

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.

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)

**Brief of *Amicus Curiae* Thomas More Law Center
in Support of Defendants-Appellees**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Thomas More Law Center states the following:

Thomas More Law Center is a not-for-profit corporation and does not have any parent corporation and no publicly held corporation owns 10% or more of its stock.

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**STATEMENT OF IDENTITY AND INTEREST
OF AMICUS CURIAE**

The Thomas More Law Center is a national, not-for-profit public interest law firm based in Ann Arbor, Michigan. The Thomas More Law Center is dedicated to defending and promoting the religious freedom of Christians, time-honored family values, and the sanctity of human life. The Thomas More Law Center accomplishes these goals on behalf of the citizens of the United States through litigation, education, and related activities.

The United States Supreme Court has recognized that litigation by public interest law firms such as the Thomas More Law Center is a form of political expression and association and is often the desirable and orderly way of resolving disputes of broad public interest and obtaining vindication of fundamental rights.

The Thomas More Law Center seeks to defend the expression of moral values in the public square. The Thomas More Law Center has a uniquely Catholic identity as a public interest law firm. As such, its actions are guided by the universal and consistent moral teachings of the Roman Catholic faith. As part of its mission, the Thomas More Law Center defends the constitutional rights of freedom of expression, freedom of association, and the free exercise of religion of groups and individuals who engage in expressive association on moral grounds. The district court's decision in this case, which punishes the Boy Scouts of America for holding and expressing moral values in theistic terms and for holding

moral values as an organization that happen to comport with the moral values of some religions, is a profound threat to the constitutional rights of those private, nonsectarian organizations that hold similar institutional values.

The Thomas More Law Center appears as *amicus curiae* in support of Defendants-Appellees/Cross-Appellants Boy Scouts of America and Desert Pacifica Council, Boy Scouts of America (collectively referred to as “Boy Scouts”) and urges this Court to reverse the judgment of the district court insofar as it grants relief to Plaintiffs-Appellants/Cross-Appellees and further urges this Court to grant summary judgment in favor of the Boys Scouts and dismiss the complaint.

SUMMARY OF THE ARGUMENT

Less than five years ago, in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the United States Supreme Court held that the Boy Scouts had a First Amendment right of expressive association to exclude avowed homosexual leaders from its membership. This internal membership criterion is consistent with the institutional values of the Boy Scouts, and it is undoubtedly consistent with the moral values espoused by many people of faith.

The mission of the Boy Scouts is “to prepare young people to make ethical and moral choices over their lifetimes by instilling in them the values of the Scout Oath and Law.” Such values include trustworthiness, loyalty, helpfulness, obedience, and reverence. These traditional moral values likewise comport with

the moral values of many religions. These values and membership criteria are important and inseparable elements of the Boy Scout's constitutionally protected right of expressive association. However, because the Boy Scouts, a nonsectarian organization, holds and expresses broad values that happen to comport with certain religious values or are expressed in theistic terms, the district court is denying them the ability to lease from the City of San Diego two parcels of park property for the secular purpose of providing inexpensive outdoor activities for the City's youth. In effect, the Boy Scouts are being punished for holding and expressing certain institutional values—those that are expressed in theistic terms or that happen to coincide with the values held by people of faith.

Through its decision, the district court is prohibiting the Boy Scouts, a private, nonsectarian organization that holds and expresses traditional moral values, from negotiating and contracting with the City of San Diego, a government entity, because, according to the district court, the organization's "private" speech and expressive association would result in the government establishing religion. This decision is unfortunately a thinly veiled continuation of the hostility toward the Boy Scouts because of their success in the *Dale* case and because of the traditional moral values that this organization espouses.¹ Indeed, the district court's decision punishes the Boy Scouts for its constitutionally protected right of

¹ This is evident from the district court's obsession with characterizing the Boy Scout's policies as "anti-agnostic and anti-atheist" and as "discriminatory."

expressive association. Moreover, this decision is contrary to the well-established law respecting the difference between government speech endorsing religion, which is forbidden by the Establishment Clause, and private speech endorsing religion, which is protected by the Free Speech and Free Exercise clauses.

Given the nature of the underlying dispute and the primary justification for the district court's hostile decision toward the Boy Scouts, which threatens to taint all future government negotiations and contracts with the Boy Scouts because of the Boy Scout's policies that embody and preserve its organizational values, the district court's decision plainly undermines the First Amendment rights to expressive association, free speech, and free exercise of religion. This decision adversely affects the fundamental rights of the Boy Scouts, and it has far reaching implications that could threaten the constitutional rights of organizations that seek to promote and preserve their organizational values, particularly those with traditional moral values that happen to comport with the moral values of people of faith.

In the final analysis, this Court should reverse the district court in so far as it grants relief to Plaintiffs-Appellants and grant summary judgment for the Boy Scouts, dismissing the complaint, because the district court's decision conflicts with the many decisions that protect the freedom of expressive association. Moreover, the district court's decision threatens to open the door to further indirect

attacks against organizations with faith-based values that engage in the protected rights of expressive association, free speech, and the free exercise of religion.

ARGUMENT

The district court's decision threatens to eviscerate the protections of the First Amendment, particularly for those who engage in expressive association based on moral grounds that comport with certain faith-based convictions. The implications of this decision reach far beyond the parties involved in the present litigation. Indeed, permitting this decision to stand would open the door for governmental action that seeks to advance a political agenda by forcing those who oppose it to relinquish their constitutionally protected views, beliefs, and practices in exchange for a government benefit that was otherwise available. As this case demonstrates, this is particularly troubling for organizations with traditional moral values, such as the Boy Scouts, and for other private, nonsectarian organizations that espouse traditional values.

“Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedom of speech, assembly, and petition.” *Healy v. James*, 408 U.S. 169, 181 (1972) (citations omitted). This right includes, for example, the right of the Boy Scouts to exclude avowed homosexual leaders from its

membership and to express traditional moral values in theistic terms. *See Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The United States Supreme Court has previously held that this right is unconstitutionally burdened by such actions as the denial of official campus recognition, without justification, to college organizations, *see Healy*, 408 U.S. at 181, requiring disclosure of an organization's membership lists even though the state had not taken any direct action to restrict the members' right to associate freely, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958), and conditioning a veterans' parade permit on the inclusion in the parade of persons whose views the veterans did not wish to have identified with their expression, *see Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995). Here, the district court is granting a license to Plaintiffs and future government officials who disagree with the Boy Scouts' membership policies and moral values to exclude the Boy Scouts from full participation in government programs. Conditioning participation in a government program—for example, negotiating a lease for parkland—on the Boy Scouts' surrendering of their traditional moral values and thus their constitutional right to expressive association is forcing the Boy Scouts to “pay a price” for exercising their First Amendment rights.

The United States Supreme Court has consistently voided efforts to condition eligibility for access to government benefits or programs on the waiver

of fundamental rights. Thus, for example, in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the Court struck down a governor's executive order designed to ensure that hiring, rehiring, transfer, and promotion was limited to employees with connections to the Republican Party, specifically rejecting the assertion that conditioning employment decisions on political association was permissible because no employee had a right to the benefits at issue. The Court wrote:

For at least a quarter-century, this Court has made clear that even though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.* This would allow the government to produce a result that it could not command directly.

Id. at 72 (internal quotation, brackets, and citations omitted) (emphasis added); see *Perry v. Sinderman*, 408 U.S. 593, 598 (1972) (noting that government may not condition public employment opportunities on waiver of First Amendment rights);

Aptheker v. Secretary of State, 378 U.S. 500 (1964) (withholding passport of Communist Party member violated freedom of association); *Speiser v. Randall*, 357 U.S. 513 (1958) (holding that tax exemption conditioned on applicant's pledge not to advocate forcible overthrow of government was unconstitutional); *see also Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F.3d 397, 409 (6th Cir. 1999) (stating that "government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech") (internal quotations and citations omitted).

In *Healey v. James*, 408 U.S. 169, 181-82 (1972), the Supreme Court acknowledged that the denial of the use of campus facilities, including the use of campus bulletin boards and the school newspaper, were not insubstantial impediments to the associational rights of a college organization. The Court rejected the argument that the campus organization's First Amendment rights were not violated because the denial of official recognition did not deter in any material way the individual advocacy of the member's personal beliefs. *See id.* at 182-83. Moreover, it was of no moment to the Court's analysis that the campus organization members could still meet as a group off campus, distribute written materials off campus, and meet together informally on campus as individuals. *Id.* In fact, the Court "concede[d] . . . that the administration 'ha[d] taken no direct

action . . . to restrict the rights of (petitioners) to associate freely” *Id.* (quoting *NAACP*, 357 U.S. at 461).

By analogy, Plaintiffs in this case convinced the district court to do what *Healey* forbids, namely, to deny the Boy Scouts use of facilities on an equal basis with other expressive organizations in San Diego. The denial of the Boy Scouts right to form a lease agreement with the City would significantly impair the Boy Scouts’ associational rights and impede their ability to continue offering programs that benefit the youth of San Diego.

The *Healey* decision makes clear that “the Constitution’s protection is not limited to direct interference with fundamental rights.” *Id.* at 183. Acknowledging its holding in *NAACP v. Alabama ex rel. Patterson*, the Court stated,

The requirement in [*NAACP v. Alabama ex rel. Patterson*] that the NAACP disclose its membership lists was found to be an impermissible, though indirect, infringement of the member’s associational rights. Likewise, in this case, the group’s possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President’s action. We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: “Freedom such as these are protected not only against heavy-handed frontal attacks, but also from being stifled by

more subtle governmental interference.” *Bates v. City of Little Rock*,
361 U.S. 516, 523 (1960).

Healy, 408 U.S. at 183.

In the present case, the district court has improperly branded the Boy Scouts as a “religion” because of its traditional moral values and then employed the “separation of church and state” mantra to punish the Boy Scouts for espousing values that the district court and Plaintiffs plainly disagreed with.² This clearly erroneous decision, if left to stand, threatens the continued viability and existence of the Boy Scouts in a far more significant and meaningful way than denying a college organization access to campus meeting facilities, bulletin boards, and the school newspaper.

Additionally, the district court’s decision ignores and indeed obliterates the fundamental principle of First Amendment jurisprudence that recognizes the “crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the

² It is clear that the City of San Diego is not providing even the appearance of preferential treatment to the Boy Scouts by negotiating a lease in a manner similar to the City’s lease negotiations with Girl Scouts, Hillel of San Diego, Black Police Officers Association, YMCA, San Diego Hebrew Day School, Sherman Heights Community Center, Neighborhood House Association, and Japanese Friendship Garden, among others.

Free Speech and Free Exercise Clause protect.” See *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).³

Like the right to expressive association, the right to freedom of speech and the free exercise of religion are made vulnerable to unconstitutional attacks by the district court’s decision. The Boy Scouts is an organization that embodies “traditional values,” and by reason of these values, it at times expresses its message in theistic terms. Similar in certain respects to the Boy Scouts, there are many nonsectarian organizations that adhere to certain values, which one could describe as “traditional,” because of the organization’s religious beliefs, practices, customs, and traditions. Forcing an organization with a Catholic identity, for example, to forego its basic values, beliefs, and practices as a condition for participating in a government program for which it would otherwise be eligible would clearly abridge the organization’s First Amendment rights to freedom of speech and the free exercise of religion, not to mention the organization’s right to expressive association.

³ The Court in *Mergens* further states, “We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.” *Mergens*, 490 U.S. at 250. Certainly, if secondary school students are capable of differentiating between endorsement and passive permission, then so too can the citizens of San Diego, and an objective reasonable observer, understand that the City’s lease arrangement with the Boy Scouts is a neutral, endorsement-free agreement.

In *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), the Supreme Court held that the school district violated the Free Speech Clause of the First Amendment by denying the church access to school premises to exhibit a film series on family and child-rearing issues, solely because the film dealt with the subject from a religious viewpoint. As the Supreme Court noted, "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Id.* at 394 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).⁴

In this case, the district court's decision would prohibit the Boy Scouts from having access to government property because of its viewpoint on certain matters that happen to comport with the viewpoint of certain people of faith. By improperly casting the Boy Scouts as a "religion" because it espouses institutional values in theistic terms and then using this improper label to employ a "separation of church and state" analysis, the district court decision threatens to remove from the public square those viewpoints on important social issues that are consistent with religious beliefs and values. The negative impact of the district court's

⁴ In this case, the City of San Diego has a clear history of respecting the rights of expressive organizations to have access to public facilities regardless of viewpoint. The district court's decision permits a third-party to interfere with the proper interaction between the City and the Boy Scouts because the third-party disagrees with the Boy Scouts' viewpoint. This pernicious result finds no basis in fact or law.

decision on the First Amendment right to freedom of speech for organizations such as the Boy Scouts is plain.

And while the Boy Scouts is not a religion, it is an association committed to its traditional moral values and is composed of persons who believe in God. Included in its membership are boys of virtually every religious faith. As members, they promise to do one's "duty to God" and to be "reverent," which is part of their constitutionally protected expressive association. The district court's decision in effect would compel these individual members of the Boy Scouts to surrender their personal convictions as a condition to their association with the Boy Scouts. This violates these members' right to expressive association, as discussed above, and has profound implications involving the free exercise of religion.

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). The First Amendment excludes all "governmental regulation of religious beliefs." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). As such, "[t]he government may not compel affirmation of religious beliefs, punish the expression of religious doctrine it believes to be false . . . or lend its power to one or the other side in controversies over religious authority or dogma." *Employment Div.*, 494 U.S. at 877 (internal citations omitted). Likewise, the government may not impose special restrictions or disabilities on the basis of

religious beliefs. *See generally* *McDaniel v. Paty*, 435 U.S. 618 (1978). “The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such.” *Id.* at 626; *see also* *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940) (stating that the Free Exercise Clause embraces two concepts, the freedom to believe and the freedom to act, and that “freedom of conscience . . . cannot be restricted by law”). Indeed, the Free Exercise Clause even forbids “subtle departures from neutrality, and covert suppression of particular religious beliefs.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (internal quotations and citations omitted).

The United States Supreme Court has long held that when the government places its power, prestige, and support “behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

As the Court stated in *City of Hialeah*,

Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility that is masked, as well as overt. “The Court must survey meticulously the circumstances of governmental categories to

eliminate, as it were, religious gerrymanders.” *Walz v. Tax Comm’n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

City of Hialeah, 508 U.S. at 534.

This convergence of controlling legal principles under the free speech and free exercise provisions yields one consistent result. Just as the government cannot require the Boy Scouts to relinquish its right to free speech and association in exchange for a government benefit or participation in a government program, so too the government cannot require a religious-based organization, for example, to relinquish its free exercise right as a condition for receipt of a government benefit. However, the district court’s decision gives government the power to do indirectly that which it cannot do directly—interfere with fundamental rights. This decision threatens to open the flank of organizations that hold traditional moral values that are inconsistent with the prevailing, “politically correct” views of government officials and others and expose these organizations to indirect attacks against their fundamental rights. As the Supreme Court acknowledged in another context, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). As such, no district court should give license to government officials or third-parties to exclude organizations from participating in government

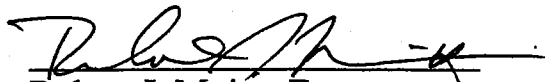
programs or having access to government facilities conditioned on the relinquishment of certain values and beliefs that the government and the third-party dislike.

According to well-established precedent, the First Amendment protects the Boy Scouts and other such organizations from indirect as well as direct attacks against their fundamental rights. The district court's decision is in direct conflict with this precedent and should therefore be reversed and judgment entered in favor of the Boy Scouts.

CONCLUSION

This Court should reverse the district court for the reasons stated above and in the Boy Scouts' brief.

Respectfully submitted,

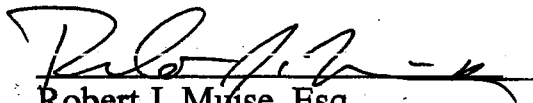

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(c) the foregoing Brief of *Amicus Curiae* Thomas More Law Center is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 3,623 words.

Dated: February 24, 2005.



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CERTIFICATE OF SERVICE

I certify that two (2) true and correct copies of the foregoing Brief of *Amicus Curiae* Thomas More Law Center in Support of Defendants-Appellees were caused to be served on February 24, 2005 by United States Mail, first-class postage prepaid, to the following attorneys:

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I also certify that the original and fifteen (15) true and correct copies of the foregoing Brief of *Amicus Curiae* Thomas More Law Center in Support of Defendants-Appellees were sent on February 24, 2005, by Federal Express next business day delivery to the Office of the Clerk, United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, CA, 94103.

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