No. 20-1881

IN THE

United States Court Of Appeals

for the Seventh Circuit

REBECCA WOODRING,

Plaintiff-Appellee.

v.

JACKSON COUNTY, INDIANA,

Defendant-Appellant,

Appeal from a Ruling of the United States District Court
Southern District of Indiana, New Albany Division
Case No. 4:18-cv-00243-TWP-DML
Hon. Tanya Walton Pratt, Judge

BRIEF OF *AMICUS CURIAE* FIRST LIBERTY INSTITUTE IN SUPPORT OF APPELLANT JACKSON COUNTY AND REVERSAL

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July 29, 2020

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1881

Short Caption: Rebecca Woodring v. Jackson County, Indiana

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

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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First Liberty Institute

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None.

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

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

N/A

Attorney's Signature: s/ Kelly J. Shackelford Date: 07/27/2020

Attorney's Printed Name: Kelly J. Shackelford

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

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N/A

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

N/A

Attorney's Signature: s/ Michael D. Berry Date: 07/27/2020

Attorney's Printed Name: Michael D. Berry

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

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N/A

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

N/A

Attorney's Signature: s/ Lea E. Patterson Date: 07/27/2020

Attorney's Printed Name: Lea E. Patterson

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

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

First Liberty Institute is a nonprofit, public interest law firm and 501(c)(3) organization. It does not issue stock, and no other entity or person has an ownership interest of 10 percent or more in the organization.

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INTEREST OF *AMICUS CURIAE*

First Liberty Institute ("First Liberty") is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans through *pro bono* legal representation of individuals and institutions of diverse faiths—Catholic, Protestant, Islamic, Jewish, the Falun Gong, Native American religious practitioners, and others.[1]

From 2015 through 2019, First Liberty represented The American Legion ("the Legion") in defending the Bladensburg Peace Cross against legal challenge by the American Humanist Association. Eventually, the Supreme Court heard the case and concluded that the Peace Cross did not violate the Establishment Clause. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019). Under that ruling, the *Lemon* test is dead, at least as applied to longstanding monuments, symbols, and practices, and a strong presumption of constitutionality stands in its place. Following the Legion's victory, First Liberty has a strong interest in the proper application of *American Legion* in other cases.

Whether in war memorials, holiday decorations, flags, or government seals, passive public displays with religious content are commonplace. Coming from many different faith traditions, they testify to America's longstanding recognition of the

[1] *Amicus* has received the consent of both parties to file its brief in this matter. No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person, other than *amicus curiae*, its members, or its counsel contributed money intended to fund preparation or submission of this brief.

role faith plays in the lives of many. The perpetual litigation filed against such passive displays not only threatens to destroy thousands of valuable historical displays, it also signals intolerance to people of all faiths. As *amicus curiae*, First Liberty maintains an interest in preserving the freedom of all faith traditions, protecting the ability of governments to recognize the significance of faith to many individuals, and ensuring that historical religious symbols are not obliterated from our nation's memory.

SUMMARY OF ARGUMENT

The district court failed to properly apply *American Legion* to Jackson County's passive display of holiday decorations. First, ignoring the examples of several courts of appeals, the district court disregarded *American Legion*'s instruction that *Lemon* (and, by implication, the tests that flowed from it) does not apply to longstanding religiously expressive monuments, symbols, and practices. Second, the court failed to recognize the display of the Nativity scene as part of a longstanding practice of government acknowledgement of the Christmas holiday. As such, Jackson County's display of the Nativity scene is entitled to *American Legion*'s strong presumption of constitutionality. Third, the district court did not even need to reach the merits of the case, because *American Legion* fatally undermines "offended observer" standing. Finally, even if Appellee did have standing, the presumption has not been rebutted, and the decision below should be reversed.

ARGUMENT

I. *Lemon* No Longer Governs Established Monuments, Symbols, and Practices.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court sought to create a universal framework for Establishment Clause decisions. Yet throughout the subsequent half century, the Supreme Court's Establishment Clause jurisprudence has confounded lower courts and practitioners alike. *See, e.g.*, *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 995, 1007 (2011) (Thomas, J., dissenting)

("[B]ecause of this Court's nebulous Establishment Clause analyses, [lower court decisions] turn on little more than judicial predilections" and "remain incapable of coherent explanation." (internal quotation marks omitted)).

American Legion stands as a beacon in the fog of Establishment Clause jurisprudence. By simply adding up the conclusions of the Justices in the plurality and concurrences, it is evident that *Lemon* is no longer controlling. After years of muddling through the application of the *Lemon* test and its progeny the endorsement test, *American Legion* sends the clear message that *Lemon* (and, by implication, the endorsement test) is dead, at least as applied to established, religiously expressive monuments, symbols, and practices, and a strong presumption of constitutionality rules in its place.

A. In *American Legion*, Six Justices Found *Lemon* Inapplicable to Established Monuments, Symbols, and Practices.

In *American Legion*, six Justices agreed that *Lemon* is inapplicable to established monuments, symbols, and practices. First, after summarizing criticism of *Lemon*, Justice Alito's plurality opinion—joined by Chief Justice Roberts and Justices Breyer and Kavanaugh—found *Lemon*'s analysis "daunting" as applied to "religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies." *Am. Legion*, 139 S. Ct. at 2081 & n.16 (plurality); *see also id.* at 2092–93 (Kavanaugh, J., concurring) (explaining that *Lemon* does not apply to cases "in the religious symbols and religious speech category," and the Court instead looks to history and tradition) (citing *Marsh v. Chambers*, 463 U.S. 783,

787–92, 795 (1983); *Van Orden v. Perry*, 545 U.S. 677, 686–90 (2005) (plurality); *Town of Greece v. Galloway*, 572 U.S. 565, 575–78 (2014)). Justice Kagan joined Alito, Roberts, Breyer, and Kavanaugh to focus on the memorial's historical context rather than on *Lemon*'s framework. The majority concluded that "[t]he passage of time gives rise to a strong presumption of constitutionality" for "established, religiously expressive monuments, symbols, and practices." *Id.* at 2085 (opinion of the Court).

Justice Thomas went further, agreeing that the plurality rightly rejected *Lemon* as applied to "claims[] like this one" but clarifying that he would also "overrule the *Lemon* test in all contexts." *Id.* at 2097 (Thomas, J., concurring). As Justice Gorsuch added: "[T]oday's plurality rightly indicates . . . *Lemon* was a misadventure . . . [and is] now shelved." *Id.* at 2101–02 (Gorsuch, J., concurring); *see also id.* at 2101 (Gorsuch, J., concurring) ("Today, not a single Member of the Court even tries to defend *Lemon* against these criticisms—and they don't because they can't.").

Justice Scalia once observed that the *Lemon* test haunted Establishment Clause jurisprudence "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). *American Legion* supplies the proverbial final nail in the *Lemon* test's coffin. At its narrowest reading, six Justices found *Lemon* inapplicable in the context of Establishment Clause challenges to historical symbols and practices. In

its place, *American Legion*'s majority created a standard affording established, religiously expressive symbols, displays, and practices a strong presumption of constitutionality in evaluating whether they are consistent with the Establishment Clause.

B. Following *American Legion*, the First, Third, and Eleventh Circuits Reject *Lemon* as to Established Monuments, Symbols, and Practices.

In the year since the Supreme Court handed down *American Legion*, three circuit courts have considered Establishment Clause challenges to different "established, religiously expressive monuments, symbols, and practices." All three adopted and applied *American Legion*'s reasoning by refusing to follow *Lemon* and instead affording a presumption of constitutionality—one to a symbol, another to a practice, and the third to a monument.

First, in *Freedom From Religion Foundation, Inc. v. County of Lehigh*, 933 F.3d 275 (3d Cir. 2019), the Third Circuit considered an Establishment Clause challenge to Lehigh County, Pennsylvania's official seal, which features a Latin cross surrounded by other symbols of historical and cultural significance. The Third Circuit summarized *American Legion*'s analysis in this way:

> *American Legion* confirms that *Lemon* does not apply to "religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies." Instead, informed by four considerations, the Court adopted "a strong presumption of constitutionality" for "established, religiously expressive monuments, symbols, and practices." . . . And the only ways the Court suggested challengers might be able to overcome the presumption of constitutionality would be to demonstrate

> discriminatory intent in the decision to maintain a design or disrespect based on religion in the challenged design itself.

Id. at 281 (internal citations omitted) (quoting *Am. Legion*, 139 S. Ct. at 2081–82, 2085). The Third Circuit reasoned that the 75-year-old seal was an established, religiously expressive symbol, thereby triggering the strong presumption of constitutionality. *Id.* at 282. It explained that "although none is required for the presumption to apply, all four of *American Legion*'s considerations further confirm the presumption's applicability." *Id.* The court concluded that the plaintiffs did not manage to overcome the presumption of constitutionality and, thus, rejected their claim. *Id.* at 284.

Recently, the First Circuit applied the same analysis in considering an Establishment Clause challenge to the inclusion of the phrase "so help me God" as an option at the end of the oath of allegiance administered at United States naturalization ceremonies. *See Perrier-Bilbo v. United States*, 954 F.3d 413 (1st Cir. 2020). The First Circuit explained that the Supreme Court's recent Establishment Clause jurisprudence gives increasing significance to historical patterns. *Id.* at 423. In *American Legion*, the Supreme Court "explicitly rejected" the three-prong *Lemon* test and "[r]el[ied] entirely on a thorough analysis of the cross as a historical symbol." *Id.* at 424. Because the "religiously expressive" phrase "so help me God" in the naturalization oath is "a ceremonial, longstanding practice," it received a strong presumption of constitutionality under *American Legion*. *Id.* at 425–26. The court did "not read *American Legion* to require that the four justifications be met in every

case" but believed they were all satisfied. *Id.* at 426 & n.10. Because the plaintiff did not overcome the presumption by showing discriminatory intent or deliberate disrespect, the First Circuit concluded the practice did not violate the Establishment Clause. *Id.* at 428.

Finally, in *Kondrat'Yev v. City of Pensacola*, 949 F.3d 1319 (11th Cir. 2020), the Eleventh Circuit considered an Establishment Clause challenge to a cross in Pensacola's Bayview Park. The Bayview Park Cross was originally erected for an annual Easter service and later used for other events, such as Veterans and Memorial Day services. *Id.* at 1321–22. Analyzing *American Legion* in detail, the Eleventh Circuit concluded, "[P]erhaps *American Legion*'s clearest message is this: *Lemon* is dead[,] . . . at least with respect to cases involving religious displays and monuments—including crosses. We count six clear votes for that proposition." *Id.* at 1326; *see also id.* at 1322 ("[*American Legion*] jettisoned *Lemon v. Kurtzman*"). After the Eleventh Circuit applied *American Legion*'s strong presumption of constitutionality and examined its four considerations, it too concluded the cross symbol did not violate the Establishment Clause. *See id.* at 1329–34.

The Eleventh Circuit's application of *American Legion* differed from the First and Third Circuit's in two nuances. While the First and Third Circuits concluded that the four considerations need not be met for the presumption to apply, *see FFRF v. Cty. of Lehigh*, 933 F.3d at 282; *Perrier-Bilbo*, 954 F.3d at 426 n.10, the Eleventh Circuit left open the question of whether the presumption applies categorically to

all established, religiously expressive monuments or only to particular monuments that meet the four considerations. *Kondrat'Yev*, 949 F.3d at 1330–33 (holding resolving that question was unnecessary, as the considerations all applied). The Eleventh Circuit also was not as confident as the First and Third that the *American Legion* Court provided clear guidance as to how the presumption could be rebutted, *cf. FFRF v. Cty. of Lehigh*, 933 F.3d at 281; *Perrier-Bilbo*, 954 F.3d at 428, but found no discriminatory intent or deliberate disrespect in the monument's maintenance or design. *Kondrat'Yev*, 949 F.3d at 1333–34.

We agree with the First and Third Circuits that the court is not required to wade into the details of the four considerations before applying the presumption. We read *American Legion* as assigning the presumption to all longstanding monuments and practices. By explaining that four factors "counsel . . . toward" the presumption, *Am. Legion*, 139 S. Ct. at 2081–82 (plurality), the Court reasoned *why* the presumption exists but did not limit *when* it applies. Instead, it is simply "[t]he passage of time [that] gives rise to a strong presumption of constitutionality." *Id.* at 2085 (opinion of the Court).

C. By Using the *Lemon*-Based Endorsement Test, the District Court Flouted *American Legion* and Three Courts of Appeals.

The district court below erred by refusing to apply *American Legion*'s historical analysis and strong presumption of constitutionality. Contradicting three courts of appeals, the district court dismissed *American Legion* as merely "frown[ing] upon

the *Lemon* test" without "offer[ing] its own test for dealing with these types of cases." *Woodring v. Jackson County*, No. 4:18-cv-00243-TWP-DML, 2020 U.S. Dist. LEXIS 75692, *26 (S.D. Ind. Apr. 29, 2020). Moreover, the district court mischaracterized *American Legion*'s presumption of constitutionality for longstanding monuments, symbols, and practices as simply "encourage[d]." *Id.* But, as the First, Third, and Eleventh Circuits all recognized, six Justices made clear that "*Lemon* is dead" as applied to established symbols and practices, *Kondrat'Yev*, 949 F.3d at 1326; *see Am. Legion*, 139 S. Ct. at 2081–82 & n.16 (plurality); *id.* at 2097 (Thomas, J., concurring); *id.* at 2101–02 (Gorsuch, J., concurring), and a majority of the Court, looking to history and tradition,[2] created a strong presumption of constitutionality, *id.* at 2085 (opinion of the Court).

Instead, the district court ignored Supreme Court precedent and three courts of appeals by returning to the endorsement test. The endorsement test derives from *Lemon*. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 691–92 (1984) (O'Connor, J., concurring) (explaining that in properly interpreting "the effect prong of the *Lemon*

[2] This historical analysis is not new. Pre-dating the *Lemon* test, it has been applied time and again in First Amendment jurisprudence. *See*, *e.g.*, *Town of Greece*, 572 U.S. at 576 ("[T]he Establishment Clause must be interpreted by reference to historical practices and understandings." (internal quotation omitted)); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182–85 (2012) (considering history to conclude that the ministerial exemption is grounded in the religion clauses); *Marsh*, 463 U.S. at 786–92 (examining "history and tradition" in considering the constitutionality of legislative prayer); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 14 (1947) (explaining that the Establishment Clause must be interpreted "in the light of its history").

test," "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion"). However, *American Legion* created its strong presumption of constitutionality precisely because weighing the original purposes or the current purposes and "messages," or effects, for longstanding displays and practices is so "daunting." *Am. Legion*, 139 S. Ct. at 2081–82 (plurality). By rejecting *Lemon* and its problematic factors, *American Legion* necessarily rejected the endorsement test that developed from them. All three circuits to consider established, religiously expressive symbols, monuments, and practices in the wake of *American Legion* recognized that the Court abandoned *Lemon* and its progeny in favor of the strong presumption of constitutionality. The Seventh Circuit must do the same and reverse the district court, because applying *American Legion* is not optional.

II. Governmental Acknowledgement of the Christmas Holiday is a Longstanding Practice Entitled to the *American Legion* Presumption.

In applying *American Legion*, the threshold question is whether the holiday display at issue is a part of an "established" or "longstanding" religiously expressive display or practice. The district court did not attempt to answer this question substantively, other than to observe separately and in passing that *American Legion* does not precisely define the word "longstanding," *Woodring*, at *26 n.3, and that the holiday display at issue is "likely no more than 20–30 years old," *id.* at *31.

But trying to pin down how old a particular display must be in order to be considered "longstanding" addresses the wrong question.

A. Courts Should Look to the Broad Historical Context of the Challenged Practice Rather than the Implementation Date of the Particular Practice at Issue.

In determining whether the presumption of constitutionality attaches, *American Legion* points to whether the particular practice at issue fits within a category of longstanding practices, not whether the particular practice is itself old. *Am. Legion*, 139 S. Ct. at 2089 (plurality) ("Where *categories* of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional." (emphasis added)). In detailing the history of the Peace Cross, the opinion of the Court looked not simply at the individual display but at the broad historical context of the cross as a symbol of sacrificial wartime service. *Id.* at 2075–78, 2085–87 (opinion of the Court). Justice Gorsuch's concurrence (joined by Justice Thomas) explained that even if a monument, symbol, or practice is new, "what matters . . . isn't its age but its compliance with ageless principles. The Constitution's meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our nation's traditions is just as permissible whether undertaken today or 94 years ago." *Id.* at 2102 (Gorsuch, J., concurring); *id.* ("Though the plurality does not say so in as many words, the message for our lower court colleagues seems unmistakable: Whether a monument, symbol, or practice is old or new, apply *Town of Greece*, not *Lemon*.").

Reading *American Legion* together with *Town of Greece* and *Marsh v. Chambers* confirms that the appropriate inquiry focuses on how a practice fits within longstanding tradition, not whether the particular practice is itself old. In both instances, the Court looked not at the history of the specific practice before them (a legislative prayer before a particular state or local government body) but at the broader historical context (legislative prayer in general, focusing on the First Congress's opening with a legislative prayer). *See, e.g.*, *Town of Greece*, 572 U.S. at 577 (examining whether the town's prayer fit "within the tradition long followed in Congress and the state legislatures"); *Marsh*, 463 U.S. at 792 (evaluating Nebraska's legislative prayer "[i]n light of the unambiguous and unbroken history of more than 200 years," and concluding "there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society").

This broad historical focus intuitively makes sense: If a 100-year-old war memorial that includes a cross is constitutional, how would one placed in the last 10 years be automatically more suspect? If a Nativity scene displayed by a town for 40 years is constitutional, why is one purchased last year inherently more suspect? The category is the right consideration, not whether a particular display or practice meets an arbitrary age requirement.

B. The Challenged Display Falls Well Within Our Government's Longstanding Tradition of Recognizing Religious Holidays.

The Court's opinion in *Lynch v. Donnelly* details in religious terms governments' longstanding history of acknowledging Christmas. *See, e.g.*, *Lynch*, 465 U.S. at 676 ("Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms."); *id.* at 686 (describing the crèche as a "symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries"). The sight of various holiday decorations, including a Nativity scene, on government property is not unusual. *See id.* at 671 (noting that Pawtucket's display of decorations traditionally associated with Christmas is "essentially like those to be found in hundreds of towns or cities across the Nation—often on public grounds").

The context of Jackson County's Nativity scene is similar to the religiously expressive displays involved in *American Legion*, as well as in the Third Circuit's *County of Lehigh* decision. Although the district court focused on the Nativity scene's perceived prominence among the other decorations, *Woodring*, at *28–29, neither *American Legion* nor *County of Lehigh* considered the context or prominence of the religious symbol determinative. *See Am. Legion*, 139 S. Ct. at 2077–78 (opinion of the Court); *FFRF v. Cty. of Lehigh*, 933 F.3d at 283. Instead, the courts looked at the historical context.

Indeed, parsing the relative size and placement of various items in a display presents precisely the sort of "daunting" analysis *American Legion* avoided. Such a process also sends a message of hostility toward religion, suggesting that religious expression can only be present if minimized. Just as excluding the Nativity scene could be perceived as hostile, so could insisting that any religious symbol be drowned in a sea of secular symbols. For example, placing Santa Claus in the same "visual field of view" as the manger, *cf. Woodring*, at *6, so that it almost looks as if Santa himself were visiting the baby Jesus along with the wise men, may so distort the message of the religious symbol that it, too, sends a message of hostility. *Cf. Am. Legion*, 139 S. Ct. at 2090 (opinion of the Court) ("It is natural and appropriate for those seeking to honor the deceased to invoke the symbols that signify what death meant for those who are memorialized. In some circumstances, the exclusion of any such recognition would make a memorial incomplete.").

C. Limiting *American Legion* to Protect Only Century-Old Individual Displays Risks Excluding Non-Christian Symbols.

One risk of interpreting *American Legion* narrowly is that restricting its application to century-old monuments could exclude minority religious voices from the public square. While not exclusively so, the majority of "established, religiously expressive monuments, symbols, and practices" in this country are closely connected

to the Christian religious tradition.[3] Courts should recognize a judicial framework under the Establishment Clause that allows for religious expression by the diverse traditions within our country.

Consider the example of legislative prayer, a practice begun by the First Congress. *See Marsh*, 463 U.S. at 787–90. Over time, the religious diversity of those offering the prayer has grown. 1860 marked the first time a rabbi offered a prayer to open Congress, and "[m]ore recently, Congress has welcomed chaplains of a variety of religious traditions, including Islam, Hinduism, Buddhism, and Native American religions." *Am. Legion*, 139 S. Ct. at 2088 (opinion of the Court). Just as the same longstanding practice of legislative prayer has grown in diversity, other established practices and displays should allow for increasing diversity.

As another example, the federal government officially recognizes Christmas Day and Thanksgiving, which are religiously-based holidays. 5 U.S.C. § 6103 (2020); *see Lynch*, 465 U.S. at 676. If, in the future, the federal government chose to recognize Yom Kippur or Eid al-Fitr as a federal holiday, would courts view that as an unconstitutional establishment of religion, or would they see it as continuing in the government's longstanding tradition of recognizing culturally-significant holidays?

[3] Although many may not recognize the following as religious symbols, these lesser-known religious symbols are present in displays and practices across the country. The flag of New Mexico displays the sacred sun symbol of the Zia Pueblo, used in Zia religious ceremonies. Religious and cultural symbols honoring five Native American nations make up Seal of the State of Oklahoma. The seal of Springfield, Ohio, displays an Islamic star and crescent, a Jewish Star of David, and a Christian cross. The sego lily and the beehive are Mormon religious symbols contained in the Utah seal and coat of arms.

A step toward diversifying local government recognition of religious holidays can be seen in displays of a menorah to celebrate Hanukkah. While not as "longstanding" as government acknowledgement of Christmas celebrations, that practice has a greater chance of surviving Establishment Clause challenges if viewed as part of the longstanding government practice of acknowledging religious holidays celebrated in the community than if it is viewed in isolation. What if a local government were approached by a group who wanted to display a shofar in observance of Yom Kippur or a lantern in commemoration of Ramadan? Religious diversity and expression would be best encouraged by looking broadly at historical practices.

III. If *Lemon* and the Related Endorsement Test Are Dead, Their Derivative, Offended Observer Standing, Must Follow.

This case presents an opportunity for the Seventh Circuit to clarify its posture toward offended observer standing in light of *American Legion*'s implications. "Offended observer standing" refers to Article III standing granted to plaintiffs who feel offended by a religiously expressive display on government property or religiously expressive speech by a government official. *See, e.g.*, *Freedom From Religion Foundation v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011); *Felix v. City of*

Bloomfield, 36 F. Supp.3d 1233, 1239–40 (D.N.M. 2014). That is the posture of Appellee Woodring.[4]

The Supreme Court has never recognized offended observer standing. *See, e.g.*, *Valley Forge Christian Coll. v. Am. United for Separation of Church & State*, 454 U.S. 464, 485–86 (1982) ("[T]he psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms."); *see also Am. Legion*, 139 S. Ct. at 2100 (Gorsuch, J., concurring) ("To be sure, this Court has sometimes resolved Establishment Clause challenges to religious displays on the merits without first addressing standing. But, as this Court has held, its own failure to consider standing cannot be mistaken as an endorsement of it."). Despite this, nearly every court of appeals has regarded "direct contact" with an "offensive" display or practice sufficient for Article III standing in Establishment Clause claims.[5] Lower courts have reasoned that if the

[4] The district court reasoned that Appellee "suffered an actual injury because she is forced to encounter the crèche while fulfilling her legal obligations and engaging with her county government," *Woodring*, at *19; yet the court also acknowledged that that Seventh Circuit precedent offers "no hard-and-fast rule on observer standing," *id.* at *18. *See also Freedom From Religion Found., Inc. v. Obama*, 641 F.3d at 803 ("Eventually we may need to revisit the subject of observers' standing in order to reconcile this circuit's decisions, but today is not the time.").

[5] *See, e.g.*, *American Humanist Ass'n v. Douglas Cty. Sch. Dist. RE-1*, 859 F.3d 1243, 1251 (10th Cir. 2017); *Freedom From Religion Found., Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 479 (3d Cir. 2016); *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1023–24 (8th Cir. 2012); *ACLU v. Grayson Cty.*, 591 F.3d 837, 843 (6th Cir. 2010); *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009); *Pelphrey v. Cobb Cty.*, 547 F.3d 1263, 1279–80 (11th Cir. 2008); *Vasquez v. L.A. Cty.*, 487 F.3d 1246, 1253 (9th Cir. 2007); *Books v. City of Elkhart*, 235 F.3d 292, 300–01 (7th Cir. 2000); *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086–87 (4th Cir. 1997).

Establishment Clause prohibits anything a reasonable observer would consider an endorsement of religion, then that observer must have standing to challenge such a display. *See Am. Legion*, 139 S. Ct. at 2101 (Gorsuch, J., concurring) (explaining lower courts' reasoning). Such a theory of standing knows no bounds and is not recognized in any other area of the law. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571–74 (1992) (explaining that absent a threatened concrete interest, the Court has "consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy."). Now that *American Legion* has abandoned *Lemon*'s focus on the effects of a longstanding government practice, this rationale for ignoring normal standing requirements in Establishment Clauses challenges has evaporated.[6] As Justice Gorsuch concluded in his *American Legion* concurrence, "With *Lemon* now shelved, little excuse will remain for the anomaly of offended observer standing, and the gaping hole it tore in standing doctrine in the courts of appeals should now begin to close." *Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring).

Furthermore, offended observer standing runs counter to First Amendment principles that welcome the expression of ideas and debate in the public square. Instead, it validates the presumption that religious symbols give offense and therefore the public square should be sanitized of them. But *American Legion*

[6] *See also* Davis, Joseph C. and Nicholas R. Reaves, *The Fruit of the Poisonous Lemon Tree: How the Supreme Court Created Offended-Observer Standing, and Why It's Time for It to Go*, forthcoming Notre Dame Law Review Reflection (Summer 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3562341 (last accessed June 11, 2020).

presumes the opposite—it presumes that longstanding, religiously expressive symbols and practices are constitutional and allowed in the public square. The Constitution does not "require eradication of all religious symbols in the public realm" or "oblige government to avoid any public acknowledgment of religion's role in society." *Salazar v. Buono*, 559 U.S. 700, 718–19 (2010) (plurality). As Justice Gorsuch explained: "[R]ecourse for disagreement and offense does not lie in federal litigation. Instead, in a society that holds among its most cherished ambitions mutual respect, tolerance, self-rule, and democratic responsibility, an 'offended viewer' may 'avert his eyes,' or pursue a political solution." *Am. Legion*, 139 S. Ct. at 2103 (Gorsuch, J., concurring) (quoting *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 212 (1975)).

The existence of "offended observer" standing paved the way for a proliferation of attacks on longstanding symbols, monuments, and practices, embroiling courts in parsing the purposes and effects of decisions made by state and local governments decades ago and leading to wildly varying results. *See id.* ("It's a business that has consumed volumes of the federal reports, invited erratic results, frustrated generations of judges, and fomented the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." (internal quotation marks and citation omitted)); *Utah Highway Patrol Ass'n*, 565 U.S. at 1001–04 (Thomas, J., dissenting) (observing that a crèche, a menorah, the Ten Commandments, or a cross "displayed on government property violates the Establishment Clause, except when

it does not"). To say there is no offended observer standing to address such questions before the federal judiciary would simply constitute a "return to the usual demands of Article III." *Am. Legion*, 139 S. Ct. at 2103 (Gorsuch, J., concurring); *see also id.* at 2094 (Kavanaugh, J., concurring) ("This Court is not the *only* guardian of individual rights in America," and "alternative avenues of relief [are available.]" (emphasis in original)). The Seventh Circuit should take this opportunity to revisit its standing doctrine accordingly.

IV. *American Legion*'s Presumption Applies and Has Not Been Rebutted.

If the Court determines that Appellee Woodring has standing and the holiday display is a longstanding government practice that triggers *American Legion*'s strong presumption of constitutionality, it should conclude that the display at issue is constitutional. While *American Legion*'s four considerations need not be met for the presumption to attach (they only counsel for the presumption), they are present here and are not overcome by the three snippets of evidence relied upon by the

district court.[7] *Woodridge*, at *31–33. As in *Lynch*, "When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message." *Lynch*, 465 U.S. at 680. Jackson County's acknowledgement that members of the community observe the Christmas holiday according to the Christian tradition falls well within our government's longstanding practice. As such, it is not an unconstitutional establishment of religion.

CONCLUSION

In the wake of *American Legion v. American Humanist Association*, *Lemon* is dead, at least as applied to established symbols, monuments, and practices. In *Lemon*'s place stands a strong presumption of constitutionality for such

[7] A passing comment by one of several commissioners, particularly lacking any context, is insufficient to establish a discriminatory purpose. *See Woodring*, at *31–32; *cf. FFRF v. Cty. of Lehigh*, 933 F.3d at 282 (finding a comment by one of three commissioners insufficient to determine purpose). No evidence is given of the Commission's original purpose in approving the Bureau of Commerce's request to "put out yard decorations for the Christmas celebration." *Woodring*, at *32. The inference drawn from the donation of the Nativity scene by a group of ministers, *id.* at *32–33, is sorely insufficient to prove deliberate disrespect for or exclusion of any other group. *Cf. Am. Legion*, 139 S. Ct. at 2082 (opinion of the Court) ("[I]t would be inappropriate for courts to compel . . . removal . . . based on supposition."). The fact that a custodian once borrowed a Nativity scene from a church, *see Woodring*, at *32, similarly could not "establish religion" in violation of the Constitution. No evidence is cited regarding how the purpose and message of the Commission has developed over time. And continuing to analyze the nuances of displays, weighing whether the secular elements are numerous enough, large enough, and prominent enough to outweigh the message of any religiously expressive elements, *see Woodring*, at *28–30, surely sends a message of hostility toward religion. *Cf. Am. Legion*, 139 S. Ct. at 2086 (opinion of the Court) (requiring the removal of WWI memorials "would not be viewed by many as a neutral act").

longstanding, religiously expressive displays and practices. In instituting this strong presumption, the *American Legion* Court recognized that the threat of religious establishment such displays pose is farfetched, at most a mere shadow. *See Lynch*, 465 U.S. at 686 ("Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed."); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. at 308 ("The measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."), *quoted in Am. Legion*, 139 S. Ct. at 2091 (Breyer, J., concurring).

In light of the foregoing, the opinion of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Cir. R. 29 because this brief contains 5,632 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Circuit Rule 32(b) because it has been prepared in proportionally spaced typeface 12-point Century font using Microsoft Word.

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I hereby certify that on July 29, 2020, I electronically filed this brief with the Clerk of the Court for the U.S. Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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