13-1668-CV

In the United States Court of Appeals for the Second Circuit

AMERICAN ATHEISTS, INC., DENNIS HORVITZ, KENNETH BRONSTEIN, JANE EVERHART,
Plaintiffs-Appellants,

MARK PANZARINO,
Plaintiff,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, WORLD TRADE CENTER MEMORIAL FOUNDATION/NATIONAL SEPTEMBER 11 MEMORIAL AND MUSEUM,
Defendants-Appellees,

STATE OF NEW JERSEY, GOVERNOR CHRIS CHRISTIE, SILVERSTEIN PROPERTIES, INC., LOWER MANHATTAN DEVELOPMENT CORPORATION, CHURCH OF THE HOLY NAME OF JESUS, BRIAN JORDAN, WORLD TRADE CENTER PROPERTIES, LLC,
Defendants.

On Appeal from the United States District for the Southern District of New York

Brief *Amicus Curiae* of The Becket Fund for Religious Liberty in Support of Defendants-Appellees and Affirmance

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, The Becket Fund for Religious Liberty states that it has no parent corporation and that no publicly held corporation owns any part of it.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a non-profit, public-interest legal and educational institute that protects the free expression of all religious traditions. It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

The Becket Fund's concern here is that failure to scrutinize Appellants' standing to challenge the display of a cross-shaped artifact in a historical museum would allow the most cantankerous adherents to the most extreme separatist views of the Establishment Clause to challenge even the tiniest manifestation of religion anywhere in the public square. If allowed to stand, this limitless approach to the application of judicial power would ultimately pervert the purposes and impair the protections that the Establishment Clause embodies.

INTRODUCTION AND SUMMARY OF ARGUMENT

This lawsuit, now ongoing for more than two years, claims that the anticipated display in the National September 11 Museum of a single artifact—a cross-shaped steel beam recovered from Ground Zero—is an unlawful establishment of religion. Appellants American Atheists, Inc. and three of its members, Kenneth Bronstein,

[1] No counsel for any party authored this brief in whole or part. No party or counsel for any party contributed money intended to fund preparing or submitting the brief. No person other than *amicus curiae*, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

Dennis Horvitz, and Jane Everhart (the "Individual Members"), object—as taxpayers and citizens of New York—to the Museum's display of the artifact, which was discovered by rescue workers at Ground Zero and treated by many as a source of inspiration among the horrors inherent in their recovery effort. The Museum plans to display the artifact in a historical exhibit entitled "Finding Meaning at Ground Zero," which will portray how rescue workers struggled to deal with the harrowing circumstances under which they were laboring. The Individual Members have failed to show an injury from the display that would entitle them to sue to ban it. They have failed to show that the display is directly supported by their taxes, and thus cannot establish "taxpayer" standing. And they have failed to show that the display directly and personally injures them, defeating "citizen" or "offended observer" standing.

Because none of the Individual Members has a right to challenge the Museum display, American Atheists also lacks that right as an organization. Its unsubstantiated allegation that the Museum refused its offer to contribute an "atheist" memorial for display—even if accepted as true—is insufficient to create standing. It is undisputed that the Museum only displays artifacts from Ground Zero, not religious memorials generally. And American Atheists has failed to identify any "atheist" artifact that the Museum has refused to display. It has no

standing to sue the Museum for refusing to display items irrelevant to the Museum's mission.

The frivolousness of this lawsuit is perhaps best illustrated by the American Atheists' own mid-litigation course correction, when they abruptly disavowed any intent to ban the display, claiming they are now "convinced . . . that it [is] not the most desirable remedy." Appellants Br. 2. Promising not to "re-write history or rip from museums all acknowledgment of our country's historical relationship with faith," they now seek only some unidentified "contextual adjustment" to the display. *See id*. They analogize the so-called "contextual" harm they now seek to remedy to "the effect of juxtaposing, as representing Christianity . . . a display consisting of a male giraffe, which averages 17-feet in height (http://whozoo.org/Intro98/natarale/natgiraffe2.htm)" against a display of "three kittens" (presumably representing atheists). *See* Appellants Br. 28. (web link in original). As if giraffes had any Internet advantage over kittens!

But the American Atheists' change in strategy is as serious as their analogy is silly. Their concession regarding the impact—to "re-write history" and "rip from museums" any indicia of religion—of the relief they originally sought underscores what is at stake and the need for a meaningful standing doctrine. Plaintiffs should not be permitted to abuse the power of the courts to satisfy their personal Goldilocks-like interest in calibrating exactly how much religion is acceptable in

public. Absent direct and personal injuries, which *do* support jurisdiction in appropriate cases, such matters may appropriately be left to the political process and to an expected level of mutual tolerance among the public generally. The Museum's display of the Ground Zero cross is so non-injurious and so far removed from the concerns of the Establishment Clause that this Court should dismiss for the American Atheists' lack of standing.

ARGUMENT

The doctrine of standing arises from Article III, section 2, of the United States Constitution, which limits "judicial Power" to actual "Cases" and "Controversies." U.S. CONST. art. III, § 2; *Allen v. Wright*, 468 U.S. 737, 750 (1984). To determine whether a proper "case" or "controversy" exists, courts utilize a "three-pronged inquiry." *In re U.S. Catholic Conference ("Catholic Conference")*, 885 F.2d 1020, 1023 (2d Cir. 1989). First, a plaintiff must show "an injury in fact that is both concrete in nature and particularized to them"; second, "the injury must be fairly traceable to [the] defendants' conduct"; and third, "the injury must be redressable by removal of defendants' conduct." *Id*. at 1023-24 (citations omitted). If any one element fails, the court "has no subject matter jurisdiction over the case." *Id*. at 1023.

Of the courts' jurisdictional limitations, standing is "perhaps the most important." *Thompson v. County of Franklin*, 15 F.3d 245, 247 (2d Cir. 1994)

(quoting *Allen*, 468 U.S. at 750). It cannot be waived, and may be raised at any time, by any party or by the court *sua sponte*. *Id*. at 248-49. Even when the issue is presented for the first time on appeal by *amicus*, a court still "must consider standing." *Maricopa-Stanfield Irr. & Drainage Dist. v. United States*, 158 F.3d 428, 433 (9th Cir. 1998).

In their Complaint, the Individual Members alleged both taxpayer and citizen standing. American Atheists alleged associational standing on behalf of its members, plus standing on its own behalf. Part I of this brief demonstrates that none of these theories creates standing in this matter. Part II provides some historical context for the Establishment Clause, demonstrating that the American Atheists' alleged concerns about the Museum's display do not implicate the Establishment Clause in any way, and that the Court should thus have no pause in dismissing their claims.

I. The Court lacks jurisdiction because Appellants all lack standing.

In the Complaint, the American Atheists allege that many of their members, including the Individual Members, are "residents, citizens, and taxpayers of the United States and the State of New York" and have been injured by seeing "the cross, either in person or on television" and by "having a religious tradition not their own imposed upon them." J.A. 20-21. But these allegations, even combined

with the meager evidence adduced on summary judgment, are insufficient to grant the American Atheists standing.

A. The Individual Members lack taxpayer standing.

The Complaint asserts that, in 2009, "the September 11 Memorial and Museum received [almost $80 million] in unrestricted government funding," and almost $70 million in 2010. J.A. 27. It also avers that, in 2010, Congress passed a law ordering the National Mint to strike September 11 commemorative medals, with "[t]en dollars from the sale of each medal . . . to be donated" to "the Memorial and Museum." J.A. 28. The American Atheists concluded that "Congress has, therefore, utilized its taxing and spending power to support the September 11 Memorial and Museum," J.A. 28, which—as discussed below—is a necessary element of taxpayer standing.

At summary judgment, American Atheists proffered scant evidence to support these allegations. *See Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (on summary judgment "plaintiff cannot rest on such mere allegations, [as at the pleading stage] but must set forth . . . specific facts"). It cites a press release that the State Assembly had passed a bill "making a significant commitment of public funds to the World Trade Center Memorial," Appellants Br. 13-14, but fails to note that the bill was vetoed by Governor Pataki. *See* J.A. 333. It similarly identified a United States Senate bill—H.R. 2865—proposing $20 million in "technical and

financial assistance to the Museum," but fails to note that that bill died in committee.[2] Appellants Br. 16-17; J.A. 333 n.7.

American Atheists does, however, cite testimony from the Museum Director, Alice Greenwald, acknowledging receipt of "an $80 million capital grant from the State of New York . . . through Governor Pataki's office" and a $250 million grant from HUD through the Lower Manhattan Development Corporation for "the capital construction of the memorial and the museum." J.A. 135-36; J.A. 333.[3] None of this is sufficient to establish taxpayer standing.

1. *Taxpayer standing requires a direct connection between a tax and the alleged injury.*

As a general rule, "taxpayers do not have standing to challenge how the federal government spends tax revenue." *Catholic Conference*, 885 F.2d at 1027 (citing *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)). The only exception is where a taxpayer specifically challenges "exercises of *congressional* power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968) (emphasis added). It is not sufficient to allege "an incidental expenditure . . . in the administration of an essentially *regulatory* statute." *Id.* (emphasis added). Nor is there taxpayer standing to challenge

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[2] *See* https://www.govtrack.us/congress/bills/112/hr2865.

[3] The Museum's director also testified that, since receiving these capital grants, the Museum has not received any public funds. J.A. 136.

"expenditures resulted from executive discretion." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 605 (2007).

Furthermore, the exception has applied only where the congressional expenditure ostensibly conflicts with the Establishment Clause. *Id.*; *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347 (2006) ("[O]nly the Establishment Clause has supported federal taxpayer suits."). The same limitations apply "with undiminished force to state taxpayers." *Id*. at 345.

2. There is no nexus between the alleged funding and the Taxing and Spending Clause.

The American Atheists have failed to adduce any evidence that the public funding allegedly received by the Museum is the direct result of legislative "tax and spend" action.

Although the Complaint alleges that the Memorial and Museum received around $80 million in unrestricted government funds in 2009 and around $70 million in 2010, J.A. 27, the American Atheists have provided no further details or evidence to meet their burden of proof on summary judgment. Thus, there is no basis for the Court to determine whether these specific allegations are true or whether the alleged funding arose directly from legislative taxing and spending.

Similarly, the New York State Assembly Bill that allegedly authorized public funding, Appellants Br. 13-14, was vetoed by the governor, J.A. 333. And the one federal funding bill identified, Appellants Br. 16-17, was never voted on by

Congress, *see supra* n.4; J.A. 333. Bills are not laws. Thus, the American Atheists also fail to show a nexus to government taxing and spending. And the bill authorizing the sale of a September 11 commemorative medal, with a $10 surcharge for the Memorial and Museum, obviously does not implicate taxing and spending either. Thus, none of these alleged, once-potential, or actual sources of public funding for the Museum can give rise to taxpayer standing.

The American Atheists' reliance on the Museum director's testimony regarding receipt of a $250 million grant from HUD and an $80 million grant from Governor Pataki's office is equally unavailing. Again, they have failed to allege or demonstrate that either of these grants originated from direct legislative distribution of tax dollars. It is not sufficient to assume that, at some point in time, the funds must have been generally authorized by the New York Legislature or U.S. Congress. Taxpayer standing arises only from direct legislative branch spending. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 479 (1982) (taxpayer standing applies to "congressional action," not decisions left to agency discretion); *Hein*, 551 U.S. at 605 (no taxpayer standing for executive branch spending). The grants at issue were issued to the Memorial and Museum by HUD, a federal agency, and Governor Pataki, the state executive. That is not sufficient to show taxpayer standing. *See id*.

3. There is no sufficient nexus between the alleged funding and the Establishment Clause.

The American Atheists' failure to demonstrate funding through Congress's taxing and spending powers or the New York equivalent is not the only flaw in their bid for taxpayer standing. They have also failed to establish a sufficient nexus with the Establishment Clause. Cases upholding taxpayer standing have involved direct congressional funding of religious institutions or programs. *See, e.g.*, *Flast*, 392 U.S. at 87 (textbook funding for religious schools); *Katcoff v. Marsh*, 755 F.2d 223, 231 (2d Cir. 1985) (military chaplaincy); *Lamont v. Woods*, 948 F.2d 825, 830 (2d Cir. 1991) (aid for religious schools and hospitals abroad); *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 405 (2d Cir. 2001) (state funding for Alcoholics Anonymous religious programming). Here, in contrast, the only public funding identified was in the form of "capital grant[s]" for "capital construction of the memorial and the museum." J.A. 136; *see also* Appellants Br. 17. American Atheists has not alleged, and there is no evidence to support, that the Memorial and Museum are religious institutions or that the grants were directed to religious activities. Designated for "capital construction," the grants have no nexus to the Establishment Clause.

It is irrelevant that the Museum plans to exhibit the artifact—even assuming that displaying it were to take on some religious significance. In *Doremus v. Board of Education of Borough of Hawthorne*, the Supreme Court denied standing to a

taxpayer who challenged a law that "provide[d] for the reading, without comment, of five verses of the Old Testament at the opening of each public-school day." 342 U.S. 429, 430 (1952). Although the taxpayer alleged a violation of the Establishment Clause, the Court found no sufficient nexus between that Clause and the plaintiff's status as a taxpayer: there was "no averment that the Bible reading increase[d] any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it." *Id*. at 433. The Court emphasized that a plaintiff must establish a "good-faith pocketbook action." *Id*. at 434. Otherwise, the grievance sought to be litigated is "not a direct dollars-and-cents injury," but merely a "religious difference." *Id*. at 434-35.

Similarly, here, because there is no "measurable appropriation" of the grants that is "occasioned solely by the activities complained of," there is no link to the Establishment Clause sufficient to create taxpayer standing. *Id*. at 434; *see also Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 74 (2d Cir. 2001) (general funding of school and teachers "not sufficient" to create taxpayer standing to challenge religious activities at school; "what was required . . . was a showing of a measurable appropriation or loss of revenue attributable to the challenged activities").

B. The Individual Members also lack "offended observer" standing.

The Individual Members' assertion that they have been injured by having "seen the cross, either in person or on television," and by "having a religious tradition not their own imposed upon them," J.A. 21, is also unavailing. They have failed to show a cognizable injury or that their injury will be redressed by this lawsuit.

1. The Individual Members have suffered no cognizable injury as citizens and residents.

Offended observer standing is a controversial category of standing, increasingly questioned by the courts. The Supreme Court most recently addressed and rejected the theory in *Valley Forge Christian College*. The plaintiffs, who were residents of Virginia, Maryland, and Washington, D.C., challenged a federal agency's decision to give property valued at $577,500 to a religious order for no payment. 454 U.S. at 468. The property was located in Chester County, Pennsylvania, *id*. at 486-87, which borders Maryland. The plaintiffs "learned of the transfer through a news release." *Id*. at 487.

The Court of Appeals had granted the plaintiffs standing as "separationists," "by virtue of an injury in fact to their shared individuated right to a government that shall make no law respecting the establishment of religion." *Id*. at 482. (citations and internal quotation marks omitted). The Supreme Court reversed and denied standing, because the plaintiffs failed "to identify any personal injury suffered by them . . . *other than the psychological consequence* presumably

produced by observation of conduct with which one disagrees." *Id.* at 485 (emphasis added). Although—as here—it was "evident" that the plaintiffs were "firmly committed to the constitutional principle of separation of church and State," the Court concluded that standing "is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Id.* at 486. Mere psychological offense—regardless of its intensity—was insufficient to support standing. *See also Catholic Conference*, 885 F.2d at 1025-26 (rejecting standing where primary injury was "discomfiture at watching the government allegedly fail to enforce the law with respect to a third party").

This Court has since hewed closely to the rulings in *Valley Forge* and *Catholic Conference* by granting plaintiffs standing to challenge alleged Establishment Clause violations only where the plaintiffs have a "direct and personal stake in the controversy." *Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1107 (2d Cir. 1992). Thus, in *Southside Fair Housing Community v. City of New York*, the Court granted plaintiffs standing to challenge a land sale by New York City because the property at issue was in their "own backyards" and they claimed they were "being displaced by the creation of an exclusive white Hasidic enclave" as a result. 928 F.2d 1336, 1342 (2d Cir. 1991) (citation omitted). This "distinct and palpable injury" was sufficient to warrant standing. *Id.* at 1341-42.

Similarly, in *Sullivan*, plaintiff Sullivan had standing to sue the Syracuse Housing Authority for contracting with a Christian rescue mission to run an afterschool program in the community center at his public housing complex, Benderson Heights. 962 F.2d at 1110. The rescue mission used the community center four afternoons a week, with an hour of Bible study at the end of each day. *Id*. at 1104. The Court found standing because Sullivan "reside[d] at Benderson Heights" and had the right "as a tenant" to use the community center, which was "functionally analogous to [his] own home." *Id*. at 1107-08. Thus, Sullivan was "not a simple bystander, . . . complaining of the nonobservance by others of the Constitution." *Id*. at 1108. He had a "direct and personal stake in this controversy." *Id*. at 1108.

Finally, in *Cooper v. U.S. Postal Service*, Cooper was granted standing to challenge religious displays at his local Contract Postal Unit (CPU). 577 F.3d 479 (2d Cir. 2009). CPUs are U.S. postal facilities, operated on private property by private parties under contract with the U.S. Postal Service, which has a "complete monopoly" over the carriage of letter mail. *Id*. at 484, 493. The purpose of CPUs is to "furnish postal services to places where it is not otherwise geographically or economically feasible to build and operate official 'classified' post offices." *Id*. at 485. The private operator of the CPU in Cooper's neighborhood had extensive religious displays that verged on proselytizing. *See id*. at 487-88.

Mr. Cooper testified that he used the CPU "because it was closer to his home than the next available post office," that the displays made him "very uncomfortable," and that "when he registered a complaint, he 'was told that [he] could go somewhere else if [he didn't] like it.'" *Id*. at 488. Because Cooper was "using the postal facility nearest his home, and that upon complaint, he was advised to alter his behavior," the Court deemed his injury sufficiently "direct and personal" to confer standing. *Id*. at 491.

The Individual Members' alleged injuries in this case are like those in *Valley Forge* and *Catholic Conference*. None of the Individual Members have shown any injury that is "direct and personal" like the injuries in *Southside Fair Housing Community*, *Sullivan*, or *Cooper*.

First, Mr. Horvitz conceded that he has "never seen the cross," has never "attempted to visit the September 11th Museum," and has "no reason to think he would be denied access" to the Museum in the future. J.A. 117. And the record is simply devoid of other evidence that he has suffered any kind of injury. The generic allegations in the Complaint that the Museum display is "offensive and repugnant to [Mr. Horvitz's] beliefs, culture, and traditions" and that the cross "marginalizes" him as an American citizen, J.A. 21, are not themselves admissible at summary judgment. *Cacchillo*, 638 F.3d at 404. But even if accepted as true, they show nothing more than a philosophical objection to the display, triggered

apparently by reading about it in the news, essentially the same "injury" that was soundly rejected in *Valley Forge*.

Mr. Bronstein likewise testified that he has "not been to the memorial," has no definite plans to go, and has never been to the Museum (since it is not yet open). J.A. 95. He has no idea how the artifact will be displayed. "All [he] know[s] it is going to be inside the museum." J.A. 96. He concedes that no one would ever "physically stop [him] from going in," but has nonetheless self-determined that "[i]f the cross is there [he] will not be able to go." J.A. 95. He also testified that "at times" he was "continuing to suffer possibly slight depression, headaches, anxiety and mental pain and anguish" and has "tried to keep away from the site" to "control" his alleged injuries. J.A. 102.

While this testimony at least qualifies for consideration at the summary judgment stage, it is no different than the allegations made on Mr. Horvitz's behalf, except perhaps in degree of intensity. But the mere difference in intensity of disagreement with the Museum's action is insufficient to trigger standing. *Valley Forge*, 454 U.S.at 486. Mr. Bronstein's alleged "injuries" are no more direct an personal to him than to any other person in the U.S. who vehemently objects to the display and determines not to visit it. *Id*. at 487 ("claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing").

Finally, Ms. Everhart also testified that she has "not visited the [M]useum yet," although she intends to go after it opens. J.A. 109-11. She does claim to have suffered from "dyspepsia," J.A. 114, although she experienced it "most vividly" because of the cross before it was ever moved to the Museum. App. J.A. 114. Again, her assertion goes only to the intensity of her disapproval of the cross generally, not to any showing of injury directly and personally to her as a result of the Museum display.

In sum, none of the Individual Members has any injuries that are "direct and personal" to them. There is no allegation of unconstitutional action in their "own backyards" as in *Southside*, or someplace "functionally analogous to [their] own home" as in *Sullivan*. They have not shown that they are being kept from using essential government services that are close to their homes as in *Cooper*, or that a religious display in connection with such services (available only from the government) is so extensive that it essentially amounts to proselytizing, also as in *Cooper*.

In addition, the indicia of state action in this matter is so slender that it further demonstrates that none the Individual Members could possibly have suffered any cognizable injury.[4] The only relevant action by the Port Authority was in donating

[4] At summary judgment the Port Authority and Museum both argued that the decision to display the artifact did not involve state action. Although they have not renewed that argument on appeal, the Court may still consider it for the purpose of

the artifact, which was unavoidably in its possession from the ruins of the World Trade Center, to a museum dedicated to memorializing the events at Ground Zero. The American Atheists have not alleged that the donation itself violated the Establishment Clause. But even if they had, their mere observation of that allegedly wrongful conduct would not give them the right to sue the Port Authority. *Cf. Valley Forge*, 454 U.S. at 485-86 (no standing for psychological injury from observing federal agency's allegedly unlawful transfer of property to religious order); *Catholic Conference*, 885 F.2d at 1025 (no standing for psychological injury suffered by observing federal agency's allegedly favorable treatment of pro-life religious organizations).

Similarly, it is undisputed that the Museum had sole authority over the decision to display the artifact. *See* Dist. Ct. Dkt. 54 at 8; Dist. Ct. Dkt. 60 at 5. And there is no evidence that government funds had any impact on that decision. In this context, an offended observer cannot have standing to challenge the Museum's private decision to display a historical artifact that is entirely within the scope of its mission just because the observer lives in the same city where the Museum is located.

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determining whether there has been state action sufficient to cause an injury for standing. *Thompson*, 15 F.3d at 248 ("[W]e are required to address [a standing] issue even if the court[ ] below [has] not passed on it ... and even if the parties fail to raise the issue before us.") (citation omitted).

A standing doctrine that would grant essentially any offended observer standing to sue the privately-owned Museum for its decisions regarding what to display, simply because the Museum has received some public funding and is located in the bystander's home town, and thereby invoking the full force of the federal judicial process, with the attendant hundreds of hours in attorney time, and hundreds of thousands of dollars in attorneys fees, is no limiting doctrine at all. Whatever vexatious challenges exist "concerning how to apply the injury-in-fact requirement in the Establishment Clause context," *Cooper*, 577 F.3d at 490—and certainly they do exist—they are in no way manifest in this lawsuit. The Individual Members have no injury that is "distinct and palpable" or "direct and personal" to them. Their objections are simply the "noncognizable psychological consequences produced by observation of personally disagreeable conduct," *Sullivan*, 962 F.2d at 1108—the view of "separatists" to one degree of intensity or another, but by no means distinguishable from the objections of any other separatist across the country. The Individual Members simply don't like the display, but that does not give them standing to sue over it.

2. The Individual Members' alleged injuries are not redressable by the remedies they seek.

In their opposition to the Port Authority's and Museum's motions for summary judgment, and again on appeal, the American Atheists have unexpectedly disavowed any intent to prohibit the Museum from displaying the artifact. They are

now "convinced . . . that it [is] not the most desirable remedy." Appellants Br. 2. They do not "seek to re-write history or rip from museums all acknowledgment of our country's historical relationship with faith." *Id*. Rather, they now desire only some unidentified "contextual adjustment" to the manner in which the artifact will be displayed. *Id*.

This about-face in litigation strategy, however, moots any standing that the Individual Members might have had, because the injuries they claim are no longer redressable under the new relief being sought.

Mr. Bronstein, for example, emphatically testified that even an impossibly dramatic "contextual adjustment"—namely, adding a memorial of "equal size, equal stature and equal position" for "every single one of 3,000 religions" in this country—would still not satisfy him. J.A. 326. He repeatedly emphasized that, no matter how the artifact is display, "[i]t is an injustice, it is unconstitutional to put that religious icon into that museum." J.A. 97. "[I]t would not matter what they put around the cross[.] . . . It should not be on the property, forget about even the museum, it should not be on the World Trade Center property." J.A. 98. Even signs providing context he claimed would be "totally ineffective." J.A. 98. "I don't want the cross in there at all." J.A. 326.

Ms. Everhart concurred that "it would not matter how the museum displays the cross beam, rather it is the display itself" that is "problematic." J.A. 105-6, "It is unconstitutional for that cross to be there on government property." J.A. 107.

Thus, even if Mr. Bronstein or Ms. Everhart had properly alleged an injury sufficient to give them standing, they have waived any relief that would address the injury as they themselves describe it. By their own testimony, regardless of how the display were "contextualized," they would still have the same psychological objection to the artifact's display in the Museum. Thus, they have mooted any standing they might otherwise have had.

C. American Atheists lacks standing as an organization.

American Atheists also lacks standing as an organization, either through its members or in its own right. First, because none of the Individual Members has standing, American Atheists cannot sue on its members' behalf. *Bldg. & Const. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 144 (2d Cir. 2006) (holding that an association may sue on its members behalf only if its members "would otherwise have standing to sue in their own right").

Moreover, American Atheists lacks any basis for suing in its own right. It has not alleged that it is a taxpayer or that it could meet the narrow qualifications for taxpayer standing. Nor has it alleged that it has directly suffered a cognizable injury as a result of the artifact's display.

As for standing on its equal protection claim, American Atheists does allege that "[o]n multiple occasions" it "publicly offered to provide a memorial for the [Museum], at its own cost, to represent the approximately 500 non-religious victims of the attack on the World Trade Center[,]" but that it has "never received a response." J.A. 28-29. In its appeal brief, it reiterates that it made at least one such offer, citing as evidence a deposition that does not seem to be in the record. *See* Appellants Br. 17 (citing "Kagin Decl., Ex. 3:"); *see also* J.A. 293-94 (Kagin Decl. with no "Ex. 3"). Thus, there appears to be no evidence sufficient to support this claim for standing at the summary judgment stage. *See also* J.A. 141 (Museum director testifying that "[n]o one came to me and offered me anything.")

But even accepting American Atheists' allegations as true, they would still not sufficient to create standing for at least two reasons. First, it is undisputed that the Museum is not displaying memorials to various religions or individuals. It is displaying actual artifacts from the ruins of, and the recovery efforts that followed, the destruction of the World Trade Center. J.A. 141 ("We are 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."). Second, it is also undisputed that the Museum has offered to display any actual "atheist" artifacts from the events of September 11 if American Atheists could identify any, which it has been unable to do. J.A. 141 ("If there were something that represented an atheist that was part of the recovery at

9/11 I would have no problem including that in the museum."); J.A. 142 ("[I]f there were an atheist story that came out of the story of 9/11 . . . and it was so central, so central to the story in the way that the recovery worker experience is central to the story of 9/11, we would have hypothetically considered including that. No such artifact ever came forward.").

American Atheists cannot invoke standing simply by having offered (assuming it ever did) some random memorial *unrelated to 9/11* to the Museum and having been rejected. Yet that is the best spin that can be put on its evidence. Because the evidence—even in that best possible light—is still insufficient to create a genuine issue of material fact as to whether the Museum discriminated against American Atheists, it is also insufficient to support standing. American Atheists cannot simply compel itself into standing by having offered items to the Museum that are irrelevant to the Museum's purposes. *See Mehdi v. U.S. Postal Serv.*, 988 F. Supp. 721, 731 n.9 (S.D.N.Y. 1997) (Sotomayor, J.) ("[T]he fact that plaintiffs have asked the Postal Service to put up a Crescent and Star and have been refused does not constitute the 'personal' denial of equal treatment required to support standing."). For all these reasons, the American Atheists lack standing.

II. The Museum's display of the artifact is neither an establishment as originally understood nor as recognized by this Court.

As understood by the Founders of the Constitution and as interpreted by this Court, establishment of religion consists of several well-defined practices centered

on government coercion of religious belief or practice. The Museum's display falls far outside these categories of practices and thus does not—and *cannot*—inflict injury on the American Atheists.

A. At the founding, an establishment consisted of government control, government coercion, government funding, or assignment of government powers to church authorities.

At the time of the founding, the "essential . . . ingredients" of an establishment took one of four forms. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2118, 2131 (2003). The first element of an establishment was public financial support of the church. This took many forms—from compulsory tithing, to direct grants from the public treasury, to specific taxes, to land grants. *Id.* at 2147. The second element of an establishment was state control over the institutional church. This control manifested itself in two ways that are startling to modern eyes: the control of religious doctrine and the appointment and removal of religious officials. *Id.* at 2132. The third feature of establishment was the coercion of individuals' religious beliefs and practices. This took three main forms: compelled church attendance, prohibition on worship in dissenting churches, and exclusion of dissenters from political participation. *Id*. at 2144, 2159, and 2176. The last element of establishment was government assignment of important civil functions to church authorities. States used religious officials and religious

institutions for social welfare, elementary education, marriages, public records, and the prosecution of certain moral offenses. *Id.* at 2171-76.

In sum, an "establishment of religion" had a very specific meaning for the Founders. It consisted of government funding of the church, government control over doctrine and personnel of the church, government coercion of religious belief and practice, and government use of the state church to carry out civil functions. Laws imposing these elements created an established church. Laws that lacked these elements did not.

B. The Museum's display of the artifact does not fall within any recognized category of establishment.

This Court's Establishment Clause jurisprudence is in line with the historical understanding of establishment. This Court has repeatedly recognized that there are potential Establishment Clause problems with government funding of religious entities, government control over religious doctrine, government coercion of religious practices, or government use of religious entities to carry out civil functions. Because the Museum's display of the Artifact involves none of these elements, it does not violate the Establishment Clause.

1. The Museum's display of the artifact does not constitute impermissible government funding.

The first element of establishment is government financial support of religion. In *DeStefano*, 247 F.3d 397, this Court considered whether state funding for the

religiously-themed Alcoholic Anonymous (A.A.) program at a private alcoholic treatment facility violated the Establishment Clause. This Court was clear that "the Establishment Clause prohibits the expenditure of funds to aid in the establishment of religion," *Id*. at 407. It acknowledged, however, that the inquiry was fact-specific and held that, while the mere inclusion of the A.A. program at the facility was constitutional, the funding would have been problematic if, for example, the facility was *required* to integrate religious organizations into its treatment programs in order to receive funding. *Id*. at 410.

Elsewhere, this Court has noted that if a "government program is 'neutral with respect to religion,'" it "'is not readily subject to challenge under the Establishment Clause.'" *Incantalupo v. Lawrence Union Free Sch. Dist. No. 15*, 380 F. App'x 59, 62 (2d Cir. 2010) (quoting *Zelman v. Simmons–Harris*, 536 U.S. 639, 652 (2002)). Here, there is no concern about discriminatory funding of religious practices. The Museum will display a broad range of historical symbols, including the cross-shaped artifact and "symbol steel" with depictions of "a Star of David, a Maltese cross, the Twin Towers, and the Manhattan skyline." J.A. 335.

Setting also matters. Every court to consider 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.[5]

2. The Museum's display of the artifact does not constitute government control over religious groups' practices.

The second element of establishment is government interference in the doctrine or governance of religious institutions. A prime example of this type of violation is *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008). There, an African-American Catholic priest brought a race discrimination claim against the Roman Catholic Diocese and its Bishop. This Court held that if a court overruled the church's decision about a ministerial employee, it would become impermissibly entangled "with religious doctrine." *Id*. at 209.

This element of establishment is completely absent here. The Museum's display of the artifact has no impact on church polity, internal church decisions, or church doctrine. It does not take sides in theological disputes or interfere with internal church governance. And it does not declare official state doctrine. The artifact is

[5] *See, e.g., Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1052 n.33 (9th Cir. 2010); *Van Orden v. Perry*, 351 F.3d 173, 181 (5th Cir. 2003), *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); *Allen v. Hickel*, 424 F.2d 944, 949 (D.C. Cir. 1970); *Brooklyn Inst. of Arts & Sci. v. City of New York*, 64 F. Supp. 2d 184, 205 (E.D.N.Y. 1999).

simply one of many symbols that helps tell the story of the September 11 rescue and recovery effort.

3. The Museum's display of the artifact is not government coercion of private parties to engage in religious activity.

The Establishment Clause likewise forbids the government from coercing an individual to engage in religious practice contrary to her beliefs. This Court invoked that principle in *Warner v. Orange Cnty. Dep't of Prob.*, 115 F.3d 1068 (2d Cir. 1996). In that case, a probationer facing a criminal sentence for drunk driving was required as a condition of probation to attend A.A. meetings, which included "explicit religious content" and "repeatedly turned to religion as the basis of motivation." *Id*. at 1075, 1076. The Court held that the religious content of the meetings, coupled with both the county's failure to provide alternative therapy programs and the threat of incarceration to the probationer if he failed to participate, violated the Establishment Clause: "Our ruling depends . . . on the 'fundamental limitation[ ] imposed by the Establishment Clause' that bars government from 'coerc[ing] anyone to support or participate in religion or its exercise.'" *Id*. at 1075 (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)).

Again, this element of establishment is completely absent here. There is no coercion: no one is forced to attend the Museum, or to view the artifact. There is not even any religious activity. The artifact "express[es] many different sentiments." While some may find the artifact religiously significant, "it does not

follow that the museum, by displaying [the artifact], intends to convey or is perceived as conveying the same 'message.'" *Pleasant Grove City v. Summum*, 555 U.S. 460, 476 n.5 (2009).

4. The Museum's display of the artifact does not impermissibly cede government powers to religious organizations.

The last element of establishment is the assignment of important civil functions to religious authorities. In *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 418 (2d Cir. 2002), this Court struck down New York's kosher fraud statutes, which defined "kosher" as food that has been "prepared in accordance with the Orthodox Hebrew religious requirements." The statutory reference to Orthodox standards led the state to delegate its power to the Orthodox rabbis who sat on the state advisory board on kosher law enforcement. *Id*. at 424. As this Court explained, not only did the laws unconstitutionally prefer the Orthodox definition of "kosher" over other ones, but they also ran "afoul of 'the core rationale underlying the Establishment Clause[, which] is preventing 'a fusion of governmental and religious functions.'" *Id*. at 428 (quoting *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982)).

Here, there is no such fusion of governmental and religious functions. The Museum's display of the Artifact does not task religious bodies with carrying out functions that properly belong to the State alone, such as interpreting and enforcing its statutes. The display thus does not violate the Establishment Clause.

CONCLUSION

The American Atheists are disgruntled about the display of the Ground Zero cross. But that does not entitle them to invoke the judicial system to make themselves feel better. The artifact is part of the history of September 11 and appropriately belongs in the September 11 Museum. It causes no cognizable injury and is so far removed from the concerns underlying the Establishment Clause that the Court should not hesitate to dismiss this case for lack of standing.

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Respectfully submitted,

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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 6979 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: November 15, 2013

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