17-3581

In The

United States Court of Appeals

For The Third Circuit

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

Plaintiffs-Appellees,

vs.

THE COUNTY OF LEHIGH

Defendant-Appellant.

On Appeal From The United States District Court for the Eastern District of Pennsylvania
5:16-CV-04504 (EGS)

BRIEF FOR THE STATES OF ARKANSAS, ALABAMA, ARIZONA, COLORADO, INDIANA, LOUISIANA, KANSAS, MICHIGAN, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, AND WEST VIRGINIA AS AMICI CURIE IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICI CURIAE

States, counties, and municipalities across the country have often incorporated religious symbols and texts in government buildings and displays. The State of Arkansas, Alabama, Arizona, Colorado, Indiana, Louisiana, Kansas, Michigan, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Utah, and West Virginia have an interest in maintaining that practice, consistent with the Establishment Clause. These sixteen states also have an interest in ensuring the proper analytic framework is used to determine whether an Establishment Clause violation has occurred.

SUMMARY OF THE ARGUMENT

In this Establishment Clause case, the district court applied the endorsement test to determine whether the County of Lehigh violated the Constitution by adopting a county seal that includes (among many other features) a religious symbol. On appeal, this Court need not and should not strictly and mechanically apply the endorsement test or the *Lemon* test to resolve this case. Recent Supreme Court precedent has made clear that these two tests have fallen into something of disrepute, and that they ***at most*** serve as bit considerations in a more complete Establishment Clause analysis—an analysis emphasizing the original purposes, intent, and understanding of the clause.

A proper analysis makes clear that the County of Lehigh did not violate the Establishment Clause by adopting its seal in 1944, nor by deciding to retain the seal in 2015. The county's act of adopting a county seal is secular in purpose. The Plaintiffs provide no evidence that the commissioners decided to adopt Commissioner Hertzogs's design for the seal because it featured a cross as one of sixteen symbols. At most, the commissioners' adoption of Commissioner Hertzog's design evinces recognition of the county's religious heritage, which the Supreme Court has held does not violate the Establishment Clause. The mere presence of a religious symbol on the county's flag does not coerce any member of the community to adhere to any religion.[1] Just as the presence of a bison head looming over the cross does not compel, coerce, or pressure the citizens of Lehigh to favor the county's protection of hoofed animals in the County Preserve, the cross in the county seal does not compel county citizens to hold any particular view about religion. The founding generation did not adopt the First Amendment to protect its citizens from the terror of a county seal that includes a cross.

[1] Other flags and seals containing religious symbols include the flag of the State of Maryland which features two large crosses, see MD GEN PROVIS § 7-202 ("The second and third quarters [include] a cross bottony counterchanged, so that they consist of a quartered field of white and red, charged with a Greek cross."); and the Great Seal of Puerto Rico, which includes a quote from the Vulgate of Luke 1:63, and a lamb that is readily recognizable as a Christian symbol representing Jesus Christ.

ARGUMENT

I. This Court should not restrict its analysis to the endorsement test.

The district court held that the County of Lehigh violated the Establishment Clause of the Constitution because in its view a reasonable observer would perceive the county's seal as endorsing Christianity. *Freedom From Religion Found., Inc. v. Cty. of Lehigh*, No. CV 16-4504, 2017 WL 4310247, at *22-23 (E.D. Pa. Sept. 28, 2017). This conclusion resulted exclusively from the district court's application of the endorsement test. *Id*. (citing *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 283 (3d Cir. 2011), *Modrovich v. Allegheny Cty., Pa.*, 385 F.3d 397, 401 (3d Cir. 2004), and *Freethought Soc. Phila. v. Chester Cty.*, 334 F.3d 247, 267 (3d Cir. 2003)).

After the Third Circuit decided *Modrovich* and *Freethought*, the Supreme Court decided two cases concerning religious displays of religious symbols, *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).[2] In neither of these cases did the Supreme Court suggest that lower courts should restrict their analysis of

[2] *Indian River*, decided after *Van Orden* and *McCreary*, concerned school prayer. *Indian River* is less applicable than *Modrovich* and *Freethought* to the case under review because the Supreme Court has guarded more jealously the Establishment Clause claims in school contexts than in non-school contexts (see *Van Orden v. Perry*, 545 U.S. 677, 691 (2005) ("[W]e have 'been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.'") (citing *Edwards v. Aguillard*, 482 U.S. 578, 583-584 (1987)).

Establishment Clause cases to the *Lemon* test or the endorsement test. Indeed, exclusive reliance on one or even both those tests in tandem would run counter to the Supreme Court's analysis in those cases.

The Supreme Court referred to the prongs of the *Lemon* test as mere "guideposts," *Van Orden*, 545 U.S. at 700, and relegated them to the status of simply "considerations" in "Establishment Clause claims." *McCreary*, 545 U.S. at 859 (2005). In *Van Orden*, Chief Justice Rehnquist also observed the reduced status of the *Lemon* test at the Supreme Court, writing, "just two years after *Lemon* was decided, we noted that the factors identified in *Lemon* serve as 'no more than helpful signposts.' Many of [the Supreme Court's] recent cases simply have not applied the *Lemon* test." *Van Orden*, 545 U.S. at 686 (2005) (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973), and citing *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)).

Decided the same day, both *Van Orden* and *McCreary* involved government displays of religious symbols (the Ten Commandments) and each case gave the Supreme Court an opportunity to elaborate on its Establishment Clause jurisprudence. Although different members of the Court joined to create a majority for each decision—and each opinion applied different analyses—these cases provide insight into the proper analysis that lower courts should follow when discerning potential violations of the Establishment Clause. Neither *Van Orden*

nor *McCreary* suggest that lower courts should adopt the endorsement test or the *Lemon* test to determine the outcome of every Establishment Clause case.

In *Van Orden*, the plurality opinion focused on the benign, non-coercive, and lengthy nature and history of the nation's acknowledgment of religion. In *McCreary*, the Court focused instead on the counties' clear animating purpose of promoting religion and religious belief. (The short and turbulent history of the monument, from 1999 to 2005, featured prominently throughout the majority opinion.) Both cases make clear that courts should analyze Establishment Clause cases to uphold the principle of religious liberty provided for in the Establishment Clause. Both cases also caution against action by the court that might evince hostility towards religion.

A. The Supreme Court has provided no mechanically applicable test to determine whether a government authority has violated the Establishment Clause.

Neither the majority in *McCreary* nor the plurality in *Van Orden* held that lower courts should strictly and mechanically apply the *Lemon* test or the endorsement test to determine whether a government's action violates the Establishment Clause in religious display cases. Chief Justice Rehnquist wrote explicitly that the *Lemon* test did not provide a useful standard for the Court to determine whether Texas violated the Establishment Clause by including the passive monument of the Ten Commandments on the grounds of its state Capitol.

See Van Orden, 545 U.S. at 686 (2005) (stating, "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history").

Justice Breyer expressed a similar view in his concurrence, writing, "there is 'no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.' One must refer instead to the basic purposes of those Clauses." *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring) (citing *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion)). Justice Breyer further decried the use of strict tests in Establishment Clause cases, writing, "no exact formula can dictate a resolution to such fact-intensive cases." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring) (internal quotation marks and citation omitted).

The Court also acknowledged in *McCreary* that "[a]t least since *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947), it has been clear that Establishment Clause doctrine lacks the comfort of categorical absolutes." 545 U.S. at 844 n.10. Although the Court in *McCreary* consulted the purpose prong of the *Lemon* test as an aid to determine whether the County had violated the Establishment Clause, it did not suggest that lower courts must or should blindly and exclusively rely on the

Lemon test to determine the outcome of Establishment Clause cases. Instead, it characterized the *Lemon* test as "summarize[ing] three familiar considerations for evaluating Establishment Clause claims." *McCreary*, 545 U.S. at 859. The Court then consulted one prong of the *Lemon* test to determine whether the county violated the underlying purpose of the Establishment Clause, which it characterized as the neutrality of government toward religion and nonreligion. *McCreary*, 545 U.S. at 860 ("The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'") (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) and citing *Everson*, 330 U.S. at 15-16 (1947); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985)).

In the case under review, the district court relied exclusively on the endorsement test to determine that the County of Lehigh violated the Establishment Clause. In its memorandum opinion, the district court expressed its belief that its holding did not comport with the true meaning of the Establishment Clause. *Freedom From Religion Found., Inc.*, 2017 WL 4310247, at *23. Nevertheless, the district court concluded that it was bound to Third Circuit precedent and decided the case based on its application of the endorsement test. *Id*.

On appeal, this Court need not and should not rely on the endorsement test alone. Instead, it should heed the Supreme Court's guidance that cases involving a display of religious symbols should be considered in light of the original purpose, intent, and understanding of the protections provided for in the Religion Clauses of the First Amendment. The different outcomes and the different analyses demonstrated by the Supreme Court in *Van Orden* and *McCreary* demonstrate that lower courts should not rely exclusively or blindly on any particular test, including the endorsement test, to determine the outcome of Establishment Clause cases.

B. Courts should consider the purpose of the Establishment Clause when deciding whether government action violates the Establishment Clause.

In his concurrence in *Van Orden*, Justice Breyer wrote that the application of legal-judgment to cases like this one "must reflect and remain faithful to the underlying purposes of the [Establishment Clause], and . . . must take account of context and consequences measured in light of those purposes. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring). For his part, Chief Justice Rehnquist also tasked courts with ensuring compliance with the Establishment Clause's twin requirements of ensuring that governments maintain separation from religion and do not express hostility toward religion. His plurality opinion in *Van Orden* emphasized the need to respect our Nation's history of acknowledging religious practice and the danger that government intervention creates. *See Van Orden*, 545

U.S. at 683-84 (writing that courts must "neither abdicate [their] responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage").

In *McCreary*, the Supreme Court expressed primarily a concern that governments remain neutral toward religion. The Court stated that the "touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." 545 U.S. at 860 (internal quotation marks and citations omitted). Not only did the Supreme Court not mandate the use of the *Lemon* test or endorsement test, but *McCreary* suggests that the Supreme Court's main concern focuses on principles that underlie the Establishment Clause. Only in light of these principles, did the Court apply the purpose prong of the *Lemon* test to determine whether the county's action violated the Establishment Clause.

In the case under review, this Court should not rigidly adhere to the endorsement test. Instead, as suggested by the Supreme Court, this Court should consider whether the particular facts of this case demonstrate that the County of Lehigh's action actually curtailed religious liberty, actively took a side in the

debate among religions or between religion and non-religion, coerced citizens into joining a religion, or punished them for not doing so. The facts show no such thing.

The facts in the present case more closely resemble those in *Van Orden* than *McCreary*. The governmental action in this case was not a pointed effort to promote religion during a time that made absolutely clear the religious purpose behind the action. The County of Lehigh adopted its county seal in 1944. There is either incredibly scant or absolutely no evidence that the county acted to approve this seal on account of the religious symbol on the seal. Instead, like *Van Orden*, the County's approval and use of the seal is much more in the nature of a benign, long-term acknowledgement of religion as an important part of Lehigh County's history.

The district court relied too heavily on comments made by Commissioner Hertzog who designed the seal. Two years after the county adopted the seal, the commissioner described each of the symbols in the seal. The seventh ***of the sixteen symbols*** he described was the canary yellow cross that, he said, symbolizes "Christianity and the God-fearing people which are the foundation and backbone of [Lehigh] County." *Freedom From Religion Found., Inc.*, 2017 WL 4310247, at *3, *20. This after-the-fact statement by one commissioner does not suggest that a majority of the commissioners had a religious purpose—let alone a primarily

religious purpose—when they adopted that commissioner's design for the county's seal two years earlier.

The fact that the county seal has been in place for more than 70 years without challenge, suggests that this passive religious symbol is more akin to the religious display of the Ten Commandments in *Van Orden* than the display in *McCreary*. *See Van Orden*, 545 U.S. at 702 (Breyer, J., concurring) (stating that "40 years [with no challenge to the religious display] suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to 'engage in' any 'religious practic[e],' to 'compel' any 'religious practic[e],' or to 'work deterrence' of any 'religious belief.'") (citing *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring)).

This case is also similar to *Van Orden* and unlike *McCreary* in that there is nothing in the history of the religious display itself that demonstrates that the government authority sought to promote religious objectives by its actions. The county seal has remained unchanged and unchallenged for more than 70 years.

C. This Court must honor the requirement that government authority cannot evince hostility toward religion.

The Supreme Court agreed that displays of the Ten Commandments were religious symbols in both *Van Orden*, 545 U.S. at 690, and *McCreary*, 545 U.S. at

867. The Justices also agreed that the display of a religious symbol in public is not itself determinative of the display's constitutionality. *See McCreary*, 545 U.S.at 863 (stating that there is no "indication that the enquiry is rigged in practice to finding a religious purpose dominant every time a case is filed."); *Van Orden*, 545 U.S. at 684 fn.3. ("[W]e have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion.") (citing *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970)).

The Latin cross in the county's seal is of course a symbol of Christianity. But the Supreme Court has not required that all such religious symbols be purged from society or from governmental insignia. To the contrary, the Supreme Court's concern for the permissible role of the acknowledgement of religion in *Van Orden* and its concern for maintaining government neutrality toward religion and nonreligion in *McCreary* dictate that courts should tread softly when invalidating displays of religious symbols as unconstitutional.

The Court in *McCreary* relied heavily on the importance of "government neutrality between religion and religion, and between religion and nonreligion." 545 U.S. at 860 (internal quotation marks and citation omitted). It is easy to see

how the principle of neutrality requires that a government authority not establish a religion where there was none before. But having a cross among 16 other symbols on a county seal does not establish a religion. It does not coerce anyone into joining a religion. It does not even express a preference for religion over non-religion or a preference between religions. It simply and accurately acknowledges religion as an important aspect of the country's history. That the religious symbol at issue is associated with Christianity is of no moment; it is just as much a historical symbol of religion as the Ten Commandments are. And of course the Ten Commandments themselves are not associated with all religions, but only some. A religious symbol does not have to belong to all religions in order for it to appear on public seals, images, etc. as a celebration and acknowledgement of religion in history.

Both the plurality opinion and Justice Breyer's concurring opinion in *Van Orden* highlight a palpable concern that misguided enforcement of the Establishment Clause would harm the very religious liberty that the Establishment Clause is meant to protect. Chief Justice Rehnquist acknowledged that the Supreme Court's Establishment Clause cases respect both "the strong role played by religion and religious traditions throughout our Nation's history" and "the principle that governmental intervention in religious matters can itself endanger religious freedom." *Van Orden*, 545 U.S. at 683. In light of these two

considerations, courts must not prohibit the government from acknowledging the religious heritage of this country. *See Van Orden*, 545 U.S. at 683-84 ("Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.").

Justice Breyer likewise cautioned against the danger of governmental hostility toward religion imposed by Establishment Clause tests due to the potential for a preference of nonreligion over religion. *See Van Orden*, 545 U.S. at 698-69 (Breyer, J., concurring) (writing that Establishment Clause tests are "insufficient, both because it is sometimes difficult to determine when a legal rule is 'neutral,' and because untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.") (internal quotation marks and citation omitted). This is precisely the danger that is present in the case under review.

This court should not require that the County of Lehigh remove the cross from its seal. The county commissioners did not adopt the seal with the purposes of coercing anyone to join a religion. They did not adopt the seal to promote a particular religion or religion over non-religion generally. They did not adopt the

seal specifically, primarily, or even in large part on account of the religious symbol on it. And the presence of the religious symbol as one of 16 other symbols on the seal is a benign acknowledgment of the religious heritage of the county. The presence of the cross is, at most, an acknowledgement of the Christian heritage of the county. In no way does the county's act of adopting the seal, or of voting to retain its seal in 2015, violate the Establishment Clause. Furthermore, in light of the 70-year unchallenged history of the county's seal, this Court would risk evincing hostility toward religion if it now requires the county to remove this feature from its seal.

D. The county seal does not violate the Establishment Clause because it has no coercive effect.

Amici suggest the court should also look to the recent legislative prayer cases, which focus their analysis on the presence or absence of government coercion. In those cases, the Supreme Court has recognized the constitutionality of governmental prayers, so long as those prayers do not coerce citizens to participate in the religion.

The Supreme Court has held that the Establishment Clause permits governmental authorities to include religious prayers during civil activities. In 2014, the Supreme Court addressed the constitutionality of legislative prayer in *Town of Greece, N.Y. v. Galloway*, holding that the town of Greece did not violate the Constitution by opening its monthly board meetings with a prayer even though

a number of the prayers invoked "the name of Jesus, the Heavenly Father, or the Holy Spirit." ––– U.S. –––, 134 S.Ct. 1811, 1815, 1824 (2014); *see also Marsh*, 463 U.S. 783 (holding that the Nebraska's state legislature did not violate the Constitution by opening each session with a prayer by a chaplain paid with public funds, even though clergyman of only one denomination had been selected for 16 years and the prayers were in the Judeo-Christian tradition).

In *Town of Greece*, the Supreme Court explained that invocation prayers recognize a longstanding practice of acknowledging a higher power during civic affairs. 134 S.Ct. 1811, 1827-28, ("Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs.").

Not only were the prayers permissible as a recognition of a longstanding practice of solemnizing public meetings, but the Supreme Court also held that the prayers were permissible because they were not coercive in nature; citizens were free to not participate in the prayer and the town did nothing to disadvantage citizens that chose to not participate. *See Town of Greece*, 134 S. Ct. 1811, 1827 ("Nothing in the record suggests that members of the public are dissuaded from

leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest.") (internal quotation marks and citations omitted).

Similarly, in the case under review, the mere presence of a cross on the county seal does not require that citizens of Lehigh acknowledge, participate in, or deny religion. A citizen's disregard of the cross, which is one of sixteen features in the seal, would be entirely unnoticed and every person is free to disregard the cross or any other symbol that appears in the seal. The seal in no way impedes citizens from moving to or away from the county, and its presence is utterly devoid of any coercive effect. Just as in *Town of Greece*, the Plaintiffs' personal offense at the sight of the County's seal does not give rise to a Constitutional violation. 134 S. Ct. 1811, 1826 ("In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum . . . .").

Conclusion

For the foregoing reasons, Amici Curiae request that this Court reverse the decision below.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP, ELECTRONIC FILING AND WORD COUNT

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.

I further certify that the text of the electronic Brief filed by ECF and the text of the hard copies filed or to be filed with the Court are identical. The electronic copy of the Brief has been scanned for viruses using Trend Micro Virus Protection.

I further certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,079 words as calculated by the word processing program used in the preparation of this brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. (32)(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 19, 2018, the foregoing was filed electronically and served on the other parties via the court's ECF system. Seven hard copies of the brief have also been sent to the Court via regular mail.

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