

No. 13-35770

**In the United States Court of Appeals
for the Ninth Circuit**

FREEDOM FROM RELIGION FOUNDATION, INC.,
a Wisconsin non-profit corporation,
Plaintiff - Appellant,

v.

CHIP WEBER, Flathead National Forest Supervisor; UNITED STATES FOREST
SERVICE, an agency of the U.S. Department of Agriculture,
Defendants - Appellees,

WILLIAM R. GLIDDEN; RAYMOND LEOPOLD; EUGENE THOMAS;
NORMAN DEFORREST; KNIGHTS OF COLUMBUS,
Intervenor-Defendants - Appellees.

**On Appeal from the United States District Court
for the District of Montana**

**BRIEF OF THE STATE OF MONTANA AND THE AMERICAN LEGION
AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* State of Montana and The American Legion state the following:

If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None._____

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:

None._____

/s/ Lawrence VanDyke
LAWRENCE VANDYKE

TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES.....	iii
II.	INTEREST OF THE <i>AMICI CURIAE</i>	1
III.	FACTUAL BACKGROUND	2
IV.	SUMMARY OF ARGUMENT.....	7
V.	ARGUMENT.....	8
	A. The Tenth Mountain Veterans Memorial constitutes the private speech of the Kalispell Knights and is protected by the First Amendment’s Free Speech and Free Exercise Clauses.....	8
	B. Removal of the Memorial would constitute impermissible viewpoint discrimination, in violation of the First Amendment’s Free Speech Clause.....	10
	C. The First Amendment bars the select sandblasting of religious symbols from the public square.....	13
VI.	CONCLUSION.....	16

I. TABLE OF AUTHORITIES.

Constitutional Provisions

U.S. Const. Amend. I.....*passim*

Cases

Bd. Of Educ. v. Mergens, 496 U.S. 226 (1990).....7
Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).....*passim*
County of Allegheny v. ACLU, 492 U.S. 573 (1989).....12
Freedom From Religion Foundation, Inc. v. Weber, 951 F. Supp. 2d 1123 (D. Mont. 2013).....4, 5
Good News Club v. Milford Central School, 533 U.S. 98 (2001)...11, 12
Lynch v. Donnelly, 465 U.S. 668 (1984).....14
Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983).....11
Salazar v. Buono, 130 S. Ct. 1803 (2010)13
Texas v. Johnson, 491 U.S. 397 (1989).....13
Van Orden v. Perry, 545 U.S. 677 (2005).....14, 15

Other Authorities

10th Mountain Division Association, *Division Chronology*, <http://www.10thmtndivassoc.org/chronology.htm> (last visited Apr. 23, 2014)3
Fort Drum: 10th Mountain Division History, Postwar Growth of Skiing, http://www.drum.army.mil/AboutFortDrum/Pages/hist_10thMountainHistory_lv3.aspx (last visited Apr. 23, 2014).4, 5

II. INTEREST OF THE *AMICI CURIAE*.

Montana Attorney General Tim Fox and the Montana Department of Justice are charged with defending the legal rights of all Montanans, including those arising under the First Amendment to the United States Constitution. Here, Appellant threatens the First Amendment Free Speech and Free Exercise rights of the Montanans who erected the Tenth Mountain Division Veterans Memorial, as well as the generations of Montanans who have hiked and skied at the Whitefish Mountain Ski Resort. For nearly six decades, Montanans passing near the Memorial have stopped and honored the Tenth Mountain Division soldiers who fought and won battles in World War II. As discussed below, removal of the Memorial would constitute impermissible viewpoint discrimination, in violation of the same Constitution the Tenth Mountain Division and Montana's Attorney General have sworn to defend and uphold.

The American Legion is a veterans service organization representing approximately 2.4 million members in approximately 14,000 American Legion posts throughout the United States, its territories, and 20 foreign countries, including England, Australia,

Germany, Japan, Mexico, and the Philippines. Since its inception, The American Legion has maintained an ongoing concern and commitment to veterans and their families. The American Legion helps military veterans survive economic hardship and secure government benefits. It drafted and obtained passage of the first G.I. Bill, and its members were among the primary contributors to the national Vietnam Veterans Memorial. The American Legion works to promote social stability and well-being for those who honorably served our nation's common defense; and it strives to ensure that those veterans who sacrificed their lives for our country are properly remembered in local, state, and national veterans memorials.

The proper resolution of this case is a matter of great concern to The American Legion because removal of the Tenth Mountain Division Veterans Memorial would have a detrimental impact on The American Legion's ability to honor those who have and do serve our nation's armed forces.

III. FACTUAL BACKGROUND.

Today, the Tenth Mountain Division is a light infantry division of the United States Army based in Fort Drum, New York. But during

World War II, the Tenth Mountain Division was a specialized unit that trained and fought in mountainous terrain and extreme weather conditions. At the time of its formation, the Army recognized that a “global war” required soldiers “trained in mountain and winter warfare.” 10th Mountain Division Association, *Division Chronology*, available at <http://10thmtndivassoc.org/chronology.htm> (last visited Apr. 23, 2014.) The Division was activated in 1943, when Allied forces reached the mountains of Italy “in some of the roughest terrain in the country.” 10th Mountain Division Association, *Division History*, available at <http://10thmtndivassoc.org/dishistory.htm> (last visited Apr. 23, 2014).

The Tenth Mountain Division was the only United States Army unit to utilize a civilian agency, the National Ski Patrol, to recruit its members. This unique feature attracted the best skiers of the day, and only those who completed the rigorous high-altitude mountain training went on to serve overseas. The Tenth Mountain Division earned a distinguished record and fearsome reputation fighting in the most treacherous terrain in Europe: the mountains of Italy, France, and Sweden. 10th Mountain Division Association, *Division History*.

The original members of the Tenth Mountain Division confronted horrible realities while fighting against the Third Reich. During a time when Jews, Christians, and other groups were killed by the thousands because of their faith and their ethnicity, members of the Tenth Mountain Division were deeply moved and consoled by the religious statues and shrines they observed in the war-ravaged towns and villages in the mountains of Europe. *Freedom From Religion Found. v. Weber*, 951 F. Supp. 2d 1123, 1126-27 (D. Mont. 2013). In these longstanding statues and shrines, many Tenth Mountain Division soldiers found reason to maintain faith and hope in the future. *Id.* at 1126-27.

Tenth Mountain Division veterans returned home to build and manage the post-war ski and outdoor recreation industry. Fort Drum: 10th Mountain Division History, available at http://www.drum.army.mil/AboutFortDrum/Pages/hist_10thMountainHistory_lv3.aspx (“Ex-soldiers from the 10th laid out ski hills, built ski lodges, designed ski lifts and improved ski equipment. . . . Vail, Aspen, Sugarbush, Crystal Mountain, and Whiteface Mountain are but a few of the ski resorts built by 10th Mountain veterans.”) (last visited Apr. 23,

2014); The 10th Mountain Division and the Boom in Post-War Skiing in America, available at <http://voices.yahoo.com/the-10th-mountain-division-boom-post-war-384375.html?cat=37> (last visited Apr. 23, 2014). Several settled around the Whitefish Mountain Ski Resort near Kalispell, Montana, and subsequently joined the Kalispell Knights of Columbus – a private organization (hereinafter the “Kalispell Knights”).

United by their common memory of statues and shrines in World War II Europe, and wanting to erect a tribute to their unit and fellow soldiers, the Kalispell Knights applied for a Special Use Permit with the United States Forest Service to place a memorial on Big Mountain in the Whitefish Mountain Ski Resort area. *Weber*, 951 F. Supp. 2d at 1126. In 1953, the Kalispell Knights obtained a Special Use Permit to furnish and maintain a veterans memorial on federal land leased to the resort.

As designed and furnished by the Kalispell Knights, the veterans memorial is a tribute to the Tenth Mountain Division and its service during World War II. The Kalispell Knights completed construction in 1954 and have continued to exercise authority and control over the

veterans memorial without substantial assistance from the government (hereinafter the “Memorial”).

The chosen location for the Memorial on Big Mountain was no accident. The Kalispell Knights who served in the 10th Mountain Division saw countless religious shrines in the mountains of Europe during World War II. The sanctums they observed were frequently located on well-worn paths that were accessible to skiers and hikers. Therefore, it was only natural that the Kalispell Knights wanted to locate their Memorial among the hiking paths and ski runs frequented by Big Mountain visitors.

Though the events transpired nearly six decades ago, the Kalispell Knights were clear in their purpose: the Memorial was placed on Big Mountain to honor the Tenth Mountain Division soldiers who fought and won World War II. Today, that intent is summarized in a nearby plaque:

When the troops started returning from WWII in Europe to their home in the Flathead Valley they brought with them many memories . . . some good, some bad. Some of these troops were members of the Knights of Columbus at St. Matthew's parish in Kalispell.

A common memory of their time in Italy and along the French and Swiss border was of the many religious shrines

and statues in the mountain communities. This started a dialogue with the U.S. Forest Service for leased land to place this statue of Jesus. On October 15, 1953 the U.S. Forest Service granted a permanent special use permit to the K of C Council #1328 for a 25ft x 25ft square for placement of the statue. A commission for the statue construction was given to the St. Paul Statuary in St. Paul, Minnesota. The statue was installed in 1955 and has been maintained by the Knights of Columbus from St. Matthew's ever since. We thank those brave troops that brought this special shrine of Christ to the Big Mountain and hope that you enjoy and respect it.

—Whitefish Mountain Resort, 2010.

United States District Court Order dated June 24, 2013, Case No. 9:12-CV-00019-DLC, Doc. 104.

IV. SUMMARY OF THE ARGUMENT.

The District Court should be affirmed. This case presents a straight-forward application of long-standing First Amendment principles. Based upon plain, binding precedent of the Supreme Court and this Court, the Memorial constitutes the private speech of the Kalispell Knights and is protected by the Free Speech and Free Exercise Clauses. Moreover, governmental removal of the Memorial would constitute impermissible viewpoint discrimination, as the First Amendment bars selective exclusion of religious symbols from the public square.

V. ARGUMENT.

The Memorial easily passes constitutional muster for at least three reasons. First, the Memorial constitutes the private speech of the Kalispell Knights and is therefore protected by the First Amendment's Free Speech and Free Exercise Clauses. Second, government removal of the Memorial would constitute impermissible viewpoint discrimination. Third, the First Amendment bars the select sandblasting of religious symbols from the public square.

A. The Tenth Mountain Veterans Memorial constitutes the private speech of the Kalispell Knights and is therefore protected by the First Amendment's Free Speech and Free Exercise Clauses.

Appellant's arguments are misplaced for one simple reason: the Memorial is not government speech and therefore cannot violate the Establishment Clause. *See e.g., Bd. of Educ. v. Mergens*, 496 U.S. 226, 248-49 (1990); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763-64 (1995). Rather, the Memorial is private speech protected by the Free Exercise and Free Speech Clauses of the First Amendment.

The Memorial's origin amply demonstrates that it is the private speech of the Kalispell Knights. The government did not place the

Memorial atop Big Mountain. The government did not solicit donations for the Memorial, ask the Kalispell Knights to build it, or install it once it was fabricated. Nor did the Kalispell Knights ever donate the Memorial to the government or relinquish control of it to government agents. Instead, the Kalispell Knights applied for and received a special-use permit – that is, a renewing lease arrangement that allows the Knights to conduct private activity on a small piece of Big Mountain land in the Whitefish Mountain Ski Resort.

The Memorial's history since its inception only confirms its status as private speech. When the Memorial was in need of repair, the Forest Service did not take possession of it or take responsibility for making improvements. Instead, the Forest Service contacted the Kalispell Knights and requested that they “maintain a presentable area” around the Memorial – which the Kalispell Knights promptly did. Furthermore, the plaque next to the Memorial – installed by the privately-owned Whitefish Mountain Ski Resort, without prompting from the Kalispell Knights – makes clear that the Tenth Mountain Division veterans were inspired by religious statues and shrines in Europe and leased the land to build a similar Memorial on Big Mountain. The plaque thanks the

“brave troops” who brought the statue to the mountain. It does not mention the government except to note that a permit was granted.

An individual citizen cannot violate the Establishment Clause. Only the government’s own speech can violate the Establishment Clause. Private citizens are guaranteed the right to free speech, to express their own views, beliefs, ideas, and messages without interference from the government. “[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Pinette*, 515 U.S. at 765 (citing *Mergens*, 496 U.S. at 250) (emphasis in original).

The Kalispell Knights obtained a special-use permit to erect *their own* Memorial. The messages put forward by the Memorial – both historic and religious – represent the private speech of private citizens, not of the government itself, and are protected by the First Amendment.

B. Removal of the Memorial would constitute impermissible viewpoint discrimination, in violation of the First Amendment’s Free Speech Clause.

There are approximately 72,000 active Special Use Permits in the United States Forest Service system. This Special Use Permit and

Memorial has been open to public use and expression for nearly six decades. Whatever the status of the forum – public, limited public, or non-public – the Memorial cannot be removed on the basis of its religious content: government removal of the Memorial would constitute impermissible viewpoint discrimination. *Good News Club v. Milford Central School*, 533 U.S. 98, 106 (2001); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (Forum analysis is irrelevant where, as here, the issue is viewpoint discrimination).

The Kalispell Knights erected the Memorial as a tribute to their Tenth Mountain Division comrades. The government cannot exclude them or their message simply because their chosen method happens to contain religious imagery. The Supreme Court is unequivocal on this point: “[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.” *Good News Club*, 533 U.S. at 112.

The Supreme Court has repeatedly addressed cases involving private religious expression, public forums, content-based regulations, and a State's interest in complying with the Establishment Clause. In every case, the Court struck down restrictions on religious content. *See*

Pinette, 515 U.S. at 762, 770; *Good News Club*, 533 U.S. at 112. The Memorial presents all of the same “determinative” factors present in those cases: “The State did not sponsor [the Knights’] 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 groups.” *Pinette*, 515 U.S. at 763. In cases like this one, “religious expression cannot violate the Establishment Clause.” *Id.* at 770.

Moreover, it does not matter that an observer might mistake the Knights’ private speech for officially endorsed religious expression. In order to constitute “endorsement,” the government must be engaged in promotion or favoritism. *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989). No such favoritism exists when the government simply treats a religious speaker impartially. The fact that someone might “attribute to a neutrally behaving government private religious expression” does not transform otherwise-valid action into a constitutional violation. *Pinette*, 515 U.S. at 764. “Given an open forum and private sponsorship, erroneous conclusions do not count.” *Id.* at 765.

With equal force, the Supreme Court has rejected “heckler vetoes” based on subjective discomfort with religious symbols. It is a “bedrock principle underlying the First Amendment” that “the government may not prohibit the expression of an idea simply because society” – or a few members of it – “finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U. S. 397, 414 (1989). That is why the Supreme Court ruled in *Pinette* that even a widely-reviled group, the Ku Klux Klan, had the right to erect a religious icon in a public forum. If the Klan has the right to erect a white cross just yards away from the Ohio state capitol building, certainly the Kalispell Knights have the right to maintain the Memorial on the slope below Chair 2 at the Whitefish Mountain Resort.

C. The First Amendment bars the select sandblasting of religious symbols from the public square.

While the Establishment Clause does not apply in this case, even if it did, the “goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm.” *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010). The Memorial at issue here contains religious imagery, but its purpose is to honor veterans. The choice of a Jesus statue is somewhat unique – but that is because it

is a unique veterans memorial for a unique unit that fought under unique circumstances. Tearing down this memorial simply because of its use of religious imagery to convey a secular message “evince[s] a hostility to religion” that is constitutionally problematic. *Van Orden v. Perry*, 545 U.S. 677, 684 (2005).

Plainly, “simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” *Id.* at 690. That is especially true when the display – such as the Memorial at issue here – serves the wholly secular purpose of honoring fallen members of the Tenth Mountain Division.

In analyzing this type of “passive monument” under the Establishment Clause, the Supreme Court has said it is driven by the “nature of the monument and by our Nation's history.” *Van Orden*, 545 U.S. at 686. Because we have an “unbroken history of official acknowledgment by all three branches of government of religion's role in American life,” the depiction of Jesus, who is both an historical and religious figure, does not *per se* render the Memorial impermissible. *Lynch*, 465 U.S. at 674. The Memorial was built with the intent of honoring and remembering the Tenth Mountain Division veterans who

fought and won many battles in World War II – a secular and noble purpose. It stands alongside a plaque that explains this intent and the reason the Kalispell Knights chose a figure of Jesus for this purpose. In these circumstances, the monument has, at the very least, a “dual significance, partaking of both religion and government,” that cannot be said to violate the Establishment Clause. *Van Orden*, 545 U.S. at 692.

VI. CONCLUSION

Allowing the Tenth Mountain Veterans Memorial to remain on Big Mountain does not create a constitutional violation simply because it is a statue of Jesus. But removing it because it is a statue of Jesus does create both impermissible viewpoint-discrimination and a content-based restriction of the Kalispell Knights' private speech.

The judgment of the District Court should be affirmed. The Tenth Mountain Division Veterans Memorial is private speech protected by the Free Speech and Free Exercise Clauses of the First Amendment.

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Dated May 7, 2014

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF
APPELLATE PROCEDURE 32(a)**

I hereby certify that the foregoing document was prepared with Microsoft Word using Century Schoolbook 14-point proportionally-spaced font. In accordance with Fed. R. App. P. 29(d) and 32(a)(7), the brief contains 2,817 words, excluding the parts of the brief exempt by Fed. R. App. P. 32(a)(7)(B)(iii).

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 7th day of May, 2014.

/s/ Lawrence VanDyke
LAWRENCE VANDYKE

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 7, 2014.

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

/s/ Lawrence VanDyke
LAWRENCE VANDYKE