No. 17-3581

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, et al.,
Plaintiffs-Appellees,

v.

COUNTY OF LEHIGH,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Case No. 5:16-cv-04504-EGS (Hon. Edward G. Smith)

BRIEF OF ALLIANCE DEFENDING FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

KRISTEN K. WAGGONER
DAVID A. CORTMAN
JONATHAN A. SCRUGGS
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260

NATHANIEL BRUNO
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, D.C. 20001

SAMUEL S. SADEGHI
Counsel of Record
CHRISTOPHER H. MCGRATH
PAUL HASTINGS LLP
695 Town Center Drive, 17th Fl.
Costa Mesa, CA 92626
(714) 668-6200
samsadeghi@paulhastings.com

GEORGE W. ABELE
PAUL HASTINGS LLP
515 S. Flower Street, 25th Fl.
Los Angeles, CA 90071

Counsel for Amicus Curiae
Alliance Defending Freedom

RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae, Alliance Defending Freedom is a non-profit organization incorporated in the Commonwealth of Virginia and is recognized as tax-exempt under Section 501(c)(3) of the Internal Revenue Code. Alliance Defending Freedom has no parent corporation. Alliance Defending Freedom has no stock issued to the public, and accordingly, no publicly held corporation owns 10% or more of any stock of Alliance Defending Freedom.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Constitution

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom ("ADF") is a not-for-profit legal organization devoted to defending and advocating for religious freedom. ADF provides strategic training, funding, and direct litigation services, and serves as counsel or *amicus curiae* in cases that concern First Amendment freedoms. Since its founding in 1994, ADF has played a role, either directly or indirectly, in dozens of cases before the Supreme Court, this Court, and in hundreds of cases before the federal and state courts across the country, as well as in tribunals around the world.

Among the cases ADF has litigated, many involve issues under the Establishment Clause. ADF commonly represents individuals, churches, religious organizations, and other entities affected by Establishment Clause jurisprudence. ADF's clients will therefore be impacted by any modification of Establishment Clause principles. For this reason, ADF has an interest in promoting accurate Establishment

[1] Defendant-Appellant and Plaintiffs-Appellees have consented to the filing of this brief, pursuant to FED. R. APP. P. 29(a). No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that Paul Hastings LLP paid the expenses involved in filing this brief.

Clause jurisprudence so that ADF's clients can rely on this precedent to protect their religious freedoms and acknowledge their religious heritage in the future. To protect these interests, ADF submits this brief to urge this Court to analyze this case in accordance with applicable and recent Supreme Court precedent.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court's incorrect holdings on standing [2] and the constitutionality of the County of Lehigh's Seal require that this case be reversed. To be fair, the district court lamented that its position in the "Article III hierarchy" required it to reluctantly follow this Court's precedent despite the district court's disagreement. Upon appeal, however, this case presents this Court with a rare opportunity to revise its Establishment Clause jurisprudence, which currently does not comport with recent Supreme Court precedent.

On the issue of standing, the district court concluded (in a footnote) that Appellees have standing simply because they had, and would continue to have, "direct, unwelcome contact with the Seal." App. 25

---

[2] Although Appellant had not argued to the district court that Appellees lacked standing, the district court made the legal conclusion that each individual Appellee had standing to sue. App. 25 n.4. This Court should accept Appellant's argument on appeal, Def.-Appellant's Br. at 39-42, and reverse the district court's conclusion pursuant to this Court's "'continuing obligation' to assure that [it] ha[s] jurisdiction[, which] requires that [it] raise issues of standing . . . sua sponte." *Seneca Res. Corp. v. Township of Highland*, 863 F.3d 245, 252 (3d Cir. 2017); *see also Freedom From Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 475 n.4 (3d Cir. 2016) (stating that this Court may "exercise de novo review over legal conclusions concerning standing").

n.4. The district court relied on this Court's decision that a litigant has standing to bring an Establishment Clause claim upon showing an "unwelcome contact with [an] allegedly offending object." *Id.* (quoting *New Kensington*, 832 F.3d at 479). The so-called "offended observer" standing, however, was rejected by the Supreme Court, which held that the "psychological consequence presumably produced by observation of conduct with which one disagrees," be it offense or else, does not constitute the requisite injury in fact required for Article III standing to bring an Establishment Clause claim. *Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). This Court should follow the correct *Valley Forge* standard, which this Court already recognized in *New Kensington*: standing may be conferred only on those litigants, who were "'subjected to unwelcome religious *exercises* or were forced to assume *special burdens* to avoid them.'" *New Kensington*, 832 F.3d at 476, 478-79 (emphases added) (quoting *Valley Forge*, 454 U.S. at 483, 486 n.22). Mere exposure to an object deemed offensive is insufficient to confer standing.

As for holding that the County's Seal, depicting a cross among several other symbols, is unconstitutional, the district court applied this

Court's "hybrid *Lemon*-endorsement test," despite acknowledging that "the test does not accurately reflect the plain text of the Establishment Clause or its drafters' intent." App. 21 (citing *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 282 (3d Cir. 2011)). Indeed, the Supreme Court has abandoned the *Lemon* test in favor of a new framework focused on historical tradition and the absence of government coercion. *See Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). This Court should likewise apply the *Town of Greece* framework in analyzing challenged government actions, like the passive religious display in this case.

Supreme Court precedent demands reversal of the district court's holdings. This Court should hold that Appellees lack standing because finding the passive cross on the County's Seal to be "offensive" falls well short of *Valley Forge*'s requisite showing of being personally subjected to "unwelcome religious exercises" or "forced to take special burdens" to avoid those exercises. Additionally, this Court should uphold the constitutionality of the County's 73-year-old Seal, which is consistent with our historical tradition and in no way coerces anyone to participate in or support any religious exercise.

FACTUAL SUMMARY

Amicus relies on the factual recitation presented in Appellant's brief.

ARGUMENT

I. "OFFENDED OBSERVER" STANDING IN ESTABLISHMENT CLAUSE CASES RUNS AFOUL OF THE SUPREME COURT'S DECISION IN *VALLEY FORGE*.

A. The Supreme Court Rejected "Offended Observer" Standing in *Valley Forge* and Has Consistently Rejected Standing Based on a Special Interest in, or Stigmatic Injury From, Government Action.

The Constitution limits judicial power to "Cases" and "Controversies." U.S. CONST. art. III, §§ 1-2. The standing doctrine, rooted in "the traditional understanding of a case or controversy . . . , limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The "'irreducible constitutional minimum' of standing consists of three elements," the "'[f]irst and foremost'" of which requires the plaintiff to have suffered "an injury in fact." *Id.* (alteration in original) (first quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); then quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998)). Like any other claim, a plaintiff's claim that a government action violates the Establishment Clause of the First

Amendment is subject to Article III's injury-in-fact requirement. *See, e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132 (2011).

The Supreme Court most recently analyzed standing in Establishment Clause cases in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* 454 U.S. 464 (1982). In that case, the plaintiffs argued that they had standing to challenge a federal agency's conveyance of land to a religious college based on taxpayer and non-taxpayer standing. *Id.* at 466-69. A divided panel of this Court reversed the district court's dismissal for lack of standing and held that while plaintiffs lacked taxpayer standing, they had standing "merely as 'citizens,' claiming 'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion.'" *Id.* at 470 (quoting *Ams. United for Separation of Church & State, Inc. v. U.S. Dep't of Health, Ed., & Welfare*, 619 F.2d 252, 261 (3d Cir. 1980)). One judge concurred, reasoning that such standing was necessary to ensure the existence of an "available plaintiff" to bring Establishment Clause challenges. *Id.* (citing *Ams. United*, 619 F.2d at 267-68 (opinion of Rosenn, J.)).

The Supreme Court reversed, holding that plaintiffs lacked both taxpayer and non-taxpayer standing. *Id.* at 482, 485-86, 490. As to non-taxpayer standing,[3] the Supreme Court held that the "psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III." *Id.* at 485. No "psychological consequence," offense or otherwise, produced by mere "observation" of an alleged Establishment Clause violation constitutes injury in fact, regardless of "the intensity of the litigant's interest[,] the fervor of his advocacy," or the "firm[ness of his] commit[ment] to the constitutional principle of separation of church and State." *Id.* at 485-86. Any other conclusion would provide litigants

[3] The Supreme Court has "carved out a narrow exception to the general constitutional prohibition against taxpayer standing," which is limited to challenges "directed 'only [at] exercises of congressional power' under the Taxing and Spending Clause." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 588-89, 602 (2007) (alteration in original) (quoting *Valley Forge*, 454 U.S. at 479, 480-82) (rejecting taxpayer standing to challenge Executive Branch action taken pursuant to the Constitution's Property Clause); *see Flast v. Cohen*, 392 U.S. 83 (1968). Taxpayer standing is not available to Appellees in this case because the challenged action was not taken by Congress pursuant to the Taxing and Spending Clause, and in any event, the County's use of taxpayer funds to print its Seal is unaffected by which symbols appear on the Seal.

"a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.* at 487.

Instead, the Court held that standing may be conferred only on those litigants, who were "subjected to unwelcome religious *exercises* or were forced to assume *special burdens* to avoid *them*." *Id.* at 486 n.22 (emphases added). To illustrate, the Court distinguished between schoolchildren who had been subject to partaking in the religious *exercise* of "Bible reading in the public schools," in one case, and a child in another case, who already had graduated but who, nevertheless, objected to school Bible readings. *Id.* (comparing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) with *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952)). As Justice O'Connor once explained, the word "exercise" has been defined as "'[t]he practice and performance of rites and ceremonies, worship, etc.; the right or permission to celebrate the observances (of a religion)' and religious observances such as acts of public and private worship, preaching, and prophesying." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 893 (1990) (O'Connor, J., concurring) (quoting 3 A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 401-02 (J. Murray ed. 1897)).

The Court also rejected as unreasonable the "assumption that if respondents ha[d] no standing to sue, no one would have standing." *Valley Forge*, 454 U.S. at 489. The Court explained that conferring standing in the absence of an injury in fact, merely to ensure the existence of an "available plaintiff" to "correct[] constitutional errors . . . does not become more palatable when the underlying merits concern the Establishment Clause." *Id.*

Indeed, *Valley Forge* is consistent with the Supreme Court's denial of standing to litigants who have framed their injury as a conflict of their interests or goals with a government action, or even as a perceived stigmatic injury caused by government action—a more severe harm than being merely offended. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 616 (1989) (plurality opinion) (reasoning that "a special interest" in a government action "does not alone confer federal standing"); *Allen v. Wright*, 468 U.S. 737, 755 (1984) (rejecting standing based on "stigmatizing injury" even as a result of "the most serious consequences of discriminatory government action" absent a showing that plaintiff was "'personally denied equal treatment' by the challenged discriminatory conduct" (quoting *Heckler v. Matthews*, 465 U.S. 728,

739-40 (1984))), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, (1976) (rejecting standing to challenge government action on the basis that it conflicted with respondents' "goal" and "interest"); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 226-27 (1974) (holding that to confer standing based on an "interest" in the proper enforcement of constitutional provisions because "citizens are the ultimate beneficiaries of those provisions" would leave "no boundaries" for standing jurisprudence); *see also Ams. United for Separation of Church & State v. Reagan*, 786 F.2d 194, 201 (3d Cir. 1986) (stating that "stigmatizing injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct").

B. Although Some Courts of Appeal Have Correctly Rejected the "Offended Observer" Standard, Others, Including This Court, Have Incorrectly Adopted that Standard.

In the aftermath of *Valley Forge*, the Seventh Circuit correctly held that being "deeply offended" by coming into contact with a religious display on government property does not amount to an injury in fact

sufficient for Article III standing. *Am. Civil Liberties Union of Ill. v. City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986) (holding that, without more, "[t]he fact that the plaintiffs do not like a cross to be displayed on public property—even that they are *deeply offended* by such a display—does not confer standing" (emphasis added)); *Freedom From Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1467-68 (7th Cir. 1988) (acknowledging appellants' allegation that "the display [was] a rebuke to their religious beliefs and that they [were] offended by its presence" but holding that "psychological harm that results from witnessing conduct with which one disagrees, however, is not sufficient to confer standing on a litigant"); *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) (reaffirming *St. Charles*'s denial of standing based on being "deeply offended" by a cross on public property and holding that "offense at the behavior of the government … differs from a legal injury" sufficient for Article III standing).

In a similar challenge to the display of a cross on government property, the Eleventh Circuit held that being "offended" is insufficient to establish standing, although in a subsequent case, the Eleventh Circuit adopted "offended observer" standing. *Compare Am. Civil*

Liberties Union of Ga. v. Rabun Cty. Chamber of Commerce, Inc., 698 F.2d 1098, 1108 (11th Cir. 1983) (holding that it would be insufficient for a litigant to show he was "offended on a philosophical basis" or that he experienced "a mere psychological reaction"), *with Saladin v. City of Milledgeville*, 812 F.2d 687, 692-93 (11th Cir. 1987) (conferring standing because "appellants come into direct contact with the offensive conduct").

Rather than faithfully apply *Valley Forge* like the Seventh and (originally) Eleventh Circuits, this Court ultimately followed the misguided approach of other Circuits and adopted the "offended observer" standard for conferring standing in Establishment Clause cases. *See Freedom From Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469 (3d Cir. 2016). In *New Kensington*, this Court initially recognized *Valley Forge*'s holding that standing may not be conferred on litigants, who "assert[] 'the generalized interest of all citizens in constitutional governance,'" or who have a "generalized disagreement" with a government action, but only on those litigants, who were "'subjected to unwelcome religious *exercises* or were forced to assume *special burdens* to avoid them.'" *Id.* at 476, 478-79 (emphases

added) (quoting *Valley Forge*, 454 U.S. at 483, 486 n.22). But the Court ultimately diverged from *Valley Forge*'s principles, especially its holding that the "psychological consequence" of "observ[ing]" a perceived Establishment Clause violation is not an injury-in-fact, *Valley Forge*, 454 U.S. at 485. *See New Kensington*, 832 F.3d at 476-79.

Instead of applying the clear guidance of *Valley Forge*, this Court looked to other courts of appeal, which had held, incorrectly, "that standing in this context 'requires only direct and unwelcome personal contact with the alleged establishment of religion.'" *Id.* at 476-77 (quoting *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1023 (8th Cir. 2012)) (citing *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009); *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1253 (9th Cir. 2007); *Am. Civil Liberties Union of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 490 (6th Cir. 2004); *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989); *Saladin*, 812 F.2d at 692). Accordingly, this Court adopted the "offended observer" standard for standing: "[A] community member . . . may establish standing by showing direct, unwelcome contact with the allegedly offending object or event,

regardless of whether such contact is infrequent or she does not alter her behavior to avoid it." *Id.* at 479.

C. This Court Should Apply *Valley Forge*'s Clear Standard for Standing in Establishment Clause Cases.

Other Circuits, and this very Court, somehow traveled from *Valley Forge*'s focus on "unwelcome religious *exercises*" to arrive at the lesser standard of "unwelcome *contact*" with an "offending object."[4] It is clear, however, that *Valley Forge* rejected standing based on the "psychological consequence" (offense or else) from "observation" of a government action. *Valley Forge*, 454 U.S. at 485. In fact, this Court already has recognized *Valley Forge*'s correct standard for standing in Establishment Clause cases: "[S]tanding exists either when plaintiffs 'were subjected to unwelcome religious *exercises* or were *forced* to

[4] For example, after quoting *Valley Forge* for the proposition that Establishment Clause plaintiffs must allege that they were "'subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them,'" the Fourth Circuit interchanged "exercises" with "display" in the following paragraph. *Suhre*, 131 F.3d at 1086 (quoting *Valley Forge*, 454 U.S. at 487 n.22). Without explaining the leap from religious *exercises* to *displays*, the Court stated that "*Valley Forge* recognized that direct contact with an unwelcome religious exercise *or display* works a personal injury" sufficient for standing purposes. *Id.* (emphasis added). In fact, the opinion in *Valley Forge* did not even mention the word "display." *Valley Forge*, 454 U.S. 464.

assume special *burdens* to avoid them.'" *New Kensington*, 832 F.3d at 479 (emphases added) (quoting *Valley Forge*, 454 U.S. at 486 n.22). Being coerced (by the government) to perform religious exercises, or forced to take special burdens to avoid those religious exercises, is a far cry from being offended by a passive viewing of a religious display.

This Court should apply the Supreme Court's clear standard regardless of how unpopular it is among the various Circuits, who are admittedly confused by the "uncertainty concerning how to apply the injury in fact requirement in the Establishment Clause context." *Cooper*, 577 F.3d at 490. The uncertainty may have been exacerbated by the Supreme Court's silence on the issue of standing in some of its post-*Valley Forge* rulings involving Establishment Clause claims.[5] Although one could speculate as to how standing was proper in those cases,[6] the Court's silence should not be interpreted as disapproving

---

[5] *See Lynch v. Donnelly*, 465 U.S. 668 (1984); *Cty. of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), *abrogated by Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *McCreary Cty v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality opinion); *Town of Greece*, 134 S. Ct. 1811.

[6] For example, taxpayer standing may have been proper in *Lynch* because the town paid for the crèche display. 465 U.S. at 671.

Valley Forge and approving the defective "offended observer" standing. Indeed, the Supreme Court has warned that when a "potential jurisdictional defect is neither noted nor discussed" in one of its decisions, "the decision does not stand for the proposition that no defect existed." *Winn*, 563 U.S. at 144.

Moreover, the Supreme Court's explicit denial of standing in other Establishment Clause cases may serve as indirect evidence that the Court does not view mere offense as a judicially cognizable injury.[7] *See, e.g.*, *Hein*, 551 U.S. at 595-96 (denying standing to plaintiffs to challenge the use of federal funds for religious conferences, which allegedly sent a message that nonbelievers "are outsiders" and "not full members of the political community"); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (denying standing to a father, who objected to the requirement that his daughter recite the Pledge of Allegiance,

---

Regardless, the Court simply did not discuss the issue of standing in those cases.

[7] The *Town of Greece* plurality's refusal to treat "offense" as a type of injury that qualifies as a constitutional harm suggests that offense likewise cannot constitute harm for purposes of standing. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014) (opinion of Kennedy, J., joined by Roberts, J., and Alito, J.) ("[R]espondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion.").

containing "One Nation Under God"); *see also Freedom From Religion Found., Inc. v. Obama*, 641 F.3d at 807 ("If a perceived slight, or a feeling of exclusion, were enough, then [the plaintiff in *Elk Grove*] would have had standing to challenge the words "under God").

Even outside the Establishment Clause context, the Supreme Court's denial of standing based on psychological reactions serves as further evidence that offense cannot constitute an injury in fact. *See, e.g.*, *ASARCO Inc.*, 490 U.S. at 616 ("a special interest" in a government action); *Allen*, 468 U.S. at 755 ("stigmatizing injury" even from "the most serious consequences of discriminatory government action"); *Simon*, 426 U.S. at 39-41 ("injury to [an] interest" or "goal").

D. The District Court Erred by Ignoring *Valley Forge* and Incorrectly Conferring Standing on Appellees Based on Mere "Offense."

Applying *Valley Forge* to the case at bar reveals that the district court erred by conferring standing on Appellees to challenge the County's Seal. The district court observed that Appellees came into "contact" and "encountered" the passive cross on the County's Seal. App. 14-16. The alleged resulting injury was Appellees' host of psychological reactions, including: finding the cross to be "offensive";

"worr[ying]" that the county "may discriminate" against an atheist; "believ[ing]" that the cross "promotes Christianity" and is contrary to the First Amendment; being "remind[ed]" of County taxes or alleged abuses by churches; "wish[ing]" to avoid the Christian church; and "feel[ing] as though the County is trying to force religion." *Id.* The Appellees did not allege, nor could they allege, that they were actually "subjected to unwelcome religious *exercises*" or that they were "forced to assume special burdens to avoid" any religious *exercise*. *Id.*

Without more, the psychological consequence of coming in contact with a passive religious display cannot constitute injury in fact under *Valley Forge*. Accordingly, this Court should reverse the district court's holding that Appellees have standing.

II. FOLLOWING THE SUPREME COURT'S LEAD IN RECENT ESTABLISHMENT CLAUSE CASES, THIS COURT SHOULD JETTISON THE *LEMON* AND "ENDORSEMENT" TESTS AND APPLY A TEST FOCUSED ON HISTORICAL TRADITION AND THE ABSENCE OF GOVERNMENT COERCION.

A. This Court's Hybrid *Lemon*-Endorsement Test is No Longer Appropriate in Light of the Supreme Court's Decisions in *Van Orden* and *Town of Greece*.

In *Lemon v. Kurtzman*, the Supreme Court adopted a three-prong test to determine whether a challenged government action comports

with the Establishment Clause. 403 U.S. 602, 612-13 (1971). The *Lemon* test provides: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* (citation omitted) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1968)). The purpose and effect prongs of the *Lemon* test were later modified by the "reasonable observer" in the so-called "endorsement test," first developed by Justice O'Connor, and ultimately adopted by the Court in *County of Allegheny*, 492 U.S. at 595. *See Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) (explaining the standard as whether an "objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools"); *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.").

This Court has adopted a hybrid *Lemon*-endorsement test by combining the traditional *Lemon* prongs with the endorsement test,

which it has considered to be "essentially the same" as "the second *Lemon* prong." *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 282 (3d Cir. 2011). Thus, under the second prong of *Lemon*, the Court "adopt[s] the viewpoint of the reasonable observer and may take into account 'the "history and ubiquity" of [the] practice,' since it "'provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.'"" *Id.* at 284 (second alteration in original) (quoting *Am. Civil Liberties Union of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1486 (3d Cir. 1986)).

Significantly, the hybrid test was adopted despite this Court's recognition "that *Lemon* has 'been the subject of critical debate'" and that "'its continuing vitality has been called into question by members of the Supreme Court and by its noticeable absence from the analysis in some of the Court's recent decisions.'" *Id.* at 282 (quoting *Black Horse Pike*, 84 F.3d at 1484). Moreover, this Court acknowledged that since *Lemon*, the Supreme Court decided two challenges under the Establishment Clause without resort to the *Lemon* test. *Id.* at 281-82 (citing *Marsh v. Chambers*, 463 U.S. 783 (1983); also citing *Van Orden*

v. Perry, 545 U.S. 677, 686 (2005), for the proposition that the "Supreme Court [is] reluctan[t] to apply *Lemon*"). The Supreme Court has similarly decided several other Establishment Clause challenges by choosing not to apply *Lemon*. *See Cutter v. Wilkinson*, 544 U.S. 709, 717 n.6 (2005) (reciting the *Lemon* test but "resolv[ing] th[e] case on other grounds"); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (neither citing nor applying the *Lemon* test); *Lynch*, 465 U.S. at 679 (applying the *Lemon* test but explaining that the Court did not find *Lemon* "useful" in *Larson v. Valente*, 456 U.S. 228 (1982)).

Most importantly, this Court applied the *Lemon*-endorsement test without the hindsight of the Supreme Court's recent decision in *Town of Greece*.[8] *See Town of Greece*, 134 S. Ct. 1811. In *Town of Greece*, the Supreme Court analyzed whether sectarian prayers at town council meetings violated the Establishment Clause. *Id.* at 1813. The Second Circuit had held that because "an objective, reasonable person would believe that the town's prayer practice had the effect of affiliating the

[8] This Court recently had occasion to consider *Town of Greece* in one Establishment Clause challenge, but nonetheless applied the hybrid *Lemon*-endorsement test without addressing or even mentioning *Town of Greece*. *Tearpock-Martini v. Borough*, 674 F. App'x 138, 140 (3d Cir. 2017).

town with Christianity," the town council's prayers were unconstitutional. *Galloway v. Town of Greece*, 681 F.3d 20, 33 (2d Cir. 2012). Without suggesting that the Second Circuit had misapplied *Lemon* or what the "reasonable observer" would conclude under the endorsement test, the Supreme Court reversed and upheld the constitutionality of the prayers based on an entirely different framework, focused on historical tradition and the absence of government coercion. *Id.* at 1813-15.

Town of Greece finally resolved the confusing split created by the Supreme Court, when on the same day, considering (substantively) the same religious display on government property (the 10 Commandments), it applied *Lemon* in one case, but not the other. *Compare McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. at 859-63 (applying *Lemon* and refusing to "abandon" it), *with Van Orden*, 545 U.S. at 686 ("Whatever may be the fate of the *Lemon* test . . . , we think it not useful" in this case dealing with a "passive" religious display). That *Town of Greece* sided with *Van Orden*'s approach is best illustrated by the majority's lack of any mention of *Lemon*. *See Town of Greece*, 134 S. Ct. 1811. Indeed, *Lemon* was mentioned only once in the

entire case: an uncontroversial quote to its dictum, appearing in Justice Breyer's dissent. *Id.* at 1841 (Breyer, J., dissenting).

Given the Supreme Court's departure from *Lemon* in numerous Establishment Clause cases, most recently in *Town of Greece*, continued application of *any* form of the *Lemon* test, including the hybrid *Lemon*-endorsement test is improper.

B. This Court Should Follow *Town of Greece* and Apply a Test Focused on Historical Tradition and Absence of Government Coercion.

1. Historical Tradition

Without even a mention of the *Lemon* test, *Town of Greece* upheld the constitutionality of prayers at town council meetings based on a new framework, focused primarily on historical tradition. *See* 134 S. Ct. 1811. The central rationale espoused by the Court was "that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Id.* at 1819 (quoting *Cty. of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part)). Significantly, the framework in *Town of Greece* was not limited to legislative prayer cases, but rather explicitly extended to *all* cases arising under the Establishment Clause. *Elmbrook Sch. Dist. v. Doe*,

134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting in denial of certiorari) ("*Town of Greece* left no doubt that 'the Establishment Clause must be interpreted by reference to historical practices and understandings.'" (quoting *Town of Greece*, 134 S. Ct. at 1819)). Notable too is that the Court's framework was inspired by the test laid out in Justice Kennedy's partial concurrence in *County of Allegheny*, a case involving a passive religious display. *Town of Greece*, 134 S. Ct. at 1819.

As explained by *Town of Greece*, this "Court's inquiry, then, must be to determine whether the [challenged] practice [by the government] fits within the tradition long followed" by various levels of our government. *Id.* *Town of Greece*'s historical tradition inquiry is also consistent with the plurality's rationale in *Van Orden*, where the display of the Ten Commandments was upheld as part of an "'unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.'" *Van Orden*, 545 U.S. at 686 (quoting *Lynch*, 465 U.S. at 674).

Moreover, while being rooted in historical tradition is *sufficient* to render a government action constitutional under the Establishment Clause, such finding is not *necessary*. *Town of Greece* "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Town of Greece*, 134 S. Ct. at 1819. In other words, the historical tradition criterion should not be "confined to the inquiry into whether the challenged practice itself is a part of our accepted traditions dating back to the Founding." *Cty. of Allegheny*, 492 U.S. at 669-70 (Kennedy, J., concurring in part and dissenting in part) (explaining that a proper test "must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion"); *see also Town of Greece*, 134 S. Ct. at 1825 (opinion of Kennedy, J., joined by Roberts, J. and Alito, J.) (explaining that certain religious traditions are permissible even if developed after the founding era because they have become "part of our heritage and tradition, part of our expressive idiom, [such as] the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' at the opening" of the Supreme Court's sessions).

Accordingly, this Court should adopt a test based on the *Town of Greece* framework that upholds the constitutionality of challenged government actions that fit within our historical tradition.

2. Absence of Government Coercion

Also significant to the analysis in *Town of Greece* was the Court's adherence to the "elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Town of Greece*, 134 S. Ct. at 1825 (quoting *Cty. of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part)). Although a majority in *Town of Greece* could not agree on the degree to which government "coercion" of religion would violate the Establishment Clause, they did agree that an absence of coercion rendered a government action constitutional. *Compare id.* at 1827 (opinion of Kennedy, J., joined by Roberts, J. and Alito, J.) (upholding the constitutionality of prayers at town council meetings because they did not "coerce nonbelievers"), *with id.* at 1815 (opinion of Thomas, J., joined by Scalia, J.) (upholding the constitutionality of prayers at town council meetings because the "subtle pressures" they

placed on respondents "d[id] not amount to actual legal coercion" or a "coercive state establishment" of religion).

This principle is also consistent with the holding in *Van Orden* that government "must not press religious observances upon [its] citizens." *Van Orden*, 545 U.S. at 683. It is also consistent with the historical tradition inquiry. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 155 (1992) ("The early practice in the Republic was replete with governmental proclamations and other actions that endorsed religion in noncoercive ways . . . ."). This Court should similarly apply a test that distinguishes between a permissible government action that does not "coerce" citizens to observe religion and an impermissible government coercion of religion.

C. The Seal of the County of Lehigh Comports With the Establishment Clause Because It Is Rooted in Historical Tradition and Is Not Government Coercion of Religion.

An application of the framework in *Town of Greece* leaves no doubt that the County of Lehigh's Seal is consistent with the Establishment Clause. Under *Town of Greece*, the first inquiry examines whether the government action comports with the "historical practices and understandings" permitted by the Establishment Clause. *Town of*

Greece, 134 S. Ct. at 1819. Here, the relevant inquiry is whether the County's inclusion of a cross among several other symbols used on its Seal "fits within the tradition long followed" by various levels of our government. *Id.*

The use of passive religious symbols in a seal or flag is the kind of government action that "'accords with history and faithfully reflects the understanding of the Founding Fathers.'" *Id.* (quoting *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)). Such examples of the use of religious symbols abound.[9] The current seal of the State of Maryland, officially used during the founding era, including when the First Amendment was ratified, prominently displays two bottony crosses and a Bible verse in Latin (Psalm 5:12). *See Maryland at a Glance*, MARYLAND MANUAL ON-LINE, http://msa.maryland.gov/msa/mdmanual/01glance/html/symbols/seal.html (last visited Mar. 7, 2018). Since the founding era, the Great Seal of the United States has displayed the "Eye of Providence" with the Latin inscription, *Annuit Cœptis*, which means, "He (God) has favored our

[9] *Amicus* refers this Court to the many examples provided in Appellant's brief, including other overtly religious examples in government, such as religious town names. Def.-Appellant's Br. 4-24.

undertakings, allud[ing] to the many interventions of Providence in favor of the American cause." U.S. DEP'T OF STATE, BUREAU OF PUB. AFFAIRS, THE GREAT SEAL OF THE UNITED STATES 6, 15 (2003), https://www.state.gov/documents/organization/27807.pdf.

In addition, there are countless other examples of religious expressions and displays, such as the "In God We Trust" inscription on currency, that do not violate the Establishment Clause because they are rooted in historical tradition, even if their history does not date back to the founding era. *See Town of Greece*, 134 S. Ct. at 1825 (opinion of Kennedy, J., joined by Roberts, J. and Alito, J.) (explaining that practices such as reciting the phrase "One Nation Under God" in the Pledge of Allegiance have become part of our "heritage and tradition"); *Cty. of Allegheny*, 492 U.S. at 672-73 (Kennedy, J., concurring in part and dissenting in part) (explaining that the Establishment Clause does not forbid practices such as the display of our national motto, "In God we trust," on coins and dollar bills).

Under the historical tradition framework, Lehigh County's use of a cross to represent its Christian settlers, placed along several other

symbols that have represented its history and tradition for over 70 years,[10] is no different than the Ten Commandments monument in *Van Orden*, which although "religious," had "an undeniable historical meaning," and was properly displayed on the Texas capitol grounds "as representing several strands in the State's political and legal history." *Compare* App. 8-13, *with Van Orden*, 545 U.S. at 690-91. *See also* Def.-Appellant's Br. at 30-32.

The County's Seal also passes the second inquiry of *Town of Greece*, which is that government "may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Town of Greece*, 134 S. Ct. at 1825 (opinion of Kennedy, J., joined by Roberts, J., and Alito, J.). Like the plaintiffs in *Town of Greece*, who alleged that the prayers "gave them offense," Appellees allege that they find the cross on the Seal to be "offensive." *Compare id.* at 1826, *with* App. 14. "Offense, however, does not equate to coercion." *Town of Greece*, 134 S. Ct. at 1826 (opinion of Kennedy, J., joined by Roberts, J., and Alito, J.). Neither does one

[10] *Amicus* refers this Court to the district court's opinion, which provided a cogent summary of the Seal's historical development and explained the meaning of the "dozen or so symbols" displayed on the Seal. App. 8-13.

Appellee's allegation that he "*feels as though* the County is trying to force religion on him." App. 14 (emphasis added). There is simply no evidence—nor could there be—that the County's Seal alone coerces anyone to engage in any religious exercise.

Given the historical tradition of the use of religious symbols in official seals generally, and in the County's Seal specifically, as well as the fact that the inclusion of the cross on the Seal does not amount to coercion of religion, this Court should hold that the County has not violated the Establishment Clause.

CONCLUSION

This case presents an opportunity for this Court to bring its Establishment Clause jurisprudence in harmony with that of the Supreme Court. This Court should apply the standard laid out in *Valley Forge* and cease applying the constitutionally deficient "offended observer" standard. This Court should also abandon the similarly constitutionally infirm hybrid *Lemon*-endorsement test and analyze Establishment Clause claims under *Town of Greece*'s new framework, emphasizing historical tradition and the absence of government coercion.

Amicus respectfully urges this Court to reverse the district court's ruling for erroneously conferring standing on Appellees, or, if this Court reaches the merits, to uphold the constitutionality of the County's Seal.

Respectfully Submitted,

Dated: March 19, 2018

By: s/ *Samuel S. Sadeghi*

SAMUEL S. SADEGHI
Counsel of Record
CHRISTOPHER H. MCGRATH
PAUL HASTINGS LLP
695 Town Center Drive, 17th Fl.
Costa Mesa, CA 92626
(714) 668-6200
samsadeghi@paulhastings.com

KRISTEN K. WAGGONER
DAVID A. CORTMAN
JONATHAN A. SCRUGGS
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260

NATHANIEL BRUNO
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, D.C. 20001

GEORGE W. ABELE
PAUL HASTINGS LLP
515 S. Flower Street, 25th Fl.
Los Angeles, CA 90071

Counsel for Amicus Curiae
Alliance Defending Freedom

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2018, a true and correct copy of the foregoing brief was served on all parties to this appeal, via the CM/ECF system, pursuant to Third Circuit Rule 25.1(b), because counsel for all parties are registered CM/ECF users, who will be served by the appellate CM/ECF system.

Dated: March 19, 2018

By: s/ *Samuel S. Sadeghi*
SAMUEL S. SADEGHI

Counsel for *Amicus Curiae*
Alliance Defending Freedom

CERTIFICATE OF ADMISSION

I hereby certify, pursuant to Third Circuit Rule 46.1(e), that I am a member of the bar of this Court.

Dated: March 19, 2018

By: s/ *Samuel S. Sadeghi*
SAMUEL S. SADEGHI

Counsel for *Amicus Curiae*
Alliance Defending Freedom

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) and the Rules of this Court, because it contains 7,142 words as determined by Microsoft Word 2010 word-processing system used to prepare the brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point New Century Schoolbook font.

This brief complies with 3d Cir. L.A.R. 31.1(c), because the text of the electronic brief is identical to the text of the paper copies filed or to be filed with the Court. The electronic copy of the brief was scanned for viruses using Cisco AMP 5.1.11 and no virus was detected.

Dated: March 19, 2018

By: s/ *Samuel S. Sadeghi*
SAMUEL S. SADEGHI

Counsel for *Amicus Curiae*
Alliance Defending Freedom