

No. 13-35770

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**FREEDOM FROM RELIGION
FOUNDATION, INC.,**

Plaintiff-Appellant,

v.

CHIP WEBER,

and

UNITED STATES FOREST SERVICE,

Defendants-Appellees,

and

**WILLIAM GLIDDEN, RAYMOND
LEOPOLD, NORMAN DEFOREST,
EUGENE THOMAS, and the
KNIGHTS OF COLUMBUS
(Kalispell Council No. 1328),**

Intervenors-Appellees.

**Appeal from the United States District
Court For The District of Montana**

**PRINCIPAL BRIEF OF PLAINTIFF-APPELLANT
FREEDOM FROM RELIGION FOUNDATION**

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I. STATEMENT OF JURISDICTION.

The Plaintiff-Appellant, Freedom From Religion Foundation, Inc. (“FFRF”), brought action against the Defendants-Appellees alleging violation of the Establishment Clause of the First Amendment. (Plaintiff-Appellant’s Excerpts of Record at 556-571.¹) FFRF sought a declaration that the Government’s continued and preferential authorization of a six-foot statue of Jesus Christ in the Flatland National Forest, on land owned and administered by the United States Forest Service, violates the Establishment Clause. FFRF commenced this action in the District Court of Montana, pursuant to 28 U.S.C. § 1391, because the Defendants-Appellees reside within that judicial district and because the actions giving rise to the claims occurred within the district. The District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331.

The District Court, Judge Dana Christensen presiding, entered final judgment dismissing FFRF’s complaint on June 24, 2013. (Excerpts at 1-2.) The Court entered an amended summary judgment order on June 25, 2013. (Excerpts at 31-59.) The Court’s summary judgment orders constitute final judgments disposing of all claims.

FFRF filed a Notice of Appeal on August 23, 2013. (Excerpts at 60-63.) The Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

¹ Plaintiff-Appellant’s Excerpts of Record are indicated hereinafter by “Excerpts,” followed by page number(s).

FFRF timely filed the notice of appeal within sixty days after entry of the judgment appealed, as allowed by F.R.A.P. 4(1)(B).

II. STATEMENT OF ISSUE PRESENTED FOR REVIEW.

Whether the District Court erred by deciding on summary judgment that a six-foot statue, on a seven-foot pedestal of Jesus Christ on Forest Service land does not violate the Establishment Clause, where disputed issues of material fact exist and the court drew unreasonable inferences against the non-moving party.

III. PERTINENT CONSTITUTIONAL PROVISION AND SUMMARY JUDGMENT RULE.

Establishment Clause: The Establishment Clause is the first of several provisions in the First Amendment to the United States Constitution, stating “Congress shall make no law respecting an establishment of religion . . .”

Summary Judgment Rule: Federal Rule of Civil Procedure 56(a) states that “the Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

IV. STATEMENT OF THE CASE.

FFRF filed this action in the District Court of Montana alleging that the Federal Government violated the Establishment Clause by preferentially granting re-authorization for a six-foot statue of Jesus Christ in the Flathead National Forest. The court subsequently allowed the Defendants-Intervenors to join this

action, without objection by FFRF. (Excerpts at 540-563.) The Government and the Intervenor then timely moved for summary judgment. (Excerpts at 366-368 and 494-496.) FFRF opposed the motions, including submission of evidence establishing disputed issues of material facts and inferences therefrom.

The District Court granted the motions for summary judgment. (Excerpts at 3-30 and 31-59.) In its decision, the court rejected arguments that FFRF lacked standing to sue on behalf of one or more of its members. The court concluded on the merits, however, that the statue of Jesus Christ on Forest Service land did not give the appearance of religious endorsement by the Government. The court, accordingly, dismissed FFRF's complaint, whereupon FFRF filed this appeal.

V. STATEMENT OF FACTS.

A. Original Authorization For Religious Shrine.

The Defendant-Appellee, Chip Weber ("Weber"), is the forest supervisor for the Flathead National Forest. (Excerpts at 558 and 546.) He is an employee of the United States Forest Service, an agency of the United States Department of Agriculture. (Excerpts at 558 and 546.) The United States Forest Service manages designated public lands of the United States. (Excerpts at 558 and 546.)

The Flathead National Forest is managed by the United States Forest Service, and it consists of public lands belonging to the United States. (Excerpts at

558 and 546.) Big Mountain is located in the Flathead National Forest. (Excerpts at 558 and 547.)

The Knights of Columbus applied for a permit to erect a religious “Shrine overlooking the Big Mountain ski run” in 1953. (Excerpts at 69.) The application stated that the Knights “propose to erect a Statue of our Lord Jesus Christ” on land owned by the Forest Service. (Excerpts at 69.)

The idea for a shrine at the top of a ski run reportedly originated with requests from Catholic skiers for such a religious shrine, which the Knights of Columbus then pushed forward to eventual dedication on Big Mountain, as reported in contemporaneous sources in 1954. (Excerpts at 71-72.) The Knights of Columbus is an exclusively Roman Catholic organization for which “church-related activities are essential to our [its] work as an organization of Catholic laymen.” (Excerpts at 529.)

The Forest Service granted the application of the Knights of Columbus, “for the purpose of erecting a religious shrine overlooking the Big Mountain ski run.” (Excerpts at 73.) On February 3, 2000, the Forest Service re-authorized the Knights to continue to “provide a site for religious shrine” on Big Mountain. (Excerpts at 75.)

B. Re-Authorizations Of The Shrine Result After Preferential Treatment.

After objection by FFRF to the Forest Service's authorization of a religious shrine on public land, Weber determined on August 24, 2011 that the continued authorization of a statue of Jesus Christ on Big Mountain was inappropriate under the United States Constitution. (Excerpts at 86.) The denial decision noted that "the Knights of Columbus and Winter Sports, Inc. (WSI) (owners and operators of the Whitefish Mountain Resort Ski Area) contend that the Statue is a symbol of spiritual and religious significance for many citizens." (Excerpts at 85.) The Forest Service decision also noted that a monument dedicated to the United States Army's 10th Mountain Division already exists on nearby private land, to which the Jesus Statue presumably could be relocated. (Excerpts at 85.) Weber's decision concluded that "renewing your permit would result in an inappropriate use of public land. The original stated purpose for the statue was to establish a shrine, an inherently religious object." (Excerpts at 86.)

Weber immediately faced blistering criticism from religious and veterans groups opposing his decision, including intense lobbying by United States Representative Denny Rehberg. (Excerpts at 101-103.) Weber, therefore, withdrew his decision and announced plans to seek public comments for re-authorizing the religious shrine on Big Mountain. (Excerpts at 83.)

As grounds for withdrawing his decision, Weber referred to “new information” indicating that the Jesus Statue might somehow be eligible for listing on the National Historic Register. (Excerpts at 83.) The Forest Service, however, actually first suggested the “new information” to the Montana State Historic Preservation Office, in a letter dated September 1, 2011, wherein the Forest Service requested that the Historic Preservation Office “concur” in a statement that the statue of Jesus was eligible for listing on the National Register of Historic Places. (Excerpts at 92.)

The Forest Service letter to the Historic Preservation Office acknowledged that religious properties are not eligible for listing on the National Register of Historic Places if associated with important persons or events or religious values: “The Statue of Jesus cannot be considered eligible for its association either with the soldiers who fought in WW II, nor for its association with Jesus.” (Excerpts at 91.) The Forest Service, therefore, asked the Historic Preservation Office to agree that the Jesus Statue has no association with Jesus or WW II veterans. (Excerpts at 92.)

The Historic Preservation Office obligingly “concurred” that the Jesus shrine “is not believed to be a religious site because unlike Lourdes or Fatima, people do not go there to pray.” (Excerpts at 93.)

Advocates of the religious shrine responded to the Forest Service's request for public comment, with the American Center for Law and Justice, a conservative Christian advocacy organization, submitting more than 70,000 names of supporters; Representative Rehberg also submitted approximately 10,000 comments he solicited through his "VeteransJesus.com" website. (Excerpts at 551.) The Government, however, also received many comments opposing the religious Shrine on public land, including from FFRF. (Excerpts at 551.)

Weber subsequently issued a different decision on January 31, 2012, which principally rejected non-existent environmental issues that no one had raised. (Excerpts at 94-100.) More importantly, Weber's new decision granted permission to the Knights of Columbus to maintain "a statue of Jesus Christ located on National forest land near the top of chair # 2 within the Whitefish Mountain resort permit boundary." (Excerpts at 94.)

Previous to the new decision, FFRF wrote to the Forest Service providing contemporaneous evidence, including a published report, that the Jesus Statue was intended as a religious monument. FFRF cited the article from the September 10, 1954 Whitefish Pilot, which noted that leading skiers of the Catholic faith asked why a shrine had not been placed on Big Mountain. In response, the Knights of Columbus selected the current location for the statue of Jesus after concluding "that our Lord himself selected this site." (Excerpts at 122.)

Prior to Weber's about-face, FFRF received numerous contacts expressing objections to the Jesus Statue on Big Mountain, including comments from veterans. (Excerpts at 125-127.) For example, John Garrity, a Vietnam veteran, wrote on December 7, 2011, as follows:

As a Vietnam Veteran, and deeply Christian Church educated and involved person my whole life, I do NOT want to see a denominational statue of ONE Church (of many churches, ethical world views) in a PUBLIC place/space that belongs to ALL Americans. Unless we respect the most different and the least in numbers among us, we have no right to expect that we are a moral, ethical people living in a free country that equally respects the rights of all Americans, as our Declaration of Independence and Constitution suggests we are. . . .

As to the suggestion that the statue of Jesus on Big Mtn. is not a religious but rather ONLY a "Veterans" or "Military" monument, on the face of it this seems totally unsupportable by any logic or fact. No matter who or why it was first installed, nonetheless, Jesus is the "Christ" of the "Christians," and only represents one of the many religious and secular viewpoints of the many diverse veterans who have served our country these 200 + years. It is admirable that the Roman Catholic Knights of Columbus want to honor our veterans, I among those Veterans. They have every right to do so, with any statue or any monument they wish to, just not a religious statue on public land that belongs to ALL Americans.

(Excerpts at 126.)

Forest Service employees themselves met with the Knights of Columbus to discuss the status of the special use permit for the Shrine on June 10, 2011. (Excerpts at 225-226.) At this meeting, the Knights expressed deep reverence for the Shrine and what it stands for; stated their feeling that the Shrine's current

location is an integral part of the spiritual experience; and rationalized that the statue is “a multi-denominational religious statue” that “speaks to all religions.” (Excerpts at 225.)

One option rejected by the Forest Service at the June 10, 2011 meeting with the Knights of Columbus involved having the statue declared a historical monument. The Forest Service’s Heritage Specialist, however, thought the Statue did not have “historical significance,” and that having the statue listed as a historical monument does not mean it would not need to be moved off national forest system land in any event. (Excerpts at 226.) Significantly, the Forest Service noted that “the Flathead has rejected proposals from other groups to put monuments, grave markers, crosses, etc. on the Forest Service land (for instance grave markers in the Jewel Basin Hiking Area, war memorial crosses near the Desert Mountain Communication Site, memorial signs/plaques at various trailheads; spreading cremation ashes at the North Fork, air-dropping cremation ashes in the Bob Marshall Wilderness, etc.).” (Excerpts at 226.)

C. The Forest Service Knowingly Gives Shrine Preference.

The Forest Service actually has long been concerned about the Jesus Statue on Big Mountain; in fact, Becky Smith noted on March 8, 2011, that “the first job I was given here on the Flathead by Neil Malkasian was to have Jesus removed from the mountain 24 years ago. At that time I interviewed the permittee, visited the

site, and talked to the administration of the resort. I went back and told Neil that removing Jesus would cause a huge stir.” (Excerpts at 227.) Her boss, Margaret Gorski, therefore encouraged the Forest Service to call the Shrine a “heritage site” and “push the story behind the statue (10th Mountain Division, etc.)”. (Excerpts at 228.) Ms. Gorski advised that if the public asks for removal of the statue, “Push the historic significance.” (Excerpts at 228.) Ms. Smith also wrote, however, that the Forest Service “would not entertain one of these permit requests today.” (Excerpts at 228.) Ms. Gorski offered the following advice on how to finesse approval of the Shrine permit. On April 18, 2011, Ms. Gorski wrote:

Play up the historic nature of the site. Perhaps Dan or the Knights would be willing to re-do the sign to be more interpretive and play up the historic connection between the site and the 10th Mountain Division, which is tied to skiing after all.

(Excerpts at 228.)

Earlier, on February 22, 2011, another Forest Service employee, Hans M. Castren, Acting Resource Assistant at Flathead National Forest, also discussed issues relating to the “Jesus Statue on Big Mountain.” Castren rhetorically asked: “Do we reissue the permit? Even though it is a religious monument on FS [Forest Service] land?” Castren also asked: “Do we continue Free Use/Fee Waiver as done in the past, even though this does not fit a category for fee waiver?” (Excerpts at 231.) Finally, Castren noted that “the media attention that the Missoulain and Beacon brings to this matter is not helpful.” (Excerpts at 231.)

The Forest Service's publicly concealed sensitivity to the Shrine was not anything new, as Becky Smith previously noted. Back on May 25, 1990, when the statue was also re-authorized, Ms. Smith wrote as follows: "First and foremost, requiring the removal of the statue may cause public relations problems which we do not need at this time." (Excerpts at 232.) Ms. Smith's boss, Neil Malkasian, responded on June 8, 1990, as follows: "Unless one of us needs to establish some 'notoriety' (Whitefish Pilot: Headlines – "New Tally Lake Forester Kicks Jesus Off Big Mountain"), then we should probably follow the path and reissue a permit with appropriate clauses as dictated by the type of permit." (Excerpts at 232.)

The initial decision to deny reauthorization for the Jesus statue resulted in the "notoriety" predicted 21 years earlier, and so by September 1, 2011, just a week after the decision, the Flathead National Forest Archeologist "determined" that the Shrine was eligible for listing on the National Register of Historic Sites, and requested concurrence by the Montana Historical Society, State Historic Preservation Office. (Excerpts at 91-92.)

Having changed course, the Forest Service then considered how to manage public perception of the Shrine. For example, Carl Davis, from the Forest Service Regional Office, recommended "focus on historical values rather than religious ones." (Excerpts at 235.) Davis also emphasized the need to "be clear about the historical value and National Register of Historic Places – eligibility of the statue

in scoping letters and news releases since this is the central issue in permit reissuance; it is in the media; and it may help inform public response during scoping and beyond.” (Excerpts at 235.) Davis also highlighted the need to claim that the statue’s “primary historical value is its association with the early development of the Big Mountain ski area, now Whitefish Mountain Resort.” (Excerpts at 235.) Davis then urged Forest Service personnel to keep in perspective that National Register eligibility “largely turns on the statue’s association with early ski hill development, and in a secular (people go there to play) rather than a religious context (people go there to pray).” (Excerpts at 235.) Finally, Davis candidly recognized that the “10th Mountain Division’s association with the statue/shrine at Whitefish Mountain (formerly Big Mountain) ski area is hard to pin-point and substantiate with existing historical data.” (Excerpts at 235.) “The statue’s WW II Veteran Association with the 10th Mountain Division is anecdotal and ambiguous.” (Excerpts at 236.)

D. The Shrine Had Religious Origin And Has Continued Religious Meaning.

According to the Government’s litigation-commissioned investigation, contemporaneous reports confirm that the intent was “to erect a statue of our Lord Jesus Christ,” for the purpose of “erecting a religious shrine overlooking the Big Mountain ski run.” (Excerpts at 383.) According to the Government’s oral historian, Ian Smith (“Smith”), the statue has subsequently been reported to be

associated with WW II veterans, culminating in a recent plaque purporting to describe the history of the statue, including the claim that “a common memory of theirs [troops] in Italy and along the French and Swiss border was of the many religious shrines and statues in the mountain communities.” (Excerpts at 385.) The plaque concludes by thanking “those brave troops that brought this special shrine of Christ to the Big Mountain and hope that you enjoy and respect it.” (Excerpts at 385.)

Smith “did not locate any sources contemporaneous with the Statue’s 1954 dedication that showed a direct association between it and WW II Veterans who had returned to Whitefish less than a decade earlier.” (Excerpts at 387.) Smith concluded that “the historical records do not directly link the statue and these WW II Veterans.” (Excerpts at 388.)

Smith’s report documents considerable actual usage of the site of the Statue for religious services or gatherings. (Excerpts at 391-393.) Smith states that “historical documents do not indicate any consistent uses of the Jesus Statue over time, but oral interviews conducted by HRA do indicate that church services and prayer gatherings have occurred periodically at the site.” (Excerpts at 391.)

Smith interviewed 13 individuals as part of his research, including three pastors, from different Christian traditions, who each commented that “from a

personal standpoint, the Jesus Statue was ‘comforting’ to them, since it reminded them of Christ’s presence in the world.” (Excerpts at 393.)

Although claiming physical remoteness of the statue, moreover, Smith incongruously describes the statue as a “well-known local landmark at Big Mountain.” (Excerpts at 395.) Smith admits that the Shrine is “something that has set Big Mountain apart from other ski resorts.” According to Mike Collins [interviewee], “the statue was something ‘that made Big Mountain sort of stand out.’ ” (Excerpts at 400.) Another interviewee described the Shrine as providing a “unique historical thing” that distinguishes Big Mountain. (Excerpts at 400.) Smith also considers it “worth reiterating” that the area of the Shrine is a summer and winter tourist destination “visited by thousands of people each year.” (Excerpts at 401.) In fact, Smith notes that the statue is located at a place of unique and great beauty in the Flathead Valley. (Excerpts at 402.)

Smith’s report relies on 13 interviews of local residents. (Excerpts at 416-493.) Jean Arthur, one source who wrote a book on the local history of Big Mountain, noted that the statue is visible by skiing past it and “very popular with skiers and families, and, of course, with big weddings over the years.” (Excerpts at 418.) Ms. Arthur also notes that her own family “would pass by the Jesus Statue and say ‘hi’ to Jesus and maybe stop for a second.” (Excerpts at 419.) As to

church services being held at the statue, Ms. Arthur commented “Oh yeah, yeah, definitely.” (Excerpts at 419.)

Brad Brittsan, a Whitefish pastor, commented that “as a believer in Christ, I look at it [Shrine] as something that is comforting.” (Excerpts at 421.) Brittsan also commented that skiers “would stop on the way down the mountain and stop for a second and, at the base of the statue, and then finish skiing down the mountain.” (Excerpts at 421.) Brittsan concludes that the statue “reminds me of God watching over us.” (Excerpts at 422.)

Mike Collins, who has lived in Whitefish since 1988, noted that the Jesus Statue “was a well-established attraction up on the mountain when he arrived in 1988.” (Excerpts at 423.) Collins acknowledged use of the Shrine in the winter months by religious groups. Collins also commented on what a “well-known feature up on the mountain” the statue was; “lots of skiers would go by it and a lot of them would take pictures of themselves with their family and friends, you know, with the statue in the background. So it was a pretty popular stop.” (Excerpts at 424.)

Linda Fopp stated that the Shrine, in her opinion, has an effect on people that goes beyond just the beauty of the scenery. She notes that skiers say “You know when you stop there, there is something else that moves them.” (Excerpts at 431.)

Dan Graves, another interviewee, came to Whitefish in the Fall of 2006, and observed the Shrine when he took one of his first skiing trips on the mountain. “I was coming down the mountain, skiing toward my office, and out of the corner of my eye – in the clouds, because it was a cloudy day – I saw something that looked like somebody standing off to the side, so I stopped, and, lo and behold, I saw this statue. And I thought, ‘Wow.’ That is really kind of unusual. I have not seen very many of these around the country. I have seen several of them in Italy because I’ve traveled to Italy a few times.” (Excerpts at 435.)

According to Graves, about 30% of the skiing business on Big Mountain is local Valley residents who “come by [the Shrine] and reflect for, you know, lack of a better word.” (Excerpts at 436.) Graves considered the Jesus Statue unique, insisting that he had never seen anything like this at other ski areas and he recognizes that the religious character of the Shrine is what distinguishes it. (Excerpts at 442.)

Martin Hale, another interviewee, noted that “people stop there [at the Shrine] all the time, and they want to know, you know, the history of it, and it was really quite popular on that particular chair lift.” (Excerpts at 444.) Hale further noted that he wasn’t sure what everyone was thinking about, “but they sure-it [the Shrine] sure caught their attention.” (Excerpts at 445.) Hale was also struck by the quiet contemplation of those who looked upon the Shrine. (Excerpts at 446.)

Smith also interviewed Mike Muldown, another long time resident of Whitefish, since 1945. (Excerpts at 453.) Muldown doesn't recall the statue ever being called a "memorial for the troops or anything. But I do recall the fact that they did mention that the World War II Veterans had come back from Europe and that was one of the reasons that they advocated the shrine on the mountain." (Excerpts at 454.) Muldown reiterated that "I do not recall it ever being specifically any kind of a memorial to the troops, that it was just inspired by the people that were members of the Knights of Columbus that had been Veterans." (Excerpts at 454.) Muldown personally enjoys seeing the Jesus statue. He stated that "I guess, to me, it's like, it's a -religious icon – that's kind of a private thing." (Excerpts at 454.)

Paul Ogle commented on the irritation caused by persons who object to the Jesus statue. "My understanding is everybody is – enjoys it being there and is irritated that some people from outside the state want to come and tell us whether we can or cannot do something locally here that the majority of the people seem to have no problem with, no issue with." (Excerpts at 459.) For Mr. Ogle, the statue definitely has religious significance:

I personally just kind of enjoyed the fact that – I mean, it's a bit like the Jesus statue in Rio and Brazil or something. It's just a reminder to me that Jesus is a very real presence in our world and I am, I guess I find some comfort in that, whether the statue is there or not. It – I'm aware that Jesus is very present and

active in our world, and to me, it's just a reminder of that. It doesn't have any religious significance beyond that.

(Excerpts at 459.) Ogle admits that he has been part of groups that have gone up to the statue "to gather to pray over our community and pray for God's protection and blessing on our community." (Excerpts at 460.)

Karl Schenck also spoke to Smith's assistant about the Shrine built shortly after Schenck's birth in Whitefish in 1953. (Excerpts at 462.) Schenck claims that the statue was built at a remote, but very beautiful part of the Mountain where people would go to view the Valley. (Excerpts at 463.) In Schenck's case, the statue has always been on the mountain and he has respect for it and even talks to it. (Excerpts at 464.) Schenck "grew up Catholic, and it was just kind of amazing that there was something that big and beautiful sitting out there on top of the mountain." (Excerpts at 464.)

Jane Solberg, another interviewee, also expressed hostility toward critics of the Shrine who were perceived as outsiders. "What in the heck is some group from not in Montana butting into business in Montana? If there is a real problem with the Jesus statue, it would've been handled locally." (Excerpts at 473.)

Jeff Tepples, who has lived in the Whitefish area since 1973, voiced a common perception of the Jesus statue as having Christian meaning: "I thought it was actually awesome to have Jesus up there and so we would often ski by there

and wave at Jesus on our way by because we were Christians and it was really meaningful to have that statue there.” (Excerpts at 481.) Mr. Tepples also noted that “I think the people – if you’re a Christian, I think they’re really happy about it, fond of it.” (Excerpts at 482.)

For Mr. Tepples, personally, the Shrine reminds him “that God is involved in everything I [he] do and the reason that I [he] think, you know, Jesus could be there is that he is the savior of the world. And it’s not trying to, you know, hammer anyone over the head with religion. I just think it’s an invitation to consider him. So, for me personally, as a pastor, but as a Christian more, just a reminder that God is in my midst.” (Excerpts at 483.)

Tom Unger was the last person interviewed for Ian Smith’s report and he noted that he saw the Shrine the very first time he ever skied on the mountain in 1955. (Excerpts at 486.) “All the locals who happen to ski on those particular runs – or on the main run of that lift – would ski by that statue. I mean, so they had to be well aware of the statue.” (Excerpts at 488.)

The historian Smith did not interview any tourists or persons who saw the Shrine from the perspective of a tourist coming to the Whitefish area. (Excerpts at 157.) Smith himself, however, has personally skied by the Jesus Statue, which he recognizes as depicting Jesus. (Excerpts at 159.) Smith has not seen similar

Shrines at other areas that he has skied. (Excerpts at 159.) Smith did not perceive the statue of Jesus as a joke when he personally encountered it. (Excerpts at 160.)

Smith's archival research did not identify any intention for the statue other than as a religious shrine. (Excerpts at 163-164.) Smith's research also did not uncover any evidence that the statue was not intended to represent Jesus Christ. (Excerpts at 166.) Nor did Smith discover any contemporaneous sources suggesting that the Shrine was intended by the Knights of Columbus as a war memorial. (Excerpts at 166.)

The statue recognizably depicts Jesus. (Excerpts at 180.) Smith acknowledges that the personal perceptions of the interviewees represent the most direct evidence of perceptions of the Shrine. (Excerpts at 187.) Curiously, however, Smith claims he did not even try to reach any conclusions about the perceptions of interviewees themselves as to whether they perceived the Shrine as having religious significance. (Excerpts at 188.)

Smith also denies having considered whether speaking out against the statue is a popular or unpopular local position to take; he also does not know whether speaking out against religion is a popular or unpopular local position. (Excerpts at 185.) Smith does not have an opinion as to whether a pervasive culture of hostility against people opposed to the Shrine would discourage complaints about it. (Excerpts at 195-196.) Smith did not investigate whether there is any local

hostility toward people who oppose the Shrine, despite comments by his interviewees. (Excerpts at 197.)

Smith also does not know the extent of irreverence and playfulness, nor did he investigate why some people engage in irreverent behavior with regard to the Shrine. (Excerpts at 198-199.) Smith also did not investigate whether persons who had personal exposure to the Shrine perceived it as a religious symbol. (Excerpts at 199-200.) Smith did not interview anybody who engaged in playful or irreverent behavior, nor does he know whether they perceive the Shrine as inappropriate or incongruous in its location. (Excerpts at 200.)

Smith acknowledges that religious sites and commemorative markers typically are not eligible for the National Register. (Excerpts at 203.)

Smith says he does not know whether WW II Veterans perceive the Shrine as evoking their religious faith and the inspiration gotten from religious symbolism in Europe. (Excerpts at 208.) Smith admits that the Shrine does not make any reference to the local 10th Mountain Division from Montana. (Excerpts at 215.)

Smith admits that some of his interviewees ascribed religious significance to the Shrine. (Excerpts at 220-221.) Smith does not have any opinion as to why religious ceremonies are sometimes held at the Shrine site. (Excerpts at 223.) Smith acknowledges that persons aware of the Shrine would view it as depicting Jesus. (Excerpts at 224.)

E. Unwanted Exposure To The Shrine.

William Cox decided to become a member of FFRF because of the maneuvers regarding the Shrine by the Forest Service. (Excerpts at 130.) Cox has long been personally opposed to the Shrine but he did not know anything could be legally done. (Excerpts at 130.)

According to Cox, the recent claim by the Knights of Columbus that the Shrine was erected as a war memorial “was news to just about everybody around here.” (Excerpts at 132.)

Cox has a Ph.D. in economics from Princeton; he previously was a senior specialist in economic policy at the Congressional Research Service; and he was a deputy chief economist in the Department of Commerce during the Carter administration. (Excerpts at 136.) Cox and his wife ski at Big Mountain 25-30 times every year. (Excerpts at 138.)

Cox is vigorously opposed to having the Statue of Jesus Christ on public land which he considers totally inappropriate; he also recognizes the statue as unmistakably a religious monument located on federal property. (Excerpts at 139.)

Cox is not opposed to all religious symbols on public property, depending upon the contextual appropriateness. (Excerpts at 140.) Cox, for example, recognizes that religious themes can have artistic value, such as with respect to art and cathedrals. (Excerpts at 140.) For that reason, Cox recognizes that religious-

themed art might be appropriate at the Smithsonian. (Excerpts at 140.) Cox considers that religious art may be publicly suitable in such a context, such as at a museum. (Excerpts at 141.)

Cox's wife is Jewish and she is very apprehensive about overtly Christian expressions, especially in public contexts. (Excerpts at 141.)

Cox considers the Jesus statue to be utterly inappropriate as a public war memorial. It is an unambiguously Christian monument with nothing about it to remind one of the heroism or the heartache of war, according to Mr. Cox. (Excerpts at 364.) As a rationalist and non-believer, Cox considers the statue of Jesus on public land to be ridiculous and offensive. He sees it as a religious monument, conspicuously Roman Catholic in style, that belongs in the courtyard of a monastery or on the roof of a church. (Excerpts at 364.)

As a regular skier, however, Cox must have frequent and unwanted contact and exposure to the Shrine when he is skiing on Big Mountain many times each winter, which he finds to be offensive. (Excerpts at 365.)

Doug Bonham lives in Essex, Montana, approximately 60 miles from Big Mountain. He also is a member of the Freedom From Religion Foundation. (Excerpts at 357.) Approximately 7 or 8 years ago, Mr. Bonham first encountered the Jesus statue on Big Mountain while skiing, and his immediate reaction was that the statue was grossly out of place and an oppressive reminder that Christians are a

controlling and favored group in the Flathead Valley. He has not skied or hiked by the statue since, and his aging knees limit him, in any event. Nonetheless, his 15 year old daughter regularly skis on Big Mountain and has exposure to the Jesus Statue, which she also considers ridiculously out of place. (Excerpts at 357.)

As a resident of Flathead Valley, Mr. Bonham is still affected by the statue on Big Mountain, which literally and figuratively looms over the Valley. He knows from residing in the Flathead Valley that this is “Christian country,” and he knows from personal experience with local residents that the statue is perceived as a religious symbol – in fact, the statue is proudly perceived as a reminder of the Christian religious values that the majority in the Valley promote. (Excerpts at 357.)

The presence of the Shrine on Big Mountain is known to skiers and non-skiers alike in the Valley, and it is perceived as a recognized symbol of the religious majority, according to Mr. Bonham. (Excerpts at 357.) Mr. Bonham knows that disagreement with or disapproval of the statue of Christ is not a popular or prudent local position, and objection to the statue is discouraged. (Excerpts at 358.) The Shrine has an influence throughout the Valley that has the effect of making non-believers, like Mr. Bonham, feel marginalized in their own local community. (Excerpts at 358.)

Pamela Morris is a third generation Montanan who knows and values the State's natural heritage. For over 60 years, she has skied, camped, hiked and fished in the mountains of Montana. (Excerpts at 360.) Ms. Morris is a member of the Freedom From Religion Foundation, which she joined after learning of opposition to the religious icon located on public land on Big Mountain. (Excerpts at 360.) Before this suit, Ms. Morris previously had sent a message to the Forest Service strongly protesting allowing a religious icon on federal lands. (Excerpts at 360.)

The Jesus Statue on Big Mountain reminds Ms. Morris of her first encounter with it during Christmas break in 1957, as a member of the Great Falls, Montana, ski team in her first major winter outing in the mountains, skiing Big Mountain. To her, the statue felt startlingly out of place: intrusive. She was 15, active in the Methodist Youth Fellowship; still, she remembers the unsettled feeling she first had when she saw it. Since then she has avoided the area: she back-packs, fishes and camps where nature has not been so violated in Montana. (Excerpts at 360-361.)

Ms. Morris grew up appreciating the outdoors and has continued to recreate regularly. (Excerpts at 361.) Ms Morris has skied many areas in Montana throughout her life, but she would definitely enjoy skiing Big Mountain again if it were a welcome site for all who love nature. The Jesus Statue, however, is an

intrusive icon, and therefore, she deliberately avoids Big Mountain. (Excerpts at 361.) Ms. Morris has made a conscious effort to avoid Big Mountain because of the Jesus Statue, which she perceives as a Christian icon on public land that has the effect of promoting one particular religious sect. (Excerpts at 362.)

F. Objection To The Shrine Evokes Hostility.

FFRF is a membership group organized as an educational 501(c)(3) charitable non-profit that advocates for the separation of state and church, and educates on matters of non-theism. FFRF's membership consists primarily of persons who identify as freethinkers (atheist, agnostic, or who are otherwise non-religious). (Excerpts at 240.) FFRF has more than 19,000 members nationally, and more than 100 in Montana, including members who reside in the City of Whitefish, the City of Kalispell and the surrounding area of Flathead County, Montana. (Excerpts at 240.) FFRF represents its members when complaining about religious displays on public-owned property. (Excerpts at 240.)

FFRF received complaints about the statue of Jesus Shrine located in Flathead National Forest, prompting FFRF to write letters of complaint well before this suit. (Excerpts at 240.)

Annie Laurie Gaylor is a co-founder of FFRF, becoming co-president in 2004. She has personally observed that the public reaction to requests to end Establishment Clause violations often devolves into ad hominem, hostility and

veiled or unveiled threats to FFRF and members who are state/church separation advocates. (Excerpts at 242.) Attacks on FFRF since contacting the Forest Service about the Shrine have often been framed in hostile and religious terms, not as mere disagreement over a “historic” monument. (Excerpts at 243.) FFRF has received a number of vitriolic phone calls and messages in response to FFRF’s request that the U.S. Forest Service decline to reissue a permit for the Jesus Shrine. These messages usually treat the issue as a religious matter. (Excerpts at 243.) Correspondence received by FFRF in October of 2011, which is when the Shrine issue garnered substantial national media attention, demonstrates the hostility to objectors. (Excerpts at 243 and 273-340.) Since FFRF filed this federal lawsuit, it has continued to receive both hostile phone calls and vitriolic e-mails, often claiming the United States is founded on a deity or Christianity and calling FFRF and its membership “anti-American.” (Excerpts at 245.)

In Ms. Gaylor’s experience, working in various capacities as founder, volunteer, board member, and staff member at FFRF for more than 35 years, many persons who object to religious displays on government property are reluctant to come forward for fear of alienation or retribution. (Excerpts at 245.) It has been Ms. Gaylor’s experience that, over the years, government officials often ignore or may fail to keep or hold onto complete records of Establishment Clause complaints. She has found this to be particularly the case regarding religious

displays that were erected on public property in the 1950s and 1960s. (Excerpts at 245.)

A prime example of unrecorded objection occurred when a complaint that Ms. Gaylor, FFRF, its members and others made over a religious display that evidently went ignored by government officials, concerning the Ten Commandments monument on the Texas State Capitol lawn. Madalyn Murray O'Hair, director of American Atheists, and Anne Nicol Gaylor, then president of the Freedom From Religion Foundation, objected several times to Texas governors since the 1970's regarding this monument on state property. None of these complaints apparently became a part of the court record in the case *Van Orden v. Perry*, but reports on these complaints, from the Galveston Daily News and the Corpus Christi Times respectively, were published on November 16, 1977. (Excerpts at 245-246 and 350-351.)

Ms. Gaylor also wrote Texas Gov. Rick Perry a letter on Sept. 4, 2001, prior to any commencement of action by Mr. Van Orden to challenge the decalogue at the Texas State Capitol, asking Governor Perry to order the immediate removal of that monument: "The State of Texas has no business dictating to its constituents which gods they may have, how many gods they should have, or that they need to have any gods at all!" (Excerpts at 246 and 352-353.) Ms. Gaylor's 2001 letter of complaint was made on behalf of a Texas FFRF member whose email

correspondence notes that he too had written Gov. Perry (“no reply”), Congressman Lamar Smith and Senators Wentworth and Ogden. The Texas FFRF member emailed FFRF that “all replies I did receive expressed support for the monument claiming tradition, America being based on godly principles, etc., etc.” (Excerpts at 246 and 354-355.)

Ms. Gaylor is unsurprised that the U.S. Forest Service has not provided/retained records of complaints about the Jesus Shrine. This is consistent with how FFRF’s complaints have been treated in other situations. (Excerpts at 247.)

VI. SUMMARY OF ARGUMENT.

The District Court erroneously concluded on summary judgment that a permanent six-foot statue of Jesus Christ, standing by itself in the forest on federal land, does not convey a religious impression. The court’s conclusion is unsupported by the evidence of record and reasonable inferences. The monument was intended as, and approved by the Forest Service as, a religious shrine -- and Jesus on Big Mountain remains a government-favored religious icon today.

A permanent Catholic shrine on public land is prohibited by the Establishment Clause, every bit as much as a Catholic church would be. Here, the Forest Service authorized a six-foot tall statue on a seven-foot pedestal of the Sacred Heart of Jesus Christ as a religious shrine, beginning in 1954, and the

indelible perception of the statue remains that of a distinctly Catholic icon. The Forest Service has preferentially authorized the Shrine and contrived justifications for its perpetuation, but the fact remains that the Jesus Shrine on Big Mountain is perceived as an unambiguous and intended religious endorsement.

A religious shrine on government land does not pass constitutional muster even if supported by popular interest groups. One story now told about the Jesus Shrine, found persuasive by the District Court, is that returning WWII veterans wanted such a religious shrine like those they saw in Europe, but this does not make the shrine any less a religious display. A shrine is a shrine, and here, the intent and purpose remain just such, i.e., a place of comfort for Catholics.

The Government's argument, reduced to its essence, otherwise would mean that religious iconography on public land is acceptable if supported by popular interest groups. The Establishment Clause, in other words, would be subject to majoritarian or popular demand. That, however, is not the lesson of our Constitution -- nor a paradigm for historical success, as world-wide religious conflict attests. The Establishment Clause is intended as a prophylactic against divisiveness, rather than a remedy in search of sectarian conflict.

Religious icons on public land cannot be constitutionally salvaged by local celebrity status. Here, Jesus on Big Mountain has achieved recognition because it is incongruously sited on government land. The Jesus Shrine derives its cachet

from being out-of-place in the middle of Forest Service land. Move the statue to a local church and it is far less notable as a memorable religious display. Religious promoters, like the Knights of Columbus, therefore, benefit from having their religious icons on public land precisely because such placement makes them stand out. The dissonance of a religious shrine in a government forest may result in irreverence by some, but only because the shrine is perceived as a misplaced religious display.

The District Court's conclusion that the Jesus Shrine is historically significant, but not a war memorial or a religious display, is not reasonable - - certainly not an undisputed material fact. The oral histories documented by the Government's own historian confirm the local perception of the statue as being religiously significant. Local observers derive "comfort" from the Jesus Shrine because it is religious. The District Court's conclusion that the Shrine is just a reminder of the area's recreational history is certainly not an undisputed fact.

The District Court's reasoning, moreover, that a stand-alone religious shrine should remain on public land because the violation is longstanding, is not constitutionally sound. The Supreme Court has consistently recognized that unconstitutional acts are not justified solely because they have previously gone uncorrected. Here, the Jesus Shrine originated as an identifiably and deliberately religious figure and remains such, which significantly distinguishes the Shrine

from displays and practices that have become merely ceremonial. Religious significance is the perception of a reasonable observer - - and objectors are treated with hostility. If courts followed the Government's "repose" logic, bans on interracial marriage and segregated public schools would still prevail.

The Forest Service itself has documented that the Shrine is inappropriate on Big Mountain -- but the Forest Service has favored its continued presence in order to avoid criticism by religious proponents. The Forest Service has recognized that the Jesus Shrine would not be approved under applicable standards, but Knights of Columbus's Sacred Heart of Jesus Shrine has been preferentially finagled and permitted. Just as individuals offended by the Jesus Shrine are discouraged from making objection, so too the Forest Service has been influenced by the cacophony of support for the Shrine by religious advocates.

The perception of the Jesus Shrine on Big Mountain as a religious icon cannot be denied, the District Court notwithstanding. The shrine is a distinctively religious icon, in a stand-alone location on public land, so as to draw attention to it as a religious symbol. The District Court's conclusion that the Shrine is too unobtrusive to really matter belies the evidence on record. Such a striking display, preferentially and permanently located on government land, gives the unmistakable impression of religious endorsement, which violates the Establishment Clause.

Government land cannot constitutionally be appropriated for permanent religious displays. The attempt here to make religious orthodoxy a matter of popular acclaim is the reason that the Establishment Clause prohibits government endorsement of religion, in order to protect matters of conscience for all. The separation of church and state is the *sine qua non* of the Establishment Clause. The District Court's decision is result-oriented, but not justified by the evidence of record or reasonable inferences.

VII. ARGUMENT.

A. Standard of Review Applicable To Summary Judgment.

The Court of Appeals reviews *de novo* a District Court's decision to grant summary judgment in order to determine whether, viewing the evidence in the light most favorable to the nonmoving party, any genuine issues of material fact exist and whether the District Court correctly applied the substantive law. *Hazle v. Crofoot*, 727 F.3d 983, 990 (9th Cir. 2013).

B. The District Court Disregarded Evidence That The Big Mountain Shrine Has The Purpose And Effect Of Advancing Religion In Violation Of The Establishment Clause.

1. The *Lemon* Test Is Applicable To Religious Displays Like The Big Mountain Shrine.

The traditional test applied by the Supreme Court to determine whether governmental action violates the Establishment Clause was set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). To be constitutional, the government

conduct at issue must: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster an excessive government entanglement with religion.

The *Lemon* test remains controlling. In two relatively recent Establishment Clause cases, the Supreme Court reached differing results under distinct tests of constitutionality. In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court held that the display of a monument inscribed with the Ten Commandments on the grounds of the Texas capitol did not violate the Establishment Clause. The plurality opinion stated that the *Lemon* test was not useful in dealing with this sort of passive monument that Texas had erected on its capitol grounds. *Id.* at 686. On the other hand, in *McCreary County v. ACLU*, 545 U.S. 844 (2005), the Court held that the display of loaned copies of the Ten Commandments on the walls of two courthouses violated the Establishment Clause because the placement of the displays evidenced a religious purpose, thus failing the first prong of the *Lemon* test.

The Ninth Circuit discussed the impact of these cases in *Card v. City of Everett*, 525 F.3d 1009, 1016 (9th Cir. 2008), a case like *Van Orden* involving a 10 Commandments display that was as part of a larger display with numerous secular monuments. The Court came to two conclusions: (1) that the three-part test set forth in *Lemon* remains the general rule for evaluating whether an

Establishment Clause violation cause exists; and (2) that the *Lemon* test does not apply to determine the Constitutionality of some long-standing religious displays that convey a historical or secular message in a non-religious context. *Card*, 520 F.3d at 1016. See also, Public Displays of Affection for God: Religious Monuments after McCreary and Van Orden, 32 Harv. J. L. & Pub. Pol’y., 231, 246 (2009) (“Most courts of appeals have concluded that the *Lemon* tripartite test of purpose, effect, and entanglement still stands after *Van Orden*.”). Here, the present case does not fit the exception discussed in *Van Orden*. Under either test, however, the Shrine on Big Mountain violates the Establishment Clause under the Ninth Circuit’s reasoning in *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011), in which the Court held that a veterans’ memorial dominated by a cross violated the Establishment Clause.

2. The Big Mountain Shrine Was And Is Still Intended As A Religious Display.

Under both *Lemon* and *Van Orden*, the Court first considers whether the purpose of government action is predominantly secular in nature. When the government acts with the ostensible and predominant purpose of advancing religion, it violates a central value of the Establishment Clause. *McCreary*, 545 U.S. at 860. The underlying value of the Establishment Clause is violated, moreover, when the government manifests a purpose to favor one faith over another faith -- or over non-believers. The Supreme Court explained in *McCreary*

that the purpose inquiry does not call for “any judicial psychoanalysis.” *Id.* at 862. Rather, “the eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history and implementation.” *Id.* Finally, the secular purpose must “be genuine, not a sham.” *Id.* at 864.

The Forest Service’s authorization of a permanent religious shrine on Big Mountain evinces a purpose that cannot be characterized as “predominantly secular.” The Knights of Columbus requested authorization to erect a religious shrine. The request made no mention of a memorial or any secular purpose. Contemporary accounts from 1954 confirm that the Shrine was dedicated atop Big Mountain with the assistance of a Catholic Priest. The Knights, in fact, specifically dedicated the Shrine “To the Honor and Glory of God.” *Id.* The Knights, moreover, were and are an exclusive membership organization for Catholic men -- and the Knights constructed numerous similar Catholic shrines around the country. The Knights constitute an exclusively Roman Catholic organization for which “church-related activities are essential to its work as an organization of Catholic laymen.”

The Forest Service, for its part, granted the Knights authorization, without cost, to put a shrine on public land. That was the purpose of the request and that was the stated purpose of the approval. No “psychoanalysis,” therefore, is

necessary to determine anybody's purpose. This is not a public forum, moreover; it is regulated use land, and permitted uses do not allow for religious shrines to be constructed permanently in National Forests! In fact, the Shrine is situated apart from recreational ski slopes, further emphasizing the appearance of governmental involvement and responsibility.

Subsequent attempts to re-write history do not detract from the religious purpose of the Catholic Shrine. The story has surfaced that returning Roman Catholic WWII veterans had seen "religious shrines" in Europe and so the Knights, who already had a history of erecting religious shrines, supposedly adopted this justification. Even that attempted rationalization, however, does not contradict that the Shrine on Big Mountain was intended for its religious significance.

The claim that veterans wanted a religious shrine does not make it suddenly non-religious. The inquiry is not who wanted a Shrine, but why. Here, the stated purpose for the Shrine confirms its religious significance. As the Tenth Circuit Court of Appeals recognized in *American Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1122 (10th Cir. 2010), a memorial cross, which is not a generic symbol of death, does not nullify religious sectarian content. Similarly, dedicating a patently Catholic shrine to a veteran's group also does not magically transform the shrine into a secular symbol. The Court stated in *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961, 974 (W.D. Wis. 2003), that "it is difficult to see how dedicating a

monument to a particular group can diminish its religious nature ... Building a church in memory of a beloved parishioner does not make it any less a place of worship.” In *Freedom From Religion Foundation v. Marshfield*, 203 F.3d 487 (7th Cir. 2000), moreover, the Court held that a similar Knights of Columbus statue of Jesus, arms open in prayer, gave the appearance of endorsement, including because the statue “portrays a figure of particular importance to one religious group.” In fact, “Jesus Christ is, if anything, more fundamental to the doctrine of Christianity than the Ten Commandments are to either Judaism or Christianity.” *Washegesic v. Bloomington Public Schools*, 813 F. Supp. 559, 563 (W.D. Mich. 1993).

As recently as June of 2011, the Knights continued to describe the Shrine on Big Mountain as a “non-denominational religious statue,” which supposedly “appeals to all religions.” The reality, of course, is that Jesus is a distinctively Christian figure, and the Knights did not disavow their original intent that the Shrine was intended to reflect obvious religious significance.

The Forest Service’s own purpose in favoring the Shrine is indicated by the disingenuous tactics used to justify reauthorization. The Forest Service recognized that war memorials and religious statues are not appropriate for approval under government regulations. The Government has admitted that a religious shrine does not fit any of the stated purposes for federal permits. The Forest Service, moreover, recognized that it had denied non-Christian groups permission to utilize

public land for religious purposes. The Forest Service, therefore, responded to criticism of its initial decision of August 24, 2011, by attributing “historical significance” to the Shrine as part of an area ski resort. The ski resort, however, has never advertised or promoted the Shrine, nor is the Shrine even situated as an obvious part of the resort, as the District Court implicitly recognized. In fact, the Government argues that the Shrine is “discreetly” remote from the groomed ski trails, although this has not always been the case. Nonetheless, knowing the tightrope it had to walk, the Forest Service coached personnel to make the remarkable argument that the Statue of Jesus has neither religious significance, nor is it a war memorial.

The present case is not analogous to the situation in *Barnes-Wallace v. San Diego*, 704 F.3d 1067 (9th Cir. 2012). The Jesus Shrine has the look and feel of being located on Forest Service land, and the Government’s authorizations have been characterized by secret and preferential consideration. In fact, religious monuments and commemorative markers are not even eligible for Forest Service authorization or placement on the National Register for Historic Sites. For that reason, the Forest Service has contrived to call an obvious religious shrine something other than what it is. The Government’s approval process in this case itself is characterized by lack of neutrality, which was not the case at all in *Barnes-Wallace*.

The Forest Service's "refined" justification crystallized one week after being criticized for its initial decision -- and the administrative record shows no study or analysis even being done along the lines suggested by the Forest Service. Similarly, the Montana State Historical Preservation Office ("MSHPO") "concurred" with the Forest Service without any study or analysis. MSHPO simply concluded that the Shrine is not like Lourdes where people come to worship. This napkin analysis, however, completely ignores the fact that religious displays are often not destination sites, such as a nativity scene on a courthouse lawn.

Unwanted exposure to religious displays on government property is plainly actionable under the Establishment Clause. MSHPO's reasoning, if adopted, would sanction permanent religious displays on government land as long as people came to the site without intending to be exposed to religious iconography. The Establishment Clause, therefore, would ironically countenance unwanted exposure to religious displays -- as long as unintended or unavoidable.

According to the Forest Service's present analysis, even a stand-alone nativity scene on government property would not be objectionable because courthouse observers did not come, in the first instance, to see the nativity scene. Unexpected and unwanted exposure to religious displays on public property, by this reasoning, would by definition render the display constitutional under the

Establishment Clause. Realistically, the Forest Service probably does not believe this, but the Forest Service finds itself in this untenable position because it has engaged in contrived reasoning to preferentially reapprove the Shrine on Big Mountain.

In the end, the evidence and reasonable inferences quite clearly establish that the Catholic Shrine on the Forest Service's property was intended and approved as a religious Shrine. That is the current purpose as well, and the Government's subterfuges merely reflect the Government's continuing purpose.

3. The Shrine On Big Mountain Has The Primary Effect Of Advancing Religion, Including Because The Shrine Gives The Appearance Of Endorsement.

The Ninth Circuit's recent decision in *Trunk* is highly instructive in evaluating the present. *Trunk* involved a Veterans' Memorial dominated by a Christian cross. In its analysis, the Court considered "fine-grained, factually specific features of the Memorial, including the meaning or meanings of the Latin cross at the Memorial's center, the Memorial's history, its secularizing elements, its physical setting, and the way the Memorial is used." 629 F.3d at 1110.

The government contended in *Trunk* that the relevant factors demonstrated that the Memorial's primary effect was patriotic and nationalistic, not religious. The Court disagreed. Taking all of the factors into account and considering the entire context of the Memorial, the Court concluded that "the Memorial today

remains a predominantly religious symbol. The history and absolute dominance of the Cross are not mitigated by belated efforts to add less significant secular elements to the Memorial.” *Id.*

The Court first acknowledged the obvious in *Trunk*, *i.e.*, that the Latin Cross “Is the preeminent symbol of Christianity.” *Id.* According to the Court, the Cross also is “exclusively a Christian symbol, and not a symbol of any other religion.” *Id.* at 1111. Similarly, in the present case, the figure of Jesus Christ on Big Mountain is unambiguously a symbol of Christian faiths, and more particularly with the “Sacred Heart,” the Catholic faith. Nothing in the record, moreover, detracts from this meaning, *i.e.*, the Christ figure has not acquired an alternate, non-religious meaning.

The Court in *Trunk* next considered whether the Latin Cross had a “broadly-understood ancillary meaning as a symbol of military service, sacrifice and death.” The Court rejected the Defendant’s argument that the Cross had such an ancillary meaning:

The reasoning behind our prior decision is straight forward. A sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion. *Ellis*, 990 F.2d at 1527. Thus, the use of exclusively Christian symbolism in a memorial would, as Judge O’Scannlain has put it, “Lead observers to believe the City has chosen to honor only Christian veterans.” *SCSC*, 93 F.3d at 626 (O’Scannlain, J., *concurring*). And in so far as the Cross is “not a generic symbol of death” but rather “a Christian symbol of death, that signifies or memorializes the death of a

Christian,” *American Atheists*, 616 F.3d at 1161, a reasonable observer would view a memorial cross as sectarian in nature. 629 F.3d at 1112.

Again, in the present case, nothing in the record suggests that the Catholic Shrine on Big Mountain has acquired an ancillary meaning as a secular war memorial. In fact, the Government’s own historian found no contemporaneous evidence that the Christ figure on the Mountain was erected as a war memorial. In any event, shrines with Statues of Christ certainly have never become a common symbol for military cemeteries in the United States. On the contrary, the evidence in this case shows that the Shrine on the Mountain is not typical of a memorial -- or even as an ancillary part of a resort.

The evidence also does not support the conclusion that Catholic shrines have been used as a default symbol memorializing veterans buried in the United States; very few if any war memorials include Catholic shrines or other religious imagery; and the Shrine on Big Mountain does not subordinate the figure of Christ to patriotic or secular symbols. In fact, no patriotic or secular symbols are present at all. On the basis of the evidence of record, therefore, one can only conclude that the Jesus Statue does not possess an ancillary meaning as a secular or non-sectarian war memorial. Christ remains, as intended, an exclusively Christian symbol.

The Court in *Trunk* further considered whether secular elements, coupled with the history and physical setting of the Latin Cross had transformed the

sectarian message of government endorsement of a particular religion. *Id.* at 1117. The Court concluded that such a transformation had not occurred, but the Court did “not discount the fact that the Cross was dedicated as a war memorial, as well as a tribute to God’s promise of ‘Everlasting Life,’ when it was first erected, or that, in more recent years, the Memorial has become a site for secular events honoring veterans.” *Id.* at 1118. The Court, in fact, did not doubt that the Memorial at issue was intended, at least in part, to honor the sacrifices of the Nation’s soldiers. Nonetheless, the Court concluded that a reasonable observer would perceive the Memorial as projecting a message of religious endorsement, not simply secular memorialization.

The Court in *Trunk* also considered it to be important that the Memorial had consisted for most of its life with the Cross alone; the Cross was dedicated in 1954 with no physical indication that it was intended as a war memorial until a plaque was belatedly added in 1989, in response to litigation; when seeking permission to erect the Cross, the applicant sought authorization to “create a park worthy to be a setting for (this) symbol of Christianity;” the Cross was dedicated in a ceremony that included a Christian religious service; and the Cross’s importance as a religious symbol was a rallying cry for many involved in the litigation surrounding the Memorial. *Id.* at 119-120.

Likewise, in the present case, secularizing factors are not present. The Big Mountain Shrine was intended and dedicated for its religious significance; returning veterans allegedly saw similar religious shrines in Europe, after which the Jesus Shrine is supposedly modeled; the Shrine was dedicated by Catholic officiates, according to contemporary reports; and long-time local residents testify to the continued religious significance and perception of the Statue.

The fact that the Catholic Shrine on Big Mountain has no surrounding secular features also is significant. In *Van Orden*, upon which the District Court relied in part, challenge was made to an Eagle's-donated monolith on the grounds of the Texas capitol, was surrounded by 22 acres of land, which "contains 17 monuments and 21 historical markers commemorating the people, ideals, and events that compose Texan identity." 545 U.S. at 681. This context in *Van Orden* was significant to Justice Breyer in his concurring decision because "when placed in the midst of numerous other, non-religious monuments, a display of the (Ten) Commandments can also impart a secular moral message." *Id.* As a result, such a display, like a Crèche among secular objects, may be permissible. *Trunk*, 629 F.3d at 1118. By contrast, however, in the present case, the Catholic Shrine is not in the midst of other non-religious symbols, and unlike the Ten Commandments, undisputedly does not impart a "secular moral message." Treating a government forest as a museum for religious shrines would be a dangerously slippery slope.

The obvious reality is that the Shrine in this case is not situated in a museum setting.

Finally, the Court in *Trunk* considered physical setting to be a relevant factor. The Court concluded, in this respect, that the Memorial's physical setting "amplified the message of endorsement and exclusion projected by its history and usage." In particular, the Court noted that the Cross remains the Memorial's central feature, *i.e.*, it dominates the site. *Id.* at 1122-23. "From the perspective of drivers on Interstate 5, the Cross is the only visible aspect of the Memorial, and the secular elements cannot neutralize the appearance of sectarianism. For these drivers, the Cross does not so much present itself as a war memorial, but rather as a solitary symbol atop a hill." *Id.* at 1123.

The physical setting in the present case "amplifies" even more the message of endorsement. Here, the Shrine has no secular elements at all, and to those looking at it from nearby ski trails, the sectarian effect is even more dramatic. In addition, as the District Court emphasized, the Statue is located away from the commercial ski trails so that it too "does not so much present itself as a war memorial, but rather as a solitary symbol atop a mountain." Moreover, locals testify that the serenity of the site presents a meditative opportunity to reflect at this religious site.

This point is not simply a matter of aesthetics. In *Van Orden*, the secular, historical and moral messages of the Ten Commandments display were highlighted by the fact that they were part of an assortment of monuments that supposedly shared a unifying, cohesive secular theme. *Van Orden*, 545 U.S. at 701-702 (Breyer, J., *concurring*). That theme supposedly reflected the historical ideals of Texans, which allegedly were grounded on moral principles involving ethics and law. The present case, however, has no such theme, but only a message that is unambiguously religious.

The fact that some skiers may behave “playfully and irreverently” around the statue does not change the equation. Such behavior, in fact, results from the very incongruity of a religious shrine in a national forest. The significant point is that a uniform response to unavoidable exposure to religious displays is not mandated by the Constitution; not everyone must object in order for the Establishment Clause to kick in.

The fact that few locals may be devout enough to brave inclement weather to actively worship at the Shrine also is irrelevant, as is the fact that local ministers may not motivate their congregants to trek to the Shrine. The Government again misconstrues the Establishment Clause as if it only prohibited religious “uses” of public land for formal services, without any prohibition on religious displays that unexpectedly confront the passer by.

A religious shrine, moreover, is no less religious if visitors and tourists recognize the shrine as a meeting spot. Such “use” does not destroy the religious nature of the shrine, any more than tourists meeting in front of Notre Dame destroy the religious nature of that church.

After examining the entirety of the Big Mountain Shrine in context, and considering its history, its religious and non-religious uses, its exclusively sectarian features, and the uniqueness and dominance of the Shrine, as the Court concluded, as in *Trunk*, it is clear that the Shrine primarily conveys a message of government endorsement of religion that violates the Establishment Clause. Context carries the weight in the Establishment Clause calculation, and should be considered. In the context of the Flathead Valley, the Government’s authorization of a religious shrine on Big Mountain has the impermissible purpose and primary effect of endorsing religion in violation of the Establishment Clause.

C. Enforcement Of The Establishment Clause Does Not Evidence Hostility To Religion.

Removal of the Shrine on Big Mountain would not constitute hostility to religion. Argument to the contrary, if accepted, would eviscerate the Establishment Clause. As the Ninth Circuit recognized in *Vasquez*, 487 F.3d at 1256, “it is well-established that governmental actions primarily aimed at avoiding violations of the Establishment Clause have a legitimate secular purpose.” Establishment Clause jurisprudence would be unworkable if it were any other way:

“To hold that the removal of objects to cure an Establishment Clause violation would itself violate the Establishment Clause would result in an inability to cure an Establishment Clause violation and thus totally eviscerate the Establishment Clause.” *Id.* at n.8, *quoting McGinley v. Houston*, 282 F. Supp. 2d 1304, 1307 (M.D. Ala. 2003), *aff’d.*, 361 F.3d 1328 (11th Cir. 2004). *See also Johnson v. Poway Unified School District*, 658 F.3d 954, 972 (9th Cir. 2011) (action taken to avoid conflict with the Establishment Clause does not inhibit nor excessively entangle government with religion).

The District Court improperly applied a bootstrap approach to the Establishment Clause, *i.e.*, “since it is there, let it be.” As the Supreme Court recognized in *Marsh v. Chambers*, 463 U.S. 783, 790 (1983), however “standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees.” The Establishment Clause invokes no such statute of repose. In *Marsh*, the Court upheld the practice of opening legislative sessions with solemnizing prayer, but only after concluding that the practice had the secular effect of solemnizing important occasions. In the present case, however, the Shrine on Big Mountain has no such pedigree. On the contrary, the Jesus Shrine solemnizes only the Christian memory of Christ, while providing a serene meditative site to reflect upon Him.

The present case, therefore, presents a situation unlike in *Salazar v. Buono*, 130 S. Ct. 1803 (2010). In *Salazar*, the only issue actually before the Court was the validity of a congressional land-transfer statute, adopted as a curative measure for a religious display found to violate the Establishment Clause. The merits of the constitutional violation were not on review by the Supreme Court, but the Court nonetheless commented on the context on which the statute was enacted and the reasons for its passage. The Court noted, for example, that Congress had previously designated the Cross at issue in *Salazar* as a national memorial for more than 300,000 WW-I Veterans. *Id.* at 1817. The Court also noted that the Cross had not been originally intended to promote a Christian message. *Id.* at 1816. Finally, taking account of the fact-specific context involved, the Court felt that the statue at issue was part of a “broader moral and historical message reflective of a cultural heritage.” *Id.* at 1817.

The factual context of the present case is quite different than in *Salazar*. The Shrine in this case was originally intended for, and is still perceived for, its religious significance. Also, it is not part of a broader moral and historical message. Nor is it a “public acknowledgment of religion’s role in society,” as the Intervenor suggests. Instead, this case is most analogous to the Ninth Circuit’s subsequent decision in *Trunk*, which issued after the Supreme Court’s decision in *Salazar*.

The District Court also erroneously treats the supposed lack of objection as decisive. In fact, the record in this case reflects that individuals have been long-offended by the Statue, including Mr. Cox who has been affected by the Shrine for 20 years. Similarly, Ms. Morris has deliberately avoided skiing at Big Mountain, after being first offended by the Shrine. Mr. Bonham, moreover, advises that criticism and objection to the Shrine is discouraged by the local Christian-Fundamentalist majority in the Flathead Valley. Such silencing, moreover, is not at all unusual, but that does not mean that the Establishment Clause should not be enforced. The heckler's veto is an unreliable test to apply, in any event, as even prior public complaints went unacknowledged by the Supreme Court in *Van Orden*. The Establishment Clause is intended to be self-executing precisely in order to avoid making "majority rules" the operative test. Courage to object is not the litmus of constitutionality.

The Establishment Clause protects the freedom of conscience and minimizes civic divisiveness, by prohibiting government endorsement of religion. *McCreary*, 545 U.S. at 876. "By enforcing the (Religion) Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails,

while allowing private religious exercise to flourish.” *Id.* at 882 (O’Connor, J., *concurring*). While it may be true, therefore, that many Americans find religious symbols like the Statue of Christ to be in accord with their personal beliefs, “we do not count heads before enforcing the First Amendment.” *Id.* at 884.

The Supreme Court’s cautionary admonitions in *McCreary* are aptly appropriate when considering this case. The Intervenor’s argue in this case that permanent religious monuments on government property should be allowed if supported by a majority. The Establishment Clause, however, is not, and should not be, merely precautionary while subject to the overriding whims of religious majorities. The Establishment Clause is not precatory.

Nor does the present case raise an issue of Free Speech. As the Supreme Court held in *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S. Ct. 1125, 1138 (2009), the Free Speech Clause’s forum analysis “simply does not apply to the installation of permanent monuments on public property.” Cases like *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995), involving temporary displays on a public square, have no applicability to the present case. As the Supreme Court recognized in *Summum*, 555 U.S. at 470-71, permanent monuments on government land do give the appearance of government sponsorship:

Just as government-commissioned and government-financed monuments speak for the government, so do privately financed

and donated monuments that the government accepts and displays to the public on government land. It is certainly not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. Because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely -- and reasonably -- interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker. This is true whether the monument is located on private property or public property, such as national, state, or city park land.

A permanent monument on public land is considered government speech, even if ownership of the display remains private. *See American Atheists*, 637 F.3d at 1115. “There is little doubt that Utah would violate the Establishment Clause if it allowed a private group to place a permanent unadorned 12-foot Cross on public property without any contextual or historical elements that served to secularize the message conveyed by such a display.” *Id.* at 1120. As a result, the Court concluded in *American Atheists*, a case of particular relevance and similarity to the present case, that the permanent placement of memorial crosses on public lands had the impermissible effect of conveying a message of religious endorsement.

The Forest Service similarly conveys a message of religious endorsement by allowing the Knights of Columbus to maintain a permanent Catholic shrine on federal forestlands. Such a permanent, and striking Christian display actually derives enhanced significance by virtue of its incongruous siting. The situation is

made worse by discovery that the Forest Service has given preferred consideration to this Catholic Shrine; engaged in subterfuge; and finally reauthorized the Shrine in spite of the fact that such requests have otherwise been denied by the Forest Service because they are inappropriate under Forest Service regulations. The record in this case, in short, does not evince neutrality, either in fact or in the perceptions of reasonable observers.

VIII. STATEMENT OF RELATED CASES.

No other case is known to be pending in this Court that is deemed to be related.

IX. CONCLUSION.

The District Court erred by granting Motions for Summary Judgment dismissing FFRF's Complaint. The court ignored disputed issues of material fact and drew adverse and unreasonable inferences against the non-moving party. The District Court's Judgment should be reversed and the case remanded.

Dated this 28th day of January, 2014.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(d)(2)(E)

I hereby certify that the foregoing document was prepared with Microsoft Word using Times New Roman 14-point proportionally spaced font. The brief contains 12,647 words, excluding the parts of the brief exempt by Fed. R. App. P. 32(a)(7)(B)(iii).

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 28th day of January, 2014.

/s/ Richard L. Bolton
Richard L. Bolton

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 28, 2014. I also hereby certify that I electronically filed the Excerpts of Record Volume 1-3 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 30, 2014.

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