

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 REPLY BRIEF IN RESPONSE TO
DEFENDANT-APPELLANT PORT AUTHORITY OF NY AND NJ'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") submits this reply brief in response to the Defendant-Appellees Port Authority of New York and New Jersey's Brief on Appeal.

POINT I

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

Defendant-Appellee Port Authority of New York and New Jersey bases much of its argument on the allegation that "Here, plaintiffs concede that the cross 'is an artifact of historic significance.'" (Port Authority Br., 7). From this they attempt to cast the "secular purpose" element of the Establishment Clause analysis as undisputed.

However, acknowledging that a religious object or symbol has historic significance does not supply a secular purpose to displays of that symbol. The Qu'ran, the Bible, the Ten Commandments, and myriad other religious symbols have historic significance. Religion itself, prayer, worship, idols of various sorts, holy water, churches, and other houses of worship, can and do have "historic significance." However, that fact alone does not render the entanglement of those objects and symbols with government, the sponsorship of those objects, and the

display of those symbols automatically secular.

Plaintiffs-Appellants contend, in part, that the proposed manner of display of the indisputably religious symbol, which was blessed and prayed over as a religious symbol, amounts to endorsement of the Christian faith in violation of the Establishment Clause and/or the Equal Protection Clause. Plaintiffs-Appellants suggest that such an apparent endorsement could be remedied by increasing representation of the experiences of non-Christian rescuers, and/or others to present an egalitarian display.

Defendant-Appellee Port Authority, on page 8 of its brief on appeal, refers again to the “historic significance” of crosses; however, they go too far when they claim that Plaintiffs-Appellants acknowledged that historic significance “stands separate and apart from its religious significance.” (Port Authority Br., 8).

Plaintiffs-Appellants made no such acknowledgement, and historical significance plainly does not “stand separate and apart” from religiosity. Were that so, then any ancient or historically revered religious symbol could be freely erected by government entities anywhere, because they would have the benefit of being both religious and ancient.

The cross at issue in the present case is indisputably religious, and indisputably Christian. It is not a religious work of art being erected in the Metropolitan Museum of Art. It is a remnant of the World Trade Center which by

happenstance and the laws of physics remained in the shape of a cross reminiscent of the Christian cross. Christians adopted the symbol and began to worship at it or to it, and pray over it, because the shape of the cross holds inherent religious, not historical, significance.

The cross was kept at the World Trade Center site until 2006, where it served as a religious symbol to Christians who apparently garnered religious solace from it. From there it was moved to a churchyard, perhaps the most appropriate location for a religious symbol.

Cross-beams of a structure that have fallen are not placed in museums because of the history of the Christian religion. They are not placed in museums because of the historical significance of the Christian cross over the past 2,000 years. A piece of a building shaped like a “T” does not have any significance. It is a piece of rubble. The significance of the “T” in this case comes from its religious nature and its religious nature only. Obviously, the religious symbol of the cross has historical significance as a historically ancient and popular religious symbol.

The reason the T-shaped metal pieces are being placed is an acknowledgement to Christianity, and a nod to Christians who prayed over it, took religious solace from it, and revere it as a religious symbol. It is not akin to the display of statue of an ancient Egyptian deity or even of a statue of a piece of

Christian artwork in the Metropolitan Museum of Art. The cross is being placed in its prominent position to be revered and to be a place of prayer and worship.

Defendants-Appellees Port Authority states that “Plaintiff cannot disprove the secular purpose for displaying the cross, to wit, the depiction of the rescue and recovery operations in the aftermath of the destruction of the World Trade Center.” (Port Authority Br., 10). However, the cross is not part of a depiction of rescue and recovery operations. It is a prayer piece. The Port Authority goes on to state “[t]he cross played a role at the World Trade Center site...” Yes, indeed it did. It played a religious role. It is only part of the story of the events of September 11, 2001, because it was a cross-shaped piece of the structure and as such it was considered “miraculous” to have survived the collapse of the buildings. As a symbol of the Christian God and Son of God, the cross-shaped metal structural supports were worshiped and/or prayed upon. That is why it was moved to a Christian churchyard in 2006. That is the role it played in the aftermath of September 11, 2001. That is that same role that applies to its display in its new location.

Defendants-Appellees Port Authority claim that the actual purpose for including the cross in the display is not to endorse religion, but to convey the story of September 11 and its impact. However, the display of the cross does not, in fact, tell that story. The cross display is religious, and is included because of its

religious significance. A reasonable, objective observer could conclude, based on all the evidence before the court, that the reason and purpose for the display of the cross was religious, and not secular, as described by Port Authority counsel.

Defendant-Appellee Port Authority misapplies *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006) (Port Authority Br., 10-11). The Second Circuit in *Skoros* 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 Dep., 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 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.

On page 12 of the Port Authority’s brief on appeal, the Port Authority claims that “Plaintiffs’ subjective beliefs ignore the historical and emotional relevance attached to the cross, as well as its overall value...” (Port Authority Br., 12). The Plaintiffs-Appellants are not suggesting that this court’s decision ought to be based on Plaintiffs-Appellants’ subjective beliefs. Rather, objectively, the “relevance” of the Christian cross to the events of September 11 and the aftermath is religious. The “emotional significance” placed upon the symbol is based on the religious significance of the symbol. A reasonable observer would find, or at a minimum could find, that the purpose of placing the cross at the proposed site is religious, and that its display constitutes an endorsement of Christianity.

Port Authority states that this particular cross is being displayed “not because of its religious symbolism, but because of its historic significance...”

(Port Authority Br., 13). However, its historic significance is religious. Its significance to the events of September 11 and the aftermath is religious. The Port Authority does 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 Port Authority casts past religious significance as mere historical significance. 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 nonreligion.

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 factfinder 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.

With respect to the “entanglement” element of the *Lemon* test, the Port Authority stated that the “display of the cross will portray how those at Ground Zero struggled to cope with the horrific situation they faced. To cope, some turned to religion, patriotism or forging relationships with relatives of victims.” (Port Authority Br. 16). However, the cross does not have any relevance to persons coping by turning to patriotism or forging relationships with relatives of victims. The cross itself only relates to how some people turned to a particular religion (Christianity), and prayed upon, revered, or worshiped this particular Christian symbol. A reasonable fact-finder could conclude that the display of this particular symbol is an excessive entanglement with religion, because it is not truly a mere storytelling or historical piece. A reasonable fact-finder could conclude that it is a religious icon, and that it is being displayed as such.

POINT II

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

Defendant Port Authority argues that there are no genuine issue 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.

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 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. 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. 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 rational basis offered by Defendants-Appellees’ counsel is not the actual basis. A reasonable fact-finder could find that nonbelievers, 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 feel welcome in honoring them,

including atheists and other non-Christians. 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 require 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.

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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 3299 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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