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Freedom from Religion Foundation v. Weber. Big Mountain Jesus and the Constitution

Constance Van Kley
Alexander Blewett III School of Law

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**Recap; *Freedom from Religion Foundation v: Weber*: Big Mountain
Jesus and the Constitution**

Constance Van Kley

No. 13-35770 Ninth Circuit Court of Appeals

Oral Argument: Tuesday, July 7, 2015, in Pioneer Courtroom, 2nd Floor, Portland, Oregon. Heard by Judges Harry Pregerson, N. Randy Smith, and John Byron Owens.

I. RICH BOLTON FOR APPELLANT FREEDOM FROM RELIGION
FOUNDATION

Mr. Bolton presented his argument defensively and without a clear structure. The Judges, particularly Judge Smith, vigorously questioned him. Their questions primarily focused on establishing whether a factual dispute exists and determining FFRF's legal arguments on both standing and the constitutional issues presented.

Mr. Bolton opened by reminding the Court that Big Mountain Jesus has historically been considered a religious shrine. The Knights of Columbus ("KOC"), not the United States Forest Service ("USFS"), owns the statue. The Appellant's position is that USFS violated the Establishment Clause by issuing a permit reauthorizing the placement of the KOC-owned Jesus statue on USFS land. The Freedom from Religion Foundation ("FFRF") does not dispute that USFS followed current regulations in reissuing the permit. Rather, it asserts that USFS showed prejudice in the permit renewal process and that the result of reissuance—the continued existence of the statue on government land—violates the Establishment Clause.

In response to Judge Smith's questions, Mr. Bolton moved to FFRF's standing to sue under the Establishment Clause. FFRF bases standing on member Pamela Morris, who saw the statue in 1957 and has since avoided the area. Judge Smith questioned why Ms. Morris would need to avoid the statue when the record suggests that she would encounter it only if she were specifically looking for it. Mr. Bolton presented two arguments: first, that Ms. Morris's declaration of avoidance is sufficient; and second, that some facts in the record suggest that the statue is actually "readily viewable." As an alternative basis for standing, Mr. Bolton pointed to William Cox, who encounters the statue several times each year. In response to Judge Smith, who suggested that Mr. Cox's dislike of the statue did not suggest religious injury, Mr. Bolton argued that any unwanted exposure to displays of religious endorsement on state property does in fact give standing. Although Mr. Cox did not become an FFRF member until after initiation of the lawsuit,

Mr. Bolton asserted that he may rightfully be considered a member for the purpose of standing.

Mr. Bolton moved then to the merits of the case, framing the issue as whether permit reissuance violates the Establishment Clause. Mr. Bolton advocated for application of the standard articulated in *Lemon v. Kurtzman*,¹ which prohibits the government's endorsement of religion. Because the exception to *Lemon* set forth in *Van Orden v. Perry*² is properly applied only in a museum-like context, it does not apply here, as the Jesus statue is the only monument on Big Mountain. The ultimate question, then, is whether the statue is a government endorsement of religious speech.

Judge Smith asked Mr. Bolton to distinguish *Capitol Square Review and Advisory Board v. Pinette*,³ a Free Speech Clause case that authorizes governmental entities to neutrally allow private speech in a public forum. Mr. Bolton argued that *Capitol Square* did not deal with a permanent monument, and USFS lands were never designated as a forum for discourse. Even if the forest were a limited public forum, permanent religious monuments such as the Jesus statue are unconstitutional. Although the current permit will expire, the statue may be considered a permanent monument because the current regulations present no obstacle to reissuance. Mr. Bolton argued that the point is moot regardless: the Establishment Clause takes precedence over the Free Speech Clause in a limited public forum analysis.

To close, Mr. Bolton returned to the issue as originally stated: does the statue give the appearance of government endorsement? Because questions of fact remain on this issue, summary judgment was inappropriate. The statue's original classification as a religious shrine may show religious endorsement. Additionally, the government initially denied reauthorization and reissued the permit only in response to public outcry, suggesting that the renewal was a product of a process susceptible to religious favoritism. For legal support, Mr. Bolton pointed to *Trunk v. City of San Diego*,⁴ in which the Ninth Circuit found that a stand-alone cross gave the appearance of religious endorsement even though it was recognized and commissioned as a war memorial. The incongruous nature of the Jesus statue in picturesque surroundings similarly gives rise to contemplation, enhancing the appearance of religious endorsement.

¹ 400 U.S. 602, 612 (1971). Under *Lemon*, an inquiry into a potential violation of the Establishment Clause considers purpose, effect, and whether the government action fosters "an excessive government entanglement with religion."

² 125 U.S. 677, 702 (2005) (Breyer, J. concurring). In his concurrence Justice Breyer suggests applying three primary considerations in difficult Establishment Clause cases: use, setting, and history.

³ 515 U.S. 753 (1995).

⁴ 629 F.3d 1099.

II. JOAN PEPIN FOR APPELLEE UNITED STATES FOREST SERVICE

To structure her argument, Ms. Pepin applied both the *Lemon* test and the *Van Orden* exception to show that the USFS's authorization of the statue was constitutional by any standard. The Judges asked few legal questions of Ms. Pepin, focusing primarily on whether a material factual issue remained. The Court seemed to closely follow her legal argument, which was well-organized and cohesive.

Ms. Pepin argued that under the *Lemon* test, the government must only show that it is motivated in part by a secular purpose. The government had two secular purposes supporting permit reissuance: first, the statue had local historical significance; and second, USFS did its duty in following regulations.

Ms. Pepin disputed FFRF's argument that USFS created a secular purpose in an attempt to hide the statue's clear religious purpose. Big Mountain Jesus is a religious symbol, but it has secular value as a beloved, quirky, and relatively rare reminder of the area's early development. Ms. Pepin argued that FFRF can present no facts discrediting the statue's historical significance but only speculate that reissuance of the permit is a sham.

Ms. Pepin turned to whether the statue gives the effect of religious endorsement. The test for endorsement is applied not to the statue itself, which is KOC's private speech, but to the government's action in reissuing the permit. Under *Capitol Square*, FFRF must show the government discriminated in favor of private religious expression or activity.⁵ Here, there is no support for a finding that USFS discriminated in favor of religious users when USFS appropriately followed neutral regulations.

Endorsement is a legal rather than a factual determination. As the plaintiff and appellant, FFRF bears the burden of showing discrimination. Ms. Pepin argued that summary judgment was appropriate because the facts as stated by FFRF cannot lead to a reasonable inference in favor of endorsement. Ms. Pepin systematically discredited FFRF's interpretation of the record, using the facts to show that USFS simply followed neutral regulations in reissuing the permit, treating KOC as it would any other applicant.

Finally, Ms. Pepin analyzed the statue under the *Van Orden* exception to the *Lemon* test. Under *Van Orden*, a court considers use, setting, and history. Here, the use is somewhat mixed but primarily secular: Big Mountain Jesus is "usually wearing a ski helmet," and skiers find the statue a convenient and quirky meeting-place. The setting, too, is secular: Big Mountain is a commercial ski area; nothing encourages worship or devotion. Finally, the history suggests religious neutrality, as

⁵ *Capitol Square*, 515 U.S. at 764.

the statue stood for fifty-seven years before its first challenge, when the Appellant first sent letters to USFS and filed FOIA requests.

III. ERIC BAXTER FOR APPELLEE KNIGHTS OF COLUMBUS

Mr. Baxter's argument centered on distinguishing and analogizing a range of Ninth Circuit and Supreme Court cases. Mr. Baxter framed the test of the Establishment Clause differently than either other party: to prevail, a person must have felt excluded on the grounds of religious belief.

His argument focused not on the Establishment Clause, however, but on the Free Speech Clause, which had not factored into the District Court's decision to grant summary judgment. If the Free Speech Clause authorizes the statue, KOC might not merely survive this challenge but enjoy considerable protection from future constitutional challenges. The Judges' questions for Mr. Baxter were designed to further clarify precedent and to establish that a factual issue did not exist.

Mr. Baxter opened by expanding on the statue's context. Big Mountain Jesus can be viewed only by travelling to a commercial ski resort, paying to ski, riding a lift to the top of the mountain, choosing one particular run on the very edge of the resort, and then looking to the left through a stand of trees at the right moment. A skier who stops will find a sign commemorating the lives of fallen WWII soldiers and designating the Knights of Columbus as the statue's owner.

Mr. Baxter looked to *Christian Science Reading Room Jointly Maintained v. City and County of San Francisco*,⁶ where the Ninth Circuit Court of Appeals analyzed a potential Establishment Clause violation within the context of a commercial airport. In a commercial context, the government likely does not endorse religion by allowing private religious speech. The statue's presence on Big Mountain creates the assumption that it belongs to the resort, not the government.

Mr. Baxter expanded the discussion of private speech in a public forum, which is expressly allowed under the Free Speech Clause. The entirety of the National Forest is a public forum; KOC's speech is private speech; and to target that speech contrary to regulations would be to discriminate against that private speech in violation of the Free Speech Clause. Mr. Baxter distinguished *Pleasant Grove City, Utah v. Summum*,⁷ where the Supreme Court analyzed a permanent government-owned monument in a public forum under the Establishment rather than the Free Speech clause. Because Big Mountain Jesus is privately owned, the proper analysis proceeds under the Free Speech Clause.

⁶ 784 F.2d 1010 (9th Cir. 1986).

⁷ 555 U.S. 460 (2009)

Mr. Baxter distinguished *Trunk*, upon which FFRF relies heavily. *Trunk* involved a 43-foot-tall cross, viewable from the interstate, with a strong history of religious use. Mr. Baxter suggested that the facts in *Trunk* were extreme, characterizing *Trunk* as the exception to the general rule that monuments stand. Mr. Baxter closed by reinforcing KOC's argument that revoking the permit would constitute unconstitutional discrimination.

IV. BOLTON'S REBUTTAL

Although Mr. Bolton had already exceeded his time limit, the Court allowed time for rebuttal. Mr. Bolton attempted to redraw the issue: the proper question is whether the statue gives the appearance of religious endorsement, not—as the government argues—whether authorization of the statue gives evidence of discrimination. Regardless of how the issue is framed, however, facts on record support FFRF's position. Mr. Bolton argued that summary judgment was inappropriate because factual disputes prevent a finding on critical issues.

V. PREDICTION

Framing the issues may prove more difficult than reaching a holding. Each party presented a different standard for determining whether the Establishment Clause is violated by the permit's reissuance. FFRF argued that the standard is whether the statue's presence on government land gives the appearance of government endorsement of religion. USFS argued both that analysis should proceed under *Lemon* and/or *Van Orden* and that FFRF must prove not only the appearance of endorsement but actual government discrimination. KOC suggested that the proper standard is a person's sense of exclusion based on religious beliefs. Further, KOC brought an additional constitutional issue: whether revoking the permit would violate the Free Speech Clause by discriminating against KOC's private speech.

It is unlikely that remanding for further proceedings would clarify legal issues: FFRF did not point to specific facts suggesting a material factual dispute, and USFS rightly characterized FFRF's attempt to do so as speculative. The Court will likely find that the only remaining questions are questions of law.

Mr. Baxter presented the free speech issue well, but the Court will likely find that the primary inquiry proceeds under the Establishment Clause. The action complained of, the government's reissuing a permit, is an act of government and not private speech. The Court will only need to reach the free speech issue if it finds that the Establishment Clause was violated and that FFRF lacked standing to bring the claim.

The Court may find that FFRF lacked standing to sue. FFRF cited to the facts on record to support its argument for standing, but it did not present a cohesive legal argument on this point. The Court's decision to question the Appellant but neither of the Appellees on standing suggests that it had already reached a decision on the issue. If the Court decides FFRF lacks standing, it need not consider whether the District Court correctly analyzed the Establishment Clause issue, but it may choose to do so to provide clarification and prevent later reversal.

If the Court reaches the Establishment Clause issue, the Appellee USFS presented the likeliest framework for the Court's decision. USFS's argument is consistent with the District Court's analysis, and it is simple, cohesive, and supported by United States Supreme Court and Ninth Circuit precedent. Even if the Court adopts the Appellant's strict standard for analysis under the Establishment Clause, however, it will likely affirm summary judgment, finding that the context of the statue prevents the appearance of government endorsement. The Court will likely affirm summary judgment on either the basis of standing or lack of violation of the Establishment Clause.