UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-81117 CIV MIDDLEBROOKS/JOHNSON

JERRY RABINOWITZ,

Plaintiff,

vs.

DR. ARTHUR ANDERSON, PALM BEACH COUNTY SUPERVISOR OF ELECTIONS,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This Cause comes before the Court on Defendant's Motion for Summary Judgment (DE 40), filed June 21, 2007, and Plaintiff's Cross Motion for Summary Judgment (DE 48), filed June 22, 2007. The Court has reviewed the record and is fully advised in the premises.

I. Background

Plaintiff Jerry Rabinowitz ("Rabinowitz") filed the instant action on December 1, 2006, alleging that the Defendant's use of a Catholic church as his polling location violates the Establishment Clause of the United States Constitution.[1] While Plaintiff brings this action individually, his amended complaint seeks an order enjoining the use of houses of worship as polling sites in all of Palm Beach County, Florida.

Defendant's motion for summary judgment first alleges that Plaintiff does not have

[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. Const. Amend. 1

standing to challenge any polling location in a house of worship, other than the site where Plaintiff actually voted. The Defendant also argues that its use of houses of worship as polling locations has a secular purpose, does not advance religion, and does not result in excessive entanglement between religion and the state. Plaintiff's motion for summary judgment, while acknowledging the secular purpose behind Defendant's use of houses of worship for voting, argues that this practice does advance religion and results in excessive entanglement.

II. Facts

Plaintiff Rabinowitz is a resident of Florida and a registered voter in Palm Beach County. His assigned polling place is the Emmanuel Catholic Church ("the Church"), in Delray Beach, Florida. Amended Complaint at ¶ ¶ 5, 26; Rabinowitz Dep. at p.14. Plaintiff voted at the Church during the general election in November 2006 and in the March 2007 municipal election.

Rabinowitz has voted at the Church since March 2001, except for one election where he participated in "early voting" by voting at a governmental complex in advance of the election. Rabinowitz Dep. at p. 6, pp. 11-12. Upon approaching the polling place on the day of the general election in November 2006, Plaintiff observed a pro-life banner. The banner was located more than 100 feet from the entrance to the polling place. Rabinowitz Dep. at 60. Once inside the Church, Plaintiff encountered various religious icons, texts and photographs associated with the Roman Catholic faith. Some of these religious icons, specifically crucifixes, were located in the same room as the voting booths. *See* Ex. B to Pl. Amended Comp. When Plaintiff objected to the religious displays, representatives of the Defendant advised him that they cannot remove religious objects because churches are not "tax supported." Amended Comp. ¶ 14.

At his deposition, Plaintiff stated that he understood that the pro-life banner located

outside the Church and the religious objects contained within the Church had not been put up at the direction of the Defendant and represented only the views of the Church. Rabinowitz Dep. at p.23-24.

The Supervisor of Elections is given the discretion to select the polling places for each county subject to the standards of accessibility set forth in Section 101.715(1), Florida Statutes. There are approximately 100 houses of worship, comprised of a variety of religions, that are used as polling places in Palm Beach County. Affidavit of Jodi Bradley at ¶ 4.

The polling places used in Palm Beach County that are houses of worship were all obtained through "Polling Location Agreements" entered into with various churches and synagogues. *Id.* at ¶5. Except for certain items that are required to be filled in on each form agreement (such as the rental fee to paid for the use of each facility) which is subject to negotiation, the terms of each polling location agreement are identical. *Id.* at ¶ 6.

Defendant does not erect, pay for, select, or maintain any religious item located within church polling places and has no direct interaction with the Church's religious ceremonies and activities. *Id.* at ¶9. The Defendant believes that Churches and synagogues are normally suitable as polling places in that they frequently have adequate parking, are designed to hold large numbers of persons and are normally accessible to elderly and handicapped persons.

Plaintiff contends that he felt uncomfortable every time he voted at Emmanuel Catholic Church but had not previously made any official objection. Rabinowitz Dep. at p.10. In addition to the pro-life banner situated at the roadway entrance to the Church, there were various religious items and messages in the room where the voting machines were located and in adjacent hallways. These included various crucifixes, a sign with the statement "Each of us matters to God," a sign

stating "God, I make a difference," a copy of the Lord's Prayer, and a copy of the Ten Commandments. Amended Comp. Ex. B, C, D, E. The Church utilized the room where the voting booths were located for teaching Sunday school classes. Plaintiff cites these religious displays as evidence that the Defendant is unconstitutionally endorsing religion.

III. Legal Analysis

Summary judgment is appropriate only when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the burden of meeting this exacting standard. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In applying this standard, the evidence, and all reasonable factual inferences drawn therefrom, must be viewed in the light most favorable to the non-moving party. *See Arrington v. Cobb County*, 139 F.3d 865, 871 (11th Cir. 1998); *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997).

The non-moving party, however, bears the burden of coming forward with evidence of each essential element of their claims, such that a reasonable jury could find in their favor. *See Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990). The non-moving party "[m]ay not rest upon the mere allegations and denials of [its] pleadings, but [its] response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Further, conclusory, uncorroborated allegations by a plaintiff in an affidavit or deposition will not create an issue of fact for trial sufficient to defeat a well-supported summary judgment. *See Earley*, 907 F.2d at

1081. The failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. *See Celotex*, 477 U.S. at 322.

A. Standing

As a preliminary matter, I must address whether the Plaintiff has standing to seek an injunction barring the use of any religious site as a polling place in Palm Beach County, or whether his claim is limited to the constitutionality of voting at the Emmanuel Catholic Church.

Article III of the Constitution limits the judicial power of the United States to the resolution of cases and controversies. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). As an incident to the elaboration of the case or controversy requirement, a litigant must have standing to challenge the action sought to be adjudicated in the lawsuit. *Id.*

A plaintiff must meet three requirements to have Article III standing. First, if, as here, the plaintiff seeks declaratory and injunctive relief, he must demonstrate that he is likely to suffer future injury; second, that he is likely to suffer such injury at the hands of the defendant; and third, that the relief the plaintiff seeks will likely prevent such injury from occurring. *Cone Corp. v. Florida Dep't of Transp.*, 921 F.2d 1190, 1203-1204 (11th Cir. 1991), *citing Whitmore v. Arkansas*, 110 S. Ct. 1717, 1723 (1990).

Regarding the alleged injury, the plaintiff must present "specific, concrete facts" showing that the challenged conduct will result in a "demonstrable, particularized injury" to the plaintiff so that the plaintiff "personally will benefit in a tangible way" from court action. *Cone Corp.*, 921 F.2d at 1204. The injury must be "real and immediate," not "conjectural" or "hypothetical." *City*

of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

Here there is no need to proceed past the first prong of the standing test, as the Plaintiff has failed to demonstrate the likelihood of future injury to himself in relation to polling places at locations other than the Emmanuel Catholic Church. Plaintiff only votes at the Church, and he acknowledged in his deposition that he has not come into contact with religious displays at any polling place other than his own. Rabinowitz Dep. at 77-78.

There is no evidence in the record of specific or concrete facts demonstrating any injury at all to Plaintiff stemming from polling locations at religious sites other than the Church. Also absent is any particularized injury such that Plaintiff would personally benefit from court action enjoining the use of religious sites other than the Church as polling places. I find that Plaintiff does not satisfy the Eleventh Circuit's standing requirement to mount a county-wide claim against the use of houses of worship as polling places. However, he does have standing to bring a constitutional claim as to his own personal polling location, and I will now analyze that claim.

B. The Constitutionality of the use of Emmanuel Catholic Church for Voting

The Supreme Court has used various tests for examining whether a challenged practice violates the Establishment Clause, and most prominent among these is the test appearing in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Although the Plaintiff contends that this test is outdated and suspect, the Eleventh Circuit has recently stated otherwise.[2] Therefore, I will apply the Lemon test, while also doing a brief analysis of the other tests Plaintiff claims that I should

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[2] "What the Supreme Court said ten years ago remains true today: Lemon, however frightening it might be to some, has not been overruled." *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11th Cir. 2003).
"even though some Justices and commentators have strongly criticized Lemon, both the Supreme Court and this circuit continue to use Lemon's three-pronged analysis." *Id.* at 1296.

apply.

The Lemon test requires that the challenged practice have a valid secular purpose, not have the effect of advancing or inhibiting religion, and not foster excessive government entanglement with religion. *Lemon,* 403 U.S. at 612-613.

Here the parties agree that the Defendant's practice had a valid secular purpose; namely, to provide a forum for voting in a secular election. Therefore, there is no need to inquire further into the first prong of the test.

Moving on, the effect prong asks whether, irrespective of government's actual purposes, the practice under review in fact would convey a message of endorsement or disapproval to an informed, reasonable observer. *King v. Richmond County*, 331 F.3d 1271, 1279 (11th Cir. 2003), *citing Lynch v. Donnelly*, 465 U.S. 668, 690 (1984).

Based upon the undisputed facts in the record, Defendant's practice of using the Church for voting does not convey endorsement or disapproval of religion to an informed, reasonable observer. In fact, the Plaintiff himself unequivocally stated that he understood the religious messages and icons at the Church were Church property and not placed at the direction of the Defendant. Rabinowitz Dep. at 23-24. He also could not identify any direct action that the Defendant took at his polling place to convey the impression that the Supervisor's office was endorsing the Catholic faith or viewpoints. *Id.* at 24. At the same time, Plaintiff, in his amended complaint, identifies himself as a "reasonable" individual. *See* Amended Comp. ¶27. While Plaintiff's complaint alleges that these messages and icons create the appearance of endorsement of religion to a reasonable observer, Plaintiff's own statements reveal the opposite. The undisputed facts here show that Plaintiff, a self-identified reasonable observer, did not equate the

religious icons and messages at his polling place with the Defendant's endorsement of the Catholic faith. Rather than having a religious purpose or effect, the placement of a polling precinct at the Church had the primary effect of facilitating a secular election.

Defendant's challenged practice satisfies the third prong of the Lemon test as well, as it does not foster excessive government entanglement with religion. In recent refinements of the Lemon test, the Supreme Court has noted that this prong is substantially similar to the effect prong of the test. *Agostini v. Felton*, 521 U.S. 203, 233 (1997)("The factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.' . . . It is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect.").

The Lemon test's excessive entanglement prong has been interpreted to mean that "some governmental activity that does not have an impermissible religious effect may nevertheless be unconstitutional, if in order to avoid the religious effect the government must enter into an arrangement which requires it to monitor the activity." *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464, 1473 (11th Cir. 1997)(internal citations omitted). There is absolutely no evidence here to support a claim of excessive entanglement. None of the Defendant's employees at the Church participated in or monitored any religious activity, nor is there even an allegation that they supported any of the Church's religious icons or messages.

This is not a case where a governmental actor actively placed a religious icon or message at a voting location, or on another piece of government property. For example, in *American Atheists, Inc. v. City of Starke*, the defendant municipality had chosen to place a lighted cross on a city water tower. 2007 U.S. Dist. LEXIS 19512 (M.D. Fla. 2007). There the court drew the

obvious conclusion and found that the city's display of the cross failed all three prongs of the Lemon test. The key distinction between that case and the instant action is that the Defendant herein had no role in the placement of the religious icons or in the selection and placement of the religious messages. Plaintiff did not have to vote in a booth where the Defendant had placed a crucifix above the ballot, or where the first page of the ballot read "Each of us matters to God." Defendant's employees were at the Church to carry out a secular election; the undisputed evidence shows that they had no religious purpose or motive, and there was no excessive entanglement.[3]

Plaintiff has simply failed to discover any evidence that Defendant's use of the Church had the effect of endorsing religion or resulted in excessive entanglement. His response refers to the personal feelings of discomfort or annoyance that he and other voters felt from viewing religious symbols and messages at their polling place. However, an individual's subjective feeling is not dispositive in the Lemon test. *See Lee v. Weisman*, 505 U.S. 577, 597 (1992)("People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation.")

Additionally, while Plaintiff's motion for summary judgment states that it is unlikely that Plaintiff is the only person who felt that the use of the Church was a governmental endorsement of religion, the record evidence reveals that he was able to easily separate the private speech of the Church from any governmental message. The record reflects that Plaintiff took offense to voting

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[3]Even if some minimal entanglement existed due to having the voting booths in a room with religious symbols and messages, the test is *excessive* entanglement. I also note the recent Supreme Court plurality opinion in *Van Orden v. Perry,* 545 U.S. 677, 690 (2005)("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."). There is no evidence of promotion in this case, and all the religious content was the private speech and expression of the Church, itself protected by the First Amendment.

in a room with religious symbols and messages, but he did not equate these items with Defendant's endorsement of Catholicism. *See* Rabinowitz Dep. at 23-24.

Finally, the record evidence is devoid of even a single individual who stated that he or she felt confused by the religious symbols at the Church and interpreted them as a governmental endorsement of religion. As noted, the Plaintiff, himself a reasonable observer, understood that the religious symbols were the Church's speech. As a matter of law under the Lemon test, an Establishment clause violation cannot exist where the state has no direct role in selecting or placing the religious symbols and messages, where there is no record evidence from a reasonable observer of confusion over state religious endorsement, and where the challenged activity has a secular purpose.

C. The Endorsement and Coercion Tests

Plaintiff's claim also fails as a matter of law under what he describes as the Supreme Court's "endorsement" and "coercion" tests. The endorsement test arose in *County of Allegheny v. ACLU*, 492 U.S. 573, 597 (U.S. 1989). While Plaintiff contends that this is a separate Establishment Clause test, it is in actuality a refinement of the Lemon test. *Id.* at 592. The Court essentially collapsed the second and third prongs of the Lemon test and held "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *Id.* at 597. This decision did not overrule or express disapproval of the Lemon test. Because I have already addressed the endorsement analysis as part of the second prong of the Lemon test, I will not repeat it here. Suffice to say that Defendant's practice passes the endorsement test for the same reasons that I noted above in my analysis of the "effect" prong of Lemon.

Like the endorsement test, the "coercion" test does not provide any relief for Plaintiff.[4] This test arose in *Lee v. Weisman*, where the Supreme Court ruled that sectarian prayer at a public school graduation violated the Establishment Clause. The Court held "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so." *Lee,* 505 U.S. at 587.

The facts of *Lee* are distinguishable from this case. In *Lee*, the Court highlighted the pervasive state involvement with religion, which included the school inviting prayer at the graduation ceremony, selecting the clergyman, and directing the type of prayer. *Id.* The Court also noted that "the First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Id.* at 589. In this case, there is no pervasive state involvement with religion. The Defendant had no role in selecting the religious messages in the Church, or in placing the religious symbols. It is also undisputed that no employee of the Defendant coerced the Plaintiff into a religious exercise.[5] Voting in a secular election, even in the presence of religious objects, is not equivalent to state-sponsored prayer at a public school graduation. Since Plaintiff has introduced no evidence of coercion aside from unsupported allegations, Defendant's practice easily satisfies the Lee test.

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[4]I am not convinced that the *Lee* holding represents a distinct test for analyzing Establishment Clause claims, as the Court seemed to find such a clear violation that use of the Lemon test was unnecessary. *Lee,* 505 U.S. at 586-587. Also, if it is held out as an independent test, it is not the most useful test to apply to the facts of this case. That said, I will analyze it briefly as a separate test simply to point out that it offers Plaintiff no support and does not change the outcome of this case.

[5]The Lee Court also noted that the age of the students increased the potential for coercion, another fact distinguishing that case from the present one. *Id.* at 592.

D. Relevant Eleventh Circuit Case Law

While it does not appear that the Eleventh Circuit has yet addressed the constitutionality of voting in churches, its holdings in other Establishment Clause cases lend support to my ruling here. For example, in *King v. Richmond County*, the Eleventh Circuit held that a Georgia state court's use of an authenticating seal containing the Ten Commandments did not violate the Establishment Clause.

The court of appeals affirmed the district court's ruling that the use of the Ten Commandments in the context of the seal had a secular purpose, that of conveying the impression of the rule of law. *King,* 331 F.3d at 1278. In continuing its analysis, the court ruled that the use of the seal with the Ten Commandments did not endorse or advance religion, as a reasonable observer would not confuse the seal with state endorsement of religion. *Id.* at 1283.

While this decision, like nearly all Establishment Clause cases, was limited to the facts of the case, it is persuasive authority. I also note the distinct difference between a key fact of that case and the present action. In *King* it was direct state action that placed the image of the Ten Commandments on the state court seal. However, in the present case the Church was responsible for the placement of all the religious symbols, and they represented the Church's speech, not the state's.

In the same vein, this case is readily distinguishable from *Glassroth v. Moore,* 335 F.3d 1282 (11th Cir. 2003). There the Eleventh Circuit held that the Alabama Chief Justice of the Supreme Court violated the Establishment Clause by placing a monument of the Ten Commandments in the rotunda of the state judicial building.

The challenged practice failed the purpose prong of *Lemon,* because the Chief Justice

testified at the trial that his purpose in placing the monument was to denote the sovereignty of God over men. *Glassroth,* 335 F.3d at 1296. Given the obvious religious purpose of the monument, the court also held that it violated the second prong of *Lemon*. *Id.* at 1297.

Among the obvious differences between that case and this action is the fact that Plaintiff does not even challenge that the Defendant's practice has a secular purpose. The Defendant here played no role in the selection or placement of the religious messages, and Plaintiff, a reasonable observer, understood that the symbols and messages were the Church's speech.

Finally, another circuit has addressed this same issue and found no Establishment Clause violation. In *Otero v. State Election Bd.*, the court of appeals affirmed the district court's grant of summary judgment to the defendant, finding that the use of churches as polling places did not violate the first two prongs of *Lemon*. 975 F.2d 738, 740 (10th Cir. 1992).

Turning to the third prong, the court of appeals stated as follows:

> The final test is that the statute not foster an "excessive government entanglement with religion." Plaintiff is perhaps correct in his argument that voting in a church might remind voters of religion, which might make some think of the religious affiliation of a candidate on the ballot or remind them of the candidate's stands on issues on which the voter's church also has taken a stand. But the test is an "excessive" entanglement, which requires a weighing of the governmental interests and motives and the extent to which the action might promote religion.
>
> The appendix to plaintiff's own complaint indicates that of the twenty-nine polling places in Miami, Oklahoma, nine are in churches; but the churches include several denominations: Catholic, Baptist, Presbyterian, Episcopal, Assembly of God, and Christian. Plaintiff has not alleged nor shown that an excessive rent is being paid for these polling places or that the defendants are attempting to promote a particular religion or religion in general. We hold that plaintiff has made an insufficient showing of excessive entanglement to escape summary judgment.

Id. (internal citations omitted).

As in that case, Defendant utilizes various denominations of houses of worship as polling places, and there is no evidence that excessive rent is paid to the Emmanuel Catholic Church or any other religious polling place. The Defendant uses the same "Polling Location Agreements" for all its polling locations, regardless of whether a location is a house of worship. Like the plaintiff in *Otero,* Rabinowitz has failed to make a sufficient showing of an Establishment Clause violation to avoid summary judgment.

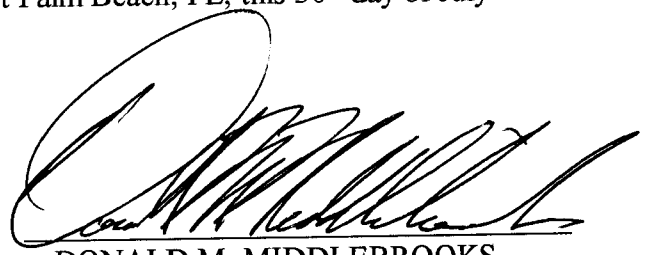
IV. Conclusion

Construing all facts in the Plaintiff's favor, his Establishment Clause claim fails as a matter of law. The Defendant's challenged practice of having a polling place at the Emmanuel Catholic Church does not violate the Lemon test. Defendant's practice has a secular purpose, it does not have the effect of endorsing religion, and it does not create an excessive entanglement between the Church and the state. All the religious symbols and messages present in the Church were the private speech of that particular house of worship, and the Plaintiff himself understood this undisputed fact. While Plaintiff may feel discomfort when viewing the religious symbols at the Church, that feeling of discomfort does not equate to a Constitutional violation in the absence of credible evidence. There is simply no evidence in the record to suggest that the Defendant's challenged practice violates the Lemon test, and it is entitled to summary judgment.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment (DE 40) is GRANTED.

DONE AND ORDERED in Chambers at West Palm Beach, FL, this 30th day of July 2007.



DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

copies to counsel of record