
Nos. 04-55732 and 04-56167

IN THE 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.

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, No. 00-CV-1726-J-(AJB)
Honorable Napoleon A. Jones, District Judge

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION AND THE VETERANS OF FOREIGN
WARS OF THE UNITED STATES IN SUPPORT OF
DEFENDANTS-APPELLEES/CROSS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

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INTRODUCTION

Pacific Legal Foundation and the Veterans of Foreign Wars of the United States respectfully submit this brief amicus curiae in support of Defendants-Appellees/Cross-Appellants (hereafter, Boy Scouts).

Founded in 1973, Amicus Pacific Legal Foundation (PLF) is a nonprofit public interest law foundation that is supported by voluntary private donations from thousands of citizens and associations from coast to coast. PLF litigates nationwide for limited government, private property rights, individual freedom, and free enterprise. Headquartered in Sacramento, California, PLF also has offices in Coral Gables, Florida; Honolulu, Hawaii; and Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has a tradition of litigating in support of First Amendment rights. PLF attorneys represented the petitioner in *Keller v. State Bar of California*, 496 U.S. 1 (1990). PLF has also participated as a friend of the court in many First Amendment cases before the United States Supreme Court and other courts. See *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); *Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

PLF submitted friend of the court briefs in support of the Boy Scouts of America in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003); *Boy Scouts of America and South Florida Council v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001); and *Boy Scouts of America v. District of Columbia Comm'n on Human Rights*, 809 A.2d 1192 (D.C. Ct. App. 2002). PLF attorneys represent one of the petitioners in *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (2002), *review granted* 65 P.3d 402 (Cal. 2003). (challenging a discriminatory fee imposed on petitioners for use of the city marina because of petitioners' affiliation with the Boy Scouts of America.).

PLF believes that its public policy perspective and litigation experience in First Amendment law will provide a helpful perspective in the resolution of this case.

Amicus Veterans of Foreign Wars of the United States (VFW) is a federally chartered voluntary membership corporation with a total membership of nearly 1.8 million veterans, most of whom are also members of local Posts, which are themselves membership corporations or unincorporated associations.

In addition to serving the interests of America's veterans through its Veterans Service, Legislative Service, and National Security programs, VFW is vitally interested in youth and community service programs, and many local Posts and members work with local Boy Scout organizations to conduct activities that benefit

the whole community. More importantly, VFW and its members are very interested in securing rights protected by the Constitution to take firm, if sometimes unpopular, positions on important social, political, religious and moral issues, and associate with others of like mind, without fear of government retaliation or discrimination.

SUMMARY OF ARGUMENT

The court below would void the Boy Scouts of America's leases at the City of San Diego's Balboa Park and at Fiesta Island in San Diego's Mission Bay Park, based on an unsupportable Establishment Clause argument. Even if one accepts the dubious—indeed, *unprecedented*—contention that Scouting is a “religion” for Establishment Clause purposes, the City's leases to the Scouts do not transmit a message of religious “endorsement,” because comparable leases on city property, including park property, are granted to scores of other nonprofit organizations, both secular and religiously oriented, with a wide variety of viewpoints and missions. This array of leases projects a commitment to pluralism and equal access, not an “endorsement” of any particular belief, sect, or religion. The constellation of leases to nonprofit organizations, including the Boy Scouts, is entirely consistent with the Establishment Clause—and fulfills the City's First Amendment duty to maintain viewpoint neutrality in allowing use of public facilities.

ARGUMENT

I

SCOUTING IS NOT A “RELIGION” FOR ESTABLISHMENT CLAUSE PURPOSES

The Court below asserts that the Boy Scouts’ Balboa Park Lease “violates the federal Establishment Clause.” *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1276 (S.D. Cal. 2003). The Court declares the same thing about the Scout lease in Mission Bay Park. April 12, 2004, Order at 5.

The Court has truly broken new ground—in a disturbing sense that defies common understanding. As far as amici have been able to discover, *never before has any federal or state court characterized the 95-year-old Boy Scouts of America as a “religion” or a “religious organization” for Establishment Clause purposes.*

A cavalier approach to expanding the reach of the Establishment Clause is not advisable. As this Circuit has observed, “[a]ttempting to define religion, in general and for the purposes of the Establishment Clause, is a notoriously difficult, if not impossible, task.” *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227 (9th Cir. 1996). Few endeavors require “more circumspection.” *Id.* (citing *Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982)). Among the dangers: “[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 . . .” *Alvarado*, 94 F.3d at 1230 (citing James M. Dovan, *God Is as God Does: Law, Anthropology, and the Definition of “Religion,”* 6 Seton Hall Const. L.J. 23, 70 (1995)).

A. The Decision Below Conflicts with Rulings Nationwide That Recognize the Scouts as a Secular Youth-Service Organization, Not a Religion Subject to the Establishment Clause

The unprecedented action of the Court below, in declaring the Boy Scouts a “religion” for purposes of constitutional analysis, challenges common sense. Rather than a theological belief system with a comprehensive creed, such as a church or synagogue, the Scouts have been recognized by courts—prior to the decision below—as a “voluntary youth service organization[.]” comparable to the “YMCA, YWCA, Girl Scouts [and] Camp Fire Girls.” *See, e.g., Jeldness v. Pearce*, 30 F.3d 1220, 1226 (9th Cir. 1994) (citing 45 C.F.R. §§ 86.12-86.14 (2003)).

The Boy Scouts are undeniably an expressive organization with a core set of principles enjoying First Amendment Protection, *see Boy Scouts of America v. Dale*, 530 U.S. at 656—and those principles do include a religious component, in that members express a belief in God, *see Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1269 (7th Cir. 1993). However, the Scouts “espouse non-denominational, nonsectarian philosophical goals,” in the manner of “the Daughters of the American

Revolution, et cetera,” and are not a “recognized religious organization[] affiliated with a specific, identifiable religion.” *Lindenberg v. United States Dep’t of Justice, I.N.S.*, 657 F. Supp. 154, 158 (D.D.C. 1987).

In rejecting a contention that the Boy Scouts are a religious organization subject to the Establishment Clause, the Court of Appeals of Oregon acknowledged that “there is a religious component to the Boy Scouts.”

But a scout’s religious beliefs—both their strength and their substance—are left to him and his family; any exploration of them is done individually and voluntarily. Beyond that, the record establishes that the bulk of Boy Scouts’ activities is secular (i.e., recreational and social).

Powell v. Bunn, 59 P.3d 559, 580 (Or. Ct. App. 2002).

Although the Seventh Circuit employed Establishment Clause analysis when it rejected a challenge to a school allowing the Boy Scouts to use its facilities, *Sherman v. Community Consol. School Dist. 21 of Wheeling Township*, 8 F.3d 1160 (7th Cir. 1993), it has been far more common for courts to explicitly distinguish the Boy Scouts from formally religious organizations. *See, e.g., Good News/Good Sports Club v. School Dist. of City of Ladue*, 28 F.3d 1501, 1505 (8th Cir. 1994) (citing the unpublished district court ruling in the case) (In contrast with the explicitly Christian-based Good News/Good Sports Club, “[t]he Scouts . . . are a *secular* organization.”) (emphasis added); *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160, 1166 (7th

Cir. 1993) (While “groups such as the Boy Scouts” had given talks at the public schools in question, “the record is barren of addresses . . . by political groups or *religious organizations* other than the Gideons.”) (emphasis added); *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1115 (7th Cir. 1986) (While the school had hosted a meeting for the Boy Scouts, “no *religious* . . . group,” other than the plaintiff—a teacher who led a Bible study—“had ever tried to hold a meeting” at the school) (emphasis added).

In vindicating the Scouts’ freedom to align their membership policies with their principles, the Supreme Court invoked the Boy Scouts’ constitutional right of expressive association; no mention was made of the First Amendment’s Free Exercise Clause—a curious omission if the Court viewed scouting as primarily a religious organization. *Boy Scouts of America v. Dale*, 530 U.S. 640.

B. The Decision Below Conflicts with the Test Employed by This Circuit That Requires Evidence of a “Comprehensive” Religious Belief System in Order to Identify a “Religion” for Establishment Clause Purposes

The Scouts are not a “religion” or a “religious organization” under the test that this Circuit employed in *Alvarado v. City of San Jose*, 94 F.3d at 1229 (citing *Africa v. Pennsylvania*, 662 F.2d at 1035). As originally announced by the Third Circuit, one prong of this test stresses “comprehensiveness” as a feature of religion—i.e., for

an organization to trigger the Constitution's religion clauses, it should consist of a belief system laying claim to "ultimate and comprehensive 'truth.'" *Africa*, 662 F.2d at 1035 (citing *Malnak v. Yogi*, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring)). Thus, [t]he Science of Creative Intelligence is a religion "in part because of its comprehensive nature: its teachings consciously aimed at providing the answers to 'questions concerning the nature both of world and man, the underlying sustaining force of the universe, and the way to unlimited happiness.'" *Africa*, 662 F.2d at 1035 (citation omitted).

Because the Boy Scouts is indisputably nonsectarian—so that its members, while professing belief in God, may define God according to varied and even conflicting creeds, or by no creed at all—it stretches the dictionary to suggest that the Boy Scouts offer a "comprehensive" belief system laying claim to "ultimate truth" in the sense of a specific spiritual path or catechism that promises the way to "unlimited happiness." The Boy Scouts offer an interfaith, common-denominator acknowledgment of a deity. Of that deity's nature and detailed, comprehensive spiritual demands, the Boy Scouts offer no systematic theology. To the contrary, the Boy Scouts leave exploration of those questions—spiritual beliefs and paths to "ultimate truth"—up to each Scout "and his family; any exploration of them is done individually and voluntarily." *Powell*, 59 P.3d at 580. Therefore, this Court should

decline the invitation to place the Boy Scouts in the category of creedal churches and other comprehensive religious systems, and should not contort the Establishment Clause to cover government interaction with the Boy Scouts.

II

THE BOY SCOUTS' BALBOA PARK AND MISSION BAY PARK LEASES DO NOT TRANSMIT ANY MESSAGE OF RELIGIOUS ENDORSEMENT BY THE CITY

Even if one accepts the dubious proposition that Establishment Clause analysis is appropriate for reviewing government interaction with the Boy Scouts, the leases at Balboa Park and Mission Bay Park do not run afoul of the Establishment Clause. Contrary to the court below, *Barnes-Wallace*, 275 F. Supp. 2d at 1269; April 12, 2004, Order at 6, a “reasonable observer” would not perceive in those leases an “endorsement” or “advancement of religion.” This is because the leases are only two of many leases of city property to nonprofit organizations of all philosophical stripes, and both secular and religious character. In its totality, this pattern of leasing transmits a message of pluralism, and open and equal access.

A. The “Endorsement” Test Requires That a Government Action Be Looked at in Context

According to the court below, the Boy Scout leases founder on the second question asked by the Establishment Clause test enunciated in *Lemon v. Kurtzman*,

403 U.S. 602, 612 (1971): “[W]hether the City’s lease of public parkland to BSA-DPC has the principle or primary effect of advancing religion.” *Barnes-Wallace*, 275 F. Supp. 2d at 1266; April 12, 2004, Order at 5.

However, when *Lemon*’s “effect” test is applied as the Supreme Court has refined it in successive rulings, no “advancement of religion” can be found in this case. The effect test analyzes “whether, irrespective of government’s actual purpose, the practice . . . in fact conveys a message of endorsement or disapproval [of religion].” *Buono v. Norton*, 212 F. Supp. 2d 1202, 1215 (C.D. Cal. 2002) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring)). However, “the Establishment Clause inquiry cannot be distilled into a fixed, per se rule. Thus, “[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.”” *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O’Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 694 (O’Connor, J., concurring)).

The “reasonable observer,” whose perspective determines whether government action “endorses” religion, “must be deemed aware of the history and context of the community and forum in which the religious display appears.” *Pinette*, 515 U.S. at 780 (O’Connor, J., concurring).

Applying this context-specific approach, the Court upheld a city's placement of a creche in a Christmas display located in a private park within the downtown shopping district. The creche was surrounded by Christmas trees, a Santa Claus, reindeer, and other secular figures—a context ensuring that a reasonable observer would not perceive religious endorsement. *Lynch*, 465 U.S. at 687. Likewise, in *County of Allegheny v. ACLU*, 492 U.S. 573, 614, 617-18 (1989), the Court upheld the placement of a menorah in front of the City-County Building, where the menorah stood next to a Christmas tree and a sign saluting liberty. Noting that the menorah has both secular and religious dimensions, and that the Christmas tree is not a religious symbol, but typifies the secular celebration of Christmas, the Court held that the combination of the two does not endorse both the Christian and Jewish faiths, but instead is a secular celebration of Christmas coupled with an acknowledgment of Hanukkah. *Id.*

Likewise, this Circuit found that Hawaii's designation of Good Friday as a state holiday did not violate the Establishment Clause, in part because "the distinctly secular character" of other state holidays provides a context that "diminishes the likelihood of an 'endorsing' effect." *Cammack v. Waihee*, 932 F.2d 765, 779-80 (9th Cir. 1991).

B. The Context for the Scouts' Leases Includes the City's Many Other Leases to Secular and Religiously Oriented Nonprofit Organizations

The Boy Scout leases pass muster under the context-specific “endorsement” test because the Scout leases are part of a rich array of city leases to nonprofit organizations with a wide variety of missions, both secular and religiously oriented. The “List of Nonprofit Leases Managed by [the San Diego] City Real Estate Assets Department” catalogues 105 organizations that enjoy lease arrangements with the city, many—as with the Scouts’ leases—with minimal annual fees. Excerpts of Record (ER) 90-92. A number of youth organizations are included, ranging from Boys & Girls Clubs to Peninsula YMCA to Mira Mesa West Little League. *Id.* The Girl Scouts lease 15 acres at Balboa Park (where their store sells the same Religious Emblem materials as the Boy Scouts use, Supplemental Excerpts of Record (SER) at 27, 152, 193, 510-14). Also receiving leases at Balboa Park for little or no cash are such nonprofit enterprises as the Mingei International Museum, the Japanese Friendship Garden, and the United Nations Association. SER at 14, 27-29. Organizations that lease City property for little or no cash in other areas of the city—zoned residential or commercial—include the San Diego Calvary Korean Church, San Diego Homeless Coalition, and Elderhelp of San Diego. SER at 11, 27-29.

**C. The Context Also Includes the City's Legal Obligation
Not to Discriminate Against an Expressive Organization
(Such as the Scouts) to Punish Its Viewpoint**

The context in which the "reasonable" observer will view the Scout leases includes the background legal principles that obligate the City not to discriminate against the Scouts, or single them out for exclusion from public programs or facilities, because of their exercise of their First Amendment right to hold beliefs of their choosing. A reasonable observer would not see "endorsement" of the Scouts' beliefs in a City leasing policy that merely complies with constitutional and statutory rules.

**1. Supreme Court Case Law Forbids the City
from Discriminating by Viewpoint in Granting
Access to Public Facilities or Programs**

An important element of the context in which the Boy Scout lease must be viewed is the line of Supreme Court rulings that forbid discriminating against expressive organizations such as the Scouts. The First Amendment demands viewpoint neutrality by government in the way it grants access to public programs or facilities; viewpoint neutrality means even-handed treatment of all secular and religious viewpoints. *See, e.g., Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819; and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). *See also Culbertson v. Oakridge School Dist. No. 76*, 258 F.3d 1061 (9th

Cir. 2001) (a religiously oriented club must be allowed access to school facilities after-hours on a comparable basis with private organizations that espouse other viewpoints).

2. California Case Law Forbids the City from Discriminating by Viewpoint in Granting Access to Public Programs or Facilities

California case law also forbids government from discriminating against viewpoints that might be unpopular with government officials, in granting access to public programs or facilities. The California Supreme Court has held “on a number of occasions that . . . government [is precluded] from making public facilities available to only favored political viewpoints; once a public forum is opened, equal access must be provided to all competing factions.” *Stanson v. Mott*, 17 Cal. 3d 206, 219 (1976) (citations omitted). The California Supreme Court has not confined this government-neutrality requirement to the political arena, but has mandated viewpoint neutrality as a comprehensive principle. Leading the California cases that forbid viewpoint discrimination by government is *Danskin v. San Diego Unified School District*, 28 Cal. 2d 536 (1946) (use of school facilities for public meetings cannot be denied to organizations that fail ideological tests—i.e., that decline to sign what amounts to a loyalty oath). Among the many rulings that invoke *Danskin* is *Vogel v. Los Angeles County*, 68 Cal. 2d 18 (1967) (public employment applicant cannot be

forced to sign an oath repudiating a disfavored organization and its beliefs as a condition of receiving public benefits). In these cases, California's High Court applied the viewpoint neutrality rule through the mechanism of the "unconstitutional conditions" doctrine—a doctrine that "has found especially strong support in California." David M. Schoeggl, *New Life for the Doctrine of Unconstitutional Conditions? Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981), 58 Wash. L. Rev. 679, 688 (1983). "The doctrine of unconstitutional conditions prevents the government from conditioning the grant of a benefit upon the waiver of a constitutional right." *Id.* at 680 (citation omitted).

The *Danskin* [unconstitutional conditions] principle has . . . been used in a wide variety of contexts. It has been applied, for example, to government programs of public employment (*see, e.g., City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259 (1970); *Bagley v. Washington Township Hosp. Dist.*, 65 Cal. 2d 499 (1966); *Kinnear v. City & County of San Francisco*, 61 Cal. 2d 341(1964); *Fort v. Civil Serv. Comm'n of Alameda County*, 61 Cal. 2d 331(1964)); welfare benefits, (*see, e.g., Parrish v. Civil Serv. Comm'n of Alameda County*, 66 Cal. 2d 260 (1967)); public housing, (*see, e.g., Atkisson v. Kern County Hous. Auth.*, 59 Cal. App. 3d 89 (5th Dist. 1976)); *Housing Auth. of City of Los Angeles v. Cordova*, 130 Cal. App. 2d Supp. 883 (1955); unemployment benefits, (*see, e.g., King v. California Unemployment Ins. Appeals Bd.*, 25 Cal. App. 3d 199 (5th Dist. 1972)); and the use of public property. (*See, e.g., Binet-Montessori, Inc. v. San Francisco Unified School Dist.*, 98 Cal. App. 3d 991 (1st Dist. 1979)). *It has been applied primarily where the constitutional right at issue was free speech (see, e.g., Vogel v. County of Los Angeles*, 68 Cal. 2d

18 (1967)); or privacy. (See, e.g., *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259; *Parrish v. Civil Serv. Comm'n*, 66 Cal. 2d 260).

Charles W. Sherman, *Committee to Defend Reproductive Rights v. Myers: Abortion Funding Restrictions as an Unconstitutional Condition*, 70 Cal. L. Rev. 978, 988-89 (1982) (emphasis added).

The message of California case law is clear: The Scouts cannot be forced to abandon their constitutionally protected viewpoints (or to accept a creed scripted by bureaucrats or the judiciary) as the price, or condition, of participating in public programs or facilities that are made available to other groups with more “acceptable” viewpoints. This is part of the “context” that presents itself to the “reasonable observer” of the Scout leases.

3. California Statutes Forbid Government Discrimination Against the Boy Scouts on Public Property

In addition to constitutional precepts that forbid San Diego from engaging in viewpoint discrimination, California Government Code section 53077.5 is also part of the setting in which to view the Scouts’ leases. This section bars government from charging a “youth group” more than other similar groups for “access to, a public beach or recreation area.” “Youth group” is defined as “an organization that serves youth 18 years of age or younger, including, but not limited to, the Boy Scouts, the Girl Scouts, the YMCA, Boys’ and Girls’ Clubs, 4H Programs, or any organization

that operates an organized camp.” Gov’t Code § 53077.5(b) and (a)(5). State law thus plainly commands equal treatment of the Boy Scouts with other youth-oriented nonprofit organizations, and forbids discrimination against the Boy Scouts in granting access to public recreational facilities.

This equal-access principle is also reflected in California Education Code, section 38134, which directs school district authorities to authorize the use of school facilities for such youth-service organizations as “Girl Scouts, *Boy Scouts*, Camp Fire, Inc.” (Emphasis added.)

In short, government entities in California operate under constitutional and statutory commands not to discriminate against the Scouts. If San Diego were to provide low-cost leases to other nonprofit organizations (as it does) while excluding the Boy Scouts, it would violate its First Amendment viewpoint-neutrality obligations, and the spirit, if not the letter, of the California Code.

All these legal imperatives are part of the context in which the reasonable observer views the Scout leases. Such an observer would recognize no “preference” for “religion” in those leases, when the City is merely fulfilling its legal mandate not to exclude the Scouts, not to penalize them because of their viewpoints, and not to condition receipt of government benefits on the Scouts’ surrender of First Amendment rights.

**D. The Decision Below Fails to Apply the
“Endorsement” Test Properly, Because It Does
Not Analyze the Scout Leases Within Their Context**

The Boy Scouts enjoy leases of city property in a broad company of youth organizations and other community-oriented nonprofit organizations that are also granted leases. There is no exclusivism that would create a perception of endorsement of any one group—any more than Christian doctrine is endorsed by a government sponsored holiday tableau in which Rudolph rubs elbows with St. Joseph.

The court below refuses to contemplate this lush pluralistic forest, and doggedly concentrates instead on a single tree—insisting that the Boy Scout leases must be looked at alone, in isolation, and not within the larger context of the multitude of other leases to other organizations. *Barnes-Wallace*, 275 F. Supp. 2d at 1274. The court finds this abundance of leases “irrelevant” because it is not clear that they are part of a formal, written, overarching leasing “program” which, taken as a whole, can be examined for neutrality under Establishment Clause principles. *Id.* The court’s approach is too blinkered. Confronted with an analogous situation, the Fifth Circuit exhibited a more holistic perspective; it recognized that the totality of a government entity’s policy decisions—even if those decisions are made individually and not within the framework of a larger program—may be reviewed to reveal a *pattern* of religious neutrality, or favoritism. In considering a “Clergy in Schools”

volunteer school counseling program, the en banc panel in *Doe v. Beaumont Independent School Dist.*, 240 F.3d 462, 463-64 (5th Cir. 2001), stressed that the program, even though developed independently from other volunteer programs run by the school district, should not be examined in isolation from those other programs for the purpose of determining whether the district was violating the Establishment Clause. Remanding the case for development of a fuller record, the Fifth Circuit directed that the trial court

not confine its analysis to only “Clergy in the Schools.” Rather, the court can and should examine the targeted program in its full context, viewing it as it actually operates in its setting, including other programs similar in purpose and function. *If the set of programs together comprise a mosaic that is neutral with regards to religion, then the Establishment Clause is not offended.*

Id. at 464 (emphasis added).

So it is with San Diego’s leases. Taken as a whole—taken as a reasonable observer would take it—San Diego’s mosaic of low-cost leases to nonprofit organizations (including the Scouts) is neutral with regard to religion, and the Establishment Clause is not offended.

III

THE BOY SCOUTS' LEASES DO NOT VIOLATE CALIFORNIA'S CONSTITUTION

When applying the California Constitution's Establishment Clause, Cal. Const. art. I, § 4, the California courts have traditionally followed United States Supreme Court doctrine. *See Duffy v. State Personnel Board*, 232 Cal. App. 3d 1, 8-9 (1991); *Rowe v. Superior Court of Los Angeles County*, 15 Cal. App. 4th 1711 (1993). Consequently, the fact that the Boy Scouts' lease passes muster with the United States Constitution (as demonstrated in Section II, above) squares it as well with California's Establishment Clause.

Article I, section 4 also mandates that "no preference" be shown by government respecting religion. The contention below that the Scouts' leases violate this provision, *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d at 1277-79, does not conform with case law interpreting the section. For instance, in holding that a menorah display on public property showed no governmental preference for the Jewish faith, the California Court of Appeal found it significant that city hall displayed other religious symbols such as Christmas trees. *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 574-77 (1989). In other words, a pluralistic menu of displays ensured that "no preference" could credibly be discerned. As noted in

Section II. B., above, San Diego maintains a constellation of leases with nonprofit organizations across the philosophical spectrum; this diverse array satisfies the “no preference” dictate, by any common-sense calculus.

The California Constitution’s Article XVI, section 5, which prohibits government grants or appropriations to “any religious sect, church, creed, or sectarian purpose,” is not violated when a religious organization rents retail space, on an equal basis with secular organizations, in a publicly owned airport. *Christian Science Reading Room Jointly Maintained v. City and County of San Francisco*, 784 F.2d 1010, 1016 (9th Cir. 1986). Therefore, the Boy Scouts’ leases pass muster, because they are comparable, in terms of low payment rates, to leases that the City has entered into with other nonprofit organizations. SER at 27-29. Indeed, if there is any difference between the Scouts’ leases and those to other nonprofit organizations, it is in the far greater investment and upkeep requirements imposed on the Scouts. As renewed in 2001, the Balboa Park lease requires the Scouts, in addition to paying a \$2,500 annual administrative fee, to raise and expend at least \$1.7 million during the first seven years of the lease to improve the leased premises; pay for operation of the premises, including some city property outside the boundaries of the leased land; maintain a broad spectrum of insurance; pay all taxes levied during the lease term; keep the property open so as “to best serve the public” during hours approved by the

City; and oversee landscaping and facility management as directed by the City. ER at 802-03, 805, 814-19, 822-23, 836-37.

Similarly, the Mission Bay Park lease obliges the Boy Scouts “to build the improvements at the [Youth Aquatics Center], and . . . pay for all maintenance and utility expenses.” SER at 3. While the City pays more than \$6 million annually to maintain other portions of Mission Bay Park, “the city pays nothing to maintain the [Youth Aquatics Center, which the Boy Scouts run].” *Id.* at 58.

Considering the substantial cost of these requirements to the Boy Scouts, and the fact that the leased properties, as dedicated parkland, have no meaningful market value to the City, *see, e.g.*, SER at 4, 8, 200, 203-04, 269, 582, 584-85, 586-87, 676, common sense—i.e., a reasonable observer—would see the City as the financial winner in these transactions. From a purely dollars-and-cents perspective, no constitutionally suspect “grant” or “appropriation” is going to the Scouts; rather, the Scouts have agreed to make what amounts to large financial contributions to the public.

IV

THE DECISION BELOW VOICES A DISTURBING ANIMUS AGAINST THE BOY SCOUTS—AND AGAINST FIRST AMENDMENT FREEDOM OF EXPRESSIVE ASSOCIATION

The court below opens its opinion with an unsettling—and ironic—diatribe against the Boy Scouts, labeling this venerable organization as a “discriminatory” group that holds beliefs “at odds with values requiring tolerance and inclusion in the public realm.” *Barnes-Wallace*, 275 F. Supp. 2d at 1263. This statement is unsettling because it suggests only a grudging acceptance of expressive association as a fundamental freedom. It casts a slur on all organizations exercising that freedom, because, to the degree any organization defines its membership by a code of beliefs, it “discriminates” against people who do not share those beliefs. To frame associational activity in this negative way disparages a keystone of American liberty.

The court’s statement is ironic because the thrust of the Boy Scouts’ litigation in cases such as *Dale* has been precisely to *preserve* “tolerance and inclusion in the public realm”—in the sense of ensuring that expressive organizations, all across the philosophical spectrum, may follow their own beliefs, safeguarded by the First Amendment from government editing, censorship, second-guessing, or suppression.

The court also unfairly brands the Boy Scouts as “anti-homosexual,” “anti-atheist,” and “anti-agnostic.” *Id.* These terms of abuse cannot be squared with the Scout Law and Scout Oath, which pledge respectful treatment toward all people. Indeed, the dissenters in *Dale* made much of the fact that the Boy Scouts in their formal literature do not voice hostility to homosexuals, 530 U.S. at 668 (Stevens, J., dissenting, joined by Souter, J., Ginsberg, J., and Breyer, J.)—as if one has to be negative toward others, and must loudly snarl that negativity, as a condition of claiming First Amendment associational rights! Professor Tribe has identified, in the Boy Scout Handbook, the quiet statements of belief that were ultimately at issue in *Dale*—and they are about positive aspirations, not enmity toward others:

The Boy Scouts, as their pre-litigation literature makes clear, are dedicated to teaching that the good life is one that foreswears promiscuity, practices sexual abstinence until marriage, respects and protects the young woman who is the object of the scout’s romantic and lustful impulses, and looks forward to the ultimate satisfaction of fathering children.

Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 Pepp. L. Rev. 641, 649 (2001) (citing *Boy Scout Handbook* 527-28 (10th ed. 1990)).

At bottom, this case asks whether the Boy Scouts will be punished, by being singled out and denied public leases of a kind available to numerous other nonprofit organizations, in retaliation for their exercise of expressive association in a politically


incorrect way—a way of which the district court has candidly indicated it disapproves. Allowing such punishment will chill the First Amendment rights that are discussed so dismissively by the court below. But the last thing the Boy Scouts deserve is punishment, because their defense of the right to think differently protects the freedom of all private associations, of all viewpoints, and the cause of “tolerance and inclusion in the public realm.”

CONCLUSION

For the foregoing reasons, Amici respectfully ask that the district court ruling be reversed.

DATED: February 24, 2005.

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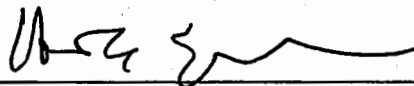
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I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS was filed with the Clerk this 24th day of February, 2005, via Federal Express. I further certify that two copies of the foregoing brief were served this day via first-class mail, postage prepaid, upon each of the following:

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