No. 13-35770

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC.,
Plaintiff – Appellant,

v.

CHIP WEBER, Flathead National Forest Supervisor, and
UNITED STATES FOREST SERVICE,
Defendants – Appellees,

and

WILLIAM GLIDDEN, RAYMOND LEOPOLD, EUGENE THOMAS,
NORMAN DeFORREST, and KNIGHTS OF COLUMBUS,
Intervenor-Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
(Chief Judge Dana L. Christensen) No. 12-19

RESPONSE BRIEF FOR THE FEDERAL APPELLEES

ROBERT G. DREHER
Acting Assistant Attorney General

JENNIFER SCHELLER NEUMANN
DAVID B. GLAZER
JOAN M. PEPIN
Attorneys, U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 7415
Washington, D.C. 20044
(202) 305-4626
joan.pepin@usdoj.gov

Of Counsel:
ALAN J. CAMPBELL
ELLEN R. HORNSTEIN
U.S. Department of Agriculture
Office of the General Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES & REGULATIONS:

MISCELLANEOUS:

INTRODUCTION

This case concerns a privately-owned statue of Jesus that has stood for 60 years on Big Mountain in Whitefish, Montana, pursuant to a special use permit issued by the United States Forest Service to the Knights of Columbus in 1953. The statue is one of the few elements remaining intact from the early development of Whitefish as a resort town, and both the Forest Service and the Montana State Historic Preservation Officer concluded that it is eligible for listing in the National Register of Historic Places. The statue is also associated in the minds of many locals with veterans of the famed Army 10th Mountain Division, some of whom hailed from the Whitefish area and returned there after World War II. They brought home memories of mountaintop shrines in the Italian Alps, and wanted to erect one at home in honor of their fellow soldiers.

As the Big Mountain ski area has developed over the years, the setting around the statue has changed. What was once a remote location, uphill from the top of the resort's lone ski lift, is now accessible to skiers using later-developed lifts and slopes, although the statue remains obscured from most angles by a copse of trees. As a result of this increased accessibility, the statue, which is often playfully decorated with ski gear, has become, as the record shows, a beloved, quirky local landmark and a reminder of the area's more rustic early days.

STATEMENT OF JURISDICTION

1. District court jurisdiction – The district court's jurisdiction is in dispute. Plaintiff Freedom From Religion Foundation (FFRF) invoked the district court's jurisdiction under 28 U.S.C. §133, 28 U.S.C. §2202, and 28 U.S.C. §1343. The Intervenor-Defendants Knights of Columbus moved to dismiss, arguing that FFRF lacked standing. The district court held that FFRF had standing based on the declaration of Pamela Morris.

2. Appellate jurisdiction – The federal appellees concur in FFRF's statement of appellate jurisdiction.

STATEMENT OF THE ISSUES

1. Whether FFRF has representational standing based on the declarations of three members to bring this Establishment Clause challenge to the statue.

2. Whether reissuance of a special use permit to maintain a monument on National Forest System lands, pursuant to regulations that are neutral with respect to viewpoint, violates the Establishment Clause because the monument in question has religious content.

STATEMENT OF FACTS

I. Legal Background

A. Regulations governing special use permits in 1953

In 1942, the Secretary of Agriculture promulgated regulations requiring generally that "[a]ll uses of national forest lands," excepting temporary uses such as fishing or camping and uses otherwise provided for by statute, "shall be designated 'special uses' and shall be authorized by 'Special Use Permits.'" 36 C.F.R. §251.1 (Cum. Supp. 1944) (Addendum (Add.) at 3) The regulation imposed detailed requirements on certain types of special use permits, such as those for mining or power transmission lines. For other, unspecified types of uses, however, the regulation required only that the permit "contain such terms, stipulations, conditions and agreements as may be required by the regulations of the Secretary of Agriculture and the instructions of the Chief of the Forest Service," and that permit holders "shall comply with all State and Federal laws and all regulations of the Secretary of Agriculture relating to the national forests and shall conduct themselves in an orderly manner." *Id*.; *see also* Excerpts of Record (ER) at 70. Under the 1942 regulation, the Forest Service issued some 70 special use permits for the installation and maintenance of

privately-owned monuments on National Forest System lands. Dodds Decl. Exh.1.[1]

The 1942 regulation generally directed the Forest Service to impose a "fee or charge commensurate with the value of the use authorized by the permit," 36 C.F.R. §251.3, but authorized the issuance of free special use permits for, among other things, "noncommercial purposes." 36 C.F.R. §251.2 (Cum. Supp. 1944) (Add.4)

B. Regulations governing the issuance and reissuance of special use permits in 2010

The Forest Service substantially overhauled its regulations governing special use permits in 1998. 63 Fed. Reg. 65950 (Nov. 30, 1998) (Add.5-25). The revised regulations set forth a two-tiered screening process for new requests for special use permits. *Id.* at 65950; 65953 (Add.6,9). The screening process applies only to requests for "new or substantially changed uses." *Id.* at 65953 (Add.9). Renewals and reauthorizations of existing uses are governed by a separate regulation and are not subject to the screening criteria.

[1] The Forest Service filed a motion for judicial notice of the Declaration of Steven M. Dodds, custodian of the Forest Service's Special Use Database, attaching a list of all monuments currently authorized by special use permits to occupy National Forest System lands.

1. Proposals for new special use permits

Under the revised regulations, the Forest Service must screen each proposal for a new special use to ensure that it meets nine enumerated requirements, one of which is that it "will not create an exclusive or perpetual right of use or occupancy." 36 C.F.R. §251.54(e)(1)(iv). The Forest Service Handbook (FSH) explains that in order to satisfy that criterion, the proposed use should "not in effect grant title to Federal land to an authorization holder or ... create the appearance of granting such a right." Monuments are listed as an example of the sort of use that could in effect grant title, or create the appearance of doing so. FSH 2709.11, Ch. 10, sec. 12.21, para. 4.

A proposal that clears the initial screening process is then screened for consistency with five additional criteria. The authorized officer must reject any proposal that, among other things, is "inconsistent or incompatible with the purposes for which the lands are managed," or which "would not be in the public interest." 36 C.F.R. §251.54(e)(5)(i) & (ii). The section of the FSH implementing this regulation, FSH 2709.11, Ch. 10, secs 12.32 & 12.32a, directs the officer to "[s]ee FSM 2703.2 regarding appropriate use of National Forest System Lands." The referenced section of the Forest Service Manual, in turn, directs that, in applying the "public

interest" criterion in the second-level screening stage, the officer should "[a]uthorize use of National Forest System lands only if . . . [t]he proposed use cannot reasonably be accommodated on non-National Forest System lands . . . ." FSM 2703.2.

A proposed use that clears both initial and second-level screening is then formally accepted as an application for a special use permit. At that point, appropriate environmental analysis must be conducted. FSH 2709.11, Ch.10, sec. 12.5. Once that analysis is complete, the Forest Service may grant or deny the permit.

2. Reauthorization of existing uses

The reauthorization of existing uses is not subject to the two-tiered screening process described above, but rather is governed by a separate regulation, 36 C.F.R. §251.64. The FSH section implementing this regulation explains that:

> 2. Proposals involving existing uses do not have to be submitted as proposals first and then accepted as applications. Rather, proposals involving existing uses are immediately accepted as applications upon submission. In reviewing an application involving an existing use, the Authorized Officer shall consider:
>
> a) Whether the proposed use would conform to the applicable Forest land and resource management plan;
>
> b) Whether the area requested is still being used for the purposes for which it is or was authorized;

c) Whether the holder is in compliance with the terms and conditions of the authorization; and

d) Whether the holder has the technical and financial capability to continue to undertake the use and to fully comply with the terms and conditions of the authorization.

FSH 2709.11, Ch. 10, sec. 11.2; *see also* ER76.

C. The National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies to "take into account" the effect of their decisions on sites and structures eligible for inclusion in the National Register of Historic Places. 16 U.S.C. §470f. The Advisory Council on Historic Preservation, an independent federal agency established under NHPA, 16 U.S.C. §470i, has established regulations governing federal agencies' duties under NHPA, *see* 36 C.F.R. Part 800, and criteria governing the eligibility of properties for inclusion in the National Register of Historic Places. *See* 36 C.F.R. §60.4; *see also National Register Bulletin: How to Apply the National Register Criteria for Evaluation*, reproduced at Add. 26-85.[2]

NHPA's implementing regulations require agencies, in consultation with the State Historic Preservation Officer (SHPO), to determine whether

[2] This Court may take judicial notice of a government publication. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 978 n.2 (9th Cir. 2007), *citing Tampa Elec. Co. v. Nashville Coal. Co.*, 365 U.S. 320, 332 & n.10 (1961). This particular government publication was also specifically cited and relied upon by the State Historic Preservation Officer in this case. *See* ER93.

there are any eligible historic properties within the project's area of potential effect. *Id*. §800.4; *see also id*. §800.2(c)(1)(i). Properties may be eligible for inclusion based on their significance to local, state, or national history. National Register Bulletin at 9. (Add.40). Properties owned by religious institutions are not eligible for listing based on their religious significance *alone*, but can qualify based on "architectural or artistic distinction or historical importance." *Id*. at 26 (Add.57). Similarly, a commemorative property such as a memorial cannot qualify for listing based solely on its association with the people or event commemorated, but may be eligible based on *its own* historic significance, acquired over time. The National Register Bulletin states that "[a] commemorative marker erected early in the settlement or development of an area will qualify if it is demonstrated that, because of its relative great age, the property has long been a part of the historic identity of the area." *Id*. at 40.

II. Factual Background

A. The statue's first 57 years

1. The statue's physical setting

On September 11, 1953, the Knights of Columbus Council of Kalispell, Montana, applied to the U.S. Forest Service for a special use permit to erect a statue of Jesus on a piece of land about 400 feet away from and 70 feet higher in elevation than the upper end of what was, at the time, Big

Mountain's only ski lift. ER69. In accordance with the regulations in effect at that time, the permit was granted for "free use" – that is, use without charge – on October 15, 1953. ER73-74. The permit authorized non-exclusive use of the 25' by 25' site, which was, and remains, subject to another non-exclusive special use permit for operation of a ski area.

The Knights of Columbus commissioned a statue, which was installed at the permitted location in 1954. ER383-84. The statue, which is about 6 feet tall, sits atop a concrete base that rises 6 feet from the ground. In typical winter snow conditions, the base is buried in the snow and the statue stands at about ground level. ER384.

Because the statue was, at the time of its installation, some 70 feet higher in elevation than the top of the then-existing T-bar ski lift, the statue was not easily accessible to skiers. *Id.* at 386. In 1968, however, the resort replaced the old T-bar with a chairlift, the terminus of which is above the statue. Although the statue remains obscured from most of the runs on Big Mountain, since 1968 it has been possible for skiers to happen upon the statue while skiing. *Id.* In summer, visitors are less likely to encounter the statue because no hiking trails pass near it. *Id.* at 387.

Other changes have occurred during the 60 years that this statue has stood on Big Mountain. The statue was originally a natural stone color, but

at some point between 1981 and 1997, a Boy Scout painted it as part of an Eagle Scout project. *Id.* at 384. In 2007 or 2008, the resort installed a fence behind the statue in an attempt to prevent skiers from high-fiving it, a common practice that resulted in the statue's hands being broken off numerous times. *Id.* at 385.

In 2010, the resort installed a plaque explaining the statue's history, ownership, and purpose. Dan Graves, President and CEO of Whitefish Mountain Resort, explained that over the years, he had observed skiers stopping by the statue and wondering where it came from and why it was there. ER435. He decided, as a matter of customer service, to put up an informational sign. The resulting plaque states:

> When the troops started returning from WWII in Europe to their home in the Flathead Valley they brought with them many memories . . . some good, some bad. Some of these troops were members of the Knights of Columbus at St. Matthew's parish in Kalispell. A common memory of their time in Italy and along the French and Swiss border was of the many religious shrines and statues in the mountain communities. This started a dialogue with the U.S. Forest Service for leased land to place this statue of Jesus. On October 15, 1953 the U.S. Forest Service granted a permanent special use permit to the KofC Council #1328 for a 25ft x 25ft square for placement of the statue. A commission for the statue construction was given to St. Paul Statuary in St. Paul, Minnesota. The statue was installed in 1955 and has been maintained by the Knights of Columbus from St. Matthew's ever since. We thank those brave troops that brought

> this special shrine of Christ to the Big Mountain and hope that you enjoy and respect it.
>
> -- Whitefish Mountain Resort, 2010

ER 385.

2. Uses and perceptions of the statue

Among the locals, there is a widespread belief that the statue is a memorial to veterans of World War II, in particular those who served in the 10th Mountain Division, ER402, although the historical record is ambiguous as to whether that was the actual intent of those who placed the statue, or whether that perception developed over time from the undisputed fact that many of the men involved in the development of the resort and the placement of the statue were World War II veterans, some from the 10th Mountain Division. ER387-88. Many of those responsible for the statue's placement are now deceased, but one of the few who remains attests that the statue was intended as a veterans' memorial. Bill Martin, a former manager of the resort who served on its board of directors for 50 years, stated in a declaration that

> 4. I was close friends with Ed Schenk, who developed the Big Mountain ski area in the late 1940s.
>
> 5. Ed had been an officer in the Army in World War II and was stationed in Italy with the 10th Mountain Division.
>
> 6. Ed recounted to me how almost all the slopes in Italy had statues of Jesus on the slopes.

> 7. Ed wanted to install a statue of Jesus on Big Mountain in memory of the men who had lost their lives in World War II.
>
> 8. Ed contacted the Knights of Columbus in Kalispell to help get the statue installed.
>
> 9. I can recall that the statue was installed in memory of the veterans Ed served with in World War II.

Supplemental Excerpts of Record at 48-49; *see also ER*486-487; 489. The 10th Mountain Division veterans group has, over the years, used the site as "a gathering place for some of their events." ER424.

The record reveals sporadic use of the statue site for religious purposes, including church services and weddings, but perhaps due to the weather or to the statue's being hard to find, ER392-93, 483, it has not been regularly used for such purposes. ER389-91. There is much more extensive evidence of religious activities occurring elsewhere on the mountain, either in the lodges or at the summit. ER390.

The record indicates that the site has been principally used as "simply a well-known landmark and meeting place for skiers on the mountain." ER394. Particularly in the days before cell phones, it was "an easy place [for skiers] to say 'Hey, I'll meet you either at the top of Two or over at the statue.'" *Id*. In addition, the statue has served as a fun backdrop for tourists to take photographs of themselves. Two long-time local skiers, Jean Arthur and Mike Jenson, both recalled seeing, and being asked to take, many

photographs of skiers posing with the statue. ER418, 450. The record contains one such photograph, ER397, taken from this website: http://www.calgarysun.com/2011/10/23/canadians-called-on-to-save-ski-hill-jesus.

There is a well-documented tradition of skiers treating the statue with playful and irreverent affection. ER396-398. Longtime resident Jean Arthur stated that it was a "comical institution on the mountain" to "decorate Jesus" with "necklaces or neckties and gloves . . . ." ER419. More recently, the statue has often been accessorized with ski gear, as shown in this photograph.

ER 397, reprinting photo from www.smh.com.au/travel/blogs/miss-snow-it-all/oh-my-ski-god-20110507-1edel.html.

"One of the best-documented parts of [the statue's] history on the mountain" is the repeated breaking off of its hands and fingers by overly-enthusiastic high-fives from passing skiers. ER398-400. Although the resort installed a fence in 2007 or 2008 to reduce the accidental vandalism by making it harder to ski past the statue at high speed, ER384-85, the high-fiving and resultant damage continues; a hand went missing in 2011, and in 2012 the replacement was accidentally broken off and turned into the resort's lost-and-found. ER399.

The most commonly-expressed sentiment about the statue is that it is simply part of the area's history; something that has been there as long as people can remember. "[N]early all of the local people interviewed by HRA said that they perceived the statue as an important part of the ski area's history and as a landmark that has simply always been there." ER382. Jean Arthur, a longtime Whitefish resident and author of *Hellroaring: Fifty Years on the Big Mountain*, stated that for her, the statue represented "just long-time memories. That it's just a part of the mountain as much as the old chalet." ER419. Mike Muldown, a lifelong resident of Whitefish, opined

that "It's nostalgic. . . . [I]t's always been there. It's like a lot of things. You just – it becomes part of your chord of memory . . . ." ER455.

B. The 2010 permit reissuance process

1. The Knights of Columbus applied for reissuance of their special use permit in 2010

The original permit issued to the Knights of Columbus in 1953 had no expiration date, ER73-74, but for reasons unexplained by the record, it was replaced in 1990 with a new permit with a ten-year term. ER84. That permit was reissued for another ten years in 2000, and the Knights of Columbus submitted a request for reissuance on July 19, 2010. *Id.*

2. FFRF filed a Freedom of Information Act request relating to reissuance of the permit

On May 26, 2011, plaintiff FFRF sent a Freedom of Information Act (FOIA) request to the Forest Service, requesting copies of the permit and application for reissuance, as well as Forest Service rules or policies governing private displays on public property. ER248-49. The letter opined that "[t]he statue of Jesus Christ cannot legally remain in Flathead National Forest. Several courts have ruled that government property may not contain religious images," and contained citations to case law. *Id.*

On June 28, 2011, the Forest Service responded to FFRF's FOIA request, providing the requested documents and internet links to the requested Forest Service rules and policies. The letter further stated that

"[t]he Forest has not reissued the permit at this point and discussions are underway to resolve the issue of the statue residing on national forest system land." ER250.

3. The Forest Service convened a meeting with the Knights to discuss FFRF's opposition to reissuance of the permit

The Forest Service convened a meeting on June 10, 2011, with representatives of the Knights of Columbus and the Whitefish Mountain Resort to discuss the permit for the statue. The meeting notes indicate that FFRF's FOIA request was the impetus for the meeting. ER225. According to the notes, the participants discussed four options for dealing with the statue: moving the statue to private land; authorizing the statue under Whitefish Mountain Resort's special use permit; having the statue declared a historical monument; and pursuing a legislative land conveyance. ER225-26. The notes do not indicate that the participants ever discussed or considered processing the permit reissuance request in accordance with 36 C.F.R. §251.64 and FSH 2709.11 Ch. 10, sec. 11.2, which are, respectively, the regulation and the Forest Service directive applicable to requests for reissuance of special use permits. ER225-26.

At the end of the meeting, the Forest Service informed the Knights of Columbus that the permit reissuance request would be denied. ER226. The Knights of Columbus indicated their intention to appeal that decision.

4. The Forest Service denied the application for reissuance of the permit

The Forest Service denied the Knights' application for reissuance of the permit. ER84-87. The Forest Service letter denying the application contained a brief recitation of the permit's history, and a two-sentence discussion of Establishment Clause jurisprudence. It noted that "Forest Service policy at FSM 2703.2 limits authorized uses of NFS lands to those that '. . . *cannot be reasonably accommodated on non-National Forest System lands,*'" *ER*85 (emphasis in original), although it failed to acknowledge that that criterion applies only to proposals for new special uses, not applications for reauthorization of existing special uses. 63 Fed. Reg. 65953 (Add.9); FSH 2709.11, Ch. 10, sec. 11.2. The letter then 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. Furthermore, the statue and its religious objective can be accommodated on adjacent private land. Therefore, I will not renew the special use permit for this statue.

ER 86.

The denial letter noted that the Forest Service was "currently assessing the historical significance of the statue in accordance with the National Historic Preservation Act." ER85. The letter noted that although the statue could not be deemed historically significant under NHPA "by virtue of its religious value to a group or community alone," the statue was being evaluated for its historical significance with respect to its "relation to the United States Army's 10th Mountain Division and the development of the Whitefish Mountain Ski Area." *Id.*

5. The Knights of Columbus appealed the denial

The Knights of Columbus filed an administrative appeal from the Forest Service's decision not to reissue the permit. The appeal alleged that the Forest Service was "treating religious and nonreligious uses differently" in violation of legal obligations and "patently discriminating against" religious uses. ER89. The appeal also noted that due to the statue's age and the way it is constructed, it cannot be moved without being damaged or destroyed. *Id.*

6. The Forest Service and the Montana State Historic Preservation Officer determined that the statue is a significant piece of local history

While the Knights' appeal was pending, the Forest Service completed its review of the statue's historic significance, concluding that the statue

merits inclusion in the National Register of Historic Places for its significance to local history. In a letter to Dr. Mark Baumler, the Montana SHPO, Forest Archaeologist Timothy Light noted that the statue is one of the few remaining elements from the early development of the ski area, which "play[ed] a significant role in the transition of Whitefish from a town heavily dependent on the lumber industry to a community built around tourism, skiing, and outdoor recreation." ER91. Light concluded that

> The statue has integrity of location, setting, materials, workmanship, feeling, and association and is a part of the early history of the ski area and would be considered a contributing element of such a historic district. Individually, it represents a small part of the history of the ski area but since so little remains intact of that early history, the statue of Jesus is probably eligible for listing on the National Register of Historic Places under criteria "a" – associated with events important to local history.

ER 92. Accordingly, Light sought the SHPO's concurrence in the determination of eligibility.

> On September 19, 2011, the SHPO concurred, noting that the statue
>
> has long been a part of the historic identity of the area. It is not believed to be a religious site because unlike Lourdes or Fatima, people do not go there to pray, but it is a local land mark that skiers recognize, and it is a historic part of the resort. Based on this we believe that it is close enough to the third example of an Eligible property description presented in National Register Bulletin #15 on page 40.

ER93; *see also* Add.71.

7. The Forest Service withdrew its decision denying reissuance of the permit

Citing the SHPO's concurrence that the statue is eligible for inclusion in the National Register of Historic Places, the Forest Service withdrew its decision denying reissuance of the permit, ER83, thereby mooting the Knights' pending administrative appeal. The Forest Service then solicited public comment on reissuance of the permit, and received approximately 95,000 comments.

8. The Forest Service issued a new decision reissuing the permit

On January 31, 2012, the Forest Service issued a Decision Memo reissuing the special use permit for another ten years. The decision noted that "[t]he statue has been a long standing object in the community since 1953 and is important to the community for its historical heritage." ER94. The decision also found that reissuance of the permit "is consistent with all Forest Plan goals, standards, and objectives for this management area." ER99. Although the Flathead Forest Plan generally allows "only those uses of National Forest System land that cannot be reasonably placed on private land," the Decision Memo explained that "the statue's historic value and eligibility for listing on the National Register of Historic Places is, in part, directly linked to the current physical location on National Forest land,"

which "constitutes a reasonable limitation to placing this statue in a new location on private land." *Id*.

C. Litigation in the district court

FFRF filed a complaint on February 8, 2012, claiming that the "continued presence of the Jesus shrine on Forest Service property . . . violates the Establishment Clause . . . by giving the appearance of the government's endorsement of Christianity in general, and Roman Catholicism, in particular . . . ." ER563. The Knights of Columbus successfully moved to intervene. ER540.

The Knights moved to dismiss for lack of standing, noting that FFRF had not identified any members who had seen and been offended by the statue. ER498-99. FFRF responded by submitting the Declaration of William Cox, who averred that he has "frequent and unwanted contact and exposure to the statue when I am skiing on Big Mountain many times each winter, which I find to be offensive," ER365, and moving to amend its complaint to add Cox as a plaintiff.

The district court denied FFRF's motion to amend the complaint because the deadline for amending pleadings had passed and FFRF had not shown good cause for failing to meet it. ER502. The district court denied

the Knights' motion to dismiss, however, because it found that FFRF had organizational standing based on Cox's declaration. ER505.

The Forest Service and the Knights both moved for summary judgment. The Knights renewed their standing argument, noting that discovery had revealed that Cox was not a member of FFRF at the time the complaint was filed and that his declaration therefore could not be considered in support of FFRF's standing. FFRF contended that Cox's declaration could be considered, but also submitted declarations from Doug Bonham and Pamela Morris, both of whom were members of FFRF when the complaint was filed.

Bonham and Morris's standing declarations, however, were unconventional. Unlike Cox, neither alleged that they had "frequent and unwanted contact with the statue . . . which [they] find to be offensive." ER365. Although Bonham professed that the statue, which he had seen 7 or 8 years earlier, "has the effect of making non-believers, like myself, feel marginalized in the community," he also admitted that his "aging knees" prevent him from actually skiing or hiking past the statue anymore and that he had not seen it since. ER357. Nevertheless, Bonham, who lives "approximately 60 miles from Big Mountain," alleged that he is "still

affected by the statue" because it "literally and figuratively looms over the valley." *Id.*

Pamela Morris stated that she had seen the statue once, in 1957, when she was 15 years old. Although she was at that time "active in the Methodist Youth Fellowship," she felt the statue was "startlingly out of place: intrusive" and it made her feel "unsettled." ER361. She has since "avoided the area: I backpack, fish and camp where nature has not been so violated in Montana." *Id.* She objects to "the intrusion of partisan artificial icons" on public lands, and will not revisit Big Mountain until it is "a welcome site for all who love nature." *Id.*

The district court held that FFRF could not rely on Cox's declaration to establish standing because the court must assess standing from the "facts as they existed at the time the plaintiff filed the complaint." ER45-46. The court held, however, that FFRF had organizational standing based on Morris's declaration. ER49. The court did not address whether Bonham would have standing. ER50.

Turning to the merits, the district court acknowledged that two distinct legal tests have been applied in varying situations to Establishment Clause challenges. Traditionally, Establishment Clause challenges have been analyzed under the *Lemon* test, under which government actions

involving religion are constitutional if they (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) [do] not foster excessive government entanglement with religion." ER51. The court noted, however, that the applicability of the *Lemon* test to longstanding monuments with religious content was called into question by *Van Orden v. Perry*, 545 U.S. 677 (2005), which declined to apply the *Lemon* test to an Establishment Clause challenge to a monument bearing the Ten Commandments on the grounds of the Texas State Capitol. ER51-52. Justice Breyer's controlling opinion in that case examined how the monument was used; its context; and its history, in particular the length of time the monument has stood without legal challenge. ER52. Following this Court's example in *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011), the court applied both tests and concluded that "no . . . constitutional violation exists under either the *Lemon* test or the *Van Orden* analysis." ER53.

Applying *Lemon*, the court found that the Forest Service's purpose in "allow[ing] a private organization's continued maintenance of a privately owned statue on public land leased to a private ski resort" was, at least in part, to preserve a "statue that has been part of the community since 1953 and reflects its historical heritage." ER54. The court rejected FFRF's

insistence that the government's purpose in reissuing the permit was necessarily identical to the Knights' purpose in applying for it, holding that "[t]he Knights' religious beliefs and reasons for erecting the statue are not juxtaposed onto the government." ER54, *citing Barnes–Wallace v. City of San Diego*, 704 F.3d 1067, 1084 n.15 (9th Cir. 2012).

The court next found that a reasonable observer would not perceive the statue as reflecting a governmental endorsement of religion. The court found it significant that the statue is flanked by a plaque informing the viewer of its private ownership and that it is located within a privately-operated ski resort, "not at a county courthouse, a federal reserve or some other property obviously governmental in nature." ER55. The court noted that the statue's location, "secluded within a group of trees off the side of a run at a private ski resort" was "less reflective of governmental religious endorsement" than the monument upheld in *Van Orden*, which was located on the grounds of a state capitol. ER55-56. The court also noted that unlike the cross at issue in *Trunk*, the statue "is not visible from miles away nor does it tower over a section of town mired in a history of anti-Semitism." ER56. On the whole, the court concluded that "permitting continued presence of the statu[]e at Big Mountain does not reflect governmental endorsement of religion." *Id.*

Finally, the court held that the statue's private ownership and maintenance do not entail any excessive government entanglement with religion. ER56. The court likened this case to *Barnes-Wallace v. City of San Diego*, in which this Court found no excessive entanglement where the city leased land to a religious organization because, among other things, the lease was "allocated on the basis of criteria that neither favor nor disfavor religion," and the city was not involved in managing the leased properties. ER56, *quoting Barnes-Wallace*, 704 F.3d at 1084. Here, the court held, the government does not maintain the statue, and its involvement is limited to processing a request for reissuance of the permit every ten years. "This limited involvement cannot amount to excessive government entanglement under the *Lemon* test." ER56.

Turning to *Van Orden*, the court examined the uses of the statue and found that its "secular and irreverent uses far outweigh the few religious uses it has served. The statue is most frequently used as a meeting point for skiers or hikers and a site for photo opportunities, rather than a solemn place for religious reflection." ER27. The court noted that the "independent secular value" of the statue was "recognized by the State Historic Preservation Officer." *Id.*

The context of the statue, the court held, is likewise secular. The court noted that the statue "sits next to a ski run" and that "[n]one of the statue's surroundings support a religious message – there are no seats for observance of the statue or similar accommodations for worshipers. Typical observers of the statue are more interested in giving it a high five or adorning it in ski gear than sitting before it in prayer." ER27-28.

Finally, the court noted that in *Van Orden*, Justice Breyer found it "determinative" that the monument had stood for 40 years without legal challenge, indicating that few if any observers interpreted it as a government effort to favor a particular religion. ER28, quoting *Van Orden*, 545 U.S. at 702. The court held that this "statue's 60 year life free of formal complaints . . . tips the scales in this case." ER28.

SUMMARY OF ARGUMENT

The district court lacked jurisdiction over this case because FFRF lacks organizational standing to bring this claim. William Cox joined FFRF after the complaint was filed, so his declaration cannot be considered in support of FFRF's standing. Doug Bonham's declaration fails to assert any concrete, ongoing injury. Pamela Morris's declaration asserts only aesthetic or environmental injury, which is not within the zone of interests of the

Establishment Clause, and so does not establish that she would have a cause of action in her own right.

Assuming that FFRF may bring this suit on behalf of its members, the judgment of the district court should be affirmed. The Forest Service's reissuance of the Knights' special use permit does not violate either the *Lemon* or *Van Orden* test. Under the *Lemon* test, which looks to the action's purpose and effects, the reissuance is constitutional because it had the secular purpose of allowing the Knights to maintain a statue that "has been a long standing object in the community since 1953 and is important to the community for its historical heritage," ER94, and because no reasonable observer, familiar with the relevant regulations, would interpret the reissuance as a government endorsement of the Knights' private religious speech. The statue also satisfies *Van Orden* because its secular uses have predominated over religious ones; its setting and context are entirely secular; and its long history without legal challenge indicates that those who encountered it did not mistake it for a government endorsement of religion.

The district court's judgment is also correct under public forum jurisprudence. Under the regulations in existence when the initial permit for the statue was issued, monuments were a permitted special use, and

thus a limited public forum was created. Governments may not discriminate against religious speech in a limited public forum without violating the Free Speech Clause, and allowing religious speech on neutral terms in a limited public forum does not contravene the Establishment Clause.

FFRF contends that public forum analysis does not apply to permanent monuments, but the general rule FFRF cites applies only to public forums that are too small to accommodate permanent monuments from all who might wish to install them. That limitation does not apply to the 193 million acre National Forest System. FFRF also raises numerous allegations that the Forest Service did not administer its permit program neutrally, but rather gave this statue preferential treatment. None of FFRF's allegations of preferential treatment, however, withstands examination.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989, 996 (9th Cir. 2013).

ARGUMENT

I. FFRF lacks standing under the Establishment Clause

To have standing under Article III of the Constitution, a plaintiff must have suffered an "'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," that was caused by the complained-of conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted). To have representational standing to assert the claims of its members, FFRF must establish "that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490 (1975). In other words, an organization may bring suit on behalf of its members if (among other requirements) it identifies members who could bring suit on behalf of themselves.

Subsequent cases paraphrased *Warth*'s holding as requiring an organization to show that identified members "would have standing to sue in their own right," *see, e.g., Friends of the Earth, Inc. v. Laidlaw Env. Serv.*, 528 U.S. 167, 169 (2000); *Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009), but that notion of "standing" included the zone of interests test. *See Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318,

320 n.3 (1977). The Supreme Court's recent decision in *Lexmark Int'l, Inc. v. Static Control Components*, 134 S.Ct. 1377, 1387 (2014), states that the zone of interest test is more aptly described as an inquiry into whether a particular plaintiff has a cause of action than as an element of "prudential standing," but however it is described, it remains a limitation on who can obtain judicial review under a particular statutory or constitutional provision. Because the rule set forth in *Warth* held that an organization's standing depends on showing that a member could "make out a justiciable case had [they] themselves brought suit," 422 U.S. at 511, then if FFRF cannot identify members who could bring suit in their own right, FFRF cannot bring suit on their behalf.

In Establishment Clause cases, the "concept of a 'concrete' injury is particularly elusive . . . because the Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary, nature." *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1250 (9th Cir. 2007). Nevertheless, there are minima. In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), the Supreme Court held that the plaintiff organization lacked standing to challenge a transfer of government property to a Christian college because the plaintiffs "fail[ed] to identify any personal

injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 485 (emphasis in original). Although a plaintiff's distress stemming from mere disagreement with a purported Establishment Clause violation is insufficient to confer standing, where a plaintiff claims that the alleged violation has inflicted "the psychological consequence [of] exclusion or denigration on a religious basis within the political community," the alleged injury is "sufficiently concrete." *Catholic League v. City and County of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) (en banc).

A. William Cox's declaration cannot be considered in support of FFRF's standing

FFRF filed its complaint in this action on February 8, 2012. ER556-565. William Cox, a resident of Kalispell, Montana, read about the suit in the newspaper and decided to join FFRF. He testified that "I wrote to them on February 18, 2012, after the suit was filed in which we're involved today, and I sent in my dues or my initial contribution at that time . . . ." ER130.

"The existence of standing turns on the facts as they existed at the time the plaintiff filed the complaint." *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007). Because Cox was not a

member of FFRF when FFRF filed the complaint, his affidavit cannot be considered in assessing FFRF's standing.

B. Doug Bonham's declaration does not allege an ongoing, concrete injury

Mr. Bonham states in his declaration that he saw the statue once, 7 or 8 years earlier, and that he perceived it as "an oppressive reminder that Christians are a controlling and favored group in the Flathead Valley."[3] He acknowledges, however, that he has "not skied or hiked by the statue since, and my aging knees limit me, in any event." ER357. Though he cannot see the statue, he claims that he is "still affected" by it because it "literally and figuratively looms over the Valley." *Id*.

Bonham does not allege either that he has ongoing direct and unwelcome contact with the statue or that he has been forced to alter his behavior in order to avoid such contact. His one past encounter with the statue is insufficient to establish standing: "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive

[3] According to the 2010 U.S. Religion Census, 32.4% of the residents of Flathead County, Montana, are religious adherents, making it the 2710th most religious of 3143 counties in the United States. By way of reference, the consolidated City and County of San Francisco, California, ranked 2530th, with 35.3% of the population claiming religious adherence. http://www.rcms2010.org/

relief . . . if unaccompanied by any continuing, present adverse effects." *Lujan*, 504 U.S. at 564. Bonham's claim that he continues to be injured by a statue he cannot see because it "looms over the Valley" is insufficiently concrete to establish standing. It is, rather, a paradigmatic example of the sort of alleged injury that is "too tenuous, indirect, or abstract to give rise to Article III standing." *Vasquez*, 487 F.3d at 1251.

C. Pamela Morris's declaration does not allege an injury within the zone of interests of the Establishment Clause

Pamela Morris's declaration states that she saw the statue once, in 1957, when she was 15. ER361. Although she was then "active in the Methodist Youth Fellowship," and therefore presumably not *religiously* offended by an image of Jesus, she felt the statue was "startlingly out of place: intrusive," and it gave her an "unsettled feeling." *Id.* As a result, she claims, she has avoided the area these past 57 years, preferring to "backpack, fish and camp where nature has not been so violated in Montana." *Id.* She would ski at Big Mountain again "if it were a welcome site for all who love nature. The Jesus Statue, however, is an intrusive icon, and therefore, I do avoid Big Mountain." *Id.* Morris spoke of her love for Montana and its natural beauty, and her desire to "protect our public lands from the intrusion of partisan artificial icons." *Id.* The declaration quotes a

comment she sent to the Forest Service, arguing that the statue "is pollution, as it is both artificial [and] not environmentally beneficial." ER360 (emphasis in original).

"The question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" has traditionally been a part of the standing analysis. *Association of Data Processing Serv. Orgs v. Camp*, 397 U.S. 150, 153 (1970). In its recent decision in *Lexmark*, the Supreme Court stated that "prudential standing is a misnomer as applied to the zone-of-interests analysis," and that the zone of interests test is better described as "ask[ing] whether [a particular person] has a cause of action under the statute." *Id.* at 1387 (internal citation omitted). However it is described, the zone of interests test remains a limitation on *who* can invoke the Court's jurisdiction to decide a particular case, and both this Court and the Supreme Court have explicitly held that it applies to constitutional as well as statutory claims. *Individuals for Responsible Gov't, Inc. v. Washoe Cnty.*, 110 F.3d 699, 702-03 (9th Cir. 1997); *Valley Forge*, 454 U.S. at 475. Indeed, Justice Scalia, who authored the *Lexmark* opinion, has argued the zone of interests test "is *more* strictly applied when a plaintiff is proceeding under a constitutional provision

instead of the generous review provisions of the APA." *Wyoming v. Oklahoma*, 502 U.S. 437, 468-69 (1992) (Scalia, J., dissenting) (emphasis in original, internal citation omitted).

Morris fails to allege an injury within the Establishment Clause's zone of interests because her alleged injury is aesthetic or environmental, not religious. All her claims of injury stem from her feeling that the statue is an "intrusion" on the "natural beauty" of the Montana mountains. ER361. Unlike Bonham, Morris does not aver that the statue makes her, as a non-Christian, "feel marginalized in the community." *See* ER358. Instead, she states that the statue made her feel "unsettled" because it was "intrusive" and a violation of nature. ER361. As this Court held in *Catholic League*, psychological consequences are a sufficiently concrete injury for Establishment Clause standing when "the psychological consequence was exclusion or denigration *on a religious basis* within the political community." 624 F.3d at 1052 (emphasis added). Morris's claimed injury does not satisfy that standard.

It is true that Morris describes the statue as "a Christian icon on public land that has the effect of promoting one particular sect," ER362, but that comment describes the supposed constitutional *violation*, not its consequential *injury* to Morris. For standing purposes, it is not sufficient

merely to allege "that the Constitution has been violated;" a plaintiff must also "identify [a] personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequences presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485 (emphasis in original). Morris may well believe that no religious images should be permitted on public property, but that belief is not sufficient to confer standing. Standing requires a personal injury, and the only injury Morris claims to have suffered as a result of her one encounter with the statue 57 years ago is not within the Establishment Clause's zone of interests.

The district court, following this Court's precedent in *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004), found that Morris's avoidance of Big Mountain due to her feelings about the statue constitute a cognizable injury. In *Buono*, the plaintiff was a practicing Catholic who admitted that his opposition to the cross at issue was based on his ideological opposition to religious images on public property, rather than any personal religious or spiritual injury. Although the Supreme Court in *Valley Forge* held that sort of injury insufficient for Establishment Clause standing, this Court distinguished *Valley Forge*, holding that because Buono altered his behavior to avoid seeing the cross, he had shown an injury in fact.

Intervening Supreme Court case law, however, has confirmed that a plaintiff "cannot manufacture standing merely by inflicting harm on themselves" in order to avoid non-cognizable harm. *Clapper v. Amnesty Int'l, USA*, 133 S.Ct. 1138, 1151 (2013). *Buono*'s holding on standing should therefore be reconsidered.

Ms. Morris has not been "forced to assume special burdens to avoid" religious exclusion or denigration or other cognizable injury. *Valley Forge*, 454 U.S. at 487 n.22. Rather, she has chosen to assume certain burdens (namely, to ski elsewhere) to avoid confronting a governmental policy choice with which she disagrees. Such "self-inflicted" injuries do not establish standing. *Clapper*, 133 S.Ct. at 1153; *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam). Otherwise, plaintiffs could confer standing on themselves by incurring some tangible burden to avoid non-cognizable injuries. The Supreme Court in *Valley Forge* nowhere suggested that assuming such a cost would be sufficient to convert non-cognizable offense into cognizable injury.

The standing inquiry turns on the nature of the underlying harm the plaintiff suffers, not on whether she has assumed some cost to avoid it. To be sure, when a person is forced to change her behavior to avoid an injury that *is* cognizable under the Establishment Clause, then the harm caused by

that behavior change gives rise to standing. But when the alleged harm that is fairly traceable to the government's conduct is not cognizable for standing purposes, as is true in this case, then a would-be plaintiff cannot bootstrap her way into standing by choosing to inflict on herself an additional or different injury. *Clapper*, 133 S.Ct. at 1151.

II. The Forest Service's reissuance of the special use permit does not violate the Establishment Clause

A. The Forest Service's reissuance of the Knights' permit satisfies the *Lemon* and *Van Orden* tests

The traditional test used to determine whether a government action violates the Constitution's prohibition against the establishment of religion was set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). To be constitutional, the government action 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." *Barnes-Wallace*, 704 F.3d at 1082-83. In later decisions, "the Supreme Court essentially has collapsed these last two prongs to ask 'whether the challenged governmental practice has the effect of endorsing religion.'" *Trunk*, 629 F.3d at 1106. The combined effects/entanglement inquiry requires a court to examine "(i) whether governmental aid results in government indoctrination; (ii) whether recipients of the aid are defined by

reference to religion; and (iii) whether the aid creates excessive government entanglement with religion." *Barnes-Wallace*, 704 F.3d at 1083, *quoting Card v. City of Everett*, 520 F.3d 1009, 1015 (9th Cir. 2008). Both the purpose and effect of the challenged government action are evaluated from the viewpoint of a "reasonable, informed observer." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 773 (1995).

In 2005, the Supreme Court declined to apply the *Lemon* test in *Van Orden v. Perry*, 545 U.S. 677 (2005), a case concerning a Ten Commandments monument on the grounds of the Texas state capitol. This Court, in a case involving a monument substantially identical to the one in *Van Orden*, explained that *Van Orden* "establishes an 'exception' to the *Lemon* test" in cases involving "longstanding plainly religious displays that convey a historical or secular message in a non-religious context." *Card*, 520 F.3d at 1016. The scope of that exception, however, is unclear. *Trunk*, 629 F.3d at 1107.

It is not clear whether this privately-owned monument fits within the exception to the *Lemon* test recognized by this Court in *Card*. However, because the statue is a longstanding, plainly religious monument with historical significance and secular use in a non-religious context, it arguably falls within the exception, so we, like the district court, address both tests.

Regardless of which test applies, reissuance of the special use permit does not violate the Establishment Clause.

1. The decision to reissue the permit satisfies the *Lemon* test

a. Reissuance of the permit had a secular purpose

In reissuing the Knights' special use permit, the government had the purpose of allowing a private organization to continue to maintain a "statue that has been a long standing object in the community since 1953 and is important to the community for its historical heritage." ER94. That legitimate secular purpose satisfies the first prong of the *Lemon* test, which requires only that the government's action is motivated "at least in part by [a] secular purpose." *Cholla Ready Mix v. Civish*, 382 F.3d 969, 975 (9th Cir. 2004). The government's "stated reasons will generally get deference" as long as they are "genuine, not a sham, and not merely secondary to a religious objective." *McCreary County v. ACLU*, 545 U.S. 844, 864 (2005). A court may invalidate a government action "on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). As detailed below, pp. 61-64, the finding that the statue has local historical significance

is consistent with both the facts and the eligibility criteria, so FFRF's assertion that it is a pretext or sham is baseless.

FFRF emphasizes that the *Knights'* purpose in erecting and maintaining the statue is religious. That is presumably so, but it does not follow that the *Forest Service's* purpose in simply processing an application submitted to it is religious. As the district court correctly stated, "[t]he Knights' religious beliefs and reasons for erecting the statue are not juxtaposed onto the government." ER54. There is no evidence whatsoever that the Forest Service had a religious purpose in reissuing the permit. Its stated reason is valid and secular, and the inquiry into purpose does not require more.

b. A reasonable observer would not perceive the reissuance of the Knights' permit as an endorsement of religion

In *Barnes-Wallace*, this Court addressed a case strikingly similar to this one. The City of San Diego had, pursuant to neutral leasing practices, leased property to the Boy Scouts of America, which was stipulated to be a religious organization that occasionally held religious activities on the leased property. This Court held that because the leases were "allocated on the basis of criteria that neither favor nor disfavor religion," 704 F.3d at 1084, *quoting Agostini v. Felton*, 521 U.S. 203, 232 (1997), a reasonable

observer "familiar with San Diego's leasing practices, as well as with the events surrounding the leasing of [the specific leased properties] and the actual administration of the leased properties, could not conclude that the City was engaged in religious indoctrination, or was defining aid recipients by reference to religion." *Id.* at 1083. The neutrality of the City's policies and practices also compelled the conclusion that "an objective observer familiar with the history of the City's leasing projects could not view the Boy Scouts leases as an 'endorsement' of religion by the City. Nothing in the City's overall leasing policy can reasonably be regarded as 'appearing to take a position on questions of religious belief or . . . making adherence to a religion relevant in any way to a person's standing in the political community.'" *Id.* at 1084 n.15, *quoting County of Allegheny v. ACLU,* 492 U.S. 573, 594 (1989)(internal citations omitted).

This Court's decision in *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993), is also instructive. There, as here, the government granted a permit for a religious display in a public forum pursuant to policies that were neutral with respect to religion. In applying the "reasonable observer" test to the "effects" prong, the Court noted that the "hypothetical observer is informed as well as reasonable; we assume that he or she is familiar with the history of the government practice at issue, as well as with the general

contours of the Free Speech Clause and public forum doctrine." 1 F.3d at 784. The Court then held that "such an observer could not fairly interpret the City's tolerance of the Committee's display as an endorsement of religion." By allowing such displays, the Court held, "the city merely states that it neither favors nor disfavors religious speech." *Id.*

The same analysis that resulted in findings of no Establishment Clause violation in *Barnes-Wallace* and *Kreisner* compels the same result here. A reasonable observer, familiar with the history of this statue, the viewpoint-neutral regulations under which it was originally permitted and under which the permit was reissued, *see* pp. 4-7, *above*, and with the general contours of the governing law, could not reasonably perceive government endorsement of religion, or the allocation of government benefits by reference to religion, from the Forest Service's reissuance of the Knights' special use permit to maintain their private display. As in *Barnes-Wallace*, nothing in the Forest Service's special use regulations, past or present, "can reasonably be regarded as 'appearing to take a position on questions of religious belief or . . . making adherence to a religion relevant in any way to a person's standing in the political community" or, indeed, to one's eligibility for a special use permit. 704 F.3d at 1084 n.15, *quoting County of Allegheny v. ACLU*, 492 U.S. at 594 (internal citations omitted).

FFRF erroneously attempts to focus the "effects" inquiry on the statue itself, rather than on the government action actually challenged in this lawsuit, namely, the permit reissuance. FFRF's analysis is misguided. The sole case on which FFRF relies in its effects argument, *Trunk v. City of San Diego*, concerned a veterans memorial that is owned by the federal government. In that case, therefore, unlike this one, the memorial itself is the government action or speech under challenge, and so the memorial was properly the focus of the effects analysis. In this case, however, the government action alleged to violate the Establishment Clause is not the display of a monument; it is the reissuance of a permit authorizing a private party to do so. The focus of Establishment Clause analysis, therefore, is on the permit decision.

Nevertheless, even if it were appropriate to focus on the statue itself, a reasonable observer would still find that it does not have the primary effect of advancing or endorsing religion. The statue sits by the side of a ski slope on a privately-operated ski resort. Unlike the displays on courthouse steps in *Allegheny* or on the state capitol grounds in *Van Orden*, there is nothing about this setting that suggests government endorsement or sponsorship of the statue's message. No one is compelled to pass by it to do anything but ski. Were it not for the plaque, it is unlikely that a casual passerby would

even know that the statue is located on public property, since it appears to be part of a commercial ski resort. The same plaque that informs the viewer of public ownership of the land, however, also informs the viewer that the statue is the private property of the Knights of Columbus. Thus, it is virtually impossible for either the hypothetical reasonable observer, or an actual observer, to form the mistaken impression that the statue is government property or represents a government-sponsored message.

In addition, nothing about the setting encourages reverence or religious devotion. There are no benches or other accommodations for anyone wishing to spend time contemplating the statue, and there has been no attempt to discourage the playful irreverence with which it has long been treated. The record documents a long-standing tradition of skiers decorating the statue with ski gear or other garb, posing for photos with it, and high-fiving it, frequently resulting in breaking off the statue's hands. ER395-400. The most commonly-noted use of the statue is as a meeting place for skiers, particularly in the days before cell phones made it easier for people to find each other. A reasonable observer would therefore conclude that the setting and use of the statue are secular, and do not create an impression of government endorsement of religion.

2. If the statue were government speech, it would be constitutional under *Van Orden*

In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Supreme Court held that a display of the Ten Commandments on the grounds of the Texas state capitol, despite its plainly religious content, does not violate the Establishment Clause. Justice Breyer, in a concurrence which this Court has recognized as the controlling opinion, *Card*, 520 F.3d at 1018 n.10, declined to apply the *Lemon* test, stating instead that a court must "examine how the [monument] is *used*," its context, and its history. *Van Orden*, 545 U.S. at 701 (emphasis in original). Of particular significance to the monument's history is the length of time for which it has stood without legal challenge. Justice Breyer found it "dispositive" that the monument in that case had stood for 40 years without legal challenge, indicating that "few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to 'engage in' any 'religious practic[e],' to 'compel' any 'religious practic[e],' or to 'work deterrence' of any 'religious belief.'" *Id.* at 702, *quoting School Dist. of Abingdon, PA v. Schempp*, 374 US 203, 305 (1963)(Goldberg, J., concurring).

Because the statue in this case is private speech, the focus of Establishment Clause analysis is on the government's permitting decision, not on the statue itself. Assuming *arguendo* that Establishment Clause analysis should be applied to the statue itself, however, the statue easily satisfies *Van Orden*'s test of constitutionality. Although the statue, like the Ten Commandments monument in *Van Orden*, unquestionably has religious content, the record shows that secular *uses* of the statue predominate over religious ones. The statue has seen only light and sporadic use as a site for religious services, but it has been consistently used as a meeting place, a site for photo-taking, and as an object of irreverent fun.

The context and setting of the statue is a commercial ski resort. As in *Van Orden*, "the setting does not readily lend itself to meditation or any other religious activity." 545 U.S. at 702. The setting primarily lends itself to skiing, and the statue's unexpected appearance beside the slopes of a commercial ski resort lends itself more to curiosity and playfulness than to reverence or worship. The fact that the statue is frequently decorated with ski gear or other garb further reinforces the secular nature of the scene.

Finally, the history of the statue shows that it stood for 57 years after its erection in 1954 before attracting legal challenge. That period of time,

longer than the 40 years held to be "dispositive" in *Van Orden*, indicates that those who encountered the statue did not perceive it as a government endorsement or establishment of religion. Rather, they either knew or assumed it to be what it is: an old, privately-owned statue reminiscent of "those bygone days of sack lunches, ungroomed runs, rope tows, t-bars, leather ski boots, and 210 cm. skis." ER34 (Dist. Ct. Opinion).

B. The pre-1998 regulations governing special use permits created a limited public forum on National Forest System lands

In 1953, when the Knights of Columbus first applied for a permit to erect a statue of Jesus, the regulations governing special use permits placed few restrictions on the allowable use of National Forest System lands. Certain specified uses, such as mining, power transmission lines, and other uses provided for by statute, were subject to more detailed regulation, but other uses, including the construction and maintenance of monuments, required only that the permit "contain such terms, stipulations, conditions and agreements as may be required by the regulations of the Secretary of Agriculture and the instructions of the Chief of the Forest Service," and that permit holders "comply with all State and Federal laws and all regulations of the Secretary of Agriculture relating to the national forests and . . . conduct themselves in an orderly manner." 36 C.F.R. §251.1 (Cum. Supp.

1944) (Add.4); *see also* ER70. Under those regulations, the Knights' initial request for a special use permit to construct a monument was properly granted, as were the roughly 70 similar requests from state and local governments, schools, clubs, historical societies, and individuals. Dodds Decl., Exh. 1.

By allowing the public to engage in expressive conduct, including the installation of monuments, on the property under its management, the Forest Service created a limited public forum. In *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), the Supreme Court explained that there are three different categories of public forums. In the first category, traditional public forums such as parks and public streets, the government may not prohibit communicative activity. It may enforce reasonable, content-neutral restrictions on the time, place, and manner of expression, but may not enforce content-based[4] restrictions unless they are narrowly drawn to serve a compelling state interest. *Id*. at 45.

[4] Content-based restrictions are distinct from viewpoint-based restrictions. Content-based restrictions may limit the use of a forum to the purposes for which it was created – for example, education – but may not limit the point of view expressed. Viewpoint-based restrictions restrict what point of view may be presented in the forum, and they are "presumed impermissible" in any type of public forum. *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 830 (1995).

A second category of public forums, known as "limited public forums," consists of "public property which the state has opened for use by the public as a place for expressive activity." *Id.* The state "is not required to indefinitely retain the open character of the facility," but "as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.* at 45-46.

Public property which "is not by tradition or designation a forum for public communication" constitutes the third category. Such "nonpublic forums," such as the school mail system at issue in *Perry*, may be reserved for their intended purposes, as long as the regulation on speech is reasonable and is not intended to suppress the speaker's viewpoint. *Id.*

Until the Forest Service revised its special use regulations in 1998, the lands of the National Forest System were in the second category: a limited public forum. The Forest Service imposed reasonable time, place, and manner restrictions by requiring that special uses, including monuments, comply with all applicable laws and with "such terms, stipulations, conditions and agreements as may be required by the regulations of the Secretary of Agriculture and the instructions of the Chief of the Forest Service." 36 C.F.R. §251.1 (Cum. Supp. 1944) (Add.4). It did not impose any restrictions on the content or viewpoint expressed by permit holders.

As the Supreme Court noted in *Perry*, the government "is not required to indefinitely retain the open character of the facility," and in 1998, the Forest Service revised its regulations in a manner that effectively closed the limited public forum to monuments. Already-existing special uses, including monuments, remain eligible for reauthorization so long as they meet certain minimal requirements. *See* pp. 4-7, *supra*; *see also* FSH 2709.11, Ch. 10, sec. 11.2. Proposals for new special uses, however, must now satisfy certain viewpoint-neutral screening criteria that, in practice, require the denial of most proposals to install new monuments. *Id*.

C. Private religious speech in a limited public forum does not violate the Establishment Clause

Both this Court and the Supreme Court have repeatedly held that private religious speech in a public forum does not constitute government speech, and does not violate the Establishment Clause. The statue here is, at most, private religious speech in a public forum, and therefore reissuance of the permit does not violate the Establishment Clause.

In *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993), the plaintiff alleged that the City violated the Establishment Clause by allowing a private group (the Christmas Committee) to erect a religious display in a public park during the Christmas season. This Court held that there was no violation of the Establishment Clause as long as the city acted in a

"nondiscriminatory manner" in approving permits for displays in the park. *Id.* at 776.

Applying the *Lemon* test, this Court held that the City had a valid secular purpose in approving the Christmas Committee's permit request.

> The City cites two such purposes: (1) the promotion of holiday spirit and (2) the promotion of free expression. We need not consider the City's first avowed purpose because the second suffices. The Supreme Court has made it clear that a policy of permitting open access to a public forum, including non-discriminatory access for religious speech, is a valid secular purpose.

Id. at 782, *citing Board of Education v. Mergens*, 496 U.S. 226, 249 (1990) and *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). This Court also held that the display, "notwithstanding its strong religious content," did not have the primary effect of advancing religion "because the display is private speech in a traditional public forum removed from the seat of government." 1 F.3d at 782.

> Tolerance of religious speech in an open forum "does not confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U.S. at 274, 102 S.Ct. at 276. "Thus . . . truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer."

1 F.3d at 785, quoting Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1553 (6th Cir. 1992) (en banc).

Similarly, the Supreme Court has repeatedly held that religious speakers may not be excluded from public forums on the ground that the government wishes to avoid an Establishment Clause violation, because no Establishment Clause violation occurs when private religious speakers participate in a neutrally-operated public forum. *Widmar*, 454 U.S. at 270-75 (allowing religious student groups to use university facilities generally open to student groups would not violate Establishment Clause); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 386 & 395 (1993) (allowing religious group to show religious movie on public property made available for "social, civic and recreational meetings and entertainments" would not violate Establishment Clause); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 845 (1995) ("To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their [religious] viewpoint"); *Good News Club v. Milford Ctrl. School Dist.*, 533 U.S. 98, 113 (2001) ("school has no valid Establishment Clause interest" in excluding religious club for children from after-school use of building that was available to secular clubs).

The statue in this case is privately owned. Its expressive content is the private speech of the Knights of Columbus. That expression exists on

federal land due to special use permit regulations that allowed permanent monuments, and that were neutral with respect to religion, thus creating a limited public forum. Although those regulations have since been amended in a manner that effectively closes the limited public forum to new monuments, the current regulations regarding both new and existing uses are likewise neutral with respect to religion. Existing monuments, whether secular or religious, may be reauthorized as long as they meet the requirements for permit reissuance. Proposed new monuments, whether secular or religious, are unlikely to be authorized because current regulations generally discourage that use. The Forest Service's actions with respect to the Knights' initial permit request and the permit reissuance have been entirely neutral with respect to religion,[5] and thus cannot constitute a violation of the Establishment Clause. *See Rosenberger*, 515 U.S. at 839 ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.")

[5] The initial permit denial was, admittedly, not neutral with respect to religion; it explicitly based the denial on the statue's religious content. ER84-86. That decision has been withdrawn, however, and is of no further effect.

D. When the limited public forum covers 193 million acres, permanent monuments do not necessarily represent government speech

Notwithstanding the regulations that allowed special use permits to be issued for monuments on National Forest System lands without discrimination on the basis of religion, FFRF maintains that "the Free Speech Clause's forum analysis 'simply does not apply to the installation of permanent monuments on public property.'" Br. at 54, *quoting Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 480 (2009). Although that quotation is accurate, it omits significant qualifying language. The paragraph from which FFRF quotes begins "To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument . . . ." The sentence from which FFRF quotes begins "But as a general matter. . . ." The Court did not, as FFRF suggests, state a categorical rule that public forum analysis never applies to permanent monuments; it was, rather, making a generalization based on the assumption that most public forums are small municipal parks.

The Court's reasoning that public forum principles did not apply in *Summum* was explicitly based on the assumption that public parks can handle only so many permanent monuments:

> The forum doctrine has been applied in situations in which government-owned property or a government program was

> capable of accommodating a large number of public speakers without defeating the essential function of the land or the program. For example, a park can accommodate many speakers and, over time, many parades and demonstrations. . . . By contrast, public parks can accommodate only a limited number of permanent monuments.

555 U.S. at 479.

Pioneer Park, the park before the Court in *Summum*, consists of 2.5 acres. *Id.* at 464. The National Forest System contains 193 million acres, an area the size of Texas. www.fs.fed.us/aboutus/meetfs.shtml. Unlike the typical public park, it is capable of accommodating a large number of permanent monuments without defeating its essential functions. The Court's assumption, therefore, that the scarcity of land on which to place permanent monuments implies that they reflect the views of the landowner simply does not apply to a forum this large. The Court explicitly acknowledged that public "forum doctrine might properly be applied to a permanent monument" under different circumstances. 555 U.S. at 480. This case presents those different circumstances.

E. FFRF's allegations that the Forest Service gave preferential treatment to the Knights' permit reissuance application are unfounded

FFRF repeatedly suggests that the Forest Service did not administer its special use permit program neutrally, but instead gave preferential treatment to the Knights of Columbus. FFRF alleges that the Forest Service

acted improperly in three ways: by reissuing this permit while turning down proposals from other parties for new monuments on Forest Service lands; by withdrawing its decision to deny the Knights' permit reauthorization request; and by finding that the statue is eligible for listing on the National Register of Historic Places. None of FFRF's allegations of preferential treatment withstands scrutiny.

1. The Forest Service did not engage in favoritism by applying the regulations governing reauthorization of existing uses to the reauthorization of an existing use, while applying the regulations governing new proposals to new proposals.

FFRF alleges that the Forest Service gave preferential treatment to the Knights' application for permit reissuance. FFRF's principal support for that allegation appears to be two record documents indicating that a proposal to erect a statue similar to Big Mountain Jesus would not be approved today, and that other proposals to install various types of monuments have been denied. ER228 ("Note we discussed we would not entertain one of these permit request[s] today"); ER226 ("The Flathead has rejected proposals from other groups to put monuments, grave markers, crosses, etc. on the Forest Service land"). There is no question that the Forest Service would be unlikely to approve a proposal to place a privately-owned statue on National Forest System lands today, but that does not

reflect favoritism towards the Knights; it reflects the fact that the regulations have changed since the Knights' original permit was granted. *See supra*, pp. 4-7. It is likewise no evidence of favoritism that the Forest Service has rejected proposals to install "monuments, grave markers, crosses, etc." on National Forest System lands, because that is what the regulations have required the Forest Service to do for the past 16 years. To the contrary, it is evidence that the Forest Service is evenhandedly applying the revised regulations to secular and religious proposed uses alike.

Reauthorizations of existing special uses are not subject to the screening criteria that generally require the denial of proposals to install new monuments on National Forest System lands. 63 Fed. Reg. 65953 (Add.9); FSH 2709.11, Ch. 10, sec. 11.2. The Forest Service did not give the Knights "preferential" treatment by applying the rules and directives governing the reauthorization of existing uses to the Knights' application for reauthorization of an existing use.

2. The Forest Service withdrew its decision to deny reissuance of the permit because it was flawed

In FFRF's telling of this case, the Forest Service initially issued a correct decision to deny reissuance of the Knights' permit, but then withdrew it in response to public outcry, and relied on invented reasons to reissue the permit. In reality, however, the Forest Service's initial denial

was flawed both procedurally and substantively. Apparently concerned about the implied threat of litigation in FFRF's FOIA request, ER225, the Forest Service denied reissuance of the permit based on an incomplete and incorrect understanding of the Establishment Clause, and failed to follow its own regulations and policies governing reauthorization of existing uses. While it is true that the denial was followed by a public outcry, it was also followed by a formal administrative appeal, which the Forest Service is not free to ignore.

The denial relied on screening criteria applicable only to proposals for new special uses, not reauthorizations of existing special uses. The denial stated that "the statue is an inappropriate use of NFS lands and must be removed," ER84, and further that "Forest Service policy at FSM 2703.2 limits authorized use of NFS lands to those that " . . . cannot be reasonably accommodated on non-National Forest System lands." ER85. Both statements reflect second-level screening criteria, *see* FSH 2709.11, Ch. 10 , secs. 12.32 & 12.32a, which should not have been applied to an application for reauthorization of an existing use. *See* 63 Fed. Reg. 65953 (Add.9) (stating that screening process "applies only to applications for new or substantially changed uses.") FFRF does not allege – nor could it credibly

do so– that the Knights' application for permit reissuance was requesting a "new or substantially changed use."

Even more seriously, the denial was explicitly based on the fact that the statue is religious in nature. As the Knights vigorously argued in their administrative appeal, the stated reasons for the denial raised serious legal issues about whether the Forest Service was "treating religious and nonreligious uses differently" and "patently discriminating" against religious uses. ER89.

In light of those issues, the Forest Service's decision to withdraw its initial denial cannot reasonably be viewed in the light that FFRF tries to cast on it. To the contrary, the record demonstrates that it was a good-faith and rational agency response to an administrative appeal of a flawed agency decision.

3. The Forest Service did not deny the statue's religious nature nor its association with the 10th Mountain Division in finding it eligible for listing in the National Register of Historic Places

FFRF accuses the Forest Service of relying on "contrived justifications" (Br. at 31) or "disingenuous tactics" (Br. at 40) in finding that the statue qualifies for listing in the National Register of Historic Places. FFRF starts from the false premise that religious and commemorative properties are categorically ineligible for listing on the National Register,

see Br. at 40, 41, and further asserts that the Forest Service "acknowledged" that false premise to be true. Br. at 6. FFRF then claims that, in order to avoid that supposed bar to listing, the Forest Service "asked the Historic Preservation Office to agree that the Jesus Statue has no association with Jesus or WW II veterans." Br. at 6; *see also* Br. at 41 ("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 record reveals, however, that Forest Service did no such thing, and the documents on which FFRF relies belie its absurd spin.

The Forest Service correctly acknowledged that "[m]onuments and religious properties are generally not eligible for listing on the National Register of Historic Places for either their association with important persons or events nor for any religious values. Therefore, this statue of Jesus cannot be considered eligible for its association either with the soldiers who fought in WWII nor for its association with Jesus." ER91. That correct acknowledgement that an association with World War II soldiers or with Jesus is not *sufficient* for listing a property on the National Register, however, does not indicate agreement with FFRF's insupportable view that

those associations *disqualify* an otherwise eligible property from listing, nor does it constitute a claim that those associations do not exist.

The Forest Service's archaeologist noted that the ski area "had a significant influence on the history of Whitefish playing a significant role in the transition of Whitefish from a town heavily dependent on the lumber industry to a community built around tourism, skiing, and outdoor recreation." ER91. Because "so little remains intact of that early history," the archaeologist concluded that the statue, which has "integrity of location, setting materials, workmanship, feeling, and association and is a part of the early history of the ski area" is "probably eligible for listing on the National Register of Historic Places under criteria 'a' – associated with events important to local history." ER92.

The Montana State Historic Preservation Officer (SHPO) agreed, adding that the statue "is close enough to the third example of an Eligible property description presented in National Register Bulletin #15 on page 40." ER93. National Register Bulletin #15, entitled "How to Apply the National Register Criteria for Evaluation," is an official publication of the National Park Service, which maintains the National Register. On page 40 is a list of three types of commemorative properties that would qualify for listing on the National Register. The third example states that "a

commemorative marker erected early in the settlement or development of an area will qualify if it is demonstrated that, because of its relative great age, the property has long been a part of the historic identity of the area." Add.71. The SHPO's conclusion that the statue falls into that category is eminently reasonable. There is no sound basis for FFRF's allegation that the finding of eligibility was "contrived."

CONCLUSION

In *Van Orden*, Justice Breyer quoted Justice Goldberg's reminder that courts must "distinguish between real threat and mere shadow" of establishment of religion. *Van Orden*, 545 U.S. at 704, *quoting Schempp*, 374 US at 308. If ever a government action presented no more than the mere shadow of a threat of an Establishment Clause violation, it is the Forest Service's reissuance of the Knights of Columbus's special use permit to maintain this privately-owned local historical landmark.

Therefore, for the reasons explained above, this Court should remand this case with instructions to dismiss because FFRF has failed to identify an individual member who would have standing and a cause of action to bring this suit on their own behalf. In the alternative, the District Court's order granting summary judgment for the Forest Service should be affirmed.

Respectfully submitted,

ROBERT G. DREHER
Acting Assistant Attorney General

Of Counsel:
ALAN J. CAMPBELL
ELLEN R. HORNSTEIN
U.S. Department of Agriculture
Office of the General Counsel

JENNIFER SCHELLER NEUMANN
DAVID B. GLAZER
JOAN M. PEPIN
Attorneys, U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 7415
Washington, D.C. 20044
(202) 305-4626
joan.pepin@usdoj.gov

APRIL 2014
90-1-0-13634

STATEMENT OF RELATED CASES

The Federal Defendants-Appellees are not aware of any related cases pending in this or any other court.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13953 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Joan M. Pepin

9th Circuit Case Number(s) 13-35770

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

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 (date) 4/30/2014 .

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.

Signature (use "s/" format) s/ Joan M. Pepin

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

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 (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)