July 18, 2014

Catherine O'Hagan Wolfe, Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: Offer of Supplemental Briefing
***American Atheists, Inc. v. Port Authority*, 13-1668-CV**

Dear Ms. Wolfe,

On June 19, 2014, the Court ordered the parties in the above-referenced appeal to submit additional briefing after the undersigned *amicus curiae*, the Becket Fund for Religious Liberty, questioned Appellant American Atheists' standing to challenge the display of the Ground Zero Cross by Appellee National September 11 Museum. Supplemental briefs were filed by American Atheists and the Museum on July 14. (Appellee Port Authority did not respond.) Notably, both parties argue in support of standing. As the only voice identifying American Atheists' lack of standing, the Becket Fund writes to notify the Court that it is willing to provide responsive briefing on the issues identified and summarized below, should the Court deem it helpful.

Injury to Plaintiffs as Taxpayers. Neither party disputes that the only evidence of taxpayer funding even remotely related to the Cross display is the Museum Director's testimony concerning two capital grants from HUD and Governor Pataki for "construction of . . . the museum." *See* Becket Br. at 7 (citing JA 135-36, 333). Because that funding was neither appropriated to the Museum by Congress or the New York Legislature, nor directly allocated to the challenged display, taxpayer standing must be denied. *See id.* at 9-11.

Injury to Plaintiffs as Offended Observers. As for "offended observer" standing, neither party's supplement brief addresses the Supreme Court's or Second Circuit's governing precedents. *See, e.g., Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (no standing based on "psychological consequence presumably produced by observation of conduct with which one disagrees"); *In re U.S. Catholic Conference*, 885 F.2d 1020, 1025-26 (2d Cir.

1989) (no standing based on "discomfiture at watching the government allegedly fail to enforce" the Establishment Clause).

American Atheists instead relies on out-of-circuit precedent to argue that its members' feelings of being "marginaliz[ed]" and "stigmatized" are adequate to generate standing. AA Supp. Br. at 10. But even if other circuits' rulings applied generally, they would not support standing here, where there is no legitimate basis for perceiving a government message of exclusion. *See Catholic League v. San Francisco*, 624 F.3d 1043, 1052 n.33 (9th Cir. 2010) (limiting standing to where "the government endorses (or condemns) a religion" and specifically noting that "a reasonable person would not infer a government's position on a religion" from "having visual contact with a cross . . . if it were merely in a painting in the city art museum"); *Moss v. Spartanburg County School Dist.* , 683 F.3d 599, 605 (4th Cir. 2012) (rejecting "sweeping conclusion that parents and students currently in school may challenge the constitutionality of school policies without demonstrating that they were personally injured in some way by those policies"); *Awad v. Ziriax*, 670 F.3d 1111, 1123 (10th Cir. 2012) (finding standing because "proposed state amendment *expressly* condemn[ed] [plaintiff's] religion and expose[d] him and other Muslims in Oklahoma to disfavored treatment").[1]

American Atheists' self-determination that the government is somehow stigmatizing them when a private museum displays the Ground Zero Cross in an historical exhibit about how rescue workers dealt with the trauma of 9/11 is grossly inadequate to create standing. *U.S. Catholic Conference*, 885 F.2d at 1026 ("self-perceived 'stigma' does not amount to a particularized injury in fact"); *Freedom From Religion Foundation, Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) ("It is difficult to see how any reader of the 2010 proclamation [for a day of prayer] would feel excluded . . . . But let us suppose that plaintiffs nonetheless feel slighted. Still, hurt feelings . . . do not support standing to sue.").

The Museum argues that American Atheists' members' mere knowledge of the display's existence, without ever seeing it, is sufficient to support standing, because they claim that this knowledge has caused "symptoms of depression, headaches, anxiety, and mental pain and anguish." Museum Supp. Br. at 1. But that argument

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[1] Although *Awad* recounts broad language from other Tenth Circuit cases upholding standing in challenges to public displays with ostensibly religious messages, that Circuit's broad articulation of the "offended observer" doctrine is inconsistent with both the Supreme Court's and this Court's more narrow rulings. *See* Becket Fund Amicus Br. at 12-15. Moreover, notwithstanding the Tenth Circuit's broad rulings granting standing to challenge government displays on public property, the Becket Fund is unaware of any cases in the Tenth Circuit or elsewhere that would support standing to challenge a private museum's display of a historical artifact for historical reasons, on premises that it possesses.

is also unavailing. The alleged symptoms are merely physical manifestations of the members' psychological reactions to having heard about the display.[2] Such "psychological consequences" are insufficient to create the right to sue, regardless of the "intensity" of the American Atheists' opposition. *See Valley Forge*, 454 U.S. at 485-86. Their own "eggshell" psychological status cannot catapult them into standing.[3] *Accord Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014) ("[A]dult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.").[4]

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[2] American Atheists' supplemental brief asserts that its members "have seen the cross, either in person or on television, and are being subjected to and injured in consequence of having a religious tradition not their own imposed upon them through the power of the state." AA Br. at 6. But each member admits having never seen the display in the Museum, which was not even open until after this appeal commenced. JA 92, 95, 110, 117. Thus, to the extent their injuries result from having "seen the cross" elsewhere, their standing is further undermined, because those injuries plainly could not have resulted from the allegedly *governmental* display, but apparently from their disapproval of the Ground Zero Cross generally. *See also* JA 114 ("I experienced it [dyspepsia], the most vividly I can remember down at Zuccotti Park after talking to Brian Jordan and seeing those baseballs attached, and the whole thing just – it really had a bad effect on me.")

[3] Many people are bothered when they perceive religious messages in public they disagree with. A song over the sound system in a government facility might have unwelcome religious (or anti-religious) meaning. Programming on government-regulated or -sponsored television and radio stations cannot possibly comport with everyone's religious views. Words and images on public monuments might convey objectionable religious sentiments. If taking offense were the only prerequisite for standing, there would be an endless barrage of Establishment Clause litigation. Here, with any government connection being extremely remote and minimal, the question of American Atheists' standing is simple: it has none.

[4] American Atheists notes that *Town of Greece* was a merits decision, suggesting that because the Supreme Court did not address standing (although the lower courts did), it should be assumed here. AA Supp. Br. at 13. But the plaintiffs in *Town of Greece* challenged prayers at a government meeting they needed to attend "to speak about issues of local concern." 134 S. Ct. at 1817. Thus, their allegation that they were being coerced by the government to participate in a religious ritual that was not their own went to the core of the Establishment Clause's protections, even though the Court ultimately determined there was no actual coercion. *See id.* at 1826 ("Offense . . . does not equate to coercion."). Here, in contrast, there is no allegation that American Atheists' members are being coerced to participate in a government-preferred mode of religious exercise. They claim only that seeing a historical artifact in a museum offends their sensibilities, which is not an injury the Constitution protects. *Freedom From Religion Foundation*, 641 F.3d at 806 ("[D]isdaining the President's proclamation [for a day of prayer] is not a 'wrong.' The President has made a request; he has not issued a command. No one is injured by a request that can be declined.").

Moreover, contrary to the Museum's assertion, Museum Supp. Br. at 1-2, the evidence submitted in support of these claims is *not* sufficient to survive summary judgment. To meet its burden at summary judgment, a "nonmoving party 'must offer some *hard evidence* showing that its version of the events is not wholly fanciful.'" *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005) (emphasis added) (citation omitted). "[In] the rare circumstance where the plaintiff relies almost exclusively on his own testimony, much of which is contradictory and incomplete," that testimony need not always be credited. *See id.* at 554-55.

Here, one of American Atheists' named members has provided *no* evidence in support of his alleged injuries. *See* JA 116-19 (Dennis Horvitz). The other two have provided nothing more than their own bare-bones testimony that they have suffered "slight depression, headaches, anxiety and mental pain and anguish," JA 102 (Kenneth Bronstein) and "dyspepsia," JA 114 (Jane Everhart). But even accepting their otherwise unsubstantiated testimony of physical ailments, there is scant evidence that the alleged injuries are caused by the display itself, that the display constitutes government action, or that the display is in any way targeted at atheists generally or the plaintiffs specifically.[5] In these circumstances, the allegations fall far short of the summary judgment standard. *See also Moss*, 683 F.3d at 606 (denying standing on summary judgment where facts were "notably thin" because students had "no personal exposure . . . apart from their abstract knowledge" of school's policy allowing released time for religious instruction).[6]

Redressability.

Finally, neither party addresses the American Atheists' redressability problem. In its opening brief and at oral argument, American Atheists expressly disavowed seeking to shut down the display. AA Opening Br. at 2-3 ("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. . . ."). Rather, they sought only to have a plaque honoring atheists hung next to the Ground Zero Cross. *See* 03/06/2014 AA Opening Argument (Court: "So the relief you are looking at is for some sort of plaque or other acknowledgement." AA: "Yes." Court: "That's it?" AA: "That's it."). Yet American Atheists' members were adamant in their depositions that no "contextual adjustment" would resolve their

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[5] *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493-94 (2009) ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.") (citation omitted).

[6] As noted by the court in *Moss*, the denial of standing for the individuals must also result in a denial for the organization to which they belong. *See* 683 F.3d at 606 ("[M]ere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient.") (citation omitted).

injuries. *See* JA 97-98 ("It should not be on the property. . . . Signs are totally ineffective . . . ."); *see also* JA 105-07 ("[I]t would not matter how the Museum displays the cross beam . . . ."); *see also* JA 326. Thus, even if "contextualizing" the cross display with a plaque for atheists were to resolve the alleged Establishment Clause violation, it would not cure the American Atheists' personal ailments, defeating the redressability requirement. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court."; the "psychic satisfaction" in seeing "that the Nation's laws are faithfully enforced" is "not an acceptable Article III remedy because it does not redress a cognizable Article III injury").[7]

The Museum's closing plea that the display's legality is "a significant and important issue" that has been litigated "for almost three years" is no reason for the Court to ignore standing and skip to a decision "on the merits." *See* Museum's Supp. Br. at 2; *see also Steel Co.*, 523 U.S. at 94 (insisting that standing be determined "as a threshold matter"). Indeed, a "federal court lacks the power to render advisory opinions." *Jennifer Matthew Nursing and Rehab. Ctr. v. U.S. Dept. of Health and Human Servs.*, 607 F.3d 951, 957 (2d Cir. 2010). And since American Atheists lack standing, that is exactly what the Museum is asking for. *See KM Enterprises, Inc. v. McDonald*, 518 Fed. App'x. 12, 13-14 (2d Cir. 2013) (lack of standing meant declaratory relief would constitute advisory opinion).

In truth, whether a museum may display a historical artifact that happens to be religiously significant to some people ought to be a no-brainer. Although many Establishment Clause cases are difficult, it is clear that the Clause does not require federal courts to "contextualize" every religious reference in public life. The only "significant and important issue" in this case is whether taking self-proclaimed offense at a religious symbol displayed in a museum, despite the absence of any evidence of government coercion or endorsement, entitles plaintiffs to invoke the power of the federal courts to assuage their hurt feelings. As difficult as Establishment Clause standing may be in some contexts, it is not difficult here. That both sides of this litigation have sought to avoid the standing requirement only underscores the importance of the Court's enforcing it.

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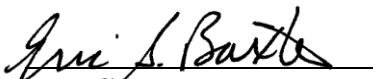
[7] In their Supplemental Brief, American Atheists now claim that they "have sought and continue to seek injunctive relief ordering the removal of and/or prohibiting the display of [the Ground Zero Cross]" and that the plaque honoring atheists is only sought in the alternative. AA Supp. Br. at 5. But after explicitly disclaiming the former remedy in their opening brief and at oral argument, they should not be able to backtrack now. Moreover, American Atheists' continued willingness to accept the proposed plaque as final relief merely underscores the artifice of their claims. The Establishment Clause does not require plaques honoring atheists everywhere a museum displays something with religious significance.

Should the Court deem further briefing useful, *amicus* stands ready to provide it.

Sincerely,



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