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United States Court of Appeals, Third Circuit.

FREEDOM FROM RELIGION FOUNDATION, INC.; Stephen Meholic; David Simpson; John Berry; Candace Winkler, Plaintiff - Appellees,
v.
THE COUNTY OF LEHIGH, Defendant - Appellant.

No. 17-3581.
March 19, 2018.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, Case No.: 5-16-cv-04504 Edward G. Smith, U.S. District Judge

Brief of Amicus Curiae Jews for Religious Liberty in Support of Appellant for Reversal

Gregory Dolin, Counsel of Record, University of Baltimore, School of Law, 1420 N. Charles Street, Baltimore, MD 21201, (410) 837-4610, gdolin @ubalt.edu, Counsel for Amicus Curiae Jews for Religious Liberty.

Howard N. Slugh, 2400 Virginia Ave., N.W., Apt. C619, Washington, DC 20037, (954) 328-9461, hslugh1@gmail.com, Counsel for Amicus Curiae Jews for Religious Liberty.

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*1 INTEREST OF AMICUS CURIAE

Jews for Religious Liberty is an unincorporated association of American Jews concerned with the current state of religious liberty jurisprudence. Its members are interested in protecting the religious liberty of their coreligionists as well as religious adherents nationwide.

Amici have a deep interest in the freedom of religion and the role of religion in public life; and their experience with these topics may provide a helpful perspective for this Court to consider. The *amici* maintain that the Plaintiffs' interpretation of the Establishment Clause, would make America a less welcoming place to its Jewish citizens. Amici assert that by interpreting the Establishment Clause in light of its historical meaning, this court can follow Supreme Court precedent and continue America's proud legacy as a country where "[a]ll possess alike liberty of conscience and immunities of citizenship." Letter from *George Washington to the Hebrew Congregation in Newport, R.I.* (Aug. 18, 1790), https://goo.gl/P2GPw 7. [1]

*2 STATEMENT OF THE ISSUES

1. Whether the District Court erred in concluding that the seal and flag of Lehigh County Pennsylvania, both of which display, among other symbols, a cross, violate the Establishment Clause?

SUMMARY OF ARGUMENT

After years of jurisprudential uncertainty, the Supreme Court recently provided definitive guidance as to how the Establishment Clause *must* be interpreted. In *Town of Greece v. Galloway*, the Supreme Court provided the clarity that lower courts craved for so long - holding that the Establishment Clause "must be interpreted by reference to historical practices and understandings." 134 S. Ct. 1811 (2014) (internal quotation marks omitted). *Town of Greece* banished the specters of the ahistoric judicially-manufactured Establishment Clause tests once and for all, firmly anchoring the Court's analysis in the provision's historic understanding.

Based on that historic understanding, Plaintiffs-Appellees' ("Plaintiffs") argument that the County of Lehigh ("County" or "Lehigh") violated the First Amendment by adopting and maintaining a flag and seal both of which display, among other symbols, a cross, is ***3** untenable. The Establishment Clause was intended to prohibit governmental actions resembling "the coercive state establishments that existed at the founding." *Id.* at 1837 (Thomas, J., concurring). Displaying religious symbols alongside secular ones, as an acknowledgment of history and heritage does not meet these criteria.

In addition to being foreclosed by Supreme Court precedent, the Plaintiffs' argument would lead to absurd results requiring renaming streets, neighborhoods, and cities. The Plaintiffs argue, and the District Court concluded, that governmental action honoring and recognizing historic contributions made by adherents of a particular faith is an endorsement of the faith itself. Such a rule makes the religious history and heritage of this country *verboten*. If the Plaintiffs' approach were to prevail, the only groups whose historical contributions the government could not recognize, would be religious ones, which in turn would make people of faith into second class citizens. This would present a particular and peculiar harm to the adherents of minority faiths because government officials would have to ignore their practices, contributions, and role in society - enabling those that seek to denigrate the religious minority to spread their hateful messages without ***4** meaningful opposition. Such an anti-religious reading of the First Amendment would prevent governmental actors from doing things like attending Jewish services, lighting a menorah for Hannukah celebrations, cancelling school (rather than merely excusing some students) on Rosh Hashanah and Yom Kippur, or potentially even recognizing a Holocaust Remembrance Day. The First Amendment was never intended to make America inhospitable to religious practitioners or to preclude the broader society from recognizing the contribution of the faithful *or the faith* to our heritage. This Court should reject the Plaintiffs' request to do so, especially when the symbols in question are so ubiquitous as to have a broad ecumenical meaning. Even if the Court were to accept the Plaintiffs' erroneous characterization that the County was particularly solicitous of Christianity, it should still rebuff their interpretation of the Establishment Clause and uphold the displays. Accepting Plaintiffs' arguments would result in a return to the bad old days when ahistoric and overly antagonistic interpretations of the Establishment Clause menaced religious Americans "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after ***5** being repeatedly killed and buried." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

ARGUMENT

I. The Historic Understanding of the Establishment Clause Does Not Bar Governmental Actions that Recognize and Honor the County's Religious Heritage.

The District Court erroneously concluded that the Plaintiffs proved that the "County's original purpose for including a cross on the Seal is not secular." *Freedom From Religion Foundation v. County of Lehigh*, No. 16-4504, 2017 WL 4310247, *10 (E.D. Pa., Sept. 28, 2017) ("FFRF"). The District Court compounded its error when it concluded that the County's *current* purpose to honor settlers who (as everyone agrees) were in fact Christian, amounts to a religious rather than secular purpose. *Id.*

Plaintiffs argued, and the District Court agreed, that the County violated the Establishment Clause because the cross on the flag and the seal, though surrounded by other secular symbols, was chosen and maintained for a "religious" purpose, and amounted to a state endorsement of Christianity. According to the District Court, the government violates the Establishment Clause whenever it recognizes ***6** the simple truth that many of its citizens, past and present, have built their lives, their families, their communities with reference to their faith. The District Court is incorrect both in its interpretation of the County's actions, which merely recognized historical facts and acknowledged multiple forces which led to the establishment of the County, and with respect to the original meaning and the Supreme Court precedents interpreting the Establishment Clause.[2] This Court should, therefore, reverse the decision below.

A. The Establishment Clause Must be Interpreted by Reference to Its Historical Understanding.

Over the last decade, the Supreme Court has "abandoned the antiquated 'endorsement test'" in favor of interpreting the Establishment Clause "by reference to historical practices and understandings." *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284-85 (2014) (Scalia, J., dissenting from denial of certiorari) (quoting *Town of Greece*, 134 S. Ct. at 1819); *see also* *Town of Greece*, 134 S. Ct. at 1834 (Alito, J. concurring) (noting that where there is inconsistency between historic practice and judge-crafted Establishment Clause tests, historic practice controls).

***7** Contrary to the District Court's conclusion that "courts have rejected similar appeals to community history," *FFRF*, at *10,[3] when evaluating government actions for compliance with the Establishment Clause, the Supreme Court explicitly directed that the "analysis is [to be] driven both by the nature of the [challenged action] and by our Nation's history." *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) (holding that a Ten Commandments monument on Texas Capitol grounds did not violate the First Amendment.). Because displaying the Decalogue in a manner similar to Texas' display had not historically been considered an "establishment of religion," the display was constitutionally permissible. The plurality rejected the application of the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which would require courts to determine if a "reasonable observer" might interpret the monument as an endorsement of religion, holding that the test was "not useful" in that situation. *Van Orden*, 545 U.S. at 686.

***8** The Court's plurality also doubted "the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence." *Id.* In the years following *Van Orden*, the Supreme Court has resolved these doubts - the Establishment Clause must be applied in light of its historical meaning rather than on the basis of abstract principles.

Perhaps more importantly, the Court reaffirmed that "there is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," *id.*, pointing out that "religion has been closely identified with our history and government, and that [t]he history of man is inseparable from the history of religion." *Id.* (alterations in original, internal citations and quotations omitted).

The Court applied the teachings of *Van Orden* in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, where it eschewed other Establishment Clause "tests," and instead went through an extensive historical analysis to determine what the founding generation prohibited when it "sought to foreclose the possibility of a national church." 565 U.S. 171, 183 (2012). The Court's historical analysis confirmed that applying antidiscrimination ***9** law to the employment of religious ministers would violate the Establishment Clause. *Id.* at 188-89.

The Supreme Court reinforced this approach in *Town of Greece v. Galloway*. There, the Court confirmed that "the Establishment Clause must be interpreted by reference to historical practices and understandings." 134 S. Ct. at 1819 (internal quotation marks omitted). Having considered historical practices, the Court concluded that the town's legislative prayer did not violate the

Establishment Clause, *Id.* at 1821-26, in part because the original understanding of "establishment" reflected "the coercive state establishments that existed at the founding." *Id.* at 1837 (Thomas, J., concurring).

This Court has not had an opportunity to apply the lessons of *Hosanna-Tabor* or *Town of Greece* to its own jurisprudence. It should do so now, and in reversing the Court below clarify that governmental recognition of historical significance of religion to the founding and flourishing of America does not violate the Establishment Clause.

*10 B. The Historical Understanding of the Establishment Clause Allows for the County's Actions Both in 1944 and Today.

Recent Supreme Court cases illuminate the sort of governmental practices that would have historically been understood to violate the Establishment Clause.

On one hand, the Court has held that legislative prayers "posed no threat of an establishment" of religion so long as no one was compelled to pray, "no faith was excluded by law, nor any favored," and the prayers "imposed a vanishingly small burden on taxpayers." *Town of Greece*, 134 S. Ct. at 1819 (citing S. REP. NO. 376, 32d Cong., 2d Sess., 2 (1853); H.R. REP. NO. 124, 33d Cong., 1st Sess., 6 (1854)).

On the other hand, it has always been understood that an "establishment" occurs where "attendance at the established church [is] mandatory, and taxes [are] levied to generate church revenue." *Id.* at 1837 (Thomas, J., concurring) (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2144-46, 2152-59, 2161-68, 2176-80 (2003)). It was also understood that a church was "established" whenever "[d]issenting ministers were barred ***11** from preaching, and political participation was limited to members of the established church." *Id.*

In *Hosanna-Tabor*, the Supreme Court indicated that under a proper historical understanding, the Establishment Clause "prevents the government from appointing ministers," or speaking on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law," leaving it "no role in filling ecclesiastical offices," thus ensuring that "matters of church government as well as those of faith and doctrine" are left exclusively within the province of the churches themselves. 565 U.S. at 184-86 (internal quotation marks omitted).

In short, Establishment Clause violations are likely whenever there is: "(1) [state] control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church." *Felix v. City of Bloomfield*, 847 F.3d 1214, 1216 (10th Cir. 2017) (Kelly, J., dissenting from denial of rehearing *en banc*) (quoting McConnell, *Establishment, supra*, at 2131).

***12** None of those factors are present in this case. Instead, the County's seal and flag *at most* merely acknowledge the role of the early Christian settlers in the establishment and eventual prospering of the County. [4]

C. Given America's History, Religious Symbols and References are Ubiquitous Nationwide, and that Prevalence Alone Precludes the Finding of Violation of the Establishment Clause.

In order to understand how prevalent references to religion are in everyday American life, one need merely consult a map. Scores of cities, including major ones like San Francisco, San Antonio, St. Paul, Saint Louis, San Diego, San Juan, and Los Angeles are named after Catholic saints. Indeed, at least fifty-six cities, spread across twenty-six states and territories are so named. *See*

Matt Vander Vennet, *The Story Behind 54 American Cities Named After Catholic Saints*, EpicPew.com (July 7, 2016), http://bit.ly/2tEyPCO. Nearly two hundred cities and towns (including nine in Pennsylvania alone) are named after biblical places such as Bethlehem, Jerusalem, Jericho, Nazareth, and even Promised ***13** Land itself. *See* Wikipedia, *List of biblical place names in North America*, http://bit.ly/2tIshn5. In fact, the city of Philadelphia where this very Court often holds its sessions, is named after one of the Seven Churches of the Apocalypse. *See* Revelations 1:11, 3:7-13 (King James).

Religious influence can also be seen in flags and seals of numerous American states and cities. For instance, the coat of arms of Puerto Rico [5] (and all seals bearing same) features the Lamb of G-d holding a flag which bears a cross of St. John. Additional Christian symbols adorn the image. *See* Welcome to Puerto Rico, *Puerto Rico Coat of Arms*, http://bit.ly/2Hm8*o*6U. Although the coat of arms' original version was granted by King Ferdinand of Spain in 1511, the legislature of Puerto Rico did not authorize the official use of the coat of arms until 1976. *Id.* The coat of arms of Puerto Rico's capital, San Juan, has similar imagery. *See* City of San Juan, PR Official Website, http://bit.ly/2GhSxat. A similar observation can be made about a number of other jurisdictions. Thus, the seal of San Juan Capistrano, California shows an image of St. Giovanni da Capistrano blessing an Indian child and onlookers. *See* City of San Juan Capistrano, CA Official Website, http://bit.ly/2Ilnwmo. The seal and flag ***14** of Bethlehem, PA (being named after the place where according to the Christian tradition Jesus was born) feature a Latin cross superimposed on a Bible. *See* City of Bethlehem, *Bethlehem Police Department Seal*, http://bit.ly/2DlXXXX.

The City of Las Cruces ("The Crosses") presents perhaps the closest analogy to the present case. In 1946, that City replaced its previous seal featuring grapes with the current seal featuring three Latin crosses (evocative of the three crosses on Golgotha). *Weinbaum v. City of Las Cruces*, N.M., 465 F. Supp. 2d 1164, 1170-71, 1173 (D.N.M. 2006), *aff'd* 541 F.3d 1017 (10th Cir. 2008). Yet, the courts rejected an Establishment Clause challenge to the seal holding that because "the City does not provide any benefit or financial support to a religious institution or afford a religious institution a role in defining legal standards or obligations [, and] [t]here is no evidence that the City sponsors any religious activity through the use of the" seal, it does not violate the First Amendment as its actions "do[] not have the effect of advancing or prohibiting religion." *Id.* at 1180. The outcome should be no different in the present case. [6]

***15** Crosses also feature prominently on various flags and other American symbols. Aside from the aforementioned flag of Puerto Rico, the cross of St. Andrew can be found on the flags of Alabama, Florida (as well as several jurisdictions within that state), and Mississippi (as a Confederate battle flag variant). The canton of the flag of Hawaii bears a Union Jack, which is in itself a combination of three crosses - the cross of St. George, the cross of St. Patrick, and the cross of St. Andrew. Maryland's state flag bears two crosses botonny and is required to be displayed on a flag pole topped with a cross botonny. *See* Md. Gen. Provisions Code §§ 7-202,-203 (2016).

Flags are not the only symbolic items that often bear the shape of the cross. For example, some of the highest military awards bestowed on American servicemen are shaped as a cross. Thus, the Army Distinguished Service Cross, the Navy Cross, the Air Force Cross, and the Distinguished Flying Cross, are all in a shape of a cross. Additionally, from 1917 to 42 Navy version of the Medal of Honor was also in the form of a cross. *See* John D. Clarke, GALLANTRY MEDALS & DECORATIONS OF THE WORLD 339-47 (2001). This is not accidental. As all early military decorations were orders of chivalry, which in turn ***16** were all religious, it is not surprising that the symbols of such orders were in a shape of a cross. *See* Samuel Clark, DISTRIBUTING STATUS: THE EVOLUTION OF STATE HONOURS IN WESTERN EUROPE 62-66 (2016). The American military's adoption of this tradition has never been seen to violate the Establishment Clause precisely because the cross-shaped decorations merely pay tribute to history and tradition. *See* spencer C. Tucker & James R. Arnold, 1 THE ENCYCLOPEDIA OF THE WAR OF 1812: A POLITICAL, SOCIAL, AND MILITARY HISTORY 963 (2012); *cf. Trunk v. City of San Diego*, 660 F.3d 1091, 1100 (9th Cir. 2011) (Bea, J., dissenting from denial of rehearing *en banc*) (noting that U.S. and foreign "military awards often use the image of a cross to recognize service ...").

The Establishment Clause cannot be read to require the renaming of hundreds of cities, towns, and villages, changing dozens of flags and seals, or requiring the military and the veterans to change the shape of some of their dearest held decorations. *Mutatis*

mutandis, the Clause does not require Lehigh County to foreswear the use of its symbols that "stood apparently uncontested for nearly two generations." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in judgment).

***17 D. Unlike the County's Actions with Respect to the Seal and the Flag, Modern Day Established Churches Share Many of the Hallmarks of Those That Existed When the Framers Drafted the Establishment Clause.**

The District Court astutely observed that "[s]eals and flags do not carry the force of law, and the citizens of Lehigh County need not fly the County Flag, or adhere to the values that it depicts. Just as the County's citizens need not value education, agriculture, cement, or bison, they need not value Christianity," and therefore a flag that merely "acknowledges the values shared by the citizens of Lehigh County at the time of its founding without establishing a compulsory, county-wide religion." *FFRF*, at *8. As Justice Breyer in his concurring opinion in *Van Orden* explained, removing symbols and displays that have "stood apparently uncontested for nearly two generations ... would ... lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions .... And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." 545 U.S. at 704 (Breyer, J., concurring in judgment) (quoted in *FFRF*, at *8). Even worse, this divisiveness would not be counterbalanced by reducing "the dangers which [the Establishment Clause] is designed to prevent." *Id.* (quoting ***18** *School Dist.of Abington Township v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)).

To understand why the County's flag is an innocuous symbol bearing within it the acknowledgment of historical, cultural, economic, and geographical realities, one need only compare the challenged government action here with practices in foreign lands that have established Churches.

As in the time of the Founding, there are countries with established Churches, and it is those countries that retain the attributes that the drafters of the First Amendment intended to guard against. For example, in Denmark, the Constitution "requires the state to support the Evangelical Lutheran Church, which is the 'Established Church of Denmark.' The constitution of the Church itself is to be set forth by government statute." Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867, 912 (2005). Bishops and other church officials are employed by the state. Liselotte Malmgart, *State and Church in Denmark and Norway* in DYNAMICS OF RELIGIOUS REFORM IN NORTHERN EUROPE, 1780-1920: POLITICAL AND ***19** LEGAL PERSPECTIVES 219 (Keith Robbins, ed. 2010); *Frequently Asked Questions*, LUTHERAN CHURCH, http://www.lutheranchurch.dk/faq/. The Church is also tasked with a number of civil service duties. *See* Marie Vejrup Nielsen and Lene Kuhle, *Religion and State In Denmark: Exception Among Exceptions?*, 24 NORDIC J. OF RELIGION & SOC'Y 173, 176 (2011). While other denominations and religions may exist without the government's permission, only "state-approved" congregations can conduct weddings, establish cemeteries, and enjoy certain tax and immigration privileges. *Id.* at 177. These types of entanglements would have constituted an "establishment of religion" in 1791, and they continue to do so today.

On the other hand, the County's attempt to recognize early Christian settlers by including and maintaining a Latin cross on its flag and seal, without imposing any duties on any resident or visitor to the County to honor, salute, or even acknowledge these symbols, *see generally* *Texas v. Johnson*, 491 U.S. 397 (1989), falls well short of this threshold for it "bear[s] no resemblance to the coercive state establishments that existed at the founding." *Town of Greece*, 134 S. Ct. at 1837 (Thomas, J. concurring).

***20 II. Plaintiffs' Approach Uniquely Disadvantages Minority Religions, Like Judaism, that May Require Governmental Cooperation to Fulfill Their Religious Obligations without Arousing Suspicions or Enmity of the Majority.**

Accepting Plaintiffs' interpretation of the Establishment Cause would make America a less hospitable place for observant Jews. Judaism is particularly needful of governmental cooperation for its free exercise, for two separate reasons. First, Judaism imposes many restrictions and responsibilities on its adherents - obligations that can only be met with cooperation from the secular authorities. Second, Jews, being adherents of a minority religion, are much more likely to have their peculiar practices and beliefs viewed with suspicion by the majority. *See* Rene Reyes, *Conscience Reexamined: Liberty, Equality, and the Legacy of Roger Williams Liberty of Conscience: In Defense of America's Tradition of Religious Equality by Martha C. Nussbaum*, 36 Hastings Const. L.Q. 1, 7 (2008) (noting that Prof. Nussbaum's book exhibits a "special solicitude for minority religions that the majority may consider unfamiliar, dangerous, or subversive."); Nadine Strossen, *Religion and Politics: A Reply to Justice Antonin Scalia*, 24 FORDHAM URB. L.J. 427, 454 (1997) (noting the frequency of "persecutions, attacks, and criticisms" of the "members of [] minority religion [s]."). In ***21** order to permit Jews to fully practice their religion and to do so with peace and security, the government will sometimes need to lend a helping hand. Accepting the Plaintiffs' arguments would make such involvement nearly impossible, and would make Jews less able to perform their rituals and make them less secure when doing so.

A. Government Does Not Violate the Establishment Clause Whenever It Acts to Recognize or Accommodate Religious Beliefs

The District Court correctly recognized that "[a]ccomodation is not establishment." *FFRF*, at *8. However, being constrained by its view of what the Third Circuit precedent required, the District Court appeared to hold that government practices recognizing religion and its importance must be subject to more rigorous scrutiny in fact if not in law. [7] The problem with this approach is that oftentimes "accommodation" and "recognition" are indistinguishable and ***22** inseparable from one another. While most often "accommodation" is viewed as simply exempting religious individuals or communities from otherwise applicable legal rules, thus leaving the government unentangled with religion, in reality, "accommodation" often requires not only abstention from acting, but active facilitation of people's ability to practice their faith. For example, governments hire chaplains for armed services, prisons, hospitals, and other institutions to "accommodate" the needs of religious individuals. In doing so, the government, at a minimum, pays the salary of the clergymen.

As the scope and reach of government has grown, it has become inevitable that governmental entities will interact to an ever greater degree with religious individuals as the latter seek to practice their faith. For example, Jewish law prohibits adherents from carrying items between public and private domains on the Sabbath. One way religious Jews avoid violating this prohibition is by creating a ritual (but physical) separation between the "home" neighborhood and the rest of the world. In the absence of this demarcation (known as an "*eruv* "), Jews cannot carry their house keys, strollers, or even their children without violating the Sabbath. Sharonne Cohen, *What Is An Eruv?, MY* ***23** *JEWISH LEARNING*, https://goo.gl/hoK9TQ. The *eruv* often takes form of a wire or a string strung up between utility poles to create an enclosed perimeter. *Id.* In order to accomplish that task, Jewish communities often need to obtain the consent of the local municipality that owns and maintains the poles.

Many governmental entities give Jewish communities permission to erect and maintain an *eruv* around their neighborhoods to facilitate the community's observance of the Sabbath. Howard Rosenberg, *Orthodox Jews Seek a Symbolic Zone*, WASHINGTON POST (Mar. 15, 1990), goo.gl/gDhY99 (noting that building an *eruv* in Washington D.C. "requires permission from the National Park Service and Potomac Electric Power Co., both of which signed off on the plan last month, and the D.C. Department of Public Works"); Tina Kelley, *Town Votes for Marker Used by Jews*, NEW YORK TIMES (Jan. 25, 2006), https://goo.gl/mBCyUn (explaining that an *eruv* in Tenafly, N.J. had been approved by the Borough Council, the county, and local utilities).

The construction of an *eruv* may require extensive discussion, negotiation, and cooperation between Jewish citizens and their government - which would, if *Lemon* were taken seriously, "entangle" ***24** the government in religious affairs, thus violating the Establishment Clause. To state the proposition is to refute it. The Constitution simply does not require the government to be passive when its religious citizens are seeking help to carry out everyday activities while complying with their religious obligations.

Similarly, Jewish law requires adherence to dietary restrictions colloquially known as "keeping kosher." *What is Kosher?*, CHABAD.ORG, goo.gl/rsUQLd. Many observant Jews will only eat foods certified as kosher by Jewish organizations. *Id.* In certain circumstances, Jews need government facilitation to obtain kosher food. For example, observant Jewish servicemembers, prisoners, and even attendees at certain government-sponsored events are provided kosher food by government entities. *Meals, Religious, Kosher/ Halal*, DEFENSE LOGISTICS AGENCY, https://goo.gl/4LraHs; KOSHER TODAY, *5,360 Inmates in Federal Prisons Request Kosher Meals* (Feb. 16, 2009), https://goo.gl/qEkhCG. These restrictions are heightened during the biblical holiday of Passover. The *Defense Logistics Agency* of the Department of Defense provides Passover meals to Jewish servicemembers. Alexandra siemiatkowski, *DLA Troop Support helps* ***25** *Jewish service members celebrate Passover, DEFENSE LOGISTICS AGENCY* (Apr. 21, 2016), goo.gl/ATs38L.

Providing soldiers, prisoners, or professors attending government conferences with food that they are comfortable eating requires governmental agencies to communicate with kosher certification agencies. *See*BUREAU OF PRISONS, *Certified Religious Diet Specifications Quote Sheet* (Oct. 2014), https://goo.gl/NZDrFy. This too would be impermissible under the strict application of the *Lemon* "entanglement" test.

Of course, other citizens may have their own dietary restrictions. Some may be vegetarians for ethical reasons. Others, out of their concern for climate change, may wish to eat foods grown in an environmentally friendly manner. In many circumstances, the government accommodates such individuals. *See* Richard Bowie, *US Prisons to Start Offering Vegan Meals*, VEGNEWS (Sept. 25, 2016), https://goo.gl/1EFh7Q (noting that, starting in October 2016, "every federal prison in the country will begin offering vegan entrees to its prisoners."). Yet, under the strict application of *Lemon*, the accommodation of religious citizens, and of religious citizens alone, is ***26** unconstitutional. That cannot be the law. However strong antiestablishment interests might be, they cannot justify precluding religious citizens from the protections available to their compatriots, simply because of their faithfulness. And therefore, a rule that does not permit the government to associate "too closely" with religious entities or messages is unworkable.

Similarly, various government actors recognize and commemorate the Holocaust an event in which six million Jews were murdered solely because they were Jews. This recognition is not a generic lamentation of man's cruelty to man, but rather recognition of a unique event where people were marked for extermination because of their *religious* beliefs. The District Court's found that "[h]onoring the settlers by retaining a cross on the Seal is the equivalent of honoring the fact that the settlers were Christian," which in turn is a non-secular purpose. Following that logic, one would have to conclude that remembering the victims of the Holocaust including by displaying items like the Star of David, the *tallit* (the traditional Jewish prayer shawl), the *Sefer Torah* (the Torah scroll), etc., is "is the equivalent of [recognizing] the fact that the" victims were Jewish, which is also a non-secular purpose. Thus, under ***27** the District Court's approach the government would have to foreswear its funding of Holocaust museums, its recognition of the Holocaust Remembrance Day, or any other action that recognize the unique nature of the Holocaust and its unique impact on a particular *religious* group - the Jews. The absurdity of the proposition is self-evident. The rule is no less absurd when applied to government's decision to honor the early settlers of Lehigh County or their faith.

Simply put, governmental entities' willingness to aid and accommodate their citizens is not a sign that they secretly wish to establish an official religion. Nor is government's recognition or commemoration of the citizenry's religious customs impermissible. The Constitution is not offended when the state not only leaves the faithful unmolested, but actively facilitates their ability to exercise religious rites and profess their faith, or formally recognizes the importance of such rites to the community's history. *See* *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the ***28** public service to their spiritual needs."); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) (describing government accommodations for deeply held religious beliefs as "permissible, even praiseworthy"); *Id.* at 723 (Kennedy, J., concurring) ("Government policies of accommodation, acknowledgment, and support for religion are an accepted

part of our political and cultural heritage.") (quotation marks omitted); *Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring) ("indifference to 'religion in general' is *not* what our cases, both old and recent, demand.").

The common thread in these opinions is that the Constitution permits the state to recognize both historical and present-day reality that Americans are indeed a religious people and that faith played and continues to play a central aspect in our civic life. An examination of history clearly reveals the solicitous attitude that American law has always taken toward religion and religious adherents. As the Supreme Court stated over 100 years ago, "this is a religious people. This is historically true." *See* *Holy Trinity Church v. United States*, 143 U.S. 457, 465 (1892). And though the society may have become more pluralistic, it remains true that

> ***29** [e]very religious institution contributes to the common good or general welfare of the whole community, even though it be attended by a particular group or is denominational in character. A democratic society where every man must unselfishly devote some part of his energy in the interest of good government cannot succeed without the moral and spiritual influence of the church.

State ex rel. Anshe Chesed Congregation v. Bruggemeier, 115 N.E.2d 65, 69 (Ohio Ct. App. 1953). It cannot then be that recognizing these truths on a government symbol such as a flag or a seal violates the Establishment Clause.

B. Adherents of Judaism Rely on Government Recognition of their Religion in Order to be Assured of Equal Societal Treatment

The followers of the Jewish faith engage in a variety of practices that may seem odd or at least unfamiliar to outsiders. From refraining from such everyday activities as driving or riding in a car, handling money, turning on electricity or gas, writing, or even simply carrying objects outside the home on certain religious holidays, to not eating or even owning any leavened products on Passover, religious Jews sometimes behave differently from the majority population. The adherence to these strictures sets religious Jews apart from their neighbors and, to the extent that the neighbors are uninformed or ***30** unaware of some of the practices, these behaviors may breed suspicion or worse. For this reason, Jews uniquely benefit from having their practices be not only "accommodated" and "tolerated" but recognized as legitimate and welcome expressions of faith.

By way of example, in 2015, Governor Larry Hogan of Maryland visited Beth Tfiloh (an Orthodox synagogue) to engage in a ritualistic purchase of *chametz*.[8] *See* Samantha S., *Governor Larry Hogan Visits Beth Tfiloh to Buy Chametz*, http://bit.ly/2HpmB2Y (March 30, 2015). As Jews are not permitted to own *chametz* during Passover it has become a tradition to sell it to non-Jews and to repurchase it after the end of the holiday. The tradition may seem odd to those unfamiliar with the Jewish faith and may in fact give rise to misunderstandings over the nature of the legal obligations as a result of the ritualistic sale. It was therefore important to have a well-known public official in the State of Maryland participate in the ceremony. By doing so, the Governor was sending a message that Jews are full members of the Maryland community and that their ***31** religious practices are welcome in that state and should not give rise to any misunderstandings.

Similarly, when then-President Obama lit menorahs in the White House and hosted Hannukah parties, or then-Vice President Biden, or then-Attorney General Michael Mukasey participated in the lighting of the National Menorah it sent a powerful message of inclusivity and recognition that religious Jews are part of the American fabric and that their religious rituals and beliefs deserve an equal place in this Republic. The fact that the National Menorah is a 30-foot-high monument located on government property or that Hannukah celebrations are hosted inside the White House and on the government's dime, is certainly a "recognition" of Judaism. At the same time, such "recognition" does not run afoul of the Establishment Clause.

There are other examples of governmental recognition of Judaism. Thus, some schools not only permit Jewish student to miss classes for certain holidays, but declare those days to be school-wide days off. Such an action is more than just an "accommodation" of individual religious students; rather, it is a "recognition" of the ***32** importance of the religious holiday itself not just to Jews, but to the larger community as well. In another instance of "recognizing," the importance of religious community, then-President George H.W. Bush sent a formal letter to Kesher Israel (an Orthodox synagogue in Washington, D.C.) to congratulate them on the establishment of the first *eruv* in the nation's capital. *See* Proclamation from the White House, dated Er[e]v Sabbath [*i.e.*, "Sabbath's Eve"], 1990, (reproduced at http:/ /bit.ly/2Dkn7wN).

It would be not only an astonishing setback to the Jewish community, but a revolution in the interpretation of the Establishment Clause to conclude that such acts of official recognition of the Jewish faith violate the Constitution. The Court should not travel down that path.

*33 CONCLUSION

When governmental entities take steps to recognize the importance and centrality of religious practices to their citizens, to honor both the secular and religious roots of their communities, to facilitate their citizens' exercise of religion, such as allowing Jews to build an *eruv*, or order kosher food, they are acting in the best interest of their citizens and consistent with historical practices stretching to the Founding. These actions do not constitute State establishment of religion. Prohibiting the government from extending such recognition or accommodation to religious entities would be contrary to history and to the long-standing recognition of the importance religion has played in the founding of this country and its continued flourishing. Plaintiffs' view of religious liberty would not produce a religion-neutral government; instead it would yield one that is actively hostile to religion, and entirely unmoored from historical roots. The Constitution does not require such an anomalous and shocking result. Rather, the recognition and accommodation of religious beliefs being "a practice that was accepted by the Framers and has withstood the critical ***34** scrutiny of time and political change," cannot violate the Establishment Clause. *Town of Greece*, 134 S. Ct. at 1819.

For these reasons, the Court should reverse the decision below.

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Respectfully submitted,

s/ Gregory Dolin

Gregory Dolin

Counsel of Record

University of Baltimore

School of Law

1420 N. Charles Street

Baltimore, MD 21201

(410) 837-4610

gdolin@ubalt.edu

Howard N. Slugh

2400 Virginia Ave., N.W.

Apt. C619

Washington, DC 20037

(954) 328-9461

Counsel for Amicus Curiae Jews for Religious Liberty

Footnotes

1 No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person - other than the amici, their members, or their counsel - contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

2 The District Court reached its decision with great reluctance. *See* note 7, *infra*.

3 In rejecting "appeals to community history," the District Court erroneously relied on two cases which were decided long before the Supreme Court announced the current governing test for Establishment Clause challenges. *Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995) stands on a particularly weak footing as a decade later, the Tenth Circuit upheld the Seal of Las Cruces, N.M., which depicted three crosses. *See* *Weinbaum v. City of Las Cruces*, N.M., 541 F.3d 1017 (10th Cir. 2008).

4 It is not even clear that a statement by *just one* of the three Commissioners, made in an *unofficial* capacity, *two years* after the seal was adopted, to a non-governmental body, can be imputed to the Commission as a whole to show impermissible motive. *See* *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008).

5 The Establishment Clause applies to the territory of Puerto Rico. *See Marrero-Mendez v. Calixto-Rodriguez*, 830 F.3d 38 (1st Cir. 2016).

6 The County stands on an even more solid footing than Las Cruces because *Weinbaum* was decided long before *Town of Greece* and *Hosanna-Tabor*.

7 The District Court intimated that were it writing on a blank slate, it would conclude that "[a]s long as citizens are free to practice any religion that resonates with them, or no religion at all, the fact that some might be offended by the Seal is an issue best addressed by elected officials, rather than the courts." *FFRF*, at *8. The District Court's instincts are in fact correct and its ultimate holding stemmed from an erroneous assessment of what the governing law requires. To the extent that the District Court correctly read Third Circuit's precedent, such precedent has been overtaken by recent decisions of the United States Supreme Court.

8 *Chametz* "is any food product made from wheat, barley, rye, oats or spelt" other than Passover matzah. Yehuda Shurpin, *What Is Chametz (Chometz)*? http://bit.ly/2IiUmEF.