

No.17-3581

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

FREEDOM FROM RELIGION FOUNDATION, ET AL.,

Plaintiffs-Appellees,

v.

THE COUNTY OF LEHIGH,

Defendant-Appellant.

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

Brief of Defendant-Appellant Lehigh County

ERIC S. BAXTER
JOSEPH C. DAVIS
DIANA M. VERM
The Becket Fund for
Religious Liberty
1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036
(202) 955-0095
ebaxter@becketlaw.org

Counsel for Defendant-Appellant

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JURISDICTIONAL STATEMENT

The district court had jurisdiction in this case under 28 U.S.C. § 1331, as it raises a federal question under the Constitution and the laws of the United States. This Court has jurisdiction over this timely appeal under 28 U.S.C. § 1291. *See* App. 5-6 (final judgment and permanent injunction dated November 7, 2017); App. 1 (notice of appeal dated November 27, 2017). As explained below, however, this case should be dismissed for lack of subject matter jurisdiction because Plaintiffs lack Article III standing.

STATEMENT OF THE ISSUES

Plaintiffs claim that the County of Lehigh, Pennsylvania, has violated the Establishment Clause by declining to strip an image of a cross from its county seal and flag. The seal and flag were adopted more than 70 years ago, and there has been no controversy about their content until the filing of this lawsuit. Moreover, the cross is just one of more than a dozen images on the seal and flag recalling significant aspects of the County's history, economy, and culture. The issues in this appeal are:

1. Do Plaintiffs have standing to sue when the only injury they have alleged is a sense of personal affront upon seeing an image of a cross on the County's seal and flag?
2. Is Lehigh County violating the Establishment Clause by declining to remove from its seal and flag an image that memorializes the influence of the County's early settlers?

STATEMENT OF RELATED CASES

This case has not been before this court previously. Counsel for Lehigh County is aware of no other case or proceeding challenging the Lehigh County seal.

STATEMENT OF THE CASE

American governments have long used seals and flags to represent the peoples and events that compose their histories—even when aspects of those histories happen to be religious.

This tradition stretches back to the creation of the most prominent American seal: the Great Seal of the United States. On July 4, 1776, just after enacting the Declaration of Independence, the Continental Congress tasked a committee comprising Benjamin Franklin, Thomas Jefferson, and John Adams with designing the new nation’s seal.¹ In response, Jefferson and Franklin both offered proposals featuring overtly religious imagery drawn from the Hebrew Bible: Franklin’s depicted Moses causing the Red Sea to “overwhelm Pharaoh”² and Jefferson’s depicted “the children of Israel in the wilderness, led by a cloud by day and a pillar of fire by night.”³ The idea behind both proposals was the same: Franklin and Jefferson sought to memorialize “the favorite contention of the settlers” of the United States, “that they were a chosen people” like the biblical Israelites.⁴

¹ Richard S. Patterson & Richardson Dougall, *The Eagle and the Shield: A History of the Great Seal of the United States* 6 (1976).

² *Id.* at 12-13.

³ *Id.* at 16.

⁴ Gilbert Chinard, *Thomas Jefferson: The Apostle of Americanism* 86 (2d ed. 1975); see also James H. Hutson, *Religion and the Founding of the American Republic* 51 (1998).

The Great Seal ultimately took a different form. But the adopted (and current) version of the seal also includes religious imagery, featuring an eye of “Providence” under a Latin motto translating as “He (God) has favored our undertakings.”⁵ Fig. 1. And over the centuries, numerous state and local governments have followed the Founders’ lead in including religious elements in their flags and seals to commemorate history and culture and to acknowledge the beliefs that motivated their settlers.

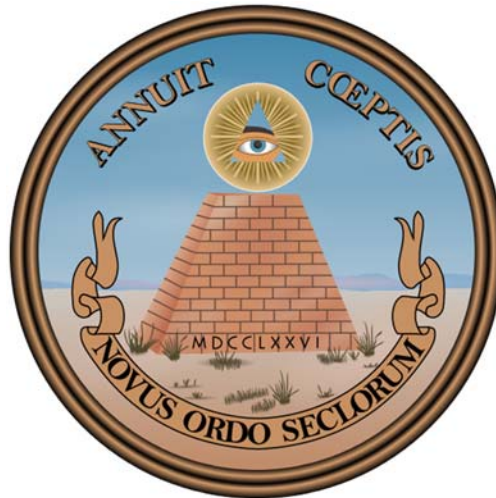


Fig. 1

For instance, much of New England was settled by Puritans, who crossed the Atlantic pursuing the freedom to live according to their understanding of Scripture.⁶ This motivation for the Puritans’ settling in America is reflected on the town

⁵ U.S. Dep’t of State, Bureau of Pub. Affairs, *The Great Seal of the United States* 15 (2003), available at <https://www.state.gov/documents/organization/27807.pdf>.

⁶ Hutson, *supra* note 4, at 4, 7.

seal of Groton, Massachusetts, which depicts the “Holy Bible” under the word “Faith.” Fig. 2.



Fig. 2

And the very names of New England’s cities illustrate the Puritan “vision of America as a new promised land,”⁷ some of them directly asserting this idea (*e.g.*, New Canaan, Connecticut; New Salem, Massachusetts); others nodding to places in the original Promised Land (*e.g.*, Connecticut’s Bethany, Bethel, and Bethlehem); and still others reflecting the Puritans’ belief in the religious nature of their project (*e.g.*, Newark, New Jersey, founded by Connecticut Puritans, is short for “New Ark of the Covenant”⁸).

⁷ Steven G. Calabresi, “A Shining City on a Hill”: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law, 86 B.U. L. Rev. 1335, 1347-48 (2006).

⁸ Charles A. Stansfield, *A Geography of New Jersey: The City in the Garden* 76 (2d ed. 1998).

Rhode Island, too, was founded by a dissenter from the established English church—the Baptist minister Roger Williams, who founded the colony to serve as a “shelter for persons distressed for conscience.”⁹ Since 1664, 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.”¹⁰ Today the anchor appears on Rhode Island’s state flag and seal, with the word “Hope.” Figs. 3, 4.



Fig. 3



Fig. 4

⁹ Hutson, *supra* note 4, at 8.

¹⁰ Hebrews 6:19 (KJV); see also RI.gov, *Origins of the Seal of the State of Rhode Island and Providence Plantations*, <https://www.ri.gov/facts/factsfigures.php>; Peter Murray & Linda Murray, *The Oxford Dictionary of Christian Art & Architecture* 15 (2d ed. 2013).

And Williams's belief in the divine guidance behind his mission is reflected in the name of Rhode Island's capital city, Providence.¹¹

Unlike the Puritan North and Rhode Island, the southern colonies were settled by Anglicans, who established America's first permanent English settlement at Jamestown. But before reaching Jamestown, the colonists landed at Cape Henry, where they planted a wooden cross on the shoreline in gratitude for their successful voyage.¹² That cross—a version of which still stands¹³—is today memorialized on the seal of Virginia's largest city, Virginia Beach. Fig. 5.



Fig. 5

¹¹ George R. Stewart, *American Place-Names: A Concise and Selective Dictionary for the Continental United States of America* 389 (1970).

¹² U.S. Dep't of the Interior, Nat'l Park Serv., *Cape Henry Memorial Cross* (Apr. 6, 2017), <https://www.nps.gov/came/index.htm>.

¹³ *Id.*

Other areas were settled by Catholics, and their flags, seals, and place names reflect as much. Maryland, for instance, was chartered by George Calvert, Lord Baltimore, who was driven to found an American colony by what he viewed as his “sacred duty of finding a refuge for his Roman Catholic brethren.”¹⁴ Today, a version of Calvert’s coat of arms constitutes the Maryland state flag—and reflecting the family’s faith, two of the flag’s quadrants feature a cross.¹⁵ Fig. 6.



Fig. 6

¹⁴ Hutson, *supra* note 4, at 12.

¹⁵ Md. Code, General Provisions, § 7-202(c).

A cross likewise features prominently on the county seal of Maryland's Dorchester County, which was named after a Calvert family friend.¹⁶ Fig. 7. And the state seal of Maryland includes a quote from the version of the Bible used by Catholics of Calvert's day—the Latin Vulgate—expressing hope that “with favor wilt [God] compass us as with a shield.”¹⁷ Fig 8.



Fig. 7



Fig. 8

¹⁶ Maryland.gov, Maryland Manual On-Line: A Guide to Maryland & Its Government, *Dorchester County, Maryland* (Aug. 10, 2017), <http://msa.maryland.gov/msa/mdmanual/36loc/do/html/do.html>.

¹⁷ Maryland.gov, Maryland Manual On-Line: A Guide to Maryland & Its Government, *Maryland State Seal – Great Seal of Maryland* (Oct. 2, 2017), <http://msa.maryland.gov/msa/mdmanual/01glance/html/symbols/reverse.html>.

Louisiana—a French and largely Catholic colony until 1803—also reflects its religious heritage in its state symbols and place names. In the center of Louisiana’s state flag and seal is a “pelican in her piety,” a symbol of Jesus’ self-sacrifice long used to illustrate how “Christians are nourished by the Eucharist.”¹⁸ Figs. 9, 10.



Fig. 9



Fig. 10

During French rule, “the colony’s civil (governmental) boundaries were the same as the church’s ecclesiastical boundaries”;¹⁹ thus, today, Louisiana’s county equivalents are called “parishes” and many are named after saints (*e.g.*, St. Bernard, St.

¹⁸ Murray & Murray, *supra* note 10, at 64-65.

¹⁹ Clare D’Artois Leeper, *Louisiana Place Names: Popular, Unusual, and Forgotten Stories of Towns, Cities, Plantations, Bayous, and Even Some Cemeteries* 3 (2012).

John the Baptist) or Catholic feast days (*e.g.*, Ascension, Assumption).²⁰ And the French Catholic influence extends not just to modern-day Louisiana but throughout the much larger former Louisiana colony, stretching up the Mississippi River Valley. For instance, a major city in Missouri and the capital of Minnesota both bear saints' names (St. Louis; St. Paul); and Ste. Genevieve, Missouri—named for the patron saint of Paris—features a large Latin cross at the center of its flag. Fig. 11.



Fig. 11

Other regions also reflect the influence of Catholic explorers and settlers—but from Spain rather than France. For instance, the state flags of both Alabama and Florida feature a Cross of St. Andrew—so named for the Christian apostle believed

²⁰ *Where Did the Names of Louisiana's 64 Parishes Come From?*, The Times-Picayune, Apr. 3, 2017, http://www.nola.com/travel/index.ssf/2017/03/64_louisiana_parish_names_hist.html.

to have been crucified by the Romans on an X-shaped cross.²¹ Figs. 12, 13. The flags closely resemble the flag the Spanish flew over Florida and coastal Alabama during colonial days—the Burgundian Saltire²²—which was introduced into Spain by the Duke of Burgundy, for whom Andrew was patron saint.²³



Fig. 12



Fig. 13

²¹ Murray & Murray, *supra* note 10, at 16, 136; *see also* Ala. Code § 1-2-5; Fla. Dep't of State, *State Flag* (2018), <http://dos.myflorida.com/florida-facts/florida-state-symbols/state-flag/>.

²² Fla. Dep't of State, *The Burgundian Saltire – 1565-1763*, <http://dos.myflorida.com/florida-facts/florida-state-symbols/state-flag/floridas-historic-flags/national-flags/the-burgundian-saltire-1565-1763/>.

²³ U.S. Dist. Ct. for the Dist. of P.R., Historical Flag Project, *The Cross of Burgundy or St. Andrew Flag (The Flag of the Viceroyalty of New Spain)*, <https://www.prd.uscourts.gov/cross-burgundy-or-st-andrew-flag-flag-viceroyalty-new-spain>.

Even further south, Puerto Rico's coat of arms features an abundance of religious imagery: at its center is a Lamb of God figure surrounded by gold Jerusalem crosses, which sits atop a book with seven seals representing the biblical Book of Revelation, and above a quote from the Latin Vulgate translated "John is his name."²⁴ Fig. 14.



Fig. 14

Both the Lamb of God and the Bible quote are references to the original Spanish name for the island, which survives in the name of its capital city: San Juan Bautista, or St. John the Baptist.²⁵

²⁴ Benjamin F. Shearer & Barbara S. Shearer, *State Names, Seals, Flags, and Symbols: A Historical Guide* 24 (3d ed. 2002).

²⁵ *Id.*; see also Murray & Murray, *supra* note 10, at 301-02.

Much of the West, too, was settled by Spanish Catholics—often led by clergy who built the region’s iconic, cross-topped mission churches.²⁶ Today, numerous government seals in California depict Spanish missions, including the seals of Santa Barbara County (Fig. 15), the City of San Gabriel (Fig. 16), and the City of Santa Clara (Fig. 17).



Fig. 15



Fig. 16



Fig. 17

²⁶ See generally Alfredo Jiménez, *Spanish Missions in the United States: Cultural and Historical Significance*, available at <https://www.nps.gov/subjects/travelspanishmissions/spanish-missions-in-the-united-states-cultural-and-historical-significance.htm>.

Ventura County's seal likewise features a mission, but adds a portrait of St. Junipero Serra, the famous missionary whose statue today is one of California's two contributions to the U.S. Capitol's Statuary Hall.²⁷ Fig. 18.

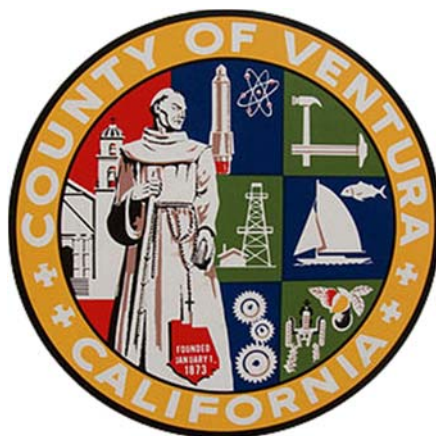


Fig. 18

And—as is clear from place names already listed—states in the formerly Spanish West are blanketed with place names reflecting aspects of Catholicism, from saints (San Francisco, San Diego, San Antonio), to the Eucharist (Sacramento (“Holy Sacrament”), California; Corpus Christi (“Body of Christ”), Texas), to the claim that Christianity is a “Holy Faith” (Santa Fe, New Mexico, short for *La Villa Real de la Santa Fe de San Francisco de Asis* (“The Royal City of the Holy Faith of Saint Francis of Assisi”))²⁸.

²⁷ Architect of the Capitol, *Father Junipero Serra* (Apr. 29, 2016), <https://www.aoc.gov/art/national-statuary-hall-collection/father-junipero-serra>.

²⁸ Encyclopedia Britannica, *Santa Fe, New Mexico, United States*, <https://www.britannica.com/place/Santa-Fe-New-Mexico>.

Utah, by contrast, traces its history to the mid-19th century, when Brigham Young led the Mormons—driven west by religious persecution—into the Salt Lake Valley in search of a place to practice their religion freely. Today, “the year the Mormons came to Utah” (1847) is emblazoned across the state flag,²⁹ and the centerpiece of both the state flag, seal, and nickname (the “Beehive State”) is the beehive—a Mormon symbol representing the community values and industriousness of the early pioneers, and deriving from a passage in the Book of Mormon.³⁰ Figs. 19, 20.



Fig. 19



Fig. 20

Likewise, the state is dotted with city names “culled from the [B]ook of Mormon or honor[ing]” Mormon leaders, including Lehi, Moroni, and Nephi (Book of

²⁹ Utah’s Online Library, *Utah State Flag and Seal*, http://onlinelibrary.utah.gov/research/utah_symbols/flag.html.

³⁰ *The Encyclopedia of Mormonism* (Daniel H. Ludlow, ed.), “Beehive Symbol,” at 99 (1992).

Mormon prophets); Bountiful and Manti (Book of Mormon cities); and Iosepa (Hawaiian rendering of “Joseph,” for Joseph Smith).³¹

Hawaii’s flag also includes religious symbolism reflecting the beliefs of figures important in its history. Since the 18th century, Hawaii’s flag has included a Union Jack in its upper-left corner to signify the friendship between pre-American Hawaii and the British Crown.³² Fig. 21. The Union Jack, in turn, consists of a combination of three crosses—the crosses of the patron saints of England, Scotland, and Ireland (George, Andrew, and Patrick, respectively), representing the unification of the three nations to form a United Kingdom.³³

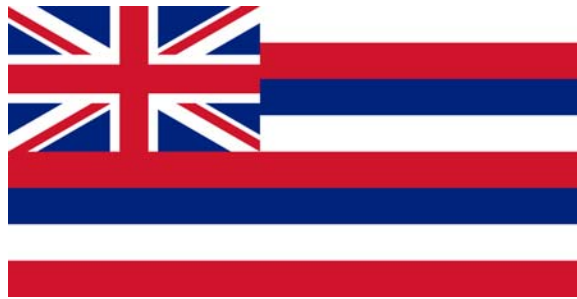


Fig. 21

³¹ Lynn Arave, *Religious Place Names Are Abundant in Utah*, Deseret News (Jan. 13, 2001), <https://www.deseretnews.com/article/818765/Religious-place-names-are-abundant-in-Utah.html>.

³² Chris Bailey, *What’s the Story Behind Hawaii’s Flag?*, Hawai‘i Magazine (Oct. 21, 2008), https://www.hawaiiimagazine.com/blogs/hawaii_today/2008/10/21/is-that-the-flag.

³³ U.S. Dep’t of the Interior, Nat’l Park Serv., *History of the British Flag* (Feb. 26, 2015), <https://www.nps.gov/jame/learn/historyculture/history-of-the-british-flag.htm>.

But American governments have not just recognized the religious faith of their *European* settlers in their official symbolism—many have used the religious iconography of the *original* inhabitants of this country, Native Americans, to convey and memorialize their histories. For example, New Mexico’s state flag depicts the sun symbol of the indigenous Zia people—the Zia’s most important sacred symbol, which signifies the four “sacred obligations” of Zia belief and has been used in religious ceremonies for nearly a millennium.³⁴ Fig. 22.



Fig. 22

Other government symbols memorialize the confluence of European and Native American religious traditions that occurred when Europeans arrived in the New World. For instance, Oklahoma’s flag symbolizes Native American and non-

³⁴ Stephanie B. Turner, *The Case of the Zia: Looking Beyond Trademark Law to Protect Sacred Symbols*, 11 Chi.-Kent J. Intell. Prop. 116, 118 & n.19 (2012).

Native American “Oklahomans united in peace”³⁵ by combining symbols of peace from two different religious traditions: the peace pipe, which is “an object of profound veneration” used in the religious ceremonies of many Native American tribes,³⁶ and the olive branch, a Christian symbol of peace deriving from its role in the Book of Genesis, in which Noah realizes that the flood waters have receded because a dove brings him “a freshly plucked olive leaf.”³⁷ Fig. 23.



Fig. 23

Likewise, the flag of Riverside, California, features the city’s “Raincross Symbol,” “derived from combining a replica of the mass bell used by [Saint] Junipero Serra

³⁵ Cortney Stone, Oklahoma Historical Soc’y, *Symbols of Oklahoma: Appreciating Oklahoma’s Identity*, <http://www.okhistory.org/historycenter/forms/tdsymbols.pdf>.

³⁶ Encyclopedia Britannica, *Sacred Pipe*, <https://www.britannica.com/topic/Sacred-Pipe>.

³⁷ Murray & Murray, *supra* note 10, at 419.

... and the cross to which the Navajo and Central American Indians pray for rain.”³⁸ Fig. 24. And the town seal of Plymouth, Massachusetts, depicts “a shield with a Saint George’s cross on it, in between the arms of which is a scene repeated four times” of Native Americans making offerings.³⁹ Fig. 25.



Fig. 24

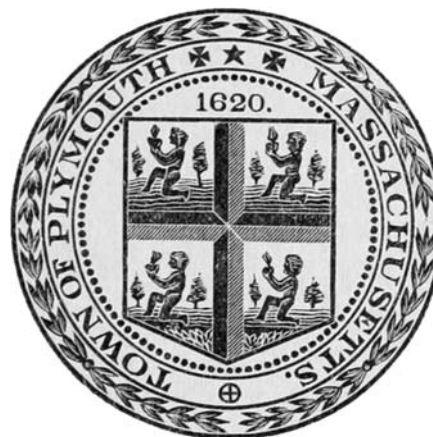


Fig. 25

Many of the religious elements on government symbols already discussed reflect well-known world-historical events, but others are more local in flavor. For instance, Winston-Salem, North Carolina, was created by combining two municipalities—Salem, a religious community founded by German Moravians (who later played a major role in Lehigh County’s history, *see infra*), and Winston, a prosper-

³⁸ City of Riverside, *History of Riverside* (2015), <https://www.riversideca.gov/visiting-aboutriv.asp>.

³⁹ David B. Martucci, *The New England Flag* (1997), <http://www.vexman.net/flags/NEFlag.html>.

ous city built on the tobacco industry.⁴⁰ Reflecting this unique history, Winston-Salem’s current flag and seal unite a church building with a skyscraper. Fig. 26. Likewise, Baraga County, Michigan, is named after the missionary bishop Frederic Baraga,⁴¹ nicknamed “the Snowshoe Priest” for his work evangelizing on Michigan’s Upper Peninsula.⁴² His silhouette—holding a crucifix—appears on Baraga County’s flag today. Fig. 27.



Fig. 26



Fig. 27

Finally, other jurisdictions within this Circuit also participate in the nationwide tradition of having their government seals reflect their histories on a religion-

⁴⁰ *An Abbreviated History of Winston-Salem*, Our State Magazine (Jan. 1, 2010), <https://www.ourstate.com/winston-salem/>.

⁴¹ Central Michigan University, Clarke Historical Library, *Baraga County*, <https://www.cmich.edu/library/clarke/AccessMaterials/Bibliographies/MichiganLocalHistory/Pages/baraga.aspx>.

⁴² Bryan Kelly, “*The Snowshoe Priest*”: Venerable Frederic Baraga, Catholicism.org (Sep. 29, 2009), <http://catholicism.org/the-snowshoe-priest-venerable-bishop-frederic-baraga.html>.

inclusive basis. For instance, the seal of Gloucester County, New Jersey, includes a red St. George's cross as an homage to its namesake county in England—the St. George's Cross is one of the principal “symbols in the coat of arms of the Duke of Gloucester”⁴³ Fig. 28. And the seal of the U.S. Virgin Islands includes a cross of different provenance: a Scandinavian cross. The islands belonged to Denmark until 1917; the seal therefore includes a Danish flag,⁴⁴ which in turn consists of a white Scandinavian cross on a red field—a design that according to medieval legend fell from heaven to indicate divine support for the Danish people.⁴⁵ Fig. 29.



Fig. 28



Fig. 29

⁴³ Gloucester County, New Jersey, *Seal of the County*, <http://www.co.gloucester.nj.us/depts/c/clerk/seal.asp>.

⁴⁴ Heraldry of the World, *US Virgin Islands*, http://www.ngw.nl/heraldrywiki/index.php?title=US_Virgin_Islands.

⁴⁵ Denmark.dk, *National Flag*, <https://www.britannica.com/place/United-States-Virgin-Islands>.

And the U.S. Virgin Islands are replete with religious place names: the islands as a whole were named by their discoverer Christopher Columbus after St. Ursula and her virgin followers, and the three main islands are called Saint Croix (“Holy Cross”), Saint John, and Saint Thomas.⁴⁶

As these examples illustrate, American governments have from the beginning used their seals and flags to convey what makes their history unique—even if it happens to be religious. And these examples are only a small sample; a fuller list is attached as an Addendum to this brief.⁴⁷

A. Religious influences in Lehigh County’s history.

Like other governments, Lehigh County’s seal and flag also reflect its unique history and culture.

⁴⁶ Encyclopedia Britannica, *United States Virgin Islands*, <https://www.britannica.com/place/United-States-Virgin-Islands>.

⁴⁷ Similar to government seals and flags, the U.S. Postal Service has also had “a long-standing history of celebrating the religions of the world on postage stamps” that use religious imagery. Darrell Stoke, *Christmas Forever Stamps*, Desert News (Dec. 16, 2015), <https://www.deseretnews.com/article/865643777/Christmas-Forever-Stamps.html>. Indeed, Plaintiff Freedom From Religion Foundation has publicly expressed its objection to such stamps. See The Daily Show with Jon Stewart, “Mail Mary” (Mar. 8, 2010), <http://www.cc.com/video-clips/drntab/the-daily-show-with-jon-stewart-mail-mary> (interviewing FFRF Co-President). And other anti-religion groups have unsuccessfully sued over the practice. See *Protestants and Other Americans United for Separation of Church and State v. O’Brien*, 272 F. Supp. 712 (D.D.C. 1967) (challenging Madonna and Child Christmas stamp).

William Penn purchased the area that today includes Lehigh County in a 1684 treaty with the Delaware Indians.⁴⁸ Penn—a Quaker and long-time advocate for expanding religious freedom in England—had “shifted his efforts ... towards establishing a separate settlement in America where freedom of conscience would be promoted.”⁴⁹ His efforts bore fruit in 1681, when he was granted a charter to develop the colony that would become Pennsylvania.⁵⁰ Penn conceived of Pennsylvania “as a sanctuary for the oppressed of Europe,” including, in particular, those who were “religiously oppressed” by Europe’s state churches.⁵¹ Viewing this as a “holy experiment,”⁵² Penn named his new colony’s capital city Philadelphia, after a city mentioned in the biblical Book of Revelation and famous for its steadfast and faithful church.⁵³

Penn then set about advertising his colony to the religiously oppressed of Europe. “As soon as he received his charter, he ... flooded the European Continent with books and pamphlets” touting the availability of religious freedom in America

⁴⁸ James J. Hauser, *A History of Lehigh County, Pennsylvania* 1 (1901).

⁴⁹ Gary S. Gildin, *Coda to William Penn’s Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. Pa. J. Const. L. 81, 91 (2001).

⁵⁰ *Id.*

⁵¹ *Id.* at 92 (internal quotation marks omitted).

⁵² *Id.*

⁵³ Stewart, *supra* at 370.

and inviting dissenters from the European state churches to move to Pennsylvania.⁵⁴ And “Europe’s oppressed Christians . . . responded” in droves.⁵⁵ His efforts were particularly successful in Germany. The first German settlement in Pennsylvania was established in 1683;⁵⁶ by 1765, Benjamin Franklin estimated that “German-speaking colonists constituted one-third of Pennsylvania’s population.”⁵⁷

Among these German immigrants were many of the “first settlers of [Lehigh C]ounty,” who “came from Germany seeking homes in this new country where there was no religious persecution and [they] could worship God in accordance to the dictates of their conscience.”⁵⁸ German religious refugees to the “Pennsylvania Dutch” area of southeastern Pennsylvania, including what is now Lehigh County, included both Lutherans and members of a wide range of groups dissenting from Germany’s Lutheran state church, including Mennonites, Schwenkfelders, Dunkers, Moravians, and Amish.⁵⁹

⁵⁴ Hutson, *supra* note 4, at 11-12.

⁵⁵ *Id.* at 12.

⁵⁶ Charles Rhoads Roberts, et al., *History of Lehigh County, Pennsylvania* 42 (1914).

⁵⁷ *Id.* at 46.

⁵⁸ Hauser, *supra* note 48, at 10.

⁵⁹ Gildin, *supra* note 49, at 92, 102; *see also* Roberts, *supra* note 56, at 47, 507-19, 547-49.

The Moravians, for example, arrived at a fork in the Delaware River on Christmas Eve 1741, establishing a new base they called Bethlehem.⁶⁰ They soon established several additional settlements in the Lehigh Valley, including the modern-day towns of Nazareth, Lititz, and Emmaus.⁶¹ These settlements were renowned for their character as carefully designed planned communities whose every feature was selected to “reflect[] Moravian religious beliefs,” foster the Moravians’ mission work, and preserve their “closely knit community structure” involving communal labor, meals, and musicmaking.⁶²

Other early Christian settlers also had significant impact. The Schwenkfelders were driven out of Germany in 1733; the next year, they arrived in the area that is now Lehigh County⁶³ and began to develop their distinctive, colorful style of *fraktur*—the famous Pennsylvania Dutch folk art of hand-lettered, decorated baptismal certificates and other religious and familial records.⁶⁴ The German Lutheran and

⁶⁰ E. De Schweinitz, *Moravian History of Bethlehem*, Lehigh Valley History, <http://lehighvalleyhistory.com/moravian-history-of-bethlehem.-by-bishop-e.-de-schweinitz,-s.-t.-d.>

⁶¹ Roberts, *supra* note 56, at 47.

⁶² Dep’t of the Interior, Nat’l Park Serv., *Moravian Town Planning*, <https://www.nps.gov/nr/twhp/wwwlps/lessons/59bethlehem/59facts3.htm>.

⁶³ Selina G. Schultz, *The Schwenkfelders of Pennsylvania*, 24 *Pennsylvania History: A Journal of Mid-Atlantic Studies* 267, 303-07 (1957).

⁶⁴ Ruthanne Hartung, *Fraktur: Tips, Tools, Techniques for Learning the Craft* 12 (2008).

Reformed groups played a critical role in the development of Lehigh County’s education system; indeed, “[t]he earliest schools of the county were almost without exception ... established at or in connection with the Lutheran and Reformed churches and the pastor was the teacher.”⁶⁵ And when in 1777 British troops occupied Philadelphia, forcing the city to remove all bells to prevent the British from melting them down for cannons, it was at a Lehigh County church—Zion Reformed Church in Allentown—that the Liberty Bell took refuge.⁶⁶

Today, these early religious influences persist in the Lehigh Valley in general, and in Lehigh County in particular.⁶⁷ Allentown’s Zion Reformed Church—now called the “Liberty Bell Church”—hosts a Liberty Bell Museum commemorating the events of 1777 and is listed on the National Register of Historic Places.⁶⁸

⁶⁵ Hauser, *supra* note 48, at 20.

⁶⁶ Roberts, *supra* note 56 at 136-138.

⁶⁷ The entire Lehigh Valley was originally united as Bucks County, but it has since been subdivided into Carbon, Lehigh, and Northampton Counties.

⁶⁸ See Zion’s United Church of Christ of Allentown, PA, *Our Heritage*, <http://libertybellchurch.org/our-heritage>. Further underscoring the pervasiveness of religious acknowledgments at the founding era—even on government property like a State House bell that rang lawmakers to their meetings—the Liberty Bell itself proclaims a religious message: it is inscribed with the words “Proclaim Liberty Throughout All the Land Unto All the Inhabitants thereof,” a quote from the biblical Book of Leviticus. See Dep’t of the Interior, National Park Service, *The Liberty Bell*, <https://www.nps.gov/inde/learn/historyculture/stories-libertybell.htm>.

Throughout the Lehigh Valley, locals look forward each year to Fastnacht Day—the Pennsylvania Dutch equivalent of Mardi Gras, on which homemade sweets are baked and eaten before the Lenten fast begins on Ash Wednesday.⁶⁹ Schwenkfelder and other *fraktur* created in Lehigh County continues to be admired and prized—and indeed, sufficiently so that a large collection of it is now housed at the prestigious Philadelphia Museum of Art.⁷⁰

The worldwide Moravian Church continues to be headquartered in Bethlehem, and Moravian clergy are trained at Bethlehem’s Moravian College.⁷¹ Just last year, the United States submitted Moravian Bethlehem to be considered as a UNESCO World Heritage site because of its status as an “outstanding example of a planned idealized Protestant community.”⁷² Bethlehem’s Christmas festivities are a major tourism draw for the region, featuring German-style Christmas markets and a city-owned, 95-foot-high star “known as the Star of Bethlehem” that brightens the sky-

⁶⁹ See Jennifer Sheehan, *Fastnacht Day Is Fast Approaching*, The Morning Call (Jan. 29, 2018), <http://www.mcall.com/entertainment/dining/mc-ent-brief-fastnacht-day-20180105-story.html>.

⁷⁰ See Philadelphia Museum of Art, *Drawn with Spirit: Pennsylvania German Fraktur from the Joan and Victor Johnson Collection*, <http://www.philamuseum.org/exhibitions/817.html>.

⁷¹ *Encyclopedia of American Religion and Politics*, “Moravians,” at 288 (2014).

⁷² UNESCO, *Moravian Church Settlements*, <http://whc.unesco.org/en/tentativelists/6240/>.

line each holiday.⁷³ And of course, the Amish likewise continue to have a significant impact on Pennsylvania's culture, economy, and tourism, with Amish goods and crafts being sold at markets throughout Pennsylvania Dutch country, including in Lehigh County.⁷⁴

B. Lehigh County's seal

This history provides the backdrop for the events that gave rise to this litigation.

In December 1944, Lehigh County's Commissioners adopted the seal at issue in this case. App. 94. The same day, they agreed to purchase a "County Flag, reproducing the County Seal." App. 95. The record contains no evidence concerning the Commissioners' understanding of the seal's imagery at the time it was adopted. The seal and flag are depicted as Figs. 30 and 31.

⁷³ Lehigh University, *In Bethlehem, An Educational Tradition*, <http://catalog.lehigh.edu/informationofgeneralinterest/inbethlehemandeducationaltradition/>.

⁷⁴ Amish America, *Amish Markets—Pennsylvania*, <http://amishamerica.com/amish-markets-pennsylvania/>.

**Fig. 30****Fig. 31**

The seal was designed by Commissioner Harry D. Hertzog. App. 99. Two years after it was adopted by the County, in a 1946 issue of a periodical published by the Lehigh County Historical Society, Hertzog explained his own reasoning for including the seal's many symbolic elements. App. 99-100.

According to Hertzog, some elements represented the County's economy: for instance, the red "buntings" outlining the seal represented the County's "tremendous diversified clothing manufacturing industries"; the "cement silos" on the right "signif[ied] that Lehigh County is the cement center of the United States"; and the "barn, farm lands and cow" on the left signified "the tremendous ... farm products that Lehigh County supplies to the Nation." App. 100. Others represented unique facts about the County; for instance, the bison head in the upper right signified that the County "own[ed] one of the largest herds of pure-bred American Bison east of the Mississippi River." App. 100. Still others exhibited general patriotism for county, state, and country: the "vermillion red heart" represented the County seat,

Allentown; the books and “lamp of learning thereon” touted the County’s “fine educational system”; the crossed national and state flags represented the United States and Pennsylvania; and the words Lehigh County appeared “[u]nderneath the Shield ... in flying ribbons.” App. 99-100.

Finally, others represented the County’s history—both secular and religious. The Liberty Bell appeared in the upper left, representing the bell’s stint in Allentown during the Revolution. App. 100. The “historical and beautiful old” Allentown Court House appeared toward the bottom. App. 99. And, partially obscured by the old Court House, a “canary-yellow” cross appeared in the middle, representing “the God-fearing people” who were “the foundation and backbone of” the County. App. 99.

The seal—including the cross—was understood within the County as an attempt “to depict [the County’s] facilities and traditions.” App. 87. For instance, curriculum used in County schools regarding the seal noted that it was “a blend of national, state and local history,” and that the cross in particular was designed “to honor the Christians who settled in Lehigh County.” App. 83, 87. And the individual Plaintiffs to this case appear to share this community understanding, explaining that they believe the cross may be included on the seal to commemorate “the Moravians,” App. 223, or “the Pennsylvania Dutch,” App. 128, or “the first settlers in this area,” App. 134.

The seal and flag are currently displayed in several government buildings around the County, and the seal is used, among other places, on the County's letterhead and website. App. 335, 337. The County received no complaints about the seal for the first 70 years of its existence, until the complaint at issue in this case. App. 276.

In November 2014, Plaintiff the Freedom From Religion Foundation wrote to the County, complaining about the seal and requesting that the County discontinue its use. App. 294-95. After receiving a second FFRF letter in January 2015, App. 296, the County Board of Commissioners held a series of meetings to discuss the complaint. App. 76. Because the seal was "a new subject to" the Commissioners, they began "gathering information" so as to "understand the historical background to the seal," including "not just the Latin cross, but all the symbols on the seal." App. 256-57. After reviewing that historical background—including through research gathered by the County solicitor, review of Commissioner Hertzog's 1946 explanation of the seal, and contacting the Lehigh County Historical Society—the Board concluded that the purpose for including the cross on the seal was the "secular" one "of honoring the early settlers" and "recognizing the history of the county." App. 86, 263.

In March 2015, the Board therefore voted unanimously to retain the current seal. App. 297-98. Responding to FFRF's complaints by letter, the Board ex-

plained that the cross is merely “one of more than a dozen elements” on the seal, that it was “included to honor the original settlers of Lehigh County who were Christian,” and thus that its “presence ... on the seal among all the other items of historical significance has the secular purpose of recognizing the” County’s history. App. 310. The County’s reply concluded that the County “is not planning on removing the cross from the seal.” App. 310.

C. This lawsuit

Following the County’s response, Plaintiffs filed this lawsuit in August 2016. Plaintiffs are FFRF and four of its members who live in Lehigh County—Stephen Meholic, John Berry, David Simpson, and Candace Winkler.

Plaintiff Meholic is “an atheist” who lives in Macungie, outside of Allentown, and who encounters the seal when he goes to meetings of the County Commissioners. App. 153-54. He views the cross on the seal as being analogous to the legislative prayer sometimes engaged in at these meetings, which also offends him. App. 158-59. According to Meholic, because of changes in the County’s religious demographics, the seal “no longer fits our community, and [is] a disservice to our population.” App. 164-65.

Berry, meanwhile, is a “non-practicing Methodist,” who has lived in Lehigh County for 27 years, but had not noticed the cross on the seal until FFRF sent its 2014 letter. App. 205, 209-10. He recognizes that in “celebrating Christians that

settled the valley” by including the cross on the seal, the County “might be referring to Moravians.” App. 223. But because the Moravians “had a doctrine of religious tolerance,” Berry believes the seal should be made “more inclusive.” App. 217, 223.

Simpson is an “atheist” from Emmaus. App. 180-81. Simpson first noticed the seal “10 or 11 years ago,” but did not complain about it until FFRF sent its 2014 letter. App. 183, 192-93. Simpson acknowledges that he has not “been discriminated against” in Lehigh County because of his atheism, but he nonetheless thinks that, in order to “be progressive, inclusive, [and] moving into the 21st century,” the County should “not have a religious symbol prominent on the county seal.” App. 190.

Finally, Winkler is an “anti-theist” who moved to Catasauqua from Alaska in 2014. App. 117, 119. Winkler acknowledges that she does not “have any grasp of early Pennsylvania American history,” and thus that she does not “understand” some of the symbols on the County seal. App. 134-35. Nonetheless, she believes it is “problematic” to include a Christian element on a government symbol because “Christians have a lot to do with murder,” especially of Native Americans. App. 134-35.

Plaintiffs’ complaint against the County alleged one claim: that “the Latin cross on the county seal and county flag . . . violates the Establishment Clause of the

First Amendment.” App. 40, 50. Plaintiffs and the County cross-moved for summary judgment in May 2017. App. 70, 91. In September 2017, the district court denied the County’s motion and granted Plaintiffs’. App. 3, 7. The district court recognized that under a historical Establishment Clause analysis, Plaintiffs’ claim would fail. The Establishment Clause, the court explained, was designed to prevent the government from “legally compel[ling] its citizens to practice and conform to” a particular religion or interfering with religious organizations, yet including a cross on the County seal does neither. App. 17-18. Indeed, the court explained, Lehigh County citizens “need not value Christianity” just because it appears on the seal—just like they “need not value education, agriculture, cement, . . . bison,” or any of the other things depicted on the seal. App. 22.

Nonetheless, the Court held the seal unconstitutional. The court felt constrained to apply the “*Lemon* test,” asking whether the cross had “a secular purpose,” and, if so, whether “a reasonable observer would perceive [it] as a government endorsement of religion.” App. 21. The court held that acknowledging the religious beliefs of the County’s settlers was per se not a secular purpose. App. 26, 27. Further, the court held that because a cross is “the preeminent symbol of Christianity,” it inherently “conveys to the reasonable observer” a religious message. App. 28, 29.

On November 2, 2017, the district court entered a permanent injunction and final judgment enjoining the County from continuing to use or display any version

of the seal that “feature[s] the Latin cross,” subject to a stay pending this appeal. App. 5.

SUMMARY OF THE ARGUMENT

Lemon is the Miss Havisham⁷⁵ of constitutional tests: surrounded by an odor of decay, it fights the battles of 50 years ago, while actively pitting people against each other to stir controversy that would otherwise not exist. This particular controversy concerns the Lehigh County seal, which includes roughly a dozen images reflecting various aspects of the county’s history, economy, and culture. 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.

The district court initially agreed. It first considered the approach required by controlling Establishment Clause precedent, noting that the “drafters’ intent and the plain text of the Establishment Clause” would have made the case “cut-and-dry” for the County. App. 17. But the court also felt bound to apply the “widely criticized” *Lemon* test, even while recognizing that its “continuing applicability” was “unclear” and that it “does not accurately reflect” the original intent of the Establishment Clause. App. 18, 19, 21.

⁷⁵ Charles Dickens, *Great Expectations* (1861).

That was a mistake. The most recent Supreme Court “religious display” case rejects the *Lemon* test, concluding that it is “not useful” in dealing with a “passive monument.” *Van Orden v. Perry*, 545 U.S. 677, 686 (2005). Since then, the Court has reinforced that “the Establishment Clause must be interpreted ‘by reference to historical practices and understandings’” to tolerate practices that were “accepted by the Framers.” *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (citation omitted). And this Court’s own application of the *Lemon* test has anticipated that view, emphasizing respect for a community’s “heritage” and its “historical decision[s].” *Modrovich v. Allegheny Cty.*, 385 F.3d 397, 412 (3d Cir. 2004). Given the County’s history and the Commissioners’ deference to that history, this is not a close case. Allowing Lehigh County to keep its seal falls well within the “unbroken history of official acknowledgement by . . . government of the role of religion in American life from at least 1789.” *Van Orden*, 545 U.S. at 686.

Compounding its decision to apply the moribund *Lemon* test, the district court further erred in its analysis by jumping to the conclusion that the seal’s purpose was to “honor[] the fact that [Lehigh County’s] settlers were Christian,” App. 26—a flawed and misleading restatement of the County’s own explanation that it sought to honor its original settlers “who were Christian,” App. 310. With this misattribution of intent, the district court concluded that the seal conveys an impermissible religious message, thus rendering it unconstitutional. App. 28-29. But

even under the *Lemon* test, acknowledging history is consistent with the Establishment Clause, including when that history has religious origins.

The district court need not have reached these arguments in the first place, because Plaintiffs lack standing to sue. None of them has suffered anything as result of the seal other than personal offense at having to see it, which is not a legally cognizable injury. Without a cognizable injury, Plaintiffs lack standing to bring this suit. Thus, this case should be dismissed for lack of subject matter jurisdiction. Alternatively, it should be resolved in Lehigh County's favor because the County's actions fully comply with the Establishment Clause.

ARGUMENT

I. FFRF and its members lack standing because their alleged injuries are not legally and judicially cognizable.

Standard of Review. Determination of a party's standing to bring suit is reviewed de novo. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 266 (3d Cir. 2014). To establish standing, a plaintiff must demonstrate a personal injury, causation, and redressability. *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 290-91 (3d Cir. 2005) (citations omitted). The injury must be "legally and judicially cognizable." *Id.* (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)). The district court found that FFRF's members were injured by "direct, unwelcome contact" with the cross on Lehigh County's seal and cited a recent Third Circuit case to justify standing on that ground. App. 25 n.4 (quoting *Freedom from Religion Found.*

Inc. v. New Kensington Arnold Sch. Dist., 832 F.3d 469, 479 (3d Cir. 2016)). But the *New Kensington* case conflicts with earlier rulings from both this Court and the United States Supreme Court. The district court’s decision on standing must therefore be reversed.

First, in *Americans United for Separation of Church and State v. Reagan*, numerous religious organizations and their members sued the United States, claiming it violated the Establishment Clause by initiating diplomatic relations with the Vatican. 786 F.2d 194, 196 (3d Cir. 1986). The plaintiffs argued they were “victims of stigmatization,” “deprived of the benefits” given the Roman Catholic Church, and “cast in an adverse light.” *Id.* at 198, 200. But the Court disagreed that this created “standing to challenge Executive Branch action.” *Id.* at 198. The Court emphasized that Supreme Court cases “make clear” that “such stigmatizing injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.” *Id.* at 201 (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984) (internal quotation marks omitted)).

Because the panel decision in *New Kensington* conflicts with the decision in *Reagan*, *Reagan* is “the controlling authority.” *United States v. Tann*, 577 F.3d 533, 541 (3d Cir. 2009); *see also Am. Civil Liberties Union of New Jersey v. Schundler*, 168 F.3d 92, 113 (3d Cir. 1999) (“no subsequent panel overrules the holding in a published opinion of a previous panel” (quoting Internal Operating

Procedure 9.1; emphasis omitted)); *United States v. Stimler*, 864 F.3d 253, 263 (3d Cir. 2017) (this Court will follow earlier precedent “unless it ‘no longer has *any* vitality’”) (citation omitted). FFRF’s members make no allegations of having been “denied equal treatment,” *Reagan*, 786 F.2d at 201, and even concede they have not been discriminated against, App. 190. Because their “offense” at the seal is substantively indistinguishable from the *Reagan* plaintiffs’ “stigmatization,” *Reagan* dictates that the district court’s grant of standing must be reversed.

Second, the grant of standing is also inconsistent with recent Supreme Court precedent. Offended observer standing—the concept that mere offense at religious imagery in the public square could justify Establishment Clause standing—arose after the Supreme Court in *Allegheny v. ACLU Greater Pittsburgh Chapter* held that government violates the Establishment Clause when it “sends a message to nonadherents that they are outsiders, not full members of the political community.” 492 U.S. 573, 595 (1989). Lower courts then assumed that an individual’s subjective offense—being made to feel an outsider—was an injury sufficient to justify standing. *See, e.g., Moss v. Spartanburg Cty. Sch. Dist.*, 683 F.3d 599, 607 (4th Cir. 2012) (“Feelings of marginalization and exclusion are cognizable forms of injury . . . because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion that they are outsiders.”) (emphasis and internal quotation

marks omitted). But more recently, the Supreme Court has rejected that analysis, explicitly holding that “[a]dults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out” just because “a person experiences a sense of affront from the expression of contrary religious views in a legislative forum.” *Town of Greece*, 134 S. Ct. at 1826. Here, FFRF’s members have alleged nothing more than personal offense at seeing the county seal. App. 47-50. Because *Town of Greece* confirms that mere offense is not “legally or judicially cognizable” under the Establishment Clause, it is no longer an injury sufficient to justify standing. See *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (“[T]he psychological consequence presumably produced by observation of conduct with which one disagrees” simply “is not injury sufficient to confer standing.”).

Because the district court’s reliance on *New Kensington* conflicts with both *Reagan* from this Circuit and *Town of Greece* from the Supreme Court, this Court should reverse for lack of standing.

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

Standard of Review. The district court’s grant of summary judgment to Plaintiffs is reviewed *de novo*, and all facts must be viewed in the light most favorable to Lehigh County. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014); *Freethought Soc’y of Greater Phila. v. Chester Cty.*, 334 F.3d 247, 255-56

(3d Cir. 2003) (applying “plenary review over the District Court’s underlying legal conclusions”). And because this case involves First Amendment claims, the Court has “‘a constitutional duty to conduct an independent examination of the record as a whole,’” and “cannot defer to the District Court’s factual findings unless they concern witnesses’ credibility.” *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 156-57 (3d Cir. 2002) (quoting *Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995)). Instead the court must “examine independently the facts in the record and ‘draw [its] own inferences’ from them.” *Tenaflly*, 309 F.3d at 157 (quoting *Christ’s Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 247 (3d Cir.1998)) *see also* *Green v. Haskell Cty. Bd. of Com’rs*, 568 F.3d 784, 795-96 (10th Cir. 2009) (stating that “a district court’s findings on each part of the *Lemon* test” are “constitutional facts” subject to heightened review).

Relying on the “intent and the plain text of the Establishment Clause,” the district court concluded that the outcome of this case should be “cut-and-dry”: the county “has not . . . legally compelled its citizens to practice and conform to Christianity, infringed on freedom of conscience, or created political conflict between the Christian Church and other religious sects.” *Id.* at 17-18. But ultimately the court abandoned this “common-sense” approach, because it believed that “precedent has taken the inquiry in a different direction.” *Id.* at 18. Thus, instead of fol-

lowing the Establishment Clause’s original meaning, the district court turned to the so-called *Lemon* test—the Supreme Court’s 1971 ahistorical attempt to define the Establishment Clause’s prohibitions.

But there the district court—in two respects—took its own detour from current law. First, the Supreme Court has long abandoned the *Lemon* test in Establishment Clause cases like this. *Lemon* was last applied by the Supreme Court in *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), under circumstances inapplicable here. And in subsequent Establishment Clause cases, the Supreme Court has avoided *Lemon*’s malleable standards, requiring instead the very form of analysis the district court felt compelled to ignore here. Second, this Court, even in applying the *Lemon* test, has done so in a manner that parallels the Supreme Court’s movement toward a “common-sense,” history-based understanding of the Establishment Clause. Either of these approaches—applying the Supreme Court’s post-*Lemon* Establishment Clause jurisprudence or this Court’s historically grounded *Lemon* analysis—leads to the same conclusion: Lehigh County’s seal is not “a law respecting an establishment of religion” and does not violate the Establishment Clause.

A. The Supreme Court has abandoned *Lemon*.

The Supreme Court’s highly criticized—and now essentially defunct—ruling in *Lemon v. Kurtzman* is an unfortunate stain on its overall Establishment Clause ju-

risprudence. In *Everson v. Board of Education*—the Court’s seminal case interpreting the Establishment Clause—the school board had reimbursed the cost to families of using public transportation to send their children to school, including to private religious schools. 330 U.S. 1, 3 (1947). In determining whether this violated the Establishment Clause, the Court reasoned that the Clause must be interpreted “in the light of its history and the evils it was designed forever to suppress.” *Id.* at 14-15. Specifically, the Court cited historical efforts to “force loyalty” toward favored religious groups and the practices of imposing fines and punishments for “such things as speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.” *Id.* at 9; *see also* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003).⁷⁶

The Court upheld the busing reimbursement scheme as falling outside of these his-

⁷⁶ Professor McConnell’s research shows that established churches at the founding shared several common features: “(1) [state] control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) [state] financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church.” McConnell, *supra*, at 2131; *see also* *Town of Greece*, 134 S. Ct. at 1837 (Thomas, J., concurring) (colonial establishments “exercised government power in order to exact financial support of the church, compel religious observance, or control religious doctrine”) (citing McConnell, *supra*, at 2144-46, 2152-2159).

torical concerns. *Everson*, 303 U.S. at 7. Although the Court agreed it was “undoubtedly true” that “children are helped to get to church schools,” it concluded that eliminating such incidental benefits was “obviously not the purpose of the First Amendment.” *Id.* at 17-18.

Lemon diverged from this approach by instructing courts (1) to delve into the “legislative purpose” of a challenged government action; (2) to ensure that the “principal or primary effect” of a government action is “one that neither advances nor inhibits religion”; and (3) to avoid “foster[ing] an excessive government entanglement with religion.” *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (internal quotation marks omitted). In *some* subsequent decisions, the Court has recharacterized these standards into the so-called “endorsement” test, which discards the purpose prong, and collapses the effects and entanglement prongs to ask whether a hypothetical “reasonable observer” would view the government action as “primarily” an endorsement of religion. *Cty. of Allegheny*, 492 U.S. at 630; *see also Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 282, 287 (3d Cir. 2011).

The *Lemon* “endorsement” test has been a fiasco. Scholars have criticized it as a “mess”⁷⁷ and “a conceptual disaster.”⁷⁸ This Court has recognized it as “vague”

⁷⁷ Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 119-21, 130 (1992).

and “unpredictable,” *Modrovich*, 385 F.3d at 401, while others have called it “hopelessly open-ended,”⁷⁹ a “judicial morass,”⁸⁰ and “Establishment Clause purgatory.”⁸¹ At least ten recent Supreme Court Justices have criticized it, including five *current* Justices.⁸² One of its most forceful critics has been Justice Kennedy, who has argued for many years that the *Lemon* test is “flawed in its fundamentals and unworkable in practice”—and that “the meaning of the [Establishment] Clause [should instead] be determined by reference to historical practices and understandings.” *Cty. of Allegheny*, 492 U.S. at 627, 669-70.

⁷⁸ Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 Cal. L. Rev. 5, 6 (1987).

⁷⁹ See, e.g., *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (Easterbrook, J., dissenting).

⁸⁰ *Green v. Haskell Cty. Bd. of Comm’rs*, 574 F.3d 1235, 1235 n.1 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing en banc).

⁸¹ *Am. Civil Liberties Union of Kentucky v. Mercer Cty., Ky.*, 432 F.3d 624, 636 (6th Cir. 2005).

⁸² See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-400 (1993) (Scalia, J., concurring) (collecting criticism from Scalia, Thomas, Kennedy, O’Connor, White, JJ., and Rehnquist, C.J.); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting); see also *Utah Highway Patrol Ass’n v. American Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari) (collecting criticism by Kennedy, Alito, Thomas, and Scalia, JJ., and Roberts, C.J.); *Green v. Haskell Cty. Bd. of Comm’rs*, 574 F.3d 1235, 1245 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of re-hearing en banc) (noting that continuing to apply *Lemon* “leave[s] the state of the law ‘in Establishment Clause purgatory.’”) (citation omitted).

It is no surprise, then, that the Supreme Court has moved decisively away from *Lemon*. In the last 16 years, it has applied the *Lemon* test only once—over 12 years ago—in a case involving a Ten Commandments display in circumstances widely divergent from those here. *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 864-66 (2005); *see also Van Orden*, 545 U.S. at 703 (distinguishing *McCreary* based on “the short (and stormy) history” of the challenged display, arising from the “substantially religious objectives of those who mounted them”). By contrast, over the same 16-year time period, the Court has decided *six* Establishment Clause cases that either ignored *Lemon* or expressly declined to apply it.⁸³ One of those six cases—*Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014)—illustrates the extent to which the Court has abandoned *Lemon* and returned to a more objective standard based on the historical meaning of the Establishment Clause. Under that case,

⁸³ *See*:

- *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (not applying *Lemon*);
- *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (same);
- *Cutter v. Wilkinson*, 544 U.S. 709, 726 n.1 (2005) (Thomas, J., concurring) (“The Court properly declines to assess [the statute] under the discredited test of *Lemon*.”);
- *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality) (not applying *Lemon*); *id.* at 698-99 (Breyer, J., concurring) (same);
- *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (same);
- *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (same).

Lehigh County's seal fully complies with the Establishment Clause. And the Court's earlier decision in *Van Orden v. Perry*, 545 U.S. 677, reinforces that *Lemon* no longer applies in cases of this nature. *See also ACLU v. City of Plattsburgh*, 419 F.3d 772, 778 n. 8 (8th Cir.2005) (en banc) (“[t]aking our cue” from *Van Orden* that “we do not apply the *Lemon* test”); *Myers v. Loudoun Cty. Pub. Schs.*, 418 F.3d 395, 399 (4th Cir. 2005) (applying *Van Orden* instead of *Lemon* in challenge to the phrase “under God” in the Pledge of Allegiance).

B. Under *Town of Greece* and *Van Orden*, practices that were accepted by the Framers are consistent with the Establishment Clause.

The Supreme Court's *Town of Greece* ruling changed the landscape of Establishment Clause jurisprudence. It clarified that *Lemon* does not apply to historical practices that were acceptable to the Framers, emphasizing that such practices themselves define the contours of the Establishment Clause. The use of religious symbolism on government seals and flags is such a practice and thus complies with the Establishment Clause. The Supreme Court's decision in *Van Orden* demonstrates that the *Town of Greece* analysis extends beyond “prayer” cases to display cases like this.

1. *Town of Greece* confirms that the image of a cross on Lehigh County's seal complies with the Establishment Clause.

The Supreme Court's most recent Establishment Clause decision in *Town of Greece v. Galloway* confirms that “the Establishment Clause must be interpreted

by reference to historical practices and understandings.” 134 S. Ct. 1811, 1819 (2014) (internal quotation marks omitted). Practices that were “accepted by the Framers” and have “withstood the critical scrutiny of time and political change” are not accidental exceptions to the Establishment Clause, but themselves define its contours. *Id.* “A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.” *Id.* (citing *Van Orden v. Perry*, 545 U.S. 677, 702-04 (2005) (Breyer, J., concurring)).

In *Town of Greece*, the Court reviewed the town government’s practice of inviting prayers at its monthly board meetings. *Id.* at 1816. Each month the town “would call the congregations listed in a local directory” until a willing minister was identified.” *Id.* “[N]early all of the congregations in town were Christian,” *id.*, such that—except during the year it was sued, when the town went out of its way to invite a Jewish layman, a Bahá’i, and a Wiccan priestess—the town’s practice comprised what the Second Circuit called a “‘steady drumbeat’ of Christian prayer.” *Id.* at 1818 (citation omitted).

Many of these prayers were “in a distinctly Christian idiom” and “invoked religious holidays, scripture, or doctrine.” *Id.* at 1816. Some of the prayer-givers prayed as if “on behalf of all present,” “saying ‘let us pray,’” or “asking audience members to stand and bow their heads.” *Id.* at 1818 (citation omitted). And at least

some government officials “bowed their heads or made the sign of the cross,” which—to the Court of Appeals—“further conveyed the message that the town endorsed Christianity.” *Id.* Yet despite these facts, the Supreme Court concluded there was “no violation of the Constitution.” *Id.* at 1815. Even though some citizens with business before the town council took offense at what they deemed being “compelled . . . to engage in a religious observance,” *id.* at 1824-25, the Court held that “offense does not equate to coercion” and that “an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views.” *Id.* at 1815, 1826. Rather, because legislative prayers were acceptable to the Framers, absent a “pattern of prayers” that “over time denigrate, proselytize, or betray an impermissible government purpose,” the practice is also acceptable under the Establishment Clause. *Id.* at 1824.

Notably, the four dissenting justices agreed that “a town hall . . . forum need not become a religion-free zone.” *Id.* at 1842 (Kagan, J., dissenting). They acknowledged that legislative prayers should “correctly” be tolerated, *id.* at 1845, as long as governments make sufficient effort to be “inclusive of different faiths,” *id.* at 1845 n.2. Even more so, they emphasized that “[c]eremonial references to the divine”—such as in “the Pledge of Allegiance, inaugural prayer, or the recitation of ‘God save the United States and this honorable Court’”—easily “fit[] the bill” un-

der the Establishment Clause. *Id.* at 1852-53 (citation and quotation marks omitted).

The Lehigh County seal is acceptable under both the *Town of Greece* majority opinion and dissenting opinion. 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 1849; *see also* Factual Background, *supra*. And the Lehigh County seal’s image of a cross is a far cry from the actual “religious observance” inherent in legislative prayer with its “statements of profound belief and deep meaning” that so concerned the *Town of Greece* dissent. *Id.* at 1825, 1853. Indeed, the cross imagery does not even rise to the level of what the dissent approved as “[c]eremonial references to the divine,” *id.* at 1852, because it simply recalls a historical fact—the actual influence on Lehigh County of its early Christian settlers—without endorsement of their religious beliefs. *Cf. Murray v. City of Austin, Tex.*, 947 F.2d 147, 155 (5th Cir. 1991) (noting that “any perceived preference[for religion] by use of [a cross] insignia” on city seal was “even more remote” than supposed preferences demonstrated by legislative prayer or “references by government to God”). As in *Town of Greece*, Plaintiffs’ complaint about Lehigh County’s seal is simply an incident of “[a]dults . . . encounter[ing] speech they find disagreeable,” which does not make an Establishment Clause violation, even “in a legislative forum.” *Id.* at 1826.

2. *Town of Greece* further extends *Van Orden*’s history-driven approach to static imagery like Lehigh County’s seal.

In *Town of Greece*, the Court cited *Van Orden* as support for the history-driven approach. *Id.* at 1819. That is no accident: although it stands on its own as the governing Establishment Clause precedent, *Town of Greece* can also be viewed as an extension of *Van Orden*’s history-driven approach beyond the field of static imagery like the Ten Commandments monument in Texas and Lehigh County’s seal here.

In *Van Orden*, the Supreme Court upheld a Ten Commandments monument on the grounds of the Texas State Capitol. 545 U.S. 677, 681 (2005). The challenged display was six feet tall and three feet wide. *Id.* at 681. Its main content was the text of the Ten Commandments, with several smaller symbols including “two Stars of David and the superimposed letters . . . Chi and Rho, which represent Christ.” *Id.* The monument was challenged by a lawyer who frequently encountered it over a six-year period while visiting the Capitol grounds “for the purpose of using the law library” nearby. *Id.* at 682.

A plurality of four Justices concluded that the *Lemon* test was “not useful in dealing with the sort of passive monument” at issue. *Id.* at 686. Instead, anticipating *Town of Greece*, their analysis was “driven by the nature of the monument and by our Nation’s history.” *Id.* They noted the “unbroken history of official acknowledgment by all three branches of government of the role of religion in American

life from at least 1789,” *id.* at 686, and held that the Ten Commandments monument fit within this tradition. They acknowledged that “[o]f course, the Ten Commandments are religious,” but emphasized that “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” *Id.* at 690.

In his controlling concurrence, Justice Breyer agreed.⁸⁴ Like the majority, Justice Breyer rejected *Lemon* and other Establishment Clause tests, concluding there is “no test-related substitute for the exercise of legal judgment.” *Id.* at 700. He distinguished “legal judgment” from “personal judgment,” tying it to history by stating that legal judgment must “remain faithful to the underlying purposes of the First Amendment’s Religion Clauses”: “assur[ing] the fullest possible scope of religious liberty,” “avoid[ing] the religious divisiveness that promotes social conflict,” and “maintain[ing] the separation of church and state.” *Id.* at 678.

He emphasized that the Establishment Clause viewed in light of these purposes “does not compel the government to purge from the public sphere all that in any way partakes of the religious.” *Id.* at 699 (citation omitted). “Such absolutism” would be “inconsistent with our national traditions” and “would also tend to pro-

⁸⁴ Other courts have held that Justice Breyer’s concurrence in *Van Orden* is “the controlling opinion.” See, e.g., *Card v. City of Everett*, 520 F.3d 1009, 1017 n.10 (9th Cir. 2008); *Staley v. Harris Cty., Tex.*, 485 F.3d 305, 309 n.1 (5th Cir. 2007).

mote the kind of social conflict the Establishment Clause seeks to avoid.” *Id.* At minimum, he stated that “legal judgment” must “tolera[te], for example, the prayers that open legislative meetings; certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; [and] the attention paid to the religious objectives of certain holidays, including Thanksgiving.” *Id.* at 699-700 (citation omitted). Applying such legal judgment to the Ten Commandments monument, Justice Breyer reviewed its “text,” “context,” and “consequences, concluding that the monument complied with the Establishment Clause. Applying that analysis here leads to the same conclusion.

Text. Justice Breyer started by acknowledging that “the Commandments’ text undeniably has a religious message, invoking, indeed emphasizing, the Deity.” *Id.* at 700-701. But, like the majority, he determined, that text “alone cannot conclusively resolve” the case. *Id.* at 701.

Unlike the monument’s “undeniably . . . religious message,” the cross here has no explicit message and not even an exclusively religious meaning. *See Salazar v. Buono*, 559 U.S. 700, 716, 717, 721 (2010) (plurality) (noting that crosses have “complex meaning beyond the expression of religious views,” including “historical meaning,” and are “often used to honor and respect” “heroic acts, noble contributions, and patient striving,” “evok[ing] far more than religion”); *see also Wein-*

baum v. City of Las Cruces, N.M., 541 F.3d 1017, 1022 n.2 (10th Cir. 2008) (noting that the Latin cross is not “exclusively” a Christian symbol, but “is an oft-used symbol in other cultures and religions as well”) (citing 5 Encyclopedia of Religion 3434 (Lindsay Jones, ed., 2005); 14 Encyclopedia of Religion at 9339 (discussing cross as symbol of tree of life)). Thus, viewers are left to draw their own meaning from the image. Plaintiff Berry, for example, understood “that we might be referring to Moravians,” App. 223, and Plaintiff Winkler assumed the cross related to the Pennsylvania Dutch, App. 128, demonstrating the image’s capacity as a historical marker.

Context. Justice Breyer found “little or nothing of the sacred” in the monument’s broader context. Rather, the presence of “17 [other] monuments and 21 historical markers” spread over “22 acres” conveyed “the ‘ideals’ of those who settled in Texas and of those who have lived there since that time,” without “readily lend[ing] [themselves] to meditation or any other religious activity.” *Van Orden*, 545 U.S. at 681, 702. These “factors provide[d] a strong . . . indication that the Commandments’ text” “convey[ed] a predominantly secular message.” *Id.* at 702.

The context of the Lehigh County seal conveys an even stronger message of secularity. Scattered over 22 acres, the Texas monuments could not be viewed simultaneously, raising a question whether anyone would actually perceive a coherent message. *Id.* at 742-43 (dissenting opinion). In contrast, the seal’s cross is

crowded onto a small field with more than a dozen purely secular images, reinforcing that the seal's overall message simply reflects various aspects of the County's history, economy, and culture, and nothing more. And a partially obscured cross on a government seal surrounded by images of bison and cement silos plainly "lend[s] itself to meditation or religious activity" *even less* readily than does a six-foot tall Ten Commandments monolith that on its face "commands worship of [God] and no other deity." *Id.* at 717 (dissenting opinion).

Consequences. As to the monument's effects, Justice Breyer emphasized heavily that "40 years passed" during which the monument went "unchallenged (until the single legal objection raised by petitioner)." *Id.* at 702. Indeed, Justice Breyer described this fact as "determinative." *Id.* He concluded that "those 40 years suggest more strongly than can any set of formulaic tests that few" would have "understood the monument as . . . a government effort to favor a particular religious sect [or] *primarily* to promote religion over nonreligion." *Id.* (citation omitted; emphasis added). This showed that members of the public overwhelmingly "considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage." *Id.* at 703. Because the monument stood "uncontested for nearly two generations," "as a practical matter" it was "unlikely to prove divisive," thereby posing no threat to "the basic purposes of the First Amendment's Religion Clauses." *Id.* at 704. In contrast, ordering the

monument’s removal “based primarily on [its] religious nature” would “exhibit a hostility toward religion that has no place in our Establishment Clause traditions.” *Id.* at 704.

Here, of course, the seal has also enjoyed an uneventful history for more than seventy years—almost twice as long as the *Van Orden* monument. This suggests that, like the Ten Commandments display, “few . . . are likely to have understood the [seal] as . . . a government effort to favor” a particular religion or “primarily to promote religion over nonreligion” *Id.* at 702. The seal thus complies with the Establishment Clause.

C. Alternatively, as applied by this Court, *Lemon* also confirms that Lehigh County’s seal complies with the Establishment Clause.

As explained above, *Town of Greece* and *Van Orden* together demonstrate that the “much maligned,”⁸⁵ oft “criticized,”⁸⁶ and long “called into question”⁸⁷ *Lemon* test has now finally been left behind. Nonetheless, even if this Court were to apply *Lemon* rather than *Town of Greece*’s historical analysis—which would be error—it would still find no constitutional problem with Lehigh County’s seal.

⁸⁵ *Freethought*, 334 F.3d at 250.

⁸⁶ *Modrovich*, 385 F.3d at 401.

⁸⁷ *Am. Civil Liberties Union of N.J. v. Black Horse Pike Reg’l Bd. of Educ.*, 84 F.3d 1471, 1484 (3d Cir.1996).

In “religious display cases” like this one—before *Town of Greece*, at least—this Court has applied two variations of the *Lemon* test: the *Lemon* “endorsement test,” which “collapse[s] the ‘purpose’ and ‘effect’ prongs” of *Lemon* into a single “endorsement” inquiry; and the full *Lemon* analysis, which separately focuses on the purpose of the government’s actions. *Freethought*, 334 F.3d at 250. This Court has preferred the “endorsement test [a]s the proper analysis” in religious display cases, *American Civil Liberties Union of New Jersey v. Schundler*, 104 F.3d 1435, 1444 (3d Cir. 1997), but—“in an abundance of caution”—has applied the full *Lemon* analysis as well. *Freethought*, 334 F.3d at 251; *Modrovich*, 385 F.3d at 403; *but see Tearpock-Martini v. Borough*, 674 F. App’x 138, 141 (3d Cir. 2017) (unpublished opinion acknowledging that “it may be unnecessary to continue to apply both”). Yet in applying these tests, this Court has considered historical practice and passage of time among the weightiest factors in assessing Establishment Clause concerns, properly anticipating the Supreme Court’s direction in *Town of Greece* and *Van Orden*. Thus, under this Court’s *Lemon* analyses, the outcome is the same as under the more recent Supreme Court cases.

1. The *Lemon* “endorsement” test favors Lehigh County.

The crucial analysis under the *Lemon* “endorsement” test is whether the government practice in question has “the effect of communicating a message of government endorsement or disapproval of religion.” *Doe*, 653 F.3d at 282. Under this

test, the government’s “motivations” behind the challenged display are irrelevant. *Modrovich*, 385 F.3d at 401. Rather, the test “centers on the perceptions of the ‘reasonable observer’” who is presumed to be “familiar with the history and context of the display.” *Id.* (citation omitted). The Court’s opinions in *Freethought* and *Modrovich*—both involving Ten Commandments displays—are illustrative.

In *Freethought*, the court weighed whether a “bronze plaque displaying a Protestant version of the Ten Commandments” on a county courthouse violated the Establishment Clause. 334 F.3d at 249. The plaque was donated in 1920 at “a public dedication ceremony with both religious and secular overtones.” *Id.* It was “affixed near what was then the entrance to the Courthouse,” where it remained “for over eight decades.” *Id.* at 249-50. Just a few years prior to the Court’s decision, that entrance was closed so that visitors then entered the court “some seventy feet to the north.” *Id.* at 250. Still, the title “The Commandments” remained “legible to a visitor walking along the sidewalk to or from the north wing main entrance.” *Id.*

The Court acknowledged that the Ten Commandments are “undeniably religious,” *id.* at 263, and that the plaque was “displayed by itself,” *id.* at 264—factors supporting an Establishment Clause violation. But the Court concluded that the plaque’s “age and history” would change a reasonable observer’s perspective. *Id.* (citation omitted; emphasis in original). Thus, even though “the reasonable observer may perceive the Ten Commandments (in the abstract) as portraying a religious

message, he or she would view the *plaque* as a reminder of past events in Chester County.” *Id.* at 265 (emphasis in original). Finally, the Court found it “highly significant” that “the County ha[d] not taken any action to highlight or celebrate the plaque since it was installed,” reinforcing the view that the reasonable observer would not view it as a religious endorsement. *Id.* at 266, 267.

The Court applied essentially the same analysis in *Modrovich*, which also involved a bronze Ten Commandments plaque. 385 F.3d 397. This plaque was donated in 1918 by “a Christian lobby” whose express mission was “to introduce religious principles into public life.” *Id.* at 405. It was installed on an exterior stone wall of the courthouse “facing a main street” in downtown Pittsburgh, where passersby “could easily read” it. 385 F.3d at 399, 405. But the Court rejected the plaintiffs’ arguments that the plaque’s origins with a “radical religious organization” and its more prominent location distinguished it from the plaque in *Freethought*. *Id.* at 407-08, 410. Instead the Court emphasized that “age and history alone provided sufficient context to prevent the reasonable observer from viewing an otherwise religious plaque as an endorsement of religion.” *Id.* at 410.

Here too, “age and history” compel the same conclusion. Lehigh County’s seal was adopted in 1944, more than seventy years ago. App. 94. Unlike in *Freethought* and *Modrovich*, there is no evidence that the County adopted the seal in proceedings with “religious . . . overtones,” *Freethought*, 334 F.3d at 249, or following en-

couragement to “introduce religious principles into public life,” *Modrovich*, 385 F.3d at 405. And like in *Freethought* and *Modrovich*, Lehigh County never sought to “highlight or celebrate” the cross’s presence on the seal. *Freethought*, 334 F.3d at 267; *Modrovich*, 385 F.3d at 409-10.

The absence of any text makes the seal even less objectionable than the Ten Commandments plaques. The plaque in *Freethought* pulled its text from “a Protestant version of the Bible,” emphasizing in all-caps each of the commandments, starting with “THOU SHALT HAVE NO OTHER GODS BEFORE ME.” *Freethought*, 334 F.3d at 253, 252. It also included a “Summary” from the New Testament reading:

THOU SHALT LOVE THE LORD THY GOD WITH ALL THINE HEART,
AND WITH ALL THY SOUL AND WITH ALL THY MIND.
THOU SHALT LOVE THY NEIGHBOUR AS THYSELF

Id. The *Modrovich* plaque—four feet tall and three feet wide—included essentially the same text, with the same “Summary” from the New Testament. 385 F.3d at 404-05. In contrast, the cross’s crowded location on Lehigh County’s seal among a dozen other symbols representing significant aspects of the County’s history, economy, and culture only underscores that no reasonable observer would perceive the county seal as “communicating a message” endorsing religion. *Doe*, 653 F.3d at 282; *see also Modrovich*, 385 F.3d at 410 (presence of “additional secular dis-

plays” would “only strengthen[]” perception that plaque “does not endorse religion”).

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

The full *Lemon* analysis differs from the “endorsement” test only in that it adds consideration of the government’s purpose in undertaking the challenged action. *Freethought*, 334 F.3d at 250-51.⁸⁸ The purpose prong asks “whether [the] government’s actual purpose is to endorse or disapprove of religion.” *Doe*, 653 F.3d at 283 (citations and quotation marks omitted). If the government action has “some secular purpose, then it survives” this prong. *Id.*; see also *Modrovich*, 385 F.3d at 412 (government purpose need not be “exclusively secular”).

“Purpose” focuses on the “motivations of the current . . . officials who have power over the decision” at the time of the litigation, not when the display was originally conceived. *Modrovich*, 385 F.3d at 411; *Freethought*, 334 F.3d at 251 (“[T]he appropriate focus of our inquiry is on the events of 2001, when the Com-

⁸⁸ In applying the full *Lemon* analysis, this Court has noted that the “effect and entanglement prongs of *Lemon* are encompassed by the endorsement test” and has simply “incorporate[d] [its] earlier discussion of the endorsement test” rather than conducting independent analysis of those prongs. *Modrovich*, 385 F.3d at 413. The district court therefore did not engage in an “excessive entanglement” analysis. Nonetheless, in declining to alter the seal the County plainly has not “entangled” itself with religion, excessively or otherwise. *Weinbaum*, 541 F.3d at 1030-31 (entanglement “comes into play” only “where the government involves itself with a religious institution”); cf. *Tearpock-Martini*, 674 F. App’x at 142 (no entanglement when the government simply “installed the sign” bearing religious content).

missioners declined to remove the plaque.”). Courts generally should “not take issue with the [government’s] characterization” of its policy. *Doe*, 653 F.3d at 283. As long as it is “not a sham,” *Modrovich*, 385 F.3d at 411, the government’s stated purpose “get[s] deference.” *McCreary*, 545 U.S. at 864-65.

Here, before being sued, the County’s Commissioners had never considered the seal’s meaning or purpose. App. 255. After being threatened by FFRF, they began gathering information to understand the “historical significance of . . . all the symbols on the seal.” App. 257. It was “a new subject” for them, and they “had to start from scratch.” App. 257. To educate themselves, they asked the county solicitor to conduct research by “contact[ing] the Lehigh County Historical Society” and “searching [their] own minutes.” App. 263. The solicitor’s research revealed that all of the symbols on the flag were there to recount significant aspects of the County’s history, economy, and culture. App. 87, 99. Based on the discussions with the solicitor that followed, App. 268, 269, the Commissioners concluded that the cross had been included “for the secular reason of honoring the early settlers,” App. 263. The Commissioners publicly announced their understanding in a response letter to FFRF, noting that “[t]he cross, one of more than a dozen elements, was included to honor the original settlers of Lehigh County who were Christian.” App. 310. Thus, the County chose to retain the seal in its entirety because “the presence of the cross” “among all of the other items of historical significance” had “the secular

purpose of recognizing the history of the County.” App. 310; *Schundler*, 168 F.3d 92, 107-08 (3d Cir. 1999) (holding that display of undeniably religious symbols “together” with “secular symbols” conveyed legitimate secular purpose); *Am. Civil Liberties Union of New Jersey v. Schundler*, 104 F.3d 1435 (3d Cir. 1997) (distinguishing displays of religious symbols alone); *see also Murray*, 947 F.2d at 155 (viewing seal “as a whole” to concluded that inclusion of cross insignia did not violate the Establishment Clause).

Considering the Commissioners’ decisionmaking process, the historical support for their conclusion, and the prevalence of government seals and flags generally that reflect those governments’ peoples and history, Lehigh County’s secular purpose for choosing not to discard its 74-year-old seal fully complies with the Establishment Clause. *See Van Orden*, 545 U.S. at 686 (acknowledging “role of religion in American life” complies with Establishment Clause); *Modrovich*, 385 F.3d at 412 (upholding respect for “heritage” and “the community’s historical decision” as “sufficient legitimate secular purposes”).

CONCLUSION

This Court should vacate and remand, with instructions to dismiss the case for lack of jurisdiction. Alternatively, if the Court reaches the merits, it should reverse the decision of the district court and remand for entry of summary judgment in favor of Lehigh County. The County’s seal and flag have existed for more than seven

decades without controversy. The inclusion of the cross among a dozen other secular images clearly sends a message identifying matters that were of historical, economic, and cultural significance to Lehigh County. Certainly, all residents of Lehigh County ought to be able to tolerate, and even appreciate, a reminder of the significant influences in the County's history, even if some of those influences were religious. But in any case, the County's passive recollection of these historical factors by maintaining its seal and flag does not violate the Establishment Clause.

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Respectfully submitted,

/s/ Eric Baxter

ERIC S. BAXTER

JOSEPH DAVIS

DIANA M. VERM

The Becket Fund for
Religious Liberty

1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036
(202) 955-0095
ebaxter@becketlaw.org

Counsel for Defendant-Appellant

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Executed this 12th day of March 2018.

/s/ Eric Baxter

ERIC S. BAXTER
JOSEPH DAVIS
The Becket Fund for
Religious Liberty
1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036
(202) 955-0095
ebaxter@becketlaw.org

Counsel for Defendant-Appellant

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

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rules of Appellate procedure 29(d) and 32(a)(7)(B). It contains 12799 words, excluding the parts of the brief exempted by Federal Rule 32(a)(7)(B)(iii) and by Local Rule 29.1(b).
2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.
3. This brief complies with the electronic filing requirements of Local Rule 31.1(c). The text of this electronic brief is identical to the text of the paper copies, and Bitdefender Endpoint Security Tools has been run on the file containing the electronic version of this brief and no virus has been detected.

Executed this 12th day of March 2018.

/s/ Eric Baxter

Eric S. Baxter

CERTIFICATE OF SERVICE

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

Executed this 12th day of March 2018.

/s/ Eric Baxter

Eric S. Baxter