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
for the Southern District of Indiana, New Albany Division
Civil Action No. 4:18-cv-00243-TWP-DML
(The Hon. Tanya Walton Pratt)

BRIEF OF *AMICUS CURIAE* THE BROWNSTOWN AREA MINISTERIAL ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

Diana M. Verm
Counsel of Record
Joseph C. Davis
Nicholas R. Reaves
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire Ave NW
Suite 700
Washington, DC 20036
T: (202) 955-0095
F: (202) 955-0090
dverm@becketlaw.org

Counsel for Amicus Curiae

RULE 26.1 DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

***Amicus Curiae* The Brownstown Area Ministerial Association.**

(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:

The Becket Fund for Religious Liberty.

(3) If the party or amici is a corporation: (i) Identify all its parent corporations, if any; and (ii) List any publicly held company that owns 10% or more of the party's stock:

***Amicus* has no parent corporations or shares of stock.**

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

N/A

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

N/A

Date: August 5, 2020

/s/ Diana M. Verm
Diana M. Verm
Counsel of Record
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire Ave NW
Suite 700
Washington, DC 20036
T: (202) 955-0095
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Date: August 5, 2020

/s/ Joseph C. Davis
Joseph C. Davis
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire Ave NW
Suite 700
Washington, DC 20036
T: (202) 955-0095
F: (202) 955-0090
jdavis@becketlaw.org

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/s/ Nicholas R. Reaves
Nicholas R. Reaves
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire Ave NW
Suite 700
Washington, DC 20036
T: (202) 955-0095
F: (202) 955-0090
nreaves@becketlaw.org

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INTEREST OF *AMICUS CURIAE*

The Brownstown Area Ministerial Association is a coalition of ministers from a variety of religious denominations throughout the Brownstown, Indiana, community. For over 20 years, the Association has supported the local community through prayer, fellowship, engagement, and direct aid. It does this in part by raising funds at two community-wide religious services each year. These funds, among other things, support a county-wide food pantry and provide direct aid to local residents in need of temporary assistance with rent, mortgage, and utility bills.

In 2003, the Association—with broad community support—purchased the nativity scene at issue in this case. This nativity scene has since been displayed in front of the historic Jackson County Courthouse each year from shortly after Thanksgiving to around January 1. As the nativity scene's owner, the Association has a strong interest in ensuring that it may continue this established tradition and confirming that its display does not violate the Constitution.[1]

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. In accordance with Fed. R. App. P. 29(a)(2), *amicus* has obtained consent from all parties to file this brief.

INTRODUCTION

American Legion was a watershed moment in Establishment Clause jurisprudence. The Court rejected *Lemon*, and all its empty promises, in favor of a test based on history and tradition for all "religiously expressive monuments, symbols and practices." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2084 (2019). Following the Supreme Court's lead, the three circuits that have since confronted religious display cases have rejected *Lemon* and applied *American Legion*. But the district court here forged its own path, concluding that "*American Legion* does not offer its own test for dealing with these types of cases" and applying *Lemon* instead. App. 18. This was error. *American Legion*'s rejection of *Lemon* has now been confirmed three times over. This Court should put to rest any uncertainty in this Circuit: after *American Legion*, it is reversible error to continue to apply *Lemon* to decide Establishment Clause challenges to displays, statues, monuments, and religiously expressive practices.

Applying *American Legion*, the Brownstown nativity scene is certainly constitutional. First, the display merits a "strong presumption of constitutionality" as a "longstanding" and "established" religiously expressive practice. *Am. Legion*, 139 S. Ct. at 2082, 2085. The current iteration of the nativity scene was first displayed in 2003, earlier than one (and close in time to two other) illustrative examples the Supreme Court cited in *American Legion*. Further, *American Legion* deliberately

chose the words "established" and "longstanding" when describing the types of displays that merit this presumption. This suggests that, while age can be determinative, courts also look to whether a display garnered immediate controversy at the time that it was placed or instead was integrated into the community peacefully and without incident. Here, the current nativity scene had been an annual tradition for almost two decades before facing legal challenge by an out-of-town plaintiff. And, even though the current display dates to 2003, sources suggest that this local tradition dates back further. All this counsels in favor of maintaining this established local practice.

Second, even putting aside *American Legion*'s presumption, Brownstown's nativity scene is constitutional because it fits comfortably within our nation's history and tradition of similar displays. This is the alternative framework *American Legion* mandated for displays that don't fall within its presumption of constitutionality. As we explain below, this nativity scene is part of a long tradition of public and private nativity scenes across the country. In the Seventh Circuit alone, dozens of cities and towns include a nativity scene in their annual holiday traditions. And this practice dates back earlier than our Founding. It is thus undoubtedly part of our nation's history and traditions.

Unfortunately, litigation like this—challenging an established local holiday tradition—is common. Throughout Indiana (and across the country), organizations like Freedom From Religion Foundation

("FFRF") send threat letters challenging similar holiday displays. In most cases, the plaintiff doesn't even live in the local community. And worse, the only alleged injury is a feeling of offense upon viewing the display. Thankfully, courts need not get sucked into resolving these aesthetic disputes. As Justice Gorsuch recognized, following *American Legion*'s rejection of *Lemon*, there is no reason to maintain the fiction that an "offended observer" has a sufficient injury to satisfy Article III's standing requirements. Instead, courts may now "dispose of cases like these on a motion to dismiss rather than enmeshing themselves for years in intractable disputes sure to generate more heat than light." *Am. Legion*, 139 S. Ct. at 2103.

ARGUMENT

I. *American Legion*, not *Lemon*, controls this case.

The district court declined to follow *American Legion*, instead applying the "endorsement" version of the *Lemon* test. App. 18. That was mistaken. After *American Legion*, *Lemon* no longer applies to cases involving "religiously expressive monuments, symbols, and practices." *Am. Legion*, 139 S. Ct. at 2084.

Before *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court held that the Establishment Clause must be interpreted "in the light of its history." *Everson v. Bd. of Educ.*, 330 U.S. 1, 14 (1947). But *Lemon* eschewed history for a three-pronged test prohibiting any government action that has a predominantly religious "purpose" or "effect," or

"excessive[ly] . . . entangle[s]" the government in religion. 403 U.S. at 612-13 (internal quotation marks omitted). Later, the Court modified *Lemon* for display cases, announcing that under the "effect" prong a display is unconstitutional if, taking into account its "'particular physical setting[],'" a "reasonable observer" would conclude that it constituted an "endorsement" of religion. *Cty. of Allegheny v. ACLU*, 492 U.S. 573-74, 575, 597 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring)); *see Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 850 (7th Cir. 2012) (en banc) ("In accord with . . . Supreme Court precedent[,] we have viewed the endorsement test as a . . . part of *Lemon*'s second prong.").

This *Lemon*/endorsement test was one of the most harshly criticized doctrines in constitutional law. Judge Easterbrook explained that it was ahistorical and subjective, akin to asking the judge to look at a display and "announce his gestalt." *Am. Jewish Congress v. City of Chi.*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting). Justice Kennedy echoed this criticism on behalf of the four *Allegheny* dissenters. *Allegheny*, 492 U.S. at 669 (Kennedy, J., dissenting) ("flawed in its fundamentals and unworkable in practice"); *see also id.* at 676 (quoting *Am. Jewish Congress*, 827 F.2d at 130 (Easterbrook, J., dissenting)). And these criticisms were soon reiterated by "a diverse roster of scholars" and "lower court judges," *Am. Legion*, 139 S. Ct. at 2081 & nn. 14-15—including several on this Court. *See Elmbrook Sch. Dist.*, 687 F.3d at 868

(Ripple, J., dissenting) ("need for a reassessment"); *id.* at 869 (Easterbrook, J., dissenting) ("hopelessly open-ended"); *id.* at 872 (Posner, J., dissenting) ("formless, unanchored, subjective and provide[s] no guidance").

By the 1990s, a majority of Justices were on record as *Lemon* skeptics. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-400 (1993) (Scalia, J., concurring). But rather than squarely address *Lemon*, the Court in "many cases" either "declined to apply the test or . . . simply ignored it." *Am. Legion*, 139 S. Ct. at 2080 (plurality). This maneuver "confounded the lower courts" and confused the law for decades. *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 13, 15-16 (2011) (Thomas, J., dissenting from denial of certiorari).

In *Town of Greece v. Galloway*, however, the Court finally gave more definitive guidance. *Town of Greece* upheld the constitutionality of a town's legislative-prayer practice because it "fi[t] within the tradition long followed" in this country. 572 U.S. 565, 577 (2014). Adopting Justice Kennedy's criticism of *Lemon* in *Allegheny*, the Court emphasized that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id.* at 576 (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part)). Moreover, *Town of Greece* insisted that "[*a*]*ny test* the Court adopts must acknowledge" practices consistent with history. *Id.* at 577 (emphasis added). Because the *Town of Greece* majority didn't explicitly address

Lemon, however, some lower courts, including this one, found themselves unable, "[f]or now," to "jettison that test altogether." *Freedom From Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1045 n.1 (7th Cir. 2018).

American Legion finally freed courts from this morass. In *American Legion*, the Court considered the constitutionality of a 32-foot-tall Latin cross maintained on government property. The Fourth Circuit had applied *Lemon*, holding that because the cross is the "preeminent symbol of Christianity," a reasonable observer would view it as "endorsing" religion. *Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 206-07, 210-11 (4th Cir. 2017). But the Supreme Court reversed, granting that the "cross is undoubtedly a Christian symbol" but explaining that it nonetheless did "not offend the Constitution." 139 S. Ct. at 2090.

In doing so, *American Legion* rejected *Lemon*'s application to all religious displays. Writing for four Justices, Justice Alito concluded that "the *Lemon* test presents particularly daunting problems" that "counsel against" its application in cases "involv[ing] the use . . . of words or symbols with religious associations." *Id.* at 2081-82 (Alito, J., joined by Roberts, C.J., Breyer, J., and Kavanaugh, J.). Joining this result in a separate opinion, Justice Thomas "agree[d]" with the part of the plurality opinion that "rejects [*Lemon*'s] relevance" to religious displays. *Id.* at 2097 (Thomas, J., concurring). And Justice Gorsuch added that "*Lemon*

was a misadventure" that *American Legion* "shelved." *Id.* at 2101-02 (Gorsuch, J., joined by Thomas, J., concurring). Thus, "six Justices . . . clearly rejected the proposition that *Lemon* provides the appropriate standard for religious-display cases"—meaning that "*Lemon* is dead" "with respect to cases involving religious displays and monuments." *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1326-27 (11th Cir. 2020); *see also* Michael W. McConnell, *No More (Old) Symbol Cases*, Cato Sup. Ct. Rev., 2018-2019, at 103-04 ("Using the standard methodology for identifying the holding of a case where there are multiple opinions but no majority, it is clear that . . . the Alito opinion commands a solid majority of six votes.").

In place of *Lemon*, *American Legion* set out a new rule for "established" or "longstanding" religious displays like the *American Legion* cross: they are entitled to "a strong presumption of constitutionality." *Id.* at 2085 (majority). This presumption, the Court explained, was motivated by four "considerations"—that identifying such displays' original purposes "may be especially difficult"; that "as time goes by," the purposes they serve "often multiply"; that "the message conveyed" by a display "may change over time"; and that removing longstanding displays may "strike many as aggressively hostile to religion." *Id.* at 2081-85 (internal quotation marks omitted). The Court indicated that plaintiffs could overcome this presumption only by demonstrating either "discriminatory intent" in the decision to erect the display or "deliberate[] disrespect[]" in the display's

design—which the *American Legion* plaintiffs hadn't done. *Id.* at 2074, 2089.

But *American Legion* also clarified that even displays that don't qualify as "established" or "longstanding" for purposes of the presumption are governed not by *Lemon* but by the historical approach set forth in *Town of Greece*. Rather than apply *Lemon*, Justice Alito explained, the Court's recent display cases "have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance." *Id.* at 2087 (plurality). That approach turns not on the longevity of the "specific" challenged display but on whether that display falls within a "*categor*[*y*] of monuments, symbols, and practices with a longstanding history"; if so, it is constitutional. *Id.* at 2089 (plurality) (emphasis added). Justice Gorsuch, writing for himself and Justice Thomas, "agree[d] with all this," explaining that "what matters . . . is whether the challenged practice fits 'within the tradition' of this country." *Id.* at 2102 (Gorsuch, J., concurring) (quoting *Town of Greece*, 572 U.S. at 577).

The upshot of *American Legion* is that applying *Lemon* in display cases is error, whether the challenged "monument, symbol, or practice is old or new." *Id.* at 2102 (Gorsuch, J., concurring). And courts of appeals have recognized as much. The First, Third, and Eleventh Circuits have all decided appeals arising after *American Legion* that involved religious displays or ceremonies. *Perrier-Bilbo v. United States*, 954 F.3d 413 (1st

Cir. 2020) ("so help me God" in the naturalization oath); *Freedom From Religion Found., Inc. v. Cty. of Lehigh*, 933 F.3d 275 (3d Cir. 2019) (cross on county seal); *Kondrat'yev*, 949 F.3d at 1325 (cross in city park). All have applied *American Legion* and upheld the challenged display or practice. *Perrier-Bilbo*, 954 F.3d at 425 & n.7; *Lehigh*, 933 F.3d at 281-82 & n.5; *Kondrat'yev*, 949 F.3d at 1325. And all have agreed that after *American Legion*, "*Lemon* and its much-maligned three-part test no longer govern Establishment Clause challenges to religious monuments and displays." *Kondrat'yev*, 949 F.3d at 1325; *see also Lehigh*, 933 F.3d at 279 (same); *Perrier-Bilbo*, 954 F.3d at 424 (same). This Court should follow suit.

And this Court's prior precedent does not stand in the way. The Seventh Circuit, of course, adheres to its "prior decisions"—but only "unless and until they have been overruled or undermined by the decisions of a higher court." *Wilson v. Cook Cty.*, 937 F.3d 1028, 1035 (7th Cir. 2019). And here, this Court's statement in *Concord* that it couldn't (yet) "jettison" *Lemon* in display cases is undermined by *American Legion*—which, as the Eleventh Circuit put it, "jettisoned *Lemon*" in display cases. *Kondrat'yev*, 949 F.3d at 1322. Indeed, to hold that *American Legion doesn't* abrogate prior circuit precedent applying *Lemon* to religious displays would create a circuit split, as the First, Third and Eleventh Circuits have expressly held that "*American Legion* abrogates the reasoning (*i.e.*, application of *Lemon*)" of prior circuit decisions

involving religious displays. *Lehigh*, 933 F.3d at 282 & n.5; *see also Kondrat'yev*, 949 F.3d at 1325 (*American Legion* "abrogates [the] analysis" of earlier Eleventh Circuit precedent applying *Lemon*); *Perrier-Bilbo*, 954 F.3d at 425 & n.7 (although previous First Circuit cases "evaluated Establishment Clause challenges" under other approaches, "[w]e follow the Supreme Court's most recent framework").

In short, "[a]t the risk of restating the obvious," "a lower court must follow a relevant Supreme Court decision." *Levine v. Heffernan*, 864 F.2d 457, 459 (7th Cir. 1988). The district court here declined to do so; this Court shouldn't make the same mistake. The governing law in this case is *American Legion*.

II. The nativity scene is constitutional under *American Legion*.

Applying *American Legion* here, the nativity scene is constitutional. As an established practice, the nativity scene is subject to a strong presumption of constitutionality that Plaintiff hasn't rebutted. And even if it weren't entitled to the *American Legion* presumption, it is nonetheless constitutional as it fits within a long tradition of nativity scenes on public property.

A. The nativity scene is constitutional under *American Legion*'s strong presumption of constitutionality.

American Legion recognized a "strong presumption of constitutionality" for *all* "established, religiously expressive monuments, symbols, and practices." 139 S. Ct. at 2085; *supra* at 7. A display that

"[s]atisf[ies] these three conditions . . . triggers" the presumption. *Lehigh*, 933 F.3d at 282.

No one disputes that the nativity scene here is "religiously expressive," and it is plainly a "symbol [or] practice." It is also "established" within the meaning of *American Legion*. Under *American Legion*, longevity alone can render a display "established," particularly where no party was moved to sue until many years after it was first erected. But even if a display's age alone would render it a borderline case, the display is still "established"—and thus the *American Legion* presumption is still triggered—if the four considerations that motivated the Court to adopt the presumption in the first place are implicated. The scene here is "established" either way.

1. The nativity scene is established because it has been displayed without controversy for nearly two decades.

A display's age alone can render it "established" for purposes of the *American Legion* presumption. *See Lehigh*, 933 F.3d at 282 ("It was adopted almost 75 years ago, so it is established."); *Kondrat'yev*, 949 F.3d at 1331 ("[T]he cross is 'established' (given its age, whether deemed to be roughly 50 or roughly 75 years old)." (internal citation omitted)). But it need not be many decades old to trigger the *American Legion* presumption by this path. *American Legion* cited five displays to which "[s]imilar reasoning applies" when discussing the presumption of constitutionality. 139 S. Ct. at 2086. Of these, three were erected within

forty years of *American Legion*, with the most recent dating to 2005. The statute of Po'Pay, "a Pueblo religious leader," *id.*, was installed in 2005.[2] The religious sculpture in the Martin Luther King, Jr. Civil Rights Memorial Park was dedicated in 1991.[3] And "Mother Joseph Pariseau kneeling in prayer," *Am. Legion*, 139 S. Ct. at 2086, was installed in 1980.[4]

The nativity scene here, first displayed in 2003, falls within this range. *See* Appellant's Br. at 4-8 (discussing history of the display); *cf. Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771-72 (1973) (citing *Lemon*, decided two years earlier, as "firmly established"); *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998) (12-year statute of limitations is "unusually generous"). And the fact that earlier iterations of a similar holiday display date back even further than the current display adds to the weight of evidence that this is an established practice. Supp. App. 15-18.

There is also no evidence of any objections to the nativity scene when it was first displayed. It wasn't until almost two decades after the scene was first displayed that an out-of-town plaintiff sued. *Id.* This case thus stands in stark contrast with cases in which displays have faced immediate scrutiny or legal challenge. *See McCreary Cty. v. ACLU of Ky.*,

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[2] *Po'pay,* Architect of the Capitol, https://perma.cc/2Y7E-UAAX.

[3] *Local Memorials Honoring Dr. King*, King County, https://perma.cc/U6AG-9RBS.

[4] *Mother Joseph*, Architect of the Capitol, https://perma.cc/8GZB-U4T9.

545 U.S. 844, 851-52 (2005) (suit filed within six months of display's unveiling); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 769 (7th Cir. 2001) (suit filed *before* display's unveiling). *Cf. Am. Legion*, 139 S. Ct. at 2085 ("[R]etaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones."); *Establish*, Am. Heritage Dictionary (4th ed. 2009) ("to place or settle in a secure position," "to be recognized and accepted").

2. The nativity scene is established because it implicates the four *American Legion* considerations.

But even if the scene's nearly-two-decade history weren't enough to clearly render it "established" for purposes of the *American Legion* presumption, it would still qualify because it implicates all four of the considerations underlying the presumption. While these considerations aren't "*required* for the presumption to apply," they can "confirm the presumption's applicability." *Lehigh*, 933 F.3d at 282. The nativity scene here implicates all four—tipping it into "established" territory even if its age and uncontroversial history alone would make it a more borderline case.

First, "identifying the[] original purpose" behind Brownstown's holiday practice is "difficult." *Am. Legion*, 139 S. Ct. at 2082. Plaintiff offers no evidence of the County's purpose, either for allowing the nativity scene to be included in annual courtyard holiday displays or for allowing those displays to be arranged differently than she would prefer. While

there is agreement that *amicus* purchased the current nativity scene, and that the Jackson County Commissioners approved its display "in the Courtyard for the Christmas Holiday," Supp. App. 17, 46, any other evidence about the County's original purpose is inconclusive or nonexistent. And "it would be inappropriate for courts to compel [its] removal or termination based on supposition." *Am. Legion*, 139 S. Ct. at 2082.[5]

Second, there are "multiple purposes" in play. *Id.* at 2083. Whatever purposes actually inspired the original holiday display in Brownstown, at least one of the County's purposes is obvious: Brownstown permits the holiday display on greenspace outside its historic courthouse to allow private citizens to gather and celebrate, as they see fit, during the holiday season. *Am. Legion,* 139 S. Ct. at 2083 ("[T]he thoughts or sentiments expressed by a government entity that accepts and displays a monument may be quite different from those of either its creator or its donor." (citation omitted)). To be sure, the nativity scene does so in a way that

[5] Despite lacking any evidence of the County's purpose in approving the nativity scene, Plaintiff attempts to use a "purpose" inquiry to smuggle *Lemon* back in, suggesting that only religious displays with a "non-religious purpose" fall within *American Legion*'s reach. Plaintiff's Mot. Summ. J., *Woodring v. Jackson Cty.*, No. 4:18-cv-00243 (S.D. Ind., Aug. 26, 2019), Dkt. 33 at 22. This is error—*American Legion* includes no such limiting language. *See Am. Legion*, 139 S. Ct. at 2085 (applying presumption to all "established, religiously expressive monuments, symbols, and practices.").

"depict[s] the origins of" the holiday—but that is a "legitimate secular purpose[.]" *Lynch*, 465 U.S. at 669.

Moreover, the County's purposes for continuing to welcome the holiday display both "multiply" and "evolve" with each passing year. *Am. Legion*, 139 S. Ct. at 2082-84. The Brownstown community, for example, connects the collection of lighted figures on their courthouse lawn to local Christmas traditions—most of which are not explicitly religious, including Christmas parades, tree lightings, reruns of "The Grinch," reindeer petting zoos, cookie decorating, and pictures with Santa.[6] And today, the County seeks merely to preserve part of its history and culture—which *American Legion* expressly permits. *Id.* at 2083. "As our society becomes more and more religiously diverse," communities like Brownstown "may preserve such . . . practices for the sake of their historical significance or their place in a common cultural heritage." *Id.* As one resident put it, "It's part of who we are here in Brownstown, you know. The nativity's always been at the courthouse."[7]

Third, as with many practices, "the 'message' conveyed [by courtyard holiday displays] change[s] over time," particularly as they "become embedded features of a community's landscape and identity." *Am. Legion*, 139 S. Ct. at 2084 (citation omitted). This is precisely what

[6] January Rutherford, *Celebrate Christmas in Jackson County*, The Tribune (Nov. 29, 2019, 8:53 AM), https://perma.cc/26QF-JXL4.

[7] Chad Mills, *Popular southern Indiana Nativity scene is back – but with changes after lawsuit*, WDRB.com (Dec. 24, 2019), https://perma.cc/Z5MU-EF24.

happened here: while the display evokes religious meaning for some, much of the Brownstown community has "come to value [the display] without necessarily embracing [its] religious roots." *Id.*; Dkt. 32-1 at 15. As with many traditions, "[f]amiliarity itself . . . become[s] a reason for preserv[ing]" the nativity scene. *Am. Legion*, 139 S. Ct. at 2084.

While the holiday display hearkens back to traditions rooted in communal religious sentiment, it also inspires modern gatherings for people who impart their own meaning on this historic tradition. That includes individuals who own businesses on Main Street; members of the local Lions Club; and families who gather for Brownstown's annual "Hometown Christmas" celebration at the historic courthouse square—sponsored in 2018 by such diverse organizations as the Chamber of Commerce, Schneider's Nursery, Hillbilly Outlaws of Jackson County, Radio 96.3 Yule Bus, Psi Iota Xi Sorority, the Jackson County Historical Society, and McDonald's.[8] The "meaning" the nativity scene conveys is as diverse and everchanging as Jackson County itself.

Fourth, because "time's passage [has] imbue[d]" the scene with "familiarity," "removing it may . . . strike many as aggressively hostile to religion." *Am. Legion*, 139 S. Ct. at 2084-85. For nearly two decades, Brownstown's holiday display has featured a nativity scene alongside Santa, his sleigh, reindeer, candy canes, and carolers. To now require it

[8] Zach Spicer, *Brownstown set for annual Hometown Christmas event*, The Tribune (Nov. 30, 2018, 10:52 AM), https://perma.cc/U2M9-WUE5.

to discard only the religious symbolism would send a clear message: the town is free to celebrate all aspects of history and tradition—except any that "partakes of the religious." *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring).

3. Plaintiff has not rebutted the *American Legion* presumption.

With the *American Legion* presumption triggered, the burden shifts to Plaintiff to rebut it. *American Legion* identified "only" two ways that challengers might do so: demonstrating "discriminatory intent" in the defendant's decision to allow the display, or "deliberate[] disrespect[]" in its design. *Lehigh*, 933 F.3d at 284 (quoting *Am. Legion*, 139 S. Ct. at 2074, 2089). Thus, courts applying *American Legion* look to the record on appeal to determine whether there is sufficient evidence of discriminatory intent or deliberate disrespect to "warrant invalidating a presumptively constitutional monument." *Kondrat'yev*, 949 F.3d at 1333; *Perrier-Bilbo*, 954 F.3d at 428 ("[T]he record does not demonstrate discriminatory intent or deliberate disrespect."); *Lehigh*, 933 F.3d at 284 (similar).

Here, there is no evidence that the centuries-old design of a nativity scene deliberately disrespects anyone else's religious beliefs. *Infra* at 20; *Kondrat'yev*, 949 F.3d at 1333 ("There is nothing unique—let alone uniquely disrespectful—about the Bayview Park cross."). Nor has Plaintiff offered evidence of an intent to discriminate on the part of the

County. And nothing in the record supports either contention. The scene is thus constitutional.

B. The nativity scene is also constitutional because it is consistent with historical practice.

Even without *American Legion*'s presumption, the nativity scene is constitutional. For displays that *aren't* entitled to a presumption of constitutionality, *American Legion* confirmed that the question is whether they "fit within the tradition" of religious acknowledgments long followed in this country. *Am. Legion*, 139 S. Ct. at 2088-89 (plurality) (quoting *Town of Greece*, 572 U.S. at 577). If so, the court "typically need go no further; the Establishment Clause claim fails." *New Doe Child #1 v. United States*, 901 F.3d 1015, 1021-23 (8th Cir. 2018) (religious acknowledgement constitutional if "consistent with historical practices"); *see also Gaylor v. Mnuchin*, 919 F.3d 420, 435-36 & n.11 (7th Cir. 2019) (upholding tax exemption for ministerial housing because of "lengthy tradition of tax exemptions for religion").

This approach focuses not on the longevity of the particular challenged display at issue, but on its fit with tradition. *Am. Legion,* 139 S. Ct. at 2088-89 (plurality). Moreover, the relevant tradition isn't limited to the "'specific practice' at hand," *New Doe*, 901 F.3d at 1021 (quoting *Town of Greece*, 134 S. Ct. at 1819), but includes "other types of church-state contacts that have existed unchallenged throughout our history, or that have been found permissible in our case law," *Allegheny*, 492 U.S. at 662

(Kennedy, J., concurring in part and dissenting in part). Thus, in *Town of Greece*, the Court upheld a town's prayer practice that had begun only nine years before, because it "fit[] within the tradition long followed" by legislatures across the country. 572 U.S. at 577. And in *Van Orden*, the Court upheld a Ten Commandments display based on a tradition of *other* acknowledgments of religion, including in the Mayflower Compact, in Thanksgiving proclamations, and in quotes inscribed on federal monuments. 545 U.S. at 685-89 & n.9; *see also id.* at 699 (Breyer, J., concurring).[9]

Applying this approach here, the Brownstown nativity scene is constitutional. Indeed, *Lynch* requires as much. There, although Justice O'Connor's concurrence applied the endorsement test, the Court's opinion looked to "what history reveals," upholding a nativity scene because it provided no "greater aid to religion" than other long-accepted practices, like legislative chaplains, references to God in the "national motto" and "Pledge of Allegiance," government subsidies for the preservation and

[9] This historical approach also aligns with the historical understanding of an "establishment of religion" under the Establishment Clause. *Lehigh*, 933 F.3d at 280; *Am. Legion*, 139 S. Ct. at 2096 (Kavanagh, J., concurring). An "establishment of religion" had a well-defined meaning that included several key elements: government control over church doctrine and personnel, mandatory church attendance, financial support of the established church, penalties for dissenting worship, restrictions on political participation by dissenters, and use of the established church to carry out civil functions. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131-80 (2003).

display of "religious paintings," and the proclamation of "a National Day of Prayer each year." 465 U.S. at 673, 676-77, 682. The same is true here. And now that *American Legion* has clarified that the *Lemon*/endorsement test applied by the *Lynch* concurrence is no longer good law, this analysis is dispositive.

Moreover—in addition to our nation's long history of broadly acknowledging the role of religion—the tradition of annually displaying nativity scenes on public land supports upholding this display. One of the "countless" ways American governments have long acknowledged the role religion plays in the lives of their citizens is by recognizing and celebrating Christmas. *Lynch*, 465 U.S. at 677. The nativity scene in Brownstown fits easily within this long tradition.

Nativity scenes have been part of Christmas celebrations for over 1,600 years. The traditional site of Christ's nativity, a grotto in Bethlehem, hosted a devotional manger by the late fourth century, with a manger scene appearing in Italy as early as 350 A.D.[10] After St. Francis popularized the practice in the thirteenth century, Sciorra, *supra*, at 65, it spread throughout the Christian world, with each region melding local customs and folklore with the original figures. Nativity scenes came to

[10] 2 The Fathers of the Church: The Homilies of Saint Jerome 222 (Sister Marie Liguori Ewald trans., Catholic University of America Press 1966) ("Now, as an honor to Christ, we have taken away the manger of clay and have replaced it with crib of silver, but more precious to me is the one that has been removed."); Joseph Sciorra, *Built with Faith: Italian American Imagination and Catholic Material Culture in New York City* 63 (2015).

America with Moravians from Germany in the 1740s.[11] The Moravians displayed the nativity scenes at schools and homes, and eventually in the Bethlehem, Pennsylvania, town center.[12]

While the Moravians are known for nativity displays, other immigrants brought their own Christmas traditions to the United States.[13] George Washington celebrated Christmas with his troops headquartered in New Jersey during the Revolutionary War, paying for a band to entertain the soldiers.[14] Christmas has been an official state holiday in Louisiana and Arkansas since 1831 and has been a federal holiday since 1870, *Lynch*, 465 U.S. at 675. The use of nativity scenes to celebrate this holiday has long been practiced by countless towns, states, and even a long line of U.S. Presidents.[15] The White House has had a tradition of displaying nativity scenes since at least President Coolidge's

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[11] Emma Diehl, *Central Moravian Church putz: starring in Bethlehem for 75 years*, The Morning Call (Dec. 12, 2012), https://perma.cc/2N6R-9MSN.

[12] *Id.*

[13] Richard A. Lacroix, *Cty. of Allegheny v. Am. Civil Liberties Union: How the Bench Stole Christmas*, 25 New Eng. L. Rev. 523, 556 n.258 (1990) (describing Christmas traditions of settlers in various states).

[14] *George Washington at Christmas*, George Washington's Mount Vernon, https://perma.cc/EF7P-XYKZ.

[15] *See, e.g.*, *A Real Christmas Celebration*, The Coolidge Exam'r, Dec. 14, 1939, at 3, https://perma.cc/3FJP-WZ6Z (Lighted New Mexico nativity scene displayed since 1928); *Nativity Scene Is Represented On Athletic Field*, The Times-News, Dec. 22, 1937, at 1, https://perma.cc/2RFC-AFNG (Nativity scene on a public high school athletic field in North Carolina); *Alexandria Church Choirs Plan Carol Programs*, Evening Star, Dec. 18, 1941, at B-2, https://perma.cc/JQ4W-TS8J (Nativity scene in Alexandria, Virginia); *Nativity scene in front of State House*, Digital Commonwealth (ca. 1955), https://perma.cc/2WWU-7REP (Massachusetts State House crèche).

administration—displaying the same eighteenth-century crèche every year since 1967.[16] Today, twenty-seven states—including Illinois and Wisconsin in this Circuit—display nativity scenes in their capitols.[17]

In Indiana, nativity scenes are widespread during the holiday season. Displays pop up each year in Valparaiso, Rockville, Versailles, Columbia City, Anderson, and Danville—just to name a few.[18] And annual nativity scenes likewise appear across the Seventh Circuit—from Campbellsport and La Crosse, Wisconsin, to Geneva and Effingham, Illinois.[19]

Governments have thus long acknowledged Christmas by displaying nativity scenes on public land. The Brownstown nativity scene joins this

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[16] *White House Christmas Traditions,* The White House Historical Association, https://perma.cc/C8R9-858U; *Coolidges Lead U.S. In Christmas Carols*, Winslow Daily Mail, Dec. 25, 1926, at 2, https://perma.cc/52XX-VNMP.

[17] Joseph Pronechen, *New Record — More Than Half of State Capitols Feature Nativity Scenes*, National Catholic Register (Dec. 24, 2019), https://perma.cc/C2PM-BKXD.

[18] *See* Sue Baxter, *Holly Days & Live Nativity Come to Valparaiso*, PanoramaNOW, https://perma.cc/3G8J-8L3V (Valparaiso); *Rockville Hometown Holidays*, Parke County (Dec. 7, 2019), https://perma.cc/89Q6-N6Z7 (Rockville); *Holiday Affair on the Square*, Ripley County (Dec. 5, 2019), https://perma.cc/L4ZW-QVEM (Versailles); *Community Christmas: Constructing Friday-Saturday Live Nativity*, The Post & Mail, https://perma.cc/H6S4-FVFV (Columbia City); Jim Bailey, *Here came Santa Claus in the parade*, The Herald Bulletin (Dec. 21, 2019), https://perma.cc/KM34-6MWQ (Anderson); Mary Wright, *Christmas on the Square*, Wright Realtors (June 28, 2016), https://perma.cc/GBX2-KUCT (Danville).

[19] *See Holiday Happenings This Weekend*, Campbellsport News (Dec. 11, 2019), https://perma.cc/5Z5E-LK3N; *Live Nativity (Diorama)*, Rotary Lights, https://perma.cc/89ZF-8PUP (La Crosse); *Christmas Walk*, Geneva Chamber of Commerce, https://perma.cc/7RKE-838K; Dawn Schabbing, *Lights, Camera, Christmas*, Effingham Daily News (Nov. 22, 2016), https://perma.cc/T75V-N9FP (Effingham).

storied tradition by recognizing the religious origins of the holiday and their importance to Americans past and present. It is therefore consistent with the Establishment Clause.

III. *American Legion* confirms that Plaintiff lacks standing.

Plaintiff's claim also fails for lack of standing. Her alleged injury boils down to this: while driving through Brownstown, she saw a nativity scene on the historic courthouse lawn and didn't like it. In no other context is such a vague and ephemeral injury—a mere feeling of offense at government action with which you disagree—sufficient to jump-start federal litigation. This Court should reject the argument that standing in Establishment Clause cases somehow merits special treatment and instead confirm that the normal Article III requirements (like a concrete and particularized injury) apply here too.

Offended-observer standing is inconsistent with the requirements of Article III, and its core principle has already been rejected by the Supreme Court. In *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, the Supreme Court held that plaintiffs who "fail[ed] to identify any personal injury . . . other than the psychological consequence presumably produced by observation of conduct with which one disagrees" did not have standing. 454 U.S. 464, 485 (1982); *see also Am. Legion*, 139 S. Ct. at 2098-2103 (Gorsuch, J., concurring); *Am. Jewish Cong.*, 827 F.2d at 134 (Easterbrook, J.,

dissenting) (citing *Valley Forge* for proposition that "[t]here is no heckler's veto. Insult without injury is not even enough to create a case or controversy.").[20] Simply put, the mere observation of government conduct with which one disagrees does not create a real, concrete, and particularized injury. Appellant's Br. at 17-18.[21]

American Legion's rejection of *Lemon* further confirms that the district court's contrary holding is mistaken. Offended-observer standing is a creature of *Lemon*: as some pre-*American Legion* courts reasoned, if "the Establishment Clause forbids anything a reasonable observer would view as an endorsement of religion, then such an observer must be able to sue." *Am. Legion*, 139 S. Ct. at 2101 (Gorsuch, J., concurring). Offended-observer standing was thus born out of a desire of some courts to provide plaintiffs—claiming a *substantive* Establishment Clause injury under *Lemon*'s endorsement theory—with the *procedural* right to press that claim in federal court. But, "with *Lemon* now shelved, little excuse"

[20] This Court has confirmed that even if someone is "deeply offended" by a religious display, this alone "does not confer standing." *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) (citation omitted). Yet this holding can be circumvented with a quick detour: by avoiding the display, a plaintiff can point to "costs in both time and money" as the basis for their standing. *Id.* Such a rule rarely deters a motivated plaintiff, allowing her to bootstrap herself into court—basing her decision to avoid the display (a self-inflicted injury) on the same feelings of offense this Court has said are *not* sufficient to create standing. But here, Plaintiff has not even satisfied this requirement. *See* Appellant's Br. at 21.

[21] *See generally* Joseph C. Davis & Nicholas R. Reaves, *Fruit of the Poisonous* Lemon *Tree: How the Supreme Court Created Offended-Observer Standing, and Why It's Time for It to Go*, Notre Dame L. Rev. Reflection (forthcoming), https://perma.cc/22YR-CLVS.

remains for continuing to entertain a standing theory that runs counter to plain Supreme Court precedent and the bedrock requirements of Article III. *Id.* at 2102. Suits like Plaintiff's—where the only injury alleged is offense—come apart at the seams without *Lemon* to hold them together.

Without *Lemon*, uniform enforcement of Article III's requirements—rather than a special carveout for Establishment Clause claims—better serves the interests of the judiciary, the general public, and litigants. "[T]he Article III notion that federal courts may exercise power only in the last resort, and as a necessity . . . serves the function of insuring that such adjudication does not take place unnecessarily." *Kondrat'yev*, 949 F.3d at 1336-37 (Newsom, J., concurring) (cleaned up). "[R]ecourse for disagreement and offense does not lie in federal litigation . . . an offended viewer may avert his eyes or pursue a political solution." *Am. Legion*, 139 S. Ct. at 2103 (Gorsuch, J., concurring) (internal quotation marks and citation omitted). As this Court has noted, holiday-inspired cases create "a depressingly steady stream of First Amendment challenges." *Concord Cmty. Sch.*, 885 F.3d at 1041.

Perpetuating offended-observer standing also means that ideologically motivated organizations can more easily turn local disputes into federal court cases, dragging local governments along with them. But deciding how communities should recall their history or celebrate holidays is fundamentally a political task, not the business of the federal courts. *See*

Am. Legion, 139 S. Ct. at 2094 (Kavanaugh, J., concurring) (noting that those who object to religious symbols have other avenues by which they can seek relief). Those who disagree with a community's decision to erect a display "can ask for relief from legislatures," *Elmbrook Sch. Dist.*, 687 F.3d at 869 (Easterbrook, J., dissenting)—just like those who disagree with a community's decision to *remove* one, *see McMahon v. Fenves*, 946 F.3d 266, 268-72 (5th Cir. 2020) (plaintiffs lacked standing to challenge removal of Confederate monuments from a city park).

Unfortunately, Plaintiff's suit is just one of many across Indiana (and the country), in which an out-of-town plaintiff has claimed standing based only on feelings of offense at a religious display. This is quite literally "drive-by" standing. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Frequently, local governments are bullied into removing displays when out-of-town organizations send letters threatening expensive and contentious litigation, despite widespread local support.[22]

In Franklin County, Indiana, for example, FFRF demanded the removal of a nativity scene outside Franklin County's Courthouse (despite its over 50-year history).[23] This has resulted in years of

[22] *See, e.g.*, News Releases, *FFRF cautions Steubenville 'not to be duped' by religious right offers,* Freedom From Religion Foundation (Aug. 2, 2012), https://perma.cc/SCM4-X3S2.

[23] Kristine Guerra, *First Amendment dispute pits nonprofit against Nativity display*, IndyStar (Dec. 14, 2014, 6:06 AM), https://perma.cc/W5KT-SSV4.

litigation. And in Fulton County, Indiana, a thirty-year-old display is facing a similar challenge by an out-of-town plaintiff.[24] *See* Order, *Lamunion v. Fulton Cty. Indiana*, No. 3:18-cv-01019 (N.D. Ind. Apr. 22, 2020), Dkt. 35. This pattern is viewed by many local citizens as an "attack on their beliefs."[25]

FFRF has applied this same formula in Iowa,[26] Michigan,[27] Ohio,[28] Texas,[29] and Wisconsin,[30] to name just a few. These suits evince "aggressive[] hostil[ity] to religion." *Am. Legion*, 139 S. Ct. at 2085.[31] And, as the reactions from county governments and residents show, they "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704

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[24] Max Lewis, *Lawsuit filed over Nativity scene at Fulton County Courthouse*, WSBT 22 News (Jan. 4, 2019), https://perma.cc/8DZJ-7VGB.

[25] Lewis, *supra* n.24.

[26] *Member tries to rid Iowa City Park of Nativity*, Freedom From Religion Foundation, https://perma.cc/H7NC-NVFS.

[27] News Releases, *Michigan town removes nativity scene due to sustained FFRF effort*, Freedom From Religion Foundation (Nov. 30, 2016), https://perma.cc/AR7V-TN3Y.

[28] News Releases, *FFRF requests removal of nativity scene from Ohio government property*, Freedom From Religion Foundation (Dec. 4, 2018), https://perma.cc/S3TY-SQZV.

[29] *Freedom From Religion Found., Inc. v. Abbott*, 955 F.3d 417 (5th Cir. 2020).

[30] New Releases, *FFRF challenges official Wis. nativity scene*, Freedom From Religion Foundation (Dec. 19, 2017), https://perma.cc/3BXN-XEGA.

[31] The Supreme Court's admonition against hostility toward religion is all the more salient as hostility toward religious imagery is increasingly expressed not only through litigation, but through vandalism of property. *See* Francis X. Rocca, *Desecration of Catholic Churches Across U.S. Leaves Congregations Shaken*, Wall Street Journal (July 22, 2020, 7:10 PM), https://perma.cc/K4PP-RS4U.

(Breyer, J., concurring). *American Legion*'s rejection of *Lemon* removed this source of conflict from federal courts. *See Am. Legion*, 139 S. Ct. at 2098 (Gorsuch, J., concurring) ("[I]t follows from the Court's analysis that suits like this one should be dismissed for lack of standing."). Thus, courts now can—and should—"dispose of cases like these on a motion to dismiss rather than enmeshing themselves for years in intractable disputes sure to generate more heat than light." *Id.* at 2103.

CONCLUSION

The district court's decision should be reversed.

Date: August 5, 2020

Respectfully submitted,

/s/ Diana M. Verm
Diana M. Verm
Counsel of Record
Joseph C. Davis
Nicholas R. Reaves
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave NW
Suite 700
Washington, DC 20036
T (202) 955-0095
F (202) 955-0090
dverm@becketlaw.org

Counsel for Amicus Curiae

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Cir. R. 29 because it contains 6,912 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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/s/ Diana M. Verm
Diana M. Verm
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 5, 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.

/s/ Diana M. Verm
Diana M. Verm
Counsel for Amicus Curiae