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)

Supplemental Brief of Defendant-Appellant Lehigh County

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

INTRODUCTION

In *American Legion v. American Humanist Association*, the Supreme Court clarified how the Establishment Clause applies to "religiously expressive monuments, symbols, and practices" on government property. No. 17-1717, 2019 WL 2527471, at *15 (U.S. June 20, 2019). First, a majority of the Justices confirmed that, in this context, the long-marginalized *Lemon* test does not apply. *Id*. at *4 (plurality); *id*. at *20 (Kavanaugh, J., concurring); *id*. at *23 (Thomas, J., concurring); *id*. at *25 (Gorsuch, J., concurring). Second, the Court held that "[t]he passage of time gives rise to a strong presumption of constitutionality," *id*. at *15, noting place names that are "rooted in religion" like "Bethlehem, Pennsylvania"; religious mottos on government seals "like Arizona's, '*Ditat Deus*' ('God Enriches'); and flags "like Maryland's, which has included two crosses since 1904," as presumptively permissible examples, *id*. at *14 & n.22. And third, the Court indicated that the presumption could be overcome only in rare situations, like when evidence clearly demonstrates that the religious expression "deliberately disrespect[s]" others. *Id*. at *18. Absent such stark circumstances, the Court explained, the removal of religiously expressive monuments, symbols, and practices "would be seen by many not as a neutral act but as the manifestation of 'a hostility toward religion that has no place in our Establishment Clause traditions.'" *Id*. at *4 (citing *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment)).

Applying these standards confirms that Lehigh County's seal (and the flag that includes it) does not violate the Establishment Clause. Indeed, the Court's ruling suggests that the seal creates no harm that could give Plaintiffs standing to sue in the

first place. This Court thus should reverse and remand for entry of judgment in Lehigh County's favor, without other proceedings in the district court.

I. *American Legion* confirms that Lehigh County's seal does not violate the Establishment Clause.

American Legion turns Plaintiffs' arguments on their head. Where Plaintiffs argue there is no "presumption of constitutionality" for historical, religiously expressive images, Resp. 28, the Supreme Court applies a "strong presumption of constitutionality," *American Legion*, 2019 WL 2527471, at *15. And where Plaintiffs argue that removing religious "relics of the past" suggests no hostility to religion, at least when they are "still being used," Resp. 39, the Supreme Court concludes that removing religious displays would appear "aggressively hostile to religion," pointing specifically to actively used official symbols like city names, seals, and flags. *American Legion*, 2019 WL 2527471, at *14; *see also id*. at *16 ("few would say that the State of California is attempting to convey a religious message by retaining" city names like "San Diego" or "Los Angeles," but "it would be something else entirely if the State undertook to change . . . those names"). In short, *American Legion* confirms that the Establishment Clause does not require Lehigh County to strip the cross from its seal, particularly since the image fittingly recalls the religious people who played a leading role in settling Lehigh County in pursuit of religious freedom.

A. Longstanding religious displays have a strong presumption of constitutionality.

American Legion involved a 32-foot Latin cross on government land in Bladensburg, Maryland. The cross was erected in 1925 and acquired by the government in 1961. *American Legion*, 2019 WL 2527471, at *7, *8. More than 50 years later, the

American Humanist Association challenged the cross under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), arguing that it violates the Establishment Clause. *Id*. at *9. The Fourth Circuit agreed. *Id*. But the Supreme Court reversed, upholding the cross 7–2 and clarifying the standards for assessing "religiously expressive monuments, symbols, and practices" on government property. *Id*. at *15.

In upholding the cross, six Justices agreed that *Lemon* does not apply to religious displays. Writing for a plurality, Justice Alito concluded that "the *Lemon* test presents particularly daunting problems" that "counsel against" its application in cases "involv[ing] the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations." *Id*. at *12 (Alito, J., joined by Roberts, C.J., Breyer, J., and Kavanaugh, J.). Justice Kavanaugh went further, explaining that "[a]s this case again demonstrates, th[e] Court no longer applies the [*Lemon*] test " in "any" Establishment Clause cases. *Id*. at *20 (Kavanaugh, J., concurring). Justice Thomas, in a concurring opinion, "agree[d]" with the part of the plurality opinion that "rejects [*Lemon's*] relevance" to religious displays and likewise would have taken "the logical next step" to "overrule the *Lemon* test in all contexts." *Id*. at *25 (Thomas, J., concurring). Finally, Justice Gorsuch "agree[d] with all this," concluding that "*Lemon* was a misadventure," "flawed in its fundamentals," "unworkable in practice," and "inconsistent" with "history" and "precedents." *Id*. at *28, *27 (Gorsuch, J., concurring) (cleaned up). Thus, six Justices agreed that *Lemon* no longer applies to religious displays.

Beyond the multiple opinions rejecting *Lemon*, a seven-Justice majority held that there is "a strong presumption of constitutionality" for longstanding religious displays. *Id*. at *15. The Court grounded this presumption in four considerations. First, identifying the "purpose" of "monuments, symbols, or practices that were first established long ago" is "especially difficult," and it would be "inappropriate for courts to compel their removal or termination based on supposition." *Id*. at *12. Second, "as time goes by, the purposes associated with an established monument, symbol, or practice often multiply." *Id.* at *13. And even for those originally "infused with religion," the "passage of time may obscure that sentiment," with communities choosing to preserve religious elements "for the sake of their historical significance or their place in a common cultural heritage." *Id*. Third, "just as the purpose for maintaining a monument, symbol, or practice may evolve, 'the message conveyed [also] may change over time.'" *Id*. at *13 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 477 (2009) (cleaned up)). The majority cited "Notre Dame in Paris"; religious place names throughout the United States, and religious mottos on many states' seals and flags as examples of government-associated religious expressions that, while "undoubtedly motivated" by religion originally, have "become embedded features of a community's landscape and identity" and are valued broadly by many "without necessarily embracing their religious roots." *Id*. at *14. Even just "[f]amiliarity itself," the Court concluded, "can become a reason for preservation." *Id*. Fourth, "when time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken

on particular meaning." *Id*. Instead, "tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion" and as "evocative, disturbing, and divisive." *Id*. Based on these considerations, the Court concluded that "[t]he passage of time gives rise to a strong presumption of constitutionality." And the Court identified only one way this "strong" presumption might be overcome: if the religious expression "deliberately disrespected" others. *Id.* at *18.

Simply choosing to honor individuals in a way that acknowledges the role of religion in their lives does not override the presumption. Rather, *American Legion* makes clear that it is entirely "natural and appropriate" when honoring particular individuals to "invoke the symbols" that are meaningful "for those who are memorialized." *Id*. at *19. Thus, "Stars of David or other symbols of Judaism" are appropriate at Holocaust memorials. *Id*. And Latin crosses—"the same symbol that marks the graves of so many of [the soldiers] near the battlefields where they fell"— are appropriate as World War I memorials. *Id*. "[M]any memorials for Dr. Martin Luther King, Jr.," the Court noted, including the "Martin Luther King, Jr. Civil Rights Memorial Park in Seattle," which was dedicated in 1991, "make reference to his faith," and the "National Statuary Hall in the Capitol honors a variety of religious figures" with religious imagery, such as New Mexico's statue of "Po'Pay, a Pueblo religious leader[,] with symbols of the Pueblo religion," which was installed in 2005. *Id*. at *16. Regardless whether such religious expressions are shared or accepted by others in the community, they are entirely appropriate to recall who the individuals were,

to honor their "important role" in history, and to "acknowledge[] the centrality of faith" in their lives. *Id*.

B. The cross on Lehigh County's seal falls easily within the presumption.

At over 70 years old, the cross on Lehigh County's seal plainly falls within the scope of "longstanding monuments, symbols, or practices" to which *American Legion* lends a strong presumption of constitutionality. *Id.* at *13, *15. The seal was adopted in 1944 and, like the Bladensburg cross, existed as a government symbol for "more than 50 years" before it was challenged. *Id.* at *9; App. 94; *see also Van Orden*, 545 U.S. at 702 (Breyer, J., concurring) (finding 40-year-old symbol's age to be "determinative"). Moreover, the cross was included to commemorate the County's earliest settlers, who were Christians seeking religious freedom, much like the names "Bethlehem, Pennsylvania," "Las Cruces, New Mexico," and "Corpus Christi, Texas" reflect the beliefs of those cities' earliest settlers. *Id.* at *14; *see* Br. 16, 27. As in *American Legion*, the seal has taken on "historical significance" over time and has "become [an] embedded feature[] of [the] community's landscape and identity." *Id.* at *13-14. "[S]crubbing away" the cross would send the same message of hostility toward religion that "has no place in our Establishment Clause traditions." *Id*. at *4. In these respects, the Lehigh County cross is on all fours with the Bladensburg cross.

Nor is there any basis to override the presumption of constitutionality. Plaintiffs have made no argument that including the cross on the seal was done to "deliberately disrespect[]" others or even that it has had that effect at any time down to the present day. *Id.* at *18. To the contrary, the individual Plaintiffs concede that they have not

"been discriminated against" because of their atheism, App. 190, and did not notice, or did not complain about, the cross until the lead-up to this lawsuit, App. 205, 209-10, 183, 192-93. They merely quibble that the image "no longer fits our community," App. 164-65, should be "more inclusive," App. 217, 223, and is "problematic," apparently because "Christians have a lot to do with murder," App. 134-35. But Plaintiffs' mere disagreement with the cross's presence on the seal is plainly insufficient to overcome the "strong presumption of constitutionality." *American Legion*, 2019 WL 2527471, at *15.

Finally, Plaintiffs' arguments that there was illicit purpose in Commissioner Hertzog's statement that he designed the seal to honor "the God-fearing people which are the foundation and backbone of the County," App. 99, or in the County's later statement that it preserved the seal to "honor the Christians who settled in Lehigh County," App. 83, 87, are even more unavailing now than they were before *American Legion*, for at least three reasons. First, "purpose" and "message" are *Lemon* factors that no longer apply in this context. *Id*. at *12 (plurality); *id*. at *20 (Kavanaugh, J., concurring); *id*. at *23 (Thomas, J., concurring); *id*. at *25 (Gorsuch, J., concurring). Second, *American Legion* explicitly recognized that it is permissible to "honor[] important figures," including "original . . . settlers," by "includ[ing] a symbolic reference to [the] faith" of the persons being commemorated. *American Legion*, 2019 WL 2527471, at *16. Finally, even if there were significant uncertainty or dispute about the underlying purpose or message of Lehigh County's seal, that is precisely why the *American Legion* Court adopted its presumption. *Id*. at *16-17. Outside of Commissioner Hertzog's statement two years after the fact, there is *no*

evidence here about the intent of the County Commission when it adopted the seal in 1944. Reply 22-23. Like *American Legion* then, this case "is illustrative" that there is "often" "no way to be certain about the motivations of the men who were responsible" for "old monuments, symbols, and practices"; that, in any event, the purpose and message of symbols can change over time; and that it would therefore "be inappropriate for courts to compel their removal or termination based on supposition." *Id.* at *15, 16-17. And if "[f]amiliarity itself" can "become a reason for preservation," Plaintiffs' disagreement with the current Commission's analysis of the Hertzog statement, Resp. 17-18, is ultimately beside the point. *Id*. at *14.

II. *American Legion* confirms that Plaintiffs lack standing.

In its earlier briefing, Lehigh County explained that standing requires an injury that could "plausibly" establish the cause of action asserted. Reply 2-3 (citing *Schuchardt v. President of the United States*, 839 F.3d 336, 344 (3d Cir. 2016)). In *American Legion*, Justice Gorsuch confirmed this argument, noting that "[w]ith *Lemon* now shelved," the psychological offense of seeing religiously expressive monuments, symbols, or practices in the public square can no longer plausibly be used to establish an Establishment Clause violation. 2019 WL 2527471, at *28 (Gorsuch, J., concurring); *see also id*. at *26-27 (citing Brief for Becket Fund for Religious Liberty as *Amicus Curiae* 34-35). Justice Gorsuch thus concluded that "it follows from the Court's analysis that suits like this one"—alleging only "disagreement and offense" at government conduct—"should be dismissed for lack of standing." *Id*. at *25, *29. He emphasized that "in light of" the *American Legion* ruling, lower courts

"may dispose of cases like these on a motion to dismiss rather than enmeshing themselves for years in intractable disputes sure to generate more heat than light." *Id*. at *29. The Court thus should find that Plaintiffs lack standing.

III. This Court should apply *American Legion* to the facts of this case in the first instance.

Remand is not warranted. A court always "retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). Indeed, it is more proper for this Court to "reevaluate" any Third Circuit precedent which now "conflicts with intervening Supreme Court precedent" than to send the case back to the district court. *In re Krebs*, 527 F.3d 82, 84 (3d Cir. 2008).

Nor is further factfinding necessary. The age of the seal is undisputed, and further review of the facts after the district court has already ruled on cross-motions for summary judgment would be unproductive. *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247, 255-56 (3d Cir. 2003) (applying "plenary review over the District Court's underlying legal conclusions"). Furthermore, *American Legion* relied on principles that have long been part of the Court's Establishment Clause jurisprudence—including that passage of time is "determinative" and that iconoclasm against longstanding religiously expressive monuments, symbols, and practices would itself "exhibit a hostility toward religion that has no place in our Establishment Clause traditions." *Van Orden*, 545 U.S. at 702, 704 (Breyer, J., concurring). The parties thus already had awareness of, and fully explored, these principles

in the district court. Furthermore, *American Legion* counsels against striving for perfection in understanding the past, recognizing that there is often "no way to be certain" as to the purposes and messages underlying any particular religious expression in public monuments, symbols, and practices. 2019 WL 2527471, at *12. The Supreme Court itself set the standard by fully resolving the dispute in *American Legion* without remanding for further proceedings.

Regarding the examples of religious symbolism on government property that Lehigh County provided for the first time in its appellate brief, *see* Br. 4-24, *American Legion* itself again demonstrates that this Court may properly consider them without remanding for the district court's take. In dozens of footnotes, including one focused on government seals, the *American Legion* Court cited everything from century-old books to modern-day websites and newspaper articles to identify *sua sponte* abundant examples of government-sponsored symbols that use religion to convey history and culture—including many of the very symbols identified in the County's briefs. *See* 2019 WL 2527471, at *14 & n.22. This Court likewise may consider these other religiously expressive monuments, symbols, and practices without remanding to the district court. Reply 11-12.

CONCLUSION

This Court should vacate and remand with instructions to dismiss the case for lack of standing. Alternatively, if the Court reaches the merits, it should confirm that *Lemon* does not apply to religious displays and, in any event, hold that the cross on Lehigh County's seal is protected by the presumption of constitutionality for longstanding religious displays and practices.

Dated: July 3, 2019

Respectfully submitted,

/s/ Eric Baxter

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

I hereby certify that the following statements are true:

1. This brief complies with the page limitation imposed by this Court's order of June 25, 2019.
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). 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 3d day of July 2019.

/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 3d day of July 2019.

/s/ Eric Baxter
Eric S. Baxter