
No. 17-3581

**In the United States Court of Appeals
for the Third Circuit**

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.,
Plaintiffs-Appellees,

v.

COUNTY OF LEHIGH,
Defendant-Appellant.

On Appeal from the United States District
Court for the Eastern District of Pennsylvania
(Smith, J.) Civil Action No. 5:16-cv-04504-EGS

**Brief of Amicus Curiae
First Liberty Institute
in Support of Defendant-Appellant and Reversal**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A), amicus curiae First Liberty Institute states that it has no parent corporation and issues no stock.

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INTEREST OF AMICUS CURIAE

Amicus curiae First Liberty Institute (“First Liberty”) respectfully submits this brief in support of the County of Lehigh to highlight the historical tradition of religious images, phrases, and names in American public life. Public displays of religion on seals and flags come from many different faith traditions, commemorating the unique culture of each locality. Removing all of these symbols, as Plaintiffs seek to do, would violate our longstanding tradition of recognizing the role that faith has played in the lives of many founding communities across this nation. It would also destroy countless historical symbols and send a signal of intolerance to people of all faiths.

First Liberty is a non-profit organization dedicated to protecting religious freedom for all Americans. First Liberty provides pro bono legal representation to institutions and individuals of all faiths, including Catholic and Protestant institutions, synagogues and Jewish schools, faith-based universities, Native American religious practitioners, an Islamic association, the Falun Gong, and others.

First Liberty often appears in court, as counsel and as amicus curiae, to restore an original understanding of our First Amendment

freedoms. For instance, First Liberty has fought alongside The American Legion to defend our nation's veterans memorials and our nation's motto "In God We Trust." Through such litigation, First Liberty seeks to protect the ability of governments to recognize the significance of faith to many individuals and to ensure that historical religious symbols of all faiths are not removed from our nation's memory.

All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person other than the amicus curiae, its members, or its counsel contributed money to fund the preparation or submission of this brief.

ARGUMENT

The seal and flag of Lehigh County comply with the First Amendment because they fit within a longstanding tradition of religious expression.

The Supreme Court has repeatedly acknowledged that there is “an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.” *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)). Examples of public references to religion include the national motto “In God We Trust,” the language “one nation under God” in the Pledge of Allegiance, and the recitation of “God save the United States and this honorable Court” at the opening of the Supreme Court’s sessions. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014). These public recognitions of faith are compatible with the First Amendment because they are “a part of our heritage and tradition.” *Id.*

That tradition of religious expression includes the longstanding practice of localities acknowledging their communities’ heritage and culture in their seals and flags. For centuries, state, county, and city governments have included religious imagery and language in their seals and flags, and many localities draw even their names from a religious

source. These symbols are often chosen to represent key features in the lives of the original settlers of a particular community, ranging from landmark buildings to inspirational imagery. For localities that have chosen religious symbols, such references comply with the First Amendment in the same way as any other symbol because they are all a part of that locality's history and culture. Lehigh County's seal and flag, reproduced below, fit squarely within the tradition of representing the particular faith of the original settlers of a community.



A. There is a longstanding tradition in the United States of recognizing the historical role of faith in the seals, flags, and names of localities.

Across the United States, seals, flags, and names of localities contain references to divinity and religion. Many have existed for centuries, and indeed, some even predate the Constitution. A reasonable

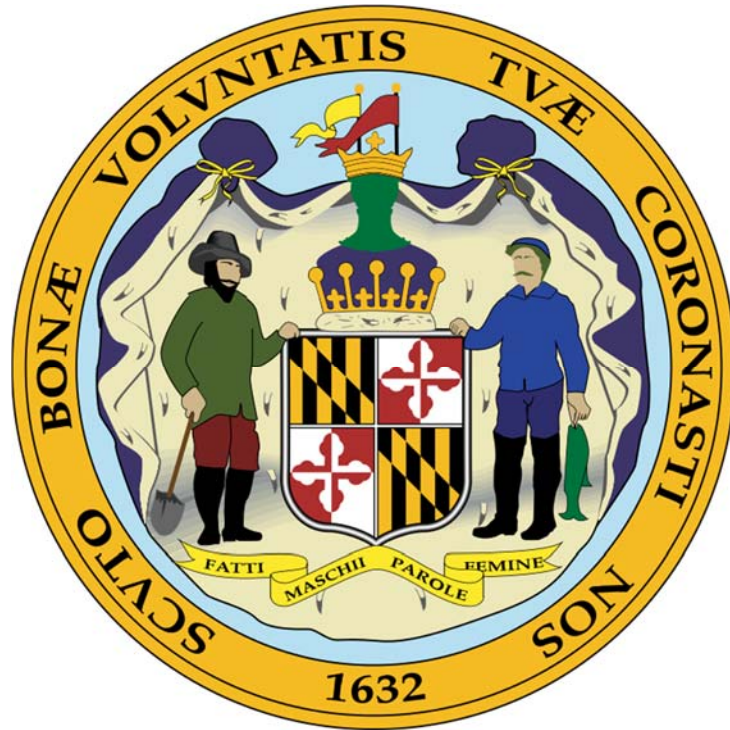
observer would consider such images to be part of a longstanding tradition of recognizing the history and culture of founding communities.

Seals and Flags. The Great Seal of Maryland was based on the Calvert family seal, and it dates back to 1648, when Maryland was still a British colony. George Calvert, 1st Lord of Baltimore, founded the colony as a refuge for persecuted Catholics from England. His son Cecilius Calvert, 2nd Lord of Baltimore, brought the seal from England in 1648 for use by the Maryland Chancellor.¹ After Maryland adopted the Constitution of 1776, the Governor’s Council retained the seal.² In 1794, the seal was replaced with a new one, but the Maryland Generally Assembly readopted the Calvert family seal in 1874, and it remains in use today.³ The Latin text encircling the seal, “Scuto bonae voluntatis tuae coronasti nos,” is Psalm 5:12 from the Latin Vulgate translation of the Bible used in the Catholic Church, and it translates as, “With favor wilt thou compass us as with a shield.”

¹ Md. State Archives, *Maryland State Seal – Great Seal of Maryland*, <https://perma.cc/FM5Q-YUWM> (last visited Mar. 19, 2018).

² *Id.*

³ *Id.*



Many of the cities in the thirteen original colonies have seals and flags that contain references to divinity and religion, reflecting the faith traditions of those founding communities. Since 1823, the seal of Boston, Massachusetts, has contained the city motto, “Sicut patribus, sit Deus nobis,” which is Latin for, “God be with us as he was with our fathers.”⁴

⁴ City of Boston, *Symbols of the City of Boston, City Flag and Seal*, <https://perma.cc/FEQ8-AZYG> (last visited Mar. 19, 2018).



References to divinity or religious symbols can also be found in Massachusetts on the seals of Berkley, Billerica, Boylston, Carlisle, Groton, Littleton, Lowell, Medway, Natick, Needham, Norton, Paxton, Plymouth, Shrewsbury, Sturbridge, Whately, and Wrentham.

As new states entered the union, those states included references to divinity and religion in their seals and flags as well. Colorado's First Territorial Assembly adopted a seal on November 6, 1861, featuring the motto "Nil sine numine," which is Latin for "Nothing without God" or "Nothing without Providence."⁵ After statehood in 1876, the First

⁵ Colo. State Archives, *State Seal*, <https://perma.cc/N2SM-J7DY> (last visited Mar. 19, 2018).

General Assembly adopted the seal with the addition of the words “State of Colorado” and the year of statehood.⁶



In 1868, during post-Civil War Reconstruction, Florida adopted a seal with the state motto “In God We Trust.”⁷ The flag of Florida features that seal on a white background with diagonal red bars, in the form of St. Andrew’s Cross.⁸

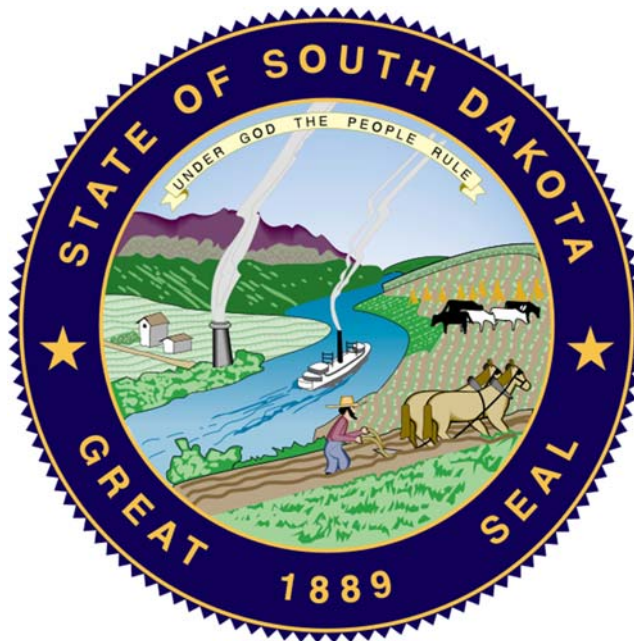
⁶ *Id.*

⁷ Fla. Dep’t of State, *State Seal*, <https://perma.cc/MZG2-N722> (last visited Mar. 19, 2018).

⁸ Fla. Dep’t of State, *State Flag*, <https://perma.cc/Q7Q6-PHG3> (last visited Mar. 19, 2018).



When South Dakota became a state in 1889, it adopted a seal with the state motto, “Under God the People Rule.”⁹



⁹ S.D. Sec’y of State, *State Seal and State Emblems*, <https://perma.cc/T5PZ-7YBN> (last visited Mar. 19, 2018).

After Utah became a state in 1896, it adopted a coat of arms and seal that included not only the year in which Utah became a state, but also 1847, the year in which the Mormon pioneers arrived in Utah.¹⁰



The Utah seal and coat of arms contain two Mormon symbols: the sego lily and the beehive. The Mormon pioneers used the sego lily for sustenance during the winter, and it symbolizes the faith of the early Saints and the mercy of God. *See* Connie Lamb, *LDS Symbols of the Relief Society*, 14 *Mormon Historical Studies* 111, 117 (2013). The beehive symbolizes industry and is based on Ether 2:3 from the Book of Mormon. *See* Susan Easton Black, *The Beehive and Deseret: Mormon Symbols in Salt Lake City*, in *The Place Which God Prepared* 119–32

¹⁰ Utah's Online Library, *Utah State Flag and Seal*, <https://perma.cc/RXK6-4Q8V> (last visited Mar. 19, 2018).

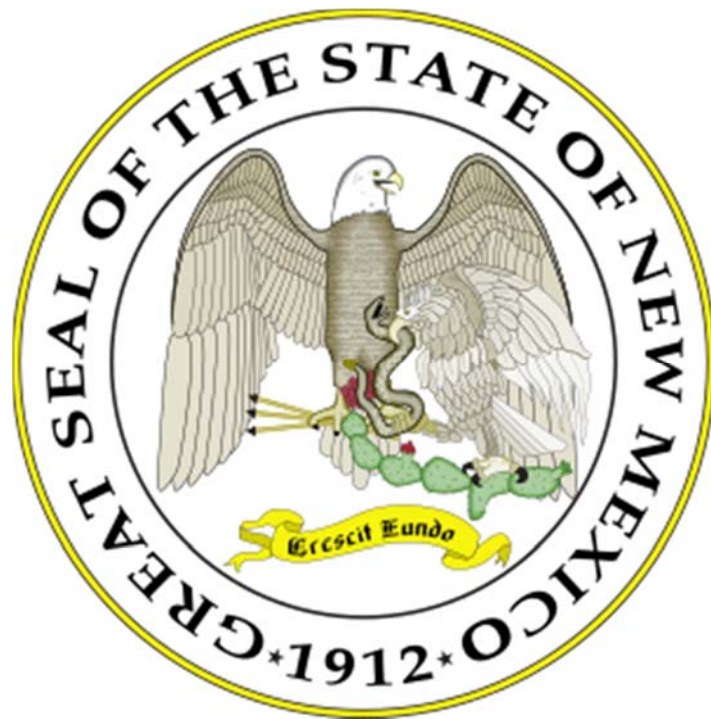
(Scott C. Esplin & Kenneth L. Alford eds., 2011).

The seal of Austin, Texas, adopted in 1916, contains an image of a Latin cross. The cross was part of the family coat of arms of Stephen F. Austin, the “Father of Texas.” The Fifth Circuit has held that Austin’s seal does not violate the Establishment Clause or the Free Exercise Clause. *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991).



The seal of New Mexico, adopted in 1913, depicts a Mexican eagle with a serpent in its beak and a cactus in its talons—the coat of arms of Mexico—shielded by an American eagle with outspread wings and arrows in its talons. The Mexican coat of arms originates from the Aztec

story of the founding of Tenochtitlan. Huitzilopochtli, the sun god and god of war, told the Aztec people that they were to wander as nomads until they arrived in their promised land. *See* Angel Vigil, *The Eagle on the Cactus: Traditional Stories from Mexico* 4 (2000). According to Huitzilopochtli, they would know that they arrived in the promised land when they saw an eagle with a serpent in its mouth landing on a cactus on an island. *Id.* at 4. When the Aztecs finally saw the sign from Huitzilopochtli, they named their city Tenochtitlan, which means “place of the prickly pear cactus.” *Id.* at 5.



The flag of New Mexico, adopted in 1925, contains the sacred sun symbol of the Zia Pueblo, which the Zia have used in religious ceremonies since the early twentieth century. *See* Stephanie B. Turner, *The Case of the Zia: Looking Beyond Trademark Law to Protect Sacred Symbols*, 11 Chi.-Kent J. Intell. Prop. 116, 119–20 (2012) (describing the Zia sun symbol as “central to the pueblo’s religion” and citing sources dating it back to 1200 A.D.).



Since 1925, the flag of Oklahoma has contained an image of a traditional Osage Nation buffalo-skin shield with seven eagle feathers. It also includes two religious symbols from different religious traditions: a ceremonial peace pipe and an olive branch.



The ceremonial pipe is used by Native Americans to seal a peace treaty, but it is also an important part of Native American prayer ceremonies. Suzanne J. Crawford, *Native American Religious Traditions* 43, 45–46, 91–94 (2007) (describing the use of ceremonial pipes in prayer ceremonies). The olive branch signifies peace in the Christian tradition, and is a reference to Genesis 8:11, in which a dove sent by Noah returns to the ark with an olive branch, indicating that the floodwaters had subsided. See Christopher A. Hall, *Worshipping with the Church Fathers* 32 (2009) (discussing Tertullian’s commentary on the dove with the olive branch in Genesis 8:11).

Oklahoma’s seal similarly contains a mix of Native American and Christian symbols. At the center of the seal’s five-pointed star is the original seal of the Oklahoma Territory. It depicts an Anglo farmer and

a Native American shaking hands, surrounded by an olive branch representing peace.¹¹ Each of the star's five points contains a seal of one of the Five Tribes: the Chickasaw Nation, Choctaw Nation, Seminole Nation, Muscogee Nation, and Cherokee Nation. The Choctaw seal shows a ceremonial pipe and an unstrung bow with three arrows.¹² The Cherokee seal shows a wreath of oak leaves, symbolizing the oak wood used to keep their sacred fire perpetually burning.¹³



¹¹ Okla. Sec'y of State, *Great Seal of the State of Oklahoma*, <https://perma.cc/5RCF-WCKN> (last visited Mar. 19, 2018).

¹² *Id.*

¹³ *Id.*

The seal of Catawba County, North Carolina, adopted by the Board of Commissioners on September 7, 1925, is divided into four parts, one of which is a Latin cross in a field of red, representing the religion of the county's founders.¹⁴ Early settlers of the county were refugees or descendants of refugees from Europe. Most were German and Scotch-Irish, who initially settled in Pennsylvania before migrating to the county.¹⁵



¹⁴ Catawba County, *About Catawba County, Significant Events in Our History*, Catawba County, <https://perma.cc/U3UQ-JSH3> (last visited Mar. 19, 2018).

¹⁵ Catawba County, *About Catawba County, Population*, <https://perma.cc/U3UQ-JSH3> (last visited Mar. 19, 2018).

The flag of Wrangell, Alaska prominently displays Chief Shakes Tribal House, representing Wrangell's native culture.¹⁶ The site itself includes a reconstruction of a Tlingit community house, surrounded by nine totem poles.¹⁷ The raven totem pole, originally carved in 1896 for the site, tells the Tlingit story explaining the origin of the sun and the moon.¹⁸



Springfield, Ohio, adopted a seal and flag that contain symbols of the three Abrahamic religions: an Islamic star and crescent, a Jewish Star of David, and a Christian Latin cross.¹⁹

¹⁶ Wrangell, Alaska, Municipal Code § 1.08.020.

¹⁷ National Register of Historic Places, *Chief Shakes Historic Site* (Oct. 27, 1970), <https://perma.cc/DY7T-9HPC>.

¹⁸ Randy Hoyt, *Totem Poles: Myths Carved in Cedar*, Journey to the Sea (Dec. 1, 2008), <https://perma.cc/N89H-PR6D>; see also Hilary Stewart, *Looking at Totem Poles* 178 (1993).

¹⁹ Flags of the World, *Springfield, Ohio*, <https://perma.cc/BPZ9-UYNA> (last visited Mar. 19, 2018).



These are but a few examples of the many instances of religious expression that can be found on seals and flags across the country.

Names of Localities. There are also counties and municipalities across the country with names that are religious in origin, reflecting the diverse histories of those localities. In New England, where the Puritans from England settled, many cities draw their names from the Bible such as Bethlehem, Connecticut. Providence, Rhode Island, was founded in 1636 by Roger Williams, a religious exile from the Massachusetts Bay Colony who named the city in honor of “God’s merciful Providence.” See Oscar S. Straus, *Roger Williams: The Pioneer of Religious Liberty* 75–76

(1894). Many other Northeastern states, including those covered by this Court's jurisdiction, contain cities with Biblical names, such as Salem, New Jersey, and Bethany, Pennsylvania.

In Louisiana, which was once a colony of France, county-level governments are called parishes based on the territorial divisions of the Roman Catholic Church. Many of these parishes have names with Roman Catholic origins:

- Ascension Parish
- Assumption Parish
- St. Bernard Parish
- St. Charles Parish
- St. Helena Parish
- St. James Parish
- St. John the Baptist Parish
- St. Landry Parish
- St. Martin Parish
- St. Mary Parish

In Utah, where the Mormon pioneers settled, the cities of Bountiful, Nephi, Lehi, Manti, Deseret, Moroni, and Kolob draw their names from the Book of Mormon.²⁰ Cities named after Mormon Church leaders include Brigham City, Benson, Taylorsville, Woodruff, Cannonville, Heber

²⁰ Lynn Arave, *Religious Place Names are Abundant in Utah*, Deseret News (Jan. 13, 2001), <https://perma.cc/7CHE-FH2M>.

City, Hyrum, St. George, and Snowville.²¹ Zion National Park, one of the most popular national parks in the United States, is located in Utah.

In the Southwest, many cities, such as San Antonio, Texas, trace their origins to Spanish missions. The Mission Trail in California covers twenty-one missions, including San Diego, San Francisco, San Jose, San Juan Capistrano, San Luis Obispo, Santa Barbara, and Santa Cruz. From Santa Fe (“Holy Faith”), to Corpus Christi (“Body of Christ”), to Los Angeles (“The Angels”), it is impossible travel across the Southwest without encountering a city that bears a Spanish religious name.

Though many cities have had religious names for centuries, a modern example is the town of Palm Tree, New York, which will come into existence in 2020. Lisa W. Foderaro, *For a Hasidic Enclave Upstate, Good Borders Make Good Neighbors*, N.Y. Times, Nov. 20, 2017, at A17. The town of Palm Tree will be formed from the village of Kiryas Joel, a predominantly Hasidic Jewish village within Monroe, New York. *Id.* After Kiryas Joel’s rapid growth led to zoning disputes, the voters of Monroe in November 2017 voted for Kiryas Joel to separate from Monroe and become an independent town. *Id.* The name Palm Tree comes from

²¹ *Id.*

Grand Rabbi Joel Teitelbaum, the Satmar Hasidic leader who founded Kiryas Joel. *Id.* Teitelbaum means “date palm” in Yiddish, and the palm tree is used as a logo for Satmar groups. *Id.*

The references to divinity and religion cited in this brief are just a few examples of the longstanding historical tradition of religious expression in the seals, flags, and names of localities across the United States. These expressions of faith are deeply rooted in our nation’s history and tradition.

B. The seal and flag of Lehigh County fit within this tradition.

The Supreme Court has held that the Establishment Clause “must be interpreted ‘by reference to historical practices and understandings.’” *Town of Greece*, 134 S. Ct. at 1819 (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)). The *Lemon* test is inappropriate for evaluating passive references to divinity and religion, such as county seals or flags. *See Van Orden*, 545 U.S. at 686 (plurality opinion); *id.* at 699 (Breyer, J., concurring) (refusing to apply *Lemon* and stating that “the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious”).

The Supreme Court has twice upheld the practice of opening legislative sessions with prayer based on historical tradition. *See Town of Greece*, 134 S. Ct. at 1818–24; *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (“In light of the unbroken history of more than 200 years, there can be no doubt that that the practice of opening legislative sessions with prayer has become part of the fabric of our society.”). Similarly, various opinions of the Supreme Court and lower courts have expressed approval of the national motto, “In God We Trust,” because it is an acknowledgement of the role of faith in our national heritage. *See County of Allegheny*, 492 U.S. at 602–03; *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984); *Newdow v. Lefevre*, 598 F.3d 638, 644 (9th Cir. 2010) (quoting *Aranow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970)) (“In God We Trust’ has nothing whatsoever to do with the establishment of religion.”); *Newdow v. Peterson*, 753 F.3d 105, 106–07 (2d Cir. 2014); *Kidd v. Obama*, 387 F. App’x 2, 2 (D.C. Cir. 2010) (per curiam); *Lambeth v. Bd. of Comm’rs of Davidson Cty.*, 407 F.3d 266, 270–73 (4th Cir. 2005); *Gaylor v. United States*, 74 F.3d 214, 217–18 (10th Cir. 1996); *O’Hair v. Murray*, 588 F.2d 1144, 1144 (5th Cir. 1979) (per curiam).

Including faith-based imagery in flags and seals is part of a

longstanding tradition of ceremonially acknowledging that faith has been a part of our national heritage. Localities all over the United States have included references to divinity and religion in their seals, flags, and names since the Founding. As with the national motto and legislative prayer, this longstanding tradition is protected by the First Amendment, and Lehigh County’s seal and flag fit squarely within this tradition.

To hold the contrary would call into question the constitutionality of countless references to divinity and religion, and it would send a message of hostility to even the most innocuous acknowledgements of faith in public life. In *Town of Greece*, the Supreme Court noted that a “test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.” 134 S. Ct. at 1819. In *Van Orden*, Justice Breyer sought to avoid controversy and division when he approved of the Ten Commandments monument at the Texas Capitol because it had existed for 40 years without legal challenge. 545 U.S. at 702–04 (Breyer, J., concurring in judgment). Here, Lehigh County’s seal and flag have existed for over 70 years without legal challenge, longer than the Ten Commandments monument in *Van Orden*.

Instead of respecting historical tradition, the district court reluctantly and erroneously held that any acknowledgement of the role of faith in a community's history is unconstitutional. That reading of the First Amendment inflames controversy and sows division by calling into question the constitutionality of countless seals, flags, and names of localities across the United States, many of which have existed for centuries without legal challenge. It opens the floodgates to potentially endless litigation over expressions of faith that reasonable observers would understand to be historical references, rather than endorsements of religion by the state.

The district court's ruling is contrary to the Supreme Court's decisions in *Town of Greece* and *Van Orden*. Lehigh County's seal and flag are protected by the First Amendment, because they fit within a longstanding tradition of localities acknowledging the historical role of faith in their founding communities.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment to the Plaintiffs and remand for entry of summary judgment in favor of the County of Lehigh.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
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I. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because the brief contains 3,384 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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March 19, 2018

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I, Cory R. Liu, hereby certify that the text of the electronically filed brief is identical to the text of the paper copies that were mailed on March 19, 2018, to the Clerk of the Court of the United States Court of Appeals for the Third Circuit.

March 19, 2018

/s/ Cory R. Liu

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.1(e), the undersigned hereby certifies that he is counsel for amicus curiae and is a member of the bar of the United States Court of Appeals for the Third Circuit.

March 19, 2018

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CERTIFICATE OF PERFORMANCE OF VIRUSCHECK

I, Cory R. Liu, hereby certify that on March 19, 2018, I caused a virus check to be performed on the electronically filed copy of this brief using the following virus software: Webroot SecureAnywhere Endpoint Protection, version 9.0.19.43. No virus was detected.

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I, Cory R. Liu, hereby certify that on March 19, 2018, I caused seven (7) copies of this brief to be mailed to the Clerk of the Court for the United States Court of Appeals for the Third Circuit, and filed an electronic copy of the brief via CM/ECF. I certify that all participants in this case are registered CM/ECF users and have consented to electronic service.

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