13-1668-cv

United States Court of Appeals

for the

Second Circuit

AMERICAN ATHEISTS, INC., DENNIS HORVITZ, KENNETH BRONSTEIN, JANE EVERHART

Plaintiffs-Appellants,

(for continuation of caption, see inside cover)

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

BRIEF FOR DEFENDANT-APPELLEE NATIONAL SEPTEMBER 11 MEMORIAL & MUSEUM AT THE WORLD TRADE CENTER FOUNDATION, INC.

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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,

Corporate Disclosure Statement
(Federal Rule of Appellate Procedure 26.1)

Defendant-Appellee National September 11 Memorial & Museum at the World Trade Center Foundation, Inc. (incorrectly named by plaintiffs-appellants as World Trade Center Memorial Foundation / National September 11 Memorial and Museum) (the "9/11 Museum") is a public charity registered under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3).

The 9/11 Museum has no parent corporation and no stock, meaning that there is no "publicly held corporation that owns 10% or more of its stock" within the meaning of Federal Rule of Appellate Procedure 26.1.

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PRELIMINARY STATEMENT

In this action, plaintiffs challenge the decision of the 9/11 Museum's curators to display among hundreds of objects in the National September 11 Museum (the "Museum") a significant artifact of the aftermath of September 11, 2001. The artifact at issue is a cross-shaped steel beam that was found at Ground Zero by rescue workers just two days after the September 11 attacks (the "Artifact"). When 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 as they searched for survivors, and found mostly victims. The Artifact remained at Ground Zero for the rest of the nine-month rescue and recovery effort, during which time many workers treated it as an inspirational or religious object. The mission of the Museum is to tell the story of the September 11 attacks and the subsequent rescue and recovery effort. The 9/11 Museum will display the Artifact in the Museum not as a relic to be venerated by museum-goers, but as an historical object that is an integral part of that story.

Plaintiffs claim that the display of the Artifact must be barred because it violates the Establishment Clause, the Equal Protection Clause, and civil rights statutes, but neither the Constitution nor state law mandates the result that they seek. Instead, as the District Court correctly held in granting summary judgment

for defendants dismissing plaintiffs' claims, after full discovery, those claims must fail as a matter of law and on the undisputed record.

There is no legal authority for the proposition that a museum is prohibited from displaying an item with historical, cultural or artistic significance merely because that item also has religious significance. The District Court's rejection of that proposition was supported by every other court to have considered it. The 110,000 square foot Museum will display hundreds of artifacts, large and small, to document the September 11 attacks and aftermath. The display of the Artifact among those historic items is no more constitutionally impermissible than the display "of literally hundreds of religious paintings in governmentally supported museums." *Lynch* v. *Donnelly*, 465 U.S. 668, 683 (1984). As courts have repeatedly held, such displays are not prohibited by the Establishment Clause, because they do not advance or endorse religion, "as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.* at 692 (O'Connor, J., concurring); *see, e.g.*, *O'Connor* v. *Washburn Univ.*, 416 F.3d 1216, 1228 (10th Cir. 2005) ("a reasonable observer aware that the statue was part of an outdoor art exhibit would not believe the [curator] endorsed the message of any particular piece of art within the exhibit."); *Van Orden* v. *Perry*, 351 F.3d 173, 181 (5th Cir. 2003) (stating that

the display of the Ten Commandments in a traditional museum setting "would wholly negate endorsement"), *aff'd*, 545 U.S. 677 (2005).

This is not a case involving disputed facts. In the District Court, plaintiffs chose not to file a statement contesting any of the material facts forming the basis of the 9/11 Museum's motion for summary judgment, as required by local court rules, and plaintiffs are therefore deemed to have admitted those facts. In fact, plaintiffs went even further than agreeing by omission with the material facts submitted by the 9/11 Museum—they *expressly adopted* those facts in their brief.

But even putting aside plaintiffs' failure to comply with the local rules—and the District Court was willing to excuse that failure—plaintiffs still failed to identify even a single disputed fact that was material to the 9/11 Museum's motion for summary judgment. Plaintiffs admitted that the Artifact has historical significance to September 11. (*See, e.g.*, Appellants' Brief ("App. Br.") at 17 ("Plaintiffs-Appellants acknowledge that the Cross is an artifact of historic significance").) They admitted that it is merely one of many objects in a museum exhibit depicting how workers coped during the rescue and recovery operation following September 11. They admitted that the Artifact is accompanied by text panels explaining its historical significance, and they take no issue with the content of those panels. They admitted that the Artifact is located next to a significantly larger steel "trident" from the World Trade Center, and that other objects more

than twice the size of the Artifact are also contained in the Museum. And they admitted that other objects with both historical and religious significance are located throughout the Museum.

Most of all, in both the District Court and in their brief for this appeal, plaintiffs even admitted that the Artifact should be displayed in the Museum. They express the "hope not to see the cross purged from the Museum," and claim to have been "convinced" by a statement of the Port Authority's former Executive Director that the Artifact "is so symbolic and so important . . . that there is no way it can ever leave the site permanently." (App. Br. at 3, 4.)

Instead, plaintiffs state a complete reversal of their previous position—that all they now seek is "some contextual adjustment to the manner of displaying the Cross." (*Id.* at 2.) But plaintiffs never identify what that "contextual adjustment" should be, why it is required, or why the current display of the Artifact is not "contextual." They claim to seek the display of a "tasteful, respectful symbol that would not alienate Christians and other non-atheists" (*id.* at 31)—ignoring that the Museum already contains vast numbers of objects, some with religious significance but most without—but even now, they cannot even identify what that symbol should be. Indeed, they *admit* that the chance of locating any historically significant Atheist symbol "is practically nil." (*Id.* at 29.)

No reasonable observer could possibly conclude that the display of the Artifact is an endorsement of religion. This Court has previously held that "'[t]he mere existence of a scintilla of evidence'" is insufficient for a plaintiff to overcome summary judgment because "'there must be evidence on which the jury could *reasonably* find for the plaintiff.'" *See Jeffreys* v. *City of New York*, 426 F.3d 549, 554 (2d Cir. 2005) (emphasis in original) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Here, plaintiffs are missing even a scintilla.

Accordingly, we respectfully submit that the judgment below dismissing plaintiffs' claims should be affirmed.

STATEMENT OF ISSUES

1. Did the District Court err in holding that there was no genuine dispute of material fact as to whether the display of an historically significant artifact in a museum was constitutionally and legally permissible?

2. Are plaintiffs entitled now to assert that there is a genuine dispute of material fact when they agreed with the facts forming the basis of the 9/11 Museum's motion for summary judgment in the District Court, and thereby waived any argument that there was such a dispute?

STATEMENT OF THE CASE

This action was commenced by the filing of a complaint by plaintiffs in New York State Court on July 27, 2011, which alleged that the display of the

Artifact violated the United States Constitution, the New York State Constitution, and New York civil rights laws. Plaintiffs filed a first amended complaint on August 15, 2011, which also alleged violations of the New Jersey State Constitution and New Jersey civil rights laws. (Appendix ("A")-18.) The 9/11 Museum removed the action in New York State Court to the United States District Court for the Southern District of New York on August 26, 2011. (A-6.) The 9/11 Museum filed an answer to the first amended complaint on October 31, 2011 (A-45), and the Port Authority filed an answer on January 24, 2012. (A-53.)

The parties thereafter engaged in discovery, at the conclusion of which the 9/11 Museum and the Port Authority each moved for summary judgment on August 13, 2012. (A-12.) As part of their motions for summary judgment, both the 9/11 Museum and the Port Authority filed separate statements of material fact as to which there was no genuine issue to be tried, as required by Local Civil Rule ("Local Rule") 56.1(a) of the United States District Court for the Southern District of New York. (A-148; A-158.) Plaintiffs filed a brief in opposition to the motion on September 12, 2012, but did not file responsive statements of material facts as required by Local Rule 56.1(b). Instead, plaintiffs expressly "concur[red] with the material statements of material facts set forth in" the 9/11 Museum's and the Port Authority's statements, although they nevertheless made various factual assertions in their brief and in a supporting affidavit. (Plaintiffs' Brief In Opposition To

Motions For Summary Judgment ("Pls. Br.") at 3, 11-cv-6026 (S.D.N.Y. Sept. 12, 2012), ECF No. 72.) Briefing was completed on September 24, 2012. (A-14.)

The District Court granted both defendants' motions in an opinion on March 28, 2013 (Supplemental Appendix ("SA")-3), which was followed by a judgment on March 29, 2013. (SA-42.) The Court held that the facts set forth in defendants' Local Rule 56.1 Statements were deemed to be admitted, but exercised its discretion to consider "Plaintiffs' numerous additional factual assertions, few of which are material, contained within their Opposition and their Exhibits." (SA-4.)

The Court determined that the display of the Artifact was constitutional under the Establishment Clause (and the corresponding provisions in the New York and New Jersey State Constitutions), pursuant to the three-part test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). In particular, the Court held that the Artifact's display: (i) had a secular purpose, in part because plaintiffs conceded that it did (SA-24-25); (ii) did not convey a message of endorsement of religion, because it was housed in a section of the museum to which it was historically relevant, accompanied by appropriate explanatory placards, and surrounded by numerous secular artifacts (SA-25-30); and (iii) did not foster an excessive government entanglement with religion (SA-30-31).

The District Court also held that the display was constitutional under the Equal Protection Clause (and the corresponding provisions in the New York

and New Jersey State Constitutions), because plaintiffs were not unequally treated, but even if they had been, the display "easily met" the applicable rational basis test. (SA-32-36; SA-39-40.) Finally, the Court held that the display did not offend New York and New Jersey civil rights laws, primarily because plaintiffs had not been denied access to a place of public accommodation. (SA-36-38; SA-40-41.) Plaintiffs appealed. (A-368.)

STATEMENT OF FACTS

The following are the straightforward and undisputed facts which led the District Court to grant summary judgment in favor of the 9/11 Museum.

A. The 9/11 Museum

The 9/11 Museum is responsible for the design, development and operation of two distinct physical spaces: the National September 11 Memorial (the "Memorial") and the National September 11 Museum (as previously defined, the "Museum"). (A-149 (9/11 Museum Local Rule 56.1 Statement ("56.1 Statement") ¶ 2).)

The Memorial is located on an outdoor space on the former site of the World Trade Center in Manhattan, and is designed to provide a tribute of remembrance in honor of the nearly 3,000 individuals killed in the September 11 attacks and the 6 individuals killed in the bombing of the World Trade Center in February 1993. (A-149 (56.1 Statement ¶ 4).) The Artifact has never been

displayed on the Memorial, and there are no plans to display it on the Memorial in the future. (A-149 (56.1 Statement ¶ 5).) Plaintiffs have previously admitted this (*see infra* at 28-29), although they misrepresent in their brief before this Court that the Artifact is "one of the largest objects in the Memorial." (App. Br. at 7.) There are no displays or activities on the Memorial at issue in this case.

The Museum, which is still in development but now expected to open in the spring of 2014, is located primarily underground, beneath the Memorial. (A-150 (56.1 Statement ¶ 6).) The mission of the Museum is to document the history of September 11, including the events leading up to, taking place on, and following that tragic day. (A-150 (56.1 Statement ¶ 8).) It is the display of the Artifact in the Museum that plaintiffs here challenge.

B. Plaintiffs

Plaintiff American Atheists, Inc. ("American Atheists") is an organization that cites chief among its goals "the total, absolute separation of government and religion." (A-20 (First Am. Cmplt. ¶ 4).) Individual plaintiffs Jane Everhart, Dennis Horvitz, and Kenneth Bronstein (together, the "Individual Plaintiffs") are members of American Atheists and identify as Atheists. (A-21-22 (First Am. Cmplt. ¶¶ 6, 7).) The Individual Plaintiffs claim that, by virtue of seeing the Artifact, they 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." (A-20-21 (First Am. Cmplt. ¶¶ 4, 5).) The Individual Plaintiffs complain that they have suffered "symptoms of depression, headaches, anxiety, and mental pain and anguish" as a result of the Artifact's existence and/or display. (A-31, 33, 35, 37, 39, 41 (First Am. Cmplt. ¶¶ 52, 58, 66, 72, 78, 86).)

C. The Artifact

The Artifact is a steel beam, which happens to be in the shape of a cross, measuring approximately 17 feet in height. It was an original part of the World Trade Center buildings' structure and was discovered in the rubble of the World Trade Center on September 13, 2001 by rescue workers. (A-151-52 (56.1 Statement ¶ 16).) After its discovery, the Artifact was venerated by certain workers during the course of the rescue and recovery operation at Ground Zero, including in religious services conducted by a priest. (A-152 (56.1 Statement ¶ 17).) Those workers were confronted on a daily basis with horrific evidence of violence and death and "the most unimaginable, horrific, emotionally devastating experience one can imagine." (A-137 (Deposition of 9/11 Museum Director Alice Greenwald at 53:19-23).) Many of them came to regard the Artifact as a source of comfort and religious symbolism during their time at Ground Zero, and they treated it as such. (A-152 (56.1 Statement ¶ 18).)

The 9/11 Museum, which was incorporated in 2003 but did not become active until 2005, was not involved in the nine-month rescue and recovery

effort or the veneration of the Artifact during that effort. (*See* A-148-49 (56.1 Statement ¶ 1).) However, after the rescue effort had concluded, experts on the 9/11 Museum's curatorial team decided to include the Artifact in the Museum because they "believe[d] wholeheartedly that this important and essential artifact belongs at the World Trade Center site as it comprises a key component of the re-telling of the story of 9/11, in particular the role of faith in the events of the day and, particularly, during the recovery efforts." (A-152 (56.1 Statement ¶ 19 (quoting a letter from the 9/11 Museum to the Port Authority of New York and New Jersey dated May 11, 2006)).)

D. The Museum Design And Display Of The Artifact

The Museum contains approximately 110,000 square feet of exhibition space, featuring approximately 1,000 display objects, including physical artifacts, photographs, oral histories, and video presentations. (A-150 (56.1 Statement ¶¶ 7, 10).) Physical artifacts are displayed wherever possible because those "authentic physical reminders . . . tell the story of 9/11 in a way that nothing else can." (A-150 (56.1 Statement ¶ 9 (quoting a July 2011 statement from the 9/11 Museum's President)).) The physical artifacts are of varying size and significance, and will be presented in their historical context with accompanying text panels and other explanatory items. The Artifact in controversy here is large, but it will hardly be the dominant object in the Museum. On the contrary, it will be

dwarfed by such items as fire trucks, an ambulance, large beams from the debris, steel "tridents" (unique design components of the World Trade Center Towers' façades), and the Last Column (a column from the South Tower measuring 37 feet tall and weighing 58 tons, which was the last remaining column to be removed from Ground Zero). (A-150 (56.1 Statement ¶ 10).)

The Museum will consist of three separate exhibits: an Introductory Exhibition; a Memorial Exhibition; and a Historical Exhibition. (A-151 (56.1 Statement ¶ 11).) It is in the Historical Exhibition—which will be dedicated to telling the narrative of the September 11 attacks and the 1993 World Trade Center bombing and their aftermath, and which will contain over 800 artifacts—that the Artifact will be displayed. (A-151-52 (56.1 Statement ¶¶ 12, 13, 16).) The Artifact will be shown in a section of the Historical Exhibition titled "Finding Meaning at Ground Zero," which will portray how rescue and recovery workers at Ground Zero struggled to come to terms with the horrific task of removing debris and human remains for months on end. (A-151-52 (56.1 Statement ¶¶ 14, 16).) Among other things, "Finding Meaning at Ground Zero" will show how certain workers "sought to counter the sense of utter destruction by holding on to something recognizable" from the debris; others "found purpose by forging relationships with relatives of particular victims"; "[m]any sought comfort in spiritual counseling, religious symbols, and the solace of ceremonies and ritual";

and some "turned to symbols of patriotism to reinforce a sense of commitment and community." (A-151 (56.1 Statement ¶ 15).)

The Artifact will be accompanied by text panels explaining its historical significance to the rescue and recovery effort, and particularly to the workers at the Ground Zero site. (A-152 (56.1 Statement ¶ 20).) It will be surrounded by numerous other objects of historical significance to the rescue and recovery, and to the people most closely tied to that effort. Among other things, the Artifact will be shown together with "symbol steel," which is steel from which ironworkers at Ground Zero cut religious symbols (such as Stars of David) and non-religious symbols (such as shapes of the Twin Towers and the Manhattan skyline) during their breaks to give as tokens of comfort to other workers and to victims' families. (A-153 (56.1 Statement ¶ 21).) It will be located directly adjacent to a significantly larger steel "trident," a unique part of the building façade of the Twin Towers. (A-153 (56.1 Statement ¶ 22).)

Other items with both historical and religious significance will be displayed in the Historical Exhibition, including an urn containing holy water from the nine rivers of India gifted to Mayor Giuliani on September 30, 2001 by a representative of the Indian government, intended to provide spiritual support following the tragic attacks; a silver plate featuring images of the Buddhas of Bamiyan, gifted by the people of Afghanistan in the wake of September 11; and a

bible that was found heat-fused onto a piece of metal and open at a page discussing retaliation and restraint. (A-153 (56.1 Statement ¶ 23); *see* A-86, at NSMM 62.)

SUMMARY OF ARGUMENT

Plaintiffs have failed to demonstrate that the District Court erred in granting the 9/11 Museum's motion for summary judgment.

First, plaintiffs have failed to show that genuinely disputed facts could establish a violation of the Establishment Clause. Plaintiffs' claim—that the display of an object in a museum violates the Establishment Clause—has been rejected by every court ever to have considered it, and for good reason: no reasonable observer could possibly interpret an exhibit in a museum as an official endorsement of religion. *See, e.g.*, *O'Connor* v. *Washburn Univ.*, 416 F.3d 1216, 1228 (10th Cir. 2005) ("[a] state is not prohibited from displaying art that may contain religious or anti-religious symbols in a museum setting.").

Here, plaintiffs do not dispute that the Artifact is one of hundreds of objects—and by no means the largest—displayed in the Museum; that it will be accompanied by explanatory text panels; and that it will be located in an exhibit together with other items of historical significance to the rescue and recovery effort, some with religious significance and some without. No reasonable observer could or would interpret such a display as a government endorsement of religion.

Second, plaintiffs have failed to establish that the exclusion of an Atheist symbol from the Museum violates the Equal Protection Clause. An Equal Protection violation requires plaintiffs to have been treated differently, but as numerous cases have established in similar situations, they have not been: no private person has the right to insert his or her own objects into the Museum or control how objects in the Museum are displayed. Further, even if plaintiffs had been treated differently, they could prevail only by showing that the 9/11 Museum's action was irrational. They cannot show that the decision to display the Artifact was irrational—in fact, they now agree that it should be included in the Museum—and they cannot show that the decision not to display a historically significant Atheist symbol was irrational—they concede that there is no such symbol.

Third, plaintiffs have no viable civil rights claims under New York and New Jersey law, as plaintiffs tacitly concede by not even attempting to defend those claims in their appeal brief. The District Court properly rejected these claims for numerous reasons, and they should be rejected for the same reasons here.

Fourth, plaintiffs cannot, in any event, assert that there is a genuine dispute of material fact, because they failed to raise such a dispute in the District Court in the form of a Local Rule 56.1 statement. *T.Y.* v. *New York City Dep't of Educ.*, 584 F.3d 412, 418 (2d Cir. 2009) ("A nonmoving party's failure to respond

to a Rule 56.1 statement permits the court to conclude that the facts asserted in the statement are uncontested and admissible. In the typical case, failure to respond results in a grant of summary judgment once the court assures itself that Rule 56's other requirements have been met." (citation omitted)). That is a sufficient independent basis on which to affirm the District Court judgment.

STANDARD OF REVIEW

The standard of review for appeals from the granting of a motion for summary judgment is *de novo*. *Miller* v. *Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003). This Court "may affirm an appealed decision 'on any ground which finds support in the record, regardless of the ground upon which the trial court relied.'" *Garcia* v. *Lewis*, 188 F.3d 71, 75 n.2 (2d Cir. 1999) (quoting *Reid* v. *Senkowski*, 961 F.2d 374, 378 (2d Cir. 1992)).

ARGUMENT

Under Federal Rule of Civil Procedure 56(a), summary judgment should be granted if the evidence shows "that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." The summary judgment procedure is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ.

P. 1); *see also United Nat'l Ins. Co.* v. *The Tunnel, Inc.*, 988 F.2d 351, 355 (2d Cir. 1993) ("Summary judgment is a tool to winnow out from the trial calendar those cases whose facts predestine them to result in a directed verdict"). Thus, "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Celotex*, 477 U.S. at 327.

For summary judgment to serve its salutary purpose, it requires that "the court must pierce through the pleadings and their adroit craftsmanship to get at the substance of the claim." *United Nat'l Ins.*, 988 F.2d at 354. Accordingly, "[c]onclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment." *Kulak* v. *City of New York*, 88 F.3d 63, 71 (2d Cir. 1996). Further, "[t]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could *reasonably* find for the plaintiff." *Jeffreys* v. *City of New York*, 426 F.3d 549, 554 (2d Cir. 2005) (emphasis in original) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

I. THE DISTRICT COURT JUDGMENT SHOULD BE AFFIRMED BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT AS TO PLAINTIFFS' ESTABLISHMENT CLAUSE CLAIMS

The dismissal of plaintiffs' Establishment Clause claims should be affirmed because, as the District Court correctly held, plaintiffs have failed to point to any genuinely disputed material fact that could support those claims. And they cannot do so, because as discussed in detail below, the indisputable facts establish that the display of the Artifact in the Museum does not advance or endorse religion and therefore does not violate the Establishment Clause. As the Supreme Court and every other court ever to have considered the issue have recognized, the Constitution does not prohibit the display of items in a museum merely because those items may be associated with religion. The prohibition applies only to a display that promotes religion, which this display assuredly does not do.

In the seminal case of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the Supreme Court established three criteria generally applicable to Establishment Clause claims: "First, the [state action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [state action] must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (citations omitted).

Subsequently, in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), Justice O'Connor stated that, when considering the constitutionality of the display of a

religious symbol, "[f]ocusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device." *Id.* at 689. For purposes of that inquiry, the relevant test is whether an objective observer who is "aware of the history and context of the community and the forum in which the display appears" would view that display as an endorsement of religion. *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring); *see id.* at 780 ("[W]e do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion . . . There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion." (emphasis in original) (citation omitted)).[1]

[1] There is disagreement over whether the *Lemon* or the endorsement test should be applied in display cases. *Compare DeStefano* v. *Emergency Hous. Grp., Inc.*, 247 F.3d 397, 411 (2d Cir. 2001) ("[T]he endorsement inquiry remains a viable test of constitutionality in certain unique and discrete circumstances—for example, where the government embraces a religious symbol or allows the prominent display of religious imagery on public property"), *with Skoros* v. *City of New York*, 437 F.3d 1, 17-18 (2d Cir. 2006) (declining to apply the endorsement test in a case challenging the constitutionality of a holiday display, but considering endorsement under the second prong of the *Lemon* inquiry). In the instant case, the distinction is immaterial because the same analysis applies under either test—the display is Constitutional for the reasons explained below.

A. The Display Of An Item With Historical And Religious Significance In A Museum Setting Is Constitutionally Permissible

Under either the *Lemon* test or the "endorsement" test, the cases are clear that the display of an item with religious significance in a museum setting does not violate the Establishment Clause because it does not advance or endorse religion. As the Supreme Court recently explained:

> Museums display works of art that express many different sentiments, and the significance of a donated work or art to its creator or donor may differ markedly from a museum's reasons for accepting and displaying the work. For example, a painting of a religious scene may have been commissioned and painted to express religious thoughts and feelings. Even if the painting is donated to the museum by a patron who shares those thoughts and feelings, it does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same 'message.'

Pleasant Grove City v. *Summum*, 555 U.S. 460, 476 n.5 (2009).

In *Lynch*, Chief Justice Burger discussed the application of the *Lemon* test to the inclusion of a crèche in a municipality's Christmas display. The Chief Justice held that the inclusion of the crèche in that display as one of many objects celebrating and depicting the origins of the Christmas holiday was constitutional because any benefit to religion was "indirect, remote, and incidental; display of the crèche is no more an advancement or endorsement of religion than . . . the exhibition of literally hundreds of religious paintings in governmentally supported museums." 465 U.S. at 683. The Court also noted that "[a]rt galleries supported by public revenues display religious paintings of the 15th and 16th centuries,

predominantly inspired by one religious faith," and gave as an example the National Gallery, "maintained with Governmental support," which regularly exhibits more than 200 religious paintings "with explicit Christian themes and messages," such as the Last Supper by Leonardo da Vinci. *Id.* at 676-77.

Justice O'Connor, in a concurring judgment in *Lynch*, also recognized that any constitutional concerns of endorsement arising out of the display of objects of religious significance are obviated where, as here, such objects are presented in a museum setting: "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.* at 692. *See also Cnty. of Allegheny* v. *Am. Civil Liberties Union*, 492 U.S. 573, 653 (1989) (Stevens, J., dissenting) ("It would be absurd to . . . exclude religious paintings . . . from a public museum.").

These same principles have been applied in numerous lower court cases. For example, in *Brooklyn Institute of Arts & Science* v. *City of New York*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999), the court stated that the display of a potentially offensive and sacrilegious exhibit in the governmentally-supported Brooklyn Museum was plainly constitutional, because it was little different from the display of "many reverential depictions of the Madonna as well as other religious paintings and ritual objects." *Id.* at 204-05. The court explained that "[n]o objective observer could conclude that the Museum's showing of the work of

an individual artist which is viewed by some as sacrilegious constitutes endorsement of anti-religious views by the City or the Mayor, or for that matter, by the Museum, any more than that the Museum's showing of religiously reverential works constitutes an endorsement by them of religion." *Id.* at 205. Plaintiffs' only effort to distinguish this case is to quote a statement from the opinion indicating that the Free Speech Clause precludes government censorship (App. Br. at 20)—a proposition which may be true, but has no relevance to this appeal.

Indeed, to our knowledge, every court ever to have considered the issue of whether a religious object may be displayed in a publicly-funded museum has adopted the view that such displays are constitutionally permissible. *See, e.g.*, *Trunk* v. *City of San Diego*, 629 F.3d 1099, 1117 (9th Cir. 2011) ("[A] museum might convey the message of art appreciation without endorsing a religion even though individual paintings in the museum have religious significance."); *Catholic League for Religious & Civil Rights* v. *City & County of San Francisco*, 624 F.3d 1043, 1052 n.33 (9th Cir. 2010) ("A plaintiff's having visual contact with a cross is immaterial, and would not raise a question if it were merely in a painting in the city art museum, because a reasonable person would not infer a government's position on a religion from the painting."); *Van Orden* v. *Perry*, 351 F.3d 173, 181 (5th Cir. 2003) (stating that the display of the Ten Commandments in a traditional museum setting "would wholly negate endorsement"), *aff'd*, 545 U.S. 677 (2005);

Elewski v. *City of Syracuse*, 123 F.3d 51, 61 n.10 (2d Cir. 1997) (Cabranes, J., dissenting) (contrasting the display of a crèche in a public park, which Judge Cabranes would have held to be unconstitutional, with "the government's sponsorship of the display of religious artwork at 'a governmentally supported museum,'" where "[c]learly there would be no Establishment Clause violation"); *Allen* v. *Hickel*, 424 F.2d 944, 949 (D.C. Cir. 1970) (upholding the inclusion of a crèche in a Christmas pageant where it was "one of a group of objects assembled to show how the American people celebrate the holiday season surrounding Christmas [and] [a]s such its purpose is no more objectionable than that of a postage stamp bearing a reproduction of a religious painting or a Government-sponsored museum display illustrating various religious or holiday customs."); *Crowley* v. *Smithsonian Inst.*, 462 F. Supp. 725 (D.D.C. 1978) (rejecting Establishment Clause challenge to evolution exhibits in the Smithsonian Museum of Natural History).

We are aware of no case in which the display of an item in a museum was found to violate the Establishment Clause or corresponding state constitutional provisions; plaintiffs are apparently not aware of such a case either, because they cite none. *See* Jamin Raskin, *Polling Establishment: Judicial Review, Democracy, & the Endorsement Theory of the Establishment Clause – Commentary on 'Measured Endorsement'*, 60 Md. L. Rev. 761, 770 (2001) ("even a display that

may appear one hundred percent religious—say, Michelangelo's Pieta sculpture of Mary and the infant Jesus Christ in a New York City museum—would pass Establishment Clause scrutiny because the purpose of including the religious sculpture in the museum would not be a religious one in the sense of promoting irrational faith or mystery over reason. It would presumably be to display one object of art expressing one artistic vision in a continuum of artistic visions represented in the museum."). Nor could any court have found such a display unconstitutional, given the Supreme Court's unequivocal direction on this point.

B. This Principle Applies Directly To The Display Of The Artifact In The Museum

The numerous authorities upholding the display of items of religious significance in governmentally-supported museums are directly applicable here, and warrant the dismissal of plaintiffs' claims.

Plaintiffs attempt to distinguish these authorities by arguing that they apply only to "art" or "encyclopedic or universal museums," and that this museum is somehow different. (App. Br. at 20-21.) But plaintiffs never explain why these authorities should apply only to certain museums, and the cases do not so hold.

Likewise, plaintiffs do not explain why the Museum is not an "encyclopedic" or "universal" museum. Like any museum, it collects and displays objects of significance to a particular topic—here, the events of September 11 and their aftermath—and is thus a museum. *See Van Orden*, 351 F.3d at 180 n.18

(“‘Museum means a public or private nonprofit agency or institution organized on a permanent basis for essentially educational or aesthetic purposes that utilizes a professional staff, owns or utilizes tangible objects, cares for the tangible objects, and exhibits the tangible objects to the public on a regular basis.’” (quoting 20 U.S.C. § 9172 (2003))). As the District Court held, “simply because a museum was created in part to commemorate a tragedy or an event does not make it less of a museum. Numerous museums, such as the National World War Two Museum and the United States Holocaust Memorial Museum, have both historical and memorial components yet are still museums.” (SA-26 n.16.) Plaintiffs offer no criticism of this persuasive reasoning.

As the District Court also held, plaintiffs do not identify even a single case supporting their supposed distinction between different types of museums. And the cases recognizing the constitutionality of museum displays are entirely inconsistent with such a distinction. For example, in *Lynch*, the Court analogized a display of a religious symbol to a museum exhibit and upheld it as constitutional even though, far from being a painting in an art museum, the display at issue was a crèche included in a municipality’s Christmas display. *See supra* at 20-21.

In *O’Connor* v. *Washburn University*, 416 F.3d 1216 (10th Cir. 2005), the Tenth Circuit rejected an Establishment Clause challenge to the display of a sculpture that was allegedly hostile to the Roman Catholic religion on a sidewalk

in a university campus. The sculpture was part of a temporary outdoor sculpture exhibition, although the nearest other sculpture was located some thirty-three feet away. *Id.* at 1220. Nevertheless, the Tenth Circuit upheld the constitutionality of the sculpture's display on the basis that it was part of a "typical museum setting," and "[a] state is not prohibited from displaying art that may contain religious or anti-religious symbols in a museum setting." *Id.* at 1228. The court reasoned that an objective observer would know that the sculpture was part of an outdoor museum exhibit because he or she would be aware that the sculpture was one of many outdoor sculptures located on the university campus, and could ascertain from a brochure available in the campus art museum that these sculptures were part of a single exhibit. *Id.* And it held that "a reasonable observer aware that the statue was part of an outdoor art exhibit would not believe the university endorsed the message of any particular piece of art within the exhibit." *Id.*

Similarly, in *Okrand* v. *City of Los Angeles*, 254 Cal. Rptr. 913 (Cal. Ct. App. 1989), a court recognized that a display of a religious symbol was constitutional so long as it took place in a "museum-like setting." *Okrand* concerned the display in the rotunda of the Los Angeles City Hall of a menorah, which was a "cultural artifact" and "historically significant because it was saved from the destruction of the Nazi Holocaust and represents the many European Jews who survived Nazi horrors." *Id.* at 917. In upholding that display, the court

emphasized that the rotunda, although clearly government property, was "a museum-like setting in view of its repeated use for display of education and artistic exhibits," and that the menorah was "much more a museum piece than a symbol of religious worship." *Id.* at 920, 922. Notably, the court held that the menorah's "'high religious significance to Jews does not mean its display does not also provide cultural and educational development to the citizenry at large.'" *Id.* at 217 (citation omitted). Plaintiffs' sole attempt to distinguish *Okrand* involves an analogy to "a billboard," several "smaller, perhaps fist-sized, objects," "a male giraffe, which averages 17-feet in height, and three kittens"; their sole authority is a web page describing the physical and behavioral characteristics of giraffes. (App. Br. at 28.) Whatever this analogy is supposed to mean, it misses the point: *Okrand* established that the display of a large historically-significant object with "high religious significance" was not an endorsement of religion when it took place in a "museum-like setting," even though the display was located in the rotunda of Los Angeles City Hall.

Here, however, the Court need not go as far as *Lynch*, *O'Connor* and *Okrand* because it is not presented with a display of an object in merely a "museum-like setting"—it is presented with the display of an object in an actual museum. And because, to a far greater degree than in *Lynch*, *O'Connor*, *Okrand* and other cases, the Museum will feature numerous historically significant objects

with accompanying explanations, no objective observer could reasonably view the inclusion of any single object as an endorsement of any meaning conveyed by that object. Rather, as the District Court succinctly stated, the display "will reinforce to the reasonable observer that they are perceiving a historical depiction of some people's reaction to finding the cross at Ground Zero." (SA-29.) And "the acknowledgment that many rescuers and volunteers found solstice in the cross is not endorsement of their religion." (SA-27.)

These circumstances are all amply supported by the uncontested record (*see infra* at 47-50) that: (i) the 9/11 Museum's expert curators decided to display the Artifact because of its historical significance to the rescue and recovery effort (A-152 (56.1 Statement ¶ 19)); (ii) the exhibition containing the Artifact will feature an array of objects, some with religious significance and some without, depicting a wide variety of ways in which rescue and recovery workers coped during that horrific effort (A-151-53 (56.1 Statement ¶¶ 14-16, 21)); (iii) the Artifact will be accompanied by detailed text panels explaining its historical significance (A-152 (56.1 Statement ¶ 20)); (iv) it will be located directly adjacent to a significantly larger steel "trident" (A-153 (56.1 Statement ¶ 22)) (directly contradicting the unsupported assertion in plaintiffs' opening brief that the Artifact "towers over any other symbols in the vicinity" (*see* App. Br. at 1)); and (v) other

objects in the 110,000 square foot Museum include fire trucks, an ambulance, large beams, and the 37 foot and 58 ton Last Column (A-152 (56.1 Statement ¶¶ 7, 10)).

Because none of these facts are or can be disputed, there is no need for a trial. Indeed, although the parties in this case conducted complete discovery, that process failed to reveal any facts suggesting that the display of the Artifact would impermissibly advance or endorse religion. Tellingly, plaintiffs abandoned many of their attempts to discover evidence about the Artifact and its display. For example, plaintiffs based their complaint in part on the allegation that the Artifact was selected for display because it was altered to enhance its religious impact after rescue workers discovered it (although why that would have been of any Constitutional significance was never explained). (A-29 (First Am. Cmplt. ¶¶ 45-46).) Plaintiffs told the District Court that they needed discovery to develop and pursue that claim (Pl. 11/11/11 Ltr. to Judge Batts at 3), and then submitted an unsigned two-page report from a purported engineering expert opining about the alleged alterations. That engineer could not defend his own report; less than one hour before his deposition was scheduled to begin, he resigned as an expert, and plaintiffs withdrew the report. Plaintiffs did not seek to offer a new expert.

Plaintiffs also told the District Court that "[d]iscovery is warranted to investigate precisely what Father Brian Jordan's role was, and how much influence he had over the inclusion of the cross." *Id.* at 2. Plaintiffs made a half-hearted

attempt to depose Father Jordan, the priest who conducted religious services in the vicinity of the Artifact during the rescue and recovery effort at Ground Zero, by failing promptly to notice the deposition; and, faced with opposition to the subpoena, quickly and voluntarily abandoned their attempt.

In short, plaintiffs have not—and could not have—discovered even a mere scintilla of evidence showing that the Artifact's display will advance or endorse religion, let alone evidence from which a jury could "reasonably find" for plaintiffs, as required to overcome a motion for summary judgment. *See Jeffreys*, 426 F.3d at 554.

C. There Is No Basis For A "Contextual Adjustment"

Faced with the indisputable facts, plaintiffs effectively concede that the Artifact's inclusion in the Museum is appropriate—they even express the "hope not to see the cross purged from the Museum"—but say that there should be "some contextual adjustment to the manner of displaying the Cross." (App. Br. at 2, 4-5; *see also id.* at 3 (expressing the "hope [that] Defendants will cooperate to fashion a contextual display"), 31 ("Plaintiffs do not hope for the Cross to be removed from the Museum").) That proposition is directly at odds with plaintiffs' previous

position.[2] But even putting that aside, plaintiffs identify no circumstances of the Artifact's display that are supposedly improper, nor have they suggested any specific way in which the present display should be changed.

The only clue in plaintiffs' brief as to why they allege the display is contextually improper is that "no other religious item is placed in a parallel position with the Cross." (App. Br. at 28.) That contention is neither correct nor relevant. As discussed in detail above, there *are* other items with both historical and religious significance in the vicinity of the Artifact. *See supra* at 11-14, 28-29.

Further, courts have never required that a religious symbol be located next to a "parallel" religious symbol[3] to negate any message of endorsement, and plaintiffs cite no case supporting such a requirement. To the contrary, courts have

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[2] *See, e.g.*, A-99 (Deposition of Plaintiff Kenneth Bronstein at 91:4-91:24 ("Q. So bottom line is you are not so much concerned with the circumstances of the display, you say it should not be displayed no matter what in the museum? A. It should not be on the property. I could not be any clearer than that . . . Q. But going back to my question, it wouldn't matter how they displayed it on that property? A. No. There is no way that I can think of that is how they could display it.")).

[3] Plaintiffs repeatedly complain that, unlike other objects of religious significance, the Artifact is "17-feet tall." (App. Br. at 1, 4, 6, 7, 9, 22, 28, 29.) They ignore the fact that, like most exhibits in most museums, the Artifact was not constructed that way by the 9/11 Museum, but rather is being displayed in the same condition it was in during the rescue and recovery effort. As the District Court found, "[d]efendants did not create the cross to be such an imposing figure in the Museum, but rather, one of the reasons that rescuers found meaning was because of its size when discovered amidst the destruction." (SA-28 (citation omitted).)

repeatedly held that even a sole religious object can be adequately contextualized by secular objects, and here, the Artifact is surrounded by numerous non-religious items including a much larger steel trident.

Thus, in *Lynch*, the Supreme Court upheld the display of a crèche as the sole religious object in a display "along with purely secular symbols" including a Santa Claus house, reindeer, a Christmas tree, and a "Seasons Greetings" banner, because it was "no more an advancement or endorsement of religion than . . . the exhibition of literally hundreds of religious paintings in governmentally supported museums." 465 U.S. at 670, 683; *see also id.* at 692 (O'Connor, J., concurring). Similarly, in *County of Allegheny*, the Court upheld the display of a menorah as the only item of religious significance in a holiday display. 492 U.S. at 613-20; *see also id.* at 635 (O'Connor, J., concurring). And in *O'Connor*, the Tenth Circuit held that the fact that a sculpture was the only item of religious significance in an exhibit of numerous sculptures operated *in favor* of its constitutionality, not against it. 416 F.3d at 1229.

The Sixth Circuit recently applied these principles in *Freedom From Religion Foundation, Inc.* v. *City of Warren*, 707 F.3d 686 (6th Cir. 2013) in rejecting a challenge to a city holiday display consisting of a single religious symbol—a nativity scene—and several secular symbols—such as a lighted tree, a "Winter Welcome" sign, reindeer, and snowmen. The Sixth Circuit held that it

was required to conduct "an assessment of *all* of the symbols in the display," *id.* at 692 (emphasis in original), because "a 'focus exclusively on the religious component of any activity would inevitably' stack the deck against faith-based symbols." *Id.* (quoting *Lynch*, 465 U.S. at 680); *see also Elewski*, 123 F.3d at 54 ("[a] reasonable observer is not one who wears blinders and is frozen in a position focusing solely on the" religious object). The Sixth Circuit therefore held that the display was appropriate, because "[i]n the context of all components of the display, the presence of the crèche 'depicts the historical origins of this traditional event long recognized as a National Holiday,'" and was thus "'no more an advancement or endorsement of religion' than . . . the display of 'religious paintings in governmentally supported museums.'" *Id.* (quoting *Lynch*, 465 U.S. at 680, 683).

Skoros v. *City of New York*, 437 F.3d 1 (2d Cir. 2006), a case which plaintiffs cite (App. Br. at 24-25), is also inconsistent with their argument that the Artifact must be accompanied by a "parallel" display from another religion. In that case, this Court upheld a holiday display policy for New York City schools permitting the display of certain religious objects but not others, and specifically affirmed the constitutionality of certain displays consisting of objects from only one religion together with secular objects. *Id.* at 7-10.

Plaintiffs argue that the Court in *Skoros* did not foreclose the possibility that "deliberate exclusion of the religious symbol of one faith from a

display that includes the religious symbols of other faiths could communicate . . . official favoritism or hostility among religious sects." *Id.* at 27. Plaintiffs give no reason as to why this case falls within that qualification. Nor could they, given their repeated admissions that, putting aside the symbols that are already displayed in the Museum in the same section as the Artifact, no other religious symbols were found in the wreckage at Ground Zero or prominent during the rescue and recovery effort. (App. Br. at 29 ("the chance of [sic] any physical evidence of any victim's or rescuer's atheistic belief would be found in the wreckage is practically nil"), 30 ("there were practically no objects in the wreckage commemorating non-Christians, including atheists")); *see infra* at 42-43.[4]

D. The Artifact's Display Meets *Lemon's* Other Requirements

Plaintiffs also argue that the display of the Artifact fails the *Lemon* test because it does not have a secular purpose and because it fosters an excessive entanglement with religion. (App. Br. at 22.)

The first argument is frivolous. In their brief, plaintiffs "acknowledge that the Cross is an artifact of historic significance" (App. Br. at 17), and they even

[4] *Cf. Allegheny*, 492 U.S. at 618 ("[w]here the government's secular message can be conveyed by two symbols, only one of which carries religious meaning, an observer reasonably might infer from the fact that the government has chosen to use the religious symbol that the government means to promote religious faith. But where, as here, no such choice has been made, this inference of endorsement is not present." (citation omitted)).

claim to have been "convinced" that the Artifact "'is so symbolic and so important . . . that there is no way it can ever leave the site permanently.'" (App. Br. at 2-3 (quoting a statement of Port Authority Executive Director Kenneth Ringler).) They have also conceded—indeed, they expressly agreed in the District Court—that the Artifact was selected for inclusion in the Museum because the 9/11 Museum "believed wholeheartedly that this important and essential artifact belongs at the World Trade Center site as it comprises a key component of the re-telling of the story of 9/11 . . . ." (A-152 (56.1 Statement ¶ 19)); *see supra* at 28.

The second argument has no more basis. Plaintiffs state in passing in their brief that "reasonable inferences can be made from the facts to conclude that the Cross fosters an excessive entanglement with religion" (App. Br. at 22), although they decline to expand upon this statement. In particular, plaintiffs never identify what the stated inferences are, or what facts supposedly support them. They also make no attempt to explain why the District Court's considered rejection of their argument that the display fosters excessive entanglement with religion (SA-30-31) was improper. And they have pointed to no facts suggesting that any religious group or individual has *any* ongoing involvement in the display.

E. Plaintiffs' State Law Claims Also Cannot Succeed

Because plaintiffs' Establishment Clause claims fail, their claims under state establishment clauses in Article One, Section Three of the New York

Constitution and Article One, Section Four of the New Jersey Constitution also fail. As the District Court held, these provisions are no broader than the federal Establishment Clause. *See, e.g.*, *Schaad* v. *Ocean Grove Camp Meeting Ass'n of the United Methodist Church*, 370 A.2d 449, 464 (N.J. 1977) (holding that the "letter and spirit" of the anti-establishment provisions in Article One, Section Four of the New Jersey Constitution "are substantially of the same purpose, intent and effect as the religious guaranties of the First Amendment and have probably always been regarded as such in this State"), *overruled on other grounds by State* v. *Celmer*, 404 A.2d 1, 7 (1979).[5] Plaintiffs do not argue that these provisions are broader than the Establishment Clause.

II. THE DISTRICT COURT JUDGMENT SHOULD BE AFFIRMED BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT AS TO PLAINTIFFS' EQUAL PROTECTION CLAIMS

Plaintiffs also allege a violation of the federal Equal Protection Clause and corresponding sections in the New York and New Jersey Constitutions. (*See* A-30-31, A-32-33, A-38-39 (First Am. Cmplt. ¶¶ 50-51, 56-57, 76-77).) Plaintiffs appear to claim that, in violation of these provisions, they have been discriminated

[5] Although there are few New York cases interpreting Article One, Section Three of the New York Constitution as distinct from the federal Establishment Clause, New York courts focus on the federal Establishment Clause and apply federal case law, including the *Lemon* test, in considering establishment issues. *See, e.g.*, *In re Faith Bible Church*, 582 N.Y.S.2d 841, 843 (N.Y. App. Div. 1992) (applying *Lemon* to analysis of both federal and state constitutional claims); *Greve* v. *Bd. of Educ.*, 351 N.Y.S.2d 715, 716 (N.Y. App. Div. 1974) (same).

against because they have not been allowed to include their own Atheist symbol in the Museum. (App. Br. at 30-31.)

Any equal protection claim suffers from the same fundamental shortcomings.[6] Plaintiffs do not allege, let alone point to facts showing, that they have been treated differently from any other person. Further, even if plaintiffs had been treated differently, to establish an equal protection violation, they must show that such differential treatment lacks any rational basis. Yet far from alleging that the display of the Artifact is irrational, plaintiffs now *agree* that the Artifact should be displayed in the Museum. And plaintiffs have failed to show that the decision not to include an Atheist symbol is irrational—in fact, even they still cannot identify an Atheist symbol that should have been included.

A. Plaintiffs Have Not Been Treated Differently

To maintain an equal protection claim, plaintiffs must demonstrate that they were treated differently from other similarly situated individuals or groups. *Lown* v. *Salvation Army, Inc.*, 393 F. Supp. 2d 223, 235 (S.D.N.Y. 2005).

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[6] Plaintiffs do not dispute that the same legal principles govern their federal and state equal protection claims. *See Under 21* v. *City of New York*, 482 N.E.2d 1, 8 n.6 (N.Y. 1985) ("[T]he State constitutional equal protection clause is no broader in coverage than the federal provision" (citation omitted)); *Drew Assocs.* v. *Travisano*, 584 A.2d 807, 812 (N.J. 1991) ("our principles of state constitutional analysis in the area [of equal protection] are substantially the same" as the federal principles); (App. Br. at 31 ("The applicable New York and New Jersey constitutional protections mirror the federal standards")).

As the District Court correctly held, though, no private individual or group has the right to dictate which objects are displayed in the Museum. Rather, the 9/11 Museum is the entity charged with curating the Museum and selecting and designing its exhibits. The displays in the Museum are therefore the 9/11 Museum's expression.[7] *See Summum*, 555 U.S. at 467 (a city's "decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech"). Indeed, it is *plaintiffs* who demand to be treated differently, seeking to secure a special right for themselves to modify the content of displays in the Museum possessed by no other private group or individual.

Thus, in *City of Warren*, the Sixth Circuit held that, because a city holiday display consisting of a sole religious symbol (a crèche) and several secular symbols was government speech, the exclusion of an atheist "Winter Solstice" sign from that display did not violate the Equal Protection Clause. The court reasoned:

> To the extent the [plaintiff] means to claim that the City's government speech commemorating the holiday disparately treats its preferred message, the answer is: welcome to the crowd. Not everyone, we suspect, is happy with the City's holiday display from one year to the next. And [plaintiff], like everyone else, is free to urge the City to add or remove symbols from the display . . . Were we to grant [plaintiff's]

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[7] (*See also* A-149-52 (56.1 Statement ¶ 2 ("The 9/11 Museum is responsible for the design, development and operation of the . . . Museum"), ¶ 16 ("In the Finding Meaning at Ground Zero section [of the Museum], the 9/11 Museum plans to include a cross-shaped steel beam"), ¶ 19 ("[E]xpert curators from the 9/11 Museum decided to include the Artifact in the Museum")).)

> request to add the Winter Solstice sign, moreover, that would place it in a preferred position . . . .

707 F.3d at 698. The Tenth Circuit reached an identical result in *Wells* v. *City & County of Denver*, 257 F.3d 1132 (10th Cir. 2001). In that case also, the court rejected plaintiffs' claim that the exclusion of an Atheist "Winter Solstice" sign from a city holiday display violated the Equal Protection Clause. The Tenth Circuit reasoned that the display was the city's speech, and because plaintiffs had no right to "dictate the content of that speech," they could not show that they had been treated differently. *Id.* at 1153.

And in *Johnson* v. *Poway Unified School District*, 658 F.3d 954 (9th Cir. 2011), the Ninth Circuit held that a public school teacher was not treated differently by being prevented from displaying religious materials in his classroom, even though materials exhibiting sectarian viewpoints were allowed. The court reasoned the materials in the classroom were government speech "and the government has the right to 'speak for itself' . . . [b]ecause [plaintiff] had no individual right to speak for the government, he could not have suffered an equal protection violation." *Id.* at 975 (quoting *Summum*, 555 U.S. at 467).

In short, because the display of the Artifact is the expression of the 9/11 Museum, not private individuals, plaintiffs have not been treated differently simply because they could not include their own symbol in the display. The fact

that plaintiffs disagree with the content of the 9/11 Museum's display does not give them a right to modify it under the auspices of equal protection clauses.[8]

Plaintiffs do not dispute any of these principles. They expressly "recognize that individuals cannot force others, including a government, to speak," and agree that "permanent monuments displayed on public property typically represent government speech." (App. Br. at 30-31.) These concessions, we submit, are fatal to plaintiffs' equal protection claims. Plaintiffs go on to note (correctly) that "this does not mean that there are no restraints on government speech," because "government speech must comport with the Establishment Clause." (App. Br. at 31 (quoting *Summum*, 555 U.S. at 468).) But the display of the Artifact does comply with the Establishment Clause, as discussed above.

B. The Display Of The Artifact Is Not Irrational

Even if plaintiffs were treated differently by the 9/11 Museum's decision to display the Artifact in the Museum (which they were not), that decision is only subject to rational basis review, as the District Court also held. *See*

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[8] *Cf. Books* v. *Elkhart Cnty.*, 401 F.3d 857, 866 (7th Cir. 2005) ("Were this display [of the Ten Commandments] erected on the wall of a public museum, we would hardly think it appropriate to second-guess the museum's purposes by questioning the quality of the exhibit's historical content or substituting our own historical analysis for that of the curator."); *Cuban Museum of Arts & Culture, Inc.* v. *City of Miami*, 766 F. Supp. 1121 (S.D. Fla. 1991) (enjoining the city from penalizing a museum for exhibiting allegedly offensive works because the museum's curatorial decisions were constitutionally protected expression).

Fighting Finest Inc. v. *Bratton*, 95 F.3d 224, 231 (2d Cir. 1996) (rational basis scrutiny of Equal Protection claim was proper because "since [plaintiff] failed to allege a violation of the First Amendment, this case did not involve the deprivation of a fundamental right."); *Lown*, 393 F. Supp. 2d at 237 (holding that "meaningful constitutional scrutiny" of contracts between the government and a religious organization "is properly carried out pursuant to the Establishment Clause . . . for Equal Protection Clause purposes, the contracts are subject to mere rational basis review"); *Satawa* v. *Bd. of Cnty. Rd. Comm'rs*, 788 F. Supp. 2d 579, 607 (E.D. Mich. 2011) ("[B]ecause the Court has already determined that Plaintiff does not have a meritorious Free Speech or Establishment Clause claim, his Equal Protection claim is subject only to rational basis scrutiny."), *rev'd*, 689 F.3d 506, 524 (6th Cir. 2012) (holding that plaintiff's Free Speech rights were in fact violated and for that reason strict scrutiny applied).[9]

Under rational basis review, the decision to display the Artifact is valid "as long as there is 'any reasonably conceivable state of facts that could

[9] The deferential rational basis standard may not apply if a plaintiff shows that he or she has been intentionally discriminated against. *See, e.g.*, *United States* v. *Moore*, 54 F.3d 92, 96 (2d Cir. 1995). However, plaintiffs have never alleged that the Artifact was included in the Museum for the purpose of discriminating against them, and there are no facts that could even remotely support such an allegation.

provide a rational basis for the [decision].'" *Red Earth LLC* v. *United States*, 657 F.3d 138, 147 (2d Cir. 2011) (quoting *Heller* v. *Doe*, 509 U.S. 312, 320 (1993)).

Plaintiffs cannot show that there was no rational basis for the 9/11 Museum's decision to display the Artifact—an object that plaintiffs admit has historical significance to the aftermath of September 11—in a Museum dedicated to that very subject. As the District Court correctly held, "[r]ational basis is easily met" because "[t]he Museum's purpose is to tell the history surrounding September 11, and the cross, as explained above, helps tell part of that history." (SA-34-35.)

The fact that the Museum does not include artifacts associated with Atheism is not irrational either; it simply reflects the factual reality that, as far as the 9/11 Museum was aware when it was designing the Museum, there were no Atheist objects comparable to the Artifact associated with the story of September 11. Plaintiffs did not dispute that in the District Court, and they do not dispute it now; in fact, even they are apparently unaware of such an object. (*See* App. Br. at 30, 31 ("there were practically no objects in the wreckage

commemorating non-Christians")); *supra* at 34.[10] Even if plaintiffs had identified a comparable Atheist object—which they have not—they would still need to show that the 9/11 Museum's curators had no rational basis for not including that object in the Museum. *See Spavone* v. *New York State Dep't of Correctional Servs.*, 719 F.3d 127, 137 (2d Cir. 2013) ("the question on rational basis review at the summary judgment stage is clear: whether a reasonable jury could conclude that no reasonably conceivable set of facts could have provided a rational basis for" the decision challenged). Plaintiffs have not pointed even to a scintilla of evidence—let alone evidence from which a reasonable jury could conclude—that the 9/11 Museum acted irrationally by not including in the Museum an Atheist artifact of which it was not aware.

Further, as plaintiffs have candidly acknowledged, the inclusion in the Museum of an Atheist symbol, without any connection to September 11, would require thousands of other equally-sized symbols representing every religious or non-religious belief. As one of the Individual Plaintiffs explained:

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[10] *See also* Fox News Interview of David Silverman (American Atheists' President and Fed. R. Civ. P. 30(b)(6) representative), Aug. 17, 2012, *available at* http://www.youtube.com/watch?v=3-0KM8btOdg (stating, in response to a question about whether an Atheist symbol was found at Ground Zero, "No, that's because there are no symbols of atheism.") (last visited, Nov. 6, 2013); 9/11 Museum's Reply Brief In Support Of Motion For Summary Judgment at 9 n.11, 11-cv-6026 (S.D.N.Y. Sept. 24, 2012), ECF No. 76 (citing interview).

> Here is the problem, there are 3,000 recognized religions in the United States today. Th[at] would require the museum for this solution that every single one has a 17 foot statue there or something, but 3,000 of them, and you would need a Pantheon to go from the museum over to the middle of New Jersey to do it.

(A-325 (Deposition of Plaintiff Kenneth Bronstein at 97:3-97:10); *see also* A-321 (Deposition of David Silverman, American Atheists' President and Fed. R. Civ. P. 30(b)(6) representative at 155:3-155:17 ("Q. How many religions or sects do you think exist in this country? A. Thousands. Q. So you would have thousands of memorials inserted into the museum; is that right? A. Equality is equality, yes.")).)

It was not irrational for the 9/11 Museum not to include thousands of religious symbols with no historical significance to the events of September 11 in the Museum, in addition to the Artifact. As the Museum's Director, Alice Greenwald, testified during her deposition, the Museum is "not in the business of providing equal time for faiths, we are in the business of telling the story of 9/11 and the victims of 9/11." (A-141 (Greenwald Deposition at 68:4-7).)[11]

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[11] Plaintiffs are correct that the Museum will feature certain items with religious significance donated after September 11 (App. Br. at 30), but all of those items also have historical significance to the events of September 11 and their aftermath. For example, the 9/11 Museum will depict how "foreign leaders expressed empathy, support and condemnation of the attacks" by showing certain objects, including some with religious significance, donated by those leaders in the immediate wake of September 11. (A-85-86, at NSMM 61); *see also supra* at 13-14.

III. THE DISTRICT COURT JUDGMENT SHOULD BE AFFIRMED BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT AS TO PLAINTIFFS' STATE CIVIL RIGHTS CLAIMS

Plaintiffs' final set of claims allege that the display of the Artifact violates state civil rights legislation, namely Article 4, Sections 40 and 40-c of New York's Civil Rights Act and New Jersey Statute 10:1-3. The District Court granted summary judgment dismissing these claims, and it is unclear whether plaintiffs in fact challenge that decision; they do not even discuss these claims in their opening brief or make any attempt to defend them on the merits. (*See* App. Br. at 32 ("Plaintiffs offer no additional response to Defendants' arguments on state law grounds").)

Section 40 of New York's Civil Rights Act and New Jersey Statute 10:1-3 are "access statutes" that are "designed to ensure that the covered facilities . . . are fully and equally open to all persons without regard to such factors as race, color, creed, or national origin." *Weinbaum* v. *Cuomo*, 631 N.Y.S.2d 825, 828 (N.Y. App. Div. 1995) (holding that New York's Civil Rights Act was "wholly inapplicable" to a claim alleging discriminatory funding of state universities because plaintiffs failed to allege that they had been denied access to the universities); *see Jews for Jesus, Inc.* v. *Jewish Cmty. Relations Council of New York, Inc.*, 590 N.E.2d 228, 232 (N.Y. 1992) (rejecting claims under Sections 40 and 40-c because "[p]laintiffs were not denied access to any place of

public accommodation"); *Williams-Murray* v. *Anthropologie, Inc.*, 290 F. App'x 484, 486 (3d Cir. 2008) (affirming that Section 40 "provides a cause of action for denial of access to public accommodations, not for alleged discrimination that takes place within places of public accommodations."); *Varriale* v. *Borough of Montvale*, 2006 WL 1806411, at *15 (D.N.J. June 29, 2006) (holding that New Jersey Statute 10:1-3 requires a plaintiff to "prove that the Defendants withheld some privilege or facility from Plaintiff").

In this case, each of the plaintiffs testified that they have no reason to believe that they will be denied access to the Museum or the Memorial (A-154 (56.1 Statement ¶ 25)), and they also admit in their brief that "they may be able to walk through the doors of the Museum." (App. Br. at 31.) That is fatal to plaintiffs' civil rights claims, as the District Court correctly held.[12]

As the District Court further held, plaintiffs' claims under the New York Civil Rights Act also fail because plaintiffs did not give notice to the

[12] Plaintiffs' claims under Section 40-c of New York's Civil Rights Act depend on their claims under Section 40, because Section 40-c only protects "civil rights" recognized elsewhere in the Act—it does not create new civil rights. Plaintiffs do not allege that any of their civil rights other than those recognized by Section 40 have been violated. *See Weinbaum*, 631 N.Y.S.2d at 828 (dismissing section 40-c claim because "plaintiffs point to no particular 'civil right' which has been denied them"); *see also New York* v. *Kern*, 554 N.E.2d 1235, 1241 (N.Y. 1990) (holding that Article 1, Section 11 of the New York Constitution, which also prohibits discrimination in relation to "civil rights," "is not self-executing . . . and prohibits discrimination only as to civil rights which are 'elsewhere declared' by Constitution, statute, or common law." (citation omitted)).

New York Attorney General at or before the commencement of this action. Such notice is required by Section 40-d of the Civil Rights Act, and failure to give it is fatal to claims under Sections 40 and 40-c. *See, e.g.*, *Feacher* v. *Intercontinental Hotels Grp.*, 563 F. Supp. 2d 389, 407-8 (N.D.N.Y. 2008) (granting summary judgment against claim under section 40 because plaintiffs did not allege that they gave the required notice); *Sundaram* v. *Brookhaven Nat'l Labs.*, 424 F. Supp. 2d 545, 571 (E.D.N.Y. 2006) ("plaintiff's claims for violations of section 40-c . . . must be dismissed because he failed to give the necessary notice to the Attorney General of New York before making those claims").[13]

IV. THE DISTRICT COURT JUDGMENT SHOULD ALSO BE AFFIRMED BECAUSE PLAINTIFFS ARE PRECLUDED FROM ASSERTING A GENUINE ISSUE OF MATERIAL FACT

Finally, the District Court judgment should also be affirmed, without consideration of plaintiffs' argument in this appeal that there is a genuine dispute of material fact, for an even more basic reason: plaintiffs waived any argument that there is a dispute of material fact by expressly agreeing with the material facts submitted by the 9/11 Museum, and by not filing a Local Rule 56.1 Statement.

[13] In addition, as the District Court also held, American Atheists' claims under Sections 40 and 40-c also fail because corporations cannot bring claims under those provisions. *Jews for Jesus, Inc.* v. *Jewish Cmty. Relations Council of New York, Inc.*, 968 F.2d 286, 293 (2d Cir. 1992).

Local Rule 56.1(a) states that a movant for summary judgment must file "a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." Local Rule 56.1(b) requires that "[t]he papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried." Further, Local Rule 56.1(c) specifically provides that "[e]ach numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party."

The meaning and effect of these rules is clear—as this Court stated in *T.Y.* v. *New York City Department of Education*:

> Should the nonmoving party wish to contest the assertions contained within a Rule 56.1 statement, the nonmoving party must respond to each of the statement's paragraphs and include, if necessary, a statement of the additional material facts that demonstrate a genuine issue for trial. A nonmoving party's failure to respond to a Rule 56.1 statement permits the court to conclude that the facts asserted in the statement are uncontested and admissible. ***In the typical case, failure to respond results in a grant of summary judgment once the court assures itself that Rule 56's other requirements have been met.***

584 F.3d 412, 417-18 (2d Cir. 2009) (citations omitted) (emphasis added); *see Gubitosi* v. *Kapica*, 154 F.3d 30, 31 n.1 (2d Cir. 1998) ("We accept as true the material facts contained in defendants' Local Rule [56.1] statement because plaintiff failed to file a response.").

In this case, plaintiffs chose not to file a Local Rule 56.1 statement, and are thus deemed to accept the facts set forth in the 9/11 Museum's statement. Indeed, plaintiffs went even further than agreeing with the 9/11 Museum's statement by omission: they *expressly agreed* with that statement. (*See* Pls. Br. at 3 ("Plaintiffs concur with the material statements of material facts set forth in Port Authority's Rule 56.1 Statement and [9/11 Museum's] Statement of Facts Pursuant to Local Civil Rule 56.1").)[14]

[14] Plaintiffs purported to include a "supplement" to the 9/11 Museum's Local Rule 56.1 statement in their brief, which consisted of a two and a half page recitation of purported facts and opinions containing no correlation to the 9/11 Museum's Local Rule 56.1 statement—or, in many cases, to any admissible evidence. (*See* Pls. Br. at 3-6.) The District Court characterized that "supplement" as containing "numerous additional factual assertions, few of which are material." (SA-4 n.1.) However, notwithstanding this "supplement," plaintiffs still admitted all of the facts in the 9/11 Museum's statement because of their failure to raise any dispute in a Local Rule 56.1 statement. *See supra* at 48-49; *see also Prevost* v. *New York*, 2006 WL 2819582, at *4-5 (S.D.N.Y. Sept. 29, 2006) (statement of facts that did not correspond to the moving party's Local Rule 56.1 statement and did not specifically contradict any facts in that statement rejected for noncompliance with Rule 56.1); *Davis-Bell* v. *Columbia Univ.*, 851 F. Supp. 2d 650, 658 (S.D.N.Y. 2012) (same); *T-Mobile Ne. LLC* v. *Village of East Hills*, 779 F. Supp. 2d 256, 261 (E.D.N.Y. 2011) (same).

Plaintiffs' failure to comply with the local rules by properly raising any factual disputes in a Local Rule 56.1 statement is a violation of substance, not form. This Court and defendants have been left to guess as to which (if any) of the material facts forming the basis of the 9/11 Museum's motion are disputed by plaintiffs, and which are not. Despite repeatedly asserting in their opening brief that there is a genuine dispute of material fact precluding summary judgment, that brief also does not identify even one specific fact that is disputed (much less a material one). For example, as discussed above, even though plaintiffs allege that all they now seek is "some contextual adjustment to the manner of displaying" the Artifact, they have not even attempted to dispute the numerous facts identified by the 9/11 Museum showing that the Artifact *will* be displayed in context, nor have they identified any other facts suggesting that the display will not be contextual.

Accordingly, plaintiffs' express agreement with the facts contained in the 9/11 Museum's Local Rule 56.1 Statement—and their election not to file a statement responding to it—precludes any attempt to dispute those facts or assert contrary facts. That alone is a sufficient ground on which to affirm the District Court judgment finding that there is no genuine dispute of material fact.

CONCLUSION

For the foregoing reasons, the judgment of the District Court granting summary judgment against all of plaintiffs-appellants' claims should be affirmed.

Dated: New York, New York
November 8, 2013

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,630 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certificate, I relied on the word count program in Microsoft Word.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font of Times New Roman.

Dated: New York, New York
November 8, 2013

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