

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 & 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' REPLY BRIEF IN RESPONSE TO
DEFENDANT-APPELLEE WORLD TRADE CENTER FOUNDATION'S
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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PLAINTIFFS-APPELLANTS' REPLY BRIEF

Plaintiffs-Appellants American Atheists, Inc., Dennis Horvitz, Kenneth Bronstein, and Jane Everhart (hereinafter, "Plaintiffs-Appellants") submit this reply brief in response to the Defendant-Appellant National September 11 Memorial & Museum at the World Trade Center Foundation, Inc.'s ("World Trade Center Foundation) Brief on Appeal.

INTRODUCTION

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 of this 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-Appellees had a religious purpose relative to placement of the cross, that the Defendants-Appellees' 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-Appellees 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.

Defendants-Appellees have alleged that summary judgment must be granted based on Plaintiffs-Appellants’ adoption of certain factual assertions in the district court below. However, different inferences and conclusions are justifiable under the same alleged facts. And, under the facts presented to the court herein, a reasonable fact-finder could reasonably conclude that the overtly religious cross display violates the Establishment Clause and/or the Equal Protection Clause of the U.S. Constitution. Further, a reasonable fact-finder

could find in favor of the Plaintiffs-Appellants on the state law claims as well.

POINT I

Plaintiffs-Appellants have demonstrated a genuine issue of material fact that the display of the cross violates the Establishment Clause.

In its Preliminary Statement, page 1, of its Brief on Appeal, The World Trade Center Foundation states that “[w]hen it was discovered among the rubble, certain workers viewed it as more significant than mere pieces of the World Trade Center buildings’ structure, and took solace in its symbolism...” (World Trade Center Foundation Br., 1). This is undoubtedly true. However, those certain workers were exclusively Christians, because the cross was viewed as a Christian symbol. The cross was viewed as “more significant than mere pieces of the” buildings, because it was religiously significant (in particular, significant from a Christian perspective. The solace sought from the cross was religious, and exclusively Christian. The symbolism was religious, and exclusively Christian.

The World Trade Center Foundation goes on to say that the cross was an “inspirational or religious object.” It was and is certainly religious, and a reasonable fact-finder could conclude that religion is the purpose of its display. It may well have been inspirational as well; however, its inspiration comes directly from its religiosity. It is only inspirational in a religious context. Non-Christians are not generally inspired by Christian crosses, just as non-Jews are not generally

inspired by a Star of David. The inspiration is a religious inspiration.

The World Trade Center Foundation states that the cross will be displayed “not as a relic to be venerated by museum-goers, but as an historical object...” (World Trade Center Foundation Br., 1). This, however, begs the genuine issue of material fact. A reasonable fact-finder could justifiably conclude, based on evidence to be adduced or introduced at trial, that the cross will be displayed as a relic to be venerated. A reasonable fact-finder could justifiably conclude that the cross will be displayed in a manner inconsistent with the Establishment Clause or Equal Protection Clause.

The World Trade Center Foundation states “[t]here is no legal authority for the proposition that the museum is prohibited from displaying an item with historical, cultural or artistic significance merely because the item also has religious significance.” (World Trade Center Br., 2). However, the case law does support the proposition that the government may not display a religious symbol where the *Lemon* test is not met. Where, such as here, a reasonable fact-finder could conclude that the primary purpose of the display is religious, that the purpose or effect of the display is to advance religion, where there has been an excessive entanglement between government and religion, and/or where there has been an endorsement of religion, that display can be prohibited.

The Defendant-Appellee World Trade Center Foundation analogizes the

display of the cross to the display of “literally hundreds of religious paintings in governmentally supported museums” (citing *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) (World Trade Center Br., 2)). However, the cross is not a religious painting, and is not like a religious painting. A reasonable fact-finder could determine that the cross is a religious relic and an object of veneration and prayer.

The World Trade Center Foundation appears to claim that any display of a religious symbol that has some historical application or artistic merit is permissible because they do not advance or endorse religion. (World Trade Center Br., 2). This begs the question. If a fact-finder could conclude that a particular display does advance or endorse religion, then the display would be prohibited. It is hard to imagine a religious symbol that does not also have some historical context, or which does not give inspiration to the followers of the particular religion. If the World Trade Center Foundation’s argument is accepted, then there would be no need for litigation over the display of religious symbols, since, under the Foundation’s interpretation, all such displays do not advance or endorse religion. The analysis is fact-intensive, in that where, as here, a reasonable fact-finder can conclude, based on all the facts surrounding the display, that it advances or endorses religion, then a genuine issue of material fact exists. *Lynch*, 465 U.S. at 683. In the present case, a reasonable observer could conclude that the cross, given its tremendous size, position of prominence, and active religious

character and purpose, is, in fact endorsed by the government which is displaying it.

Defendant-Appellee World Trade Center Foundation misapplies *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006) (World Trade Center Foundation Br., 33-34). The Second Circuit in *Skoros* recognized 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 does

not change that. “[T]he display of the Cross without parallel contextual display of non-Christian religious objects of comparable impact promotes 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.

Defendants-Appellees argue that this particular cross is being displayed not because of its religious symbolism, but because of its historic significance. (World Trade Center Foundation Br., 34-35). However, the historic significance of the Christian cross is religious. The cross’s significance to the events of September 11 and the aftermath is religious. The Defendants-Appellees do not dispute that it was blessed, prayed over, revered, and considered a religious symbol. That was its role in the aftermath of September 11, 2001. Essentially, the Defendants-Appellees characterize past religious significance as mere historical significance, and they make the argument that all historically valuable religious icons by definition do not advance or endorse religion. A reasonable observer, however, could view the matter differently, and could find that the purpose and effect of the display is to promote Christianity, to honor Christianity, to endorse Christianity, and to prefer one religion over other religions, and religion over non-religion.

The District Court erred in finding that inclusion of the Ground Zero Cross in a section of the display entitled “Finding Meaning at Ground Zero” removes all genuine issues of fact as to whether it constitutes an endorsement of religion. The cross is indisputably a religious symbol. It is being placed in the most prominent position of any symbol. The “meaning” found by virtue of the cross was indisputably a religious meaning. There is no evidence of any meaning contained in this particular cross symbol other than a religious meaning. A reasonable fact-finder could conclude that the cross symbol, as displayed, is an endorsement of the Christian religion. Evidence adduced at trial could reasonably show that an objective, reasonable observer of the display would find that its purpose and effect is religious, and that it constitutes an endorsement of religion. The evidence presented by the Port Authority is certainly not conclusive and is largely self-serving. Genuine issues of material fact remain which can only be resolved by presentation of the evidence at trial.

POINT II

Plaintiffs-Appellants have demonstrated a genuine issue of material fact that the display of the cross violates the Equal Protection Clause.

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).

Defendant-Appellee World Trade Center Foundation states that Plaintiffs-Appellants have not been treated differently. However, in the district court below, Plaintiffs-Appellants showed that they and other non-believers have been treated differently. Plaintiffs-Appellants offered, at their own cost, to supply a symbol to represent the fallen and rescuer atheists, which was rejected by Defendants-Appellees, although they accepted some other religiously oriented gifts fashioned after September 11 for ultimate display. *See* Kagin Decl., Ex. 3, Silverman Dep., at 92-94:23.

Further, Defendants-Appellees argue that there are no genuine issues of material fact as to an equal protection violation because the district court decided that there was no genuine issue of material fact as to the purpose of placing the cross at its proposed location. However, that is precisely the issue on appeal, and

“the cross helps tell part of the history surrounding September 11th” is not the only conclusion a reasonable finder of fact could reach after being presented all of the evidence and testimony at trial.

This Court can take judicial notice that atheists differ from church-goers 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-Appellees 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-Appellants’ fundamental rights, as articulated above, the heightened scrutiny test applies. Plaintiffs-Appellants 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.

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.

Under the facts of this case, a reasonable finder of fact could reach the conclusion that the rational basis offered by Defendants-Appellees’ counsel is not the actual basis. A reasonable fact-finder could find that non-believers, including atheists, are being treated differently without legal justification, and that they are being discriminated against in violation of the Equal Protection Clause.

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. Plaintiffs-Appellants should be afforded the opportunity of a day in court to fully and fairly present the evidence to a reasonable finder of fact.

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-Appellants do not seek to offend any fellow citizens. The Plaintiffs-Appellants merely desire that all Americans, including atheists and other non-Christians, feel welcome in honoring them. Plaintiffs-Appellants do not seek to re-write history or rip from museums all religious art work.

While Plaintiffs-Appellants 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-Appellants respectfully ask that this honorable Court reverse the decisions of the district court below.

Dated: November 22, 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 no more than 3313 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
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/s/ Eric O. Husby
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