

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.

(For Continuation of Caption See Inside Cover)

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

**AMICUS BRIEF OF FR. BRIAN JORDAN, OFM
IN SUPPORT OF DEFENDANTS-APPELLEES**

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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.

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STATEMENT OF INTEREST

Amicus curiae Father Brian Jordan, OFM submits this brief pursuant Federal Rule of Appellate Procedure 29(a).¹

Fr. Jordan is a member of the Orders of Friars Minor (OFM), better known as the Franciscan Brothers. Fr. Jordan was ordained in 1983. During the past thirty years, he has held a variety of positions, both within the Catholic Church and in the larger community. As a pastor at churches in New York City, Boston, and Maryland, Fr. Jordan has devoted his professional efforts to the needs of laborers and immigrants. He is currently a campus minister at St. Francis College, Brooklyn, N.Y.

Fr. Jordan holds a B.A. in History, Siena College (1978); a Master of Divinity, Washington Theological Union (1982); a Doctor of Ministry (highest honors), Andover Newton Theological School (1990); and a Master of Professional Studies in Industrial and Labor Relations,

¹ No counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* and his counsel contributed monetarily to the preparation or submission of the brief. All parties did not consent to the filing of this brief; thus, *amicus* has filed this brief along with a motion for leave to file, pursuant to Fed. R. App. P. 29(a).

Cornell University (2008). Fr. Jordan has written extensively on issues relating to labor unions, immigration affairs, and September 11.

Fr. Jordan has received the following community awards: Community Service Award, Office of the City Comptroller, New York, N.Y. (2008); Humanitarian Service Award, NYC Central Labor Council, New York, N.Y. (2003); Distinguished Alumni Award, Siena College (2003); Community Service Award from Mayor Michael Bloomberg (2002); and Governor's Award for Social Services, Annapolis, MD (1995 & 1999).

On September 11, 2001, Father Jordan lost many very close friends among the over 2,800 victims who were killed in the terrorist attacks on the World Trade Center. Among those victims was his mentor, Rev. Mychal Judge, the beloved chaplain of the Fire Department of New York. Later that morning, Fr. Jordan began ministering to all faiths at Ground Zero. In his words, "They gave me a gas mask and a vial of holy water and I went to work blessing bodies and body parts."²

² Bonnie DeSimone, *It's More Than Just a Race; Events of Sept. 11 Etched in Minds of Many Runners*, Chicago Tribune, Nov. 4, 2001, at C10.

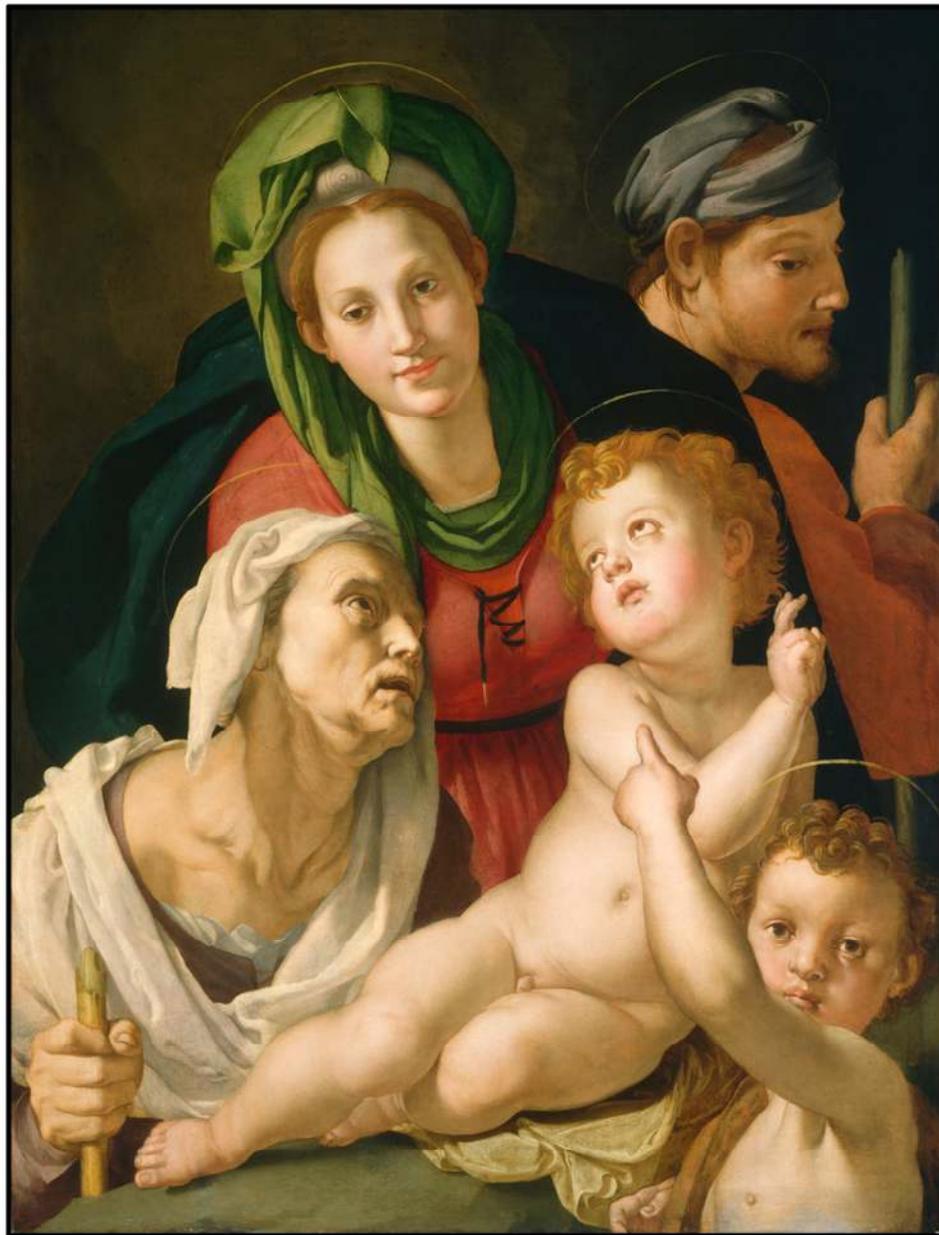
As a chaplain at Ground Zero, Fr. Jordan counseled thousands of individuals from September 2001 through June 2002. In the days following the attack, construction workers found the World Trade Center Cross amid the wreckage of the World Trade Center. It quickly became a symbol of hope and comfort, as well as a gathering place for first responders, rescue workers and others of all—and no—religious faiths. Fr. Jordan blessed the Cross, and it remained at or near Ground Zero for the decade following the attacks. On July 23, 2011, shortly before the Cross entered the 9/11 Museum, Fr. Jordan again blessed the Cross, asking for the support of “God the Father,” who “is the Father of Abraham who is fully embraced by Judaism, Christianity and Islam.” Fr. Jordan also referenced Shintoism, Hinduism, and the Decalogue of Assisi, a non-denominational proclamation by Pope John Paul II during an interfaith meeting of 250 world religious leaders.

In response, the American Atheists sued not only the Museum but Fr. Jordan personally. They accused Fr. Jordan of blessing the Cross and suggesting that it be included in the Museum. Ultimately, Fr. Jordan was dismissed from the case, after which the Atheists sought to depose him. They gave up that effort when Fr. Jordan moved to

quash the deposition because of the subpoena's unreasonableness and burden.

SUMMARY OF THE ARGUMENT

In 1527, Il Bronzino created a striking Mannerist painting of the world's most famous mother and child.



Called *The Holy Family*, Bronzino's work depicts the Virgin Mary and the baby Jesus being visited by Mary's cousin, the older Elizabeth, along with her infant son, John the Baptist. Today, the U.S. government publicly displays *The Holy Family* in the National Gallery of Art, in Washington, D.C.³

In 1769, Father Junípero Serra, a Franciscan missionary, established his first of nine religious missions in what is now San Diego, California. His work was integral to the exploration and development of the future state of California. For this, he is recognized as the leading missionary in the early exploration and development of North America. Several state memorials honor Fr. Serra's legacy, including the Junípero Serra Museum in Presidio Park, San Diego, and the tribute established in 1965 in Capitol Park (part of the California State Capitol Museum).⁴ In 1931, the State of California donated a statue of

³ See <http://www.nga.gov/content/ngaweb/Collection/art-object-page.531.html>.

⁴ See California State Capitol Museum, *Father Junípero Serra*, <http://capitolmuseum.ca.gov/VirtualTour.aspx?Content1=1416&Content2=1422&Content3=546>.

Fr. Serra to the National Statuary Hall Collection in the U.S. Capitol Building.⁵ Millions of tourists see these exhibits annually.



These overtly religious works comprise but two examples of thousands that would be ripe for removal from public spaces under the theory advanced by the American Atheists and the four individuals

⁵ Architect of the Capitol, *Explore Capitol Hill, Father Junipero Serra*, <http://www.aoc.gov/capitol-hill/national-statuary-hall-collection/father-junipero-serra>.

(collectively “American Atheists” or “Atheists”). The American Atheists may claim that the present dispute is narrow, concerning only the placement of the World Trade Center Cross in the 9/11 Museum. But their view of the Establishment Clause, if adopted, would rewrite the history of Ground Zero and ignore the Founding Fathers’ directives embodied in the Religion Clauses of the First Amendment. Even their attempt to reframe the issue as seeking “equal representation” fails. *Post hoc* inclusion of atheist symbols does injustice to the role the Cross played at Ground Zero.

The Establishment Clause does not prohibit a government from displaying religious objects in a museum. The American Atheists have identified no court that, under the aegis of the Establishment Clause, has banned a historical item with religious content or significance from a government-funded museum. Nor have the Atheists identified any decision requiring the addition of extraneous, irrelevant displays in a museum to “cure” an alleged Establishment Clause violation. A government museum need not cede to the demands of every individual interest group in the name of purported “equal representation” of other beliefs, including atheism.

The hostility with which the Atheists chase religion from the public domain is remarkable. Courts should not condone the use and threat of litigation to strip any hint of religion from the 9/11 Museum and other public spaces.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE PERMITS RELIGIOUS DISPLAYS IN PUBLIC

Contemporary Establishment Clause litigation has left in its wake a most tortuous jurisprudence. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), provides the oft-cited test, but it is routinely criticized. Notwithstanding which formalistic test applies, precedent uniformly considers the historical purpose of the Establishment Clause and the context in which a particular item is displayed by the government. Under this inquiry, and given the long history of religion in the United States, the Establishment Clause cannot be used to censor historical exhibits merely because the exhibit includes or even highlights a religious aspect of the history.

A. Establishment Clause Jurisprudence Frequently Overlooks The Original Purpose Of The First Amendment

If there is any consensus about the Establishment Clause, it is that the Supreme Court's jurisprudence is in disarray. *See Mount*

Soledad Mem'l Ass'n v. Trunk, 132 S. Ct. 2535, 2535 (2012) (Alito, J., concurring in denial of certiorari) (“This Court’s Establishment Clause jurisprudence is undoubtedly in need of clarity”); *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (“Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions.”); *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (“[T]he endorsement test is flawed in its fundamentals and unworkable in practice.”); *Lemon*, 403 U.S. at 666 (White, J., concurring in judgment) (describing the entanglement reasoning as “a curious and mystifying blend”).

The Supreme Court is not alone in its criticism. *See, e.g., John Doe 3 v. Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (en banc) (Easterbrook, J., dissenting) (“Standards such as those found in *Lemon* . . . and the ‘no endorsement’, not only are hopelessly open-ended but also lack support in the text of the [F]irst [A]mendment and do not have any historical provenance.”). This Court has also

recognized the problem. *Skoros v. City of New York*, 437 F.3d 1, 13 (2d Cir. 2006) (noting the “frequently splintered Supreme Court decisions”).

What is clear, however, is the underlying premise that courts must respect the Founding Fathers’ understanding of the Establishment Clause. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) (“[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.”); *see also Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (“Historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.”).

Where much of the jurisprudence goes astray is its disconnect from the historical foundation of the Establishment Clause. The original understanding of the Establishment Clause focused on precluding government-sanctioned religions and the coercion of citizens to participate in those religions, rather than the mere display of religious items in public. *See* Michael W. McConnell, *Establishment*

and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2131 (2003) (“An establishment is the promotion and inculcation of a common set of beliefs through governmental authority.”). “The Framers understood establishment necessarily [to] involve actual legal coercion.” *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) (quotation marks omitted).

Notwithstanding the questionable analyses of some Establishment Clause cases, many decisions adhere to the historical concepts. This Court has framed the analysis in a way that appears consistent with the historical focus: “It has long been accepted that the Establishment Clause prohibits the government from officially preferring one religious denomination over another: ‘The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.’” *Skoros*, 437 F.3d at 16 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). Indeed, the Religion Clauses “seek to ‘assure the fullest possible scope of religious liberty and tolerance for all.’” *Van Orden*, 545 U.S. at 698

(Breyer, J., concurring in judgment) (quoting *Abington*, 374 U.S. at 305 (Goldberg, J.)).

Importantly, “[t]he First Amendment leaves the Government in a position not of hostility to religion, but of neutrality.” *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring). For this reason, “[t]he philosophy is that the atheist or agnostic—the nonbeliever—is entitled to go his own way.” *Id.* Accordingly, the Government does not “establish” a religion whenever the Government permits religious activity in the public sphere, let alone when it merely acknowledges religion’s existence or its role in the seminal moments of our Nation’s history. Indeed, “[t]he Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin.” *Stone v. Graham*, 449 U.S. 39, 45-46 (1980) (Rehnquist, J., dissenting).

Stated perhaps too broadly, “government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious

institution, and may not involve itself too deeply in such an institution's affairs." *Allegheny*, 492 U.S. at 590-91.

The doctrinal disarray creates unpredictability, which provides opportunity for those hostile to religion to employ the judicial process to try to extirpate any vestige of religion from the public square. Through lawsuits and the threat of burdensome litigation, a zealous few harass and intimidate small towns, government agencies, civic groups, and private citizens who do no more than memorialize the glorious and sometimes tragic history of their communities and the Nation.

B. Religion Has Been And Continues To Be An Integral Part Of United States History

Whether intentionally or not, the American Atheists' brief ignores the fact that religion has always been and continues to be an integral component of the United States. Indeed, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); *see also Lee*, 505 U.S. at 633 (Scalia, J., dissenting) ("The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition."); *Abington*, 374 U.S. at 226 ("The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home,

the church and the inviolable citadel of the individual heart and mind.”); *Engel v. Vitale*, 370 U.S. 421, 434 (1962) (“The history of man is inseparable from the history of religion. And . . . since the beginning of that history many people have devoutly believed that ‘More things are wrought by prayer than this world dreams of.’”).

Examples abound of the historical and continuing role of religion in society and government. In *Marsh*, 463 U.S. at 788, the Court observed that “the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer.” The federal government has conducted business for over two hundred years and has continuously recognized the religious component of society. *See Lee*, 505 U.S. at 631-46 (Scalia, J., dissenting).

The Supreme Court itself starts its session with a prayer: “God save the United States and this Honorable Court.” *See Engel*, 370 U.S. at 439 (Douglas, J., concurring) (“That utterance is a supplication, a prayer in which we, the judges, are free to join, but which we need not recite any more than the students need recite the New York prayer.”). The U.S. Court of Appeals for the D.C. Circuit uses the same invocation.

Congress has continued the Founders' acknowledgement of religion. The Northwest Ordinance, reenacting the Northwest Territory Ordinance of 1787, provided: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 50, 52 (1789). In 1865, Congress authorized that "In God We Trust" be added to coins. *See* Act of March 3, 1865, 13 Stat. 517, 518. In 1954, Congress amended the Pledge of Allegiance to include "under God." Act of June 14, 1954, Pub. L. No. 83-396, ch. 297, 68 Stat. 249; *see also* Pub. L. No. 107-293, 116 Stat. 2057 (2002) (reaffirming the "under God" phrase"). In 1956, Congress proclaimed the Nation's motto to be "In God We Trust." Pub. L. No. 84-140, 70 Stat. 732 (1956). Each of these non-sectarian phrases evinces the intricate role that religion plays in public life. *See also* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

Additionally, "[e]ach of our Presidents, from George Washington to John F. Kennedy, has, upon assuming his Office, asked the protection and help of God." *Engel*, 370 U.S. at 446 n.3 (Stewart, J., dissenting). This trend continues. During his inaugural address in January 2013,

President Obama remarked that, “while freedom is a gift from God, it must be secured by His people here on Earth.”⁶ In 2001, George W. Bush invoked the parable of the Good Samaritan, when he stated: “When we see that wounded traveler on the road to Jericho, we will not pass to the other side.” In 1997, William J. Clinton ended his address with: “May God strengthen our hands for the good work ahead—and always, always bless our America.”⁷

These few examples belie the Atheists’ attempt to litigate their claims in a vacuum, divorced from history and the particular events at Ground Zero. *See Lynch*, 465 U.S. at 674 (observing the “unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789”).

⁶ The White House, Inaugural Address by President Barack Obama, Jan. 21, 2013.

⁷ Numerous other court decisions have catalogued the long-standing history of religion in public life. *See, e.g., McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting); *Newdow v. Roberts*, 603 F.3d 1002, 1016-22 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment).

II. DISPLAYING THE WORLD TRADE CENTER CROSS IN THE MUSEUM IS FULLY CONSISTENT WITH THE ESTABLISHMENT CLAUSE

Here, the district court correctly granted summary judgment in favor of the defendants, notwithstanding the “bedeviled” nature of Establishment Clause jurisprudence. To exclude the Cross—a symbol of hope and comfort at Ground Zero—from the 9/11 Museum would be an act of revisionist history. To include objects unconnected to Ground Zero—under the cloak of “equal representation”—would be equally revisionist. Neither the Establishment Clause’s text nor history permits such historical censorship merely because the events include religion. Moreover, the district court’s legal analysis comports with the original understanding and purpose of the Establishment Clause. Finally, adopting the Atheists’ unsupported interpretation of the Establishment Clause would logically permit efforts to eradicate innumerable artifacts and art from the public arena.

A. History Demands That The Museum Include The World Trade Center Cross

When over 2,900 individuals perished on 9/11, the Nation’s consciousness was shocked. The individuals who worked the recovery sought solace. Many spent days and nights literally picking up human

body parts from the wreckage. Not surprisingly, many workers sought some explanation for the utter destruction of Ground Zero.

Two days after the attacks, construction workers found the World Trade Center Cross amid the rubble of 6 World Trade Center.⁸ The Cross quickly became a source of inspiration for workers at Ground Zero. One account reported that “rescuers wrote messages on the cross for those who died or have been working at Ground Zero.”⁹

The Cross became the centerpiece of the search for answers and healing. Numerous reports detailed the volunteer efforts of Fr. Jordan at Ground Zero. On October 5, 2001, Fr. Jordan, along with other workers, participated in a ceremony at Ground Zero.

At the ceremony yesterday, a crowd of workers, nuns, firefighters, police officers and others watched as the priest reached the beam. It had been moved by crane to what once was the West Street walkway. A welder had attached newly minted state quarters to the foot of the cross. Names of some of the dead and “God Bless Our Fallen Brothers,” had been etched into it.

⁸ Major newspapers reported on the Cross and Fr. Jordan’s volunteer efforts at Ground Zero. *See, e.g.,* Mae M. Cheng, *Where Faith Is Needed: Priest Helps Rescuers Who Seek Spiritual Sustenance*, *Newsday*, Sept. 29, 2001, at A2.

⁹ Mae M. Cheng, *America’s Ordeal: Cross Brings Spiritual Lift to Workers*, *Newsday*, Oct. 5, 2001, at A46.

Bagpipes played “Amazing Grace” as the bucket, carrying Father Jordan, a police officer, a firefighter and others, reached the cross.

Sprinkling holy water from his aspergillum on each side of the cross, Father Jordan prayed: “By the grace and love of almighty God, to the north, I bless this cross in the name of the father, the son and the holy spirit,” and then repeated the blessing for east, west and south.

Some watched silently. Some cried. Some just smoked cigarettes. “Keep playing bagpipes,” Father Jordan shouted. A group of workers holding hands sang “God Bless America.”

A nun prayed while trying to turn off her buzzing cellphone. “You can never ever destroy the spirit of America,” Father Jordan said, and the crowd cheered: “U.S.A. U.S.A.”

Then the priest blessed rescue dogs (Atlas and Keifer) and their veterinarians.¹⁰

In December 2001, a N.Y. Times reporter wrote the following account:

Father Jordan has been saying Mass every Sunday since September at the base of a split beam found by ironworkers in the rubble of 1 World Trade Center. The beam fell in the perfect shape of a cross and immediately became an inspiration for many Christians and others working at ground zero. On Christmas Eve, two Muslims were among the people who attended midnight Mass there, Father Jordan said.

¹⁰ Jennifer Steinhauer, *A Nation Challenged: The Site: A Symbol of Faith Marks a City's Hallowed Ground*, N.Y. Times, Oct. 5, 2001, at B12; see also Greg Gittrich & Corky Siemaszko, *In Rubble, A Sacred Find: Ceremony at Cross*, N.Y. Daily News, Oct. 5, 2001, at 18 (observing that “many were overcome by emotion”).

To feel moved by the Christmas services was not about being Roman Catholic, the congregants said yesterday. Many of them were not. It was more about taking the time, about half an hour or so, to stop and think and to feel the emotions of the past 15 weeks at the spot where it all happened. Even with all the funerals, tributes and memorial services since Sept. 11, many of the people closest to the devastation had not allowed themselves that half-hour.¹¹

Later, in May 2002, another N.Y. Times reporter described

Fr. Jordan's continuing ministerial activities at Ground Zero:

Straight ahead, preaching against the backdrop of destruction, was the Rev. Brian Jordan, a Franciscan in running shoes and mist-fogged glasses. He was talking away in that Nassau-Queens accent that says you can't kid a kidder. For several months he has been a chaplain of ground zero, celebrating Sunday Mass for a select and wounded congregation—family members, recovery workers, volunteers—that seems to find comfort in his guy-next-door ways.¹²

Recent accounts describe the Cross's role within the context of a much larger historical display:

“None of these objects are in and of themselves the reason why they're here,” says Joe Daniels, the memorial foundation's president. “They all represent a platform for the stories behind them. The cross is a perfect example. That was an artifact that was literally born from the site,

¹¹ Dean E. Murphy, *A Nation Challenged: Christmas Mass Beneath a Cross Of Fallen Steel*, N.Y. Times, Dec. 26, 2001, at A1.

¹² Dan Barry, *Coping: At Ground Zero, Seeking Shelter From the Storm*, N.Y. Times, May 12, 2002, Sec. 14, at 1.

and it played an actual role during that hellish recovery period.”¹³

These reports demonstrate the Cross’s integral role at Ground Zero, yet the American Atheists’ brief omits these facts from its briefs. From just days after the 9/11 attacks until over ten years later, the Cross symbolized hope and faith to the many workers and visitors. No reasoned basis exists to exclude this part of history from the 9/11 Museum simply because it is a symbol associated with religion.

B. The District Court Correctly Ruled That The Display Of The World Trade Center Cross Does Not Violate The Establishment Clause

In evaluating an Establishment Clause challenge, this Court has applied the three-factor test set forth in *Lemon*. See *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 411 (2d Cir. 2001); *Skoros*, 437 F.3d at 17-18. Under *Lemon*, the Court must ask: (1) is there a secular purpose; (2) is the primary effect one that neither advances nor inhibits religion; and (3) is there “excessive government entanglement with religion.” *Lemon*, 403 U.S. at 612-13. Here, the district court

¹³ Sally Jenkins, *A Long-Standing Message of Loss and Hope*, Wash. Post, Sept. 9, 2011, at A1.

correctly applied *Lemon* to the few facts established by the American Atheists in response to the defendants' motion for summary judgment.

First, the American Atheists do not dispute that the Museum has a secular purpose for including the Cross. Nor could they. There is no secret about the historical purpose for including artifacts, including the Cross, in the 9/11 Museum.

Second, the primary effect of the display of the World Trade Center Cross will neither advance nor inhibit religion. In fact, the Atheists presented no evidence that the display of the Cross will advance any particular religion—or religion in general.

Certainly, a cross can be seen as “the principal symbol of Christianity around the world.” *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring in part and concurring in judgment). To many, a cross is a “short cut from mind to mind,” conveying religious ideas. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). Nonetheless, the mere fact that the Cross may convey a religious message to some observers is no basis to exclude it from the historical collection of artifacts that will retell the story of 9/11

and Ground Zero to generations to come. No reasonable observer could conclude that the display of the Cross is advancing religious doctrine.

Third, the Atheists' argument and evidence fail the "excessive entanglement" prong. As the 9/11 Museum explains in its brief, the American Atheists provided no evidence or argument on this point.

More fundamentally, the Supreme Court has explained that "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch*, 465 U.S. at 692; *see also Van Orden*, 545 U.S. at 742 (Souter, J., dissenting) ("[T]he Government of the United States does not violate the Establishment Clause by hanging Giotto's Madonna on the wall of the National Gallery."); *Allegheny*, 492 U.S. at 653 (Stevens, J., dissenting) (concluding that "it would be absurd to . . . exclude religious paintings . . . from public museums"). Other courts have arrived at the same conclusion. *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.").

The Atheists' Establishment Clause claim rests on a further flaw, namely that the First Amendment should protect individuals from feeling uncomfortable. In their amended complaint, the individual plaintiffs had contended that the mere existence and display of the World Trade Center Cross had caused them "depression, headaches, anxiety, and mental pain and anguish."

But the Founders did not draft the Establishment Clause to protect the emotional sensitivities of ideological crusaders. *See John Doe 3*, 687 F.3d at 866 (Ripple, J., dissenting) ("[T]he Establishment Clause does not, and cannot, protect an individual from personal emotional and psychological unpleasantness."); *id.* at 877 (Posner, J., dissenting) ("Hypersensitivity is not a First Amendment principle.").

Furthermore, none of the other concerns seen in Establishment Clause cases, such as divisiveness, coercion, lack of neutrality, and endorsement, lends any credence to the Atheists' theory. The Museum requires no one to agree with the religious nature of the Cross. Nor can the display of a historical artifact in a public museum reasonably create the divisiveness with which the Court is sometimes concerned. The

Museum is also acting in a neutral manner; it displays a piece of history in a historically accurate context.

Finally, the American Atheists try to manufacture an appearance of entanglement based on Fr. Jordan's public ministry, but their argument is meritless. Even if Fr. Jordan had preached on every corner, in the style of John the Baptist, and lobbied every government official in the city, the Atheists' claim would still fail. The Free Speech Clause protects Fr. Jordan's right to express his views—just as it protects the Atheists' disparagement of religion. Likewise, Fr. Jordan, as with every other citizen, has the right to petition government officials. *See* U.S. Const. amend. I; *see also X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 72 (2d Cir. 1999) (stating that “the First Amendment gives any citizen the right to petition the government”). That right cannot be revoked merely because Fr. Jordan is a man of the cloth.

In short, the Establishment Clause permits the display of religious items—even to the exclusion of other religious or non-religious items—in museums and other public settings directed to the history concerning the items. Here, the Establishment Clause cannot be used to require the inclusion of an atheist symbol unconnected to Ground

Zero's history. Nor can it be used to exclude the World Trade Center Cross—a source of inspiration to thousands of families, workers, and victims of the terrorist attacks.

C. Accepting The American Atheists' Arguments Could Render Many Federal Museums And Congressional Displays In Violation Of The Establishment Clause

The consequences of any decision adopting the American Atheists' position are apparent. Following their logic, the Atheists will suffer mental and emotional duress even when visiting our Nation's museums and public spaces which display overtly religious items. The National Gallery of Art, in particular displays a range of art works that would violate the Establishment Clause, according to the American Atheists' theory. Highlighted below are a few examples of religiously-themed works displayed and produced by the Federal government and which would be subject to attack should the American Atheists prevail.

Around 1510, the Renaissance artist Raphael painted the *Alba Madonna*. Displayed in the West Building of the National Gallery of Art, the painting depicts Mary with the baby Jesus, sitting in her lap and holding a cross. Next to them is a young St. John the Baptist. "The Christ Child's gesture of accepting the cross from the Baptist is the

focus of attention of all three figures, as if they have foreknowledge of Christ's sacrifice for mankind."¹⁴



¹⁴ See <http://www.nga.gov/content/ngaweb/Collection/art-object-page.26.html>.

In another painting the *Niccolini-Cowper Madonna*, Raphael captured Mary with the Christ Child sitting on her lap. The masterpiece, hanging in the National Gallery of Art, captures a playful Jesus exhibiting an intimacy uncommon in Renaissance art.¹⁵



¹⁵ See <http://www.nga.gov/content/ngaweb/Collection/art-object-page.27.html>. For examples of religious art in the Capitol Rotunda, see <http://www.aoc.gov/paintings-0>.

Similarly, governmental display of many Renaissance sculptures would be threatened with litigation. For instance, the National Gallery exhibits Susini's sculpture titled *The Young Saint John the Baptist*, which depicts the young evangelist sitting next to his sheep.¹⁶



¹⁶ See <http://www.nga.gov/content/ngaweb/Collection/art-object-page.133635.html>

Even statues representative of United States history will come under attack. The statue of Fr. Junípero Serra, *see supra*, would violate the Establishment Clause, according to the Atheists' theory. The statue of Brigham Young (below) in the Capitol Building would be another violation.¹⁷ Young, the first governor of Utah Territory, was also the longest serving president of the Church of Jesus Christ of Latter-day Saints. The Atheists' argument, if approved, would banish the "American Moses" from the halls of Congress.



¹⁷ See <http://www.aoc.gov/capitol-hill/national-statuary-hall-collection/brigham-young>.

Appellants’ expansive distortion of the Establishment Clause would also undermine the permissibility the National Museum of the American Indian’s exhibits, several of which record religious ideas of Native Americans. One museum essay, for example, describes the Seminole Stomp Dance as “part of the Green Corn Ceremony, a four-day gathering held each year to mark the renewal of seasons and express gratitude to the Creator for providing food and life.”¹⁸ Another exhibit highlights the role of Native American religion in the post-World War II recovery of the Code Talkers.¹⁹

The National Museum of Native Americans also includes the Arapaho pipe bag, a Native American religious artifact.²⁰ The bag, shown below, may have been associated with the Ghost Dance religion.²¹ The museum’s webpage explains that the religion “spread rapidly among Plains Indians, and by 1890, Ghost Dance ceremonies

¹⁸ <http://nmai.si.edu/exhibitions/circleofdance/seminole.html>.

¹⁹ <http://nmai.si.edu/education/codetalkers/html/chapter5.html>.

²⁰ <http://nmai.si.edu/exhibitions/infinityofnations/plains-plateau/029707.html>.

²¹ *Id.*

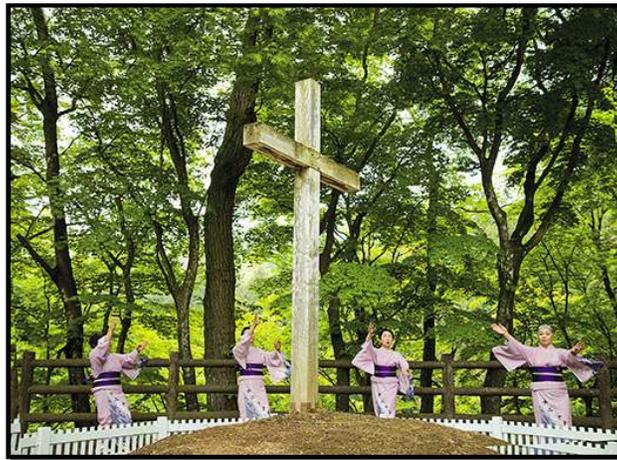
were practiced by the Lakota, Cheyenne, Comanche, Shoshone, Assiniboine, Arapaho, and other tribes.”²²



The ramifications of the Atheists’ historically unhinged Establishment Clause theory would extend beyond art displayed in national museums. Publications supported with government funds,

²² <http://nmai.si.edu/exhibitions/infinityofnations/plains-plateau/029707.html>

such as the *Smithsonian Magazine*, would be potential targets of the Atheists' litigation efforts. For instance, the *Smithsonian Magazine* recently published an article titled *The Little-Known Legend of Jesus in Japan*, which details a local folklore that describes Jesus' travels and death in Japan.²³ Accompanying the article is the following photograph of a cross, which is reportedly at the burial ground of Jesus' last resting place:



If the Atheists' present complaint is to be credited, the *Smithsonian Magazine* article and its photograph must have caused them actionable physical and emotional distress.

²³ Franz Lidz, *The Little-Known Legend of Jesus in Japan*, *Smithsonian Magazine*, Jan. 2013, available at <http://www.smithsonianmag.com/multimedia/photos/?c=y&articleID=183833821&page=2>.

When confronting the specter of litigation, municipalities and government institutions often concede to the demands, despite the accusations' merits.²⁴ Giving just the hint of legitimacy to the Atheists' argument will produce more questionable decisions by government officials, even though a given exhibit should be immune from attack. Quite simply, "[t]he Constitution does not oblige government to avoid any public acknowledgment of religion's role in society." *Salazar v. Buono*, 559 U.S. 700, 719 (2010) (Kennedy, J.). In fact, "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Lee*, 505 U.S. at 598. Yet, that is the Atheists' apparent goal with their lawsuit here.

Moreover, the Museum is permitted under the Constitution to preserve, in a historical exhibit, the religious artifacts, speech, and other records that so pervaded the events at Ground Zero. *See Pinette*,

²⁴ *See, e.g.*, Vince Haley, *Save the Wren Chapel: An Astounding Bit of Blabber from the President of William and Mary*, Nat'l Rev. Online (Nov. 17, 2006), at <http://www.nationalreview.com/articles/219285/save-wren-chapel/vince-haley> (describing the ill-conceived decision to remove the 100-year old Wren Cross from the 274-year old Wren Chapel on the College of William and Mary).

515 U.S. at 767 (explaining that the Establishment Clause “was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum”).

III. IGNORING THE FREE EXERCISE CLAUSE, THE AMERICAN ATHEISTS ATTEMPT TO CURTAIL RELIGION IN PUBLIC

During this litigation, the American Atheists have continued their public crusade to attack all things religious, and the present lawsuit is another example of their efforts. Their attack on the World Trade Center Cross is without merit. Moreover, their decision to sue Fr. Jordan personally—merely for praying in public—epitomizes how their objectives contravene the Religion Clauses, and the Free Exercise Clause in particular.

A. The Free Exercise Clause Guarantees Father Jordan’s Right To Bless The World Trade Center Cross

Based on the American Atheists’ allegations, Fr. Jordan was sued because he publicly blessed the World Trade Center Cross, publicly opposed moving the Cross from the World Trade Center site, and publicly proposed the inclusion of the Cross in the 9/11 Museum. When the suit was filed, it was obvious that Fr. Jordan was not a state actor.

The Atheists sued Fr. Jordan simply because he ministered his faith in public and expressed his views about a public issue.

The Atheists' suit against Fr. Jordan was an improper, content-based attempt to chill his freedom to practice his religious beliefs by imposing personal liability for core protected activities. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 160-61 (2002). Importantly, the Constitution does not permit courts to "purge from the public sphere all that in any way partakes in the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring).

The Free Exercise Clause exists to ensure the freedom to practice one's faith. It was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (Burger, C.J.); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 697 (2012) (explaining that the Free Exercise Clause "protects a religious group's right to shape its own faith and mission through its appointments"); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 576 (1993) (Souter, J., concurring in part and

concurring in judgment); *Braunfield v. Brown*, 366 U.S. 599, 603 (1961) (“The freedom to hold religious beliefs and opinions is absolute.”).

In this vein, this Court’s rephrasing of the *Lemon* test captures the dual purpose of the Religion Clauses: “[W]hen presented with Establishment Clause challenges, we are required to ask whether the government acted with the purpose of advancing *or inhibiting* religion and whether the aid has the effect of advancing *or inhibiting* religion.” *DeStefano*, 247 F.3d at 406 (emphasis added) (internal quotation marks omitted). This phrasing also highlights the proverbial “vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other.” *Pinette*, 515 U.S. at 768 (plurality).

The present suit, as originally filed against Fr. Jordan, attempted to hinder his ability to minister and encapsulates the Atheists’ disregard for the protections of the Free Exercise Clause. The Atheists claimed that Fr. Jordan’s blessings of the World Trade Center Cross caused them, at least in part, emotional and physical distress. That contention is frivolous.

Although later dismissed from the lawsuit, Fr. Jordan endured the stress of being potentially liable for damages and attorneys’ fees (as

the Atheists demanded). The suit was meritless *ab initio*, and the Court should note the chilling effect the Atheists' litigation strategy will have. Every time a religious figure speaks in public, he or she will have to be concerned that the words spoken will subject the person to a lawsuit by some group that might be "offended" by religious concepts. Even worse, such tactics discourage the free exchange of ideas about religion. This should not happen. *See Salazar*, 559 U.S. at 718 (Kennedy, J.) ("The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm.").

B. The Present Suit Is The Latest Salvo In The American Atheists' "Civil War" On Religion

In addition to seeking to burden and punish Fr. Jordan's freedom to minister, this case is part of the American Atheists' concerted campaign to remove religious references from the public. Through this suit, the Atheists want to rewrite history so that it is cleansed of references to particular religions, or diluted by including atheist items unconnected to the actual historical events at Ground Zero.

The American Atheists assail religion in many ways, but their purpose is clear. Their September 11 message leaves no doubt: "The truth is that religion is poison. It attacks people's minds and spreads

like a virus, infecting person after person, generation to generation.”²⁵ The American Atheists wish to be the antidote to this so-called “poison.” In fact, according to the Atheists, “[w]e should know better by now than to believe in childish things like prayer.”²⁶

Not surprisingly, David Silverman, the president of the American Atheists, frequently shares his disdain for religion. He stated that the World Trade Center Cross “has been blessed by so-called holy men and presented as a reminder that their god, who couldn’t be bothered to stop the Muslim terrorists or prevent 3,000 people from being killed in his name, cared only enough to bestow upon us some rubble that resembles a cross.”²⁷ Silverman’s disdain for religion does not stop at the Cross. He has said that “[t]he Vatican is evil,”²⁸ and that “[p]eople need to hear

²⁵ American Atheists, *It’s September 11*, Sept. 11, 2013, at <http://news.atheists.org/2013/09/11/its-september-11/>.

²⁶ *Id.*

²⁷ *Atheist Group Wants to Stop World Trade Center Cross*, CNN.com, July 26, 2011, at http://articles.cnn.com/2011-07-26/us/new.york.wtc.cross_1_atheist-group-american-atheists-cross.

²⁸ *The Very Best of David Silverman, President of American Atheists*, at <http://youtu.be/CRo-5yUm5Y0>.

religion being called a silly myth.”²⁹ The National Legal Director for the American Atheists, Edwin Kagin, believes likewise. Mr. Kagin contends that everyone is born an atheist until “the god talk get[s] poured into your little head.”³⁰ He has called his anti-religion efforts “the American religious civil war.”³¹

Their self-proclaimed “civil war” is far from civil. The organization has mounted a wide-spread assault on all things connected to religion, using high-profile billboards to continue their attack. During Christmas in 2010, the Atheists posted the following billboard:



²⁹ *Connecticut Groups Unite for First Secular Conference*, Examiner.com, Oct. 20, 2013, at <http://www.examiner.com/article/connecticut-groups-unite-for-first-secular-conference>.

³⁰ <http://edwinianinfo.webs.com/apps/videos/videos/show/14753424-edwin-kagin-american-atheist>.

³¹ ABC News, *Nightline*, July 16, 2010, available at <http://youtu.be/Hk1QpvQDdPM>.

In more recent billboards, the American Atheists implored people to celebrate Santa Claus, but drop the “myth” of Jesus, and have likewise attacked Islam, Judaism, and Mormonism as “myths.”³²

These attacks on religion are ironic. They illustrate the beauty of the Free Speech Clause and this country’s tolerance for the distasteful and offensive. But to the American Atheists, the “idea that all human beings should be free to believe whatever they want—the foundation of ‘religious tolerance’—is something we need to reconsider. Now.”³³ Under our continuing Constitutional experiment, the First Amendment permits the American Atheists’ leadership to issue verbal slaps to Christians, Jews, Muslims, and anyone else who believes in religion. In almost all instances, the proper response is to turn the other cheek. *See* Matthew 5:39-40 (“[W]hoever slaps you on your right cheek, turn the other to him also.”). This comports with the First Amendment; the Atheists have every right to protest, criticize, and even mock religion. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1210-21 (2011).

³² *See* <http://religion.blogs.cnn.com/2013/10/09/creationists-battle-atheists-in-latest-billboard-war/>.

³³ *Id.*

But those verbal slaps go too far when the American Atheists, armed with cease and desist letters, federal court complaints, and subpoenas, wield the Establishment Clause as a weapon in their “civil war” against religion—in this case to eradicate religion from the public stage by rewriting history. *See Van Orden*, 545 U.S. at 677 (Breyer, J., concurring in judgment) (“[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.”). The Constitution does not authorize their demands for a judicially-enforced, revisionist history or their attempts to chill Fr. Jordan’s right to minister in public.

IV. CONCLUSION

Amicus Curiae Father Brian Jordan respectfully asks this Court to affirm the judgment that the display of the World Trade Center Cross in the 9/11 Museum does not violate the Establishment Clause.³⁴

³⁴ The inclusion of the Cross also qualifies as “government speech” and thus does not violate the First Amendment. *See Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day, November 15, 2013, the foregoing AMICUS BRIEF OF FR. BRIAN JORDAN, OFM was electronically filed and therefore served electronically via the court's ECF/CM system, and was further served by e-mail and first-class mail to all lead counsel of record.

/s/ Matthew J. Dowd

Matthew J. Dowd

Dated: November 15, 2013

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(B)(i). The brief contains 6,977 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared using Microsoft Word in Century, a proportionally spaced typeface, and 14-point size font.

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