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## Religion: Display of Cross-Shaped Girder at 911 Memorial Site Does Not Constitute Establishment of Religion

## *American Atheists, Inc. v. Port Authority of New York*, No. 13-1668-cv (2d Cir. July 28, 2014).

The Second Circuit has upheld a District Court decision rejecting a claim by an atheist group that a 911 memorial display of a cross-shaped girder which had previously been venerated in a nearby church violated the Establishment Clause.

After September 11, 2001, rescue workers at the World Trade Center site worked for many months to clean up the debris and recover the bodies of those who lost their lives. Some time into this recovery and cleanup effort a worker, Frank Silecchia, found a column and perpendicular welded together from the intensity of the collapse that appeared, to many, as a Latin cross. Workers lifted it from the rubble and erected it on a platform, where a Franciscan priest blessed it and began holding services before it. Many people attended the services, and no single sect of any faith dominated the site. In fact, many nonbelievers visited the site as well.

Through the early 2000's the Port Authority of New York and the September 11 Memorial and Museum Foundation collected artifacts from the September 11 site to place in a museum that would eventually be constructed. In 2006, it was agreed that the cross should be one of those artifacts. But instead of placing the cross at a hangar with all other artifacts until the museum opened it was placed at nearby St. Peter's Roman Catholic Church where it could be visited and viewed by the public. In 2011 the September 11 Memorial and Museum Foundation retook physical possession of the cross and relocated it to the museum on the World Trade Center site. This site includes an outdoor memorial and an indoor museum, wherein over 1,000 objects and items from the site ranging from small personal effects like glasses to large pieces of the buildings themselves can be viewed.

The cross was placed in an exhibit called “finding meaning at Ground Zero” where a general textual panel states how workers struggled in the months after the attack as the difficult recovery worked stretched on, that some turned to patriotism by hanging flags across the site and others questioned faith or held onto it. A panel more specific to the cross itself recounts the facts of its recovery, how it was used at the site by all faiths and worshipped by some, and that it “represents good over evil” and “the human spirit.” This exhibit also displays and notes that ironworkers at the site cut other religious and nonreligious symbols from the debris, including a Maltese Cross, a Star of David, and the Manhattan skyline.

The American Atheists filed suit in 2011, arguing the display of the cross at the museum violated the Establishment Clause. The District Court rejected this argument and found, as a matter of law, that the display did not violate the Constitution. The American Atheists timely appealed.

**HELD**: The Second Circuit affirmed the District Court, holding the display did not violate the Establishment Clause.

**DISCUSSION**:The Circuit Court began by recounting the three familiar prongs of the *Lemon* test under which government neutrality toward religion is evaluated; that the government action “(1) “have a secular . . . purpose,” (2) have a “principal or primary effect . . . that neither advances nor inhibits religion,” and (3) “not foster an excessive government entanglement with religion.” Under the first prong, the Court of Appeals evaluated both the actual and perceived purpose of the cross display to a reasonable observer. American Atheists argued the actual purpose must be religious since the significance of the item derives from its religious symbolism. The Circuit Court found, however, that the actual purpose of the display was secular based on the government agencies’ stated purpose of recounting the historical events of September 11, that once at the museum it was no longer venerational but was displayed with text and documents focusing on history. The Second Circuit denied the argument that, because an item has religious significance, its display is necessarily the promotion of religion.

American Atheists argued also that, even if the actual purpose was secular, the reasonable observer would perceive the cross as religious because the Latin cross is inherently religious--and this one had been in actual religious worship at Ground Zero. The Court of Appeals countered that Supreme Court precedent dictates a reasonable observer would know all the circumstances of the display, including the cross’ historical role at Ground Zero, that the government agencies advised the public and religious groups using the cross that once at the museum it would cease to be used in any religious worship, that the cross is displayed in a section of a museum focused on how people at the site and the throughout the nation dealt with September 11 and its aftermath, that the lack of any mention at the museum of how atheists in particular dealt with these tragedies is a function of the fact that there is no artifact specifically showing a particular way atheists alone came to terms with September 11, and that the plaque depicting the names of the September 11 victims lists all without regard to their religious affiliation or lack thereof. The court found this reasonable observer would not perceive the government display as religious given these “secular” facts relating to the museum and the cross.

The Circuit Court also denied that the primary effect of the display was religious or that a reasonable observer would think the government was sponsoring or endorsing religion by displaying the cross. The court focused on the same facts above to determine that the reasonable observer would not perceive endorsement. Overall, the Court did not see the display

of this one cross among thousands of other Ground Zero historical artifacts as creating a message that atheists were outsiders.

The court also rejected the American Atheists' entanglement argument, saying that displaying "an object with religious significance in a public museum does not manifest entanglement unless religious authorities played a role in that decision," of which there was no record here.

http://www.ca2.uscourts.gov/decisions/isysquery/f4247446-1ce8-4c40-be80-385791f52110/1/doc/13-1668_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/f4247446-1ce8-4c40-be80-385791f52110/1/hilite/ (last accessed August 14, 2014)