

In The  
**United States Court of Appeals**  
For The Ninth Circuit

**LORI & LYNN BARNES-WALLACE;  
MITCHELL BARNES-WALLACE;  
MICHAEL & VALERIE BREEN; MAXWELL BREEN,**

*Plaintiffs – Appellants/Cross-Appellees,*

v.

**CITY OF SAN DIEGO,**

*Defendant,*

and

**BOY SCOUTS OF AMERICA AND BOY SCOUTS OF  
AMERICA-DESERT PACIFIC COUNCIL,**

*Defendants – Appellees/Cross-Appellants.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
AT SAN DIEGO**

**BRIEF OF THE AMERICAN LEGION *AMICUS CURIAE*  
IN SUPPORT OF APPELLEES/CROSS-APPELLANTS  
BOY SCOUTS OF AMERICA,  
URGING REVERSAL OF THE DISTRICT COURT**

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No. 04-55732

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BOY SCOUTS OF AMERICA  
Appellee/Cross-Appellants,

v.

LORI & LYNN BARNES-WALLACE, MITCHELL  
BARNES-WALLACE, MICHAEL & VALERIE BREEN, and  
MAXWELL BREEN  
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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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BRIEF OF THE AMERICAN LEGION *AMICUS CURIAE*  
IN SUPPORT OF APPELLEES/CROSS-APPELLANTS,  
BOY SCOUTS OF AMERICA

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**STATEMENT OF *AMICUS*' INTEREST**

The American Legion ("the Legion") is the largest veterans organization in the United States, comprising more than 2,600,000 current and former members of our armed services, and long has worked to foster patriotism, character, and good citizenship. An Act of Congress chartered the Legion as a corporation in 1919. *See* Act of September 16, 1919, ch. 59, 41 Stat. 284

(currently codified at 36 U.S.C. §§ 21701-08 (2000)). The Legion's statutory purposes include upholding and defending the Constitution and supporting its members' service to their country. *See* 36 U.S.C. § 21702 (2000).

The Legion long has supported the Boy Scouts of America. Indeed at its first national convention in 1919, the Legion adopted a resolution that read, in part: "The American Legion heartily commends the principles and achievements of the Boy Scouts and recommends that each post assist the Scout troop in its community in whatever manner practicable." Since that time the Legion's support for the Boy Scouts has remained unstinting. Legion posts throughout the United States routinely sponsor and support Boy Scout troops with financial and personal assistance. They currently support more than 2600 Boy Scout troops nationwide. And in 2000, while *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), was pending, the Legion reaffirmed its fundamental view that the Boy Scouts should retain the liberty to maintain membership and leadership standards that are consistent with its mission of instilling in young boys the virtues of a Scout.

More saliently, the Legion, like other groups, is committed to maintaining its own liberty to administer standards and membership policies consistent with its organizational goals. As a voluntary veterans organization, the Legion is vitally interested in associational freedom. There is no test for Legion membership other than honorable military or naval service to the

United States. *See* 36 U.S.C. § 21703 (2000) (establishing honorable service in the armed forces during any listed period of hostilities as membership requirement).

This case presents a grave challenge to any voluntary organization. It is a case about the freedom of association masquerading as a case about the establishment of religion. For if the acknowledgement of God is deemed sufficient to adjudge the Boy Scouts a religion, then any number of other voluntary organizations with theistic roots will be equally affected. If allowed to stand, the decision of the district court will greatly limit the fundamental liberty of a voluntary organization to endorse traditional American values without suffering a governmental penalty because of its viewpoint. Thus, this case is -- in the end -- about the core American virtues of freedom to speak and freedom to associate -- the very freedoms that Legion members fought so unstintingly to preserve through their wartime service to our Nation. For this reason the Legion has elected to participate as *amicus curiae*, urging reversal of the district court's decision insofar as it holds that leases to the Boy Scouts by the City of San Diego constitute an unconstitutional establishment of religion.<sup>1</sup>

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<sup>1</sup> Counsel for all the parties have consented to the filing of this *amicus* brief. Accordingly this brief is authorized pursuant to Fed. R. App. P. 29(a).

## ARGUMENT

### I. The Camp Balboa And Fiesta Island Leases To The Boy Scouts Are Not An Establishment Of Religion.

As currently construed, the “*Lemon* test” – first set forth in *Lemon v. Kurzman*, 403 U.S. 602 (1971) -- holds that government action does not violate the Establishment Clause if (1) the government acted with a secular purpose and (2) the action does not have the primary effect of advancing or inhibiting religion. See *Mitchell v. Helms*, 530 U.S. 793, 807-08 (2000) (plurality); *Agostini v. Felton*, 521 U.S. 203, 222-23, 232-33 (1977); *American Family Assoc. Inc. v. City & County of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994); *Kreisner v. City of San Diego*, 1 F.3d 775, 781 (9th Cir. 1993). These criteria are used to evaluate whether a particular governmental action (such as the leases at issue in this case) advances religion in violation of the Establishment Clause – a situation that arises if the government action “result[s] in governmental indoctrination,” “define[s] its recipients by reference to religion,” or “create[s] an excessive entanglement” with religion. *Agostini*, 521 U.S. at 234.

No party to this dispute contends that the Camp Balboa and Fiesta Island leases fail the *Lemon* test because they have a religious purpose and were the cause of direct governmental indoctrination. Nor does anyone suggest that the City determined eligible leaseholders on the basis of their religion. Rather,

the district court concluded (erroneously, in our view) that, despite the neutral process by which the City entered into the leases, the leases with the Boy Scouts had the effect of advancing religion. *Contra Moore v. City of Van*, 238 F.Supp.2d 837, 849-50 (E.D. Tex. 2003) (a neutral city policy allowing equal access to community center by religious and non-religious groups alike “clearly” meets all prongs of the *Lemon* test).

The linchpin of the district court’s faulty analysis is its mistaken conclusion that the Boy Scouts are a religion. For if they are not, then (absent a direct governmental support for exclusively religious activities) no general support of the Boy Scouts can be an impermissible establishment of religion. And, if the Boy Scouts are a religion, then many other organizations that acknowledge and adopt theistic principles are also practicing religions – and that, simply is not the case.<sup>2</sup>

The district court’s decision begins from an unremarkable factual premise: Adult leaders of the Boy Scouts and youth members are required to have a belief in a deity. That requirement, imposed by the Boy Scouts as a

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<sup>2</sup> As detailed more fully in the Boy Scouts’ brief, the District Court’s conclusion that religion pervades and is central to the Boy Scouts’ mission is clearly erroneous. The Boy Scouts are no more a pervasively religious organization than are, Hillel of San Diego, and San Diego Hebrew Day School, all of whom also lease city property for their use. Indeed, the Plaintiffs’ concession that the Boy Scouts are not a “religious sect or creed” conclusively refutes the District Court’s erroneous conclusion.

condition of membership in their voluntary organization, is a protected exercise of the Boy Scouts' First Amendment freedom of association. *See Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7<sup>th</sup> Cir. 1993).<sup>3</sup> Thus, nobody could dispute the district court's factual conclusion that the Boy Scouts require some form of religious belief as a prerequisite to participation.

And there is, equally, little factual dispute that some (though not all) of the Boy Scouts engage in practices that are religious in nature. Scouts are taught reverence and a duty to God and, where appropriate, afforded the opportunity to participate (though *not*, significantly, required to participate) in religious activities.

But acknowledgment of religious themes and incorporation of those theistic views in ongoing activities does not make the Boy Scouts a religion or an organization whose primary purpose is religious, any more than the incorporation of religion in the invocation opening a court proceeding renders the court a religion. To be sure, the Boy Scouts believe that a child cannot be the best kind of citizen absent a belief in some ultimate deity – but the Boy Scouts neither specify which deity one should believe in, nor do their activities

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<sup>3</sup> Similarly, other Boy Scouts membership requirements are also protected by the First Amendment, *see Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and do not violate California state law, *see Randall v. Orange County Council Boy Scouts of America*, 17 Cal.4th 736, 952 P.2d 261 (1998); *Curran v. Mount Diablo Council of Boy Scouts of America*, 17 Cal.4th 670, 952 P.2d 218 (1998).

have the other attributes of a pervasively religious denomination. Of equal importance, the religious component of the Boy Scouts' program is conjoined with other, far more dominant activities, such as camping and knot tying that have no religious aspect whatsoever. As a consequence the City's leases to the Boy Scouts cannot reasonably be characterized as support for the establishment of a "religion."

**A. Historical And Theoretical Definitions Of Religion.**

Consider the question of what, exactly, constitutes a "religion." As this Court recognized, the task of defining a religion is by no means free from doubt. *See Alvarado v. City of San Jose*, 94 F.3d 1223, 1227 (9th Cir. 1996) ("Attempting to define religion, in general and for the purposes of the Establishment Clause, is a notoriously difficult, if not impossible, task.") (*citing* James M. Donovan, "God is as God Does: Law, Anthropology, and the Definition of 'Religion,'" 6 Seton Hal Const. L. J. 23 (1995) and *Africa v. Comm. of Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981) ("Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the first amendment.")). But whatever the outer limits of the definition, the district court manifestly erred in concluding that City leasing to the Boy Scouts is support for and establishment of a religion. As a matter of first principles one could seek a definition either in history or in an abstract, ontological

assessment. The Boy Scouts' membership rules and practices satisfy neither test.

To begin with, the meaning of "religion" at the time of the Founding (and thus, as understood by the Framers) would not have included theistic belief of the sort practiced by the Boy Scouts. And, the Framers' views are of critical importance for, as the Supreme Court has said, the interpretation of the Establishment Clause must "comport with what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

For the Founders, religion necessarily encompassed conceptions of adherence to a *particular* deity and the performance of sacraments and acts in furtherance of that adherence – not generalized belief in the existence of some mystical, spiritual deity. Thus, for example, the Virginia Declaration of Rights parenthetically defined religion as "the duty which we owe to our Creator *and the manner of discharging it.*" Va. Decl. of Rights, cl. XVI (1776) (emphasis supplied), *reprinted in* Schultz, West & Maclean, ed. "Encyclopedia of Religion in American Politics," Appendix 1 at 279 (1998) [hereinafter "Appendix 1"]; *see also* James Madison, "Memorial and Remonstrance" (1785), *reprinted in* Appendix 1 at 280 (same).

Then-contemporary linguistic usage was consistent with this conception of the definition of a "religion." To understand the meaning attributed to

words and concepts from the late 18<sup>th</sup> Century, the Supreme Court has often relied on the compilation of early American definitions first published by Noah Webster in 1828. *See, e.g. Crawford v. Washington*, -- U.S. --, 124 S.Ct. 1354, 1364 (2004) (relying on Webster for early definition of “witness”); *Kyllo v. United States*, 533 U.S. 27, 33 n.1 (2001) (definition of “search”); *see generally Hubbell v. United States*, 530 U.S. 27, 50 (2001) (relying generally on “dictionaries published around the time of the founding”).

Webster’s 1828 dictionary makes clear that a religion, as understood by those who prohibited the “establishment of religion,” would have only included organizations that have a particularized doctrinal belief in a specific deity and use specific rituals. Thus, as Webster defined the term, a religion (as distinct from theology) is: “godliness or real piety in practice, consisting in the performance of all known duties to God and our fellow men, in obedience to divine command, or from love to God and his law.” *See* Noah Webster, *An American Dictionary of the English Language* (S. Converse, New Haven, 1st ed. 1828). In addition, religion is even more particularly defined as “the performance of the duties we owe directly to God, from a principle of obedience to his will” or a “system of faith and worship.” *Id.*<sup>4</sup>

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<sup>4</sup> Webster also recognized that religion has a much broader definition, including both theology and morality and virtue. *Id.* It is, however, clear that in proscribing the establishment of religion, the Framers could not have used

This historical understanding of “religion” continued well into the 20<sup>th</sup> Century. For example, an early edition of Black's Law Dictionary used the following definition:

Religion has reference to man's relation to Divinity, to reverence, worship, obedience, and submission to mandates and precepts of supernatural or superior beings, and in its broadest sense includes all forms of belief in the existence of superior being exercising power over human beings by volition, imposing rules of conduct, with future rewards and punishments. As used in constitutional provision forbidding the establishment of religion the term means a *particularized system of faith and worship recognized and practiced by a particular church, sect, or denomination.*

See Black's Law Dictionary (3rd ed. 1933) (emphasis supplied).

Similarly, the Oxford English Dictionary records the oldest use of the phrase “religion” as meaning “[a] state of life bound by monastic vows.” Oxford English Dictionary 568 (2d ed. 1989). Later definitions also encompass the concept of religious practice and sacraments as integral to the definition of a religion. See, e.g., *id.* (“Action or conduct indicating a belief in, reverence for, and desire to please, a divine ruling power; *the exercise or practice of rites or observances implying this.*”) (emphasis supplied); *id.* (“A particular system of faith and worship”). In short, religion – under any reasonable definition of the concept -- necessarily encompasses a particularized body of doctrine and

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religion in this broader sense inasmuch as they clearly did not intend to prohibit virtue or morality.

practices relating to a specific god-figure and describing a system of transcendent beliefs about ultimate reality.<sup>5</sup>

### **B. The Jurisprudence Defining Religion.**

The judicial vision of religion has, historically, also stressed traditional elements like theology, sacraments, and, above all, worship of a deity. Thus, in 1890 the Supreme Court in *Davis v. Beason*, 133 U.S. 333 (1890) upheld an Idaho statute prohibiting bigamists and polygamists from voting on the grounds that the free exercise clause protects a belief but not necessarily the expression of that belief in action. In doing so, the Court stated: “[T]he term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.” *Id.* at 342. More recently, in 1931, Chief Justice Hughes concluded that “[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.” *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting), *overruled on other grounds, Girouard v. United States*, 328 U.S. 61 (1946). State courts have

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<sup>5</sup> Other theoretical considerations of religion are consistent with this understanding. For example, the International Encyclopedia of Public Policy and Administration (Shafritz, ed., Westview Press, 1998) defines “Religious Organizations” as “Groups formally established to pursue matters of worship, to provide pastoral and spiritual care for its members, or to provide service to the larger community.” *Id.* at 1951-52.

generally echoed this interpretation.<sup>6</sup>

Contemporary analysis of the concept of religion tracks this understanding. In *Alvarado*, 94 F.3d at 1227-31, this Court addressed whether representations of Quetzalcoatl or "Plumed Serpent" of Aztec mythology constituted religious symbols. In considering the issue, this Court cited favorably and adopted the three-factor test for identifying a "religion" enunciated by the Third Circuit in *Africa*, 662 F.2d at 1032-36.<sup>7</sup> As this Court described the test, the practices of an organization constitute a "religion" under the following circumstances:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs. \* \* \* The "formal and external signs" listed by the [Third Circuit] include: "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions."

*See Alvarado*, 94 F.3d at 1229 (citing and quoting, *Africa*, 662 F.2d 1032, 1-35-36).

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<sup>6</sup> For example, *see, e.g. Gabrielli v. Knickerbocker*, 12 Cal.2d 85, 90, 82 P.2d 391, 393 (1938); *Sunday School Bd. of S. Baptist Convention v. McCue*, 179 Kan. 1, 6, 293 P.2d 234, 237 (1956); *Nicholls v. Mayor of Lynn*, 297 Mass. 65, 70, 7 N.E.2d 577, 579-80 (1937); *Kolbeck v. Kramer*, 84 N.J. Super. 569, 573-74, 202 A.2d 889, 891-92 (App. Div. 1964), *modified*, 46 N.J. 46, 214 A.2d 408 (1965).

<sup>7</sup> The *Africa* court itself derived its analysis from the persuasive concurring opinion of Judge Arlin Adams in *Malink v. Yogi*, 592 F.2d 197, 205 (3d Cir. 1979) (Adams, J., concurring).

### C. The Boy Scouts Are Not A Religion.

Judged by the *Alwardo* standard the Boy Scouts are not a religion. Their practices do not comprehensively address deep and fundamental ultimate questions; their religious activities are not omnipresent; and they have none of the formal, external signs of a religion. Rather, theistic beliefs are but one component of a far broader and wider Boy Scouts program.

First, consider the question of whether the Boy Scouts are principally engaged in an effort to address “fundamental and ultimate questions.” As the *Africa* court explained:

Traditional religions consider and attempt to come to terms with what could best be described as “ultimate” questions -- questions having to do with, among other things, life and death, right and wrong, and good and evil. Not every tenet of an established theology need focus upon such elemental matters, of course; still, it is difficult to conceive of a religion that does not address these larger concerns. For, above all else, religions are characterized by their adherence to and promotion of certain “underlying theories of man’s nature or his place in the Universe.”

*Africa*, 662 F.2d at 1033 (quoting *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1190 (D.C. Cir. 1969)). No plausible construction of the Boy Scouts’ practices could reasonably conclude that it meets this aspect of the definition of religion. While the Boy Scouts’ principal goal is to develop the character of boys who participate, and while as an incidental aspect of that goal, reverence for God is taught, the Boy Scouts have no theology to speak of.

There is no Boy Scout answer to questions of “life and death” and the Boy

Scouts have no “underlying theory of man’s nature or his place in the Universe.” The Boy Scouts teach character through group activities like camping – they don’t teach fundamental theological questions about the ontological existence of a God. In short, the Boy Scouts’ Oath is not the “functional equivalent,” *see Africa*, 662 F.2d at 1033, of the Bible or the Koran.

Similarly, the Boy Scouts’ practices do not have the requisite comprehensiveness to warrant definition as a “religion.” An attempt to foster character through religious belief is not the same as a comprehensive religious structure or system. For the Boy Scouts’ belief in a deity is but a small part of a broader system of teaching that is designed, in the words of the Boy Scouts’ mission statement “to prepare young people to make ethical and moral choices over their lifetimes by instilling in them the values of the Scout Oath and Law.”<sup>8</sup> There is no comprehensive Boy Scout answer to the question of *how* an ethical life is lived. Absent such comprehensiveness, the Boy Scouts are no

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<sup>8</sup> In teaching values and virtue the Boy Scouts are true to the Framers understanding that the purpose of teaching youth is the development of moral character. For the Nation’s founders viewed a virtuous citizenry as the essential pre-condition for republican self-government. *See, e.g.*, Va. Const. of 1776, Bill of Rights, § 15 (“That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue \* \* \*”); Mass. Const. of 1780, ch. V, § 2 (“wisdom and knowledge, as well as virtue [are] necessary for the preservation of \* \* \* rights and liberties”); The Federalist No. 55, (Rossiter and Kesler eds. 1999) (Madison) (“Republican government presupposes the existence of [virtue] in a higher degree than any other form”).

more a religion than is “economic determinism, Social Darwinism, or even vegetarianism.” *Africa*, 662. F.3d at 1035.

Finally, and most obviously, the Boy Scouts have none of the formal attributes of religious practice. There are no priests, no religious holidays, no mandatory formal services, no religious structure or organization, and no attempt to proselytize.<sup>9</sup> Perhaps most significantly, the Boy Scouts do not assert the necessity of a unitary adherence to any specific deistic belief. The hallmark of religion, after all, is a claim (in some form) of exclusivity. But one can hardly imagine that anyone would “convert” to being a Boy Scout. And membership in the Boy Scouts is in no way inconsistent with membership in any religious organization. One can be a Boy Scout and a Roman Catholic or a Boy Scout and a Jew, or a Boy Scout and a non-denominational believer. But one cannot, in the common understanding, simultaneously be both a Christian and a Jew. Thus, at this fundamental level the claim that the Boy Scouts are a religion collapses into incoherence. *See Powell v. Bunn*, 59 P.3d 559, 579-580

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<sup>9</sup> To be sure the Boy Scouts do have a hierarchy and structure (with Scout leaders, Troops, Packs, and Dens) – but that structure is administrative, not religious. There is no theological or doctrinal supervision. And, of course, the Boy Scouts seek new members, just as any other voluntary organization does. But, critically, in distinction from true religions, the Boy Scouts do not do so in derogation of other belief systems. The existence of optional religious services for those who wish to participate further buttresses the claim that the Boy Scouts are not a religion. Another hallmark of religion is, at least on its face, a requirement for periodic participation in religious rituals. The Boy Scouts, by contrast, expressly reject such a requirement.

(Or. Ct. App. 2002) (holding that the Boy Scouts' activities are primarily social and recreational)

**D. Belief In A Deity Is Not Religious Belief For Establishment Purposes.**

The Boy Scouts are no more a religion than is the ACLU. Both have a core system of beliefs. Both have a hierarchy. And both profess their views about social issues openly. If the simple act of linking those views to an acknowledgement of the existence and power of a deity is enough to convert an organization into a religion then any organization that chooses to acknowledge a deity is a "religion" for purposes of the Establishment Clause. Such a rule would sweep far too broadly and, in effect, condemn the Executive Branch as a religion.<sup>10</sup>

To take examples from our history, "the day after the First Amendment was proposed, Congress urged President Washington to proclaim 'a day of thanksgiving and prayer,' to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." *Lynch*, 465 U.S. at 675 n.2.

Washington issued the proclamation which began: "Whereas it is the duty of all

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<sup>10</sup> The judicial branch would also be a "religion," invoking as it does, a deity in the opening of the court. See *Elk Grove Unified School Dist. v. Newdow*, -- U.S. --, 124 S.Ct. 2301, 2318-19 (2004) (Rehnquist, C.J., concurring) (noting that Court sessions opens with invocation of God). The legislature, likewise, would be a religion under Appellees' view. *Contra Marsh v. Chambers*, 463 U.S. 783 (1983) (invocation of God not establishment of religion).

Nations to acknowledge the problems of Almighty God \* \* \*” 4 Papers of George Washington 131: Presidential Series (W. Abbot & D. Twohig eds. 1993). Almost every succeeding President has issued similar proclamations.

Lincoln, of course, invoked a deity explicitly in the Gettysburg Address. *See* 1 Documents of American History 429 (H. Commager ed. 8<sup>th</sup> ed. 1968) (“that this nation, under God, shall have a new birth of freedom”). He reiterated that invocation in his famed Second Inaugural Address. *See id.* at 443 (“with firmness in the right as God gives us to see the right”). Franklin Delano Roosevelt concluded his inauguration with these words: “In this dedication of a nation we humbly ask the blessing of God.” 2 *id.* at 242. The invasion of Normandy on D-Day did not transform itself into a religious exercise simply because General Eisenhower invoked “the blessings of Almighty God upon this great and noble undertaking.” *Newdow*, 124 S.Ct. at 2318 (citation omitted).

\* \* \* \* \*

The district court’s cursory analysis disregarded all of this. It wrongly equated acknowledgement of a deity with “religious practices” and thus, concluded (without analysis of any of the foregoing factors) that the Boy Scouts are a religion. *See Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1272-73 (S.D. Calif. 2003). This was error.

A proper regard for this Court's precedent demonstrates that the mere presence of a theistic component in the Boy Scouts oath and practices do not make it a "religion." The conclusions of this Court in *Alvaro* are equally applicable today:

We are hard put to imagine a more unworkable definition of religion or religious symbol or believer for purposes of the Establishment Clause or Free Exercise than that which is offered here. \* \* \* "[I]f anything can be religion, then anything the government does can be construed as favoring one religion over another, and \* \* \* the government is paralyzed." \* \* \* While the First Amendment must be held to protect unfamiliar and idiosyncratic as well as commonly recognized religions, it loses its sense and thus its ability to protect when carried to the extreme proposed by the plaintiffs

*Alvaro*, 94 F.3d at 1230 (quoting 6 Seton Hall Const. L.J. at 70) (footnote omitted); see also *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680, 687-88 (7<sup>th</sup> Cir. 1994) (rejecting overbroad definition of religion, including fantasy and paganism).

## **II. The First Amendment Interests At Stake Are Fundamental.**

The decision of the district court undervalues the associational freedoms at issue in this case. The Supreme Court has long recognized that there is a core constitutional right "to enter into and maintain \* \* \* intimate or private relationships [and] to associate for the purpose of engaging in protected speech." *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987). Thus, "implicit in the right to engage in activities protected by the

First Amendment” is a “corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

This freedom to associate “is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.” *Dale*, 530 U.S. at 647-48; *see also Roberts*, 468 U.S. at 622 (right of expressive association is “especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority”). Diversity in viewpoints and freedom of expression are not advanced by compelled governmental uniformity of views. Rather, associations are free to choose whether to propound or not propound “a particular point of view, and that choice is presumed to lie beyond the government’s power to control.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 575 (1995).

Thus, as the Supreme Court has succinctly held, “[f]reedom of association \* \* \* plainly presupposes a freedom not to associate.” *Roberts*, 468 U.S. at 623. Recognizing the power of this legal principle, just three years ago the Supreme Court rejected efforts to compel the Boy Scouts to admit avowed homosexuals as members and leaders. The Boy Scouts were, correctly, adjudged to be an expressive association entitled to First Amendment protection. The forced inclusion of members who did not hold its views would

significantly burden that right and was, therefore, deemed impermissible. *Dale*, 530 U.S. at 659.

The ACLU's attempt to have the Boy Scouts' leases with the City of San Diego cancelled is nothing more than an effort to achieve indirectly what the City and the ACLU cannot achieve directly. By failing to recognize this simple fact, the decision of the district court substantially undervalues the Boy Scouts' protected First Amendment freedom of association.

**A. The Decision Of The District Court Eviscerates Fundamental First Amendment Interests.**

The courts have repeatedly held that access to generally available government programs and benefits must be granted in a "viewpoint neutral" manner, and may not be restricted based upon the content of the views expressed by those seeking access to the government benefit. *E.g. Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (access to school facilities); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) (access to school funding).

This realization should have ended the matter. A restriction on access to a government-sponsored benefit fails to meet the principles of equality if it is "an effort to suppress expression merely because public officials oppose the speakers' view." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 800 (1985). In short, to exclude the Boy Scouts from the Balboa

Park and Fiesta Island leases because of their adherence to theistic beliefs is to prefer atheism to theism and is, in itself, a discriminatory act.<sup>11</sup>

**B. The First Amendment Does Not Permit Discrimination Against An Organization Because Of Its Viewpoint.**

It bears emphasizing that there is, lurking behind the distinctions being drawn, an unstated yet palpable anti-religious component to the plaintiff's claim. All Boy Scouts are asked to follow the Scout Oath and Law, which, in turn, require each Scout to do his "duty to God" and be "morally straight." The Oath embodies traditional values, *Dale*, 530 U.S. at 649 and, as a consequence, the Boy Scouts accept neither atheists or agnostics, *see Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7<sup>th</sup> Cir. 1993), nor avowed homosexuals, *see Dale*, 530 U.S. at 653-54. Thus, at its core, the Boy Scouts' principles rest on a fundamentally theistic (though non-denominational) foundation.

But the Supreme Court has squarely held that theistic organizations may not be excluded from programs in which they are otherwise qualified to participate on account of their religious beliefs. *E.g. Rosenberger*, 515 U.S. at 831-32 (finding viewpoint discrimination in exclusion of student religious

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<sup>11</sup> As more fully set forth in Appellants' brief on the merits, the District Court's conclusion that there was no competition for leases and thus, that the lease to the Boy Scouts was the product of a preferential leasing system, is clearly erroneous. The San Diego program for leasing to non-profits includes leases to (among others): Boys and Girls Club; Torrey Hills YMCA; and the Jewish Community Center.

publication from school funding on basis of publication's religious viewpoint); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-94 (1993) (viewpoint discrimination in exclusion of religious group from use of school facilities). The Boy Scouts' exclusion from Balboa Park, while it remains open to others, is indistinguishable from the impermissible exclusions at issue in *Rosenberger* and *Lamb's Chapel*.

Indeed, the potential scope of the decision below is chilling. If widely adopted, the court's holding would, in effect, permit governmental discrimination against any organization that acknowledges the existence or importance of a deity. For example, the Preamble to the American Legion's National Constitution begins "For God and country \* \* \*." Surely such a statement is not to be construed as a basis for barring the Legion (or similar organizations) from participation in governmental benefit. Compare *Regan v. Taxpayers With Representation*, 461 U.S. 540, 551 (1983) (legitimate government policy to preferentially subsidize veterans' organizations). Yet that may be the import of the district court's decision.

\* \* \* \* \*

With all due respect, those who would oust the Boy Scouts from their long-standing leases of Camp Balboa and Fiesta Island have forgotten the wisdom of our constitutional commitment to diversity of viewpoints. Many years ago, Justice Brandeis noted that the First Amendment constrains

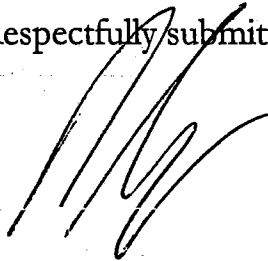
governments, preventing them from securing “silence coerced by law – the argument of force in its worst form.” *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The ACLU’s lawsuit, seeking to compel action by the City of San Diego, is nothing more than an effort to coerce the Boy Scouts’ silence. If the ACLU or San Diego view the Boy Scouts’ beliefs as odious, they are free to say so; they are free to advocate their social view in the marketplace of ideas. But they may not base a decision to oust the Boy Scouts from a generally available government benefit upon the Scouts’ disfavored message regarding homosexuality. “While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.” *Hurley*, 515 U.S. at 579.

## CONCLUSION

For the foregoing reasons, the decision of the district court should be vacated and the judgment below reversed insofar as it holds leases to the Boy Scouts unconstitutional.

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Respectfully submitted,



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## CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the requirements of Fed. R. App. P. 29(d). The brief has been prepared using Microsoft Word Garamond 14-point typeface. Exclusive of the table of contents; table of authorities; certificate of compliance; and certificate of service the brief contains 5,552 words.



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Paul Rosenzweig

## CERTIFICATE OF SERVICE

I hereby certify that on this the 21st day of February 2005, I filed with the Clerk's Office of the United States Court of Appeals for the Ninth Circuit, via UPS Overnight Delivery, the required number of copies of this BRIEF OF THE AMERICAN LEGION *AMICUS CURIAE* IN SUPPORT OF APPELLEES/CROSS-APPELLANTS, BOY SCOUTS OF AMERICA, URGING REVERSAL OF THE DISTRICT COURT, and further certify that I served via UPS Ground Transportation the required number of copies of said Brief to:

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