Amicus Corner

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The First Amendment's competing Establishment Clause and Free Exercise Clause obligations can make local government attorneys feel like they are traversing a mine field. What's more, it's not just local government attorneys who struggle in this area. Establishment Clause jurisprudence, and in particular the "*Lemon* test," referring to *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has been recently described by one Eleventh Circuit Judge as a "hot mess."[1] And Justice Scalia famously offered the following criticism of the *Lemon test*:

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys ….[2]

The Establishment Clause provides, "Congress shall make no law respecting an establishment of religion . . . ." Courts generally analyze claims under the Establishment Clause pursuant to *Lemon*. Under the *Lemon* test, a challenged government action must: (1) have a secular purpose; (2) not have a "principal or primary effect" that advances, inhibits, or endorses religion; and (3) not foster "an excessive entanglement between government and religion."[3] "If a state action violates even one of these three prongs, that state action is unconstitutional."[4]

While *Lemon* has been the subject of a good deal of criticism, in 2005, the Supreme Court decided another Establishment Clause case that further muddied the waters for these claims, particularly regarding passive monuments. In *Van Orden v. Perry,* 545 U.S. 677, 681 (2005), the Court held that the state of Texas had not violated the Establishment Clause by displaying a monument inscribed with the Ten Commandments on its State Capitol grounds. A four-member plurality of the Court indicated "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."[5] "Instead," the Court explained, its "analysis is driven both by the nature of the monument and by our Nation's history."[6]

Because five Justices could not agree on a single opinion, the four-member plurality opinion was not controlling in *Van Orden*. Instead, Justice Breyer's concurrence was the controlling opinion because it was the narrowest decision upholding the majority.[7] He explained that to analyze "borderline cases," courts should exercise "legal judgment" reflecting the underlying purpose of the First Amendment, and also take into account "context and consequences," including the historical meaning of the monument, its physical setting, the circumstances of its placement, and how long the monument has stood unchallenged.[8] Unlike the plurality opinion, which would not have applied *Lemon,* Justice Breyer noted that the *Lemon* test still acts a "useful guidepost[]" for passive monuments.[9]

Where do these decisions leave local governments? As Judge Newsom of the Eleventh Circuit, noted "I don't pretend to know…exactly how the questions surrounding the constitutionality of [passive monuments] should be analyzed or resolved."[10] There may yet be reason for local governments to hope that the Supreme Court may finally put the ghoul that is *Lemon* test to bed and provide much needed clarity to local government attorneys in the area of passive monuments.

Maryland-National Capital Park & Planning Commission v. American Humanist Association

IMLA filed an amicus brief in a recent Supreme Court petition-stage case, *Maryland-National Capital Park & Planning Commission v. American Humanist Association,* urging the Court to grant certiorari based on the confusion in this area of the law. The Court granted certiorari and will hear oral arguments in the case later this term and issue a decision in by the end of June 2019.

American Humanist Association

involves an Establishment Clause challenge to a large Latin cross located on public land and has been maintained by the Maryland-National Capital Park and Planning Commission (Commission) for many decades. Specifically, in 1925, the American Legion and a group of bereaved mothers erected a memorial to honor residents of Prince George's County, Maryland, who fought and perished in World War I. To evoke the grave markers on the battlefields in Europe, the memorial bears the shape of a cross. It includes a large plaque listing the names of the 49 county residents who died in World War I and the words "valor," "endurance," "courage," and "devotion" are inscribed on the sides of the memorial. The memorial is situated in Veterans Memorial Park, which also contains monuments to the War of 1812, World War II, the attack on Pearl Harbor, the Korean and Vietnam wars, and the events of September 11, 2001. Standing at 40 feet, the cross is by far the largest memorial in the park.

The community has never used the memorial for a religious ceremony, and the only mention of a religious event in connection with the memorial occurred 87 years ago. However, some invocations have been offered by private citizens during war memorial events, which have been predominantly Christian.

In 1961, the Commission acquired the memorial and the roadway median on which it sits due to traffic safety concerns arising from the placement of the cross in the middle of a busy intersection. The Commission has since expended $117,000 in costs to maintain and repair the memorial.

The cross stood unchallenged until 2014, when the American Humanist Association and three individuals filed suit against the Commission, claiming that because the memorial bears the shape of a cross, it constitutes an unconstitutional endorsement of Christianity and therefore violates the Establishment Clause.

The district court granted summary judgment to the defendants, explaining that it is "uncontroverted" that the maintenance and display of the memorial is not "driven by a religious purpose whatsoever," and that the memorial's long history and context would lead any reasonable observer to conclude that the monument does not "hav[e] the effect of impermissibly endorsing religion," but instead serves exclusively as a war memorial[11]A divided panel of the Fourth Circuit reversed, finding that although the Commission had a legitimate secular purpose in terms of safety concerns, it violated the second and third prongs under *Lemon* because the primary / principal effect of the cross was endorsing Christianity and because it represented excessive entanglement between the government and religion.[12] The Fourth Circuit concluded that a "reasonable observer would fairly understand the Cross to have the primary effect of endorsing religion" given that its "sectarian elements easily overwhelm the secular ones," and in particular, given the immense size of the cross in comparison to the other nearby displays[13]

Although the Establishment Clause is violated under *Lemon* if even one of the prongs is violated, the court went on to conclude that the third prong was also violated based on both the fact that the Commission spent $117,000 to maintain the cross as well as the fact that the cross was so large that the display "aggrandizes [it] in a manner that says to any reasonable observer that the Commission either places Christianity above other faiths, views being American and Christian as one in the same, or both."[14]

Judge Gregory dissented and noted that "the majority's decision would lead to per se findings that all large crosses are unconstitutional despite any amount of secular history and context, in contravention of Establishment Clause jurisprudence."[15] Local governments across the country maintain and own public memorials, like the one at issue here, that employ religious imagery to convey a historical or secular message. As judge Niemeyer pointed out in his dissent from denial from rehearing en banc, the Fourth Circuit's decision "needlessly puts at risk hundreds of monuments with similar symbols standing on public grounds around the country, such as those in nearby Arlington National Cemetery…"[16]

By granting certiorari, the Supreme Court may have five Justices prepared to overrule *Lemon*, or at the very least, conclude that *Lemon* is not the appropriate test for passive monuments, as four Justices believed in *Van Orden*. We will know the answer to that question, as well as the fate of the monument in this case, by the end of June 2019.

Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation

Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation is another First Amendment case in which IMLA participated as an amicus recently, urging the Supreme Court to grant certiorari to help provide clarity to local governments. *Morris County* concerns the County's neutral historic preservation grant program, which did not exclude churches from potential grants for historic preservation. The issue in the case is whether excluding churches from the County grant program that uses the public money for historic preservation purposes in addition to improving active worship space violates the Free Exercise Clause of the U.S. Constitution.

In 2002, the voters of Morris County authorized the County Freeholder Board to permit historic preservation funding under a trust funded by a county property tax. Four kinds of entities could apply for grants: municipal governments within Morris County; Morris County government; charitable conservancies whose purpose includes historic preservation; and religious institutions. At the time of the grants in question, the trust considered applications to stabilize, repair,

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rehabilitate, renovate, restore, improve, protect, or preserve historic properties. All grantees were required to meet the same conditions for the grant and the type of grantee applying for the grant was not considered in the criteria for awarding grants.

From 2012 to 2015, the Freeholder Board approved a total of over $11 million in grants for historic preservation, of which $4.6 million, or 42%, was awarded to twelve churches. All twelve churches "have active congregations" and all "have conducted regular worship services in one or more of the structures" for which grant funds have been or will be used.

Some of the grant applications that the churches submitted, indicated that funds were needed to allow the church to offer religious services. However, whenever such a statement was made in the application, the applicant also indicated that the funds were needed to allow the community and others outside the organization to use it as well. At least one of the churches also used the grant funds to replace a broken stained-glass window, which had religious imagery on it.

The Freedom from Religion Foundation (FFRF) and a member of the group who is a Morris County resident and taxpayer, filed a complaint in New Jersey state court, asserting that the grants violated the Religious Aid Clause of the New Jersey Constitution.[17] The defendants argued that if the Religious Aid Clause was violated, the Clause conflicts with the Free Exercise Clause of the U.S. Constitution.

By way of background, the Supreme Court recently held in *Trinity Lutheran Church of Columbia Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017), that the Missouri Department of Natural Resources' express policy of denying grants for its playground resurfacing program to any applicant owned or controlled by a religious entity violated the rights of Trinity Lutheran Church under the Free Exercise Clause by denying an otherwise available public benefit on account of religious status. *Trinity Lutheran* distinguished its holding from a prior Supreme Court holding, *Locke v. Davey,* 540 U.S. 712 (2004). *Locke* involved the State of Washington's scholarship program, which allowed high achieving students to use scholarships for both religious and non-religious schools, but they could not use the funds to pursue a devotional theology degree.[18] In *Locke,* the Court concluded the Washington program did not violate the Free Exercise Clause because the student was denied a scholarship because of what he proposed to do with it – i.e., study theology, and states have a "historic and substantial interest" in excluding religious activity from public funding.[19]

Threading the needle between *Locke* and *Trinity Lutheran* may prove challenging for local governments. To further complicate matters, only four of the six Justices from the majority opinion in *Trinity Lutheran* joined footnote 3, which indicated that the decision was limited to "express discrimination based on religious identity with respect to playground resurfacing" and that those four Justices were not addressing "religious uses" of government funding.[20] Thus, it is not entirely clear how broad *Trinity Lutheran's* holding is.

Back to *Morris County,* the New Jersey Supreme Court concluded the County violated the state constitution's Religious Aid Clause, which prohibits using public money to build or repair churches.[21] The court then analyzed whether the Religious Aid Clause is at odds with the U.S. Constitution, ultimately concluding that the clause does not violate the U.S. Constitution's Free Exercise Clause.[22] After analyzing *Trinity Lutheran* and *Locke,* the New Jersey Supreme Court determined that this case was more akin to *Locke,* noting that the churches are not being denied public funds because they are religious institutions, but rather, because they plan to, use public funds to repair church buildings so that religious worship services can be held there.[23]

A split of authority has developed after *Trinity Lutheran,* with the highest courts in New Jersey and Massachusetts on one side, and the Sixth Circuit and the Supreme Court of Vermont on the other[24] *American Atheists, Inc. v. Detroit Downtown Development Authority,* involved Detroit's facially neutral grant program to revitalize the downtown area. The Sixth Circuit concluded that, "[b]y endorsing all qualifying applicants, the program has endorsed none of them, and accordingly it has not run afoul of the Establishment Clause."[25]. Similarly, the Supreme Court of Vermont concluded that plaintiffs were unlikely to demonstrate that providing grant funds to repair and paint the exterior of a church was distinguishable from funding playground resurfacing as in *Trinity Lutheran*. The Court in *Taylor* warned that, "[i]n fact, denying the [church] secular benefits available to other like organizations might raise concerns under the Free Exercise Clause of the United States Constitution."[26] *Id*. at 323.

This split in authority underscores the challenges local governments face in this area of the law. In *Trinity Lutheran,* churches were categorically excluded from the public grant program. In *Morris County*, churches were allowed to apply for a neutral grant program, along with other charitable organizations. Yet, in both cases, the government was sued and found liable for a violation of the First Amendment.

Conclusion

Both *American Humanist Association* and *Morris County* highlight the difficulty local government attorneys face in interpreting the Supreme Court's Establishment Clause and Free Exercise jurisprudence. IMLA does not endorse religion or promote government entanglement with religion, but we believe the current state of the law is too nebulous for local government attorneys and ultimately results in increased liability for local governments. After all, if judges around the country cannot decipher the Supreme Court's Establishment Clause and Free Exercise jurisprudence, local government attorneys will continue to struggle to advise their clients. Our hope is that these cases present the Supreme Court with an opportunity to provide local governments with clear guidelines in this area of the law.