IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

Freedom From Religion Foundation, Inc.,

Plaintiff,

v.

Chip Weber, Flathead National Forest Supervisor; and

United States Forest Service, an Agency of the United States Department of Agriculture,

Defendants,

And

William Glidden, Raymond Leopold, Norman DeForrest, Eugene Thomas, and the Knights of Columbus (Kalispell Council No. 1328),

Intervenor-Defendants.

Case No. 9:12-cv-19-DLC

MEMORANDUM IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Skiers on Big Mountain at the Whitefish Mountain Resort near Kalispell, Montana, are well-acquainted with the life-size statue of Jesus that stands just below chairlift two. Approximately six feet tall, the statue stands atop a cement pedestal also six feet in height. When the snow piles up, the statue stands at about snow level, with its arms outstretched toward the ski runs and valley below.

For most regulars, the statue is a quirky element of the Resort's character and culture. A favorite meeting and resting spot, it is frequently adorned with goggles and ski poles for "photo ops" or enhanced with a ski jump for catching a "high-five" with Jesus. Locals know the statue as a war memorial, erected in honor of veterans from the Army's 10th Mountain Division. Since 2010, a large plaque adjacent to the statue recalls those soldiers from World War II who fought in ski patrols on the slopes of Italy. The plaque explains that the statue was erected in memory of the soldiers, and is owned and maintained by a private organization, the Knights of Columbus.

The statue is an example of private, not government, speech. And just like the ski resort surrounding it, the statue is permitted on public

land pursuant to a neutral leasing policy. The government cannot discriminate against the Knights of Columbus's use of public land just because they are religious, and by allowing their private speech, the government is not promoting religion any more than it is promoting skiing. The government's decision not to force the statue's removal from Big Mountain—after it has stood there for nearly sixty years without controversy—in no way constitutes an establishment of religion in violation of the First Amendment's Establishment Clause. Thus, the Court should resolve this litigation as a matter of law in favor of the Knights of Columbus and the government.

FACTUAL BACKGROUND

The following facts concerning the Big Mountain statue are undisputed:

The Statue's Origins

1. In September 1953, the Knights of Columbus, Kalispell Council No. 1328 (the "Knights of Columbus" or "Knights") applied for a permit from the Forest Service to use "[t]hat piece of land 25 feet by 25 feet approx. 400 ft. north-north west of the upper Terminal of the Big

Mountain Ski Lift, and in elevation approx. 70 feet higher." Statement of Undisputed Facts at ¶ 1 (hereafter, "SUF at ¶ __").

2. The Knights' recommended that the statue "be made a permanent part of the recreation area on top of Big Mountain." SUF at ¶ 2.

3. The permit was granted on October 15, 1953. SUF at ¶ 3.

4. The Knights commissioned the statue from the St. Paul Statuary Company in St. Paul, Minnesota. SUF at ¶ 4. The statue was crafted with a cavity at the bottom so that a dowel extending out from two feet deep within the pedestal could be inserted with cement into the statue "so that the statue and pedestal become like one piece." *Id.*

5. The Knights installed the statue on Big Mountain in 1954. SUF at ¶ 5.

6. Although the original permit had no expiration date, SUF at ¶ 6, in August 1990, a new permit was issued for the statue with an expiration date of December 31, 1999, *id.* A subsequent amendment extended the deadline through December 31, 2000. *Id.*

7. In 2000, the permit was again reauthorized for another ten-year period, with a termination date of December 31, 2010. SUF at ¶ 7.

8. Through that entire time—from 1953 through the end of 2010, and even into mid-2011—there is no evidence of any controversy regarding the statue. *See* SUF at ¶ 8 ("Moreover, the oral interviews and research conducted by [Historical Research Associates, Inc. ("HRA")] uncovered no evidence of individuals commenting negatively about the statue or complaining about its presence on Big Mountain prior to the events that led to the current litigation.")

The Recent Controversy

9. In July 2010, the Forest Service notified the Knights via letter that their permit would expire at the end of the year. The letter advised that, for a regulatory fee of $111.00, the Knights could renew for another ten-year period. SUF at ¶ 9.

10. The Knights submitted their renewal application later that month, A-23, and the fee was paid on August 3, 2010, SUF at ¶ 10.

11. The Forest Service "accepted the application," *see* SUF at ¶ 11, but did not issue any response.

12. Over nine months later, on May 25, 2011, Plaintiff Freedom From Religion Foundation, Inc. ("FFRF")—a non-profit organization

based out of Madison, Wisconsin—served a FOIA request on the Forest Service, seeking information about the statue. SUF at ¶ 12.

13. The FOIA request essentially threatened legal action, warning that "[b]y permitting a display of this nature, the Federal Forest Service appears to endorse religion over non-religion, and specifically prefers Christianity over all other faiths. This is a direct violation of the Establishment Clause of the First Amendment to the United States Constitution." SUF at ¶ 13.

14. Apparently in response to the threat, the Forest Service invited representatives of the Knights of Columbus and the Resort to meet concerning renewal of the permit. SUF at ¶ 14.

15. The parties discussed several options for preserving the statue, including having it declared a historical monument. The Forest Service's initial thinking, however, was that the statue would not be eligible. SUF at ¶ 15.

16. The Forest Service acknowledged at the meeting that there are real concerns that the statue will be seriously damaged or even destroyed if it has to be moved. SUF at ¶ 16.

17. At the meeting's close, the Knights were informed that their permit would not be reissued. SUF at ¶ 17.

18. The Forest Service followed up with a formal letter from Forest Supervisor Chip Weber on August 24, 2011, stating, "I have determined that the statue is an inappropriate use of [National Forest Service] lands and must be removed . . . ." SUF at ¶ 18.

19. The letter concluded that allowing the statue to remain on Big Mountain would violate the Establishment Clause. SUF at ¶ 19.

20. The letter also noted that "Flathead National Forest Heritage Program Leader Tim Light is currently assessing the historical significance of the statue in accordance with the National Historic Preservation Act (NHPA), including consultation with the Montana State Historic Preservation Office." SUF at ¶ 20.

21. The Knights timely appealed from Mr. Weber's decision to force the statue's removal. SUF at ¶ 21.

22. Eight days later, on September 1, 2011, while the appeal was still pending, Forest Archaeologist Timothy Light wrote to the Montana State Historic Preservation Office (SHPO), concluding that, although the statue was not eligible for listing on the National Register of

Historic Places because of "its association either with the soldiers who fought in WWII nor for its association with Jesus," it probably would be eligible for its "associat[ion] with events important to local history," namely, the area's "transition . . . from a town heavily dependent on the lumber industry to a community built around tourism, skiing, and outdoor recreation." SUF at ¶ 22.

23. Mr. Light noted that, "[i]ndividually [the statue] 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." SUF at ¶ 23.

24. Mr. Light concluded that, in his opinion, "[m]oving the statue would be an adverse effect to the integrity of the setting and location[,] and the setting, with its grand views of the valley and proximity to Chair 2, is an important aspect to the site's historic integrity." SUF at ¶ 24.

25. Mr. Light requested the SHPO's independent "concurrence in this determination of eligibility." SUF at ¶ 25.

26. By letter dated September 19, 2011, the SHPO "agree[d] that the commemorative marker is eligible" for listing, because it was "placed in its current location a few years after the resort was upgraded after World War II" and "has long been a part of the historic identity of the area." SUF at ¶ 26.

27. The SHPO also noted that the statue "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." SUF at ¶ 27.

28. The SHPO concluded that the statue was eligible for listing not only under criteria A, but also under criteria "F" because of its commemorative aspect. SUF at ¶ 28.

29. Based on the SHPO's independent confirmation of the statue's listing eligibility, on October 21, 2011, Forest Supervisor Weber withdrew his earlier decision and announced that the Forest Service would "formally seek public comment on a proposed action for reissuing the permit." SUF at ¶ 29.

30. A thirty-day period for public comment was announced on November 3, 2011. SUF at ¶ 30.

31. Approximately 95,000 comments were received. They overwhelmingly favored the permit being renewed. SUF at ¶ 31.

32. Following the notice-and-comment period, the Forest Service issued a final "Decision Memo" reauthorizing the Knights' special use permit for a period of ten years. SUF at ¶ 32.

33. The memo observed that renewal was warranted because "[t]he statue has been a long-standing object in the community since 1953" and "is important to the community for its historical heritage" based on its association with the early development of the ski area on Big Mountain. SUF at ¶ 33.

34. The renewed permit was issued on January 31, 2012, with an expiration date of December 31, 2020. The renewed permit—like all previous permits—is for "nonexclusive use" only. SUF at ¶ 34.

The Statue's Setting

35. The statue sits on National Forest Land among ski slopes that are part of the Whitefish Mountain Resort. SUF at ¶ 35.

36. The Resort is privately-owned and operated, but the upper ends of its ski runs are on Forest Service land. SUF at ¶ 36.

37. Thus, the land under the statue is double leased for use by both the Knights and the Resort. The Knights' and the Resort's permits both specify that they are for non-exclusive use. SUF at ¶ 37.

38. While well known, the statue stands in a relatively less prominent place on the slopes. SUF at ¶ 38.

39. For the first two decades after the statue was erected, an uphill trek was required to visit the statue, as it was 400 feet beyond the "T-bar that served the resort's main ski runs at that time." SUF at ¶ 39.

40. For years, many people did not know the statue was there. SUF at ¶ 40.

41. Even after the first chairlift was installed at Big Mountain in 1960, access to the statue was not significantly affected, because the lift served runs located "on a different part of the mountain." Thus, skiers still had to "go out of [their] way" to get to the statue. SUF at ¶ 41.

42. Although the second chairlift installed in 1968 did increase access to the statue—meaning that skiers were "more likely simply to happen upon it while making runs down the hill," the statue remained "in a location that is not highly visible from most of the modern ski runs on Big Mountain." SUF at ¶ 42.

43. A grove of trees stands above the statue, so even when skiing the run nearest the statue, it cannot be seen until the skier is nearly alongside it. *See* SUF at ¶ 43. "In fact, this is the way most visitors to Big Mountain have first encountered the statue." *Id.*

44. Moreover, "the mountain's skiable terrain has expanded so much since the 1960s that 'it's very easy for many people to go skiing and miss it.'" SUF at ¶ 44.

45. The statue is not in an area that people walk by in the summer. There are no hiking trails that go by it. SUF at ¶ 45.

46. Current president and CEO of the resort, Dan Graves, was personally not even aware of the statue for several months after he started work on the mountain in 2006. SUF at ¶ 46.

Perceptions of the Statue

47. "Many locals . . . perceive the statue as a memorial to World War II veterans and the Tenth Mountain Division." SUF at ¶ 47.

48. These perceptions are based on the historical reason why the statue was commissioned and installed on Big Mountain. SUF at ¶ 48.

49. "[I]t is historically accurate that several of the founders and leading figures at Big Mountain during its early years were veterans of

World War II, some of whom served in the Tenth Mountain Division." SUF at ¶ 49.

50. The Tenth Mountain Division has used the statue "a couple of times" as a site for a veterans' gathering. SUF at ¶ 50.

51. In 2010—before there was any controversy about the statue—the Resort installed a plaque next to the statue, with information collected by Dan Graves drawing the association between World War II veterans and the statue:

> When the troops started returning from [World War II] 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 25 ft 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 KOC 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.

SUF at ¶ 51. Prior to that time the pedestal included a small metal plaque with the words "Knights of Columbus 1954." *Id.*

52. Even more prevalent is the "long-standing tradition of playfulness surrounding the statue, with skiers sometimes decorating it with ski gear and Mardi Gras beads, or high-fiving it as they ski by—a practice that has led to the statue's hand being broken off on numerous occasions." SUF at ¶ 52.

53. Indeed, one of the best-documented parts of the statue's history on the mountain is the frequency with which the statue's hands and fingers have been broken off by skiers. SUF at ¶ 53.

54. The record includes evidence that the hand was broken off as early as 1970. SUF at ¶ 54.

55. The Knights of Columbus visit the statue several times a year to maintain and repair the statue. The left hand and arm have been broken and repaired numerous times over the years. SUF at ¶ 55.

56. Indeed, in recent years, "a fence was built behind the statue" . . . to help protect it from ongoing damage caused by skiers either hitting [it] with ski poles or high-fiving it—a long-standing 'comical institution' on the mountain." SUF at ¶ 56.

57. This "playfulness and irreverence . . . do not represent an anomaly in the history of the Jesus statue on Big Mountain, but rather something that has come to typify many people's interactions with and perceptions of the statue." SUF at ¶ 57.

58. There is also a "long-standing tradition" of other "perceptions and activities surrounding the statue that have little to do with religion"—specifically, its role as "a well-known landmark," a "meeting place for skiers on the mountain," and "a place where visitors have enjoyed having their photographs taken." SUF at ¶ 58.

59. "In addition, nearly 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." SUF at ¶ 59.

60. In contrast, "the historical record suggests that religious uses of the Jesus statue on Big Mountain have been sporadic and inconsistent over time." SUF at ¶ 60("[We] found no evidence showing any systematic or consistent use of the statue for church services or prayer gatherings during the nearly sixty years it has stood on Big Mountain."); *see also id.* ("My review of the historical records relating to

the history and development of the Big Mountain ski area uncovered limited evidence of the statue being used as a site for church services or religious gatherings during the nearly sixty years it has stood on the mountain.").

61. Indeed, the record of religious activities at other locations within the Resort strongly outweighs the record of religious activities at the statue. SUF at ¶ 61.

62. The only documented wedding that took place at the statue was presided over by a judge, not a pastor or priest. SUF at ¶ 62.

63. "[T]he vast majority of visitors to Big Mountain throughout the course of its sixty-five-year history have gone there to recreate and enjoy the outdoors, not to visit the Jesus statue." SUF at ¶ 63.

64. In sum, "secular uses surrounding the statue have outweighed the religious ones." SUF at ¶ 64.

65. The Forest Service has made express effort to convey that the statue is privately owned and that the Forest Service does not approve of the statue's religious aspect. SUF at ¶ 65.

Freedom From Religion Foundation

66. Plaintiff Freedom From Religion Foundation ("FFRF") is a Wisconsin non-profit corporation. SUF at ¶ 66.

67. In its FOIA request of May 26, 2011, FFRF purported to be "writing on behalf of a concerned area resident and taxpayer, and other Montana members of the Freedom From Religion Foundation." SUF at ¶ 67.

68. Shortly before and even long after filing this lawsuit, however, FFRF was still recruiting members to participate in the lawsuit. SUF at ¶ 68.

69. To support its standing as an association, FFRF relies upon the standing of its member, William Cox. SUF at ¶ 69.

70. Cox joined FFRF on February 18, 2012, ten days after the complaint in this matter was filed on February 8, 2012. SUF at ¶ 70.

71. Indeed, Cox first contacted FFRF "in response to the suit" and "wasn't aware of the organization before that time." SUF at ¶ 71.

72. As a frequent skier at Big Mountain, Cox has "been acquainted" with the Jesus statue "for most of the last 20 years." SUF at ¶ 72.

73. He is aware that both the slopes and the statue are on federal land leased from the Forest Service. SUF at ¶ 73.

74. He has "known all along that the ski resort leases its property from the Forest Service," but he "hadn't really applied that to the issue of the statue until the question of renewing the lease came up." SUF at ¶ 74.

75. Mr. Cox has not made "any effort to avoid the statue" when skiing at Big Mountain in the past, and he plans to continue skiing there in the future. SUF at ¶ 75.

76. He has never "observed any religious conduct around the statue," and he is not personally "aware of any religious ceremonies that have been conducted at the statue." SUF at ¶ 76.

77. The first time Cox saw the statue, he reacted in "astonishment, as what in the world is that doing there"; he was "amazed to find a statue of Christ standing at the top of a ski run." SUF at ¶ 77.

78. He objects to the statue because of his "outrage or revulsion over what [he] regard[s] as the ignorance or the superstition, not to mention the hypocrisy that goes with much of our religious expression, and certainly the ignorant superstition and hypocrisy that enter our public

debates and our public ceremonies where religion intrudes, and just a matter of personal belief." SUF at ¶ 78.

79. Cox finds the statue to be "totally out of place, just as a matter of personal judgment." SUF at ¶ 79.

80. He also objects to the statue as a "brazen contravention of our Constitution," as he believes that "right up to the [S]upreme [C]ourt, religious monuments on federal property or maybe any public property have been found to be in contravention of the [E]stablishment [C]lause of the U.S. Constitution." SUF at ¶ 80.

81. According to Cox, the Forest Service should discriminate against religious organizations by barring them from its leasing policy because "it's pretty clearly in violation of our jurisprudence . . . to lease property for a big, fat religious symbol, for a brazenly religious monument." SUF at ¶ 81.

82. Cox concedes he is unaware of any evidence of "the Forest defending the statue as a religious symbol." SUF at ¶ 82.

83. Cox is not offended by public symbols on public property generally, but only when their imagery or placement is what he subjectively considers inappropriate. SUF at ¶ 83.

84. There is a war memorial at the "depot" in downtown Kalispell depicting "a soldier kneeling with his head bowed before the upright rifle and the helmet on top of his fallen comrade." SUF at ¶ 84.

85. Cox understands that the depot property is "probably city property," and that the memorial depicts a "spiritual moment." SUF at ¶ 85.

86. Cox does not object to this because he finds it "a fitting war memorial." SUF at ¶ 86.

87. Cox has viewed religious art in the National Smithsonian Museums, but does not find it offensive or unconstitutional, because "[i]t's been there a long time, and as far as [he] know[s], if nobody has objected ... it's regarded as cultural history." SUF at ¶ 87.

88. He would object, however, if such art were displayed on the National Mall because this would constitute a "very brazen representation of religion in a national government setting." SUF at ¶ 88.

89. Cox is aware that the words "Under God" are carved into the Lincoln Memorial. SUF at ¶ 89.

90. He does not believe that they should be removed, however, because the words are part of "a historical document, the Gettysburg address." SUF at ¶ 90.

91. Cox does not object to a plaque of the Ten Commandments that sits at the Kalispell city courthouse because "the Ten Commandments do have something to do with the law" and because it is "a nice little monument the size of a large gravestone." SUF at ¶ 91.

92. He would object, however, if the Ten Commandments were put up "in neon lights." SUF at ¶ 92.

93. In general, Cox is not offended by religious images in public if they "have historical significance" and "[i]f they're in an appropriate place." SUF at ¶ 93.

94. Cox has admitted on National Public Radio that the war memorial is "a part of the local culture." SUF at ¶ 94.

95. For Cox, "whether a piece of religious art or a religious symbol is appropriately placed" depends on "whether it's in violation of the Constitution." SUF at ¶ 95.

96. FFRF's lawsuit has generated significant controversy, triggering nationwide news coverage, public rallies, and action by Montana's congressional representatives. SUF at ¶ 96.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Summary judgment is based on the record, which "taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DiMartini* v. *Ferrin*, 889 F.2d 922, 926 (9th Cir. 1989) *amended,* 906 F.2d 465 (9th Cir. 1990).

Standing is a core element of federal subject matter jurisdiction, and is therefore subject to the same standard of review that applies to a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Barnum Timber Co.* v. *U.S. EPA*, 633 F.3d 894, 899 (9th Cir. 2011). The plaintiff has the burden of proving subject matter jurisdiction by a preponderance of the evidence. *Bly-Magee* v. *Lungren*, 214 F. App'x 642, 643 (9th Cir. 2006). In determining whether jurisdiction exists, the Court may consider evidence outside of

the pleadings. *McCarthy* v. *United States*, 850 F.2d 558, 560 (9th Cir. 1988).

ARGUMENT

I. The Court lacks subject matter jurisdiction because discovery revealed that FFRF lacks standing.

This Court's Order of November 27, 2012, held that FFRF had associational standing. Dkt. 55. The Order was based solely on the affidavit testimony of FFRF member William A. Cox submitted in response to Intervenor-Defendants' motion to dismiss. *Id.* The Court noted that Cox's affidavit was necessary for Plaintiff to have standing, and accepted the affidavit despite Plaintiff's untimely submission only because requiring the Plaintiff to refile the complaint with sufficient allegations would cause "needless delay." *Id.*

However, discovery has revealed new evidence that negates FFRF's standing in two ways: (1) Cox was not a member of FFRF at the time FFRF filed its complaint; and (2) Cox has not suffered an actual injury. Since "the jurisdictional issue of standing can be raised at any time," FFRF's lack of standing requires dismissal of the case despite the Court's previous ruling. *United States* v. *Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997). *See also Renee* v. *Duncan*, 686 F.3d 1002, 1012 (9th Cir.

2012) ("Article III standing is a non-waivable jurisdictional defect that may be raised at any time").

A. FFRF lacks standing because Cox was not a member of FFRF when the complaint was filed.

Cox did not become a member of FFRF until two weeks after this lawsuit was filed. SUF at ¶ 69. Indeed, Cox did not even know that FFRF existed until after the lawsuit was filed. SUF at ¶ 70.

This newly discovered fact negates FFRF's standing. Associational standing requires an organization to demonstrate that at least one of its "members would otherwise have standing to sue" in his or her "own right." *Wilderness Soc'y, Inc.* v. *Rey*, 622 F.3d 1251, 1256 (9th Cir. 2010) (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000)). To satisfy this element of associational standing, an organization must identify at least one individual who is a member of the organization at the time it filed the lawsuit. *D'Lil* v. *Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9th Cir. 2008) ("The evidence relevant to the standing inquiry consists of 'the facts as they existed at the time the plaintiff filed the complaint.'") (quoting *Skaff* v. *Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007)). Indeed, there is "no case law to support" the idea "that representational

standing may be based on a member who joined the organization after the suit has been filed." *EPIC* v. *Pacific Lumber Co.*, 469 F. Supp. 2d 803, 815-16 (N.D. Cal. 2007).

Cox was not even aware of FFRF's existence until after it had filed suit, and his first contact with FFRF was "in response to the suit." SUF at ¶ 70. Because Cox was not a member of FFRF at the time FFRF filed the suit, he cannot serve as the basis for FFRF's associational standing. *D'Lil,* 538 F.3d at 1036.

The Court relied on FFRF's representations about Cox in ruling on the motion to dismiss, Dkt. 55, because FFRF failed to mention in its submissions to this Court, including in the Cox Affidavit, that Cox was not a member of FFRF when FFRF filed its complaint. FFRF made this rather important omission knowingly, since FFRF attempted to add Cox to this case after the motion to dismiss was filed in an attempt to shore up its standing. Its failure to inform the Court or the other parties that Cox joined after the complaint was filed led directly to the Court's ruling on the motion to dismiss. Given this new information, FFRF's complaint should now be dismissed for lack of standing.

B. FFRF does not have standing because Cox admitted in discovery that he had a mere philosophical disagreement with the statue, not a cognizable injury.

In addition to the fact that Cox joined FFRF after the fact, discovery has also revealed a separate set of facts that negate FFRF's standing: Cox's "injury" amounts to nothing more than the "'psychological consequence presumably produced by observation of conduct with which [he] disagrees,'" and is thus insufficient to confer standing to Cox, much less FFRF. *Caldwell* v. *Caldwell*, 545 F.3d 1126, 1131 (9th Cir. 2008) (quoting *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982)). In particular, Cox made clear that he (1) has only a philosophical and legal disagreement with the statue's placement; (2) does not seek to avoid the statue; and (3) is not forced into frequent, direct contact with the statue.

1. Only a philosophical disagreement with the statue's placement.

During his October 23, 2012 deposition, Cox described his reaction to the war memorial as stemming from (a) his disagreement with religion generally and "the hypocrisy that goes with much of our religious expression, and certainly the ignorant superstition and hypocrisy that

enter our public debates and our public ceremonies where religion intrudes";[1] (b) his personal preferences on where war memorials should or should not be located (a war memorial "at the top of a ski hill . . . [is] totally out of place, just as a matter of personal judgment");[2] and (c) his understanding of constitutional jurisprudence.[3] These are all philosophical differences, not cognizable injuries.

Offended observer standing is a controversial category of standing that has increasingly come into question by courts. In *Valley Forge*, the Supreme Court rejected the idea of psychological offended observer standing: "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III." 454 U.S. at 485. There must be a "personal injury" beyond mere psychological harm. *Id.* The Ninth Circuit has spelled out this distinction in the context of offended observer standing by rejecting standing for plaintiffs asserting mere

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[1] SUF at ¶ 77.

[2] SUF at ¶ 78.

[3] "[R]ight up to the supreme court, religious monuments on federal property or maybe any public property have been found to be in contravention of the establishment clause of the U.S. Constitution." SUF at ¶ 79.

philosophical disagreement, *Caldwell*, 545 F.3d at 1130-33 and finding it only where there is evidence of avoidance by the plaintiff, *Buono* v. *Norton*, 371 F.3d 543 (9th Cir. 2004), or forced frequent and direct contact, *Vasquez* v. *Los Angeles Cnty.*, 487 F.3d 1246 (9th Cir. 2007).

In *Caldwell*, the Ninth Circuit rejected offended observer standing where the plaintiff claimed that a government-funded website endorsed religious viewpoints about evolution and made her feel like an "outsider[ ] by the State of California and the United States." *Id.* at 1129-30. The plaintiff was a parent with students in the California public schools who was "actively involved in elections and debates about the selection of instructional materials for science classes." *Id.* at 1129. Despite her personal connection to the website, the court held that her interest was "not sufficiently differentiated and direct to confer standing" and that her allegations "constitute[d] no more than the generalized grievances of one who observes government conduct with which she disagrees." *Id.* at 1133, 1130. *See also United States* v. *5 S 351 Tuthill Rd. Naperville, Ill.*, 233 F.3d 1017, 1022 (7th Cir. 2000) ("[A] plaintiff who has merely an 'intellectual or academic curiosity' in the outcome of a suit does not have standing") (quoting *S.E. Lake View*

Neighbors v. *Dep't of Hous. and Urban Dev.*, 685 F.2d 1027, 1033 (7th Cir.1982)).

The court explained that "it is not enough for a party to claim that the Establishment Clause has been violated." *Id.* at 1131. Plaintiffs must "identify [a] personal injury suffered by them *as a consequence* of the alleged constitutional error . . . ." *Id.* (quoting *Valley Forge*, 454 U.S. at 485).

Cox's injury is merely psychological. *Caldwell*, 545 F.3d at 1132. Disagreements with religion and distaste for "the hypocrisy that goes with much of our religious expression," [4] Cox's "personal judgment" about where a statue should be sited,[5] and Cox's feelings about constitutional jurisprudence[6] are philosophical and legal disagreements, not legally cognizable injuries.

Despite his philosophical and legal objections to the nature and location of the war memorial, Cox takes no offense at a statue at the

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[4] SUF at ¶ 77.

[5] SUF at ¶ 78.

[6] "[R]ight up to the supreme court, religious monuments on federal property or maybe any public property have been found to be in contravention of the establishment clause of the U.S. Constitution." SUF at ¶ 79.

city depot that Cox concedes depicts a "spiritual moment." SUF at ¶¶ 83-85. The city depot statue is of a soldier in a praying position, "kneeling with his head bowed before the upright rifle and the helmet on top of his fallen comrade." *Id.* In Cox's estimation, this statue is a "fitting war memorial." *Id.*

Nor is Cox offended by a plaque of the Ten Commandments at the city courthouse because "the Ten Commandments do have something to do with the law" and because it is "a nice little monument the size of a large gravestone." SUF at ¶ 90. Cox would object to the plaque only if it were larger or put up in "neon lights." SUF at ¶ 91. And he is similarly comfortable with religious art in public museums because "[i]t's been there a long time, and as far as [he] know[s], if nobody has objected . . . it's regarded as cultural history." SUF at ¶ 86. Cox also believes the phrase "Under God" is properly included as part of the Lincoln Memorial on the National Mall because it is part of "a historical document, the Gettysburg address." SUF at ¶¶ 88-89.

Ultimately, then, whether Cox is offended by religious displays depends on his personal conceptions of whether they "have historical significance" and "[i]f they're in an appropriate place"—"appropriate

placement" being defined as whether, in his understanding, "it's in violation of the Constitution or not." SUF at ¶¶ 92, 94. And he is not offended by religious symbols that have been there for a long time and "nobody has objected" to them. SUF at ¶ 86. Yet, he is offended by the memorial at issue here despite its role as "part of the local culture," and despite it being undisputed that the war memorial has been around for over sixty years without objection. SUF at ¶ 93.

Cox's objection to the memorial is thus insufficient to confer standing on Cox or FFRF. Cox is merely asserting a right to "have the Government act in accordance with *[his] views* of the Constitution." *Valley Forge*, 454 U.S. at 483 (emphasis added). But this "assertion of a right to a particular kind of Government conduct . . . cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Id.* Cox cannot use the judicial process as a mere "'vehicle for the vindication of [his] value interests.'" *Schmier* v. *U.S. Court of Appeals for Ninth Cir.*, 279 F.3d 817, 822 (9th Cir. 2002) (quoting *Allen* v. *Wright*, 468 U.S. 737, 756 (1984)). See also *5 S 351 Tuthill Rd.*, 233 F.3d at 1022 ("'[S]imple indignation,' or an impact on 'one's opinions,

aspirations or ideology' do not suffice to establish standing") (quoting *Harris* v. *City of Zion*, 927 F.2d 1401, 1405 (7th Cir.1991)).

Indeed, Cox's subjective philosophical differentiation between the war memorial and other religious displays raises questions better resolved in the "rarified atmosphere of a debating society" than in court. *Cent. Delta Water Agency* v. *United States*, 306 F.3d 938, 946 (9th Cir. 2002) (quoting *Valley Forge*, 454 U.S. at 472)). It is precisely the type of "abstract objection" the Ninth Circuit in *Caldwell* held insufficient to confer standing. 545 F.3d at 1133 (quoting *Valley Forge*, 454 U.S. at 473).

2. No forced avoidance of the statue.

Cox also expressly disclaims that he has avoided the statue. Unlike the plaintiff in *Buono*, Cox concedes that he has not changed his behavior to avoid the war memorial. SUF at ¶ 74(stating that Cox makes no effort to avoid the Jesus statue). He "most certainly plan[s] to continue to ski on 'Big Mountain.'" *Id.* By contrast, the plaintiff in Buono avoided the area entirely as long as the offending symbol was in place. 371 F.3d at 547 ("Buono will tend to avoid Sunrise Rock on his visits to the Preserve as long as the cross remains standing"). *Cf.*

Barnes-Wallace v. *City of San Diego*, 530 F.3d 776, 784 (9th Cir. 2008). (Plaintiffs avoided public park altogether because they were offended by Boy Scouts).

3. No forced frequent, direct contact.

Moreover, unlike the plaintiff who objected to the seal in *Vasquez*, Cox is not forced into frequent, direct contact with the war memorial. It is undisputed that although the statue sits on federal land, the land is leased to a commercial ski resort where Cox has to obtain a lift ticket to engage in a recreational activity. Cox is not forced to confront the war memorial to get to a government job, to avail himself of government goods or services, or to participate in government programs. Indeed, it is undisputed that Cox's unwanted exposure is merely fleeting as Cox "ski[s] past the statue." SUF at ¶ 74. There is no proof that Cox has anywhere near the "daily contact" that the *Vasquez* plaintiff did. In *Vasquez*, by contrast, the plaintiff had "daily contact" with the offending seal, presumably as a part of his job. 487 F.3d at 1249. The contact was "frequent and regular" and forced him into "unwelcome 'daily contact and exposure.'" *Id.* at 1252. None of those factors are present here.

* * *

Cox's standing fails for two reasons. First, he was not a member of FFRF until two weeks after the complaint was filed. Second, Cox describes only a psychological injury—really a philosophical disagreement—as the basis for his standing. His testimony expressly disclaims that he avoids the statue, or that he comes into frequent, direct contact with it. "Because [Cox] is a member of the Foundation and the Foundation has relied exclusively on h[is] alleged injury to support its standing, its claim to standing rises or falls with [Cox]. Thus, because [Cox] lacks standing, so too does the Foundation." *Moss* v. *Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 606 (4th Cir. 2012) (rejecting FFRF associational standing).

II. The Forest Service's decision renewing the Knights' permit does not violate the Establishment Clause.

Contrary to FFRF's apparent assumptions, the Establishment Clause does not promise—or even propose—a public square stripped of even the smallest evidence that our nation includes religious people whose values and beliefs are manifest in its history and culture. Rather, the Constitution gives the government "latitude in recognizing and accommodating the central role religion plays in our society." *Kreisner* v. *City of San Diego*, 1 F.3d 775, 780 (9th Cir. 1993) (quoting *County of*

Allegheny v. *ACLU,* 492 U.S. 573, 657 (1989) (Kennedy, J., concurring and dissenting)). It "does not compel the government to purge from the public sphere all that in any way partakes of the religious. *Van Orden* v. *Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) (citations omitted). And it "does not prohibit practices which by any realistic measure create none of the dangers [the Establishment Clause] is designed to prevent." *Kreisner*, 1 F.3d at 780 (citations omitted); *see also Salazar* v. *Buono*, 130 S. Ct. 1803, 1818 (2010) (plurality opinion) ("The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm . . . [or] oblige government to avoid any public acknowledgment of religion's role in society.").

The statue on Big Mountain raises no threat of an establishment of religion. It is private speech, by a private organization, far from the seat of government or any government activity that might lend indicia of government endorsement. Indeed, the statue sits in the middle of a commercial ski resort, further removing the possibility that any person might infer from it a sense of government rejection or disapproval. Moreover, a large sign stands directly adjacent to the statue, explicitly stating the statue's history as a war memorial installed and maintained

by the Knights of Columbus, marking it as private, not government speech. In this context, the statue poses no risk of creating the dangers the Establishment Clause was designed to prevent.

To the contrary, it is evidence of government neutrality, where both commercial enterprise and religious organization (and by extension everything in between) are given equal access to a public forum, with complete indifference to their expressive activity. This is the very aim of the Establishment Clause, not something it should seek to prohibit.

Moreover, the statue has stood on Big Mountain for nearly sixty years without controversy. Unobtrusive, it can be and has been easily tolerated by the philosophically opposed. And the Knights and others, who through the statue privately express a religious remembrance, have bemusedly tolerated the jovial irreverence—even when that has become destructive—poured out on the statue over the years. The current dispute—stirred up as it was by a mission-driven, outside organization, scrambling for local members in whose name it could sue—simply cannot cloud the fact that for sixty years, the statue has never so offended nor coerced as to send a message of government exclusion to anyone from anything. The Establishment Clause ought to

reward the friendly mutual respect that pre-existed this litigation, not the "social conflict" that its "absolutism" engenders.[7]

A. The statue does not violate the Establishment Clause because it is private speech in a public forum.

Private speech in a public forum can almost never violate the Establishment Clause.[8] In *Capitol Square Review and Advisory Bd.* v. *Pinette*, the Supreme Court considered a "large Latin cross" standing "alone and unattended" in a public forum directly in front of Ohio's capitol building. 515 U.S. 753, 757 (1995); *see also id.* at 817 (Ginsburg, J., dissenting). A majority of seven confirmed that "private religious speech, far from being a First Amendment orphan, is as fully protected

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[7] *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) ("Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.")

[8] Since only government action, not private action, can violate the Establishment Clause, the leading *Lemon* test focuses on whether (1) the "government's actual purpose is to endorse or disapprove of religion"; (2) the government's action has a "principal or primary effect . . . that . . . advances [or] inhibits religion"; and (3) the government's action "foster[s] excessive government[al] entanglement with religion." *Nurre* v. *Whitehead*, 580 F.3d 1087, 1096-97 (9th Cir. 2009) (quotations omitted; alterations original) (citing *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)). Notably, the *Lemon* test is not applied in every case. *See, e.g.*, *Van Orden*, 545 U.S. at 686 (*Lemon* test "not useful in dealing with" government-owned "passive monument").

under the Free Speech Clause as secular private expression." *Id.* at 760. Thus, the State could only restrict the display outright if it had a compelling government interest in doing so. *Id.* at 761. The State claimed—and the Court agreed—that avoiding a violation of the Establishment Clause would be a compelling government interest. *Id.* at 761-62. Thus, the question for the Court was "whether a State violates the Establishment Clause when, pursuant to a religiously neutral state policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government." *Id.* at 757.

The Court found no violation. The full majority upheld the display because—as is true in this case—"[t]he [government] did not sponsor . . . expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups." *Id.* at 763.

The majority divided only on whether the cross's proximity to the statehouse might cause a reasonable observer to "mistake private expression for officially endorsed religious expression." *Id.* A plurality of

four justices declined to consider the question, adopting a *per se* rule that private religious expression "cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Id.* at 770.

Speaking for the majority's three remaining members, Justice O'Connor insisted that—even in cases involving private speech—the fact-intensive endorsement test should still be applied to consider "the perception of a reasonable, informed observer," who possibly could be misled as to government endorsement by, for example, the nearby looming statehouse. *Id.* at 772-73. But even there, Justice O'Connor agreed that cases involving private speech in a public forum would almost always satisfy the "endorsement" inquiry: "None of this is to suggest that I would be likely to come to a different result from the plurality where truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly." *Id.* at 775 (O'Connor, J., concurring).

Applying this standard to the Latin cross by the statehouse, Justice O'Connor found no violation of the Establishment Clause. Although she

assumed that her hypothetical "reasonable observer" would know that "the cross is a religious symbol, that [the ground] is owned by the State, and that the large building nearby is the seat of state government," *id.* at 780-81, that observer would also know "the general history of the place" and that ""Capitol Square is a public park that has been used over time by private speakers of various types." *Id.* at 781. Finally, the reasonable observer would also "certainly be able to read and understand an adequate disclaimer," which was presumed under the facts of the case to exist. *Id.* at 782. Under such circumstances, Justice O'Connor concluded that no such reasonable observer could conclude that the government was endorsing the religious message of the Latin cross, notwithstanding its proximity to the statehouse. *Id.* at 783; *see also id.* at 784 (noting that a sign "adequately disclaim[s] any government sponsorship or endorsement") (Souter, J., concurring).

The Ninth Circuit has similarly applied a standard that strongly presumes no violation of the Establishment Clause in the case of private speech in a public forum. In *Kreisner* v. *City of San Diego*, the court assessed the constitutionality of a religious Christmas display in Balboa Park—a vast, 1200-acre spread of public property. 1 F.3d 775,

776 (9th Cir. 1993). The display was erected in a smaller area of the park, within "the Organ Pavilion." It consisted of eight scenes from the New Testament, "[e]ach . . . housed in a palm-covered booth ten feet high and fourteen feet wide" and "[e]ach contain[ing] [a] life-size statuary depicting a . . . scene from the life of Christ." *Id.* at 777. "Seven of the eight scenes also include[d] gospel passages in English and Spanish." *Id.* The display was accompanied by "[o]ne or more disclaimer signs, stating that the Biblical display is privately sponsored and not allied with the City." *Id.* at 778.

The plaintiff argued that the city's decision to issue a permit for the display violated the Establishment Clause. The Ninth Circuit disagreed, holding—as in *Capitol Square*—that a "truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer." *Id.* at 785 (quoting *Americans United For Separation of Church & State* v. *City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (emphasis in original)). The court explained that a more restrictive policy prohibiting use of the forum by religious speakers simply because they are religious would constitute

"government hostility to religion" instead of "the neutrality contemplated by the Establishment Clause." *Id.* at 785.

Together, *Capitol Square* and *Kreisner* create a strong presumption that the Establishment Clause is not implicated by the facts of this case, because the statue constitutes private speech in a public forum. It is undisputed that displaying the statue is expressive conduct by the Knights of Columbus, not the government. It is likewise undisputed that the Flathead National Forest, where the statue resides, is a public forum. *See, e.g.*, 36 C.F.R. 251.50(c) (authorizing "noncommercial activities involving the expression of views, such as assemblies, meetings, demonstrations, and parades"). Thus, it would require unusual government presence or involvement for a reasonable observer to infer government endorsement of religion from the statue.

The facts cannot support such a conclusion. There are no buildings or other trappings of government in close proximity to the statue that could confuse the reasonable observer. Rather, the statue sits high on the mountain, where it is completely surrounded by a commercial ski resort. Moreover, the statue is widely perceived as either a war memorial, SUF at ¶¶ 47-50, a quirky tourist attraction, SUF at ¶¶ 52-

57, or simply an historical cultural landmark, SUF at ¶¶ 58-59. Any religious activity in connection with the statute has been "sporadic and inconsistent," far outweighed by the secular activity surrounding it. SUF at ¶¶ 60-64. And perhaps most significantly, there is a large plaque directly adjacent to the statue clearly explaining that it is an expression by the Knights of Columbus in memory of veterans from the Army's 10th Mountain Division. SUF at ¶ 51. Justice O'Connor's analysis in *Capitol Square* that a disclaimer overcame the effect of proximity to a government building applies *a fortiori* here, where there is a disclaimer with no visible indicia of government presence to disclaim in the first place.

Under all the relevant circumstances, no reasonable observer could conclude that the Forest Service's decision to renew the permit—for a private display in a public forum, far removed from the seat of government—is a government endorsement of religion. Thus, Defendants are entitled to a summary judgment.

B. The statue's longevity without controversy further confirms it does not violate the Establishment Clause.

In *Van Orden* v. *Perry*, the Supreme Court considered a six-foot tall "monolith" standing on Texas's State Capitol grounds and enscribed with the Ten Commandments, two Stars of David, and "the superimposed Greek letters Chi and Rho, which represent Christ." 545 U.S. 677, 681 (2005). Van Orden was a lawyer who "encountered the Ten Commandments monument during his frequent visits to the Capitol grounds" for using the Supreme Court library. *Id.* at 682 "Forty years after the monument's erection and six years after Van Orden began to encounter the monument frequently, he sued numerous state officials," alleging a violation of the Establishment Clause. *Id.*

A plurality of four justices recognized the Court's "Januslike" cases, with "[o]ne face look[ing] toward the strong role played by religion and religious traditions throughout our Nation's history," and the other "look[ing] toward the principle that governmental intervention in religious matters can itself endanger religious freedom." *Id.* at 683. Recognizing the difficulty of "respecting both faces," *id.*, the plurality ultimately concluded that the "passive use" of the Ten Commandments,

which have both religious and historic significance, did not violate the Establishment Clause, particularly considering that the petitioner had "apparently walked by the monument for a number of years before bringing [his] lawsuit." *Id.* at 691.

Justice Breyer provided the concurring opinion that upheld the monument.[9] He focused on "the basic purposes" of the sometimes conflicting Free Exercise and Establishment Clauses:

> They seek to "assure the fullest possible scope of religious liberty and tolerance for all." They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.

Id. at 698 (Breyer, J., concurring) (citations omitted). In this spirit, Justice Breyer emphasized that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Id.* at 699 (citation omitted). "Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* (citations omitted).

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[9] His opinion thus provided the rule of decision under *Marks* v. *United States*, 430 U.S. 188 (1977).

Justice Breyer observed several factors confirming that the Ten Commandments posed little threat of establishing religion. The monument "communicate[d] not simply a religious message, but a secular message as well." *Id.* at 701. There was "prominent[] acknowledge[ment]" that the monument had been donated to the State. *Id.* at 702. The monument's physical setting, while providing a "context of history and moral ideals," did not "readily lend itself to meditation or any other religious activity." *Id.* These factors strongly conveyed that the monument "convey[ed] a predominantly secular message." *Id.*

Still, Justice Breyer found "a further factor" that was even more determinative:

> As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). And I am not aware of any evidence suggesting that this was due to a climate of intimidation. Hence, those 40 years suggest more strongly than can any set of formulaic tests 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, [or] primarily to promote religion over nonreligion . . . .

Id. at 702 (Breyer, J., concurring).

Unlike the government-owned monument in *Van Orden*, the privately-owned statue in this case does not present a "difficult borderline case[]." *See id.* at 700. Its private character already removes it from the core of the Establishment Clause, where government action is the concern. *See Corp. of Presiding Bishop* v. *Amos*, 483 U.S. 327, 337 (1987) (stating that "[a] law is not unconstitutional simply because it *allows* churches to advance religion"; rather, "it must be fair to say that the *government itself* has advanced religion through its own activities and influence"). But that only underscores Justice Breyer's concern that Establishment Clause "absolutism" not be permitted to stir up "social conflict." *Van Orden*, 545 U.S. at 699.

The statue here, like the monument in *Van Orden*, clearly conveys a predominantly secular message. While the image of Jesus is indisputably religious, the adjacent signage conveys the clear message of honoring those who have sacrificed their lives defending our country. *See id.* at 701. The plaque includes a prominent statement that the statue is privately owned and maintained. *See id.* at 701-02. The physical setting, while undoubtedly striking, does not "readily lend itself to meditation or any other religious activity." *See id.* at 702.

Indeed, the statue is only accessible to persons who have paid to use the chairlift and skied part way down the slope. SUF at ¶¶ 39-46. It is unlikely that anyone would make this effort just to meditate or worship at the statue. The history of the statue strongly confirms that, in fact, the secular perception of the statue far outweighs any religious perception that might arise from the strictly private expression.

Most significantly, as in *Van Orden*, the empirical evidence here is clear that—for sixty years— "few individuals . . . are likely to have understood the [statue] as amounting, *in any significantly detrimental way*" to an endorsement of religion. *See id.* at 702 (emphasis added). Mr. Cox, the lead complainant has skied at Big Mountain for more than twenty years, yet only joined FFRF and this litigation, after the complaint was filed. SUF at ¶¶ 69-71. Indeed, the litigation itself was stirred up only because of FFRF, an outside organization that aggressively litigates for the removal of *all* religious symbols from the public square—a position that is far afield from that espoused by the Supreme Court. *Compare e.g.,* SUF at ¶ 13 (suggesting it is always "inappropriate to have religious symbols placed on Federal property"), *with Van Orden*, 545 U.S. 677 (upholding government display of Ten

Commandments) *and Capitol Square*, 515 U.S. 753 (upholding private display of Latin cross on government property).[10] And even *after* it filed the complaint in this case, FFRF was still searching for a Montana resident to bolster its standing. *See* SUF at ¶ 67. Rather than condone such litigious advocacy, the Establishment Clause should "seek to avoid that divisiveness based upon religion that promotes social conflict" and instead promote the "'peaceful dominion that religion exercises in [this] country,' where the 'spirit of religion' and the 'spirit of freedom' are productively 'united,' 'reign[ing] together' but in separate spheres '*on the same soil.*'" *Van Orden*, 545 U.S. at 698 (quoting A. de Tocqueville, Democracy in America 282-283 (1835) (H. Mansfield & D. Winthrop transls. and eds. 2000)). The passage of sixty years more than

[10] The Ninth Circuit's recent ruling in *Trunk* v. *City of San Diego*, 629 F.3d 1099 (9th Cir. 2011), is not to the contrary. Although the court in that case struck down the display of a forty-three foot Latin cross on government property, it expressly noted "[t]his result does not mean that . . . no cross can be part of this veterans' memorial." *Id.* at 1125. Moreover, the cross in *Trunk* constituted government, not private, speech, *id.* at 1102, 1104-05, and had a long history of religious use and perception that overwhelmed its secular message, *id.* at 1101-02, 1118. The cross's "sectarian effect" was also reinforced by a history of "long-standing, culturally entrenched anti-Semitism" in the city where the cross was displayed. *Id.* at 1121. No such factors are present in this case.

adequately confirms that the statue poses no threat of an establishment of religion. *Accord Buono*, 130 S. Ct. at 1817 (plurality opinion) ("Time also has played its role. . . . It is reasonable to . . . giv[e] recognition to the historical meaning that the cross ha[s] attained.).

CONCLUSION

For all the foregoing reasons, Intervenor-Defendants' motion for summary judgment should be granted.

Dated: January 18, 2013

Respectfully submitted,

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

I hereby certify that the foregoing *Memorandum in Support of Intervenor-Defendants' Motion for Summary Judgment* contains 9869 words, excluding the caption, certificates of service and compliance, table of contents and authorities, and exhibit index, but including the signature block.

/s/ *Eric S. Baxter*
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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2013, I caused the foregoing *Memorandum in Support of Intervenor-Defendants' Motion for Summary Judgment* to be served via this Court's electronic filing system on the following counsel of record:

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