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Freedom from Religion Foundation v. Weber. Must Big Mountain Jesus Come Down from the Hillside?

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Precap; *Freedom from Religion Foundation v. Weber*: Must Big Mountain Jesus Come Down from the Hillside?

Constance Van Kley

I. QUESTIONS PRESENTED

Does the Freedom from Religion Foundation (“FFRF”) have standing to bring suit?

Does the continued authorization of a privately owned statue of Jesus Christ on publically owned land violate the Establishment Clause when the statue serves some secular purpose and is within the boundaries of a privately operated ski resort?

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1953, the United States Forest Service (“USFS”) issued a Special Use Permit to the Knights of Columbus to erect and maintain a six-foot-tall stone and cement statue of Jesus Christ on USFS land leased to a private ski resort, Whitefish Mountain Resort (“Big Mountain”).¹ When the Knights of Columbus placed the statue in 1954, it was seventy feet above the top of the Big Mountain’s sole ski lift.² When the resort expanded in 1960 and again in 1968, chairlifts carried skiers above the site of the statue, allowing patrons to encounter Big Mountain Jesus on their way down the slopes.³

The Knights of Columbus, a Roman Catholic organization, approached the USFS in response to requests from some of its members, veterans of WWII who had encountered similar religious statuary on Italian slopes during tours in Europe.⁴ It is unclear whether the statue was initially placed to honor fallen soldiers, but a plaque placed nearby in 2010 suggests that Big Mountain Jesus serves such a commemorative purpose.⁵ The Knights of Columbus were certainly also motivated by religious sympathy, as evidenced by the subject of the statue as well as its chosen location, which one member described as chosen by “Our Lord himself.”⁶

Big Mountain Jesus has served mixed purposes over the years. Religious ceremonies, including weddings and worship, have been held at the site, but the parties dispute the frequency of religious use.⁷ Before skiers carried cell phones, friends found the statue served as a convenient

¹ Order 3, June 25, 2013, No. 9:12-cv-00019.

² Appellee’s Resp. Br. 9, Apr. 30, 2014, No. 13-35770.

³ *Id.*

⁴ Order 5-7.

⁵ *Id.* at 7.

⁶ *Id.* at 5.

⁷ Appellee’s Resp. Br. 12; Appellant’s Principal Br. 16, Jan. 8, 2014, No. 13-35770.

meeting place. The incongruousness of Big Mountain Jesus, partially obscured by trees,⁸ has brought out a spirit of irreverence and playfulness in many. The statue, regularly featured in skiers' photos, is often found dressed in ski gear and other attire.⁹ Big Mountain Jesus's hands have so frequently been broken off by passing skiers' high-fives that Big Mountain placed a fence around the area in an unsuccessful attempt to prevent further damage.¹⁰

Although the initial Special Use Permit had no designated expiration date, the USFS renewed the permit in 1990 and 2000 for ten-year terms.¹¹ The USFS then denied renewal in 2011, citing case law potentially implicating the constitutionality of further authorizations.¹² The Knights of Columbus appealed the denial, and the USFS withdrew its decision, requesting feedback from the public before making a final determination.¹³ The public spoke overwhelmingly in favor of renewing the permit. The USFS also reached out to the Montana State Historic Preservation Office, which found that the statue was eligible for listing on the National Register of Historic Places. The USFS reauthorized the permit in 2012, citing the historical importance of the statue to Big Mountain and the surrounding community.¹⁴

Pamela Morris, an active Montanan, joined the Freedom from Religion Foundation ("FFRF") in early 2012 because of her outrage at Big Mountain Jesus, which she encountered in 1957 and has actively avoided since.¹⁵ FFRF filed suit in the U.S. District Court of Montana against Chip Weber, Flathead National Forest Supervisor, and the USFS on February 8, 2012.¹⁶ FFRF requested a declaration that the USFS's continued allowance of Big Mountain Jesus on public land violates the Establishment clause and an injunction ordering withdrawal of USFS authorization and removal of the statue.¹⁷ The District Court subsequently granted the Knights of Columbus's unopposed motion to intervene.¹⁸

The Knights of Columbus twice challenged the suit on the grounds that FFRF lacked standing to sue.¹⁹ The District Court twice denied motions on this issue, ultimately determining that FFRF had standing based on Ms. Morris's membership at the time of filing.²⁰ The

⁸ Order 8.

⁹ *Id.* at 8

¹⁰ Appellee's Resp. Br. 14.

¹¹ Order 9-10.

¹² Appellant's Principal Br. 5-8.

¹³ Order 10.

¹⁴ *Id.*

¹⁵ Order 16.

¹⁶ Compl. Feb. 8, 2012, No. 9:12-cv-00019.

¹⁷ *Id.* at 9-10.

¹⁸ Order, May 9, 2012, No. 9:12-cv-00019.

¹⁹ Order, Nov. 27, 2012, No. 9:12-cv-00019; Order, June 25, 2013, No. 9:12-cv-00019.

²⁰ Order 16, June 25, 2013.

District Court nonetheless granted summary judgment to the USFS and the Knights of Columbus on June 25, 2013, holding that the continued presence of Big Mountain Jesus on USFS land did not violate the Establishment Clause. FFRF appealed.

III. ARGUMENT

A. Standing

The District Court analyzed FFRF's standing to sue under *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, holding that FFRF had standing because "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."²¹ The holding was based in part on the individual standing of FFRF member Pamela Morris, with the court finding that she satisfied the test set forth in *Summers v. Earth Island Institute*: she could demonstrate she was "under threat of suffering concrete and particularized 'injury in fact; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury."²²

1. Arguments

Appellees Weber and the USFS did not win summary judgment on this issue but on the constitutional issue discussed below. On appeal, the Appellees argue that none of the three FFRF members upon whom the organization asserts its standing had individual standing to sue at the time the complaint was filed. Member William Cox may have had individual standing, but he was not a member when FFRF brought suit, and "[t]he existence of standing turns on the facts as they existed at the time the complaint was filed."²³ Member Doug Bonham was a member when FFRF sued, but his injury is neither ongoing nor concrete: he only saw the statue once and has not since been near it because "[his] aging knees limit [him]."²⁴ Ms. Morris was also a member when the complaint was filed, but "her alleged injury is aesthetic or environmental, not religious": she may suffer a direct and concrete injury, but her injury

²¹ *Id.* at 14 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000)).

²² *Id.* (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).

²³ Appellee's Resp. Br. 32 (citing *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007)).

²⁴ *Id.* at 33.

stems from the artificiality of the statue in the mountains of Montana.²⁵ The appellees do not argue that FFRF would lack standing if Mr. Cox, Mr. Bonham, or Ms. Morris had individual standing to sue.

In its reply brief, Appellant FFRF asserts that any of the three members mentioned had individual standing at the time the complaint was filed. Mr. Cox, a frequent Big Mountain skier, did not join FFRF until ten days after the complaint was filed, but he “seeks to vindicate . . . the very same cause of action that is at stake,” and allowing FFRF to bring suit on his behalf now promotes judicial economy.²⁶ Mr. Bonham suffers injury even though he can no longer ski because the statue is a symbol of religious preference that marginalizes the non-believers such as himself throughout the Flathead Valley.²⁷ Ms. Morris has affirmatively avoided “a significant and beautiful ski area in order to avoid the Jesus Statue, which the district court correctly deemed controlling.”²⁸

2. *Analysis*

Appellees Weber and the USFS bring valid objections to the individual standing of Mr. Cox, Mr. Bonham, and Ms. Morris, but the Court may nonetheless determine that FFRF has standing based on that of Mr. Bonham or Ms. Morris. FFRF has been unable to present authority supporting consideration of Mr. Cox.²⁹ Judicial economy may well be promoted by considering Mr. Cox’s standing, but a correct inquiry into the issue of standing likely supersedes consideration of judicial economy. The Court could find that Mr. Bonham’s concrete and actual injury is directly attributable to the statue because he has personally encountered it and was offended by it. It could also find that Mr. Bonham’s injury is not ongoing because his stated reason for avoiding the statue is his aging body rather than his outrage. Additionally, Mr. Bonham’s injury may be caused by the culture of his community rather than by the statue itself, in which case removal of Big Mountain Jesus would not redress his injury. Finally, Ms. Morris is clearly offended by Big Mountain Jesus, which she sees as a blatantly religious symbol, but her affidavit suggests that her injury may be caused by the artificiality rather than the religiosity of the statue. The Court could potentially dismiss for lack of standing, in which case Mr. Cox may immediately bring a new suit.

B. The Establishment Clause

²⁵ *Id.* at 36.

²⁶ Appellant’s Reply Br. 10-11, May 14, 2014, No. 13-35770.

²⁷ *Id.* at 8-9.

²⁸ *Id.* at 9-10.

²⁹ Order 15-16, June 25, 2013, No. 9:12-cv-00019.

The District Court applied two analyses to determine the constitutionality of Big Mountain Jesus, ultimately determining that the USFS had not violated the Establishment Clause regardless of the analysis applied.³⁰ The *Lemon* Test, established in *Lemon v. Kurtzman*, “requires that challenged government conduct must (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion.”³¹ An exception was later developed in *Van Orden v. Perry*, where a plurality of the Court found the *Lemon* test unhelpful.³² In his concurrence, Justice Breyer noted that there is “no test-related substitute for the exercise of legal judgment[.]”³³ Breyer considered the following factors in his analysis: the historical use of the monument, the surrounding context, the monument’s history, and the frequency of complaints.³⁴ Following *Trunk*,³⁵ the Ninth Circuit recognizes Justice Breyer’s concurrence as controlling.³⁶

1. *The Lemon Test*

Arguments

Appellant FFRF argues that the district court erred in finding that Big Mountain Jesus passes the *Lemon* test.³⁷ The government’s purpose was not “predominantly secular” when it authorized an obviously religious statue, and the USFS’s determination that the statue is historically important is unsupported by the record.³⁸ The statue has the primary effect of advancing religion, as it is clearly a Christian shrine, and any ancillary patriotic or secular meaning is lost on its observers.³⁹ FFRF does not expressly address whether the statue fosters “excessive government entanglement with religion,” but it argues that “[t]he Jesus Shrine has the look and feel of being located on Forest Service land, and the Government’s authorizations have been characterized by secret and preferential consideration.”⁴⁰

Appellees Weber and the USFS assert that continued authorization of Big Mountain Jesus is permissible under the *Lemon* test. The government

³⁰ *Id.* at 28-29.

³¹ *Id.* at 21 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

³² *Id.* at 21-22 (citing *Van Orden v. Perry*, 545 U.S. 677, 686 (2005)).

³³ *Van Orden*, 545 U.S. at 700, Breyer, J., concurring.

³⁴ Order at 22, June 25, 2013 (citing *Van Orden*, 545 U.S. at 700, Breyer, J., concurring).

³⁵ *Trunk v. City of San Diego* 629 F.3d 1099, 1107 (9th Cir. 2011).

³⁶ Order at 22, June 25, 2013.

³⁷ Appellant’s Principal Br. 35.

³⁸ *Id.* at 35-37.

³⁹ *Id.* at 41-44.

⁴⁰ *Id.* at 39.

must only show that it is motivated “at least in part by [a] secular purpose,”⁴¹ and the USFS was motivated by the historical and cultural importance of the statue, not the religious sentiment that motivated the Knights of Columbus.⁴² Big Mountain Jesus does not have a primary effect of advancing religion because a reasonable observer would not see the statue as endorsement of religion: it is on a privately operated ski hill with a plaque informing viewers of its history and private ownership.⁴³ Like FFRF, the USFS does not explicitly address the issue of entanglement, but it does argue that the USFS did not show preferential treatment and complied with all pertinent regulations.⁴⁴

Analysis

The Ninth Circuit could potentially go either way on the constitutionality of the USFS reissuance of permits under the *Lemon* test. The first element, secular purpose, will likely be satisfied if it accepts the standard advanced by the USFS and adopted by the District Court, in which a secular purpose need only be a partial motivation for the government action. The record supports a finding that Big Mountain Jesus serves a partially secular purpose. If, however, the Court requires the secular purpose to be primary, as FFRF argues it should, it will likely find that the USFS did not have a secular purpose, failing the *Lemon* test. The second element, the advancement of religion, also may or may not be satisfied. The Court will likely find that Big Mountain Jesus advances religion, but it may find that a reasonable observer would not impute its religious message to the government. The third element of entanglement will likely be satisfied if the second element is. The Court could also choose to avoid in-depth analysis, holding that a factual issue remains and remanding.

2. *The Van Orden Exception*

Arguments

Appellant FFRF asserts that the *Van Orden* Exception does not apply to the facts at hand because the Ninth Circuit applies the *Lemon* test unless the objection is to a “long-standing religious display[] that convey[s] a historical or secular message in a non-religious context,” and Big Mountain Jesus conveys a religious message.⁴⁵ Unlike *Van Orden*,

⁴¹ *Cholla Ready Mix v. Civish*, 382 F.3d 969, 975 (9th Cir. 2004).

⁴² Appellee’s Resp. Br. 41-42.

⁴³ *Id.* at 45-46.

⁴⁴ *Id.* at 45, 57-64.

⁴⁵ Appellant’s Principal Br. at 35 (citing *Card v. City of Everett*, 520 F.3d at 1009, 1016 (9th Cir. 2008)).

where a Ten Commandments monolith was in a museum-like setting, surrounded by other secular objects that together brought a deeper understanding of Texas culture.⁴⁶ Big Mountain Jesus has no “secular moral message.”⁴⁷ Thus, the context does not secularize Big Mountain Jesus.⁴⁸ Additionally, use of the statue is historically religious: “locals testify that the serenity of the site presents a meditative opportunity.”⁴⁹ Even the irreverent use points to the religiosity of the statue, as it “results from the very incongruity of a religious shrine in a national forest.”⁵⁰

Appellees Weber and the USFS argue that even if continued allowance of Big Mountain Jesus fails under *Lemon*, it falls within the exception outlined in *Van Orden*, and consideration of the statue’s use, context, and history warrants continued authorization.⁵¹ The statue’s secular uses far outweigh religious uses: “[t]he statue has seen only light and sporadic use as a site for religious services, but it has consistently been used as a meeting place, a site for photo-taking, and as an object of irreverent fun.”⁵² The context surrounding Big Mountain Jesus is largely secular, as the statue is within the borders of a ski resort, with no area dedicated to meditation or prayer.⁵³ Finally, the history supports the USFS’s renewal of the Special Use Permit because Big Mountain Jesus went unchallenged for fifty-seven years, ten years longer than the Ten Commandments at issue in *Van Orden*.⁵⁴

Analysis

The Ninth Circuit will likely determine that *Van Orden* does not apply because the facts here are immediately distinguishable. The museum-like setting of *Van Orden* suggests that the Ten Commandments imparted a weighty historical message, not unlike teaching students of American History about the religious beliefs of early European settlers. Big Mountain Jesus is thoroughly enjoyed by locals, but the Court probably will not find irreverence and playfulness compelling enough to apply the *Van Orden* exception. If, however, the exception applies, its requirements will likely be satisfied: the use, context, and history of Big Mountain Jesus all serve to secularize the statue.

3. Free Speech in a Public Forum

⁴⁶ *Van Orden*, 545 U.S. at 681, Breyer, J., concurring.

⁴⁷ Appellant’s Principal Br. at 45 (citing *Van Orden*, 545 U.S. at 681, Breyer, J., concurring).

⁴⁸ *Id.* at 47.

⁴⁹ *Id.* at 46.

⁵⁰ *Id.* at 47.

⁵¹ Appellee’s Resp. Br. at 47.

⁵² *Id.* at 48.

⁵³ *Id.*

⁵⁴ *Id.* at 48-49.

In granting summary judgment for Appellees Weber and the USFS, the District Court had no need to reach the Appellees' argument that the First Amendment authorizes renewing the Knights of Columbus's permit.

Arguments

Appellees Weber and the USFS argue that the National Forest System lands were a limited public forum prior to 1998, when the regulations governing issuance of permits were overhauled.⁵⁵ Big Mountain Jesus is "at most, private religious speech in a public forum," and it is therefore authorized by the Free Speech clause and does not violate the Establishment clause.⁵⁶ Because the USFS was a public forum when the permit was first issued, the USFS would have violated the Establishment Clause by denying the permit, suggesting prejudice against religion.⁵⁷ Similarly, the USFS followed all applicable regulations in reauthorizing the permit, and those regulations are neutral as to religion, so denying reauthorization would have compromised the government's neutrality toward religion.⁵⁸ Further, because the USFS lands covers 193 acres, a monument such as Big Mountain Jesus does not represent government speech despite its permanence.⁵⁹

Appellant FFRF argues that a private party may not place a permanent religious monument on government land under the Establishment Clause.⁶⁰ Even if the USFS lands are properly classified as a public forum, the "Free Speech Clause's forum analysis 'simply does not apply to the installation of permanent monuments on public property.'"⁶¹ The plaque's attribution of the statue to the Knights of Columbus does nothing to further the USFS's argument because the USFS's allowance of the statue is at issue, not the statue itself.⁶² Thus, the Free Speech Clause does not protect Big Mountain Jesus.

Analysis

If the Ninth Circuit reaches this issue, it will probably find that the First Amendment does not allow the Knights of Columbus's placement of Big Mountain Jesus on federal land. The USFS's argument is flawed in that the USFS lands are no longer a public forum and they were not when the alleged injury—reissuance of the permit—took place.

⁵⁵ *Id.* at 49.

⁵⁶ *Id.* at 52.

⁵⁷ *Id.* at 54-55.

⁵⁸ *Id.* at 55.

⁵⁹ *Id.* at 56-57.

⁶⁰ Appellant's Reply Br. 13.

⁶¹ *Id.* at 15 (citing *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 480 (2009)).

⁶² *Id.* at 17-18.

Although FFRF is wrong to assert that there are no exceptions to the rule that permanent monuments may not be installed on public lands under the Free Speech clause's forum analysis,⁶³ the forum analysis probably does not apply. Even if it did, Big Mountain Jesus is unlikely to be an exception to the rule.

⁶³ Appellee's Resp. Br. 56 (citing *Pleasant Grove City*, 555 U.S. at 480) ("Although [FFRF's] quotation is accurate, it omits . . . 'To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument . . .'").