

Appeal Nos. 04-55732 and 04-56167

United States Court of Appeals
for the Ninth Circuit

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

Plaintiffs-Appellants/Cross-Appellees,

--- v.---

CITY OF SAN DIEGO,

Defendant,

AND

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

Defendants-Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

**BRIEF OF *AMICUS CURIAE*,
INDIVIDUAL RIGHTS FOUNDATION, IN SUPPORT OF
DEFENDANTS-APPELLEES/CROSS-APPELLANTS
AND FOR PARTIAL REVERSAL OF THE JUDGMENT BELOW**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Individual Rights Foundation states that it is a division of The Center for the Study of Popular Culture, a not-for-profit, tax-exempt corporation. The Center for the Study of Popular Culture does not have any parent corporation and has no stockholders.

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INTEREST OF AMICUS CURIAE

Pursuant to Fed. R. App. P. 29, the Individual Rights Foundation (“IRF”) files this *amicus curiae* brief in support of Defendants-Appellees/Cross-Appellants Boy Scouts of America and Desert Pacific Council, Boy Scouts of America (collectively the “Boy Scouts”) and in opposition to Plaintiffs-Appellants/Cross-Appellees Lori & Lynn Barnes-Wallace, Mitchell Barnes-Wallace, Michael & Valerie Breen, and Maxwell Breen (collectively the “Plaintiffs”).

The IRF was founded in 1993 and is dedicated to supporting litigation involving civil rights and First Amendment issues and educating the public about the importance of First Amendment freedoms. To further its goals, IRF attorneys appear in litigation and file *amicus curiae* briefs in appellate cases involving First Amendment issues. The IRF seeks to resist attempts from anywhere along the political spectrum to limit public expression because such attempts pose a serious threat both to cultural diversity and to our free form of government.

STATEMENT OF THE CASE

The Boy Scouts have camped in City of San Diego (“City”) public park lands, including Balboa Park, for over 80 years (ER 1966, ¶ 7), including a formal lease for nearly 50 years. (*Id.*)¹ From its own funds, Boy Scouts developed and

¹Numbers preceded by “ER” refer to pages in the Excerpts of Record prepared by Plaintiffs; numbers preceded by “SER” refer to pages in the

built the aquatic center on Fiesta Island, at no cost to the City. (SER 215.) Boy Scouts have also expended millions of dollars in improving and maintaining other facilities on these public properties and in paying all their operating expenses, thereby eliminating any need for taxpayer funding. (SER 5, 215.) By paying for these costs and valuable improvements, Boy Scouts has conferred, and continues to confer, valuable benefits on the City by reducing expenditures that the City would otherwise spend for comparable services. (SER 204.)

The Boy Scouts' Fiesta Island lease with the City provides, among other things:

"LESSEE agrees not to discriminate in any manner against any person or persons on account of race, marital status, sex, religious creed, color, ancestry, national origin, age, or physical handicap *in LESSEE's use of the premises*, including, but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations" (ER 1971, ¶ 27.)²

In compliance with their leases, Boy Scouts have permitted the public

Supplemental Excerpts of Record prepared by Boy Scouts; numbers preceded by "BOP" refer to the Brief of Plaintiffs; numbers preceded by "BOBS" refer to Brief of Boy Scouts.

²Boy Scouts' lease regarding the Camp Balboa facility has a very similar provision. These leases only restrict Boy Scouts' discrimination in the "use of the premises" and have been mutually understood by the City and Boy Scouts not to include Boy Scouts' membership policies. (ER 1968-69, 1971.)

unrestricted use (other than requiring advance reservations) of such leasehold properties by making their facilities open for use by all members of the public without regard to sexual orientation or religious belief, in accordance with the City's policies, on a non-discriminatory, first-come/first-serve basis. (SER 8, 216-17; ER 1994.) There is no evidence of anyone ever being denied "use of the premises." (ER 1973.)

By providing low-cost youth recreational facilities and allowing members of the public to use their facilities on a first come/first serve basis, Boy Scouts have assisted the City in meeting a number of the "major goals" of the Balboa Park Master Plan to "[p]reserve and enhance the mix of cultural, and active and passive recreational uses within Balboa Park that serve national, regional, community and neighborhood populations" and to "[p]reserve Balboa Park as an affordable park experience for all citizens of San Diego." (SER 7, 50.)

In addition to the Boy Scouts, the following arguably "discriminatory" religious and nonreligious non-profit organizations also lease public park lands from the City, none of which pay market rent for their City leases (SER 8):

Girl Scouts of America (SER 7, 27);³

³Similar to the Boy Scouts' Oath, the Girl Scout Promise reads:

"On my honor, *I will try*
To serve God and my country,

Girls Club of San Diego (SER 12, 27);
Boys' Club of San Diego (SER 12, 27);
American-Russian Business Council (SER 11);
Asian Business Association (SER 11, 29);
Black Police Officer's Association (SER 11, 28);
Japan Society of San Diego and Tijuana (SER 11, 28);
Jewish Community Center (SER 11, 27);
 Point Loma Community **Presbyterian Church** (SER 28);
Salvation Army (SER 11);
 San Diego **Calvary Korean Church** (SER 29);
 San Diego County **Hispanic** Chamber of Commerce (SER 11, 28);
Vietnamese Federation of San Diego (SER 11, 27);
 Young Men's **Christian** Association (SER 11, 28); and
 Young Women's **Christian** Association (SER 29).

Boy Scouts presented evidence to the District Court that "the lease terms and property uses of the [*Boy Scouts*] leases are indeed comparable to those of other non-profit organizations, and that the [Boy Scouts] are not receiving any special treatment from the City beyond that accorded to other non-profit lessees on similar property." (SER 201 (Expert Witness Report of Richard B. Peiser) (emphasis added).) The City's lease with Boy Scouts helps to "assure that the facilities are available to broadest possible segment of the youth population at minimal fees [and] is best served by the current arrangement" with Boy Scouts. (SER 205)

Notwithstanding the City's comparable low-cost leases with each of the

To help people at all times
 And to live by the Girl Scout Law." (SER 153 (emphasis added).)

above “discriminatory” non-profit organizations and Boy Scouts’ compliance with City anti-discrimination policies in the public’s use of its leaseholds, Plaintiffs singled out only the Boy Scouts and filed the present lawsuit to prevent the City from providing a “subsidy” to the Boy Scouts because of the allegedly below-market annual fee⁴ Boy Scouts have been paying for the right to lease these public lands. (ER 1968, 1972.)

On cross-motions for summary judgment regarding these leasehold properties, the District Court ruled that Boy Scouts’ leases of the Balboa Park and Fiesta Island properties were effected by way of exclusive lease negotiations with

⁴Plaintiffs’ own expert witness on valuation conceded that, if a third party purchaser of the Boy Scouts’ properties were required to continue the existing use of that property for community or educational services, the two leases would have a collective annual market rental value of \$162,956 (\$102,308 plus \$60,648). (ER 91, 1975, 1977.) By contrast, Boy Scouts submitted proof of average expenditures of about \$148,000 annually from its charitable assets in order to maintain its City-owned leaseholds. (SER 215; ER 732.) This fact does not even take into account the millions of dollars spent by Boy Scouts on capital improvements to these leaseholds. (SER 5, 215; ER 1968, 1970.) Thus, if the public service restrictions on the existing use of those properties are taken into account, the annualized benefits received by the City from Boy Scouts’ leasehold occupancy appears to be far greater than the annual market rental value that the City would otherwise receive. Therefore, contrary to the District Court’s finding that the City bestowed on Boy Scouts the benefits of valuable parkland for a nominal fee (ER 2690), the City has not conferred any financial benefit on the Boy Scouts and appears to have received a much greater financial benefit than the City would otherwise receive. Perhaps, for this reason, no other party has ever approached the City with an interest in leasing Camp Balboa. (ER 1967.)

the City, to the exclusion of other groups,⁵ thereby violating the federal constitution's Establishment Clause and the California constitution's No Preference and No Aid clauses. (ER 2684-93.) The District Court specifically rejected the Boy Scouts' offer of proof that the City's exclusive lease negotiation process has been employed with regard to numerous other non-profit leases (ER 2684), including the Girl Scouts and Campfire Girls, whose membership policies also discriminate on the basis of gender. However, the District Court declared that the City's practices with regard to other leases was irrelevant. (*Id.*) Boy Scouts were not given the opportunity to show that, if viewed in context, Boy Scouts did not receive any preferential treatment over other non-profit organizations.

SUMMARY OF ARGUMENT

Your amicus respectfully submits that constitutional error by the District Court demands reversal in order to avoid serious erosion of First Amendment freedoms of speech, religion, and expressive association:

(1) The District Court's conclusion that Boy Scouts' leases of the Balboa Park and Fiesta Island park lands are invalid under state and federal establishment

⁵In fact, the evidence showed that other nonprofit groups, such as the Girl Scouts, also renewed their City leases through an exclusive negotiation process which was the same or substantially similar to the process used for the Boy Scouts. (ER 1978.)

clauses is based on the assumption that a municipality may *never* enter a lease through exclusive negotiations with a religious-oriented person or entity, regardless of the secular benefit to the municipality or of the municipality's leasing practices with nonreligious entities. By declaring irrelevant any evidence of how other nonprofit organizations have been allowed to engage in exclusive lease negotiations with the City, the District Court has fashioned Establishment Clause precedent which is hostile to, and singles out for discrimination, only religious groups which desire to lease public lands or receive public benefits widely available to nonreligious groups.

(2) The District Court's judgment violates the expressive association rights of Boy Scouts because it targets the rights of religious organizations in a viewpoint discriminatory manner by treating them differently than secular organizations and by unfairly setting religious entities apart as a class for unequal treatment. The District Court's conclusion sets a dangerous precedent which will lead to erosion of the rights of all expressive associations, including religious and minority associations that serve the needs of narrow segments of society.

ARGUMENT**I. THE DISTRICT COURT APPLIED AN OVERLY EXPANSIVE INTERPRETATION OF THE FEDERAL ESTABLISHMENT CLAUSE WHICH IS HOSTILE TO RELIGIOUS INDIVIDUALS OR GROUPS WHO WISH TO LEASE PUBLIC LANDS ON EQUAL FOOTING WITH NONRELIGIOUS INDIVIDUALS OR GROUPS.**

A governmental act does not violate the Establishment Clause if (1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive entanglement of church and state. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The District Court's judgment below concluded that the City ran afoul solely of the second *Lemon* prong, namely, that the City's lease of public park land to Boy Scouts had the primary effect of advancing religion.⁶ (ER 2674 (citing *Agostini v. Felton*, 521 U.S. 203, 231, 234 (1997)).)

The District Court's conclusion hinged largely on the assumption that a "reasonable observer" would necessarily, as a matter of law, perceive an

⁶The evidence below was virtually undisputed that the City's lease with Boy Scouts had the legitimate secular purpose of providing low cost recreational facilities for San Diego youth (BOBS 20-21), so the District Court could not take the position that the lease with Boy Scouts did not have a valid secular purpose. See *Bowen v. Kendrick*, 487 U.S. 589, 602-03 (1988) (Adolescent Family Life Act, which provided grants to religious and other institutions providing counseling on teenage sexuality, had legitimate secular purpose of helping reduce teenage pregnancy rate despite fact that religious groups' methods for achieving Act's purposes coincided with their religious beliefs).

advancement of religion whenever a municipality enters exclusive lease renewal negotiations, without a public bidding process, with a tenant having established religious beliefs, regardless of the municipality's practices in this regard with nonreligious persons or entities.⁷ (ER 2687.) This assumption is unjustified.

It is beyond dispute that mere rental of public facilities to religious organizations does not per se have a primary effect of advancing religion, even though overtly religious practices are occurring on the public leasehold. See, e.g., *Christian Science Reading Room Jointly Maintained v. City & County of San Francisco*, 792 F.2d 124 (9th Cir. 1986); *Woodland Hills Homeowners Organization v. Los Angeles Comm. College Dist.*, 218 Cal.App.3d 79 (1990). After all, a leasehold by definition confers certain *exclusive* privileges and benefits upon the lessee, regardless of the lessee's religious viewpoint or practices. Accordingly, the mere fact that Boy Scouts maintain certain religious practices or literature on its public leasehold premises does not per se raise questions of constitutional dimension.

⁷The District Court ruled that evidence of exclusive negotiations with numerous other nonprofit entities was irrelevant to the issue of whether Boy Scouts' lease of the parklands was a violation of the Establishment Clause. (ER 2684.) However, it assumed that the Establishment Clause "reasonable person" standard *requires* a lease-by-lease analysis and cannot, as a matter of law, look outside of each lease process to perceive a neutral citywide practice of granting exclusive lease negotiations on an equal basis to a diverse array of nonprofits.

By the same token, the mere rental of public facilities to a religious tenant by way of exclusive negotiations with a public entity lessor which also engages in exclusive negotiations with non-religious tenants does not per se have a primary effect of advancing religion because the Constitution does not lay down a standard which either favors or disfavors religious organizations in the leasing of public lands. *See Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736, 746 (1976) (“religious institutions need not be quarantined from public benefits that are neutrally available to all”). Accordingly, if cities can exclusively negotiate with non-religious tenants at all, they can do so with religiously-oriented tenants, so long as the overall practice does not favor or disfavor religion. *Agostini, supra*, 521 U.S. at 234.

What the City of San Diego cannot do is exclusively negotiate leases *only* with religious organizations or in a manner *different* from non-religious organizations or in a manner which *prefers* religious belief. However, the record below reveals no evidence that this occurred. There is absolutely no evidence that the City preferred Boy Scouts because of their religious or moral beliefs. Nor is there any evidence that the City’s non-profit leasing practice exclusively negotiated only with the Boy Scouts or with religious organizations. Plaintiffs simply could not produce any evidence of any de facto favoritism or sponsorship

of religious organizations in San Diego's leasing practice with non-profit organizations.

Therefore, under the circumstances, the only way in which the District Court could find the non-existence of triable issues of fact in this regard was to simply exclude as irrelevant all other evidence of the City's exclusive lease negotiations with other nonprofit entities. However, in doing so, the District Court skewed the inquiry, unfairly sloped the constitutional playing field, and denied Boy Scouts the right to their day in court to prove that the City's practice did not favor religious entities in general or the Boy Scouts in particular.

Of course, any government leasing program could be perceived as non-neutral if one views the practice of aid to religious charitable organizations out of context with the practice of aid to non-religious charitable organizations.

However, if a city has an *actual* practice of exclusive lease negotiations with a wide range of non-profits, favoring neither religious or non-religious organizations, how can neutral constitutional principles dictate that a religious non-profit should not be permitted to participate therein?

Unfortunately, in the present case, the District Court set up an unnecessarily inflexible rule that any "exclusive negotiations" with an organization having an inherently religious program would, as a matter of law, lead a "reasonable

observer” to conclude that the City is endorsing such an organization. (ER 2687.)

This conclusion is flawed because it ignores the more reasonable test erected by the Supreme Court that requires a sufficient factual inquiry into whether the challenged government action is likely to be perceived as an endorsement of religion. *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)).

For several reasons, the City’s lease with the Boy Scouts does not result in endorsement of the Boy Scouts’ program. First, absent evidence of overt government favoritism or sponsorship, there is no government sponsorship or endorsement inherent in a religiously-oriented tenant’s or permittee’s *private* speech. *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) (government permit allowing private creche was not endorsement of religion). “There 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.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995) (quoting *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990)) (emphasis in original).

Having a mutually beneficial lease with a non-profit religious corporation

does not imply endorsement of the non-profit tenant's religious beliefs any more than a mutually beneficial lease with a for-profit corporation implies endorsement of that tenant's goods or services. *Christian Science Reading Room Jointly Maintained v. City & County of San Francisco*, 784 F.2d 1010, 1015 (9th Cir. 1986); *Woodland Hills Homeowners Organization v. Los Angeles Community College Dist.*, 218 Cal.App.3d 79, 95 n.13 (1990). "A [government act] is not unconstitutional simply because it *allows* [religious organizations] to advance religion, which is their very purpose." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987) (emphasis in original).

Accordingly, merely *allowing* a private lessee of public lands, such as the Boy Scouts, to practice their religion-friendly program⁸ does not lead to the

⁸Ironically, the ACLU has vigorously argued in previous litigation that "religion plays a minimal role" in the Boy Scouts' program and that, therefore, the Boy Scouts is not a religious organization for purposes of the Free Exercise Clause. *Randall v. Orange County Council*, 17 Cal.4th 736, 740 (1998). In fact, Boy Scouts' modest religious programs appear to merely educate and preserve the memory of this nation's diverse religious heritage as reflected in many longstanding official references to God and divinity. See, e.g., *Elk Grove Unified School Dist. v. Newdow*, 124 S.Ct. 2301, 2322 (2004) (citing numerous official "symbols, songs, mottoes, and oaths" which reference divinity); *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984) ("Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders").

perception that the government is requiring or sponsoring religious activity. *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993). And there is no reason to believe that a reasonably informed observer would not understand that leaseholders have some inherently exclusive rights that do not reflect on the landowner. Therefore, absent evidence of overt government endorsement, *private speech* by a religiously-oriented public tenant is simply *not reasonably perceived as government speech. Id.*

Second, the secular purposes and benefits received by the City clearly mitigate any perception of government sponsorship. In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Supreme Court held that the Adolescent Family Life Act did not have the primary effect of advancing religion although the Act allowed grants to religious institutions providing counseling on teenage sexuality without expressly requiring that funds not be used for religious purposes. Rejecting the District Court's conclusion that the involvement of religious organizations in the Act had the impermissible effect of creating a "symbolic link" between government and religion, the Court stated that it "has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Id.* at 609. Such reasoning would jeopardize government aid to religiously-affiliated hospitals because of the potential

perception of a “symbolic link” between the religious hospital and the government entity subsidizing the secular medical services provided to the patient. *Id.* at 613-14. Notwithstanding that the religious institutions’ beliefs might coincide with government objectives, the “symbolic link” between government and religion is simply not sufficient where the aid is provided “for secular purposes.” *Id.*

In the present case, the City of San Diego has a clearly secular and valid purpose for its lease with Boy Scouts, i.e., providing low-cost recreational facilities to young people. (ER 2703.) The District Court expressly acknowledged that both the City and the Boy Scouts receive mutual benefits from Boy Scouts’ lease of the City’s public park lands. (ER 3742.) Moreover, there is no evidence that any of the “benefits” provided by the lease were directed toward any of the religious aspects of the Boy Scouts’ program. *Bowen, supra*, 487 U.S. at 613-14. Therefore, in light of the City’s clearly legitimate “social welfare” objectives and the lack of any direct connection to the religious practices of the Boy Scouts, the present case, like *Bowen, supra*, does not have the effect of creating the perception of a “symbolic link” between government and religion.

Finally, any other potential perception of favoritism is completely mitigated in this case by a neutral city leasing practice of engaging in exclusive lease negotiations with, and granting favorable lease terms to, a wide diversity of non-

profit groups, irrespective of their religious beliefs, in a way which is representative of the existing diverse spectrum of taxpayer and consumer preferences. “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); *see also Bowen, supra*, 487 U.S. at 609 (“important” indicator of secular effect that the “aid is made available regardless of whether it will ultimately flow to a secular or sectarian institution”).

In this regard, the present case is not unlike the creche cases in which a nativity scene standing alone in an exclusive government venue may be impermissible, but, when perceived together sharing a traditional public forum, such as a park, with a group of other cultural symbols, any perception of government endorsement is lost. *Cf. County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) with *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984).

Unfortunately, the practical effect of the District Court’s unnecessarily narrow lease-by-lease analysis in this case is to extend the reach of the federal Establishment Clause far beyond the neutral boundaries of case law to the point of being hostile towards religious persons and entities. *See Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 248 (1990). If the

District Court opinion is affirmed, then existing public leasing practices or other government benefits, including grants to religious organizations for secular purposes, that may appear in any way to create a “public perception” of assistance to religious organizations may stand in jeopardy.

The District Court’s analysis is also contrary to established precedent. For example, in *Christian Science Reading Room Jointly Maintained v. City & County of San Francisco*, 784 F.2d 1010 (9th Cir. 1986), this Court upheld against an Establishment Clause challenge a public airport “policy of renting space to religious groups.” *Id.* at 1013. In considering whether the effect of this policy was to advance religion, this Court recognized that “benefits to religion are improper only if they are other than ‘incidental.’” *Id.* at 1014. Two factors are important in this analysis: “first, there must not be ‘any imprimatur of state approval on religious sects or practices,’ and second, *the benefits must be generally available to others besides religious groups.*” *Id.* (Emphasis added.) This Court found that there was nothing in the Airport’s leasing policy which suggested that the Airport endorsed any religious views or “gave favored status to religion in general.” *Id.*

The present case also passes this same test. There is no evidence that the City’s exclusive lease renewal negotiation process gave favored status to any religious organization or to religion in general. Nor is there any evidence that the

benefits of the exclusive lease renewal negotiation process was not generally available to all groups, secular and religious alike.

However, by excluding any evidence of the exclusive lease negotiation process for other secular and religious groups, the District Court foreordained an Establishment Clause violation because a finding of government neutrality was impossible without evidence of the City's exclusive lease negotiation practices with all varieties of nonprofits.

Clearly, the lease in the present case is less direct and more remote of a benefit than the direct grant of funds to religious institutions in prior Establishment Clause precedent. *See Bowen, supra*, and *Roemer, supra*. Therefore, by refusing to consider the full panorama of San Diego's public leasing practices and by narrowly focusing on only one lease in a hyper-technical attempt to find a symbolic endorsement, the District Court expanded its Establishment Clause analysis far beyond the confines of the case law laid down by the Supreme Court and this Court.⁹

⁹In a sense, the District Court's opinion creates a de facto "super rescission clause" that allows non-party taxpayers to challenge, at any time, public leases with religiously-oriented entities or individuals, regardless of any actual limitation period for asserting rescission. Furthermore, by ignoring the very substantial reliance by the parties to such contracts in the form of millions of dollars in capital improvements, the District Court unnecessarily burdens state contract law and comity interests and significantly erodes California's strong public policy against

The District Court's judgment should be reversed because, in its overzealous haste to sanitize all public/private relationships of every vestige of religious affirmation, the District Court's ruling would make the Establishment Clause hostile to religion, contrary to established precedent, and would transform it into an ideological litmus test favoring organizations and beliefs having no religious content. Thus, the District Court's opinion moves away from the neutrality principle endorsed by the Supreme Court in its recent Establishment Clause cases (*see Agostini v. Felton*, 521 U.S. 203), would actually make non-profit public tenants less diverse, both culturally and educationally, and would offer taxpayers and consumers fewer choices regarding the use of their public park lands.¹⁰

finding contractual forfeitures. See Cal. Civ. Code § 1643 (contract to receive interpretation making it lawful and operative), § 1995.270 (public policy of state to enable freedom of contract by parties to commercial real property leases), § 1635 (all contracts, whether public or private, are interpreted by same rules); *Harbor Island Holdings, L.L.C. v. Kim*, 107 Cal.App.4th 790, 799 (2003) (policy of state that any provision for forfeiture of property without regard to actual damage suffered constitutes an unenforceable penalty).

¹⁰In addition to the Boy Scouts, the City of San Diego leases public park land for little or no rent to such diverse groups as the Boys & Girls Clubs, the YMCA, the Jewish Community Center, the Little League, and many other groups having diverse membership requirements which, like the Boy Scouts, are culturally distinct. (SER 7-8, 10-14, 27-29, 36.) Since Boy Scouts maintain camping, aquatics, and other recreational activities for all members of the public without discrimination on a "first come, first serve" basis (SER 216-17; ER 1994),

II. THE DISTRICT COURT'S ORDER HOLDING THAT ONLY RELIGIOUS ORGANIZATIONS CANNOT EXCLUSIVELY NEGOTIATE WITH THE CITY FOR THE LEASE OF PUBLIC LAND IS VIEWPOINT DISCRIMINATORY AND ESTABLISHES A DANGEROUS SLIPPERY SLOPE ERODING THE RIGHTS OF ALL EXPRESSIVE ASSOCIATIONS.

The District Court held that the City's lease selection process is a "nonpublic forum" in which the City "selected" the Boy Scouts for "preferential treatment" (ER 2703) by engaging in exclusive negotiations with Boy Scouts and abandoning the principle of neutrality toward religious belief in its lease review process. (*Id.*) However, the District Court refused to consider any evidence regarding the City's exclusive negotiations with other nonprofit organizations -- the only evidence which would ostensibly demonstrate whether the process employed by the City with regard to the Boy Scouts was actually neutral and non-selective.¹¹ (ER 2689.) Thus, the District Court virtually guaranteed that the Boy Scouts and the City could not meet its neutrality test by declaring irrelevant the very evidence which could show the City's neutrality in lease negotiations with

removal of the Boy Scouts from San Diego park lands *would only reduce the number and diversity of youth-serving recreation-oriented groups and facilities available to serve the public.*

¹¹For example, the Court refused to consider evidence that the Girl Scouts of America, a "discriminatory" organization (based on sex) that also seeks to teach its members to "serve God," was granted exclusive negotiations with the City on nearly identical terms as the Boy Scouts. (SER 153.)

the Boy Scouts.

The refusal to consider evidence of the lease renewal process as to other nonprofit lessees is especially significant because the City leases its public lands to over 100 nonprofit organizations, many of whom are organizations which arguably “discriminate” on the basis of sex, ethnicity, or religious belief in their internal membership policies or in the criteria by which they choose to dispense their program or financial benefits, including the Girl Scouts of America, Asian Business Association, Black Police Officer’s Association, Jewish Community Center, Point Loma Community Presbyterian Church, Salvation Army, San Diego Calvary Korean Church, San Diego County Hispanic Chamber of Commerce, Vietnamese Federation of San Diego, and the Young Men’s Christian Association. (SER 7-12, 27-29.)

The refusal to allow Boy Scouts to present evidence of the process by which other nonprofit organizations, including “discriminatory” organizations, became City tenants not only prevented the Boy Scouts from proving the neutrality of their own process, but also *demonstrates viewpoint discrimination against Boy Scouts’ particular religious and moral beliefs* in violation of Boy Scouts’ expressive association rights. The District Court’s viewpoint discriminatory perception of the Boy Scouts is well illustrated by the tone it took in the opening

paragraph of its July, 2003 opinion:

“[Boy Scouts’] private viewpoints include an anti-homosexual, anti-agnostic and anti-atheist stance. In addition to holding these views, the *Boy Scouts displays intolerance* toward individuals who identify themselves as homosexual, agnostic or atheist by denying membership to or revoking the membership of gay and nonbelieving individuals. . . . After *Dale*, it is clear that the *Boy Scouts of America’s* strongly held private, discriminatory *beliefs are at odds with values requiring tolerance and inclusion* in the public realm, and *lawsuits like this one are the predictable fallout from the Boy Scouts’ victory before the Supreme Court.*” (ER 2669-70 (emphasis added).)

The polemical nature of the foregoing statements seem inappropriate for a judicial officer being asked to apply neutral legal principles to decide the constitutional rights of the Boy Scouts and, had they been made out of court, might have been enough to recuse Judge Jones from hearing the present controversy at all. These comments show disdain and animosity for the Boy Scouts’ viewpoint outside of any need arising from a decision of the issues in this case. Thus, they strongly suggest that the District Court’s decision in this case was infected with viewpoint discrimination against the politically incorrect beliefs of the Boy Scouts and in violation of their expressive association rights. In short, this case sets a dangerous precedent which threatens all unpopular expressive activity, making them subject to government use of punitive denials of public “benefits”.

Such viewpoint discrimination, if left unchecked, could drastically affect the rights of many expressive associations. For example, expressive activity by such groups as the Salvation Army, Girls Club, or the Young Women's Christian Association may include appointment of leaders and youth counselors, who, like the Boy Scouts, often *teach more by their example* than by mere precepts. See, e.g., *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 701-02 (8th Cir. 1987) ("to permit single pregnant staff members to work with the girls would *convey the impression that the Girls Club condoned pregnancy* for the girls in the age group it serves") (emphasis added); *Harvey v. Young Women's Christian Ass'n*, 533 F.Supp. 949, 952 (W.D.N.C. 1982) (court rejected pregnancy discrimination claim of employee who was fired because she *wished to offer herself as a role model* of the "alternative lifestyle" of unwed pregnancy to young women, which was "*contrary to the YWCA's purpose*") (emphasis added). Such expressive associations should not be denied equal access to a forum simply because that form of expression arises out of the association's membership and employment policies.

"Governmental restraint on [speech] need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers."

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974). By attempting to

punish the manner in which the membership and employment policies of expressive associations like the Boy Scouts can be exercised, the District Court has improperly attempted to create new limitations under the First Amendment. Such limitations would allow the government, by way of novel and expansive interpretations of state and federal establishment clauses and “no preference” clauses, to restrict expressive conduct to orthodox viewpoints. *Texas v. Johnson*, 491 U.S. 397, 418 (1989). However, such laws cannot be used to override free speech or association rights under the First Amendment. *Id.*; *Boy Scouts of America v. Dale*, 530 U.S. 640, 660 (2000).

Accordingly, this case raises serious issues of state-authorized censorship by way of punitive denials of benefits aimed at the Boy Scouts’ mode of communicating traditional values, through expressive role modeling, regarding what is “morally straight” or what constitutes doing one’s “duty to God.” It is a “bedrock principle” of the First Amendment that the government may not punish expression of an idea “simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson, supra*, 491 U.S. at 414. Thus, when the state seeks, as in this case, to *deny access to a forum only to certain speakers* whose “discriminatory” viewpoints are conveyed through their leadership role modeling policies and not to other speakers whose leadership role modeling policies are in

line with the state's viewpoints, there is a great danger of state-mandated censorship.

The First Amendment will not tolerate a government regulation which "is in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). The Supreme Court has outlawed viewpoint discrimination where the denial of participation in a government forum (such as exclusive lease negotiation practices) extends only to associations communicating a disfavored viewpoint, such as speakers having "a religious perspective" on an otherwise forum-permissible subject matter, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or a request for funding by an otherwise qualified student publication solely because of its religious perspective in a university forum purporting to fund a wide diversity of publications, *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995), or instruction in character and morals "from a religious viewpoint" in a limited public forum otherwise permitting instruction in character and morals. *Good News Club v. Milford Central School*, 533 U.S. 98, 109 (2001).

The record below as well as the District Court's opinion make clear that Boy Scouts has been *selected for disfavored treatment based solely on the exercise of its expressive leadership policy and viewpoint* regarding "sexual

orientation” and “religion.” (ER 2669-70, 2703.) The District Court’s conclusions that the government does not engage in viewpoint discrimination “by making a value judgment about the recipient’s suitability for the subsidy” because of a “discriminatory membership policy” (ER 2703) and that court rulings like the present case are the “predictable fallout” of the Boy Scouts’ vindication of their own constitutional rights in the *Dale* case (ER 2669) simply show viewpoint discrimination involving a nonpublic forum. Thus, if the District Court’s opinion is upheld, many churches and other expressive associations which espouse “traditional values” could be similarly categorized and thereby denied access to public leases or other government “benefits” based simply on their disfavored viewpoint.

Such viewpoint discrimination clearly violates the First Amendment.

Viewpoint discrimination is presumptively impermissible in any forum when it is directed against expression otherwise permitted within the subject matter limitations of the forum. *Rosenberger, supra*, 515 U.S. at 830; *Perry Educ. Ass’n. v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 46 (1983). Moreover, “the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.” *Rosenberger, supra*, 515 U.S. at 828 (citing *Simon & Schuster, Inc. v. Member of N.Y. State Crime*

Victims Bd., 502 U.S. 105, 115 (1991)). Thus, the First Amendment is clearly violated in this case because the equal right of religiously-oriented nonprofit organizations -- as compared to secular organizations -- to access public lease benefits is being denied based solely on the organization's viewpoint.

Accordingly, exclusion of the Boy Scouts from eligibility for exclusively-negotiated public leases based on Boy Scouts' internal membership policies violates the First Amendment. *Good News Club, supra*, 533 U.S. at 111.

Thus, this case is really about ***viewpoint discrimination against politically incorrect organizations*** which engage in speech or expressive associations which are contrary to evolving notions of morally and politically correct behavior. What the District Court is really saying in this case is that the City is barred from entering into exclusive lease negotiations ***only with respect to religiously-oriented organizations***. But such a practice is the very ***essence*** of viewpoint discrimination. By disallowing constitutionally-protected associations from participating in certain aspects of San Diego's leasing program, ***the District Court is implementing a form of discrimination -- viewpoint discrimination -- which it is forbidden to do***. See, e.g., *Rosenberger, supra*, 515 U.S. at 828 ("[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys").

The constitutional principles at stake here are of no small moment because the District Court's order has *negative implications for a broad variety of expressive associations*, including the important rights of gay and lesbian associations and other associations having an unpopular viewpoint. Based on the District Court's reasoning, a gay rights organization could not limit its leadership positions to gay rights activists without suffering financially if a City chose to punish such behavior. Ecclesiastically-based organizations could also be excluded from various public benefits because they limit ordinations to men, or non-homosexuals, or even to believers.

Thus, the District Court's order has vast negative implications for equality of expression and participation in state-sponsored fora by associations expressing their moral viewpoints through their leadership and membership policies. Therefore, the District Court's ruling must be reversed because it directly conflicts with relevant First Amendment jurisprudence regarding viewpoint discrimination and permits the use, in an unintended manner, of the Establishment Clause and of California's No Preference and No Aid clauses to deny, on a non-neutral basis, public lease participation by disfavored expressive associations in a potentially large variety of contexts. The ruling fundamentally erodes established First Amendment rights of such associations by lowering the constitutional scrutiny of

viewpoint discriminatory efforts to economically weaken them. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (First Amendment is offended by giving "one side of a debatable public question an advantage in expressing its views"). Such an attempt to slope the ideological playing field is therefore a true threat to core First Amendment interests.¹²

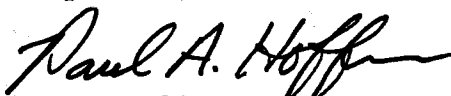
CONCLUSION

This amicus respectfully submits that this Court should overturn efforts from any part of the political spectrum to compel ideological orthodoxy or to punish non-conformity, especially when it is directed against expressive associations. Far from vindicating the rights of minorities, a ruling which undermines the right of expressive association in this case may unwittingly lay the groundwork for denial of First Amendment rights of all citizens, including the First Amendment rights of minorities.

¹²Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of "free speech." *Perry Educ. Ass'n.*, *supra*, 460 U.S. at 62 (Brennan, J., dissenting). Thus, the First Amendment doctrine of "viewpoint neutrality" is one of the strongest bulwarks against attempts from historical factions across the ideological spectrum to shackle opponents by restraining attempts to speak, worship, associate, fund raise, or engage in numerous other expressive activities vital to a robust, open, and free pluralistic society. By contrast, limitations on First Amendment rights, such as the rights at stake in this case, dangerously lead away from a free and diverse society.

By failing to reverse the ruling below, the freedom of expressive associations holding unique viewpoints to exercise their constitutional rights and to compete on an equal, viewpoint-neutral basis for participation in public fora with other associations will be substantially chilled. Therefore, your amicus respectfully urges this Court to reverse the District Court's order in this case.

Respectfully submitted,



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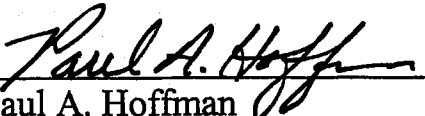
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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, counsel for the Individual Rights Foundation states that he is unaware of any related cases pending in this Court.

Dated: February 22, 2005

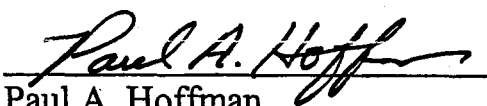

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief has a typeface of 14 points or more and contains 6,865 words of proportionately spaced text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2005, I caused to be served at least two copies of the BRIEF OF AMICUS CURIAE, INDIVIDUAL RIGHTS FOUNDATION, IN SUPPORT OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS AND FOR PARTIAL REVERSAL OF THE JUDGMENT BELOW on each of the separately represented parties in this case by serving the following attorneys by way of First Class mail, postage pre-paid:

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