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 (Kalispelll Council No. 1328),

Intervenors-Appellees.

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

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REPLY BRIEF OF PLAINTIFF-APPELLANT FREEDOM FROM RELIGION FOUNDATION

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I. DISPUTED ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT.

This is an appeal of a summary judgment decision, but the Government and the Knights of Columbus (herein after "KOC") treat the Court's well-recognized summary judgment protocol dismissively. They ignore disputed issues of material fact and the reasonable inferences from the evidence. They instead seem to argue simply that the District Court's findings are supported by credible evidence, but that is not the applicable summary judgment standard. In fact, the Government, KOC, and the amici, all proceed on appeal as if the record from the District Court is of no constraint. They argue their positions as if whatever facts they allege in their briefs are undisputed, even when not part of the lower court record. At the same time, the Government and KOC ignore the evidence of record and all inferences that conflict with their views. This leads the Government and KOC to the remarkable conclusion that a looming Statue of Jesus Christ on Forest Service land has no religious significance as a matter of law.

The Appellees' unorthodox approach to summary judgment methodology results in troublesome inconsistencies for them, as well. For example, the Government the KOC contend that the Catholic Shrine at issue is a thoughtful tribute to veterans of World War II, but perceived as an incongruous joke by winter skiers. The Government and KOC also claim that the Shrine is hardly even noticeable to skiers, and yet has historic significance as a symbol of the

development of Big Mountain as a recreational resort area. In fact, the Government and KOC claim that the Statue of Jesus is discreetly remote from the Big Mountain ski resort, but all the while perceived as part and parcel of the resort. Finally, the Government and KOC claim that the Jesus Statue is modeled after similar religious shrines in Europe, but yet it is supposedly not a religious monument at all on Big Mountain. In short, according to the Government and KOC, the Big Mountain Shrine has many contradictory characteristics, attributes, and meanings - - except, of course, the Statue of Jesus Christ supposedly has no religious significance. This is a fantastical view of the evidence of record, akin to denying that "the Emperor has no clothes," in the well-known tale of group pandering.

The evidence of record, in reality, does not support the Appellees' conclusions. In the first place, the record does not support the claim that the Catholic Shrine was intended as a war memorial. (Excerpts at 387-88.) The Statue of Jesus has always been identified as a "religious shrine," without association with the area ski resort. In fact, the Shrine was apparently intended to be modeled after similar religious monuments in Europe, which motivation does not detract from its religious significance.

The record also establishes that the Shrine on Big Mountain is perceived to have religious significance to this day. The Government's own investigation,

which included thirteen interviews of local residents, confirms this reality. These interviews show the obvious, *i.e.*, that Jesus on Big Mountain is perceived as having religious meaning to many. (*See* Appellants' Principal Brief at 14-21.) By contrast, the Government's conclusory statement that the Shrine is associated with the early development of Whitefish as a resort town is unsupported, just as no evidence has ever been produced of an actual study by the Forest Service supporting this historical relationship.

The Shrine also was intended to be seen - - and it is readily accessible to the public. Again, the Government's own witness describes the statue as a "well-known local landmark." (Excerpts at 395.) The evidence also shows, however, that the Statue is not situated as part of the facilities of an area ski resort itself, being located at a separate place of "unique and great beauty in the Flathead Valley." (Excerpts at 402.)

The record further establishes that the Government gave special consideration in this case to re-authorization of the Catholic Shrine. The Government admits that the statue of Jesus was not even eligible for listing on the National Register of Historic Places, based on its association with either the soldiers who fought in World War II or its association with Jesus. (Excerpts at 91.) The Government's conclusion, therefore, that a shrine on Forest Service land has no religious significance is dubious and reflects the Government's contrived means

to a preferential outcome. The Government's argument on appeal, moreover, does not detract from the contemporaneous evidence of actual preferencing in the face of the multitudes.

In the end, the District Court, the Government, and KOC, all have stubbornly refused to view the evidence of record in the light most favorable to the non-moving party. They have instead drawn unsupported conclusions that actually defy any rational assessment of the evidence. That is not appropriate in any circumstance, and it is particularly wrong when deciding a summary judgment motion.

II. FFRF HAS ASSOCIATIONAL STANDING BASED ON THE STANDING OF INDIVIDUAL MEMBERS.

A. Unwelcome Contact With, Or Avoidance Of, An Offensive Religious Display On Public Land Provides A Basis For Standing.

Article III standing exists for individuals who have unwelcome contact with an offensive religious display on public land. The Ninth Circuit Court of Appeals has consistently reached this conclusion, recognizing that "the concept of a 'concrete' injury is particularly elusive in the Establishment Clause context ... because the Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary nature." *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010). With this in mind, the Court has

consistently upheld standing on the basis of contact with religious images, including in numerous display cases. *Id*. at 1050.

As the Court noted in *Vasquez v. Los Angeles*, 487 F.3d 1246, 1250 (9th Cir. 2007), *citing Suhre v. Haywood County*, 131 F.3d 1083, 1085 (4th Cir. 1997), the injury that gives standing to plaintiffs in the Establishment Clause context is the injury caused by unwelcome contact with a religious display that appears to be endorsed by the state. *Id*. at 1251. This is just such a case, where FFRF's members, including William Cox, have had direct proximity to the Shrine on Big Mountain. (Excerpts at 130-141 and 364-365.) Similarly, Pamela Morris has affirmatively altered her conduct in order to avoid the Shrine, as the district court correctly recognized. (Excerpts at 360-362.)

FFRF member Doug Bonham also is affected by the omnipresence of the Jesus Statue, as a participating member of the Flathead Valley local community. (Excerpts at 357-358.) As the court recognized in *Suhre*, 131 F.3d at 1087, "plaintiffs who are part of the community where a challenged religious symbol is located and are directly affronted by the presence of this symbolism certainly have more than an abstract interest in seeing that the government observes the Constitution." Thus, where there is a personal connection between the plaintiff and the challenged display in his or her home community, standing is established by the proximity to the conduct challenged.

The majority of other Circuits also have held that the non-economic harm resulting from contact with an offensive religious symbol provides a sound basis for Article III standing. *Vasquez*, 487 F.3d at 1253. Unwelcome contact, even without avoidance, is enough to establish a legally cognizable injury. *Id*. at 1250 n. 4.

The Ninth Circuit, moreover, does not distinguish between ideological and religiously-motivated objections to religious displays, although the objectors here are actually all non-believers. In *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004), the defendants suggested that the Supreme Court's decision in *Valley Forge* required that a plaintiff's offense be grounded in religious beliefs, rather than ideological values. The Court rejected this interpretation, concluding that in *Valley Forge*, the plaintiffs lacked standing because their sense of offense was unaccompanied by a personal affront suffered as a consequence of the alleged constitutional violation. In *Valley Forge*, unlike the present case, the plaintiffs had no proximity to the site of their complaint, nor conscious avoidance.

The "psychological consequence" of unwanted exposure to religious displays constitutes concrete harm particularly where it is produced by direct exposure in one's own community. *Catholic League*, 624 F.3d at 1052. *See also, Vasquez*, 487 F.3d at 1252 ("unlike plaintiffs in *Valley Forge*, who were physically removed from defendant's conduct, Vasquez is a member of the community where

the allegedly offending symbol is located"). FFRF's members satisfy this criterion, but the Ninth Circuit also has consistently found standing where an offensive religious display on public land has caused "affirmative avoidance" of the display, leading to an "impaired ability to freely and unreservedly use public land." *Buono v. Norton*, 371 F.3d 543, 547 (9th.Cir. 2004).

Affirmative avoidance is sufficient to establish standing, although the Ninth Circuit does not require it. "Unwelcome direct contact, without avoidance, is enough to establish a legally cognizable injury for purposes of standing." *Vasquez*, 487 F.3d at 1252-53. *See also*, *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 784 (9th Cir. 2008) (plaintiffs had standing when they would not use public land because of religious use); *Ellis v. La Mesa*, 990 F.2d 1518 (9th Cir. 1993) (standing found to exist where plaintiffs avoided using land on which cross was displayed).

In short, the Court has consistently held in numerous cases that injury is sufficient to establish standing under the Establishment Clause where an individual affirmatively avoids public land in order to resist exposure to a religious display. That is the case in the present matter, particularly with respect to Ms. Morris, as the district court properly held.

B. FFRF Members Have Had Direct Contact With, Or They Have Avoided, The Shrine On Big Mountain.

Ms. Morris has affirmatively avoided Big Mountain because of the Shrine. She is a long-time skier in Montana, for more than 60 years, but she has steered clear of Big Mountain in order not to have direct contact with 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.) Ms. Morris' avoidance has continued ever since she first encountered the Shrine as a teenager, at which time she was profoundly offended. (Excerpts at 360-361.)

FFRF member William Cox, by contrast, has had continuing direct unwanted contact with the offensive display on Big Mountain. (Excerpts at 365.) Where such offense is caused by direct contact, within one's own community this is precisely the type of concrete and personal injury sufficient to confer standing, which courts consistently deem adequate to confer standing. Mr. Cox has had frequent and regular unwanted contact with the Jesus Statue at issue. He lives only 15 miles from Big Mountain and he regularly skis there each winter. Both his past and future exposures to the Shrine are classic and quintessential indicia of standing under applicable Ninth Circuit precedent.

The effect of the Shrine, moreover, impacts both skiers and non-skiers in the Flathead Valley. FFRF member Doug Bonham explained that the Jesus Shrine has a looming omnipresence throughout the Valley which impacts him even though he

is no longer able to ski. (Excerpts at 357-358.) Within the local community, the Shrine is widely recognized and perceived as a symbol of religious preference and endorsement. (Excerpts at 357.) According to Mr. Bonham, moreover, persons who object to the Jesus Statue being on Big Mountain are discouraged and marginalized within the Valley. (Excerpts at 358.) Where such personal impact of a religious display occurs within one's own political community, the offense is sufficiently concrete for purposes of standing.

C. FFRF Has Associational Standing Based On The Standing Of Its Individual Members.

An organization may sue on behalf of its members who would have standing to sue in their own right. *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 181 (2000); *Pacific Rivers Council v. United States Forest Service*, 689 F.3d 1012 (9th Cir. 2012). The Government and KOC disagree with the Supreme Court on this point, as their vitriolic attack on FFRF suggests, but that is the established law. KOC, in particular, seems contemptuous of FFRF's associational advocacy on behalf of members, but KOC lacks legal justification.

In the present case, FFRF has indentified at least three different members who would have standing in their own right to raise objections to the Jesus Statue on Big Mountain, including Mr. Cox, Ms. Morris, and Mr. Bonham. In the case of Mr. Cox, personal standing is based upon past and continuing direct unwanted contact with the Jesus Statue. In the case of Ms. Morris, she has affirmatively

avoided a significant and beautiful ski area in order to avoid the Jesus Statue, which the district court correctly deemed controlling. With respect to Mr. Bonham, he resides in the community in which the Jesus Statue exerts an oppressive endorsement of religion and marginalization of non-believers like himself. These are sufficient bases for jurisdiction, regardless of the Government's dismissive approach to standings.

D. FFRF Has Active Members With Personal Standing Sufficient To Provide Associational Standing.

The Government also objects to FFRF's associational standing because FFRF supposedly did not have members with standing at the time that the complaint in this matter was filed on February 8, 2012. In fact, however, both Pamela Morris and Doug Bonham already were members of FFRF pre-suit, in part, because of FFRF's common objection to the Shrine on Big Mountain. (Excerpts at 358 and 360.)

The Government's objection to Mr. Cox, moreover, ignores the reality that he has functionally always been represented by FFRF since the outset of this litigation. The Government complains that Mr. Cox officially only became a member of FFRF on February 18, 2012, 10 days after the suit was filed. On the other hand, the Government does not deny that his interest in this suit is in complete alignment with FFRF and it premises his objection to the Shrine on the same operative facts and cause of action instituted by FFRF. Mr. Cox seeks to

vindicate the same claims advanced by FFRF, *i.e.*, the very same cause of action that is at stake, as he testified during extensive adverse questioning by the Government and KOC lawyers. Even if the pending complaint was to be dismissed without prejudice for want of jurisdiction, therefore, Mr. Cox could simply file a new lawsuit, with the same claims now pending in this Court, as FFRF offered to do. Judicial economy, however, now warrants that this action proceed without such delay and waste precipitated by a second filing.

This Court, moreover, does not exceed its power by exercising jurisdiction over the pending controversy as long as there exists a substantial identity of interest between FFRF and its members, and as long as the pleadings set forth the same facts upon which the parties base their invocation of the Court's jurisdiction. *Cf. Delta Coal Program v. Libman*, 743 F.2d 852, 856 (11th Cir. 1984); *Smith v. CHF Industries*, 811 F. Supp. 2d 766, 774 (S.D.N.Y. 2011). Here, Mr. Cox, Ms. Morris and Mr. Bonham each has such an identity of interest with Freedom From Religion Foundation, and their claims have functionally been before the Court since the outset, including that of Mr. Cox.

E. Equitable Relief Does Not Require The Participation Of FFRF's Individual Members In The Lawsuit.

Finally, KOC contends erroneously that organizational standing is inappropriate because the necessary proof supposedly requires the participation of individual members as named plaintiffs. Individual participation, however, is not

mandated by the form of the relief requested here, i.e., declaratory and injunctive relief against the Forest Service's continued approval of a Jesus statue on public land. This equitable relief is not like a damage award to an individual, where proof of personal compensatory damages might be necessary. The injury to FFRF's individual members in this case is redressible by the equitable relief demanded in the Complaint.

Individualized proof as to a requested remedy is ordinarily only required where damages are sought. *Warth v. Seldin*, 422 U.S. 490, 516 (1976), cited in *American Baptist Churches v. Meese*, 712 F. Supp. 756, 765 (N. D. Cal. 1989). Where, as here, however, an association "seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Id* at 515. Equitable relief, moreover, is particularly suited for group representation. *American Baptist Churches*, 712 F. Supp. at 765. *See also NAACP v. Ameriquest Mortgage Company*, 635 F. Supp.2d 1096, 1103 (C. D. Cal. 2009) (rejecting defendant's argument that discrimination allegations required individual participation where prospective injunctive relief was sought; the court concluded that where injunctive relief is sought).

The right to relief in this case is not dependent upon differentiated injury to FFRF's members. As discussed above, standing in Establishment Clause cases

arises from unwanted exposure to or avoidance of an offensive religious display. Standing does not depend on any individualized avoidance or unique emotional distress. "The Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary nature." *Catholic League*, 624 F.3d at 1049. Once standing is established by unwanted exposure to an offensive religious display, the injury is redressible by the general equitable relief demanded by FFRF on behalf of members in this case. In *Pacific Rivers Council*, therefore, this Circuit most recently affirmed standing in an environmental case where no individual member of an associational organization were named as parties. By contrast, the Government tries to hold closed the courthouse doors too tightly in this case.

III. THE ESTABLISHMENT CLAUSE DOES NOT COUNTENANCE PERMANENT RELIGIOUS MONUMENTS ON GOVERNMENT PROPERTY.

A. Jesus On Big Mountain Has Religious Meaning.

The Government and KOC argue strenuously that the Establishment Clause allows for permanent religious monuments to be placed on Government land by private parties. These arguments fail to distinguish permanent displays that have paramount religious significance, as in the present case, from temporal displays or those with secular import. The Government and KOC also do not recognize the distinct nature of religious displays that have the appearance of Government

endorsement. Nor do the Government and KOC attribute significance to the preferential treatment underlying the Government's re-authorization in the present case for the Statue of Jesus to remain on Big Mountain.

The Court's decision in *Trunk v. City of San Diego*, 629 Fed. 3d 1099 (9th Cir. 2011), in the first instance, provides a compelling and instructive analysis for determining whether an alleged war memorial gives the appearance of religious endorsement. Just as in *Trunk*, the religious shrine on Big Mountain "today remains a predominantly religious symbol." *Id*. at 1110. More particularly, nothing in the records suggests that the Catholic Shrine on Big Mountain has acquired an ancillary meaning as a secular war memorial.

The fact that the Shrine on Big Mountain has no surrounding secular features also is significant, particularly in distinguishing the stand-alone shrine in this case from the museum-like setting in *Van Orden v. Perry*, 545 U.S. 677 (2005). The Supreme Court's rationale in *Van Orden* turned significantly on the fact that the display of the Ten Commandments at issue there did not convey an impression of religious endorsement, but rather was part of a secular historical assemblage. The clear implication from the Court's fragmented decisions in *Van Orden* is that the ultimate conclusion would have been affected by a solo religious display, as indicated by the Court's companion decision in *McCreary County v. ACLU*, 545 U.S. 844 (2005).

B. Private Ownership Of A Perpetual Religious Display On Public Land Does Not Trump The Establishment Clause.

The Shrine in the present case, for purposes of the Court's intent and endorsement analysis, remains most analogous to the Cross at issue in *Trunk*. Moreover, the fact that ownership of the Shrine has not been formally dedicated to the Government does not make the decision in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995), involving temporary displays on a public square, applicable to the present case. As the Supreme Court recognized 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." That is particularly true in the present case where the Catholic Shrine is not even identified as being part of the Big Mountain Ski Resort. Even now, with the addition of a recent plaque, the Shrine is not identified as being part of the private commercial ski resort. In fact, KOC claims that the statue is a war memorial dedicated to the memory of World War II veterans, rather than a private display belonging to the ski resort. The location of the statue also was selected for its pristine and contemplative location, which further gives the appearance that this monument is situated on Government property, with the attendant appearance of Government support.

The Government and KOC make the unprecedented suggestion that Government land can be perpetually dedicated to patently religious displays

consistent with the Establishment Clause. No case has recognized such a purported Free Speech right where the display is found to have a predominant religious connotation. The Government's argument insinuates that permanent use of Government property, even for the purpose of a church, also must be allowed if the Government otherwise leases Forest Service property to facilitate recreational opportunities. No court is known to have accepted this proposition or construction of the Establishment Clause. The cases cited by the Government and KOC, by contrast, have typically involved temporary, seasonal or advocacy speech in the context of a public forum.

The Court's decision in *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067 (9th Cir. 2012), does not alter the equation. That case did not at all involve a lease of property to be used for the display of a religious monument. The case involved the lease of commercial property, albeit by a religious organization, which did not intend to use the property as a church or religious shrine, or for other predominantly religious purpose. Although the Boy Scouts admitted that the leased premises in San Diego were used incidentally for some religious instruction, the Court's consideration of other factors suggests that the Court did not intend to authorize the permanent use of Government property for religious monuments, Catholic shrines, grottos or churches.

The present case is also markedly distinguishable from *Barnes-Wallace* because the evidence of record indicates that reauthorization of the Catholic Shrine was not accomplished pursuant to the neutral application of Government regulations, despite the Government's attempt on appeal to re-write past history. On the contrary, the evidence of record, and the reasonable inferences therefrom, indicate that the Government did not follow a neutral policy in this case, reacting instead to public outcry by reauthorizing the Statute of Jesus in circumstances that others would have been denied. As a result, although government regulations do not even allow for historic registration of monuments commemorating World War II veterans or religious figures, here a Statue of Jesus Christ, described by proponents as a war memorial, is deemed by the Government to be neither a war memorial nor a religious statue. These facts, and the inferences that a reasonable person would draw, obviously distinguish this case from the situation in *Barnes-Wallace*.

The Court's analysis in *American Atheists, Inc. v. Duncan*, 367 F.3d 1095, 1122 (10th Cir. 2010), is instructive in analogous circumstances. *American Atheists* involved the private placement of Catholic Crosses on government property. The Court rejected the argument that private sponsorship of such religious displays trumped the Establishment Clause, even if posted with acknowledgement of the sponsoring party. Significantly, the Court explained that

"there is little doubt that Utah would violate the Establishment Clause if it allowed a private group to place a permanent unadorned twelve-foot cross on public property without any contextual or historical elements that serve to secularize the message conveyed by such a display." *Id.* at 1120. The Court's reasoning was persuasive in the *Duncan* case and it is perhaps even more compelling in the present case.

In the final analysis, the Government and KOC seek to avoid altogether disputed factual landmines by arguing simply that the Government must allow permanent religious monuments on Government property as a matter of even-handedness. If this proposition is accepted as an unqualified matter of law, however, then permanent religious monuments, shrines, sanctuaries, and even churches, will come to adorn the landscape of public property throughout the Country. This would be contrary to recognized Establishment Clause principles, which have had a positive and salutary effect over the course of American history. The Establishment Clause serves a valuable purpose. It is not merely precatory.

The District Court's decision in this case appears out-come orientated, thereby emphasizing precisely the danger of making the Establishment Clause protections for conscience matters subject to majoritarian whim.

IV. CONCLUSION.

The present case must be analyzed as the Court would review any summary judgment decision by a district court. Here, the lower court, as well as the Government and KOC, have essentially eschewed standard summary judgment methodology.

The record is clear that disputed issues of material fact exist, which the District Court inappropriately ignored. The District Court also refused to draw reasonable inferences in favor of the non-moving party, as required. On the contrary, the Court, the Government, and KOC, each positively draw unreasonable and unsupported inferences - - against the non-moving party.

Analyzed properly, summary judgment should not have been granted in this case anymore than in a non-religious case. Religion is naturally emotive, which reality underlies the prophylactic purposes of the Establishment Clause. The volatility of religion, moreover, does not justify application of a relaxed summary judgment standard, as happened in this case. As a result, this case should be analyzed, based on the evidence of record, just as other cases. Under this standard, summary judgment should not have been granted. The Judgment of the District Court accordingly should be reversed.

Dated this 14th day of May, 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 4,341 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 14th day of May, 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 May 14, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Richard L. Bolton*
Richard L. Bolton

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