

Nos. 04-55732 and 04-56167

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LORI BARNES-WALLACE, *et al.*

Plaintiffs-Appellants/Cross-Appellees

v.

BOY SCOUTS OF AMERICA, *et al.*

Defendants-Appellees/Cross-Appellants,

On Appeal from the United States District Court
For the Southern District of California
No. 00-CV-1726-J (AJB)
The Hon. Napoleon A. Jones, Jr., Presiding

**BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
IN SUPPORT OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence is a project of The Claremont Institute for the Study of Statesmanship and Political Philosophy, a non-profit educational corporation that does not have a parent corporation and has never issued shares to the public.

QUESTION PRESENTED

1. Did the District Court err in holding that the leases of dedicated parklands by the City of San Diego to the Boy Scouts of America-Desert Pacific Council amount to an unconstitutional establishment of religion?

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INTEREST OF AMICUS CURIAE

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to “restore the principles of the American Founding to their rightful and preeminent authority in our national life,” including the principle, at issue in this case, that the inculcation of moral virtue in the citizenry was deemed by the Founders to be essential in a republican form of government.

The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as amicus curiae in cases of constitutional significance. Of particular relevance here, the Institute has published extensively about the foundations of representative government and the constitutional protections of speech and association that are necessary to protect those foundations, including a monograph entitled “On the Front Lines of the Culture War: Recent Attacks on the Boy Scouts.”

In 1999, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence, in order to further advance its mission. The Center’s purpose is to further the mission of the Claremont Institute through strategic litigation, including the filing of amicus curiae briefs, in cases such as this that involve issues of constitutional significance going to the heart of the founding principles of this nation. The Claremont Institute participated as

amicus curiae in *Boy Scouts v. Dale*, 530 U.S. 640 (2000), both in the Supreme Court and in the New Jersey appellate and supreme courts.

STATEMENT OF THE CASE...

Plaintiffs Lori and Lynn Barnes-Wallace and Michael and Valerie Breen sued to dissolve a relationship between the City of San Diego and the Boy Scouts of America and the Desert Pacific Council, Boy Scouts of America (collectively “Boy Scouts”) dating back to 1918 when the City first granted Boy Scouts permission to use municipal land. Today, Boy Scouts uses its 18 acres in Balboa Park and its half acre on Fiesta Island in Mission Bay Park to serve the San Diego community by providing youth-focused recreational, camping, and aquatic sports facilities. As per its lease agreements with the City, Boy Scouts has spent and continues to spend millions of dollars in making improvements to both properties. In addition, Boy Scouts assumes full responsibility for the maintenance, management, and insurance of both properties. Given these obligations, in lieu of lease payments and in accordance with San Diego’s policy for leasing public property to non-profit organizations, Boy Scouts pays a nominal one dollar fee plus a \$2,500 administrative fee for the Balboa Park property and no additional fees for the Fiesta Island property. However, again as per the lease agreements, Boy Scouts has no exclusive or even preferential use of the properties, but keeps both properties open for public use on a non-discriminatory basis.

Boy Scouts entered into lease agreements with the City in 1957 for 18 acres in Balboa Park and in 1987 for one-half acre on Fiesta Island in Mission Bay Park. On the Balboa Park property (commonly known as “Camp Balboa”), Boy Scouts has made extensive improvements to the property, including adding power and water utilities, and building nine campsites. Additionally, in its 2001 Balboa Park lease agreement with the City, Boy Scouts agreed to spend \$1.7 million of its own charitable funds in improvements to Camp Balboa during the first seven years of the lease. Whereas the City spends approximately \$1.7 million maintaining other Balboa Park facilities, the City pays nothing to maintain Camp Balboa. Griffith Decl. ¶ 17 (SER 5).

The City leased the Mission Bay Park property to Boy Scouts after over 40 youth-oriented groups forming the “Fiesta Island Youth Facility Committee” met to discuss the development of what the committee named the “San Diego Youth Aquatic Center.” The City Council chose Boy Scouts as the lessee because of Boy Scouts’ stellar track record for developing and operating quality youth programs, as evidenced by Boy Scouts’ success in Balboa Park. Complaint at 4-5, ¶¶ 22-23, *Boy Scouts of America v. San Diego*, No. 04-CV-0235 (S.D. Cal. 2004). As part of the Mission Bay Park lease, Boy Scouts agreed to raise and spend \$1.5 million to build and endow the Youth Aquatic Center as part of a \$4 million campaign.

Whereas the City spends more than \$6 million to maintain other Mission Bay Park

properties, the City pays nothing to maintain the Youth Aquatic Center. Griffith Decl. ¶ 9 (SER 3).

Both the Balboa Park and the Mission Bay Park lease agreements require that Boy Scouts provide for public use of the property. The Balboa Park lease states that “the public in general shall not be excluded from the said premises except at such times as their presence would conflict with the program of Boy Scouting.” Similarly, the Mission Bay Park lease states that “the general public shall not be wholly or permanently excluded from any portion of the premises” and that the Boy Scouts may book a maximum of 75% of available time at the Youth Aquatic Center. At Camp Balboa, since 2000, on approximately one-third of available days the property is used by non-Scouts, sometimes concurrently with Scouts. Complaint at 10, ¶ 50. At the Youth Aquatic Center, since 2000, function rooms or aquatic equipment were used 46% of available days by non-Scouts compared to 29% of available days by Scouts. *Id.* at 11, ¶ 53.

The City does not consider non-profit groups’ internal membership requirements when reviewing City leases. Rothans Decl. ¶ 9 (SER 12); Griffith Decl. ¶ 6 (SER 2). Rather, the City determines which groups are in the best position to fulfill City goals, awards leases to those organizations, and ensures City objectives are met by means of the lease terms. The City determined that Boy Scouts was best suited to meet its youth recreation goals in the Balboa Park Master

Plan and the Mission Bay Master Plan, and thus awarded the Boy Scouts leases on the same terms as other non-profit organizations who lease City property. The length and terms of Boy Scouts' leases are similar to the length and terms of the City's 104 leases to non-profit organizations. Over one-third of the non-profit leases are for terms of 25 years or greater. Rothans Decl. ¶15 (SER 13-14, 27-29). Fifty-five leases generate no revenue for the City. Seventy-seven lessees pay less than Boy Scouts' \$2,501 nominal plus administrative fee for Camp Balboa. Rothans Decl. ¶ 10 (SER 12, 27-29). Furthermore, several of the non-profit leases are to sectarian religious groups or groups that are otherwise selective in their associations, such as the Jewish Community Center, the Point Loma Community Presbyterian Church, the Girl Scouts, the Black Police Officers Association, and the Vietnamese Federation of San Diego—all of which pay either nothing for their lease or an amount less than the Boy Scouts pay.

Despite never having attempted to use either Boy Scouts property, the plaintiffs want to invalidate the leases between the City and Boy Scouts. The District Court held in summary judgment that Boy Scouts was a primarily religious organization and that the City's two lease agreements with Boy Scouts therefore violated the Federal Establishment Clause and the California Constitution's No Aid and No Preference Clauses. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1272, 1288 (S.D. Cal. 2003). The Court posited that Boy Scouts'

decision to exclude from Scouting activities those individuals who do not meet its membership requirements makes Boy Scouts a discriminatory organization. However, nothing in the record suggests that Boy Scouts failed to make its leased properties available for public use, including use by the plaintiffs, on a non-discriminatory basis. Indeed, just the opposite is true; failure to make the property available to the public on a non-discriminatory basis would result in a violation of the lease, but the plaintiffs allege no such violation. The plaintiffs chose not to use the property because they disagreed with Boy Scout teachings and the presence of Boy Scouts made them nervous. Order of April 13, 2001, at 6-7, *Barnes-Wallace v. Boy Scouts of America*, No. 00-CV-1726 (S.D. Cal.) (ER 6-7). If the errant District Court verdict stands, the cost of the plaintiffs' nervousness is the death of an 85-year, mutually-beneficial relationship between San Diego and the Boy Scouts of America.

SUMMARY OF ARGUMENT

The District Court erred when it held that Boy Scouts is a religion and when it applied the Federal Establishment Clause and the California Religious Clauses to San Diego's leases with Boy Scouts. In *Boy Scouts of America v. Dale*, the Supreme Court held that Boy Scouts is not required to admit members who would detract from its expressive message. The stated mission of Boy Scouts is to instill moral virtue in young people; thus, its moral purpose is indistinguishable from its

expressive message. As a result of Boy Scouts' success in *Dale*, Boy Scouts may exclude Scouting activities at Camp Balboa and the Youth Aquatic Center individuals who profess beliefs contrary to Boy Scouts' own beliefs. Rather than attack the Supreme Court's decision in *Dale*, the plaintiffs seek to punish Boy Scouts for exercising its constitutionally-protected freedom of association. The plaintiffs claim that, because Boy Scouts stands by its beliefs, Boy Scouts is a religion and may not enter into leases with the City on the same basis as other non-profit organizations.

Boy Scouts is not a religion and therefore its lease of municipal property is not an establishment of religion. Boy Scouts has no church, professes no sectarian creed, and does not approve or disprove of any religious sect. What Boy Scouts does seek to foster is a specific set of moral principles as communicated in the Scout Oath and Law; however, belief in a set of moral principles does not make the Boy Scouts a religion. Though Boy Scouts has a freedom of association right to exclude particular individuals from membership, it cannot exclude whomever it wishes from its San Diego leaseholds—Boy Scouts contracted away the right to exclude from its property. Yet, the plaintiffs are not content with equal public access to Boy Scouts' managed, maintained, insured, and improved properties. They demand that Boy Scouts changes its moral code to embrace the plaintiffs' own viewpoints or else pay a fictional market rate for City land in direct contrast to

the City's lease agreements with other non-profit groups. To enforce the plaintiffs' demands, the City would engage in unconstitutional viewpoint discrimination.

Because Boy Scouts is not a religion and may exercise expressive association, San Diego's leases with Boy Scouts are constitutionally sound, and fair treatment of Boy Scouts is constitutionally mandated.

Even if Boy Scouts were a religion, to continue with its own leasing policy, the City would, under current Supreme Court precedent, have to treat religious, irreligious, and non-religious groups equally, without preference and without establishment of any one belief. The government, and specifically in this case San Diego, not only may deal but must deal with religious groups. If a government body does not treat religious groups at least equally to nonreligious groups, then the government manifests an unconstitutional hostility toward religion.

Finally, even if Boy Scouts were somehow a religion because it is theistic, nothing in the Establishment Clause or the California Constitution prevents the City from promoting Boy Scouts' moral message. The people who wrote and ratified the Establishment Clause never intended that it prohibit a city or a state from encouraging a profound respect for the Creator who is the source of all our rights. Indeed, the best evidence suggests just the opposite: the Establishment Clause was designed not just to prevent the establishment of a national church but to prohibit the federal government from otherwise interfering with state

encouragement of religion as the states exercised their core police powers to protect the health, safety, welfare, and *morals* of the people. The Framers believed that a virtuous citizenry, particularly as fostered by moral and religious instruction, was essential for the survival of republican government. Similarly, when the plaintiffs and the District Court invoke the California No Aid and No Preference clauses to the California Constitution, they overlook that the preamble to the California Constitution begins with an expression of gratitude to Almighty God. California's Constitution—and the Constitution of almost every other State—exhibits a preference for theism over atheism. By acknowledging God, Boy Scouts are doing no more than the Framers of the United States Constitution and the Drafters of the California Constitution did when they wrote the documents the Court looks to today.

ARGUMENT

I. Boy Scouts Is Not a Religion Merely Because It Promotes a Duty To God.

The fact that Boy Scouts is not a religion is clear to anyone who has ever attended a Scouting event. Boy Scout uniforms are not draped with religious symbols. Boy Scout campouts are not consumed by prayers or religious ceremonies. Boy Scout hikes are not religious pilgrimages. The plaintiffs and the District Court would have this Court believe that the Boy Scouts' "duty to God" acknowledgement, the optional religious emblems programs developed and run by

outside religious groups, and time for grace before meals and taps somehow equates with the establishment of religion. The District Court's holding that "the overwhelming and uncontradicted evidence shows that [Boy Scouts'] purpose and practices are religious," *Barnes-Wallace*, 275 F. Supp. 2d at 1272, overlooked that the "duty to God" and the requirement to be "reverent" are but small parts of the Scout Oath and Law,¹ that only a small percentage of boys in the Boy Scouts choose to earn religious emblems (of which only a few are available compared to a vast number of available and required merit badges), and that the time spent saying grace before meals would be negligible by comparison to all other Scouting activities. Mere acknowledgment of God is far from synonymous with advancement of a particular sectarian faith.

Boy Scouts' own acknowledgement of a "duty to God" is nothing new in America. Almost every State constitution acknowledges God, and the Founders' writings about our government are full of similar religious references. The preamble to California's constitution is typical: "We, the People of the State of California, *grateful to Almighty God* for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution." Cal. Const. Preamble (emphasis added). Indeed, many state constitutions recognize that the *public*

¹ The relevant part of the Scout Oath requires a Scout to "do my duty to God and my country." One of the twelve elements of the Scout Law is "A Scout is: ... Reverent."

worship of God is a *duty* of mankind, even while they expressly protect against formal sectarian establishments and provide for the free exercise of religion. *See, e.g.,* Del. Const. art. I, § 1 (“Although it is the duty of all persons frequently to assemble together for the public worship of Almighty God; and piety and morality, on which the prosperity of communities depends, are hereby promoted; yet no person shall or ought to be compelled to attend any religious worship”); Md. Const. Declaration of Rights art. 36 (“That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty”); Mass. Const. pt. 1, art. II (“It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe”). These and similar constitutional acknowledgements of God remain in place to this very day, in nearly every one of the fifty states. It is a strange interpretation indeed that would label Boy Scouts’ non-sectarian acknowledgement of God and commitment to reverence as evidence of sectarian religious purpose when so many state constitutions—including the California constitution—give voice to the same beliefs, yet under the District Court’s ruling, not just the Boy Scouts but nearly every one of the fifth States must be deemed a “religion.”

Additionally, the drafters of many of the original State constitutions explicitly provided for religious education. The Pennsylvania Constitution of

1776, for example, provided that “all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning . . . shall be encouraged and protected.” Pa. Const. of 1776, § 45; *see also* Vt. Const. of 1777, ch. II § 41 (“all religious societies or bodies of men that have or may be hereafter united and incorporated, for the advancement of religion and learning . . . shall be encouraged and protected”). Several States continue to recognize the importance of moral and religious instruction in fostering the kind of citizen virtue the Founders thought necessary to the continued security of the republic. *See, e.g.*, Neb. Const. art. 1, § 4 (“Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature . . . to encourage schools and the means of instruction”); Vt. Const. ch. II, § 68; Ind. Const. art. 8, § 1. In Massachusetts, it is the “duty” of Harvard professors and other teachers of youth “to impress on the minds of children and youth committed to their care and instruction the principles of *piety* and justice” (emphasis added). Mass. Gen. Laws ch. 71, § 30 (2004). Massachusetts’s call for piety and Boy Scouts’ requirement of reverence do not make either the State of Massachusetts or the Boy Scouts “religions.”

For nearly a century, Boy Scouts has been singularly successful in its mission of instilling in boys a sense of their moral obligations to God, country, and family. Such moral training was thought by our nation’s Founders to be essential

in a republican form of government. Boy Scouts' model of moral education, which requires a Scout to recognize his duty to God and country, closely parallels the sort of education advocated by our nation's Founders. For example, in his farewell address, George Washington noted that "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."

George Washington, Farewell Address (1796), *reprinted in* WILLIAM B. ALLEN, ED., *GEORGE WASHINGTON: A COLLECTION* 512, 521 (1988). Perhaps the best example of this sentiment is expressed in the Northwest Ordinance, adopted by Congress in 1787 for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, art. 3, 1 stat. 51, 53 n. a (July 13, 1787, reenacted Aug. 7, 1789). Countless other examples from the Founding period point toward the importance of religion. Benjamin Franklin called for prayer at the Constitutional Convention, saying: "I therefore beg leave to move that henceforth, prayers imploring the assistance of Heaven and its blessings on our deliberations be held in this assembly every morning before we proceed to business." Benjamin Franklin, Speech before the Constitutional Convention (June 28, 1787), *reprinted in* JAMES MADISON, *THE PAPERS OF JAMES MADISON*, vol. II at 985 (Henry D. Gilpin ed., 1840). The same

week that Congress approved the Establishment Clause for submission to the States, it enacted legislation to provide for paid chaplains in the House and Senate. *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). That same Congress requested by joint resolution that Washington give a Thanksgiving Day proclamation which would “recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.” *Wallace v. Jaffree*, 472 U.S. 38, 101 (1985) (Rehnquist, J., dissenting). Washington complied, writing on that first occasion of a holiday we still celebrate today: “Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks.” *Id.* at 102. Washington addressed the nation as President, not as a priest. Though his proclamation—which was requested by Congress—recognized a national duty to God and advocated reverence, Washington was not presiding over a religious organization but fulfilling his governmental duty. The people who wrote the Establishment Clause did not shy away from religious expression; Boy Scouts follows their example.

Like State constitutions and the principles of our Founders, the Scout Oath and Law require a Scout's moral education to include several factors, including acknowledgment of God and commitment to reverence. Despite their multiple references to God, calls to piety, and reminders of religious duty, neither State constitutions nor the Founders set up religions, but governments. Similarly, the Boy Scout Oath and Law do not set up a religion but a system of moral education recognized by State constitutions and the Founders as essential for the survival of the republican institutions they established.

II. Though the Founders Supported State Encouragement of Religion and Moral Education Is Within a State's Police Power, At Minimum, Religion Must Be Treated Neutrally

Even if Boy Scouts were somehow a religion, San Diego does not establish religion by leasing municipal property to Boy Scouts on terms similar to those offered to several other non-profit groups.

Aid to religion is not dispositive of an Establishment Clause violation. Even Thomas Jefferson, who coined the phrase "a wall of separation between church and state," Thomas Jefferson, *Letter to the Danbury Baptist Association*, Jan. 1, 1802, in JEFFERSON: WRITINGS 510 (M. Peterson, ed. 1984), asked local governments to make land available for Christian purposes, signed an 1803 Indian treaty providing funds for the erection of a church and support of a priest, and authorized Christian Sunday services to be

held in the Treasury Department and the War Office—after Congress had already voted to allow the Capitol building to serve as a church on Sundays. *See, e.g., Wallace*, 472 U.S. at 103 (1985) (Rehnquist, J., dissenting); WALTER LOWRIE AND MATTHEW ST. CLAIRE CLARKE, EDs., 4 AMERICAN STATE PAPERS 687 (1832); 6 ANNALS OF CONGRESS 797 (1800); JAMES HUTSON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC 84, 89 (1998). Though recent Supreme Court decisions have moved away from the intended meaning of the Establishment Clause, the Supreme Court still adheres to the view that a State may fund religious training as part of a neutral program. *Locke v. Davey*, 540 U.S. 712, 719 (2004) (“there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology”). Even if Boy Scouts is somehow a religion, therefore, San Diego’s lease with the Boy Scouts on comparable terms offered to other non-profit groups would be far less support for religion than what either the least religious Founder or recent Supreme Court decisions hold to be Establishment Clause violations.

Though the Founders favored the encouragement of religion, current Supreme Court jurisprudence emphasizes that government must at least be neutral toward religion. *See e.g. Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001); *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995).

But cf. Wallace, 472 U.S. at 106 (Rehnquist, J., dissenting) (“The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the ‘wall of separation’ that was constitutionalized in *Everson* [*v. Board of Ed.*, 330 U.S. 1 (1947)]”). And the neutrality fostered under this view of the Establishment Clause must not be a mask for hostility toward religion. As Justice Goldberg noted in his concurring opinion in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963):

Untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

If the City excludes Boy Scouts from its non-profit lease program by applying a false concept of neutrality, as the plaintiffs demand, the City would be guilty of pervasive devotion to the secular and hostility to the religious. *See also Lynch*, 465 U.S. at 673 (holding that hostility toward religion in the application of the First Amendment would run afoul of the Free Exercise Clause). On the other hand,

allowing Boy Scouts to use municipal land as one group among many non-profit groups with similar leases ensures neutrality. *See Good News Club*, 533 U.S. at 114 (“Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club”). Furthermore, invalidating Boy Scouts’ leases would generate greater discrimination than maintaining the leases: if the Boy Scouts is excluded from Balboa Park based on its viewpoint (or excluded from the same leasing policy the city maintains with other non-profits), the City will exhibit hostility toward religion instead of its current religion-neutral policy. *See id.* at 118 (“We cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum”).

The Establishment Clause simply does not require the silencing of all religious voices that come in contact with government. In fact, government action may not inhibit religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“[The government action’s] principal or primary effect must be one that neither advances *nor inhibits* religion”) (emphasis added); *see also Rosenberger*, 515 U.S. at 831 (“It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social

viewpoint”). Silencing all hints of religiosity in order to protect an agnostic’s freedom of conscience (that of plaintiffs Breens, for example) is essentially an establishment of nonreligion and definitely an inhibition of religion. Thus, eliminating Boy Scouts’ leases is a far greater threat to the Establishment Clause than preserving the leases. The plaintiffs desire such a system where nonreligious non-profits receive free leaseholds while minimally religious lessees must pay market value even when the property is not available for commercial development. *See* Griffith Decl. ¶ 21, 24 (SER 6, 8). If the criteria for receiving a non-revenue-generating lease from the City require that a group profess nonreligious belief, San Diego would inhibit religion by creating a financial disincentive for the exercise of religion. *Cf. Agostini v. Felton*, 521 U.S. 203, 231 (1997) (“The criteria [for participating in a federal program] might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination”).

The City chose to develop a neutral program, and San Diego correctly did not exclude Boy Scouts from the neutral leasing program. The City had a clear secular purpose in granting Boy Scouts leases in Balboa Park and Mission Bay Park. *See* Griffith Decl. ¶ 7, 16 (SER 3, 5). The City did not act to further Boy Scouts’ moral ideology—though it could have—but rather sought to further the City’s own secular, youth-oriented, recreation goals. “If the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without

regard to religion, to all who adequately further that purpose . . . then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.” *Mitchell*, 530 U.S. at 810. This is particularly true in light of the Ninth Circuit’s oft-repeated rule that “A reviewing court must be reluctant to attribute unconstitutional motives to government actors in the face of a plausible secular purpose.” *Kreisner v. San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) (internal quotation marks omitted). The original interpretation of the Establishment Clause allowed for intentional and significant aid to religion. But even under the Supreme Court’s newer neutrality standards, these lease agreements pass constitutional muster. The benefit the City’s secular goals, while maintaining the required neutrality toward religion.

Moreover, San Diego has several leases for nominal fees with non-profit groups that “discriminate” in their membership—ethnic groups, church groups, youth groups, etc. “The provision of benefits to so broad a spectrum of groups is an important index of secular effect.” *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). In *Widmar*, the Supreme Court held that a state university could not prevent a religious student group from meeting in university facilities when facilities were generally available to student groups. Here, San Diego generally leases property to non-profit organizations for minimal fees, and preventing Boy Scouts from participating in the City’s program would likewise be

unconstitutional. Also, if the City engaged in a thorough examination of Boy Scouts' religious doctrine before granting a lease, excessive government entanglement with religion would occur. *cf. id.* at 270 n.6 (holding that inquiring into the distinction between worship and speech "would tend inevitably to entangle the State with religion in a manner forbidden by our cases").

III. Properly Understood, the Establishment Clause Left Religion to the States.

The Federal Establishment Clause should not apply to the states the same way it applies to the federal government. The Establishment Clause was designed to prevent the federal government from establishing a national church *or from otherwise interfering with State support of religion.*

The Supreme Court has recognized that the interpretation of the Establishment Clause should "comport with what history reveals was the contemporaneous understanding of its guarantees," *Lynch*, 465 U.S. at 673, and a key part of that history includes a substantial role for the public acknowledgment of a "Creator" as the source of "unalienable rights" and the use of religion to support that understanding. *Declaration of Independence* para. 2, 1 Stat. 1 (1776). Then-Justice Rehnquist's lengthy analysis of the Congressional debate leading up to the submission of the First Amendment to the states illustrates that none of the Congressmen involved, including Madison, wished to undermine the States' ability to aid religion. *See Wallace*, 472 U.S. at 94-99 (Rehnquist, J., dissenting).

Of course, the Fourteenth Amendment affected a fundamental change in our constitutional order and was intended to afford individuals federal protection against state governments that would interfere with their fundamental rights. But the Establishment Clause is different in kind from the other provisions of the Bill of Rights that had previously been incorporated and made applicable to the States via the Fourteenth Amendment.² The Free Speech and Free Exercise Clauses, for example, are much more readily described as protecting a “liberty” interest or a “privilege” of citizenship than is the Establishment Clause, yet when Justice Black wrote in *Everson* that the Establishment Clause was incorporated and made applicable to the States via the Due Process clause of the Fourteenth Amendment, he merely cited prior cases incorporating the Free Speech and Free Exercise clauses, without any analysis of the evident differences between them and the Establishment Clause. *See id.*, 330 U.S. at 5 (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), a free exercise case, and *Cantwell v. Connecticut*, 310 U.S. 296 (1940), a free exercise case, which in turn relied upon *Schneider v. State*, 308 U.S. 147 (1939), also a free speech case).

² The very Congress that adopted the Fourteenth Amendment—saw no Establishment Clause problem with state constitutions that acknowledged God, gave thanks to God, and even encouraged the public worship of God, nor did it see such acknowledgments as inconsistent with the Free Exercise and Establishment clauses of the U.S. Constitution or with comparable clauses in the states’ own constitutions.

Everson's incorporation holding has recently been called into question. In *Elk Grove Unified Sch. Dist. v. Newdow*, Justice Thomas argued that, "The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause." 124 S. Ct. 2301, 2330 (2004) (Thomas, J., concurring); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 677-78 (2002) (Thomas, J., concurring). Justice Thomas's ideas are not new; the propriety of incorporating the Establishment Clause has long been questioned. In the seminal *Schempp* case, for example, Justice Stewart commented: "The Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy." *Schempp*, 374 U.S. at 310 (Stewart, J., dissenting). In fact, incorporating the Establishment Clause actually works against the original intent of the Establishment Clause. As Justice Thomas has noted, "An incorporated Establishment Clause prohibits exactly what the Establishment Clause protected — state practices that pertain to 'an establishment of religion.' At the very least, the burden of persuasion rests with anyone who claims that the term took on a different meaning upon incorporation." *Newdow*, 124 S. Ct. at 2331 (Thomas, J.,

concurring). The reconsideration of *Everson* is long overdue, and even if it is beyond the power of this Court to take up the task, the inquiry that Justice Thomas has re-opened should at least counsel against reading the incorporated Establishment Clause even more strictly than the Supreme Court has previously done.

IV. Because California's Constitution Endorses Religious Belief, the No Preference and No Aid Clauses Must Be Read in Light of that Endorsement.

The California Constitution's No-Preference and No-Aid Clauses must also be considered, but as noted in Part I above, Boy Scouts' acknowledgment of God fulfills rather than offends the California Constitution. The preamble to the California Constitution states that the people of California are "grateful to Almighty God." In light of this preamble, the No Preference Clause of Article 1 Section 4 of the California Constitution cannot be read to prevent the City from encouraging, much less even cooperating with, the Boy Scouts because of its requirement that members similarly acknowledge a duty to God. The California Courts have not done so. *See Woodland Hills Homeowners Organization v Los Angeles Community College Dist.*, 266 Cal. Rptr. 767 (Cal. Ct. App. 1990) (holding that a community college with surplus real property may enter into a 75 year lease with a religious group without violating the Federal or California Religious Clauses, and that such lease did not advance religion because it had a

secular purpose). *See also E. Bay Asian Local Dev. Corp. v. California*, 13 P.3d 1122 (Cal. 2000) (holding that a statute exempting religious organizations from historic landmark designation did not violate Art. 1 § 4 because it protected religious free exercise).

San Diego's lease also complies easily with the No Aid Clause (even assuming that the lease amounts to "aid" to Boy Scouts at all, given Boy Scouts' significant obligations to the public under the terms of its lease). That Clause provides that "Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any *religious sect, church, creed, or sectarian purpose* . . . nor shall any grant or donation of personal property or real estate ever be made...for any *religious creed, church, or sectarian purpose* whatever." Cal. Const. art. XVI § 5 (emphasis added). Boy Scouts is not a sect, is not a church, has no sectarian creed, and has no sectarian purpose. As the District Court itself found, Boy Scouts is non-sectarian. *Barnes-Wallace*, 275 F. Supp. 2d at 1278-79. Yet the District Court held that San Diego's lease nevertheless violated the No Aid Clause because "California courts and the Ninth Circuit . . . when using the word 'sectarian' have used it synonymously with 'religious.'" *Barnes-Wallace*, 275 F. Supp. 2d at 1279. By this slight of hand, "non-sectarian" becomes "sectarian," and not just San Diego's lease with the Boy

Scouts, but the Preamble of California's own Constitution, would violate the No Aid Clause. This nonsensical reading of the Clause is certainly not required, and both common sense and text suggest the opposite. Aid which advances religion in general, on a non-sectarian basis, is permitted, while aid which advances a particular sect is not. The clause does not require hostility toward religion, nor prohibit a religious organization from receiving indirect benefit from state action with a secular purpose.

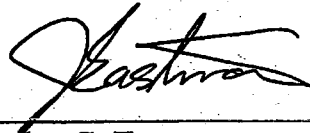
Even if the No Preference and No Aid Clauses could be used against Boy Scouts, denying Boy Scouts a lease would offend the Federal Religious Clauses. In *Widmar*, the Court held that a state university may not prohibit religious worship in university buildings when rooms are generally available to student groups. Justice Powell wrote, "The state interest asserted here — in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution — is limited by the Free Exercise Clause and . . . by the Free Speech Clause as well." *Widmar*, 454 U.S. at 276; see also *Kreisner*, 1 F.3d at 779 n.2. Similar to *Widmar*, San Diego makes nominal fee leases generally available to non-profit groups. If Boy Scouts is denied the opportunity to participate in the public leasing program, San Diego will violate Boy Scouts' Federal rights.

CONCLUSION

The District Court's grant of summary judgment for plaintiffs should be reversed.

Dated: February 24, 2005

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

I certify that the attached amicus curiae brief in support of the Appellants is proportionately spaced, has a typeface of 14 points or more, and contains 6,326 words, less than the 7,000 words permitted under Rule 29(d) of the Federal Rules of Appellate Procedure for amicus curiae briefs on the merits.



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CERTIFICATE OF SERVICE

I am employed in the County of Orange, State of California. My business address is One University Drive, Orange, California 92866. I am over the age of 18 and not a party to the within action. I served the attached documents described as **Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence in Support of Defendants-Appellees/Cross-Appellants** on interested parties in this action by service to:

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In addition, pursuant to Rule 25(a)(2)(B)(i) of the Federal Rules of Appellate Procedure, I mailed the above document on February 24, 2005, to the clerk by First-Class mail, postage prepaid.

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

Executed on February 24, 2005, at Orange, California.


Gloria L. Davis