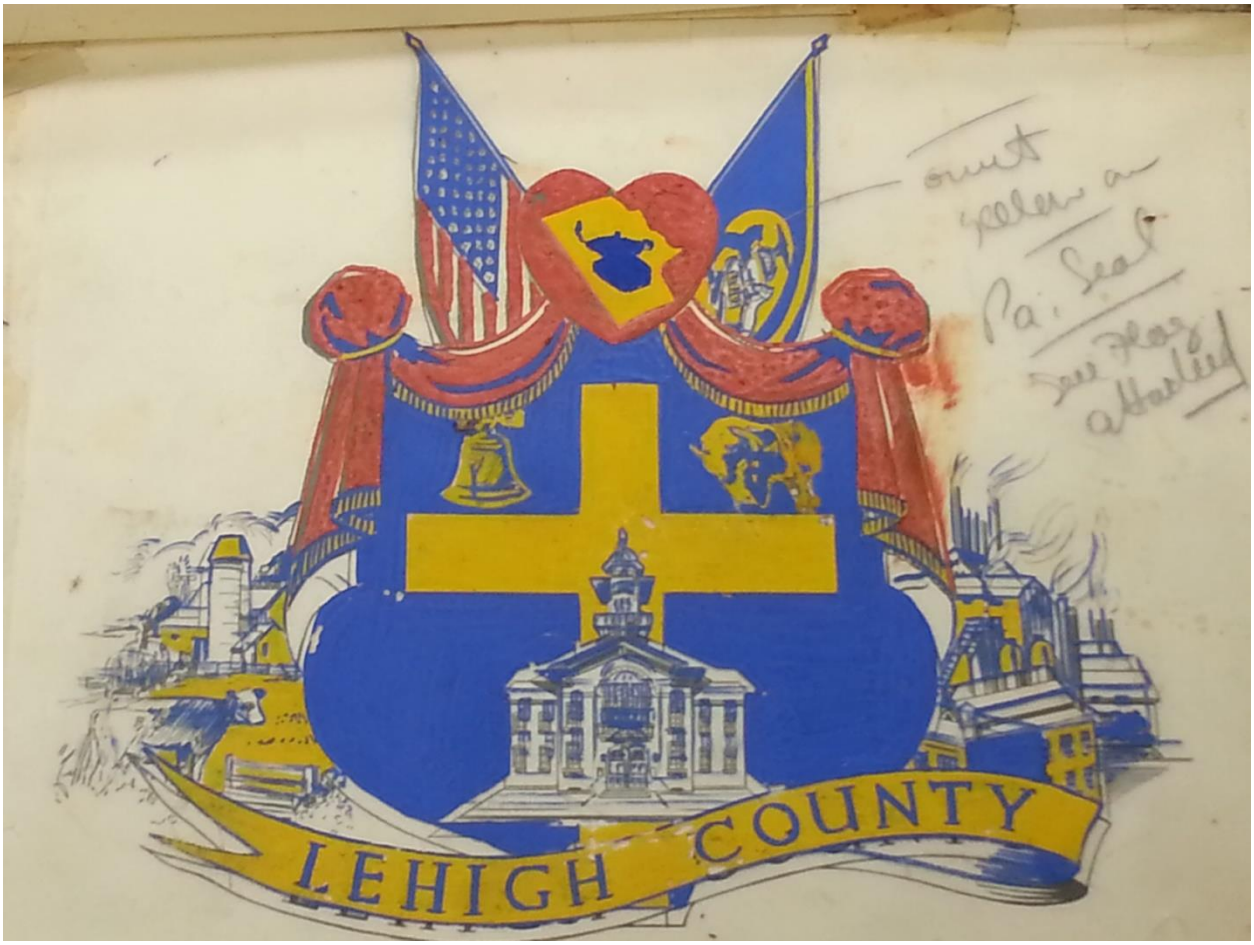
STATEMENT OF THE CASE

General Background

Plaintiffs-Appellees Stephen Meholic David Simpson, John Berry, Candace Winkler (collectively the "Individual Plaintiffs"), and Freedom From Religion Foundation ("FFRF") challenge the Lehigh County Seal under the Establishment Clause of the First Amendment. Individual Plaintiffs are citizens of Lehigh County

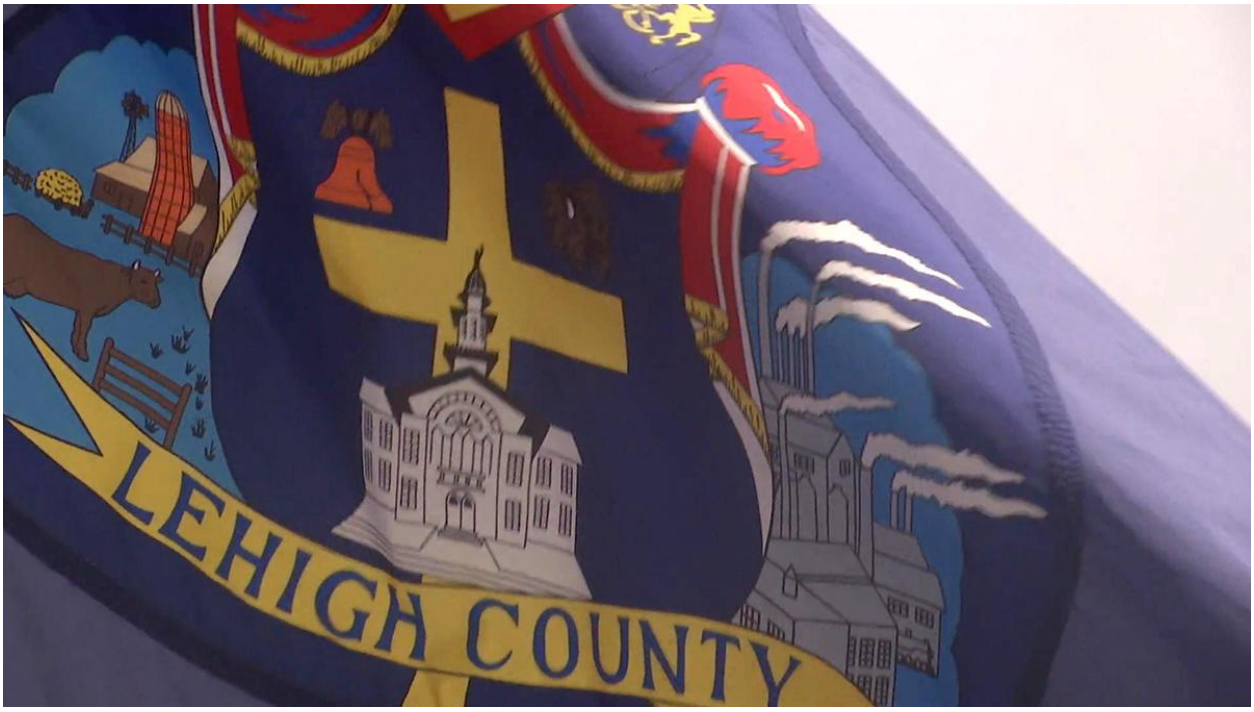
and members of FFRF. App. 153, 161 (Stephen Meholic Deposition, 4:8-10, 12:10-12); 180, 182 (David Simpson Deposition, 4:8-9, 6:1-3); 204, 207 (John Berry Deposition, 4:21-22, 7:8-10); 117, 119 (Candace Winkler Deposition 4:9-13, 6:18-20). As citizens of the County, Individual Plaintiffs encounter the County Seal in a number of different settings.

The Seal was originally adopted in 1944. App. 94. The original design featured bright colors of red, blue, and yellow. App. 97.



At the time of the Seal's adoption, the County also agreed to enter into a contract for the purchase of a county flag that would include a reproduction of the

County Seal. App. 95. The present-day County flag uses a multi-colored version of the County Seal featuring the same primary colors as the original Seal.



Response to Lehigh County's Statement of the Case

Much of the County's statement of the case raises new facts that were not part of the record before the district court. As discussed in Section IV of the Argument below, these new facts should be disregarded.

The County omits several material facts from its discussion of the facts actually before the district court. Moreover, many facts discussed by the County require clarification, correction, or expansion. These factual matters are addressed below.

I. Commissioner Hertzog included the Latin cross on the Lehigh County Seal to signify Christianity.

In the 1946 Lehigh Historic Society article, Commissioner Hertzog explained the inclusion of the Latin cross as follows:

> 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.

App. 99.[1]

II. The County's position as to the meaning of the Latin cross on the Lehigh County Seal rests solely upon Commissioner Hertzog's statements.

In its March 25, 2015 letter written in response to FFRF's request that the Latin cross be removed from the County Seal, 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." App. 310. The County maintains this position today. App. 279 (Rule 30(b)(6) Deposition of County Representative ("County Dep.") 46:12-21).

The County's position is based exclusively upon Commissioner Hertzog's statements in the 1946 Lehigh Historic Society article. App. 78 (Answer to

[1] This statement bears emphasis given the way in which the County has misrepresented Commissioner Hertzog's comments. County Brief, 32 (omitting entirely Hertzog's reference to Christianity and changing the tense of Commissioner Hertzog's statements regarding the god-fearing people who he stated *are* the backbone of the County).

Request for Production of Documents No. 17[2]); App. 266-67 (County Dep. 33:9-34:14). Yet the County acknowledged Commissioner Hertzog did not state that the Latin cross was included to honor the Christian settlers of Lehigh County. App. 266-67 (County Dep. 33:9-34:14). The County explains its reinterpretation of the commissioner's statements by simply stating that it is the way in which the County "processed the [article's] information." *Id.*

III. The Lehigh County Seal is widely placed throughout Lehigh County.

The County has placed the Seal in a variety of settings around the County, including on County vehicles (App. 103); County buildings including the Government Center (App. 104-05), Courthouse, former juvenile detention facility, Coroner's building, and prison; and signage of County parks. App. 74. The County flag containing the Seal is displayed at the Lehigh Valley International Airport, the Work Release Center, a detox center, Cedarbrook Nursing Home, the Iron Pigs Stadium, the Velodrome, a nature preserve, CedarView Apartments, the Agricultural Preservation building, a juvenile detention facility, the Coroner's building, the Government Center, the County Courthouse, the County prison, the

[2] Plaintiffs' Request for Production of Documents No. 17 sought "all documents that in any way support the contention that the cross on the seal was included to honor the original settlers of Lehigh County, who were Christian.

Lehigh Valley Planning Commission building, and the Lehigh and Northampton Transportation Authority building. App. 74-75.

Within the County's Government Center building, the Seal is visible in the County's Public Hearing Room (where the Board of Commissioners holds its public meetings). App. 44, 58 (¶ 26); 106-07 (images of seal). The room features a Seal measuring several feet in diameter. *Id.* During Commissioners' meetings, the Seal is also displayed on several television monitors hanging in the room. App. 155 (Meholic Dep. 6:8-25).

The Seal is also used on the County website and on a variety of official County documents, including real estate tax paperwork. App. 74. The version of the Seal used on the website is colored blue, black, and white. App. 112.

IV. Individual Plaintiffs have suffered direct unwelcome contact with the Lehigh County Seal.

Plaintiff Meholic finds the Seal offensive because it does not represent him, and he objects to feeling as though the County is trying to force religion on him. App. 158-59 (9:12-10:1). Plaintiff Meholic has directly encountered the County Seal while attending Commissioners' meetings (both on the wall behind the Commissioners and on the television screens in the room), at the Lehigh Valley Airport, on the county Website, and on County documents. App. 154-158. Plaintiff Meholic will have contact with the Seal in the future because, among other things, he plans to attend future County Commissioners' meetings. App. 158 (Meholic Dep. 9:3-7).

Plaintiff Simpson finds the presence of the Latin cross on his County's Seal to be offensive, and he interprets the presence of the Latin cross on the County Seal as the County's endorsement of Christianity. App. 185, 188 (Simpson Dep. 9:2-10, 12:8-13). Plaintiff Simpson has directly encountered the County Seal on the County website, while attending the Lehigh County Sheriff's Office to obtain a license to carry a firearm, when preparing tax paperwork, and when reporting to the County courthouse for jury duty. App. 183-88. As a property owner in Lehigh County, Plaintiff Simpson will continue to receive tax bills featuring the County Seal. App. 189 (Simpson Dep. 13:8-16).

Plaintiff Berry finds his contact with the County Seal unwelcome because it contains a Christian cross and endorses, accepts, and promotes Christianity. App. 217-18 (Berry Dep. 17:18-21, 18:2-9). Plaintiff Berry has directly encountered the County Seal in the County's public hearing room, on the County website (which he uses for his job), on County flags, on public vehicles that service the building in which he works, and when reporting to the County courthouse for jury duty. App. 210-12, 215. Plaintiff Berry will continue to encounter the Seal because he will have to use the website for work. App. 213 (Berry Dep. 13:10-14).

Plaintiff Winkler is offended by the presence of the Latin cross on the County Seal because she wishes to avoid the Christian church and looks to her government to protect her from a church she wishes to avoid. App. 127-28. Plaintiff Winkler has directly encountered the County Seal on the County website, on real estate tax bills, and on the County flag flown at the Lehigh Valley Airport. App. 122, 129-30. Plaintiff Winkler will continue to encounter the Seal on the County website because she is pursuing a real estate career and uses the website to look up property assessments and tax values. App. 131 (Winkler Dep. 18:1-4).

SUMMARY OF ARGUMENT

The issue before the Court is whether the Lehigh County Seal featuring a large Latin cross in its center violates the Establishment Clause under the Third Circuit's *Lemon*-endorsement test. This is the sole issue presented by both parties

to the district court and the sole issue the district court decided. Yet on appeal, the County argues that a different test applies and contends that the district court erred by applying the very framework the County argued in favor of below.

The reason for the County's improper attempt to switch arguments is clear: under the *Lemon*-endorsement test, the Lehigh County Seal is unconstitutional. The Seal fails the two-part test because it was originally designed to celebrate Christianity and, as the present-day symbol of the Lehigh County government, it has the effect of endorsing Christianity today. The history of the Seal does not supply the reasonable observer, from whose perspective the Court conducts its *Lemon*-endorsement analysis, with anything that would change the message of Christian endorsement conveyed by the inclusion of the religion's preeminent symbol. Nor does the County's modern day attempt to put a secular spin on the inclusion of the Latin cross ring true when considered against the original statements of purpose, which are expressly religious.

The County's introduction of new facts and legal arguments does not change this result. The Court cannot consider these new facts and arguments because they were not raised below. But even if it could, the County has failed to show that any Establishment Clause test or analytical framework other than *Lemon*-endorsement should apply to this case. Where the challenged display consists of an actively-used, present-day symbol of local government containing a Latin-cross that was

originally included to signify Christianity, *Lemon*-endorsement is the appropriate test.

ARGUMENT

I. This Circuit routinely applies *Lemon* and the endorsement test in Establishment Clause cases.

This Court uses *Lemon* and the "endorsement test" to evaluate government action in Establishment Clause cases. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 282-83 (3d Cir. 2011) (applying both tests); *Stratechuk v. Board of Educ., South Orange-Maplewood School Dist.*, 587 F.3d 597, 604-06 (3d Cir. 2009); *Modrovich v. Allegheny County, Pa.*, 385 F.3d 397, 406-13 (3d Cir. 2003). The touchstone for the Court's analysis under these tests "is the principal that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *Stratechuk*, 587 F.3d at 604 (citing *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

The standards for both tests are well known. Under *Lemon*, "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 of government with religion." *Indian River*, 653 F.3d at 283 (internal quotations omitted) (citing *Modrovich*, 385 F.3d at 401 (citation omitted)). Like the "effect" prong of *Lemon*, the endorsement test prohibits government action from having

"the effect of communicating a message of government endorsement or disapproval of religion." *Id.* at 282 (citing *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984)). As this Court observed in *Modrovich*, the endorsement test combines "an objective version of *Lemon*'s 'purpose' prong with its 'effect' prong [and] 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).

This Court has often consolidated aspects of the two tests to streamline their application. Given "the endorsement test and the second *Lemon* prong are essentially the same," *Indian River*, 653 F.3d at 282, the two are often considered in tandem. *See, e.g.*, *id.* at 290 (concluding application of *Lemon*'s second "effect" prong encompassed analysis under endorsement test); *Modrovich*, 385 F.3d at 404, 412 (concluding application of endorsement test encompassed analysis under *Lemon*). In addition, this Court has found *Lemon*'s entanglement prong to be subsumed by the combined effect and endorsement analysis. *See id.* at 412 (the "effect and entanglement prongs of *Lemon* are encompassed by the endorsement test"); *Freethought Soc. of Greater Philadelphia v. Chester County*, 334 F.3d 247, 258 n.8 (3d Cir. 2003) (noting that the entanglement prong is "an aspect of the inquiry into the effect") (internal quotations and citation omitted).

This combined "*Lemon*-endorsement" framework sets up a two-part process for evaluating Establishment Clause challenges. The Court must review the purpose of the challenged display under *Lemon* and the effect of the display under the combined *Lemon* and endorsement test analysis. Both reviews are conducted from the perspective of a reasonable observer. *McCreary*, 545 U.S. at 862 ("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").

II. Under this Circuit's *Lemon*-endorsement approach, the Lehigh County Seal is unconstitutional.

A. Lehigh County acted with the purpose of promoting Christianity when it adopted and retained its Seal.

Lemon's purpose prong asks "whether the government's actual purpose is to endorse or disapprove of religion." *Indian River*, 653 F.3d at 283 (citing *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)). To answer this question, courts in this circuit consider both the original purpose for a display and any present-day purpose for maintaining the display. *Freethought*, 334 F.3d 247 at 261-62. Because the endorsement test focuses on the present-day effect of a display, statements of present-day purpose are particularly important in the Court's overall assessment. The original purpose plays an important role as well: it assists the court in assessing the credibility of a present-day articulation of purpose. *Id. See also*

McCreary, 545 U.S. at 866 (rejecting argument that historic purpose should be disregarded in favor of reviewing only the most recent evidence related to purpose).

Where articulations of present-day purpose are a mere sham, government defendants fail *Lemon*'s purpose prong. *Stratechuk*, 587 F.3d at 604. Even though a government's statement of purpose is generally entitled to some deference, a government faces the hurdle of showing that its stated purpose for maintaining a display is genuine, not a sham, and not merely secondary to a religious objective. *McCreary*, 545 U.S. at 864 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) and *Edwards v. Aguillard*, 482 U.S. 578, 586-87, 590 (1987)). *McCreary* establishes the height of this hurdle and reaffirms the vitality and importance of the purpose prong itself. 545 U.S. at 860-66.

McCreary squarely rejected arguments that *Lemon*'s purpose prong should be minimized or disregarded. The plaintiffs in *McCreary* challenged their county's posting of the Ten Commandments, initially by themselves and then as part of more elaborate displays that were developed by the county after the plaintiffs challenged the initial display. *Id.* at 852-57. The county first argued that *Lemon*'s purpose prong should be abandoned because of the purported difficulty in truly identifying official purpose. *Id.* at 861. But the Court disagreed, emphasizing the importance of a government's purpose and noting that examination of purpose is a

task to which appellate courts are well accustomed. *Id.* Likewise, the Court rejected the County's alternative argument that the purpose prong should be satisfied by *any* identification of secular purpose: "it would be . . . a mistake to infer that a timid standard underlies . . . the purpose enquiry." *Id.* at 865. Where a claim to secular purpose is merely trivial or not worthy of belief, the purpose prong is not satisfied. *Id.* at 865, 865 n.13.

In this case, Lehigh County cannot satisfy its burden under *Lemon*'s purpose prong. Commissioner Hertzog's expressly religious purpose for including the Latin cross on the County Seal casts too large a shadow for the County to overcome. Commissioner Hertzog included the Latin cross to signify Christianity. The County's statement that the cross was included for a different purpose—made for the first time in the face of litigation and based exclusively upon Commissioner Hertzog's statements—is not worthy of belief.

1. Commissioner Hertzog included the Latin cross on the Lehigh County Seal to endorse Christianity.

In the 1946 Lehigh Historical Society article, Commissioner Hertzog clearly stated his purpose for including the County Seal's most prominent symbol: "in *center* of Shield appears the *huge* cross *in canary-yellow* signifying *Christianity* and *the God-fearing people* which *are* the backbone of our County." App. 99 (emphasis added). The Commissioner's comments, made soon after the County's adoption of the Seal, provide the best insight into the Seal's purpose. *See, e.g.*,

McCreary, 545 U.S. at 862 (recognizing that the objective observer used for analyzing government purpose looks to the "traditional external signs that show up in the "text, legislative history, and implementation of the statute or comparable official act) (internal quotations and citations omitted).

Given the central role the Latin cross plays in Christian tradition, Commissioner Hertzog's identified purpose for the cross's inclusion is unsurprising. Courts have consistently recognized the Latin cross as indisputably symbolic of Christianity. *See American Humanist Assoc. v. Maryland-National Park and Planning Commission*, 874 F.3d 195, 206 (4th Cir. 2017) (recognizing the Latin cross as the "preeminent symbol of Christianity") (citing *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004); *Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995); *Gonzales v. N. Twp. of Lake Cty.*, 4 F.3d 1412, 1418 (7th Cir. 1993); *Murray v. City of Austin*, 947 F.2d 147, 149 (5th Cir. 1991); *ACLU v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 (11th Cir. 1983)); *see also Trunk v. City of San Diego*, 629 F.3d 1099, 1110 (9th Cir. 2011) (surveying decisions supporting same). Indeed, before the district court, the County agreed. County S.J. Br., 31 ("a Latin cross is universally considered a Christian symbol"); *see also* Answer of Lehigh County, App. 43, 57 (¶¶19-20) (admitting the same). Because of the undeniable importance of the Latin cross to Christianity, Commissioner Hertzog's religious purpose for including the cross in the County

Seal was likely well understood by his two fellow Commissioners at the time the Seal was adopted.

The inclusion of other secular symbols in the Seal does not detract from Commissioner 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 Christianity and the County's God-fearing population are equally worthy of celebration. Moreover, given the recognizability of the Latin cross in comparison with other elements and its prominence on the Seal—in terms of size, location, and color—Hertzog's goal of Christian promotion stands out above all else.

2. Modern claims of a secular purpose for retaining the Latin cross on the Seal are not worthy of belief.

Against the backdrop of Commissioner Hertzog's statements, the County's present-day claim that the Latin cross is included or maintained for any other reason is not credible. While the County superficially asserts a different purpose for the inclusion of the Latin cross—to honor the Christian settlers of Lehigh County—it admitted during discovery that its position is based exclusively upon Commissioner Hertzog's own historical explanation of the Seal's purpose. App. 78 (¶ 17); App. 266-67 (County Dep. 33:9-34:14). The slightest examination of the County's stated position reveals it to be a self-serving and ultimately unfounded

"reinterpretation" of Commissioner Hertzog's express religious purpose for including the cross.

The Court must assess the believability of the County's present-day purpose claims, and these original statements of the Seal's designer loom large in this analysis. Again, courts in this Circuit typically take account of the original purpose behind a government display when considering whether a stated modern purpose is a sham. *See Freethought*, 334 F.3d at 262. Here, there is additional support for taking Commissioner Hertzog's statements into account: Lehigh County invited this consideration by relying exclusively upon these statements to support its present-day spin on the significance of the Latin cross.

Commissioner Hertzog's statements cannot bear the weight of the County's contemporary reinterpretation. Hertzog made no reference to the settlers of the County. Instead, he stated a purpose of honoring *Christianity*. Moreover, Commissioner Hertzog's reference to the Christian population of the County was a present-tense reference: he referred to the "God-fearing people" who "*are*" the backbone of the County—not a group of settlers who *were* the founders of the County generations prior. Considering Hertzog's actual statements—upon which the County exclusively relies—the Court must reject the County's identified secular purpose as a mere sham designed to improve its position in this litigation.

The Seventh Circuit rejected a similarly self-serving change-of-position in an Establishment Clause challenge to a municipal seal including a Latin cross. *Harris v. City of Zion, Lake Cty., Ill.*, 927 F.3d 1401, 1413-14 (7th Cir. 1991). There, the reverend who founded the city designed the seal and presented it to the Zion City Council for approval. *Id.* at 1405. In doing so, the city's founder made clear he had a religious purpose in designing the seal: he described the seal as (1) signifying God's approval of all things on which the seal would be placed and (2) conveying that the officers of the city were God's ministers. *Id.* After the seal was challenged, the city council voted to retain the seal for what it cited as "historical reasons." *Id.* at 1413-14. Against the backdrop of the statements from the seal's creator, the court rejected the city council's modern purpose as a sham: "[w]ith such explicit religious design behind the seal's original adoption . . . something more than a perfunctory appeal to history is required to legitimatize the underlying purpose of [the] seal." *Id.*

This Court should reach the same conclusion. The County's argument that its present-day stated purpose clears *Lemon*'s purpose hurdle is no more than the argument rejected by the Supreme Court in *McCreary*. The County has effectively asked the Court to take its baseless reinterpretation at face value and find its intent to be secular because it is honoring the County's history—the settlement of the area by Christian settlers. But the Supreme Court has already held that it will not

engage in such a toothless application of *Lemon*'s purpose prong. When the Court follows *McCreary*'s instruction and examines the County's statements, the insincerity of the County's present-day position becomes clear.

The County's argument must also fail because it provided no evidence to the district court to support that Lehigh County was settled by Christians. While the County has attempted to introduce such evidence on appeal, as discussed below, this new evidence cannot be considered. The County's modern reinterpretation of the Seal's purpose asks the Court to not only overlook this lack of evidence but to actually ignore the contradictory evidence of purpose in the record. *Lemon*'s purpose prong is not so meaningless. Given the record in this case, the Court must conclude what any reasonable observer would: the County has a religious purpose for maintaining the County Seal, just as it did when it designed the Seal 70 years ago.

3. Even if the 2015 Commissioners refused to modify the seal to honor Christian settlers, such a purpose violates *Lemon*.

Even if the County's stated modern purpose for retaining the Latin cross is found 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 considering the clear history of an original intent 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*, 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"). This case is no different. The Court should strike down the County's stated purpose for retaining the Latin cross 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 purpose prong analysis reveals that the County's purpose for including the Latin cross on the Seal has always been the same: to promote and endorse Christianity. Commissioner 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 must reject their claim and impute Commissioner 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 cannot honor Christian settlers without endorsing and commemorating Christianity and no other religion. Considering these facts, the Lehigh County Seal is unconstitutional under the purpose prong of *Lemon*.

B. The Lehigh County Seal endorses Christianity.

The endorsement test and *Lemon*'s effect prong together 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)). This analysis begins with a review of the display itself. *See Freethought*, 334 F.3d at 260 (beginning by analyzing whether the plaque itself endorsed religion). The analysis also includes the "context and history" of the challenged display because the reasonable observer used by the court is "more knowledgeable than the uninformed passerby." *Id.*, 334 F.3d at 259, 262; *Indian River*, 653 F.3d at 284 (citations omitted). Even though the endorsement test focuses on whether the display symbolically endorses or disapproves religion from the eyes of a reasonable observer, the history surrounding the origination of the action is part of the reasonable observer's perspective and a court's review. *Indian River*, 653 F.3d at 284-285.

1. The Seal's features and prominence in Lehigh County further its religious endorsement.

a. The Seal's design sends a message of Christian endorsement.

The Seal's most prominent symbol—the Latin cross—unquestionably endorses Christianity. Before the district court, both parties agreed that the Latin cross is the preeminent symbol of Christianity. The meaning of the cross as a

Christian symbol stems from its connection with the crucifixion and miraculous resurrection of Jesus Christ, "a doctrine at the heart of Christianity." *See Carpenter v. City and County of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996) ("[T]he Latin cross . . . represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ."). There is no room to mistake the religious significance of this symbol, and Commissioner Hertzog clearly knew as much when he chose it to signify Christianity.

The prominence of the cross relative to the other symbols on the County Seal adds to its endorsement of Christianity. In terms of positioning, the Latin cross is the centerpiece of the County Seal. Its prominence as the centerpiece is amplified by its size—the largest of any of the symbols on the Seal—and color—a bright canary yellow that stands out prominently against the blue background. These features cannot be viewed as incidental given the fact that Commissioner Hertzog's explanation of the presence of the Latin cross remarked on each of them ("in *center* of Shield appears the *huge cross* in *canary-yellow*"). As other courts of appeals considering government seals under *Lemon* have observed, this prominence weighs in favor of a finding of improper religious endorsement. *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)).

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.[3] 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

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

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 and instead held 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 expresses the City's approval of those four pictures of City life—its flora, its schools, its industry and commercial life, and its Christianity."); *see also Robinson*, 68 F.3d at 1229-1233 (finding city seal containing Latin cross in one quadrant unconstitutional under *Lemon*); *Webb v. City of Republic, Mo.*, 55 F.Supp.2d 994, 998-1001 (W.D. Mo. 1999) (finding city seal containing religious fish symbol in one quadrant unconstitutional under *Lemon*).

b. The prominence of the Seal in the community as a symbol of Lehigh County government furthers the Seal's message of Christian endorsement.

The Lehigh County Seal is prominently placed throughout the County and confronts County citizens in all aspects of life. As citizens travel through the Lehigh County community, they see the Seal displayed on buildings, vehicles, and parks. In some of these locations, the Seal will be represented on the County's official flag. At home, citizens confront the Seal on the County website and when they receive their tax bills. Lehigh County citizens involved in their local

government see the Seal displayed prominently behind the County's commissioners and on each of the several televisions in the meeting room.

Given this widespread use of the Seal, a reasonable citizen would clearly associate the Seal with the Lehigh County government. The Lehigh County Board of Commissioners has the authority to adopt and display the Seal, and the Board actively displays the Seal during its public meetings. There can be no doubt that the Seal is the symbol of Lehigh County 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).

As the widespread symbol of government power, the Seal's ability to affiliate Lehigh County with its Christian endorsement is enhanced. The Seal is *the* symbol of the local government and the one place the government can clearly associate itself with a message to be sent to its citizens. As other courts confronting Establishment Clause challenges to seals have held, this connection must weigh heavily on the Court's endorsement analysis. *See Harris*, 927 F.2d at 1412 (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 (N.D. Ohio 1998) ("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.").

The ongoing use of the Seal and the direct connection between the Lehigh County government and the Seal's message distinguishes this case from *Freethought*. In *Freethought*, a Ten Commandments plaque was placed on *a courthouse*, and for 80 years, the government took no action to "highlight or celebrate" it. Here, the County Seal was adopted as *the one symbol of the government*, and it has been maintained and placed throughout the County to serve its symbolic function for more than 70 years. This distinction between the *Freethought* plaque and the Lehigh County Seal is more striking because the Seal is used on an *ongoing* basis during public meetings. This use unquestionably connects the present-day Lehigh County government and its officials with the Seal's Christian endorsement.

Given the clarity of the Christian endorsement conveyed by the Seal's symbols and the Seal's ongoing use and prominence in the community, the Seal fails the endorsement test when viewed on its face. Thus, to pass master under the *Lemon*-endorsement analysis, the "history and context" of the display must include compelling evidence of a secular message conveyed by the Seal and its centrally-located Latin cross. As discussed below, there exists no such history or context,

and the reasonable observer's perception that the Seal endorses Christianity is only enhanced considering a full review of the Seal's history.

2. The Lehigh County Seal's history and context does nothing to alter its religious endorsement.

The history and context of the Seal dose not dampen or obscure the religious endorsement evinced by the Latin cross. Based upon Commissioner Hertzog's comments, the reasonable observer would know that the Latin cross was originally included in the Seal to celebrate Christianity and the God-fearing people of Lehigh County. The reasonable observer would see that Commissioner Hertzog's comments have never been disavowed by the County; on the contrary, the current Board of Commissioners relied upon Commissioner Hertzog's statements in voting to retain the Seal. The County's attempt to announce a purpose narrower than the seal's designer—to celebrate only *certain* Christians (the County's settlers) as opposed to Christianity itself—does not obscure the religious endorsement conveyed by a Seal that continues to utilize the preeminent symbol of Christianity. *See Harris*, 927 at 1415 (government may not "honor its history by retaining [a] blatantly sectarian seal").

Nor does the mere fact that the County Seal has been in existence for 70 years alter the religious message it conveys. *Freethought* expressly rejected this sort of "presumption of constitutionality argument in reliance upon Justice O'Connor's concurrence in *County of Allegheny v. ACLU*. *Freethought*, 334 F.3d

at 260 n.10. In *Allegheny*, Justice O'Connor explained that otherwise religious endorsements do not survive challenge "by virtue of their historical longevity alone:"

> historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from the scrutiny under the Fourteenth Amendment.

Id. (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 630-31 (1989), *abrogated by Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014)). Guided by this rationale, the Third Circuit held that historic artifacts and monuments do not possess a "presumption of constitutionality," and "displays that do have the effect of endorsing religion are not held to be constitutional simply because of their age." *Freethought*, 334 F.3d at 260 n.10.

Lehigh County's *Lemon* argument does little more than attempt to remake this already-rejected presumption of constitutionality argument. County Brief, 59-62. And even if a mere-passage-of-time argument could be made, the age of a County Seal being actively placed throughout the community is far less significant than the age of a plaque placed in one fixed location on a historic building. The symbol here is not one whose reach has faded due to having a fixed presence in one or a limited number of locations. Its use continues, suggesting to the

reasonable observer that the County continues to adhere to the message of Christian endorsement the seal was originally designed to convey.

III. The Court cannot stray from its *Lemon*-endorsement framework.

The Court must apply its *Lemon*-endorsement framework in this case unless conflicting Supreme Court precedent has intervened. *Karns v. Shanahan*, 879 F.3d 504, 514 (3d Cir. 2018); 3d Cir. I.O.P. 9.1. The two Supreme Court decisions chiefly relied upon by the County to support its argument that the Court should abandon *Lemon*—*Van Orden v. Perry* and *Town of Greece v. Galloway*—fall well short of hitting this mark. *Van Orden* decided a "borderline" case involving a static monument, and *Town of Greece* dealt narrowly with the constitutionality of legislative prayer. Because this case involves a present-day *government seal actively used by the local government*, these cases do not interfere with the Court's obligation to apply the *Lemon*-endorsement framework.

Even if the Court were not bound by its prior *Lemon*-endorsement precedent, it should still apply the test because it is particularly well-suited for handling facts like those presented by this case. As revealed by the application of the *Lemon*-endorsement framework above, the test provides the Court a workable framework for considering the unique facts in this case: (1) Commissioner Hertzog's stated religious purpose and the County's failed attempt to reinterpret that purpose today (*Lemon*'s purpose prong) and (2) the effect of the Seal on a reasonable observer

given its background and widespread use in the County (the combined *Lemon*-endorsement analysis).

Certainly, this framework does a better job of addressing the unique facts of this case than an ambiguous charge for Courts to evaluate whether the Framers would have approved of the practice. If this approach were to be adopted in all Establishment Clause cases—and not just in those cases involving the narrow issue of legislative prayer—courts would face unanswerable historical questions[4] with no framework to guide their analysis. This rudderless approach would roundly ignore the unique facts and circumstances of individual cases, despite the Supreme Court's longstanding recognition of the fact-intensive nature of Establishment Clause application. And—based upon the 30 pages of new "evidence" included in the County's Brief—it would seemingly require appellate judges to become historians.

Such a reeducation of our nation's jurists need not start today. Considering the principles faithfully embodied in the *Lemon*-endorsement framework, its

[4] Edwin Chemerinsky, *Why the Rehnquist Court Is Wrong about the Establishment Clause*, 33 Loyola University Chicago L.J. 221, 223 (2001) (observing the difficulty in using history as a guide for interpretation of the religion clauses) (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring) ("A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons . . . [T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition.")).

suitability for analyzing the issues raised in this case, and the inapplicability of *Van Orden* and *Town of Greece* to this case, the Court should confidently decline the County's invitation to overcomplicate this case. The Court must apply its already-established *Lemon*-endorsement framework to the facts of this case, and as discussed above, it must conclude that the Lehigh County Seal is unconstitutional.

A. *Lemon* is based upon unquestioned bedrocks of Establishment Clause jurisprudence.

Contrary to the County's contentions, *Lemon* is not a lone obstacle that it must overcome—*Lemon* merely enshrined the Supreme Court's analysis from prior Establishment Clause cases into a formal test. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). For instance, in *Schempp*, a case decided well before *Lemon*, the Supreme Court announced an Establishment Clause "test" strikingly similar to *Lemon*:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.

374 U.S. at 222. This test, the Court explained, was based upon the Supreme Court's prior holdings, which consistently held that the Establishment Clause "withdrew all legislative power respecting religious belief or the expression thereof." *Id.* To summarize its discussion, the Court concluded "that to withstand the strictures of the Establishment Clause there must be a

secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* (citing *Everson v. Board of Education*, 330 U.S. 1 (1947); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

This pre-*Lemon* "test" was utilized by the Supreme Court on several occasions. *See Torcaso v. Watkins*, 367 U.S. 488, 489–90 (1961) (finding an unconstitutional purpose and effect in a requirement that public office holders declare a belief in God); *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 243 (1968) (finding the primary purpose and effect of a program loaning textbooks to parochial schools did not violate the Establishment Clause); *Epperson v. State of Ark.*, 393 U.S. 97, 107-08 (1968) (finding that unconstitutional religious reasons were the force behind a law prohibiting the teaching of evolution in schools); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 672-74 (1970) (finding property tax that exempted property used for religious purposes did not have an unconstitutional purpose or primary effect of advancing religion). *Lemon*'s entanglement prong also has its roots in this pre-*Lemon* precedent. *See Walz*, 397 U.S. at 670 (characterizing one purpose of the Religion Clauses as "mark[ing] boundaries to avoid excessive entanglement" between church and state).

These cases demonstrate that *Lemon* is merely the messenger: it formalized a pre-existing analysis grounded upon constitutional principles that underlie the Supreme Court's longstanding Establishment Clause jurisprudence. Against this

backdrop, the County's broad attack on *Lemon* and the principles it seeks to protect must be seen as a challenge to 70 years of Supreme Court Establishment Clause precedent. Mere criticism of *Lemon* by dissenting Justices and legal commentators does not undermine the importance of the purpose and effect of a challenged display, considerations that demonstrate the Lehigh County Seal violates the Establishment Clause whether under the *Lemon* label or otherwise.

B. The Supreme Court has never discarded *Lemon*.

Considering the bedrock principles *Lemon* encapsulates, it should come as no surprise that the County has failed to point to a case expressly abandoning *Lemon*. Rather than discard *Lemon*, where the Supreme Court has encountered facts for which the original *Lemon* test was not perfectly suited, it has adapted or augmented the test, allowing its collective Establishment Clause jurisprudence to better accommodate the wide variety of factual scenarios that can arise in this arena. *See Wallace*, 472 U.S. at 68-76 (O'Connor, J., concurring in the judgment) (setting forth the endorsement test); *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997) (examining entanglement under *Lemon*'s effect prong). This approach makes sense in light of the many decisions that came together to form *Lemon*'s test and the countless cases that have applied some form of that test since.

Van Orden v. Perry and *Town of Greene* do not discard *Lemon*. These cases fall well short of providing the sort of language that would be needed to overrule

Lemon in light of its widespread use in the Establishment Clause arena for more than 40 years. *See Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality opinion) (special justification is required to depart from established precedent where "the principle at issue has become settled through iteration and reiteration over a long period"). Although *Van Orden* and *Town of Greece* were decided without use of *Lemon*, the Supreme Court has previously decided Establishment Clause cases without using *Lemon* and has not hesitated to return to it in the future. *Compare Lee v. Weisman*, 505 U.S. 577 (1992) (striking down prayer at a public school graduation ceremony without using *Lemon*) *with Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (invalidating public school policy permitting student-led, student-initiated prayer at football games under *Lemon*).

C. Lemon is well-suited for the Court's analysis of the constitutionality of the Lehigh County Seal.

For more than three decades, this Court has successfully applied its *Lemon*-endorsement test in the context of Establishment Clause challenges to displays. *See, e.g.*, *ACLU v. Allegheny County*, 842 F.2d 655, 661-63 (3d Cir. 1988) (applying *Lemon* in challenge to displays of crèche and menorah by county); *ACLU v. Schundler*, 104 F.3d 1435 (3d Cir. 1997) (applying *Lemon* and endorsement test in challenge to display of crèche and menorah); *Freethought*, 334 F.3d at 263-68 (applying *Lemon* and endorsement in challenge to Ten Commandments plaque). District courts in this Circuit have done the same—both

before and after *Van Orden* and *Town of Greece*. *See, e.g., Freedom From Religion Foundation v. Connellsville Area Sch. Dist.*, 127 F.Supp.3d 283, 309-10 (W.D. Pa. 2015) (applying *Lemon*-endorsement and rejecting applicability of *Town of Greece* in challenge to Ten Commandments on public school grounds). This longstanding and widespread use of *Lemon*-endorsement has not led to the sort of Establishment Clause crisis warned of by the County and *amici*.

Freethought demonstrates the adequacy of the *Lemon*-endorsement analysis for accommodating the sort of historical concerns underlying the County's argument that a different test should apply. The County itself celebrates *Freethought* for presaging the Supreme Court's analysis in *Van Orden* and *Town of Greece*—but *Freethought* merely applied the *Lemon*-endorsement test.

Freethought's consideration of history and context was not novel, and *Lemon* and the endorsement test have long been interpreted to require the same consideration. Under *Lemon*, courts impute the "history and context" of a challenged practice to the reasonable observer. *See, e.g., McCreary*, 545 U.S. at 866 (citation omitted). While *Freethought*'s ultimate holding does not govern this case—because this case involves an actively-used, present-day seal and not a static monument—its application of *Lemon*-endorsement shows how this task is carried out to account for necessary historical considerations.

The application of *Lemon* by other courts of appeals in the context of

municipal seal challenges further demonstrates the appropriateness of the test for handling Plaintiff's challenge to the Lehigh County Seal. *Lemon* has allowed courts addressing municipal seals to place proper focus on the purpose behind the adoption of religious seals and the power of government symbols to send messages of endorsement. *Harris*, 927 F.3d at 1411 (striking down seal under *Lemon*'s effect prong with focus on seal's power as government symbol); *Robinson*, 68 F.3d at 1226, 1232 (same); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1254-55 (9th Cir. 2007). But it has also allowed for consideration of truly unique histories—quite unlike the general appeal to history by the County in this case—where such particular facts exist. *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1035 (10th Cir. 2008) (applying *Lemon* ("the touchstone for Establishment Clause analysis") to uphold a city seal based upon "*compelling evidence*" establishing that the challenged symbolism was "*not religious at all*") (emphasis added); *Murray*, 947 F.2d at 153-58 (upholding city seal under *Lemon* in reliance upon the secular history of the coat of arms of the family after which the city was named).

Given *Lemon*'s ability to do the job in this case, the County's motivation for straining to push the Court in a different direction becomes clear: under *Lemon*, the Lehigh County Seal is unconstitutional. But dissatisfaction with the result returned by *Lemon*-endorsement is no basis to apply a different test. Not only *should* the Court apply this framework because it is the appropriate test for analyzing the facts

of this case, it *must* apply the *Lemon*-endorsement test because neither *Van Orden* nor *Town of Greece* apply to these facts.

D. *Van Orden*'s "legal judgment" test is inapplicable here.

This case does not present the sort of "borderline case" decided in *Van Orden*. According to Justice Breyer, *Van Orden* was a borderline case because it closely pitted what he considered to be the competing policies of separation (between government and religion) and non-hostility (by the government towards religion). *Van Orden v. Perry*, 545 U.S. 677, 700 (2005). This case is not such a close call: removal of the Lehigh County Seal is vital to maintaining government neutrality and—given the unique circumstances in this case—will not tread near a slippery slope of excessive hostility towards religion.

Again, this case involves an actively-used *government seal* located throughout Lehigh County, not a single static monument located among other monuments on County property. There can hardly be a clearer example of *government* involvement in religious promotion than use of a religious symbol *by the government* on *its official symbol* of its power and authority. *See Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring) (disagreeing with the application of *Lemon* but opining that the permanent erection of a Latin cross on the roof of city hall would violate the Establishment Clause because such an "obtrusive year-round religious display would place the government's weight behind an obvious effort to

proselytize on behalf of a particular religion"). Moreover, because the Lehigh County Seal is still being used by the County today, Justice Breyer's concern that removal of relics of the past can reflect hostility by kicking up dust where no controversy exists is not implicated in this case. *See Van Orden*, 545 U.S. at 704.

This case further differs from *Van Orden* due to the symbol at issue: the Latin cross universally recognized as the symbol of Christianity. While in certain contexts the Ten Commandments has been ascribed a purportedly secular connection to law, few courts, if any, have ascribed a secular meaning to a standalone Latin cross. *See, e.g.*, *Maryland-National Capital*, 874 F.3d at 206-07 (collecting cases discussing the preeminence of the Latin cross as *the* symbol of Christianity and holding that "[o]ne simply cannot ignore the fact that for thousands of years the Latin cross has represented Christianity").

Given these distinguishing features, Justice Breyer's concurrence in *Van Orden* does not support straying from *Lemon* in this case. Justice Breyer made clear that *Van Orden* did not overrule *Lemon*, *Van Orden*, 545 U.S. at 700-03 (referring to *Lemon* as a "useful guidepost" and a "more formal Establishment Clause test"), and that he resorted to "legal judgment" in *Van Orden* only because it was a "borderline case." *Id.* at 700. Because Justice Breyer's controlling concurrence does not conflict with this Court's prior application of the *Lemon*-

endorsement test, it must consider the constitutionality of the Lehigh County Seal under this tried-and-true rubric.

E. *Town of Greece* is inapplicable to this case.

Town of Greece does not apply to this case because its holding is limited to the legislative prayer context.[5] *Town of Greece* merely extended the holding in *Marsh v. Chambers* to the local legislative prayer context. *Town of Greece*, 134 S.Ct. 1811, 1827-28 (2014). *Marsh* established that the tradition of Congressional legislative prayer precluded a finding that prayers to open state legislative sessions violate the Establishment Clause. *Id.* at 1818-19. *Town of Greece* simply applied *Marsh*'s analysis to the legislative prayer practice confronting the Court, finding Greece's practice of opening its monthly town meetings with an invocation by a local clergyman to be a part of the same legislative prayer tradition as identified in *Marsh*. *Id.* at 1824. But just as *Marsh* has not affected Establishment Clause cases

[5] It bears noting that the County did not cite to *Town of Greece* once in its motion for summary judgment below. While the *issue* of the Lehigh County Seal's constitutionality was obviously addressed below, based upon the County's lack of reliance upon *Town of Greece* and the patent inconsistency between its argument below and its appellate argument based upon *Town of Greece*, the Court would be justified in deeming the County's *Town of Greece* argument to have been waived. *See Webb v. City of Philadelphia*, 562 F.3d 256, 259 (3d Cir. 2009) (parties cannot "advance new theories or raise new issues in order to secure a reversal of the lower court's determination") (citing *Union Pac. R.R. Co. v. Greentree Transp. Trucking Co.*, 293 F.3d 120, 126 (3d Cir. 2002) (citations omitted)). But as discussed further in this section, even if the argument is considered, it must be rejected.

outside the legislative prayer context during the 30 plus years since its holding, neither does *Town of Greece*.

Properly understood, the *Town of Greece* holding was narrow and did not create an Establishment Clause test that can be used by courts confronting challenges outside of the legislative prayer context. In fact, *Town of Greece* did not apply an Establishment Clause test at all. Instead, it outlined a two-stage analysis that ultimately assessed whether Greece's prayer policy fell within the legislative prayer exception first recognized by *Marsh*—not whether it violated the Establishment Clause. *Id.* at 1819.

The Court's first stage of analysis did not involve Greece's policy; it asked more generally whether evidence existed to suggest that legislative prayer is permissible under the Establishment Clause. *Id.* at 1818-19. The Court's conclusion at this stage merely followed the Court's reasoning in *Marsh* to hold that legislative prayer has a unique history as a practice accepted by the Framers when the clause was authored. *Id.* Where this sort of history can be shown, the Court concluded, *an Establishment Clause analysis* need not be conducted. *Id.* at 1819.

Instead, at the second stage, the Court asked whether Greece's policy *fit within the legislative prayer tradition*—not whether it violated the Establishment Clause. *Id.* at 1819 (framing the inquiry as whether the Greece practice "fits within

the tradition long followed in Congress and the state legislatures"), 1825 (concluding that the prayers delivered in accordance with Greece's practice "d[id] not fall outside the tradition" the Court previously recognized). Notably, in resolving this issue, the Court invoked a "reasonable observer" to assess whether Greece's policy fit within the legislative prayer tradition. The invocation of this tool, well known in *Lemon* jurisprudence, demonstrates courts' need for some objective standard to evaluate a challenged government action in the Establishment Clause context. But ultimately, the Court's analysis related only to the narrow question considered by the Court at the second stage of its analysis.

Because of this, the Court's analysis in *Town of Greece* is not useful outside the legislative prayer context. The Court merely recited the long-established basis for treating legislative prayer cases differently and reviewed Greece's practice within that framework. Unsurprisingly, several Courts have acknowledged *Town of Greece*'s limitations in the brief time since. *See, e.g.*, *Smith v. Jefferson County Bd. of School Com'rs*, 788 F.3d 580, 588-89 (6th Cir. 2015) (declining to use *Town of Greece*'s "pure historical approach" in the public school setting and instead applying *Lemon* and endorsement test); *Lund v. Rowan County, North Carolina*, 863 F.3d 268, 276 (4th Cir. 2017) (interpreting *Town of Greece* (and *Marsh*) as applicable to the legislative prayer context).

Town of Greece's narrow holding does not apply here. Use of religious symbolism in government seals is not a part of the legislative prayer tradition, and despite the County's improvident attempt to demonstrate otherwise (for the first time on appeal), there is no centuries-old tradition of Christian symbols being used in a seal or symbol for the United States. Indeed, when arguing before the district court, the County effectively acknowledged this fact, admitting that an adoption of the current Lehigh County Seal today would violate the Establishment Clause. County S.J. Br., 28, 36 ("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."). This argument conflicts with the County's new argument under *Town of Greece.* If use of religious symbols in government seals were just like legislative prayer, municipalities nationwide could adopt seals with religious symbols today, just as they can adopt legislative prayer policies. There is simply no Establishment Clause jurisprudence to support a claim that such openly religious action would be permissible. The Court must reject the County's invitation to stretch *Town of Greece* beyond its inherent limits and instead apply its *Lemon*-endorsement analysis. *See Tearpock-Martini v. Borough*, 674 F.App'x 138, 140-42 (3d Cir. 2017) (unpublished opinion after *Town of Greece* applying *Lemon* and

endorsement in Establishment Clause case involving a challenge to local governments erection of a religious sign).

IV. Lehigh County's belated introduction of extra-record evidence does not affect the outcome of this case: the Lehigh County Seal violates this Circuit's *Lemon*-endorsement test.

It is well established that a party may not seek to alter the factual record when appealing a summary judgment decision:

> [A]n appellate court may only review the record as it existed at the time summary judgment was entered. In reviewing a summary judgment order, an appellate court can consider only those papers that were before the trial court. The parties cannot add exhibits, depositions, or affidavits to support their position.

Webb, 562 F.3d at 259 (citations omitted). Yet the County included nearly 30 pages of extra-record evidence in its opening brief (along with a 24-page addendum containing additional new evidence). County Brief, 4-30; Addendum. Because this evidence was not presented to the district court—where Plaintiffs would have had an opportunity to challenge it through discovery—it must be disregarded by this Court of Appeals. But even if the evidence is considered, it does not change the outcome of the Court's *Lemon*-endorsement analysis.

A. The extra-record evidence must be disregarded.

Had the County added the support for its new evidence to the appendix, the Court would be authorized to strike those portions of the appendix including the new evidence. *See Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 862 (3d Cir.

2012) (citation omitted) (striking appendix materials that "could have been, but were not, presented to the [d]istrict [c]ourt"); *see also* Fed. R. App. P. 10(a) (limiting record on appeal to those papers filed with the district court). To avoid a Rule 10 violation, the County attempts to sneak in its support for this new evidence through 74 footnotes in its brief containing citations to everything from century-old books to modern-day websites and newspaper articles. County Brief, 4-30. All of this is done without a single word devoted to explaining why the evidence was not provided to the district court and on what basis this Court may now consider it. The County's effort must meet the same fate as if it had included the materials in the appendix itself: the Court must disregard all of the new evidence not presented to the district court. *See, e.g., Holland v. Simon Prop. Grp. Inc.*, 495 F. App'x 270, 271 (3d Cir. 2012) (refusing to consider matter outside the district court record).

The rules of federal procedure implicated by the County's summary judgment appeal show why the Court must disregard this new evidence. Rule 56 sets out procedures related to the facts and supporting documentation required to file or oppose a summary judgment motion. Fed. R. Civ. P. 56(c)-(h) (requiring, among other things, that evidence in support of or in opposition to summary judgment be admissible under the Federal Rules of Evidence). In this case, Judge Smith's chamber rules require the submission of a numbered concise statement of material facts with record support for each assertion or alleged dispute. Hon.

Edward G. Smith Policies and Procedures II.E.4. While the Federal Rules of Civil Procedure, in combination with local rules and chamber rules, provide a process by which the parties raise and the district court decides evidentiary issues related to motions for summary judgment, the Federal Rules of Appellate Procedure do not.

Rule 37 of the Federal Rules of Civil Procedure also bears upon evidentiary issues often considered by district courts in the summary judgment context. Fed. R. Civ. P. 37(c). Under Rule 37(c), district courts may preclude a party from supporting a motion with evidence that was not identified or produced during discovery. At the district court level, parties often argue for the exclusion of evidence offered to support summary judgment where that evidence was not disclosed or identified during discovery. *See, e.g., Johnson v. Federal Exp. Corp.*, 2014 WL 65761, at *1-2 (M.D. Pa. Jan. 8, 2014) (considering request by plaintiff to exclude evidence relied upon by defendant in support of summary judgment for lack of identification or production during discovery).

Admissibility determinations under Rule 56(c) evidentiary determinations under Rule 37(c) are matters to be resolved by trial courts and reviewed by appellate courts under an abuse of discretion standard. *See Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999) (applying abuse of discretion standard to admissibility determination in summary judgment context) (*see also Gunville v. Walker*, 583 F.3d 979, 985 (7th Cir. 2009) (observing that evidentiary

findings—even in the summary judgment context—are subject to abuse of discretion standard)); *Grider v. Keystone Health Plan Central, Inc.*, 580 F.3d 119, 134 (3d Cir. 2009) (exclusionary sanctions under Rule 37(c) are matters "entrusted to the discretion of the district court" and subject to review for abuse of discretion). Where a party withholds evidence from the district court and seeks to introduce it at the appellate stage, a party deprives the district court of its opportunity to make these determinations and the appellate court from having a district court determination to review. Such conduct makes a mockery of the express rules and standards of review in place for addressing these issues.

The County's conduct in this case creates these very problems. First, because none of the new evidence was produced in discovery, had it been supplied to the district court in support of the County's summary judgment motion, Plaintiffs would have challenged the County's ability to include the evidence. The County's failure to produce the evidence it now relies upon in this appeal is especially problematic because Plaintiffs sought discovery of information the County might use for the very purpose it now seeks to introduce this new evidence. App. 78 (¶ 17) (County's response to Plaintiffs' request seeking all documents upon which the County's interpretation of the meaning of the Latin cross was based), *supra* n.2. Even if the district court would have chosen not to exclude the evidence, Plaintiffs would likely have been given an opportunity to conduct

discovery on the subjects and to offer competing evidence, whether by citation to competing sources or by appropriate expert report.

Second, Plaintiffs would have raised several challenges to the admissibility of the new evidence pursuant to Rule 56(c) and the local requirements related to parties' concise statements of material facts. For instance, the County seeks to establish that Lehigh County locals "look forward each year to Fastnacht Day" through reliance upon a 2018 newspaper article. County Brief, 29 n.69. Clearly, Plaintiffs would have challenged the admissibility of this hearsay evidence to support a contention about the modern-day residents of Lehigh County.

An examination of other new sources of information underscores the danger in accepting this sort of new evidence on appeal where parties and a district court have not had an opportunity to address it. One of the flags referenced by Lehigh County in its Statement of the Case and Addendum is the flag of Rhode Island, which includes the word "hope" and an image of an anchor. County Brief, 7; Addendum, 21. The County asserts that Roger Williams's "experiment in religious freedom has been symbolized on the state seal by an anchor—a Christian symbol of hope deriving from the New Testament's assertion that 'hope' in God's promises is an 'anchor of the soul.'" County Brief, 7. But the County's source of this material—a website (https://www.ri.gov/facts/factsfigures.php)—actually refers to the County's interpretation as merely the "most coherent explanation" of

the use of "hope" on the seal. This claim, in turn, stems from historical notes that were published in 1930 stating that the words and emblems on the seal "were probably inspired" by a biblical phrase in Hebrews. A source that acknowledges that "the most coherent explanation" is something that "probably" happened, is not admissible under any standard. As another example, the source cited by Lehigh County to support its inclusion of the purported image of the flag of Ste. Genevieve, Missouri is merely a website, which appears to be a Maryland store that sells flags. Again, this source would not pass muster under an admissibility challenge.

The prejudice stemming from these problems is enhanced by how significantly this new evidence factors into the County's appellate arguments. The new evidence can broadly be divided into two categories: (1) facts related to religious practices and influences within Lehigh County (County Brief, 24-30) and (2) facts related to the purported nationwide tradition of religious symbols in government seals (County Brief, 4-24). Both categories of new evidence feature prominently in the County's arguments.

- "The seal's inclusion of a cross to recall the county's settlement by religious minorities seeking freedom to live out their beliefs is consistent with the Establishment Clause and does nothing to establish Christianity as an official religion." County Brief, 37.

- "Given the County's history and the Commissioners' deference to that history, this is not a close case." *Id.* at 38.
- The Latin cross simply recalls "the actual influence on Lehigh County of its early Christian settlers." *Id.* at 52.
- The County Commissioners' "decisionmaking process" and "the historical support for their conclusion," are factors that demonstrate its purpose in choosing not to discard the seal. *Id.* at 65.
- "Like legislative prayer, the use of religious imagery on government seals and flags enjoys an 'unambiguous and unbroken history' that extends back to our nation's founding, and even beyond." *Id.* at 52, citing *Town of Greece*, 134 S. Ct. at 1849.[6]

Given the complete failure by the County to offer any basis for its late introduction of this new evidence, upon which it so heavily relies, neither the Plaintiffs nor the Court can be expected to piecemeal every new fact cited by the County in this response brief. In effect, the County has presented a completely new case on appeal by offering previously-unproduced evidence—which was specifically requested in discovery and not produced—to support entirely new

[6] The use of improper new evidence in this context, to support the County's previously-unraised argument that the Seal passes constitutional muster under the *Town of Greece* analysis, is doubly problematic.

legal arguments. Worse yet, the County's new arguments conflict with its prior statements and arguments before the district court. Under these facts, this Court should not hesitate to disregard these new facts and arguments. *Webb*, 562 F.3d at 263 n.4 (refusing to consider "policies and practices of other para-military organizations," which were introduced by amici for the first time on appeal, in case dealing with a challenge to the specific policies of the police department-defendant).

B. The extra-record evidence does not change the outcome of the Court's *Lemon*-endorsement analysis.

The existence of other American government seals containing purportedly religious symbols would not alter Commissioner Hertzog's purpose for including the Latin cross on the Lehigh County or the message of Christian endorsement the Lehigh County Seal conveys today. Nor would the fact that Lehigh County's founders are predominantly Christian alter these *Lemon*-endorsement conclusions. While the Court should not consider the new facts on either subject, even if considered, these histories are insufficient to overcome the compelling evidence unique to the seal at issue in this case.

V. Individual Plaintiffs and FFRF have standing to sue.

The County's argument that Individual Plaintiffs and FFRF lack standing is another new argument raised on appeal. Before the district court, the County did not raise any arguments as to Plaintiffs' lack of standing. While Plaintiffs raised an

affirmative standing argument in their summary judgment brief (ECF No. 20-1, 9-11), the County did not file a response to Plaintiffs' brief to challenge the claims of standing. ECF No. 24 (County's response to Plaintiffs' summary judgment motion, consisting of a two-page response to Plaintiffs' concise statement of facts). Like the County's other new arguments, its standing argument fails as well.

This Circuit recently adopted the "direct, unwelcome contact" standard for individual standing in Establishment Clause display cases. *Freedom From Religion Foundation v. New Kensington Arnold School Dist.*, 832 F.3d 469, 479 (3d Cir. 2016). Under this standard, individuals have standing to bring an Establishment Clause challenge to a government display where they have had direct and unwelcome contact with the display. *Id.* In adopting this standard, the Court observed that plaintiffs who are members of the community where a challenged display is located will have a stronger claim to standing and will have suffered a concrete and particularized grievance where they allege direct, unwelcome contact with the display. *Id.* (citing *Valley Forge Christian Coll. v. Ams. United For Separation of Church & State, Inc.*, 454 U.S. 464, 482-83 (1982).

This holding aligns with the view of the majority of the other courts of appeals that have addressed the issue and does not conflict with prior Third Circuit precedent. *Id.* at 476-77. Although the County argues that *New Kensington*'s holding on standing conflicted with this Court's prior decision in *Ams. United For*

Separation of Church & State, Inc. v. Reagan, 786 F.2d 194 (3d Cir. 1986), *Reagan* did not address standing premised upon direct, unwelcome contact. *Id.* at 200. Instead, the plaintiffs in *Reagan* asserted *stigmatic injury* in connection with congressional funding and diplomatic-recognition actions undertaken with the Vatican. *Id.* at 200-01. This Court found that the alleged stigmatic injuries were insufficient to confer standing because those injuries had only a remote and speculative relationship to the government activities at issue. *Id.* at 201. *New Kensington* is not at odds with this holding: it premised standing on *specific injury* (direct, unwelcome contact) not generalized grievances. *New Kensington*, 832 F.3d at 478-79 (specifically grappling with the issue of conferring standing only where there is something more than "generalized grievances").

Nor does *New Kensington* conflict with anything in *Town of Greece*. *See* County Brief, 42 (quoting *Town of Greece* and arguing that direct, unwelcome contact standing conflicts with *Town of Greece*). *Town of Greece* did not address standing at all. The Court's comment that disagreeable speech does not make an Establishment Clause violation is *substantive* Establishment Clause analysis. *Id.* Indeed, the sentence preceding the quote relied upon by the County makes this clear: "Offense, however, does not *equate to coercion*." *Town of Greece*, 134 S.Ct. at 1827. Clearly, the Court's comments related to the presence or absence of an Establishment Clause *violation*, not a plaintiff's standing to bring a claim. *See*

Felix v. City of Bloomfield, 841 F.3d 848, 854 (10th Cir. 2016) (rejecting the same standing argument the County makes here).

Under the direct, unwelcome contact standard, it is clear Individual Plaintiffs and FFRF have standing. Each of the Individual Plaintiffs has experienced direct, unwelcome contact with the Lehigh County Seal. And each of the Individual Plaintiffs will continue to experience this direct, unwelcome contact in the future because of the County's widespread use of the Seal. Because Individual Plaintiffs have standing, FFRF has organizational standing as well. *See ACLU-NJ v. Wall*, 246 F.3d 258, 261 (3d Cir. 2001).

CONCLUSION

The Court should affirm the district court's opinion finding that the Lehigh County Seal fails both parts of the *Lemon*-endorsement test. The Seal violates *Lemon*'s purpose prong because Commissioner Hertzog's statement regarding the Seal's design leaves no room to doubt the religious purpose that motivated the original design. As nothing more than a reimagining of Commissioner Hertzog's words, the County's modern take on the inclusion of the cross is unavoidably saddled with Commissioner Hertzog's unconstitutional intent. In addition, given the design and present-day use of the Seal, it also fails an endorsement analysis. The Seal's most prominent feature is the Latin cross. This preeminent symbol of Christianity—placed among other images symbolizing the pillars of Lehigh

County's identity—signals the government's approval and celebration of its Christianity. Because the County continues to use the Seal today without ever having disavowed Commissioner Hertzog's statements, a reasonable observer would conclude that the Seal is unconstitutional under both parts of the *Lemon*-endorsement test.

The Court should also disregard the new facts and legal arguments put forward by the County for the first time on appeal. *Lemon*-endorsement is the proper framework for considering the constitutionality of the Lehigh County Seal. As this case demonstrates, the *Lemon*-endorsement test supplies courts with a flexible framework that provides guidelines for considering a wide range of factual situations while respecting the competing interests of separation of government and religion and non-hostility towards religion.

Respectfully submitted,

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COMPLIANCE CERTIFICATIONS

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

1. **My name appears on the brief for Appellants, and I am a member of the bar of the United States Court of Appeals for the Third Circuit.**
2. **Appellants' brief complies with the type volume limitation and contains 12,383 words as counted by Microsoft Word.**
3. **Appellees' brief was filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system on April 25, 2018. Opposing Counsel in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.**
4. **The text of the electronic version of Appellants' brief is identical to the text of the paper copies of the same.**
5. **The virus detection program Malwarebytes Anti-Malware, version 3.4.5.2467, has been run against the final PDF version of Appellants' brief prior to filing, and no virus was detected.**

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

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