No. 20-1881

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REBECCA WOODRING,

Plaintiff—Appellee,
v.

JACKSON COUNTY, INDIANA,

Defendant—Appellant.

On appeal from the United States District Court
for the Southern District of Indiana,
No. 4:18-CV-00243-TWP-DML
The Honorable Tanya Walton Pratt, Judge

BRIEF *AMICUS CURIAE* OF THE FREEDOM FROM RELIGION FOUNDATION IN SUPPORT OF APPELLEE AND AFFIRMANCE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1881

Short Caption: Woodring v. Jackson County, Indiana

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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None

Attorney's Signature: /s/ Patrick Elliott Date: 9/14/2020

Attorney's Printed Name: Patrick Elliott

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

None

Attorney's Signature: /s/ Christopher Line Date: 9/14/2020

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Freedom From Religion Foundation ("Foundation")[1] is the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinions about religion based on reason, rather than faith, tradition, or authority. Founded nationally in 1978 as a 501(c)(3) nonprofit, FFRF has more than 32,000 members, including members in every state and the District of Columbia. Its purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government.

FFRF ends hundreds of state/church entanglements each year through education and persuasion, while also litigating, publishing a newspaper, and broadcasting educational programming. Because of this important work, FFRF has a direct interest in ensuring proper application of the Establishment Clause of the First Amendment. FFRF members, as secularists, atheists and agnostics, are particularly made

[1] Consent to this brief has been given by all parties. Counsel for either party has not authored this brief, in whole or in part. No party or person made a monetary contribution for the preparation or submission of this brief other than the amicus curiae, its members or its counsel.

to feel like outsiders when encountering devotional religious displays on government property. Since 1978, FFRF has fielded hundreds, if not thousands of complaints by its members and members of the public who think that creches and other sectarian devotional displays belong on church and private lawns, not on property that belongs to "We the People."

SUMMARY OF THE ARGUMENT

This case must be resolved by adhering to the core Establishment Clause principles that have guided courts for decades. The Supreme Court has long recognized that the Establishment Clause of the First Amendment to the Constitution demands governmental neutrality among religious faiths, and between religion and nonreligion. *See McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860, (2005); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15 (1947). The Supreme Court, and this Court, have reaffirmed time and again the Constitution's commitment to this neutrality.

For non-religious and minority religious residents of Jackson County, the prominent display of a nativity scene at the county

courthouse each and every December is anything but neutral. Jackson County conveys a message of exclusion and secondary status to non-Christians, which is renewed each year when the nativity is installed. The nativity scene announces that Jackson County is a Christian county, where Christians "are insiders, favored members of the political community," and all others "are outsiders." S*anta Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-310 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). This exclusionary message violates "[t]he clearest command of the Establishment Clause [] that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

This case is properly resolved utilizing the purpose and endorsement tests articulated in *Lynch* and *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) and utilized by this Court to assess the constitutionality of nativity scene displays for decades. These tests have not been overruled by the Supreme Court and dictate that Jackson County must cease displaying the nativity scene in front of its courthouse each year.

The Supreme Court's recent ruling in *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019), did not alter the core principles that courts have always relied upon when assessing the constitutionality of government practices showing preference for or endorsing religion. Nor did it overrule *Lynch* and *Allegheny*. Like *Van Orden v. Perry*, 545 U.S. 677 (2005), before it, *American Legion* merely provides that in religious display cases featuring unique secular histories and contexts, an exercise of legal judgment is more useful than the traditional Establishment Clause framework.

In *American Legion,* the Court found an extensive history, borne out by a robust record featuring expert reports discussing the cross's use as a World War I symbol, as reason to opt for the legal judgment standard. No such extensive history supports the nativity display in this case.

Ending the seasonal display of the nativity scene in front of the Jackson County Courthouse does not convey hostility to Christianity, but rather embraces neutrality, protecting the diversity of religious beliefs, and the constitutional rights, of all Jackson County residents.

ARGUMENT

The Supreme Court has observed that the touchstone for Establishment Clause analysis is that the "First Amendment mandates neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Courts have consistently held that the clause "prohibits the government from promoting 'a point of view in religious matters' or otherwise taking sides between 'religion and religion or religion and nonreligion.'" *Milwaukee Deputy Sheriffs' Ass'n v. Clarke*, 588 F.3d 523, 527 (7th Cir. 2009) (citing *McCreary*, 545 U.S. 844, 860); *Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1149 (9th Cir. 2018).

I. Longstanding principles of Establishment Clause jurisprudence govern nativity scene displays.

In *Lynch* and *Allegheny*, the Supreme Court utilized the longstanding principles that undergird the Establishment Clause to determine whether nativity scene displays violated the Establishment Clause. These bedrock principles, including government neutrality toward religion and secular purpose and effect, are embodied in the framework

of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), and remain "the prevailing analytical tool for the analysis of Establishment Clause claims." *Books v. City of Elkhart, Indiana*, 235 F.3d 292, 301 (7th Cir. 2000). This Court is "obliged by the doctrines of stare decisis and precedent to employ [this] methodology unless instructed otherwise by the Supreme Court." *Id.*

The Supreme Court has not overruled these cases or invalidated the important principles contained within them. The Court's recent decision in *American Legion* did not alter these core principles and the Supreme Court's endorsement analysis and secular purpose standard are still binding on this Court.

A. The Supreme Court has not overruled *Lynch* and *Allegheny*, the leading nativity scene cases, so this Court is bound by their analyses.

A court cannot and should not disregard binding case law that is on point unless it has been explicitly overruled by the Supreme Court. *See Censke v. United States*, 947 F.3d 488, 492 (7th Cir. 2020) ("But the Court has explained that it does not overrule itself silently."); *Lombardo v. United States*, 860 F.3d 547, 558 (7th Cir. 2017) ("only the Supreme Court has the prerogative of overruling or modifying [its previous]

holdings."); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Thus, the principles of endorsement and secular purpose remain relevant and, when analyzed here, point to the unconstitutionality of the nativity display.

In assessing whether the nativity scene displayed outside the Jackson County courthouse represents an endorsement of religion or religious belief, this Court is "charged with the responsibility of assessing the totality of the circumstances surrounding the display to determine whether a reasonable person would believe that the display amounts to an endorsement of religion." *Books,* 235 F.3d at 304 (citing *Allegheny*, 492 U.S. at 597). The reasonable observer is aware of a situation's history and context and encompasses the views of adherents and non-adherents alike. *Freedom From Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1046 (7th Cir. 2018).

In *Lynch,* Justice O'Connor's concurrence asserted that under *Lemon's* "primary effect" prong, "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849–50 (7th Cir. 2012) (citing *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)). This Court must follow established precedent and apply the framework laid out in its prior cases and the Supreme Court cases addressing nativity scenes.

B. *American Legion* did not overrule Supreme Court precedent on nativity scenes.

While the Supreme Court's recent ruling in *American Legion*—like *Van Orden*—was decided without applying *Lemon*, the fractured decision did not discard *Lemon* or the longstanding Establishment Clause principles that underlie it. These principles were applied by the Supreme Court in *Lynch* and *Allegheny* and these cases remain binding precedent on this Court.

The portions of Justice Alito's opinion in *American Legion* that criticized *Lemon* and proposed that courts "look[] to history for guidance"—Parts II-A and II-D—failed to garner a majority. And

although Part II-B outlined four considerations that "counsel against efforts" to apply *Lemon* in certain cases and "toward application of a presumption of constitutionality," these words don't overrule *Lemon* or other Supreme Court cases requiring a governmental secular purpose and effect. *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (lower courts must not "conclude our more recent cases have, by implication, overruled an earlier precedent"). *American Legion*'s treatment of *Lemon* is no different from *Van Orden's* treatment of *Lemon*, which did not stop the Court from applying *Lemon* on the very same day that *Van Orden* was decided. *See McCreary,* 545 U.S. at 864.

In fact, while attempting to explain why the "Lemon test" is difficult to apply in cases involving old displays with unknown or multiple purposes, the Court scrutinized purpose and effect just as it would under *Lemon*. Justice Kagan brought this point home when she wrote: "I think that test's focus on purposes and effects is crucial in evaluating government action in this sphere—*as this very suit shows*." *Am. Legion,* 139 S. Ct. 2067, 2094 (Kagan, J., concurring in part) (emphasis added).

II. Significant differences between the cross memorial in *American Legion* and the Jackson Courthouse nativity display render *American Legion* inapplicable here.

A. The Peace Memorial cross was deemed to have dual significance borne out in its history and purpose.

In *American Legion*, the Supreme Court found the Bladensburg community erected the Latin cross war memorial to honor local soldiers killed in the First World War. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019). The Court identified that this purpose was spelled out by the inclusion of a bronze plaque identifying the 49 local soldiers to whom the monument was dedicated and by the inclusion of the words "Valor," "Endurance," "Courage," and "Devotion" on the memorial's base. *Id.* at 2077. The Court deemed this design "unsurprising" because the cross was "so widely associated with" the war. *Id.* at 2076. This historical link between the war and the memorial was critical in the Court's Establishment Clause analysis. When used in World War I memorials erected during a time when the nation was in mourning, the Court found the cross to be a "symbol of the[] sacrifice" of American soldiers killed in the war. *Id.* at 2089. For the Peace Cross, the Court found that, "[a]s long as [the memorial was] retained in its original place and form" it would also speak of the community that

erected and maintained the monument. *Id.* Importantly, the Court noted that while the memorial's Latin cross may have conveyed a symbolic reference to faith, that faith was associated with the fallen soldiers, not the government. *Id.* at 2089. As Justice Breyer emphasized in his concurrence, which was joined by Justice Kagan, "[The Court] upholds the constitutionality of the Peace Cross only after considering its particular historical context and its long-held place in the community. . ." *Id.* at 2091 (Breyer, J., concurring in judgment).

The historical context and purpose of the nativity display stands in stark contrast to that of the roadside memorial in *American Legion*. The nativity scene is a Christian symbol with no secondary secular meaning, and its repeated display on government property sends the message that Christians "are insiders, favored members of the political community," and all others "are outsiders." S*anta Fe Indep. Sch. Dist. v. Doe*, 530 U.S. at 309-310.

B. The nativity scene is an inherently religious symbol with no secondary meaning.

In *American Legion*, the Court found that the cross, while a symbol of Christianity, has also been used "in many contexts in which the

symbol has also taken on a secular meaning," including "trademarks held by businesses and secular organizations, including Blue Cross Blue Shield, the Bayer Group, and some Johnson & Johnson Products." 139 S. Ct. at 2074. When used in connection with World War I, the Court found that the cross was recognized as a symbol of the conflict, which had been reflected in contemporary literature, poetry, and art. *Id.* at 2075.

In contrast, the nativity scene is, and has always been, solely used as a religious symbol. There are no widely used secular representations of the nativity scene. It is not used in any secular trademarks, or in any contexts where it represents anything other than a Christian celebration of the birth of Jesus Christ. This Court has recognized the fact that "the nativity story is a core part of Christianity, and it would be silly to pretend otherwise. Many nativity scenes therefore run a serious risk of giving a reasonable viewer the impression of religious endorsement." *Concord Cmty. Sch.*, 885 F.3d at 1046.

When analyzing nativity displays, this Court begins its analysis with the "recognition that '[t]he Nativity scene, with its figures of Mary, Joseph, the infant Jesus, the Magi, shepherds, angels, and animals, is

an unequivocal Christian symbol, unlike the Christmas tree and the reindeer and the tinsel and Santa Claus. . . A vivid tableau of the birth of Jesus Christ, it brings Christianity back into Christmas, unlike the star and the wreath and the tree, which for most people are in the nature of lifeless metaphors.'" *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 127 (7th Cir. 1987) (quoting *City of St. Charles*, 794 F.2d at 271-272).

In *American Legion*, the Justices agreed that "the secular values inscribed on the Cross and its place among other memorials strengthen its message of patriotism and commemoration." 139 S. Ct. 2067 at 2091 (Breyer, J., concurring); *Id.* at 2077-78 (majority). The nativity scene itself has no secular trappings, while secular elements can be added, or removed, the nativity scene itself has no inherent secular meaning. When the nativity is standing alone it "affirms the most fundamental of Christian beliefs—the birth of Jesus was not just another historical event. Rather, to the believer Christ's birth was an act of divine intervention in human affairs that set this birth apart from all others." *American Civil Liberties Union v. City of Birmingham*, 791 F. 2d 1561, 1566 (6th Cir. 1986). Without accompanying secular trappings, the

nativity scene standing alone can only be viewed as "the universally recognized symbol for the central affirmation of a single religion—Christianity." *Id.*

American Legion also does not resolve the constitutionality of this nativity display because it is a relatively new display, which is capable of changing each year. *Am. Legion*, 139 S. Ct. at 2082, 2085. The Peace Cross is a stationary, permanent display erected nearly 100 years ago. The nativity scene is reinstalled every year, and each time the County chooses to allow the display, a depiction of the birth of Jesus, a violation occurs anew.

Moreover, in *American Legion*, it was alleged that due to its age and its unique exposed aggregate concrete composition, the removal of the Peace Cross would have been costly and potentially fatal to the already crumbling structure. Oral Arg. Tr. 6:19-22.[2] Here, Jackson County could easily determine not to put up the nativity scene, or it could more appropriately arrange for it to be placed on private property.

[2] Available online: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1717_7l48.pdf

The nativity scene's religious meaning has not been diminished or changed over time and the display has no unique secular importance to Jackson County. This is most clearly evinced by the fact that following FFRF's letter to the County in 2018, citizens held a rally, featuring prayer, on the lawn of the Courthouse, which was attended by two County Commissioners. (Dkt. 32-1 at 38-39). The Jackson County nativity scene has also been displayed alone in public view for years. "When the government initiates an effort to place [a religious] statement *alone* in public view, a religious object is unmistakable." *McCreary*, 545 U.S. at 869 (emphasis added). Only after its legality was questioned, did the County make a half-hearted attempt to move separate displays closer to the nativity scene.

These stark differences are important because the specific facts in a given case play an important role in determining whether a government practice or display violates the Establishment Clause. *American Legion*'s analysis simply does not apply. In this case, the nativity display fails the purpose and endorsement tests articulated in *Allegheny*.

III. Curing an Establishment Clause violation does not convey government hostility towards religion.

The idea that ending a practice, or removing a seasonal display, that has been found to violate the Establishment Clause would actually violate the Establishment Clause itself by evincing a government hostility towards religion is preposterous and cuts against the entire purpose of the clause. The Establishment Clause requires government neutrality on religion and the Supreme Court has made clear that "[t]he government does not discriminate against any citizen on the basis of the citizen's religious faith if the government is secular in its functions and operations." *Allegheny*, 492 U.S. at 610 "On the contrary, the Constitution **mandates** that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths." *Id.* (emphasis added.).

The Court even warned of "would-be theocrats" who "may be even audacious enough to claim that the lack of established religion discriminates against their preferences." *Id.* at 611 "But this claim gets no relief, for it contradicts the fundamental premise of the Establishment Clause itself. The antidiscrimination principle inherent

in the Establishment Clause necessarily means that would-be discriminators on the basis of religion cannot prevail." *Id.*

Courts have ruled that actions taken to avoid potential Establishment Clause violations do not violate the Establishment Clause. In *Vasquez v. Los Angeles ("LA") Cty.*, the Ninth Circuit Court of Appeals found that the removal of a Latin cross from the LA County Seal would be viewed by "a reasonable observer who is informed… and familiar with the history of the government practice at issue" not as an act of hostility towards religion but more reasonably "as an effort to restore their neutrality and to ensure their continued compliance with the Establishment Clause." 487 F.3d 1246, 1257 (9th Cir. 2007). This was demonstrated by the fact that the County removed the cross only after the presence of crosses on other municipal seals had been held to be unconstitutional. *Id.*

Courts have found that action taken to "avoid conflict with the Establishment Clause" and maintain the very neutrality the Clause requires neither has a primary effect of advancing or inhibiting religion nor excessively entangles government with religion. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 972–73 (9th Cir. 2011) (citing *Nurre v.*

Whitehead, 580 F.3d 1087, 1097-1098 (9th Cir. 2009); *Vasquez*, 487 F.3d at 1257–58; *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225–26, (1963) (rejecting the contention that the absence of religion equates to "affirmatively opposing or showing hostility to religion")).

The argument that ending a constitutional violation would somehow implicate the Establishment Clause is particularly problematic in this case. The nativity scene in this case was not placed in front of the Jackson Courthouse in order to "remove a government-imposed burden on the free exercise of religion. Christians remain free to display their crèches at their homes and churches." *Allegheny*, 492 U.S. at 632. Jackson County has "neither placed nor removed a governmental burden on the free exercise of religion but rather… conveyed a message of governmental endorsement of Christian beliefs." *Id.* Any action taken by Jackson County to correct this constitutional violation would not be hostile to religion, but restore government neutrality towards religion, as the Establishment Clause requires.

CONCLUSION

The Establishment Clause of the First Amendment to the Constitution demands governmental neutrality among religious faiths, and between religion and nonreligion. Jackson County's display of a nativity scene at the county courthouse each and every December violates the Establishment Clause's core neutrality principles and conveys a message of exclusion and secondary status to Jackson County's non-Christian residents. For this reason, the district court must be affirmed.

Respectfully Submitted,

Dated: September 18, 2020

/s/ *Patrick C. Elliott*

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CERTIFICATE OF COMPLIANCE

I, Patrick C. Elliott, certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,498 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14-point Century.

Dated: September 18, 2020

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 18, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 18, 2020

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