

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)

**OPENING BRIEF OF BOY SCOUTS OF AMERICA AND
DESERT PACIFIC COUNCIL, BOY SCOUTS OF AMERICA**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Boy Scouts of America and San Diego-Imperial Council, Boy Scouts of America (formerly known as Desert Pacific Council, Boy Scouts of America) state that they are not-for-profit corporations without stockholders. The only affiliate of Boy Scouts of America is Learning for Life, a not-for-profit corporation. Boy Scouts of America charters as local Councils approximately 300 not-for-profit corporations such as San Diego-Imperial Council to support Boy Scouting and other Scouting programs in localities nationwide. Effective January 1, 2005, Desert Pacific Council, Boy Scouts of America changed its name to San Diego-Imperial Council, Boy Scouts of America.

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REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure, Boy Scouts respectfully request that this Court hear oral argument. This case presents for review important questions of First Amendment law and involves a lengthy factual record. Boy Scouts believe that oral argument will assist the Court in addressing the issues presented.

JURISDICTIONAL STATEMENT

Boy Scouts of America and San Diego-Imperial Council, Boy Scouts of America (“San Diego Boy Scouts”) (together “Boy Scouts”) appeal from the judgment of the Honorable Napoleon A. Jones, Jr. of the United States District Court for the Southern District of California entered April 13, 2004 and corrected on July 1, 2004. Boy Scouts timely filed their Notice of Appeal on April 23, 2004. Fed. R. App. P. 4(a)(1). This Court has jurisdiction since this is an appeal from a final decision of a federal district court. 28 U.S.C. § 1291. The district court had subject matter jurisdiction because Plaintiffs’ claims arise under the First and Fourteenth Amendments to the U.S. Constitution and exercised supplemental jurisdiction over Plaintiffs’ state law claims. 28 U.S.C. §§ 1331, 1367(c).

ISSUES PRESENTED FOR REVIEW

1. The City selected San Diego Boy Scouts as lessee of two parcels of park property for the secular purpose of providing inexpensive outdoor activities for the City’s youth. Did the district court err in holding the leases invalid under the Establishment Clause and parallel state constitutional provisions for failure of the City to provide for competitive bidding?

2. Standing requires that Plaintiffs prove that they were injured or aggrieved by the City’s leases to San Diego Boy Scouts. Plaintiffs never attempted to use either property, at which they would have been welcome if they had; never

offered any evidence of a “pocketbook injury” for municipal taxpayer standing; and are not third-party beneficiaries under the leases. Did the district court err in finding that Plaintiffs have standing to prosecute their claims?

3. A claim is moot only if there is no possible effective relief that a court could provide. The City and San Diego Boy Scouts, the only parties to the Camp Balboa lease, intended that the lease would be reinstated at such time as this Court reversed the district court’s decision. Is the appeal of the judgment as to the Camp Balboa lease moot?

STATEMENT OF THE CASE

Nature of the Appeal

The City of San Diego has followed a practice of leasing City property to nonprofit organizations for nominal rent so long as the organizations agree to develop the properties for an agreed purpose and to make the properties available for public use. There are more than 123 such leases. (SER 10-15, 27-29.)¹ The City negotiated many of the leases exclusively with the lessees after determining that the lessees were particularly suited to particular pieces of property.

¹ “ER ____” refers to the “Excerpts of Record” submitted by Plaintiffs on January 3, 2005. “SER ____” refers to the “Supplemental Excerpts of Record” submitted by Boy Scouts on February 14, 2005.

The City leases parkland property to the local affiliates of the three national youth camping organization—Girl Scouts of the USA, Camp Fire Boys and Girls, and Boy Scouts of America. All of the leases with these organizations were negotiated exclusively.

San Diego Boy Scouts leases two properties—a youth camp in Balboa Park and the San Diego Youth Aquatic Center on Fiesta Island in Mission Bay Park. Both are used extensively by members of the public as well as by Scouts.

In the district court below, Judge Jones invalidated the leases to San Diego Boy Scouts on a rationale first proposed by Judge Jones himself at oral argument—that to have entered into lease negotiations with San Diego Boy Scouts without competitive bidding constituted a violation of the Establishment Clause.

Course of Proceedings

Plaintiffs filed this case on August 28, 2000, two months after the United States Supreme Court held that Boy Scouts' membership requirements are constitutionally protected. *See Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

On April 13, 2001, the district court denied motions of Boy Scouts and the City for summary judgment based on Plaintiffs' lack of standing. (ER 1-21.) The district court noted that although Plaintiffs never tried to use the properties in question, they still might have standing as municipal taxpayers, depending on discovery about the market value of the underlying property and the

value of Boy Scouts' investment in the properties. (ER 12-13.) The district court also held that Plaintiffs lacked standing to sue under San Diego's Human Dignity Ordinance and for breach of contract on the leases. (ER 15-18.)

Plaintiffs filed their First Amended Complaint on May 12, 2002, alleging that the leases violated the Establishment Clauses of the U.S. and California Constitutions, the "No Preference" Clause of the California Constitution, the Equal Protection Clauses of the U.S. and California Constitutions, the "No Aid" Clause of the California Constitution, and California common law. (ER 602-04.) Plaintiffs requested that the district court "declare that defendants' leases of public parkland" violate federal and state law and "issue a permanent injunction" prohibiting the City from leasing to San Diego Boy Scouts. (ER 604.)

On July 31, 2003, the district court granted summary judgment to Plaintiffs on their claims that the Camp Balboa lease constituted an establishment of religion and dismissed the common law claim. 275 F. Supp. 2d at 1276, 1279, 1280, 1287 (ER 2687, 2691, 2693, 2701-02). Boy Scouts pursued an interlocutory appeal (case no. 03-56517), but it was dismissed as premature on December 17, 2003.

On April 12, 2004, the district court granted summary judgment to Plaintiffs on their claims that the Fiesta Island lease constituted an establishment of

religion. (ER 3732-51.) The district court entered a judgment on April 13, 2004 (ER 3752), and this appeal followed.

Opinions Below

July 31, 2003 Order Regarding Camp Balboa

As an association committed to the traditional moral values of the Scout Oath and Law, Boy Scouts of America is composed of persons who believe in God. In its July 31, 2003 opinion and order, the district court described these lawful and constitutionally protected values as an “anti-agnostic and anti-atheist stance.” 275 F. Supp. 2d at 1263 (ER 2669). Throughout the order, the district court referred to Boy Scouts as “discriminatory.” *Id.* at 1263, 1264, 1274, 1278, 1281, 1282, 1283, 1285, 1286, 1287, 1288 (ER 2670, 2671, 2684, 2690, 2693, 2694, 2695, 2696, 2700, 2702, 2703).

Having forcefully expressed personal antipathy to Scouting’s values, the district court turned to a description of the leasing program. The district court acknowledged that the City leased “publicly-owned land to ‘well over 100 nonprofit groups to advance the educational, cultural and recreational interests of the City’ without regard to whether the lessees are religious.” *Id.* at 1274 (ER 2684) (quoting City’s Resp. Br. at 7 and citing Rothans Decl. ¶ 19 (SER 14-15, 27-29) (emphasis added)).

The district court also reviewed “the process by which the City determines to whom it will lease its public lands,” including leases obtained through exclusive negotiations:

When deciding which prospective lessee should receive a non-revenue lease, the City looks at a list of factors, including the proposal, how it serves the public or particular need, whether it adds employment or sales tax, the benefits to the community, the services that the lessee would provide, who the lessee serves in the community, the lessee’s mission statement, funding and level of professionalism.

Id. at 1274 (ER 2685). The City’s Real Estate Assets Department decides, with direction from the Mayor and City Council, whether to “either solicit interest in the property by doing a request for proposal (‘RFP’) that includes selection criteria or, recommend an exclusive negotiation with a particular prospective lessee.” *Id.* (ER 2685). Once the lease terms are negotiated, “the Mayor and the City Council decide whether to approve a lease based on information provided them by Real Estate Assets.” *Id.* at 1275 (ER 2685-86).

In the case of the Camp Balboa lease, the City Council approved the lease only after “extensive public hearings” during which other groups were free to “come in and say, ‘we could do better.’” *Id.* (ER 2686; *see* ER 2453-668).

Despite this opportunity to offer “a better deal” than San Diego Boy Scouts, “no one did.” *Id.* (ER 2686). In what should have been a dispositive holding, the district court concluded that “the City selected its recipient by making the value

judgment that [San Diego Boy Scouts] alone is best suited to fulfill the City's needs with respect to the parkland." *Id.* at 1287 (ER 2703) (emphasis added).

In its Establishment Clause analysis, the district court acknowledged that the "reasonable observer" test required the court to take into account the "history and context of the community and forum," *id.* at 1270 (quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001)), to determine whether the leases to San Diego Boy Scouts have the "primary effect of advancing religion," or were "allocated on the basis of neutral, secular criteria," *id.* at 1266, 1267 (ER 2675, 2678-79). Yet, after referring to the undisputed evidence of the history, context, and ubiquity of the City's leasing practices, the district court excluded the evidence as irrelevant. *Id.* at 1274 (ER 2679).

Despite San Diego Boy Scouts' evident fitness as a camping organization to develop and maintain a camping area for community use, the district court held that because Boy Scouts' "private" speech requires that members promise to do their duty to God, the City established religion by negotiating the Camp Balboa lease exclusively with San Diego Boy Scouts. *Id.* at 1276 (ER 2687). Even though the process followed was public and entirely typical, *see id.* at 1274-75 (ER 2685) (citing Griffith Dep. at 92-94 (ER 844-45)), the district court held that exclusive negotiations with San Diego Boy Scouts were not neutral

because, by definition, they were not equally open to “the religious, areligious and irreligious.” *Id.* at 1275 (ER 2686).²

In the name of “values requiring tolerance and inclusion,” *id.* at 1263 (ER 2670), the district court excluded San Diego Boy Scouts from the City’s leasing program and invalidated the Camp Balboa lease.

April 12, 2004 Order Regarding Fiesta Island

On April 12, 2004, the district court granted Plaintiffs summary judgment as to the Fiesta Island lease, relying on its decision regarding the Camp Balboa lease. Again, the district court focused on “whether the City’s lease of public parkland in Mission Bay Park to [San Diego Boy Scouts] has the principal or primary effect of advancing religion.” Apr. 12, 2004 Order at 5 (ER 3736).

The undisputed evidence showed that virtually all of the youth-serving organizations in San Diego had joined a committee to propose that the City “execute a long-term agreement” with San Diego Boy Scouts to develop and operate the Youth Aquatic Center on Fiesta Island for the benefit of San Diego youth. *Id.* at 8. Nevertheless, the district court concluded that absent competitive

² The district court denied summary judgment on the Fiesta Island lease because the record included no evidence of lease negotiations. The record included no evidence regarding the nature of the negotiations because Plaintiffs’ claims had not been based on the nature of the negotiations. Plaintiffs had asserted that the City was not permitted to lease to San Diego Boy Scouts on any terms.

bidding there was necessarily an Establishment Clause violation; the lobbying by 42 other community groups was “insufficient to demonstrate neutrality in the lease of the property itself.” *Id.* at 10 (ER 3741); *see id.* at 7 (ER 3738).

Quoting its own prior order, the district court dismissed as irrelevant the undisputed evidence that the City regularly engages in exclusive negotiations with “religious” and “irreligious” organizations alike. *Id.* at 11 (ER 3742) (quoting *Barnes-Wallace*, 275 F. Supp. 2d at 1275).

STATEMENT OF FACTS

The Parties

Plaintiffs

Plaintiffs Breen are an agnostic couple and their minor child. (ER 83, 590.) Plaintiffs Barnes-Wallace are a lesbian couple and their minor child. (ER 368, 589.) No Plaintiff has ever sought to use the Youth Aquatic Center or Camp Balboa. Apr. 13, 2001 Order at 8 (ER 8). (ER 84, 371; SER 527, 536, 541-42, 554.) The undisputed evidence is that the Youth Aquatic Center and Camp Balboa are open to and used by members of the general public and that Plaintiffs may use them on the same basis as any other member of the general public. (*See* SER 623-24, 698-99.) Plaintiffs object to the leases based on their “feelings” and “beliefs” about Boy Scouts (ER 84-85, 369-71) and sued simply to require the City to lease to another nonprofit that is more acceptable to them, even if the same rent

and lease-terms applied. (SER 241 (75:7-24); 234 (55:17-21); 252 (36:14-20); 247 (98:5-106:22).) They did not sue to save the City money.

City of San Diego

The City has a long history of “encourag[ing] nonprofit organizations to develop cultural, educational, and recreational programs” on City property. (SER 36; *see* SER 30-35.) The City’s leasing program saves the City money by relieving the City of the significant costs of maintaining and improving public property. (SER 205, 499-500.)

While the City spends more than \$6 million annually to maintain the portions of Mission Bay Park that it does not lease to nonprofits (SER 67, 68) and over \$1.7 million annually just to maintain buildings in Balboa Park (SER 72), the City spends nothing on the property leased to San Diego Boy Scouts (SER 3 ¶ 9, 5 ¶ 17).

Boy Scouts

Boy Scouts of America is a nonprofit youth camping organization that charters San Diego Boy Scouts to bring the Scouting program to local youth. (SER 214.) San Diego Boy Scouts supports 18,576 youth and 8,236 adults members in Cub Scouts, Boy Scouts, and Venturing in San Diego and Imperial Counties. (*Id.*) San Diego Boy Scouts also supports an additional 4,655 youth and leaders in Learning for Life, an affiliate of Boy Scouts of America without any

membership requirements. (*Id.*)

Boy Scouts of America was established “to promote . . . the ability of boys to do things for themselves and others, . . . [and] to teach them patriotism, courage, self-reliance, and kindred virtues.” 36 U.S.C. § 30902. Its mission 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.” (ER 1515.) The Scout Oath states:

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

(SER 745, 764.) The Scout Law provides that a Scout is

Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverent

(SER 745.) These broad values are shared by the 4.4 million youth and adults who participate in the traditional programs of Cub Scouts, Boy Scouts, and Venturing, not to mention many millions more Americans. *See Roberts v. United States Jaycees*, 468 U.S. 609, 636 n.* (1984) (O’Connor, J., concurring) (quoting Paul Fussell’s observation that *Boy Scout Handbook* is a “book about goodness”); *Welsh*

v. Boy Scouts of America, 993 F.2d 1267, 1278 (7th Cir.) (describing the Boy Scouts as “one of the seedbeds of virtue that cultivate the sorts of citizens our nation so desperately needs,” and noting that “[t]hroughout its eighty-six years of existence, the Boy Scouts have successfully presented its combination of educational, social, athletic, craft, wilderness training and outdoor activities to our young people”), *cert. denied*, 510 U.S. 1012 (1993).

Although Scouting includes boys of virtually every religious faith and is “absolutely nonsectarian,”³ membership requires a promise to do one’s “duty to God” and to be “reverent.” (SER 745; ER 1519, 1527, 1580 art. IX.) These values and internal membership criteria are elements of Boy Scouts’ constitutionally protected expressive association. *See Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Welsh*, 993 F.2d 1267; *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261 (1998).

The Leases

The Terms of Nonprofit Leases

Of the City’s 123 leases to nonprofit groups, 96 either require no rent or rent less than the annual \$2,500 administrative fee San Diego Boy Scouts pays

³ Through use of ellipses, Plaintiffs exclude reference to the fact that Boy Scouts are “absolutely nonsectarian.” (Pls. Br. at 10.) (ER 1580 art. IX, § 1, cl.1.)

for the Balboa Park property. (SER 14-15, ¶ 19.) The City has at least 19 leases with youth-oriented recreational nonprofits, none of which pays more than the annual \$2,500 fee. (*Id.*) In addition, at least 50 of the 123 leases have terms of 25 years or longer. (SER 13-15, ¶¶ 15, 18-19; SER 27-29.) The nonprofits agree to provide the City with valuable maintenance and property improvements, as well as to operate community services. (SER 32 ¶ C(3); SER 37 ¶ 2.) For example, the Jewish Community Center pays \$1 for the entire 50 year lease in exchange for which it has built a sports complex, a gym, a theater, and meeting rooms. (SER 87, 93-94, 104.) The Center is open to the public and operates the Jacobs Fitness Center, the Nierman Preschool, the Astor Judaica Library, and summer camps including Camp Keshet, Camp Gesher, Camp Hevra, Camp Kadima, Camp Maccabia, Camp Kochavim, and Camp Biddur. (SER 87-88, ¶¶ 2-3; SER 444-61.)

The Lease Process

The City elects to enter into exclusive negotiations (1) when particular groups have been deemed to be appropriate operators of particular pieces of property or (2) in circumstances in which exclusive negotiations may enable the City to obtain the best lease terms for the City. (*See* ER 850 (132:8-23).) The City also regularly enters into exclusive negotiations when an existing lessee that has proven competent to operate a piece of property requests a renewal or extension before a lease expires. (ER 843-44; *see* 592 (135:7-20).) Many of the City's

leases are the product of exclusive negotiations. *See* 275 F. Supp. 2d at 1274-75 (ER 2685-86). For example, the City exclusively negotiated leases 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. (SER 433-34, 592 (135:15-20), 1168, 1172-73, 1175, 1182,-83, 1185-86, 1189-90.)

The Diversity of Nonprofit Lessees

The City's leasing program and practices have resulted in a great diversity of nonprofit lessees. The City leases public property to religious organizations (e.g., San Diego Calvary Korean Church, the Point Loma Community Presbyterian Church, the Jewish Community Center, the Salvation Army). (SER 11, ¶ 6; SER 27-29.) The City also leases to organizations that limit their membership or services based on race or ethnicity (e.g., the Vietnamese Federation of San Diego, the Black Police Officers Association), sex (e.g., Girl Scouts), and age (e.g., Camp Fire, ElderHelp). (SER 11, ¶ 3; SER 27-29.)

The City leases all of this property without regard to the private religious or moral viewpoints or the internal membership requirements of the lessees. For example, the Girl Scouts sell Religious Emblems materials in their shop in Balboa Park. (SER 510-14.) The Jewish Community Center holds Sabbath and Hanukkah celebrations and maintains a Judaica Library on its

parkland property. (SER 445, 449, 450, 459, 460-61.) San Diego Calvary Korean Church requires members to “accept the principles of the Presbyterian faith [and] be baptized” and conducts services solely in Korean. (SER 114-15 ¶¶ 2, 3.) The Salvation Army and the Point Loma Community Presbyterian Church require a belief in Jesus Christ. (SER 81, ¶ 2; SER 462.)

Apart from its leasing practices, the City gives money to religious organizations such as Catholic Charities and the Salvation Army to provide public services⁴ and directly subsidizes various other ethnic and religious organizations.⁵ For example, the City provided more than \$100,000 in outright grants to the San Diego Lesbian, Gay, Bisexual, and Transgender Community Center, which rents space only to groups which “endorse[]” its mission, such as the Metropolitan Community Church, which holds its church services at the Center on Sundays.⁶

⁴ Episcopal Community Services, Catholic Charities, and the Salvation Army received over \$315,000 from the City in fiscal year 2003. (SER 440-43.)

⁵ Recipients include Asian Story Theater, Centro Cultural de la Raza, Christian Community Theater, San Diego Center for Jewish Culture, and self-described gay and lesbian organizations, including Diversionary Theatre, Gay Men’s Chorus of San Diego, San Diego Men’s Chorus, and San Diego Women’s Chorus. (SER 125, ¶ 3; SER 126-30.)

⁶ See <http://www.thecentersd.org/>, <http://www.thecentersd.org/roomrentals.asp>, <http://www.thecentersd.org/religious.asp>; <http://www.mccsd.org/>.

The Limited Uses of Park Property

Mission Bay Park, in which Fiesta Island sits, and Balboa Park consist of “dedicated” parkland that cannot be sold or commercially developed under the Charter of the City of San Diego. (SER 1, 39-40; 267-68 (37:20-38:16), 270-71 (169:15-170:3, 170:21-22).) Dedicated parkland may be used only “for park, recreation or cemetery purposes.” Charter, art. V, § 55 (SER 40.). The City leases some of this dedicated parkland so that nonprofits may provide “recreational, cultural, or educational service to a broad segment of the citizens of San Diego.” (SER 36; *see* SER 36-38 (Policy No. 700-04); *see* SER 30-35 (Policy No. 700-08); SER 420.)

The peninsula of Fiesta Island on which the Youth Aquatic Center sits is specifically designated for “youth camping.” (SER 429-30 (Mission Bay Park Master Plan Update (May 13, 1997))).)

Similarly, the Balboa Park Master Plan reserves a corner of the park for youth camping, and Girl Scouts, Camp Fire, and San Diego Boy Scouts maintain campgrounds for the purpose of providing “an area for the appreciation of nature and the opportunity for young person social interaction within an outdoor setting.” (SER 51, 422.) This corner is separated from the rest of the park by a ravine containing a freeway off-ramp and, except for the portions leased for the youth camps, is undeveloped. (SER 52, 652-53.)

The Fiesta Island Lease to San Diego Boy Scouts

Fiesta Island is dedicated parkland as part of Mission Bay Park. The proposal that a small portion of the island be developed into a youth aquatic center was made by the Fiesta Island Youth Facility Committee, a 42-member group of virtually all of the youth-serving organizations in San Diego, including Logan Youth and Family Services, Girl Scouts, Boys & Girls Club, Barrio Station, Jewish Community Center, Camp Fire, Association of Retarded Citizens, and YMCA. (ER 3289-90; SER 218 ¶ 12, 1047-49, 1082, 1051-52, 1065-79, 1137-41.) The Committee asked the City to lease the property to San Diego Boy Scouts as the agency best equipped to develop and manage the project. (SER 1050, 1133, 1138.) The Committee selected the name “San Diego Youth Aquatic Center” to show that it would be an aquatic center for all community youth. (SER 1082 ¶ 7.)

The City Council approved a 25-year lease to San Diego Boy Scouts in 1987 for about one-half acre on Fiesta Island “for the purposes of constructing, maintaining, and operating an aquatic safety training and recreational center in boating, sailing and water sports,” which would be open to all youth-serving organizations. (SER 220-24, 1050 ¶ 14; ER 1038.) Under the lease, San Diego Boy Scouts was required to:

- expend \$1.5 million to build and endow the Youth Aquatic Center;

- “assume full responsibility and cost for the operation and maintenance of the premises”;
- “order, obtain, and pay for all utilities and service and installation charges” for those utilities;
- pay all taxes levied during the lease term;
- take out and maintain property damage, fire, extended coverage, and vandalism insurance; and
- hold the property open “to best serve the public” during hours approved by the City.

(ER 672, 673, 679, 681-83, 689.)

San Diego Boy Scouts spent approximately \$2.5 million to build the Youth Aquatic Center and spends approximately \$148,000 annually to maintain both the Youth Aquatic Center and Camp Balboa. (SER 204-05, 215, 1084 ¶ 19.) Were it not for the City’s lease to San Diego Boy Scouts, there would be no Youth Aquatic Center for the community to use.

The Camp Balboa Lease to San Diego Boy Scouts

San Diego Boy Scouts have had camp sites in Balboa Park since 1916. After World War II, and later under a 1957 lease, San Diego Boy Scouts improved the Camp Balboa property by (1) constructing nine campsites, a swimming pool, an amphitheater, a program lodge, a picnic area, a parking lot, restrooms and showers, storage facilities, a ham radio room, a residence and office for a camp ranger, and administrative headquarters; (2) landscaping and planting trees on the site and off-site along the adjacent roadway; and (3) bringing water

and power to the property. (SER 217.) From 1996 through 2000, San Diego Boy Scouts spent \$748,056 on capital improvements, maintenance, and operating costs. (ER 732.)

The Camp Balboa lease is substantially similar to the leases to Girl Scouts and Camp Fire.⁷ Toward the end of their 50-year lease terms, San Diego Boy Scouts and Girl Scouts requested renewals before launching capital campaigns to further improve their leased parkland. (SER 24-25.) After two years of negotiations, the City Council approved new leases to San Diego Boy Scouts and Girl Scouts at the same Council meeting. (SER 24-26, 193-95, 431-36.)

In December 2001 and over a year into this litigation, the City approved a 25-year lease agreement to San Diego Boy Scouts at the rental rate of

⁷ Since 1955, Girl Scouts of San Diego-Imperial Council, Inc., has leased approximately 15 acres in the northwest corner of Balboa Park for a Girl Scout youth recreational facility. (SER 24-25, 152, 155-95.) Under that lease, Girl Scouts built improvements to the property, including administrative headquarters, a resource center, a Scout store, and cabins. (SER 193.) In December 2001, the City approved a 25-year lease agreement at the rental rate of \$1 per year and a \$2,500 annual administrative fee. (SER 160-62, 192-93.) Under the new lease, Girl Scouts must raise and expend at least \$1.9 million during the first seven years of the lease to further improve the leased premises, including constructing a multipurpose building, amphitheater, storeroom, and expanded recreational areas. (SER 176, 192-93.)

In 1957, Camp Fire Boys and Girls entered into a 50-year lease for a youth recreational facility and related administrative offices in Balboa Park. (SER 56-63.) The lease agreement provides for a rental rate of \$1 per year. (SER 57.)

\$1 per year and a new \$2,500 annual administrative fee. The administrative fee more than covers the City's administrative expense. (SER 24-25.) Under the new lease, San Diego Boy Scouts also must:

- raise and expend at least \$1.7 million during the first seven years of the lease to further improve the leased premises;
- “assume full responsibility and cost for the operation and maintenance of the premises,” including a portion of City property adjacent to and outside of the leased property;
- “order, obtain, and pay for all utilities and service and installation charges” for those utilities;
- take out and maintain property damage, fire, extended coverage, and vandalism insurance;
- pay all taxes levied during the lease term;
- hold the property open “to best serve the public” during hours approved by the City; and,
- follow a City-specified best management practices program for parking lots, landscaping, erosion control, storm drains, recyclables, and hazardous materials.

(ER 802-03, 805, 814-19, 822-23.)

There is no dispute that by leasing to San Diego Boy Scouts in the identical manner as Girl Scouts and Camp Fire, the City was motivated only by providing recreational facilities to young people. Plaintiffs admit that, according to the City, the “leases of public parkland to [San Diego Boy Scouts] benefit the youth of San Diego and the community as a whole by providing recreational facilities for young people” (Pls.’ Mem. at 27 [DE 152]), and that “the City

determined that leasing parkland to [San Diego Boy Scouts] advances the public policy of San Diego and is the best use for the properties in question” (*id.* at 2).

The Youth Aquatic Center and Camp Balboa Are Used Extensively by the General Public

The Youth Aquatic Center and Camp Balboa are available for use by Scouts and by the public alike on a first-come, first-served basis. (SER 216-17, 295, 307, 317, 617.) No group is denied use of the facilities or equipment for any reason other than pre-existing reservations. (SER 216 ¶ 11.) All groups—Scouting and non-Scouting—are charged the same modest usage fees. (SER 216 ¶ 11; SER 311, 314.)

The Youth Aquatic Center offers kayaks, canoes, sail and row boats, and classroom space to youth-serving community groups at inexpensive rates. (SER 215-16.) A day-long rental of a canoe is \$12, including life vests and paddles. (SER 216 ¶ 11.) The Youth Aquatic Center is used more by groups unaffiliated with Scouting than it is by Scouting groups (66% in 2002).⁸ The youth

⁸ Plaintiffs complain that Boy Scouts reported usage by days rather than number of users. (Pls. Br. at 41-42 n.13.) Days of use are a more meaningful statistic than numbers of users because once a group has reserved a camp site, a room, or the pool, that space is not available for someone else to use during that time, no matter how many people are using it. Indeed, Plaintiffs’ own discovery requests asked for “days” and “time” and did not ask for numbers of users.

(Footnote continued on next page)

groups which use the Youth Aquatic Center include Girl Scouts, a group for at-risk inner-city youth, YMCA Indian Guides and Indian Princesses, Sea Camp,⁹ Drug Education for Youth, Camp Fire, Red Cross, and school and church youth groups. (SER 216 ¶ 13.)

Camp Balboa offers camping, swimming, archery, and meeting space to community groups also at inexpensive rates. (SER 217.) Campsites are \$4 per camper per weekend. (SER 217 ¶ 18; *see* SER 50 (the City’s goal is to provide “an affordable park experience”).) A substantial percentage of the use of Camp Balboa is by non-Scouting groups (34% in 2002) (SER 218), including Junior Athletes in Wheelchair Sports, Boys and Girls Clubs, YMCA, Red Cross, Girl Scouts, Camp Fire, a day camp for children with cancer, a hospice for children, and school, church, and civic groups. (SER 197, 1998, 218, 220-25, 280, 286, 297, 304.)

(Footnote continued from previous page)

(ER 2241, 2242, 2244 (requesting “the number of DAYS”); ER 2242, 2412 (requesting “the percentage of time”).)

⁹ Plaintiffs unjustifiably separate Sea Camp from other non-Scout organizations to reduce the statistic on non-Scout usage. (ER 2262-65.) Sea Camp is a marine education organization that reserves time and space at the Youth Aquatic Center for hands-on laboratories and aquatics activities. (ER 2309, 2312.) Sea Camp is not affiliated with Boy Scouts and its usage is appropriately included with other non-Scout usage. (*See* Boy Scouts’ Objections to Plaintiffs’ Exhibits, filed March 3, 2003 [DE 184] and March 22, 2004 [DE 274].)

Plaintiffs Suffered No Injury

There is nothing preventing Plaintiffs from enjoying the Youth Aquatic Center or Camp Balboa. No Plaintiff has ever been denied use of the Youth Aquatic Center or Camp Balboa. Plaintiffs have never been to either property or inquired about using them. Apr. 13, 2001 Order at 8 (ER 8).

(SER 235, 242, 244-45, 252.) As the district court concluded, “Plaintiffs point to no evidence that the [San Diego Boy Scouts] has discriminated against any individual in violation of [the leases].” 275 F. Supp. 2d at 1282 (ER 2696).

Plaintiffs do not dispute that the leased properties are dedicated parkland and as such have no meaningful market value. (ER 856; SER 4 ¶ 12, 8 ¶ 24; 200 ¶ I(1), 203 ¶ IV(4); 257-58 (17:24-18:2), 261-62 (33:19-34:4), 263 (105:11-17), 269 (162:6-164:3), 300 (176:9-25); Am. Compl. ¶ 98 (ER 604) (leased properties are “permanently dedicated” parkland). Plaintiffs’ experts simply speculated that two-thirds of San Diegans, as required by the City Charter, would vote to sell the public parkland. *See* Charter, art. V, § 55 (SER 666-67; ER 112 ¶ 2; 252 ¶ 2; 589-90); Fed. R. Evid. 702, Advisory Committee Notes, 2000 Amendments (trial judge must find expert testimony is “not speculative” before it can be admitted). Even if that speculation were valid, it is undisputed that San Diego Boy Scouts has put more money into the Fiesta Island and Balboa Park properties over the years than Plaintiffs’ experts say they are worth if sold for

similar uses. Plaintiffs value the Youth Aquatic Center site at \$1.25 million (ER 31 ¶ 48; *see* ER 1976 ¶ 48), while San Diego Boy Scouts spent approximately \$2.5 million to build the facility (SER 1084 ¶ 19; *see* SER 215 ¶ 10). Similarly, while Plaintiffs value Camp Balboa at \$1.25 to \$1.9 million to purchase outright for recreational purposes (ER 30 ¶ 42; *see* ER 1975 ¶ 42), it is undisputed that San Diego Boy Scouts spent \$748,056 from 1996 through 2000 in maintaining and improving the facilities already built and the current lease calls for \$1.7 million in further improvements plus annual maintenance expenditures to be spent by 2009—for a total of over \$2.4 million. (ER 732, 820.)

The Effect of the District Court’s Ruling

On January 8, 2004, the City entered into a settlement agreement with Plaintiffs that allows San Diego Boy Scouts to remain on the leased property until such time as “all appeals” are exhausted and Plaintiffs receive a final judgment in their favor. (SER 1113.)

Following the district court’s judgment from which Boy Scouts appeal, the City sent San Diego Boy Scouts a notice of termination but assured San Diego Boy Scouts that they could remain on the property under a month-to-month tenancy “until all appeals are finally resolved.” Upon reversal of the district court’s decision, the City stated that the notice of termination will be withdrawn and the lease fully restored:

[The notice of termination] does not mean that the DPC must vacate the property. Section 2.3 of the Camp Balboa lease provides in relevant part, ‘[t]he occupancy of the premises after the expiration or termination of this agreement constitutes a month-to-month tenancy, and all other terms and conditions of this agreement shall continue in full force and effect; provided, however, CITY shall have the right to terminate the holdover tenancy at will.’ Consistent with its settlement agreement with Plaintiffs in *Barnes-Wallace*, the City will allow the DPC to retain possession of the Camp Balboa property until all appeals are finally resolved in favor of Plaintiffs. In the event the judgment is reversed, this termination notice shall no longer be effective.

(SER 1290-91 (emphasis added).)

SUMMARY OF ARGUMENT

The City’s decision to lease to San Diego Boy Scouts represented the City’s “judgment” that San Diego Boy Scouts is “best suited to fulfill the City’s needs with respect to the parkland.” *Barnes-Wallace*, 275 F. Supp. 2d at 1287. The Establishment Clause requires no more neutrality than that. However, the district court below, obsessed with characterizing Scouting’s private membership policies as “anti-agnostic and anti-atheist” and as “discriminatory,” failed to take account of the overwhelming evidence of the neutrality of the City’s leasing program and practices. In invalidating the City’s leases to San Diego Boy Scouts, the district court erred on several grounds.

First, the district court erred in concluding that the leases violated the Establishment Clause and California religion clauses because of the process used

in obtaining them. The district court agreed that City's motivations were secular, and it cited no evidence showing that the leases or the leasing process have the primary effect of advancing religion.

Second, Plaintiffs lack standing. Plaintiffs never attempted to use either the Youth Aquatic Center or Camp Balboa and therefore lack direct standing. They lack standing as municipal taxpayers because they failed to produce any evidence of City money flowing to Boy Scouts or harm to the City's finances. Indeed, Plaintiffs are indifferent to the financial terms of the leases; they are concerned only with the identity of the lessee. This case should have been dismissed without reaching the merits.

Finally, Plaintiffs' assertion that the appeal with respect to the Camp Balboa lease is moot is frivolous. Plaintiffs raised the mootness argument in a motion to dismiss this appeal simply as a tactic to delay the briefing schedule. The documents Plaintiffs attach and the cases they cite show unequivocally that Boy Scouts' appeal of the Balboa Park judgment is not moot.

ARGUMENT

This Court reviews a district court's grant of summary judgment *de novo*. *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1493 (9th Cir. 1996).

I.
**THE LEASES TO SAN DIEGO BOY SCOUTS DO NOT VIOLATE
THE ESTABLISHMENT CLAUSE OR CALIFORNIA LAW**

The lease of property that is designated for recreational use to a premier youth camping organization is the most natural pairing one could imagine. Indeed, the district court's decision does not preclude San Diego Boy Scouts as a potential lessee; the court's expressions of dislike for Boy Scouts' views are largely gratuitous. The district court found fault not with the selection of San Diego Boy Scouts as the lessee but the process by which the selection was made. Had San Diego Boy Scouts emerged as the winning bidder after an RFP bidding process, there would have been no Establishment Clause problem under the district court's analysis. In fact, however, the process that the City followed was constitutionally unobjectionable.

Furthermore, to find an Establishment Clause violation the court also would have had to find that the leases were "aid" to "religion," neither of which is true. For these reasons the judgment below should be reversed.

A. The Leases Do Not Evidence Endorsement of Boy Scouts

Because it is undisputed that the City's motivations with respect to leasing to San Diego Boy Scouts are secular,¹⁰ the only question remaining is whether the leases have the primary effect of advancing or endorsing religion. *See Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) (Government action does not violate the Establishment Clause if (1) the government acted with a secular purpose and (2) the action does not have the primary effect of advancing or inhibiting religion.); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592 (1989) (analyzing whether challenged government practices have the effect of endorsing religion); *Kreisner v. City of San Diego*, 1 F.3d 775, 781 (9th Cir. 1993) (same), *cert. denied*, 510 U.S. 1044 (1994); *see also Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

¹⁰ “[T]he government offers a secular rationale” for leasing to San Diego Boy Scouts, namely that the “leases of public parkland to [San Diego Boy Scouts] benefit the youth of San Diego and the community as a whole by providing recreational facilities for young people.” (Pls.’ Mem. at 14, 27 (DE 152).) “[T]he City determined that leasing parkland to [San Diego Boy Scouts] advances the public policy of San Diego and is the best use for the properties in question.” (*Id.* at 2.) The district court agreed: “[T]he City selected its recipient by making the value judgment that [the local Boy Scout council] alone is best suited to fulfill the City’s needs with respect to the parkland.” 275 F. Supp. 2d at 1287 (emphasis added).

The leases of parkland to the camping organization here were the result of applying neutral, secular criteria. The City makes 123 nonprofit leases available to both religious and secular lessees on a nondiscriminatory basis. The City regularly engages in exclusive negotiations with nonprofit lessees if, in the City's judgment, that is the best way for them to get the City the best deal. *See* 275 F. Supp. 2d at 1274-75; (*see* SER 592, 1233-34; ER 2686). Here, the evidence demonstrates that San Diego Boy Scouts was selected as lessee because of its competence to develop and operate youth camping and aquatic facilities and not for any reason having to do with its own internal membership requirements. Indeed, in seeking to provide for youth camping, the City entered into leases with all three major camping organizations—Girl Scouts, Camp Fire, and Boy Scouts. In leasing the Fiesta Island site, the City acted in response to the urging of a committee of virtually all local youth organizations which identified San Diego Boy Scouts as the nonprofit best equipped to develop and operate the San Diego Youth Aquatic Center for the community. San Diego Boy Scouts was the organization “best suited to fulfill the City's needs with respect to the parkland.” *Id.* at 1287 (emphasis added). That conclusion should have ended district court's analysis.

1. Leases Obtained Through Neutral Processes Available to Others Do Not Evidence Endorsement

Acknowledging the difference between exclusive negotiations and an RFP bidding process is a far cry from concluding that exclusive negotiations constitute endorsement, particularly when there are secular reasons for them, they are commonly used in the nonprofit context as a whole, and they are followed by public hearings at which other groups could have come forward. “[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.” *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 839 (1995).

In *Christian Science Reading Room v. City & County of San Francisco*, 784 F.2d 1010 (9th Cir.), *amended by* 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987), this Court rejected an argument that the Establishment Clause and related provisions of the California Constitution prohibited the government from leasing space in an airport for the purpose of maintaining “a reading room used for meditation and reading of Christian Science texts.” 784 F.2d at 1011. There was no indication that a competitive bidding process was used to obtain the lease. This Court concluded that “there is nothing to suggest that the Airport endorsed the religious views and beliefs of the Reading Room or gave favored status to religion in general” because “the benefits of rental

space at the airport [were] generally available” to a variety of groups. *Id.* at 1014, 1015 (emphasis added). In fact, the evidence demonstrated that the airport was filled with secular organizations and facilities. Thus, the Court concluded that:

[i]f the Airport endorsed the tenets of Christian Science by renting space to the Reading Room, then it could as easily be argued that it is endorsing the business and labor practices of domestic airlines, the politics and policies of the foreign government that own airlines, the consumption of alcohol and sourdough bread, and the reading of *Penthouse* magazine. Clearly, it does none of these.

Id. at 1014-15; see *Southside Fair Housing Committee v. City of New York*, 928 F.2d 1336, 1350 (2d Cir. 1991) (upholding the sale of property to a Hasidic organization for use as a yeshiva, dormitory, and synagogue, noting that no other group was refused the chance to buy property in the area and that, as a result, “under a neutral system that was designed to develop urban renewal land, it just so happened that one particular group had the resources to take advantage of development opportunities. That does not constitute a violation of the first amendment”); *64th Street Residences, Inc. v. City of New York*, 150 N.E.2d 396, 399 (N.Y.) (upholding a system of selling properties “at auctions where there is little likelihood of competing bids”), *cert. denied*, 357 U.S. 907 (1958).

Clearly, the court below erred in judging the leases to San Diego Boy Scouts in a vacuum.

2. The History, Ubiquity, and Context of the City’s Leases and Exclusive Negotiations Show No Endorsement

The Supreme Court and this Court look to the “reasonable observer” familiar with the “history,” “ubiquity,” and “context” of a government action to determine whether the action endorses religion. “[T]he ‘history and ubiquity’ of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.” *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 630 (1989) (O’Connor, J., concurring in part and in the judgment); *see Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001); *Kreisner*, 1 F.3d at 784 (the reasonable observer also is familiar with “the general contours of the Free Speech Clause and public forum doctrine”).¹¹

The reasonable observer is fully aware of the history, context, and ubiquity of leasing City property in San Diego, including use of the leasing

¹¹ Nearly any government action could be overturned as a violation of the Establishment Clause if Plaintiffs’ personal misgivings here were enough to determine the primary effect of the City’s action in leasing park property for camping and kayaking purposes. “[T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from . . . discomfort” *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 779 (1995) (O’Connor, J., concurring in part and concurring in judgment).

program as a public forum by 123 nonprofit organizations. This Court found that the Establishment Clause was not violated when the City allowed a religious group to erect a religious display in Balboa Park even though the group was not charged a fee. *Kreisner*, 1 F.3d 775. Noting the “eclectic range of uses” that occur in Balboa Park, this Court concluded that no reasonable observer could interpret the City’s tolerance of the display as endorsement of religion. *Id.* at 784. Furthermore, that the City did not charge the religious groups to use the site was not an Establishment Clause violation in the absence of any evidence that the City charged fees to other groups using City property in similar ways. *Id.* at 789. Rather, by granting “first-come, first served” permits to both religious and nonreligious groups, the City,

“merely states that it neither favors nor disfavors religious speech. In fact, [the city] does not even go so far as to ‘acknowledge’ religion by permitting the [biblical] display; it merely sends a message that religious groups will be treated no worse than others. Anyone familiar with [Balboa Park] soon realizes that many groups use it, and that none of these groups receives special treatment from [the city].”

Id. at 784 (quoting *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1542 (6th Cir. 1992) (en banc)) (emphasis added).¹²

Here, the reasonable observer would not perceive two out of 123 leases as signifying a government endorsement of a religion, or even endorsement of the lessee. (SER 10-15, 27-29.) In addition, the process by which those two were obtained fits with a context of numerous exclusive negotiations with lessees deemed particularly suited for a particular property. (ER 850 (132:8-23); SER 592 (134:24-135:20).) Any reasonable observer would view the leases to San Diego Boy Scouts as one aspect of a broader undertaking to provide recreational facilities to community children, not as an endorsement of Boy Scouts. *See Zelman*, 536 U.S. at 655-56.

“[T]here 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.” *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990)

¹² Indeed, the City constitutionally could not have refused to lease to San Diego Boy Scouts based on opposition to Boy Scouts’ values, nor could it have conditioned the leases on relinquishment of Boy Scouts’ private speech or treated San Diego Boy Scouts differently because of that speech. *See, e.g., Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); *Speiser v. Randall*, 357 U.S. 513, 518 (1958); *Metro Display Advertising, Inc. v. City of Victorville*, 143 F.3d 1191, 1195 (9th Cir. 1998).

(emphasis in original). Boy Scouts’ private speech cannot be attributed to the City simply because the City leases parkland to San Diego Boy Scouts. Boy Scouts’ private speech encouraging members to fulfill their “duty to God”—in ways left entirely to the Scouts, their families, and their religious leaders—is private speech.

Here, the neutrality of the City’s leasing practices forecloses the possibility that Scouting’s “duty to God” could be attributed to the City. The City leases to a wide variety of religious and secular nonprofits, and has exclusively negotiated with an equally wide cross-section of these groups. The City applies a laundry list of neutral criteria to determine which groups are “best suited” to lease particular properties. These actions do not endorse religion.

B. The Leases Are Not “Aid” to Religion

The leases at issue cannot be said to be “aid” to San Diego Boy Scouts. The flow of money here is from San Diego Boy Scouts to the City, not the other way around.¹³

¹³ Plaintiffs’ claims under the California’s Establishment and No Preference Clauses—Cal. Const., art. I, § 4—also fail. Such claims are analyzed “by reference to *Lemon v. Kurtzman*.” *Paulson v. City of San Diego*, 294 F.3d 1124, 1129 (9th Cir. 2002), *cert. denied*, 538 U.S. 978 (2003); *see East Bay Asian Local Development Corp. v. State*, 24 Cal. 4th 693, 718-19, 13 P.3d 1122, 1139 (2000) (California’s Establishment Clause not “any more protective” than the First Amendment), *cert. denied*, 532 U.S. 1008 (2001). If a challenged act “satisfies all prongs of the *Lemon* test, it follows that [it] is neither a

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The proper focus of the Establishment Clause inquiry is “the nature of the benefit received by the recipient” and not the religious nature of the recipient. *Rosenberger*, 515 U.S. at 843-44 (noting that a state school may provide free printing for a Christian newspaper because “[p]rinting is a routine, secular, and recurring attribute of student life”); see *Mitchell v. Helms*, 530 U.S. 793, 822 (2000) (plurality opinion) (“The issue is not divertibility of aid but rather whether the aid itself has an impermissible content.”); *Bowen v. Kendrick*, 487 U.S. 589, 613 (1988) (upholding grants for medical services that “are not themselves ‘specifically religious activities’ and . . . are not converted into such activities by the fact that they are carried out by organizations with religious affiliations”).

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governmental preference for or discrimination against religion” under the No Preference Clause. 24 Cal. 4th at 719, 13 P.3d at 1139. The City’s leases to San Diego Boy Scouts do not endorse religion or show preference to religion.

Similarly, the City’s leases do not violate the No Aid Clause of the California Constitution because they are not “benefits” and even if they were, they would be only “indirect, remote, or incidental” benefits to San Diego Boy Scouts. Cal. Const., art. XVI, § 5; *Paulson*, 294 F.3d at 1131. The No Aid Clause “has never been interpreted . . . to require governmental hostility to religion, nor to prohibit a religious institution from receiving an indirect, remote, and incidental benefit from a statute which has a secular primary purpose.” *California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593, 605, 526 P.2d 513, 521 (1974) (emphasis added).

The Establishment Clause does not prohibit government from entering into relationships with religious organizations. “[T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government’s secular purpose.” *Mitchell*, 530 U.S. at 827 (plurality opinion); *see Agostini*, 521 U.S. at 233; *Hunt v. McNair*, 413 U.S. 734, 742 (1973); *Lemon*, 403 U.S. at 614. *See* Stephen V. Monsma, *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money* 68 (1996) (51% of nonprofit organizations that deliver child care services are religiously affiliated and of those 82% receive government funds).

1. The City Does Not “Aid” San Diego Boy Scouts

Leases like those involving Fiesta Island and Balboa Park are simply not comparable to any kind of aid or benefit that this or any other court has ever invalidated under the Establishment Clause. The Supreme Court has consistently rejected “[t]he simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses.” *Tilton v. Richardson*, 403 U.S. 672, 679 (1971). This case is even easier because it does not involve a transfer of money or even any sort of in-kind benefit. Indeed, the record shows that Boy Scouts invest more in the leased properties than Plaintiffs allege they would cost to purchase outright for the same uses. (Youth Aquatic Center: \$2.5 million invested (ER 3213) versus \$1.25 million market value (ER 1976, 3712); Camp Balboa:

\$2.4 million invested and to be invested (ER 732, 820, 836) versus \$1.25 to \$1.9 million market value (ER 1975).) The City receives millions of dollars in improvements to its property that must be held open to the general public and administered at no cost to it. As a result, Boy Scouts subsidize the City rather than the other way around.

The Supreme Court has “recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions.” *Rosenberger*, 515 U.S. at 842; *see Mitchell*, 530 U.S. at 819-20 (plurality opinion); *id.* at 843 (O’Connor, J., concurring); *Prince v. Jacoby*, 303 F.3d 1074, 1092 (9th Cir. 2002), *cert. denied*, 540 U.S. 813 (2003).

However, because the Establishment Clause analysis depends on the nature of the purported benefit and not the recipient, the Supreme Court and this Court have upheld numerous programs that involve the actual transfer of government money to sectarian organizations. *See, e.g., Zelman*, 536 U.S. 639 (sectarian schools); *Rosenberger*, 515 U.S. at 840 (Christian student newspaper); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 482-83 (1986) (Christian college); *Roemer v. Board of Public Works*, 426 U.S. 736, 744 (1976) (Catholic colleges); *Tilton*, 403 U.S. at 686 (Catholic colleges); *Kong v. Scully*, 341 F.3d 1132 (9th Cir. 2003) (religious health care institutions).

Similarly, the Supreme Court also has upheld programs benefiting sectarian groups through in-kind rather than direct monetary benefits. *See, e.g., Mitchell*, 530 U.S. at 849 (O’Connor, J. concurring) (“federal funds pay for instructional materials and equipment” that Catholic schools borrowed from public schools); *Agostini*, 521 U.S. at 208-09 (federal funds used to pay for remedial education to students at religious schools); *Zobrest v Catalina Foothills School District*, 509 U.S. 1, 4 (1993) (use of government funds for deaf child at a Catholic school); *Mueller v. Allen*, 463 U.S. 388, 390-92 (1983) (tax deduction for educational expenses incurred by parents of children attending parochial schools); *Hunt*, 413 U.S. at 736-38 (state bond issuance for constructing facilities at a Baptist college); *Walz v. Tax Commission*, 397 U.S. 664 (1970) (property tax exemptions for churches).

There is simply no precedent for finding that the leases here constitute “aid” in any sense.

2. Leases That Exchange Value-For-Value Are Not Aid

A government lease for nominal cash rent to a sectarian organization in exchange for valuable improvements and services does not violate the Establishment Clause. In *Hawley v. City of Cleveland*, 24 F.3d 814 (6th Cir. 1994), the Sixth Circuit rejected an Establishment Clause challenge to the lease of airport space to the Roman Catholic Church for maintenance of a

nondenominational chapel. No bidding process was used to obtain the lease; the airport space in question simply had been unused before the City and Church agreed to convert the space into a chapel. *Id.* at 818. The court also observed that it is “common” for airports to “charge non-profit tenants less than full market rent,” and the Church paid a nominal rent of \$100 per month. *Id.* at 818-19. The Church had, however, spent over \$300,000 in making improvements to the property. *Id.* at 818. The lease served the secular purpose of accommodating the needs of travelers and no one had ever been denied the opportunity to use the Airport Chapel. *Id.* at 822, 819. Accordingly, the court found that the lease was constitutional. *Id.* at 822; *see Brashich v. Port Authority of New York and New Jersey*, 484 F. Supp. 697, 703-04 (S.D.N.Y. 1979) (rejecting an Establishment Clause challenge to 20-year lease, without competitive bidding, at rate of \$1,300 per year, of one acre of JFK airport property to Catholic, Protestant, and Jewish organizations for construction and maintenance of several chapels), *aff’d*, 791 F.2d 224 (2d Cir. 1980).

Other courts evaluating value-for-value property transfers to sectarian organizations have reached the same results. *See, e.g., Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1242 (D. Utah 2004) (exclusively negotiated sale of a plaza to the Mormon Church “under mutually advantageous terms”); *Woodland Hills Homeowners Association v. Los Angeles Community*

College District, 218 Cal. App. 3d 79, 93-95 (1990) (75-year lease of surplus property to a Jewish congregation for use as a temple and religious village); *64th Street Residences*, 150 N.E.2d at 399 (sale of land to Catholic university for constructing and operating a campus).

Here, San Diego Boy Scouts received leases in exchange for constructing and maintaining camping and aquatics centers for City youth. Because the leases traded value for value, there is no monetary support to Scouting activities. This case is easier than *Christian Science*, *Kreisner*, and *Hawley* where the entirety of the usage was religious. Here, the leases involve the secular purposes of constructing and maintaining campgrounds and aquatic facilities that are available to all residents of San Diego.

C. Boy Scouts Are Not A “Religion”

Neither can Boy Scouts be said to be “religion” for Establishment Clause purposes. A fair evaluation of Boy Scouts’ private speech requires consideration of the totality of the Scouting program because to “[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation.” *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).¹⁴

¹⁴ Despite its statements to the contrary, the district court, in effect, applied the now-overturned pervasively sectarian test, *see Mitchell*, 530 U.S. at 826-27

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The lack of even a shred of evidence that the City was influenced in any way by religion in selecting San Diego Boy Scouts is hardly surprising given the nature of religion in Boy Scouts: Boy Scouting provides organized outdoor activities and an advancement program for boys and young people. (*See, e.g.*, SER 736-979.) Plaintiffs concede that “Boy Scouts of America is not a religious sect” and that San Diego Boy Scouts “is not a house of worship like a church or synagogue.” (ER 54 ¶ 185; *see* ER 2007 ¶ 185.)¹⁵ Moreover, Boy Scouts are “absolutely nonsectarian.” (ER 1580, art. IX, § 1, cl. 1; SER 273-74, 309.) Scouts and their leaders may be of any faith or may be unaffiliated with any organized religion. (*See, e.g.*, ER 1527.) And there is no religion that includes the Scout Oath and Law as part of its canon. *See Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2325 (2004) (O’Connor, J. concurring) (“I know of no religion that incorporates the Pledge [of Allegiance] into its canon . . .”). It

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(plurality opinion), relying on its finding that Boy Scouts is “inherently religious,” to conclude that the leases constitute an establishment of religion. 275 F. Supp. 2d at 1276 (ER 2687.) This was error.

¹⁵ Because neither Boy Scouts of America nor San Diego Boy Scouts is a “religious sect, church, creed, or sectarian purpose” or an “institution controlled by any religious creed, church, or sectarian denomination,” Cal. Const. art. XVI, § 5, Plaintiffs’ claim under the California Constitution’s No Aid Clause fails for this reason as well. *See supra* note 13.

strains credulity to suppose that the City was influenced by Scouting's "duty to God" aspect rather than its reputation as a camping organization in awarding the leases, particularly in the context of parallel leases to parallel camping organizations.

Courts across the country have examined Scouting's private speech and have concluded that, for purposes of the Establishment Clause, Boy Scouts is not a religious organization. *See Powell v. Bunn*, 59 P.3d 559, 579-80 (Or. Ct. App. 2002) (rejecting argument that Boy Scouts is a religious organization based on duty to God requirement and religious emblems program because "the bulk of Boy Scouts' activities is secular (i.e., recreational and social)"), *review denied*, 77 P.3d 635 (Or. 2003); *Scalise v. Boy Scouts of America*, ___ N.W.2d ___, 2005 Mich. App. LEXIS 117, *24, 2005 WL 119613 (Mich. Ct. App. Jan. 20, 2005) ("The Boy Scouts are not primarily a religious organization."); *see also Good News/Good Sports Club v. School District of the City of Ladue*, 859 F. Supp. 1239, 1248 (E.D. Mo. 1993) (Boy Scouts is "a secular organization, the primary purpose of which is to develop skills and moral character not related to any religious faith."), *rev'd on other grounds*, 28 F.3d 1501, 1506 n.7 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995); *Good News Club v. Milford Central School*, 21 F. Supp. 2d 147, 160 (N.D.N.Y. 1998) (Scouting is "primarily secular in nature"), *aff'd*, 202 F.2d 502 (2d Cir. 2000), *rev'd on other grounds*, 533 U.S. 98 (2001).

Nevertheless, the district court took Scouting's descriptions of its own programs and mission out of context, particularly from cases where the private nature of Scouting membership was at issue. For their part, Plaintiffs rely on the ambiguity of the term "religious" to conflate the one "absolutely nonsectarian" aspect of Scouting's Oath and Law with sectarian beliefs and practices. Boy Scouts are voluntary organizations made up of individuals who share the values of the Scout Oath and Law and who come together to participate in a primarily secular program. *See Powell*, 59 P.3d at 580 n.32.

II. PLAINTIFFS LACK STANDING

Plaintiffs lack direct standing to pursue their constitutional claims, they lack municipal taxpayer standing, they lack standing to bring a claim under San Diego's Human Dignity Ordinance, and they lack standing to bring a breach of contract claim. Since no Plaintiff has standing, this lawsuit should have been dismissed years ago.

A. Plaintiffs Do Not Have Direct Standing to Bring Their Constitutional Claims

In order to establish direct standing, a party must show (1) "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," (2) that the injury "fairly can be traced to the challenged action," and (3) that the injury "is likely to be redressed by a

favorable decision.” *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (internal citations omitted). The burden of demonstrating standing is on Plaintiffs, who are invoking federal jurisdiction. *See Schmier v. United States Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2002). Plaintiffs failed to satisfy their burden.

All Plaintiffs concede that they have never tried to use, much less been denied use of, either the Youth Aquatic Center or Camp Balboa. Even after discovery, Plaintiffs have “no evidence that the [San Diego Boy Scouts] has discriminated against any individual in violation of [the leases].” 275 F. Supp. 2d at 1282 (ER 2696).¹⁶ Nonetheless, Plaintiffs assert that they have demonstrated an injury-in-fact based on their “feelings” and “beliefs” about Boy Scouts. (ER 84-85, 369-71.)

First, Plaintiffs claim that they are directly injured because they have “unequal access” to the properties. Despite extensive evidence of use of the properties by the public, Plaintiffs have complained that their potential use of the

¹⁶ San Diego Boy Scouts does not and may not discriminate in who may use the properties. (*Compare* SER 12 ¶ 9; 281-82 (153:3-156:15); 315-16 (229:2-231:6) *with* Pls. Br. at 25-26.) Because Plaintiffs have no evidence of unequal treatment, their Equal Protection claims should have been rejected on summary judgment. *See, e.g., McLean v. Crabtree*, 173 F.3d 1176, 1185 (9th Cir. 1999), *cert. denied*, 528 U.S. 1086 (2000).

properties is unequal because the properties are not available for public use when Scouting groups are using the properties. This argument is entirely specious.

Any resident of San Diego—including Plaintiffs—can reserve any facilities within the Youth Aquatic Center and Camp Balboa for any time that Scouts can. (SER 216-17, ¶ 11, 18.) The facilities are available on a first-come, first-served basis. (*Id.*) If Plaintiffs or some other non-Scouts reserved a campsite for a particular time, Scouts could not use the campsite during that time and vice versa. Because they are treated exactly the same as every other resident of San Diego, Plaintiffs have not suffered an individualized injury-in-fact. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992); *United States v. Richardson*, 418 U.S. 166, 176-77 (1974).¹⁷

Plaintiffs Breen attempt to demonstrate a direct injury by claiming that they avoid the properties because of “the surrounding physical representations of [San Diego Boy Scouts’] controlling presence and its religious and discriminatory mission.” (Pls. Br. at 48.) For support, Plaintiffs rely on cases

¹⁷ Plaintiffs claim injury based on the fact that users of the properties pay a user fee to the Council to help cover costs, but Plaintiffs are treated no differently than other residents of San Diego, including Scouts or non-Scouts, who wish to use the Youth Aquatic Center or Camp Balboa. (SER 216-17 ¶¶ 11, 18 (\$12 for a day-long rental of a canoe and \$4 per camper per weekend).)

involving giant crosses and other unequivocally sectarian displays. *See, e.g.,* *Buono v. Norton*, 371 F.3d 543, 549 (9th Cir. 2004) (five to eight-foot tall cross); *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617, 618 (9th Cir. 1996) (51-foot cross); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1520-21 (9th Cir. 1993) (36-foot and 43-foot crosses), *cert. denied*, 512 U.S. 1220 (1994); *Kreisner*, 1 F.3d at 777 (life-size statuary depicting a biblical scene from life of Christ along with gospel passages).

Plaintiffs' cases are inapplicable. There are no giant crucifixes or biblical statues at the Youth Aquatic Center or Camp Balboa.¹⁸ The only specific offending item on either property that Plaintiffs identified were two small "Scout chapel" signs in Camp Balboa marking a primitive structure of benches forming an outdoor theater. (SER 217 ¶ 17.) The signs and the structure were not visible from

¹⁸ Plaintiffs Breen also assert that "religious activities" occur on both properties. (Pls. Br. at 48-49.) Plaintiffs Breen nowhere describe what "religious activities" occur at the Youth Aquatic Center or Camp Balboa that would not be permitted—indeed, protected—in any public park. Picnickers on the leased properties are as free to say grace before meals as any other citizens picnicking on public parkland. In any event, overtly sectarian activity occurs in areas of Balboa Park outside of Camp Balboa. The City permits religious weddings with visible religious symbols in Balboa Park and Presidio Park, including in buildings originally built as houses of worship. (SER 506.) The City permits other religious services and events in Balboa Park. For example, a church rented the Spreckels Organ Pavilion in Balboa Park for a Good Friday service on March 29, 2002; another church rented the Organ Pavilion for an Easter sunrise service on March 31, 2002; and Christian Crusade rented the Organ Pavilion for an event on April 2, 2002. (*Id.*)

outside the property. (*Id.*) Because Plaintiffs have never been on the property (SER 244 (43:14-18), 215 (31:6-10, 32:8-10), 255 (115:23-25)), they were never exposed to the signs (SER 254 (74:14-23); 246 (63:22-24)). In any event, the signs are of no help to Plaintiffs because the signs and the structure were removed three years ago in order to make way for a climbing wall (SER 217, 310), and Plaintiffs are seeking only injunctive and declaratory relief. *See Liddle v. Corps of Engineers of the United States Army*, 981 F. Supp. 544, 557 (M.D. Tenn. 1997) (plaintiffs challenging lease of parkland to a Christian organization lacked standing because they were not subjected to “unwelcome religious exercises or displays” nor were they “forced to assume special burdens in order to avoid confronting such exercises or displays”).

B. Plaintiffs Do Not Have Municipal Taxpayer Standing

Plaintiffs also claim to have municipal taxpayer standing for their constitutional claims. For municipal taxpayer standing, Plaintiffs must prove a “pocketbook” injury. *See Doremus v. Board of Education*, 342 U.S. 429, 434 (1952); *Doe v. Madison School District No. 321*, 177 F.3d 789, 793 (9th Cir. 1999) (en banc). In particular, Plaintiffs must allege “specific amounts of money that the government ha[s] spent solely on the unlawful activity.” *Doe*, 177 F.3d at 794. The complaint “must ‘set forth the relationship between taxpayer, tax dollars, and the allegedly illegal government activity.’” *Cantrell v. City of Long Beach*, 241

F.3d 674, 683 (9th Cir. 2001) (quoting *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1178 (9th Cir. 1984)). In *Doe*, because the plaintiff identified no municipal expenditures “occasioned solely by” the challenged activity, this Court held that the plaintiff did not have municipal taxpayer standing. 177 F.3d at 793-94; *see also* *ACLU-NJ v. Township of Wall*, 246 F.3d 258, 263-64 (3d Cir. 2001). The court below acknowledged that municipal taxpayer standing depended on “the fair market value of the properties in question, the effect on the fair market value of the Boy Scouts’ improvements, and the cost of maintaining the properties” (ER 13) but made no conclusions regarding these facts. Plaintiffs failed to meet their burden here.

First, it is undisputed that the City spends nothing on the leases to San Diego Boy Scouts. (SER 3 ¶ 9, 5 ¶ 17.) Second, it is undisputed that the leased properties, as dedicated parkland which cannot be sold and is subject to severe use restrictions, have no meaningful market value. (SER 4 ¶ 12, 8 ¶ 24; 200 ¶ I(1), 203 ¶ IV(4); 257-58 (17:24-18:2), 261-62 (33:19-34:4), 263 (105:11-17), 269 (162:6-164:3), 300 (176:9-25); Am. Compl. ¶ 98 (ER 604) (leased properties are “permanently dedicated” parkland).) There is no way to assign a monetary value to a lease or land that cannot be sold and commercially developed. Third, even if a court could assume away the restrictions, Boy Scouts still have put more into the leased properties than Plaintiffs’ experts claim they are worth to buy outright. (Youth Aquatic Center: \$2.5 million invested (ER 3213) versus \$1.25 million

market value (ER 1976, 3712); Camp Balboa: \$2.4 million invested and to be invested (ER 732, 820, 836) versus \$1.25 to \$1.9 million market value (ER 1975.) Fourth, if the leases were cancelled, the City would simply lease to another nonprofit on the same lease terms. (SER 4 ¶ 12, 8 ¶ 24.) Indeed, Plaintiffs concede that they would be content with another nonprofit lessee, even if the same rent and lease terms applied. (SER 241 (75:7-24); 234 (55:17-21); 252 (36:14-20); 247 (98:5-106:22).) Thus, it is clear that Plaintiffs are not attempting to redress any financial harm to the City or their pocketbooks but instead are simply attempting to throw a particular lessee off the property to assuage their personal views.

Again, the case here is much more easily disposed of than precedent cases were. In *Valley Forge*, where the federal government had given to the Valley Forge Christian College, free of charge, a 77-acre tract of land appraised at \$577,500. 454 U.S. at 467-68. The college, whose faculty members were required to be “baptized in the Holy Spirit” and to live “Christian lives” and whose administrators had to be affiliated with the Assemblies of God, planned to use the property to expand their program of training ““men and women for Christian service as either ministers or laymen.”” *Id.* at 468-69 (citation omitted). In upholding dismissal for lack of standing, the Supreme Court noted that “there is no basis for believing that a transfer to a different purchaser would have added to the

Government receipts” since “the ultimate purchaser would, in all likelihood, have been another non-profit institution . . . rather than a purchaser for cash.” *Id.* at 480 n.17. Because any “cost” to the City here would be the same regardless of whether Plaintiffs were successful in their suit, they have not established an injury sufficient for municipal taxpayer standing. *See Doe*, 177 F.3d at 794 (finding no municipal taxpayer standing where plaintiffs alleged only expenditures that would have been made “whether or not the ceremony included a prayer”).

C. Plaintiffs Do Not Have Standing Under San Diego’s Human Dignity Ordinance

Plaintiffs lack standing to bring a claim for an alleged violation of San Diego’s Human Dignity Ordinance. S.D. Mun. Code. § 52.9606(a)(3). Plaintiffs Breen do not have standing to pursue a Human Dignity Ordinance case because their claims are based on religious belief, not sexual orientation, and the ordinance covers only sexual orientation. Plaintiffs Barnes-Wallace, who have never sought, let alone been denied, access to the Youth Aquatic Center or Camp Balboa, have no standing because the Ordinance permits a private right of action only by an “aggrieved person.” *Id.* at § 52.9609(a). Indeed, both properties are freely available to Plaintiffs and all other residents of San Diego, as discussed above. (SER 216-17, ¶ 11, 18.) Even after discovery, Plaintiffs have no evidence that anyone ever has been denied or would be denied use of either property based on his or her sexual orientation. *See* 275 F. Supp. 2d at 1282 (ER 2696).

Accordingly, Plaintiffs are not “aggrieved” and therefore have no standing to bring a claim under the Ordinance.¹⁹

D. Plaintiffs Do Not Have Standing to Claim Breach of Contract

Plaintiffs have no standing to claim breach of contracts to which they are not parties. Plaintiffs concede that they are not parties to the leases between the City and San Diego Boy Scouts, but assert that they have standing to bring a claim for breach of contract because they were “expressly” made third-party beneficiaries of the leases. Cal. Civ. Code § 1559. They are mistaken.

Here, Plaintiffs are merely incidental beneficiaries with no standing to sue. *See* Restatement (Second) of Contracts § 313 cmt. a (1981) (“Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested.”). Plaintiffs were not “expressly” made beneficiaries of any sort. *See* Cal. Civ. Code § 1559.

¹⁹ The subsection on which Plaintiffs Barnes-Wallace rely applies only to City “supported facilities and services.” S.D. Mun. Code. § 52.9606(a)(3). Plaintiffs deleted from their block quotation (Pls. Br. at 52) the provision that states “This subsection shall not apply to any facility, service or program which does not receive assistance from the City of San Diego which is not provided to the public generally.” *Id.* There is no evidence that Boy Scouts receives any assistance from the City that other organizations and the public do not receive. Thus, the Human Dignity Ordinance does not even apply.

The California Supreme Court has held that “persons who are only incidentally or remotely benefited” by a contract have no standing to enforce it, although creditor or donee third-party beneficiaries may have standing. *Martinez v. Socoma Companies, Inc.*, 11 Cal. 3d 394, 400, 521 P.2d 841, 844-45 (1974). In *Martinez*, the federal government set up a program to benefit residents of low income neighborhoods by entering into contracts with the defendant companies to train and employ “hard-core unemployed residents” of East Los Angeles. *See id.* at 398. The defendants failed to provide the promised services, and a class of qualified residents brought suit for breach of contract. *Id.* at 399. The court held that the plaintiffs were not creditor beneficiaries because the federal government had no legal duty to provide them with the benefits set forth in the contract. *Id.* at 400. Similarly, they were not donee beneficiaries because the benefits of the contract were not simply gifts but rather were “a means of accomplishing a larger public purpose.” *Id.* at 401. Thus, the plaintiffs lacked standing to sue for breach of contract. *Id.* at 407.

Plaintiffs assert that they have standing as creditor beneficiaries under the leases. This argument fails because, like the federal government in *Martinez*, the City owed no legal duty to Plaintiffs to have the leased properties developed into and operated as a campground and youth aquatic center. The Balboa Park and Fiesta Island leases do not “discharge some form of legal duty owed” to the

Plaintiffs by the City. *Martinez*, 11 Cal. 3d at 400, 521 P.2d at 845. Instead, the leases here simply implement the City's decisions for the appropriate use of the parkland. Neither lease manifests an intent to confer on Plaintiffs or the general public a right of action against Boy Scouts to enjoin the leases: the leases expressly reserve such rights to the City. (ER 801 § 1.2, 1038 § 1.02.)

III. BOY SCOUTS' APPEAL OF THE BALBOA PARK JUDGMENT IS NOT MOOT

Boy Scouts' appeal of the district court's judgment on the Camp Balboa lease certainly is not moot.²⁰ The City and San Diego Boy Scouts negotiated the lease while both were defending the constitutionality of leasing to Boy Scouts, and neither intended to limit their rights to appeal.²¹ Following the

²⁰ Plaintiffs' attempt to argue mootness based on the terms of a lease to which they are not parties is a backdoor attempt to assert standing to sue under that contract, which should be rejected for the reasons set forth above. A person not named in a contract does not have standing to enforce the contract or dictate what its terms mean. *See FDIC v. Craft*, 157 F.3d 697, 706 (9th Cir. 1998); *Long v. Salt River Valley Water Users' Association*, 820 F.2d 284, 288-89 (9th Cir. 1987); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 n.2 (9th Cir. 1987).

²¹ When the City and San Diego Boy Scouts agreed that a "final judgment" terminating the lease would terminate the lease, they intended that finality would not occur until all appeals were exhausted. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995); *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987); *United States v. Johnson*, 457 U.S. 537, 542 n.8 (1982); *Linkletter v.*

(Footnote continued on next page)

district court's decision on the Camp Balboa lease, the City attested to the fact that a month-to-month tenancy by San Diego Boy Scouts remains in place and at such time as this Court reverses the district court's ruling, the City will withdraw the notice of termination and the lease term will be restored. (SER 1290-91.) In addition, the terms of the Camp Balboa lease could be replicated in a new lease, even if the current one were defunct, and the question of its constitutionality would still be a live controversy. Plaintiffs' assertions to the contrary are frivolous.

The burden of demonstrating mootness is a heavy one. "The party asserting mootness bears the burden of establishing that there is no effective relief remaining that the court could provide." *Southern Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1134 (9th Cir. 2004). "As long as effective relief may still be available . . . , the controversy remains live and present." *Northwest Environmental Defense Center v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988) (cited by Plaintiffs); see *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1116-18 (9th Cir. 2003) (cited by Plaintiffs); see also *Christopher Village, Ltd. Partnership*

(Footnote continued from previous page)

Walker, 381 U.S. 618, 622 n.5 (1965); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1571 (9th Cir. 1993); *De Rodulfa v. United States*, 461 F.2d 1240, 1253 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972).

v. Retsinas, 190 F.3d 310, 315 (5th Cir. 1999) (cited by Plaintiffs) (appeal was not moot because the court could grant declaratory relief).

There is no question that this Court's reversal of the district court's injunction will fully restore the Camp Balboa lease. The cases cited by Plaintiffs either clearly support Boy Scouts or are inapposite.²²

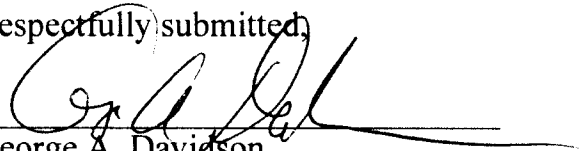
²² The instant case does not involve the voluntary or unrelated actions of a party that moots the issues before the Court. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 20 (1994) (voluntary settlement by same party who appealed); *Dilley v. Gunn*, 64 F.3d 1365, 1368 (9th Cir. 1995) (prisoner transferred to a different prison); *People of the Village of Gambell v. Babbitt*, 999 F.2d 403, 406 (9th Cir. 1993) (voluntarily relinquished oil and gas leases); *Harrison Western Corp. v. United States*, 792 F.2d 1391, 1393 (9th Cir. 1986) (voluntary abandonment of the contract at issue); *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 721 (9th Cir. 1982) (voluntary settlement and agreement to dismiss the appeal); *County of San Luis Obispo v. Superior Court*, 90 Cal. App. 4th 288, 293-95 (Cal. Ct. App. 2001) (bankruptcy and foreclosure mooted property interest); *Torres v. Marianas Public Land Corp.*, 3 N. Mar. I. 484, 493 (N. Mar. I. 1993) (unrelated termination of the lease while the appeal was pending; but the case was not moot if the validity of the lease were upheld in separate litigation). Neither is this an interlocutory appeal as in *Dannenberg v. The Software Toolworks Inc.*, 16 F.3d 1073, 1074 (9th Cir. 1994), nor an appeal from denial of habeas relief as in *Hawkins v. Risley*, 984 F.2d 321, 324-25 (9th Cir. 1993), nor a "final adjudication" under the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(c)(1), *DeMarco v. Depotech Corp.*, 131 F. Supp. 2d 1185, 1187 (S.D. Cal. 2001), *aff'd*, 32 Fed. Appx. 260 (9th Cir. 2002).

CONCLUSION

For the foregoing reasons, the judgment of the district court insofar as it grants relief to Plaintiffs-Appellants/Cross-Appellees should be reversed and summary judgment dismissing the complaint should be granted for Boy Scouts.

Dated: February 14, 2005

Respectfully submitted,



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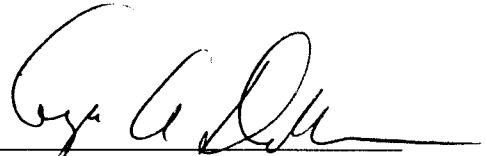
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellees/Cross-Appellants state that they are unaware of any related cases pending in this Court.

Dated: February 14, 2005



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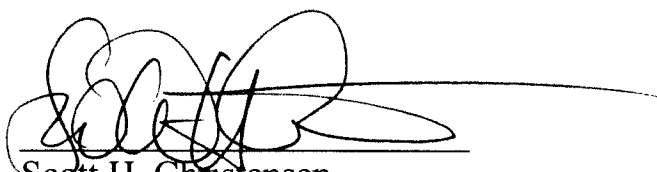
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CERTIFICATE OF COMPLIANCE

**Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C)
and Circuit Rule 32-1 for Case Numbers 04-55732 and 04-56167**

I certify that, pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14-points or more, and contains 13,488 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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A handwritten signature in black ink, appearing to read 'Scott H. Christensen', is written over a horizontal line. The signature is stylized and somewhat cursive.

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2005, I served copies of the Opening Brief for Defendants-Appellees/Cross-Appellants Boy Scouts of America and Desert Pacific Council, Boy Scouts of America on the following attorneys by way of First-Class Mail or other class of mail that is at least as expeditious:

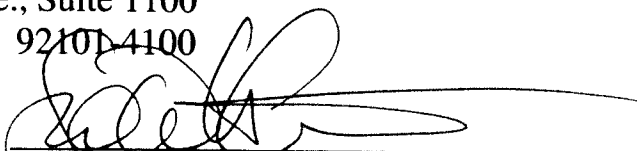
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