

13-1668-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

American Atheists, Inc., Dennis Horvitz, Kenneth Bronstein, Jane Everhart
Plaintiffs-Appellants,

Mark Panzarino,
Plaintiff.

---v.---

Port Authority of New York and New Jersey, World Trade Center Memorial
Foundation/National September 11 Memorial and Museum,
Defendants-Appellees.

State of New Jersey, Governor Chris Christie, Silverstein Properties, Inc., Lower
Manhattan Development Corporation, Church of the Holy Name of Jesus, Brian
Jordan, World Trade Center Properties, LLC,
Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant, American Atheists, Inc., by and through its undersigned counsel, hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

Plaintiffs brought this action alleging that the Defendants violated the Establishment Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the New York Constitution, the New Jersey Constitution, the New York Civil Rights Act, and New Jersey Statute 10:1-3. In 2011, a Christian cross (the “Ground Zero Cross” or “the Cross”) was erected at the New York City World Trade Center site. From 2006 to 2011, the Cross had been situated at the nearby St. Peter’s Church. On or about September 13, 2001, the Cross was salvaged from the debris of the World Trade Center buildings, and the Cross was erected at the September 11 rescue site where it served as an extremely religious symbol for religious services and a source of spirituality. The Cross is approximately 17 feet tall and towers over any other symbols in the vicinity, expressing Christian primacy. The Plaintiffs assert for the reasons stated in its pleadings, motions, briefs and other papers below that the erection of the religious symbol violates the aforementioned federal and state Constitutional provisions and statutes.

On Appeal herein, the Plaintiffs argue that they demonstrated below that there are disputed issues of material fact before the Court, particularly as to whether displaying the 17-foot Cross in a way that dwarfs all other religious representation in the Museum actually endorses a Christian viewpoint.

Plaintiffs respect the honorable victims and rescuers who suffered the worst

of 9/11 and its aftermath. Plaintiffs seek to uphold the First Amendment and Equal Protection principles that all Americans have a right to, including non-Christians.

“At a time when we see around the world the violent consequences of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish.” *McCreary Cty. v. Am. Civil Liberties Union of Kentucky*, 545 U.S. 844, 882 (2005) (O’Connor, J., concurring).

Plaintiffs also do not seek to re-write history or rip from museums all acknowledgment of our country’s historical relationship with faith. Plaintiffs seek some contextual adjustment to the manner of displaying the Cross within the nation’s memorial museum commemorating the fallen and the rescuers at the World Trade Center.

Plaintiffs initially suggested displaying the Cross at St. Peter’s church where it would be accessible to all without cost in close proximity to Ground Zero, as had previously been the intent of many. The reaction of others to that suggestion has convinced Plaintiffs that it was not the most desirable remedy. *See, e.g., Paul D. Cohen, A New Station for 9-11 Cross. Careful Journey to Church for Hallowed Relic, Daily News*, Oct. 6, 2006, available at <http://www.nydailynews.com/archives/news/a-new-station-9-11-cross-careful-journey-church-hallowed-relic-article-1.569943> (“Port Authority Executive

Director Kenneth Ringler, praised by Jordan for brokering the temporary move to St. Peter's, said: "This cross is so symbolic and so important . . . that there is no way it can ever leave the site permanently."). Thus, Plaintiffs hope Defendants will cooperate to fashion a contextual display that does not alienate non-religious visitors to the nation's preeminent memorial and museum commemorating the World Trade Center attacks' victims and rescuers, including the non-Christians.

The Museum, for its part, denies any collaboration with the Port Authority and takes full responsibility for the manner of displaying the Cross. The Museum intends to display the famous Cross, universally acknowledged as a symbol of Christianity, in the Historical Exhibition of the Museum. Memorandum of Law in Support of National September 11 Memorial & Museum at the World Trade Center Foundation, Inc.'s Motion for Summary Judgment, at 5. It goes to great lengths to try to distinguish the above-ground Memorial from the below-ground Museum, where the Cross will be. But the distinction between "Memorial" and "Museum" is a distinction without a difference here, as the full entity will stand in perpetuity as the nation's preeminent memorial museum commemorating the World Trade Center attacks. "A memorial museum is entirely different [from an art museum]; a comparable museum would be the Auschwitz-Birkenau Museum in Poland." *See* Paterson Decl., Ex. 7, Kreder Expert Report, at. 7: ¶ 3. The Museum also likens its display to the routine display of religious art in art museums across the country.

The display of religious objects in traditional art museums does not have the same effect as the proposed display of the 17-foot Cross in a near vacuum of objects representing non-Christian suffering when non-Christians indisputably counted among the victims and rescuers. *See id.* at ¶ 2.

The Port Authority, a governmental entity, argues that contrary to the record, it had no part in the efforts of the Museum to put the Cross into the Museum. Plaintiffs maintain that the nexus of collaboration between the co-Defendants goes far beyond their relationship as lessor and lessee. The Port Authority was actually the entity that donated the Cross to the Museum for display. The Port Authority played an integral part in the planning and execution of its eventual display.

The Supreme Court of the United States has made it clear that this level of symbiosis between state and private actors overcomes both the state action doctrine and the government speech doctrine. The overwhelmingly dominant manner of displaying the Cross violates the Establishment Clause, Equal Protection Clause, the New York Constitution and the New Jersey Constitution. State-sponsored favoritism of one religion must be counteracted in some meaningful way. Government “may not prefer one religion over another or promote religion over nonbelief.” *McCreary*, 545 U.S. at 883 (O’Connor, J., concurring), *citing Everson v. Bd. of Ewing*, 330 U.S. 1, 15-16 (1947). Plaintiffs hope not to see the Cross purged from the Museum, but seek symbolic representation of the non-religious

victims and rescue workers so that the Christian viewpoint is not governmentally endorsed at the expense of non- Christian Americans.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the case involves federal constitutional questions. The District Court entered an Opinion dated March 28, 2013 (Appendix Document 13), and Judgment was entered on March 29, 2013 (Appendix Document 14). Plaintiffs-Appellants filed a notice of appeal on April 26, 2013 (Appendix Document 15). Jurisdiction in this Court is based upon 28 U.S.C. § 1291, in that this is an appeal from a final judgment of the District Court disposing of all claims by all parties.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- A. WHETHER GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING THE OVERWHELMINGLY DOMINANT DISPLAY OF THE CROSS OVER ANY OTHER RELIGIOUS SYMBOLISM IS A VIOLATION OF THE ESTABLISHMENT CLAUSE.
- B. WHETHER GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING THE DISPLAY OF THE CROSS IS A VIOLATION OF EQUAL UNDER THE LAW.
- C. WHETHER GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING THE NEW YORK AND NEW JERSEY CONSTITUTIONS' GUARANTEES TO PLAINTIFFS OF EQUAL PROTECTION OF THE LAWS.

STATEMENT OF THE CASE

This appeal arises from a dispute between the Plaintiffs-Appellants and Defendants-Appellees over a 17-foot-tall Christian cross (the “Ground Zero Cross” or “the Cross”) which was erected in 2011 at the New York City World Trade Center site. From 2006 to 2011, the Cross had been situated at the nearby St. Peter’s Church. On or about September 13, 2001, the Cross was salvaged from the debris of the World Trade Center buildings, and the Cross was erected at the September 11 rescue site where it served as an extremely religious symbol for religious services and a source of spirituality.

The case was removed from state court to the United States District Court, Southern District of New York on or about August 26, 2011. On or about October 31, 2011, December 9, 2012, and January 24, 2013, the various Defendants filed separate answers to the Plaintiffs’ Amended Complaint and made demands for trial by jury. The parties submitted a Rule 26 discovery plan report on or about January 17, 2012.

On or about August 13, 2012, the Defendants-Appellants filed motions for summary judgment. On or about September 12, 2012, the Plaintiffs-Appellants filed their response to Defendants’ motions for summary judgment. On September 24, 2012, the Defendants filed reply memoranda in support of their motions for summary judgment.

On or about March 28, 2013, the United States District Judge Deborah A. Batts entered an Opinion granting the Defendants' motions for summary judgment and dismissing the case. The clerk entered Judgment on or about March 29, 2013, and appeal is now taken to this court by notice of appeal timely filed with the Court on or about April 26, 2013.

STATEMENT OF FACTS

On or about September 13, 2001, the Cross at issue in this case was obtained from the debris of the World Trade Center buildings. It was erected at the September 11 rescue site where it served as a religious symbol for religious services and a source of spirituality. From 2006 to 2011, the Cross was situated at the nearby St. Peter's Church. In 2011, the Cross was lowered into the National September 11 Museum.

The essential problem with the Cross is that it alienates non-Christians seeking to commemorate the dead, wounded and other affected persons. The Cross also alienates those who wish to learn about events at the National September 11 Memorial & Museum. The 17-foot tall Christian Cross is one of the largest objects in the Memorial. It dominates all other religious objects. The inclusion of information to accompany the Cross does not change the essential facts that in the present case the government is sponsoring and erecting an indisputably religious symbol which advances one religion above all other religions, and non-religion as

well.

Plaintiffs concurred with the material statements of material facts set forth in Port Authority's Rule 56.1 Statement (Appendix No. 7) and National September 11 Memorial & Museum at the World Trade Center Foundation, Inc.'s Statement of Facts Pursuant to Local Civil Rule 56.1 (Appendix No. 9) in Support of Its Motion for Summary Judgment, both filed August 13, 2012. Plaintiffs supplemented the facts stated therein with additional facts and the District Court stated in its March 28, 2013, Opinion (ECF Docket No. 83; Appendix No. A-13), page 2 that "The Court will consider Plaintiffs' numerous additional factual assertions... contained within their Opposition and their Exhibits under *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir. 2001).

As Plaintiffs-Appellants demonstrated in their September 12, 2012, Memorandum of Law In Opposition to Defendants' Motions for Summary Judgment (District Court Docket No. 72) as supported by the Affidavit of Edwin Kagin together with supporting exhibits (District Court Docket No. 73), it was widely reported that among the victims of the 9/11 attack were 31 Muslim Americans, approximately 400-500 Jewish Americans, approximately 500 non-religious Americans, and an unknown number of Americans of other faiths.

A Roman Catholic Priest, Father Brian Jordan, blessed the Cross in October 2011, "after construction workers at the site told him they saw the Cross

as “a sign that God never abandoned us at Ground Zero.” Paul D. Cohen, *A New Station for 9-11 Cross. Careful Journey to Church for Hallowed Relic*, Daily News, Oct. 6, 2006, Oct. 5, 2006, *available at* <http://www.nydailynews.com/archives/news/a-new-station-9-11-cross-careful-journey-church-hallowed-relic-article-1.569943>. Christian services were frequently held at the site of the Cross until it was removed to St. Peter’s Roman Catholic Church, 22 Barclay St., Manhattan. Paterson Decl., Ex. 15, Greenwald Depo., at 28: 6-9 & 14-18. The 17-foot-tall Cross is by far the dominant religious object to be displayed in the Museum. Paterson Decl., Ex. 15, Greenwald Depo., 74:10-11 (“It is the dominant object that speaks to the role of religion at ground zero.”) & 74:19-21 (“it is the largest object in the museum that speaks to the religious—the role at religion at ground zero.”).

Other museums, such as large encyclopedic or universal museums like the National Museum of American History, the Metropolitan Museum of Art, and the American Museum of Natural History present many different cultures in close proximity in order for the similarities and differences to be easily understood. Paterson Decl., Ex. 7, Kreder Expert Report, at 7: ¶¶ 2-3. “It is the display of many religious objects from different cultures together to maximize their educational value that renders their presence intellectual – rather than alienating – to the non-religious (or differently religious) museum goer not

seeking a religious experience.” *Id.* at ¶ 3.

“[T]he display of the Cross without parallel contextual display of non-Christian religious objects of comparable impact would appear to promote a Christian viewpoint of how September 11, 2001, is to be memorialized and would imply governmental endorsement of Christianity.” Paterson Decl., Ex. 7, Kreder Expert Report, at 6: ¶ 6. To prevent this impact on a reasonable observer, a full representational account of the aftermath of 9/11 “that does not by clear implication diminish non-Christian rescuers” is required. *Id.* at 6: ¶ 6.

It is known that the religious fanatics who violated all religious and civil law in attacking on 9/11 made claim to being followers of Islam. Sadly, the view of many is that this is a struggle between Christianity and Islam. The then-President of the United States likened the 9/11 attacks to a “crusade.” *See* Office of the Press Secretary, *Remarks by the President Upon Arrival*, Sept. 16, 2011, *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010916-2.html>. Significant antipathy toward Islam was seen in the arguments seeking to deny the right of followers of Islam to build an Islamic “Center” on private property a few blocks from Ground Zero. *E.g.*, Jeff Jacoby, *A Mosque at Ground Zero?*, Boston.com (June 16, 2010), *available at* http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/06/06/a

_mosque_at_ground_zero/.

The Cross at issue is believed to be a gift from the Christian god; it is widely regarded to be a supernatural gift from the deity. Christians share an acceptance of commonly understood explanations. A duty is imposed upon Christians to teach these truths to the world. Matthew 28:16–20. This religious requirement is known as “the Great Commission.”

http://en.wikipedia.org/wiki/Great_Commission. The Cross is to remind the faithful that, as Jesus Christ died on the cross for the sins of the world, and rose from the dead, so will those who died in Christ on 9/11 be resurrected from the dead to live for eternity with Him.

The Cross was made into a holy relic of current worship and veneration, and was recognized and treated as such—quite unlike historic religious objects that are so commonly housed in other museums. Father Brian Jordon held Catholic Masses at it. Paterson Decl., Ex. 15, Greenwald Depo., at 28:6-9 and 14-18. An incredibly high number of people have prayed to it. Documents produced by the Museum show its coordination with Father Jordan to conduct a religious ceremony and bless it yet again right before it went into the museum. Kagin Decl., Ex. 1, Transfer and Blessing Ceremony of the World Trade Center Cross, July 23, 2011 at 9 AM to Its Final Home, NSMM 117-118 (speech also available at <http://www.youtube.com/watch?v=9vu2WRHcMjQ>). When the

intersecting girders were found in the wreckage, there were many more cross-shaped girders with various pieces of debris affixed. The debris affixed to the Ground Zero Cross appears to have been melted duct work. Kagin Decl., Ex. 2, Email from James Murray to Timothy Stickelman with cc to Bill Wong (WTCC) and John Barrera, Re: Cross Move, Sept. 27, 2006, at PA 30 ¶ 5. This has been interpreted widely by believers as a representation, put there by a god, of the shroud Christ wore to his crucifixion. *E.g.*, Paterson Decl., Ex. 15, Greenwald Depo., at 41:2-24. In May 2006, the World Trade Center Memorial Foundation agreed to the return of the Cross to the site of the tragedy. *Id.* at 11-12.

Documents produced by the Museum show its coordination with Father Jordan to conduct a religious ceremony and bless it yet again right before it went into the museum. Kagin Decl., Ex. 1, Transfer and Blessing Ceremony of the World Trade Center Cross, July 23, 2011, at 9 AM to Its Final Home, NSMM 117-118, NSMM 106-108 (speech also available at <http://www.youtube.com/watch?v=9vu2WRHcMjQ>). The Port Authority's Executive Director asked "...the newly appointed director of the museum, to consider the museum housing this artifact." *Id.* at 12:17-19.

As described in more detail in Part I below with excerpts from specific documents, the Port Authority was complicit in placement of the Cross at St. Peter's Church (as opposed to the hangar that was used for the other artifacts

being housed for the museum) as well as the planning and logistics of the constitutionally questionable practice of a unilaterally-Christian religious ceremony when the Cross was relocated to the Memorial site. These documents include:

The bylaws of the 9/11 Memorial and Museum, which provide that “additional [Board] directors will be appointed equally by the New York State Governor and New York City Mayor.” Kagin Decl., Ex. 4, IRS Form 1023, Addendum, Part II Question 4-c. The Port Authority’s status is not one of mere lessor and owner/donor of the object in question. Although a private entity’s mere acceptance of public funds “in and of itself” does not render all of its activities state action, the amount of governmental funds and resources, including real estate, dedicated to this Museum is extraordinary, perhaps unprecedented. *See Arons v. State*, 2004 WL 1124669, at *6 (S.D.N.Y. May 20, 2004).

Moreover, in this case, there is evidence that the Port Authority’s Executive Director asked “...the newly appointed director of the museum, to consider the museum housing this artifact.” Paterson Decl., Ex. 15, Greenwald Depo., at 12:17-19. This request, coming on the heels of the director’s appointment, holds subtle yet definite coercive power.

The New York State Assembly passed a bill, A. 10232, which proscribes the Museum from charging admission fees to the memorial. *Assembly Passes*

Bill Prohibiting Admission Fees at World Trade Center Memorial, New York State Assembly, New York State Assembly Press Release (June 23, 2006), available at <http://assembly.state.ny.us/Press/20060623c>. Assembly Speaker Sheldon Silver stated that “[t]he State of New York is making a significant commitment of public funds to the World Trade Center Memorial...[w]ith this funding comes an expectation that the memorial, visitors’ center and museum will be fully accessible to all New Yorkers and all other visitors seeking to pay their respects to those who died, honor the heroes and forever remember what happened at that site and the spirit with which the nation responded.” *Id.*

On August 6, 2010, the President of the United States signed into law The National September 11 Memorial & Museum Commemorative Medal Act of 2010, Public Law 111-221, which adds a \$10.00 surcharge per each commemorative medal sold to be paid to the Museum “to support its operations and maintenance.” *Id.* at Section 7.

On September 10, 2012, Defendants made public a document titled PORT – MEMORIAL Memorandum of Understanding, that demonstrates overwhelmingly the symbiosis between the two Defendants in the funding and operation of the Museum, and the involvement of state actors:

The designees of the NY and NJ Governors (NJ Governors will be offered a designee on the Memorial board) will serve on the Memorial Board’s Finance & Investment Committee, which is responsible for

oversight of the annual budget, period financial statements, and general organizational policies...[Also,] Memorial and the Port agree to work together to obtain federal funding to subsidize the Memorial and Museum's costs of operations and help ensure long-term financial sustainability. Kagin Decl., Ex. 5, at 1-a and 1-h.

A Site-wide Coordination Task Force will be established to ensure all activities that impact (or have the potential to impact) World Trade Center stakeholders are appropriately coordinated. The Task Force will be comprised of one representative each from: the Port designated by the Governor of NY and one designated by the Governor of NJ, the Memorial, and the City of New York, plus relevant staff of each. Kagin Decl., Ex. 5, at 2-a and b.

The Port, the New York Governor, the New Jersey Governor, and the New York City Mayor will each name a representative to participate in Major Event planning with staff of the Memorial ... It will be the goal that the plans presented will be reflective of the input of and be satisfactory to the Governors', Port's, and New York City Mayor's representatives..." Kagin Decl., Ex. 5, at 3-b and 3-e.

Further, numerous examples of extensive coordination between the Port Authority and the Museum were revealed through discovery. These include messages conferring upon how best to hold religious ceremonies. Kenneth J. Ringler, the Executive Director for the Port Authority on May 16, 2006, wrote to Father Jordan and Mr. Malloy a letter (Kagin Decl., Ex. 6) stating:

Dear Father Jordan and Mr. Malloy,

One of the most difficult challenges we face at the Port Authority is how to appropriately and sensitively protect and preserve hundreds of World Trade Center artifacts that remain after the 9/11 terrorist

attacks, including the steel beams in cross form that have been located on the site for nearly five years.

I appreciate the guidance you have provided me during the past month to help us develop a plan to temporarily relocate the steel beams in cross form off the site during construction has been completed. We believe this is an extremely important artifact and one that will help convey to generations of Americans exactly what happened on 9/11 and its aftermath.

We now look forward to working with both of you on a plan to temporarily relocate the artifact to a public space at St. Peter's Church, where it can be seen from the World Trade Center site and viewed by millions of people each year...

Part of an email from Allison Blais, of the Museum, to David Tweedy, the Port Authority's Chief of Capital Planning, dated May 4, 2011, involving a ceremony to hold when the Cross is brought back to the site, states: "To allow a greater number, we need the Port's help on devising a plan to allow a greater number of people onto the Plaza without having to credential every individual, but restricting to a certain pathway..." Kagin Decl., Ex. 7 at PA 40 ¶ 1. A bill, S. 1537, has been proposed which would authorize the Secretary of the Interior to provide technical and financial assistance to the Museum and authorize the Secretary to accept the potential donation of title to the Memorial. H.R. Comm. Nat. Park, Sub. Comm. Nat. Resources. *9/11 Memorial Cross National Monument Establishment Act of 2011: Hearings on H.R. 2865*, 112th Cong., 4, (Sept. 8, 2011). Under this bill, the federal government would provide \$20

million in annual financing. *Id.* Approximately \$250 million of the \$650 million dollars already used to construct the museum was provided by the federal government. *Id.* at 38.

Plaintiff American Atheists publicly offered to provide a memorial for the Museum, at its own cost, to represent the approximately 500 non-religious victims of the attack on the World Trade Center. American Atheists never received a response. Kagin Decl., Ex. 3, Silverman Depo., at 92-94.

Plaintiffs-Appellants acknowledge that the Cross is an artifact of historic significance. Plaintiffs-Appellants contend, however, that its proposed manner of display in the Museum amounts to endorsement of the Christian faith in violation of the Establishment Clause and/or the Equal Protection Clause, which could be remedied by increasing representation of the experiences of non-Christian rescuers and victims.

SUMMARY OF ARGUMENT

Plaintiffs-Appellants assert that the prominent and conspicuous display of the Cross violates the Establishment Clause because it constitutes an endorsement of Christianity. The facts in the present case may be interpreted by a reasonable fact-finder to demonstrate just such an endorsement. The present case also demonstrates genuine issues of material fact that the Defendants had a religious purpose relative to placement of the Cross, that the Defendants' placement of the

Cross had the purpose and effect of advancing Christianity, and that the placement of the Cross fostered an excessive entanglement with religion. Further, a reasonable fact-finder could conclude that the Defendants have violated the Equal Protection Clause of the U.S. Constitution and the New York and New Jersey equivalents.

Summary judgment should only be granted by a district court when there are no issues of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). In reviewing a motion for summary judgment, the “court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weight the evidence.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In fact, the trial court has such discretion that the court may also deny summary judgment “in a case where there is reason to believe that the better course would be to proceed to a full trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). As the parties in this nationally important case are at complete opposition as to the reasonable significance of material facts and whether they amount to governmental endorsement of religion, the Court, as a matter of law, should not have granted summary judgment. Rather, this Court should reverse the decision of the district court such that the district court may proceed with a trial on the merit

ARGUMENT

A. THE OVERWHELMINGLY DOMINANT DISPLAY OF THE CROSS OVER ANY OTHER RELIGIOUS SYMBOLISM IS A VIOLATION OF THE ESTABLISHMENT CLAUSE

As the district court noted, “neutrality” is the “touchstone” of First Amendment analysis (District Court’s March 28, 2013 Opinion, Appendix No. 13). The district court below erred in its application of the Lemon Test for evaluating challenges under the Establishment clause, as the court should properly have found that under the facts of the case, a reasonable fact-finder could conclude that the Cross did not have a secular purpose, has the principal or primary effect of advancing religion, and fosters an excessive government entanglement with religion. A reasonable fact-finder could also have found that the Cross constitutes an endorsement of religion.

The First Amendment to the Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” U.S. CONST. amend. I. “Endorsement [of a particular religious viewpoint] sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring). This is a highly fact-sensitive, contextual inquiry. *Van Orden v. Perry*, 545 U.S. 677,

698 (2005) (Breyer, J., concurring) (observing “highly fact-sensitive” nature of endorsement case inquiries requiring consideration of “the context of the display”). Reasonable fact-finders may reach different conclusions based on the same or similar facts.

In *Brooklyn Inst. of Arts and Sci. v. City of New York*, 64 F. Supp. 2d 184, 190 (E.D.N.Y. 1999), a case out of New York, Mayor Rudolph Guliani threatened to cut off funding, and to ultimately terminate the Brooklyn museum’s lease, in an attempt to coerce it into taking down an exhibit of the Madonna that offended his and many Catholic New Yorkers’ sentiments. The court held, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *Id.*, quoting *West Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). That is exactly what Plaintiffs seek to prevent in this case.

Moreover, no previous case (or judicial *dicta*) regarding display of an object in a “typical [art] museum setting” remotely applies to the case at bar. *See Lynch*, 465 U.S. at 692 (1984) (O’Connor, J., concurring) (“traditional museum setting”). In fact, Plaintiffs agree with Justice Stevens that it “would be absurd to . . . exclude religious paintings . . . from a public museum.” *See County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 653 (Stevens, J., dissenting). In contrast, Defendants’ above-ground/below-ground distinction

between memorial and museum is an attempt to distract the court from the obvious—the Museum at issue in the present case is different from most. Large encyclopedic or universal museums like the National Museum of American History, the Metropolitan Museum of Art, and the American Museum of Natural History present many different cultures in close proximity in order for the similarities and differences to be easily understood. Paterson Decl., Ex. 7, Kreder Expert Report, at 7: ¶¶ 2-3. “It is the display of many religious objects from different cultures together to maximize their educational value that renders their presence intellectual – rather than alienating – to the non-religious (or differently religious) museumgoer not seeking a religious experience.” *Id.* at ¶ 3. The common display of religious objects in most museums will not have the same effect as the incredibly dominant display of the Cross will in this Museum.

The United States Supreme Court adopted the tripartite *Lemon* test to evaluate claims arising under the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Under *Lemon*, government conduct (1) must have a secular purpose; (2) must not have the primary effect of either advancing or inhibiting religion; and (3) must not lead to excessive entanglement between religion and government. *Id.* Since then, the Court has refined the test such that it requires one to ask whether the reasonable observer perceiving the “challenged governmental practice [would conclude that it]

either has the purpose or effect of ‘endorsing’ religion.’” *See County of Allegheny*, 492 U.S. at 592; *accord Lynch v. Donnelly*, 465 U.S. at 687 (O’Connor, J., concurring) (proposing “perception of endorsement” test for the first time in the Court’s jurisprudence).

With regard to the first prong of the *Lemon* test, the purpose of the government must be secular. In this case, a reasonable person could conclude that the placement of the 17-foot Cross, which has been the subject of veneration and has been viewed as a gift from God has a religious purpose, and not a secular one. Similarly, there exists a reasonable inference from the facts that the Cross has the purpose and effect of advancing religion, specifically Christianity. Lastly, reasonable inferences can be made from the facts to conclude that the Cross fosters an excessive entanglement with religion.

As explained by one scholar, “This determination is not entirely a question of fact but is instead a legal question to be answered on the basis of judicial interpretation of social facts.” Jordan C. Budd, *Cross Purposes: Remediating the Endorsement of Symbolic Religious Speech*, 82 Denver U. L. Rev. 183, 189 (2004) (internal citations and quotes omitted). Thus, even if the district court found that there were no genuine issues of material fact, the Defendants were nevertheless not entitled to judgment as a matter of law. Whereas it is true that the Court’s recent jurisprudence allows more religious

expression on public land, “certain forms of symbolic religious speech remain squarely at odds with the Establishment Clause.” *Id.* As concisely articulated by that scholar:

Specifically, courts regularly conclude that religious symbols permanently displayed on public property create in the well-informed observer a perception of endorsement and thus violate the effects prong of O'Connor's reformulated Lemon test, irrespective of government's articulated purpose in erecting the display. Cases supporting the proposition are legion, and departures from it are rare. Example of decisions striking down the permanent display of crosses and crucifixes on public land include *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) (upholding injunction preventing unconstitutional display of an approximately seven-foot tall Latin cross on public land), rev'd on other grounds by *Salazar v. Buono*, 130 S.Ct. 1803 (2010) (questioning need for injunction after transfer of land to private entity); *Carpenter v. City and County of San Francisco*, 93 F.3d 627 (9th Cir. 1996) (decided under the California Constitution); *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996); *Gonzales v. North Township of Lake Cty.*, 4 F.3d 1412 (7th Cir. 1993) (finding display of cross in public park to be unconstitutional); *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993) (decided under California Constitution); *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (finding display of cross in public park to be unconstitutional); *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988) (finding use of cross on military base to honor servicemen missing in action to be unconstitutional); *Greater Houston Chapter of the American Civil Liberties Union v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984) (finding an alcove of meditation and memorial installing Latin crosses and a Star of David in a public park to be unconstitutional); and *American Civil Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (upholding preliminary injunction against city's prominent display of a 15-foot Latin cross). *See also Jordan C. Budd, Cross Purposes: Remediating the Endorsement of Symbolic Religious Speech*, 82 Denver U. L. Rev. 183, 203 n.121 (2004) (collecting cases). Decisions striking down the permanent display of religious statuary on public land include *Freedom From Religion Found., Inc., v.*

City of Marshfield, 203 F.3d 487 (7th Cir. 2000) (following the per se test from *Pinette*) and *Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir. 1991) (decided under the California Constitution). *See also Budd, supra*, at 203 n.122 (collecting cases).

Plaintiffs agree with the Museum that the reasonable-observer standard contemplates one who is “aware of the history and context of the community and the forum in which the display appears.” *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring). Where the parties disagree is whether a reasonable person, aware of both the World Trade Center’s terrorist attackers’ purported adherence to Islam and also aware of the Ground Zero mosque controversy, would perceive the huge and widely venerated Cross in a practical vacuum of any symbols commemorating non-Christian victims or rescuers to constitute governmental endorsement of Christianity.

The Second Circuit in *Skoros v. New York City*, for example, did not “ignore the possibility that, in some circumstances, a government’s deliberate exclusion of the religious symbol of one faith from a display that includes the religious symbols of other faiths could communicate the official favoritism or hostility among religious sects that is prohibited by the Establishment Clause.” 437 F.3d 1, 27 (2d Cir. 2006), *citing School Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring); *Van Orden v. Perry*, 545 U.S. 677, 698 (Breyer, J., concurring). In describing the endorsement test, the Second Circuit also stated that beyond obvious proselytizing or coercion, there

are “numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others.” *Id.* at 29, quoting *Allegheny Cty.*, 492 U.S. at 627-28 (O’Connor, J., concurring in part and concurring in the judgment).

Even if the Cross is accompanied by written explanation, it would not change the fact that it is the dominant religious object in the National September 11 Memorial & Museum. *See* Paterson Decl., Ex. 15, Greenwald Depo., at 6: ¶ 4. Placing it in an underground “museum” and surrounding it with fire engines doesn’t change that. “[T]he display of the Cross without parallel contextual display of non-Christian religious objects of comparable impact would appear to promote a Christian viewpoint of how September 11, 2001, is to be memorialized and would imply governmental endorsement of Christianity.” Paterson Decl., Ex. 7, Kreder Expert Report, at ¶ 6. What is required is a full representational account of the aftermath of 9/11 “that does not by clear implication diminish non-Christian rescuers.” *Id.* at 6: ¶ 6.

It is known that the religious fanatics who violated all religious and civil law in attacking on 9/11 made claim to being followers of Islam. Sadly, the view of many is that this is a struggle between Christianity and Islam. The then President of the United States likened the 9/11 attacks to a “crusade.” *See* Office of the Press Secretary, *Remarks by the President Upon Arrival*, Sept. 16, 2011,

available at [\[whitehouse.archives.gov/news/releases/2001/09/20010916-2.html\]\(http://whitehouse.archives.gov/news/releases/2001/09/20010916-2.html\). Significant antipathy toward Islam was seen in the arguments seeking to deny the right of followers of Islam to build an Islamic “Center” on private property a few blocks from Ground Zero. *E.g.*, Jeff Jacoby, *A Mosque at Ground Zero?*, Boston.com \(June 16, 2010\), *available at*](http://georgewbush-</p>
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http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/06/06/a_mosque_at_ground_zero/.

In addition, the Cross at issue is believed to be a gift from the Christian god; it is widely regarded to be a supernatural gift from the deity. Christians share an acceptance of commonly understood explanations. A duty is imposed upon Christians to teach these truths to the world. Matthew 28:16–20. This religious requirement is known as “the Great Commission.”

http://en.wikipedia.org/wiki/Great_Commission. The Cross is to remind the faithful that, as Jesus Christ died on the cross for the sins of the world and rose from the dead, so will those who died in Christ on 9/11 be resurrected from the dead to live for eternity with him. The Cross was made into a holy relic of current worship and veneration, and was recognized and treated as such—quite unlike historic religious objects that are so commonly housed in other museums. Father Brian Jordon held Catholic Masses. Paterson Decl.,

Ex. 15, Greenwald Depo., at 28:6-9 and 14-18. An incredibly high number of people have prayed to it. Documents produced by the Museum show its coordination with Father Jordan to conduct a religious ceremony and bless it yet again right before it went into the museum. Kagin Decl., Ex. 1, Transfer and Blessing Ceremony of the World Trade Center Cross, July 23, 2011 at 9 AM to Its Final Home, NSMM 117-118 (speech also available at <http://www.youtube.com/watch?v=9vu2WRHcMjQ>). When the intersecting girders were found in the wreckage, of course there were quite a few more cross shaped girders with various pieces of debris affixed. The debris affixed to the Ground Zero Cross appears to have been melted duct work. Kagin Decl., Ex. 2, Email from James Murray to Timothy Stickelman with cc to Bill Wong (WTCC) and John Barrera, Re: Cross Move, Sept. 27, 2006, at PA 30 ¶ 5. This has been interpreted widely by believers as a representation, put there by a god, of the shroud Christ wore to his crucifixion. *E.g.*, Paterson Decl., Ex. 15, Greenwald Depo., at 41:2-24.

Defendants cite just only one case involving display of an object worth explicitly comparing and contrasting to the present case, *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566 (1989). In that case, a California court found that the city of Los Angeles's display of an unlit menorah during Chanukah did not violate the three prongs of the *Lemon* test. The Court reasoned that the presence

of an unlit menorah in the City Hall rotunda did not benefit the Jewish faith, nor was the display of the object an excessive entanglement when cultural and historic displays were typical in the rotunda in question. But the present case is distinguishable both as to kind and as to degree.

A *semi-permanent* display of a 17-foot tall Cross in the *nation's* museum dedicated to memorializing the fallen of 9/11 is clearly a greater degree of expression than what was affected in *Okrand*. To analogize to our facts, the menorah in that case would have had to have been as big as a billboard and surrounded with smaller, perhaps fist-sized, objects from perhaps a half dozen other religions. Consider the effect of juxtaposing, as representing Christianity and other religions, of a display consisting of a male giraffe, which averages 17-feet in height (<http://whozoo.org/Intro98/natarale/natgiraffe2.htm>), and three kittens. The same decision-making that claims to de-emphasize the Cross by placing it next to fire engines, moving pictures and other secular items, *see* Paterson Decl., Ex. 15, Greenwald Depo., at 206:10-16, is also at play when no other religious item is placed in a parallel position with the Cross. As stated by Justice Blackmun in his *County of Allegheny* opinion, “[a]n 18-foot dreidel would look out of place [beside a 45-foot Christmas tree] and might be interpreted by some as mocking the celebration of Chanukah.” *County of Allegheny*, 492 U.S. at 618.

Our nation's jurisprudence with regard to the Establishment Clause is difficult, but in our facts it can be reduced to first principles. The proposed manner of display will be an impermissible endorsement of a particular religion.

B. THE DISPLAY OF THE CROSS IS A VIOLATION OF EQUAL PROTECTION UNDER THE LAW

There are genuine issues of material fact that the display of the 17-foot Cross constitutes a violation of Equal Protection of the Laws. “In order for Plaintiffs to state an equal protection claim, they must allege that they were intentionally discriminated against on the basis of a protected classification, in this case, religion.” *People United for Children, Inc. v. City of New York*, 108 F. Supp. 2d 275, 298 (S.D.N.Y. 2000). With regard to religious discrimination, non-belief, no less than any competing religious tradition, is a “discrete and insular” minority. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 91 n.4, 97 (1977); *Young v. Southwestern Savings and Loan Ass’n.*, 509 F.2d 140, 142 (5th Cir. 1975); *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 613-14 n. 5 (9th Cir. 1988); *Williams v. Allied Waste Serv.*, 2010 U.S. Dist. LEXIS 84218 (E.D. Tex. June 30, 2010).

This Court can take judicial notice that atheists differ from churchgoers in that they do not congregate or worship symbols. Accordingly, the chance of any physical evidence of any victim's or rescuer's atheistic belief would be found in the wreckage is practically nil. To require the production of such evidence to prevent

the overwhelmingly Christian coloration of the Museum's narrative perfectly embodies the perpetually impossible demand to "prove a negative." This has never been required to surmount a summary judgment motion. The fact that there were practically no objects in the wreckage commemorating non-Christians, including atheists, does not mean that our nation's narrative should trivialize the experience and mourning of non-Christians.

How, one might ask, would it look if Defendants were attempting to convey to the objective observer the message that the United States of America is indeed a "Christian nation?" Additionally, as there has been a violation of the Plaintiffs' fundamental rights, as articulated above, the heightened scrutiny test applies. Plaintiffs ask the Court to consider whether the State has truly fostered its secular purpose of depicting the rescue and recovery efforts in the aftermath of the attacks in the least constitutionally restrictive manner possible; or rather, if by promoting the preeminence of a huge Christian icon above all others, the State was improperly crossing the line between Church and State.

Plaintiffs offered, at their own cost, to supply a symbol to represent the fallen and rescuer atheists, which was rejected by Defendants although they accepted some other religiously oriented gifts fashioned after September 11 for ultimate display. *See* Kagin Decl., Ex. 3, Silverman Depo., at 92- 94:23. While Plaintiffs recognize that individuals cannot force others, including a government, to

speak, Plaintiffs do not hope for the Cross to be removed from the Museum and are willing to work with Defendants to provide a tasteful, respectful symbol that would not alienate Christians and other non-atheists.

Under the government speech doctrine enunciated by the United States Supreme Court in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), permanent monuments displayed on public property typically represent government speech. *Id.* As the Court stated, however, “this does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause.” *Id.* at 468.

**C. NEW YORK’S AND NEW JERSEY’S CONSTITUTIONS
GUARANTEE PLAINTIFFS THE EQUAL PROTECTION OF THE
LAWS.**

The applicable New York and New Jersey constitutional protections mirror the federal standards discussed above. *See Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 244 (S.D.N.Y. 2005); *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 530, 87 N.E.2d 541 (1949); *e.g.*, *South Jersey Catholic School Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 150 N.J. 575, 586, 696 A.2d 709 (1997). As stated above, the manner of displaying the Cross in the absence of significant symbols of other-religious or non-religious beliefs discriminates against Plaintiffs. Thus, while they may be able to walk through the doors of the Museum, they will be alienated and prohibited from learning about

and honoring the dead or rescuers, including the non-Christians among them. The Plaintiffs offer no additional response to Defendants' arguments on state law grounds other than what is stated above.

CONCLUSION

Wherefore, for the foregoing reasons, the Plaintiffs-Appellants respectfully request that this Honorable Court REVERSE the district court's order on Defendants' Motions for Summary Judgment and REMAND for further proceedings.

As noted in the brief above, the Plaintiffs-Appellants respect and honor the victims and rescuers of the September 11, 2001, attacks and their families. The Plaintiffs do not seek to offend any fellow citizens. The Plaintiffs merely desire that all Americans feel welcome in honoring them, including atheists and other non-Christians. Plaintiffs do not seek to re-write history or rip from museums all acknowledgment of our country's historical relationship with faith.

While Plaintiffs have the less popular voice in this litigation, they certainly are not alone. Our Bill of Rights and the Fourteenth Amendment requires minority rights to be respected. *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 884 (2005) (O'Connor, J., concurring), *quoting West Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place

them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts”). It is the upholding of these rights in our most trying hours that preserves this country’s greatness. It is understandable that conviction can tremble in the wake of prolific attacks upon us, but if this nation has hope for healing and peace, it will not come to fruition through alienating non-Christians. For all of the foregoing reasons, Plaintiffs respectfully ask that this honorable Court reverse the decisions of the district court below.

Dated: August 9, 2013

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CERTIFICATE OF COMPLIANCE

Pursuant to the Federal Rule of Appellate Procedure 28.1(e)(3) and 32(a)(7)(C), I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 28(e)(2)(A)(i) and 32(a)(7)(B)(iii). Exclusive of those portions excluded by Fed R. App. P. 32(7)(a)(B)(iii) this brief contains 8,683 words.
2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32 (a)(6). The brief has been prepared in proportionally spaced, 14-point Times New Roman type using Microsoft Word 2010.

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